Federal Court  Cour fédérale

Date: 20121214

Docket: IMM-2803-12

Citation: 2012 FC 1476

Ottawa, Ontario, December 14, 2012

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

ANGEL CASTANEDA MALVAEZ
MARIA ELIZABETH MENDOZA LUNA
LUIS ANGEL CASTANEDA MENDOZA
ALEJANDRO CASTANEDA MENDOZA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants challenge the legality of a decision rendered by the Refugee Protection Division of the Immigration and Refugee Board [Board], made on February 8th, 2012, dismissing their claims for protection both under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act].

[2] Today, the applicants do not question the legality of the determination made by the Board that they are not Convention refugees because there is no nexus with any of the grounds listed in section 96 of the Act. This only leaves the issue whether the Board's finding that the risk faced by the applicants is a risk faced by the general population in their country – and for this reason, they are not "persons in need of protection" under subparagraph 97(1)(b)(ii) of the Act – falls within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v new Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190 [*Dunsmuir*]).

[3] The principal applicant, Angel Castaneda Malvaez, his spouse, and their two sons [together the applicants] are citizens of Mexico who lived in Tultitlan in the state of Mexico. On January 24, 2011, they fled to Canada to escape a well-known criminal and drug cartel. The applicants have been personally targeted by La Familia Michoacana [La Familia]. They say they have endured extortion fees, the hijacking of their store, death threats, physical assault, and forced participation in drug distribution at the hands of La Familia. The applicants claimed refugee protection on January 26th 2011, shortly after their arrival in Canada. Despite some doubts expressed by the Board, the applicants' overall account of the facts has not been seriously questioned.

[4] The applicants' story begins with the opening of their hardware store, Ferreteria ABC San Angel, in 2000. The store was well-located in the town of Tultitlan, Mexico, and was across the street from a sizeable high school. The store became, according to the principal applicant, one of the most successful businesses on the street. Since the opening of the store, the principal applicant faced extortion by "regular criminals, and also small time thieves", as well as weekly police requests for protection money. As the applicants indicate, for many business owners in Mexico, these ongoing

requests were sadly "just part of 'the cost of doing business' and is not the reason for their refugee claim."

[5] In June of 2009, the principal applicant received an anonymous phone call threatening him, his business, and his children if he did not give the caller money. The caller referred to himself as "Commander of Zetas". The Zetas is a well-known criminal organization in Mexico. After contacting the police and having them trace the call, the police assured the principal applicant that the call had been made at random from Mexico City, far away from the applicants' town, and that there was no grave cause for concern. Then, in April 2010, armed members of La Familia entered the applicants' business and declared that it now belonged to them. They proceeded to threaten the principal applicant with the destruction of his store, warned him against contacting the police, and took 4000 pesos from him. According to the applicant, this event marks the beginning of where he saw his situation turn from one of generalized risk to that of personalized risk.

[6] One week after their first visit by La Familia members, three men arrived at the store and told the principal applicant that they were there to collect their money. The applicant responded that there was no money in the place, to which the intruders became verbally abusive and warned of impending trouble. The applicant recognized these individuals as judicial police officers. A few days later, on the 23rd of April 2010, the principal applicant's son was kidnapped and beaten as a warning to the principal applicant that he must continue to pay La Familia. On that day, a car pulled up with his son and three or four armed men inside. The son was dragged out of the car and cut with a bottle. The attackers also warned against contacting the police and stated that they would cut the son up and throw his head at the door if the principal applicant did not comply with their demands.

The principal applicant contacted the police about the incident and made a formal denunciation, although he did not retain a copy; the police did nothing.

[7] The visits from La Familia persisted, and each time the principal applicant gave them at least 10,000 pesos. At one point, the principal applicant decided to close his store in an effort to end the threats. But this was to no avail as members La Familia came to the applicants' house, severely assaulted the principal applicant by pistol whipping him, and forced him to reopen the store. The principal applicant again contacted the police and filed a report after his store was robbed and merchandise was stolen one night. The identity of those responsible for the break-in was unknown. The police were ineffective each time the principal applicant sought their protection, only offered to protect him upon payment of a bribe, and warned him that his family might end up dead if the complaints he lodged were pursued. The extortion fee requests continued and the principal applicant kept paying them to La Familia until, one day, members of La Familia brought two packets wrapped in tape and forced the principal applicant to keep them in his store until they were picked up by someone. While he did not open the packets, he inferred that they contained drugs. The principal applicant also recognized some of those who picked up the packages as police officers, or former police officers. He did not tell his family about the packages, but it was at that point that he decided to flee Mexico.

