



Date: 20120430

Docket: IMM-6727-11

Citation: 2012 FC 493

Ottawa, Ontario, April 30, 2012

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

**JOSE ISAIAS AREVALO PINEDA
MONICA BANNESA GARCIA SANTOS**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Jose Isaias Arevalo Pineda (the Male Applicant) and Ms. Monica Bannesa Garcia Santos (the Female Applicant) are citizens of Guatemala who claim protection in Canada.

Although this application for judicial review was initially begun naming both Applicants, the only arguments presented were in respect of the Male Applicant.

[2] The Male Applicant claims that he was a bus driver in Guatemala who had been the subject of extortion demands by gang members. After notifying the police, he was subsequently

attacked in retaliation and fled to Canada fearing further retaliation or murder. In a decision dated September 6, 2011, a panel of the Immigration and Refugee Board, Refugee Protection Division (the Board) found that both the Male Applicant and the Female Applicant were not Convention refugees under s. 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] or persons in need of protection under s. 97 of IRPA. In summary, with respect to the Male Applicant, the Board believed his story but concluded that his alleged fear of persecution from gang members in Guatemala: (a) had no nexus to a Convention ground; and (b) was a generalized risk as contemplated by s. 97 of IRPA.

[3] The Applicants seek to have this decision overturned insofar as it relates to the Male Applicant. For the reasons that follow, the decision vis-à-vis the Male Applicant will be quashed.

[4] The only issue in this case is whether the decision of the Board that the Male Applicant was subject to generalized and not personalized risk was reasonable. The Applicants submit that the Board erred:

1. by failing to identify the risk to the Male Applicant and in ignoring and mischaracterizing facts; and
2. by mis-applying s. 97(1)(b)(ii) to the Male Applicant's circumstances.

[5] The question in this case – the determination of a generalized risk – is one of mixed fact and law to which the standard of reasonableness is applicable (see e.g. *Acosta v Canada*

(*Minister of Citizenship and Immigration*), 2009 FC 213, [2009] FCJ No 270 [*Acosta*]). As taught by the Supreme Court of Canada, on a standard of reasonableness, the Court should not intervene where the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. In this task, the Court is concerned with the existence of justification, transparency and intelligibility in the decision-making process (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

[6] As described in s. 97 of IRPA and refined in many cases of the Federal Court, protection under s. 97 is not available to a person who is subject to a generalized risk in his own country.

The leading case on this subject is *Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31 at para 7, 387 NR 149, which teaches that:

The examination of a claim under subsection 97(1) of the Act necessitates an individualized inquiry, which is to be conducted on the basis of the evidence adduced by a claimant “in the context of a *present* or *prospective* risk” for him

[Emphasis in original]

[7] In other words, each case must be examined on its facts, although the jurisprudence may provide certain guidance and principles.

[8] In this case, the Applicants argue that the Board failed to identify and articulate the risk faced by the Male Applicant, and that its decision contains no acknowledgment that he was targeted and feared returning to Guatemala because of a police complaint that led to the murder of his employer and the apparent disappearance of his brother. In my view, these allegations are justified.

[9] While the Board acknowledged the evidence regarding the murder of the Male Applicant's employer and the disappearance of his brother at paragraph 26 of its decision, the Board apparently failed to consider that the Male Applicant had been threatened with murder, an allegation which the Board recounted at paragraph 15 of its decision. The Board implicitly recognized that the Male Applicant had been targeted by the gang, as is apparent from its reference to *Acosta* at paragraph 31 of its decision for the principle that an individual may still be a victim of generalized violence even though their identity is known to their perpetrators. However, the Board's analysis appears to be simply premised on the assumption that the Male Applicant had been targeted for extortion. For example, at the beginning of its analysis of this issue, the Board stated that:

[The Applicant's] evidence overwhelmingly point[s] to the gangs being interested in him the same way that they are interested in all other people who make money or are perceived to make money in the country.... I find that the nature of the risk faced by the claimant is not changed only because he is in a profession the criminals deem more attractive than some others.

[10] At paragraph 28, the Board similarly stated that:

I find that the country documents overwhelmingly point to high rates of crime and violence. Documents indicate that criminal gangs target buses and force drivers to pay a daily tax to avoid the attacks. The same document explains about how gang extortion forces people out of their home[s] or even schools. While the consistency of the claimant's experience with the documentary evidence enhances his credibility, it shows that what he experienced was a generalized problem.

[Emphasis added; footnotes omitted]

[11] The underlined sentence suggests that the Board considered the Male Applicant's "experience" to be one of extortion; in its analysis, the Board does not refer to the retaliatory threats suffered by the Male Applicant.

[12] In referring to the evidence regarding the employer and brother at paragraph 26 of its decision, the Board effectively collapsed the distinction between initial extortion and the retaliation faced by the Male Applicant:

He also stated that the gangs know people in the police because the gang members knew that he had been to the police and specifically beat him up for it. They also killed his boss who had notified the police. I find that the methods criminals use to intimidate their victims do not change the nature of the risk they impose on them. The claimant also stated that his brother who worked as a bus driver assistant has disappeared. As heart breaking as this is, I find it to be consistent with the generalized nature of the risk.

[Emphasis added]

[13] The Respondent refers to a number of cases, including *Acosta*, above, and *DFR v Canada (Minister of Citizenship and Immigration)*, 2011 FC 772, 392 FTR 248, for the proposition that the fact that a victim is known to the perpetrators or that a threat is implemented does not mean that they are not the victim of generalized risk. I agree. However, these propositions do not cure the fact that the Board failed to fully identify and analyze the risk feared by the Male Applicant.

[14] Accordingly, I find that the decision of the Board does not meet the reasonableness standard and its decision vis-à-vis the Male Applicant should be overturned. For completeness, I wish to make it clear that the decision of the Board with respect to the Female Applicant is maintained.

[15] The Applicant proposed a very thoughtful, three-part question for certification:

- (a) Is the actualization of risk, in the form of actual attacks or threats against an individual, sufficient enough to take them outside the scope of s. 97(1)(b)(ii) of IRPA?
- (b) If not, are the actions or perceived actions of the individual which trigger or sufficiently heighten a s. 97 risk, sufficient to take the individual outside the scope of s. 97(1)(b)(ii) of IRPA?
- (c) If not, are the actions or perceived actions of the individual which trigger or sufficiently heighten a s. 97 risk, factors supporting a finding that the individual falls outside the scope of s. 97(1)(b)(ii) of IRPA?

[16] Although the application of s. 97(1)(b)(ii) has been a difficult task for the Board and for this reviewing court, I believe that the direction of the Court of Appeal in *Prophète* may be as much guidance as we can expect. Whether the personalized nature of risk takes an individual claimant outside the purview of “generalized risk” is a question that falls within the mandate of the Board, based on the facts before it in each case. The most that can be said is, as stated by Justice James Russell in *Rodriguez v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 11, [2012] FCJ No 6 (QL), “in some cases, personal targeting can ground protection, and in some it cannot”. I always welcome an opportunity to put the Court of Appeal to work.

Unfortunately, this is not going to happen in this case. No question of general importance will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for leave and judicial review is dismissed with respect to the Female Applicant and allowed with respect only to the Male Applicant;
2. the decision of the Board with respect to the Male Applicant is overturned and the matter remitted to the Board for re-consideration; and
3. no question of general importance is certified.

“Judith A. Snider”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6727-11

STYLE OF CAUSE: JOSE ISAIAS AREVALO PINEDA and MONICA
BANNESA GARCIA SANTOS v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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**REASONS FOR JUDGMENT
AND JUDGMENT:** SNIDER J.

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