[8] On January 20th, 2011, La Familia demanded that 50,000 pesos be paid by the applicant by January 29th, 2011, but by that point, the family had already applied for temporary resident visas to Canada, which were issued on January 11th, 2011. The family left Mexico on January 24th, 2011, leaving before the most recent debt came due. Subsequent to the departure of the applicants, they

were informed by a nephew that their home had been broken into. Neighbours confirmed that armed men had broken in but that nothing was taken – leading the applicants to conclude that theft was not the motive behind the break-in and that the perpetrators were instead searching for the applicants.

[9] The Board identified the determinative issue to be that of generalized risk and that the applicants were not personally at risk, since they faced a risk that is faced by the general population in Mexico – that of criminal activity. The applicants contest the reasonableness of this conclusion on three grounds: (1) the Board misinterpreted and misapplied the law on generalized risk; (2) it failed to conduct an individualized inquiry; and (3) it interpreted generalized risk in an erroneous manner that is contrary to the purpose of the statute. The respondent replies that, when read as a whole, the decision of the Board is reasonable in the circumstances.

[10] Decisions determining whether an applicant faces a generalized risk are usually based on questions of mixed fact and law, such that they are usually subject to the standard of reasonableness upon review (see *Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213 at paras 9-11 [*Acosta*]; *Portillo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 678 at para 18, [2012] FCJ No 670 [*Portillo*]). And where the particular question is one determining whether an applicant is a member of a particular social group (business owners, in this case), it is also a question of mixed fact and law that is reviewable on the basis of reasonableness (*Olvera v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1048 at para 28, [2012] FCJ No 1128 [*Olvera*]; *Samuel v Canada (Minister of Citizenship and Immigration)*, 2012 FC 973). With the application of the reasonableness standard, the Court will intervene where the reasons given in the impugned decision are not "justified, transparent or intelligible" [*Dunsmuir*].

[11] In light of the facts and the law, I find the Board's decision to be unreasonable. In particular, I agree with the applicants that the Board misapplied and misinterpreted the concept "generalized risk" under section 97 of the Act, without view to the purpose of a generalized risk determination, and that this was intimately linked to a dearth of individualized assessment: "There must be some particularization of the risk of the person claiming protection as opposed to an indiscriminate or random risk faced by the claimant or others" (*Surajnarain v Canada (Citizenship and Immigration),* 2008 FC 1165 at para 20, 336 FTR 161 [*Surajnarain*].

[12] Despite the fact that the Board mentions at paragraph 21 of its decision, that the principal applicant is "personally subject to a risk of harm under [s]ection 97 involving extortion and gang violence," it nevertheless finds that the applicant's risk on return is a "generalized one" which, in my humble opinion, is a capricious and arbitrary finding, a conclusion which is not otherwise supported by the evidence on record and is contrary to the intent of the exclusionary clause (see *Surajnarain* at paras 17-21).

[13] The Board also writes, at paragraph 28 of their decision, that

> it is settled law that claims based on targeting because a claimant is a member of a group that is perceived to be wealthy, where that group is large enough to make the risk widespread, will not meet the requirement of subparagraph 97(1)(b)(ii). Though a group may be a small portion of the population of the country of reference, what matters is that the risk is widespread or prevalent. The RPD finds that a business owner being targeted for extortion and/or to serve the drug cartels' purpose is a risk that is widespread in Mexico.

However, recent case law demonstrates that the Board's analysis of the case law is somewhat incomplete. Important caveats must be made in light of the particular facts of this case. This has prompted the Court to intervene in similar situations, especially where the decision under review "completely negates an admitted situation of individualized risk simply because the actions giving rise to that risk are also criminal" (*Lovato v Canada (Minister of Citizenship and Immigration)*, 2012 FC 143 at para 9, [2012] FCJ No 149 [*Lovato*].

[14] Indeed, it is apparent that the Board has chosen to refer only to those decisions of the Court that hold generally that claimants who have been specifically targeted, nonetheless face a generalized risk if the majority of the citizens of the country, or the subgroup to which the claimant belongs, also generally experience that same risk (see e.g. *Acosta*; *Guifarro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 182). However, this is only a partial view of the jurisprudence ((*Olvera v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1048 at para 37, [2012] FCJ No 1128). Interpreting section 97 of the Act in such an overly broad manner defeats its original purpose since it becomes nearly impossible to categorize a risk as "personalized" when the risk in question is related to criminal activity against the claimant.

[15] In *Portillo* at para 36, Justice Gleason ruled that it was unreasonable for the Board to find that the applicant faced only a generalized risk – even though he had been personally threatened by the Mara Salvatrucha criminal gang in El Salvador – due only to the rampant nature of criminal gang violence in El Salvador. Justice Gleason states that "[i]f the Board's reasoning is correct, it is unlikely that there would ever be a situation in which this section would provide for crime-related risks" (*Portillo* at para 36). Similarly, in *Lovato* at para 14: "[S]ection 97 must not be interpreted in

a manner that strips it of any content or meaning. If any risk created by 'criminal activity' is always considered a general risk, it is hard to fathom a scenario in which the requirements of section 97 would ever be met."

[16] Recent case law suggests that it is unreasonable to decide that a claimant was specifically targeted, yet then go on to conclude that there is a lack of personalized risk due to the widespread nature of that same risk in the claimant's country (see e.g. *Lovato* at para 7; *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1210, [2011] FCJ No 1477 [*Guerrero*]; *Vasquez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 477, [2011] FCJ No 595; *Uribe v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1164, [2011] FCJ No 1431; *Munoz v Canada (Citizenship and Immigration)*, 2010 FC 238, [2010] FCJ No 268). Again, along this vein of reasoning, in *Portillo*, Justice Gleason succinctly states that "if an individual is subject to a *personal* risk to his life or risks cruel and unusual treatment or punishment, then that risk is no longer general." Justice Shore, referencing the *Portillo* decision, further clarifies that "even if [the risk] is widespread in his or her country of origin … individual targeting cannot be said to be general or impersonal" (*Olvera* at para 1).

[17] In *Guerrero*, Justice Zinn observes at paras 28, 29, 33, and 34:

> My second observation is that too many decision-makers inaccurately describe the risk the applicant faces and too many decision-makers fail to actually state the risk altogether. Subparagraph 97(1)(b)(ii) of the Act is quite specific: The personal risk a claimant must face is "a risk to their life or to a risk of cruel and unusual treatment or punishment." Before determining whether the risk faced by the claimant is one generally faced by others in the country, the decision-maker must (1) make an express determination of what the claimant's risk is, (2) determine whether that risk is a risk

> to life or a risk of cruel and unusual treatment or punishment, and (3) clearly express the basis for that risk.
>
> An example of the sort of decision I am addressing is that under review. The closest the decision-maker in this case comes to actually stating the risk she finds this applicant faces is the following: "[T]he harm feared by the claimant; that is criminality (recruitment to deliver drugs)…." But this is not the risk faced by the applicant, and even if it were, the decision fails to state how this meets the test of risk set out in subparagraph 97(1)(b)(ii) of the Act. At best, the risk as described forms part of the reason for the risk to the applicant's life. When one conflates the reason for the risk with the risk itself, one fails to properly conduct the individualized inquiry of the claim that is essential to a proper s. 97 analysis and determination.
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> …
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> During the course of oral submissions, I asked the respondent, given his interpretation of *Baires Sanchez*, if he could provide an example of a situation where a person targeted for death from a gang in one of these gang-infested countries could obtain s. 97 protection. The example provided in response was the situation where a gang had been hired to kill a claimant. In that circumstance, it was submitted that the risk to the claimant was personal and was not one faced generally by the population. I note that the scenario provided is exactly that which this applicant faced. He faced death at the hand of a gang hired by a criminal organization to kill him.
>
> I do not accept that protection under the Act is limited in the manner submitted by the respondent. This is not to say that persons who face the same or even a heightened risk as others face of random or indiscriminate violence from gangs are eligible for protection. However, where a person is specifically and personally targeted for death by a gang in circumstances where others are generally not, then he or she is entitled to protection under s. 97 of the Act if the other statutory requirements are met.

[18] Consolidating the line of reasoning that has been developing within this strand of interpreting section 97 of the Act, in *Portillo* (at paras 40-41) Justice Gleason goes on to propose a test for the analysis of generalized risk under section 97 of the Act. (1) The nature of the risk faced by the claimant must first be appropriately determined. This is done by assessing the ongoing or

future nature of the risk the claimant faces in terms of whether the risk will continue to be personalized in nature; what the risk is; whether the risk can be classified as either cruel and unusual treatment or punishment; and the basis of the risk faced. (2) With the nature of the risk having been appropriately determined, the next step is to compare the "risk faced by the claimant to that faced by a significant group in the country to determine whether the risks are of the same nature and degree" (*Portillo* at para 41). If the risk faced by the claimant can be differentiated under this second step, then the claimant will be entitled to protection under section 97 of the Act.

[19] I note at this point that the respondent has made no attempt to adequately deal with these jurisprudential developments. At the hearing before me, counsel for the Minister continued to hold the position that there has been an individualized assessment by the Board, that the distinction between "generalized" versus "personalized" risk is often "blurred", and that on the particular facts of this case, the outcome is an acceptable one in light of the facts and the law. It appears to me that the Board in this case erred in the same matter as the Board did in the cases cited above where the Court intervened.

[20] As noted previously, the Board found that the principal applicant was "personally subject to a risk of harm under [s]ection 97 involving extortion and gang violence," but then went on to find that the applicant's risk on return was a "generalized one" (see para 21 of the Board's decision). The principal applicant began to be targeted personally when La Familia first declared "ownership" of his store in April 2010. Once the applicants were targeted by La Familia, the family faced death threats and the principal applicant and one of his sons were seriously physically beaten and injured, the applicant was forced to allow drugs to be kept at and picked up from his store, and even when he

tried to close his store in the hopes that La Familia would stop terrorizing his family, they simply forced him to reopen the store. At no point does the Board acknowledge the forced reopening of the store. It also bears mentioning that the location and success of the principal applicant's store are unique elements to his individual situation. As the applicant has expressed, the success of his business leads to high traffic, which increases the attractiveness of his store as a target for La Familia both in terms of their drug operations but also in terms of revenue garnishing extortion fees. The location across from a sizeable high school is notable for the access it gave La Familia to potential clientele in terms of the drug wing of their operations, and also potentially in the expansion of other illegal activities.

[21] In comparing the situation faced by the applicants to that faced by a significant group in the country in order to determine whether the risks faced by the applicants are of the same nature and degree, I note that the applicants are the first to acknowledge that prior to April 2010, when La Familia began to target them, they faced no risk that was different in nature and degree to that faced by other business-owners in the area. The applicants themselves consider the extortion by street-level criminals and required payment of police protection to be a generalized risk. Nonetheless, after La Familia became involved, the physical violence endured by the family was personalized. The applicant states that there were five or six other businesses of a similar nature nearby and they did not face these same issues or problems that he and his family faced. Clearly the situation of the applicants, and the level of threats and harm that befell them, can be distinguished from the nature and degree of the risks faced by other business owners in the area. At least, the Board should have addressed this issue in its reasons and come to some conclusion: "The risks of those standing in the

same vicinity as the gunman cannot be considered the same as the risks of those standing directly in front of him" (*Olvera* at para 41).

[22] The Board failed to conduct an individualized assessment in light of the particular circumstances of the case. With similar facts to the present case and also referred to in *Portillo* at para 44, in *Gomez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1093 at para 38, [2011] FCJ No 1601, Justice O'Reilly overturned the Board's decision where the claimants also faced extortion, threats of kidnapping, and assault that did not begin on a personalized level but subsequently escalated to become personalized in nature:

> The applicants were originally subjected to threats that are widespread and prevalent in El Salvador. However, subsequent events showed that the applicants were specifically targeted after they defied the gang. The gang threatened to kidnap [the applicant's] wife and daughter, and appear determined to collect the applicants' outstanding "debt" of $40,000. The risk to the applicants has gone beyond general threats and assaults. The gang has targeted them personally.

[23] Additionally, in a recent decision rendered by Justice Mactavish regarding a store owner in Jamaica, and again following the *Portillo* line of reasoning *(Tomlinson v Canada (Minister of Citizenship and Immigration)*, 2012 FC 822, [2012] FCJ No 955), Justice Mactavish writes that the applicant "does not just fear a criminal gang in Jamaica because he lives there or because he works as a shopkeeper in that country. That would be a generalized risk faced by a substantial portion of the population." Instead, like the principal applicant in the case at bar, the situation escalated where, prior to the change in circumstances, the applicant "may have been at risk of extortion or violence like many other shopkeepers in Jamaica. However, unlike the general population, [the applicant] is

now at a significantly heightened risk as a result of having been, to quote the Board, 'specifically and personally targeted by the gang'" (at para 19).

[24] For the above reasons, the Board's determination that the applicants are not persons in need of protection under section 97 of the Act is unreasonable and shall be set aside. The matter shall be remitted to the Board for redetermination by another member. No question of general importance has been proposed by counsel representing the parties and none shall be certified by the Court.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be granted as the Board's determination that the applicants are not persons in need of protection is unreasonable and must be set aside. The matter is remitted to the Board for redetermination by another member of the Board. No question is certified.

"Luc Martineau"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2803-12
STYLE OF CAUSE:	ANGEL CASTANEDA MALVAEZ MARIA ELIZABETH MENDOZA LUNA LUIS ANGEL CASTANEDA MENDOZA ALEJANDRO CASTANEDA MENDOZA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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