

Federal Court



Cour fédérale

Date: 20130603

Docket: IMM-3509-12

Citation: 2013 FC 592

Ottawa, Ontario, this 3rd day of June 2013

Present: The Honourable Mr. Justice Roy

BETWEEN:

**Carlos Ervey HERNANDEZ LOPEZ
Janet BARRIENTOS GAMINO
Karla Janet HERNANDEZ BARRIENTOS
Marcos David HERNANDEZ BARRIENTOS
Jonatan Elven HERNANDEZ BARRIENTOS**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review made pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, (the “Act”) of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the “Board”) finding that Mr. Carlos Ervey Hernandez Lopez, his wife Janet Barrientos Gamino and their three minor children (the

“applicants”) are not Convention refugees, nor persons in need of protection within the meaning of sections 96 and 97 of the Act.

[2] The applicants are citizens of Mexico. The parents have operated a profitable leather business in Jalisco, Mexico. They allege that they fear for their lives and that they should be declared refugees under section 97 of the Act.

Facts

[3] On December 19, 2008, a group of four armed men, including two police officers, came to the applicants’ store. They identified themselves as members of the Zetas gang and demanded the sum of 10,000 pesos as “protection money” to be paid to them on a monthly basis for having their leather store in a Zetas territory.

[4] The men also threatened to harm the couple’s children if they did not comply or if they sought help from the police. The men promised to return on January 20th, 2009, to collect the money.

[5] Mr. Lopez and Mrs. Gamino noticed surveillance being conducted over their leather store and some passing by the house of Mrs. Gamino’s parents.

[6] On January 20, 2009, the same men who had indicated that they would be back for protection money arrived in a police truck demanding to be paid. They were fully armed. Mr. Lopez and Mrs. Gamino had only 8,500 pesos which they gave to the men. In return, the men vandalized

the place and Mr. Lopez was cut. The men threatened serious harm if Mr. Lopez did not “stop playing with them”. The men proceeded to steal some merchandise to “cover for the remaining 1,500 pesos” and left.

[7] Mr. Lopez sought help from a well-known lawyer from Colima, Mexico, who had a reputation of helping victims of crime and corruption. The lawyer suggested that the applicants close down their business and move to another city. They later decided to move to the city of Monterrey where they had some friends.

[8] However, before they were able to move, three police officers broke into the applicants’ house on January 25, 2009 while Mr. Lopez had gone to pick up the children. They harassed and beat Mrs. Gamino and showed her a piece of paper containing the friends’ address in Monterrey. They threatened that they would find the applicants wherever they may flee. Threats were made that Mrs. Gamino would be raped and one of her children would be killed if the business did not open the following day.

[9] Mr. Lopez immediately called the lawyer who would have told him that his family was being watched. Mr. Lopez continued to operate his business while planning the escape with the help of some friends.

[10] The applicants arrived in Canada on February 17, 2009. They claim that their lawyer filed a report on their behalf after their arrival in Canada in order to get the matter investigated. It looks like nothing happened.

[11] In June 2010, Mr. Lopez received a call from their lawyer who told him that she had been attacked by police officers who had warned her not to help the applicants. According to the applicant, the lawyer told him that the Zetas knew they were in Canada and expected that they would be deported back to Mexico. It is that call from their lawyer that led the applicants to file a claim for refugee protection in Canada. The claim was made in August 2010.

[12] Mr. Lopez also testified at the hearing that Mrs. Gamino's godfather was shot dead in September 2010 as he was leaving his business located two blocks away from the applicants' leather store. His wife and child were also murdered. Mr. Lopez testified that the lawyer the applicants had hired and Mrs. Gamino's sister had later disappeared (around June 3, 2010 and November 2011). Mrs. Gamino also reported that her mother has had to change telephone numbers three times. They alleged that these incidents are related to the Zetas who vowed to seek revenge on the applicants' family members.

Impugned decision

[13] Credibility is not an issue in this case. The Board found that although the applicants somewhat exaggerated their claim, they are believed. The only issue here is whether or not there is in this case a personalized risk. It is accepted by the applicants that the Board's finding that there is no connection between the applicants' claim and a Convention ground pursuant to section 96 of the Act is appropriate. They rely on section 97 and, in particular, subparagraph 97(1)(b)(ii). It reads:

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de

of former habitual residence, would subject them personally	nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

[14] The Board found that, pursuant to subparagraph 97(1)(b)(ii) of the Act, “[t]he evidence must establish that the claimant would face a risk different from those faced by the general population”.

The Board goes on to find, at paragraph 19, “that according to the claimants’ testimonies, the risk that the claimants face is one that is faced generally by others in the country, specifically those who have money or are perceived to have money”.

[15] The question before the Court is therefore whether these facts constitute a personalized risk or they face in a category of risk of violence that is faced by the population in general. At the end of paragraph 25 of the Board’s decision, one finds the gist of the Board’s decision. It reads:

Because the claimants face a risk based on their profile as business people, and this risk is the same that other citizens in that country face, the panel finds that the claimants are not Convention refugees nor are they persons in need of protection.

Standard of Review

[16] It is not disputed by the parties that the standard of review in this case is that of reasonableness.

[17] Both parties rely on *Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213, where it was held that the interpretation of the exclusion of generalized risk of violence under paragraph 97(1)(b) of the Act involves applying the law to the particular facts and is therefore reviewable on a standard of reasonableness. Recent cases support that view (*Hernandez v Canada (Minister of Citizenship and Immigration)*, 2013 FC 107; *Malvaez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1476).

[18] In reviewing the Board's decision on the reasonableness standard, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and will only intervene if the decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47 and *Canada (Citizenship and Immigration) v Khosa*, [2009] 1 SCR 339 at para 59).

Analysis

[19] The Court has reached the conclusion that the Board's decision fails the standard of reasonableness, largely for the reasons well articulated by Justice Gleason in *Portillo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 678, 409 FTR 290 [*Portillo*].

[20] As I read the Board's decision, it turns a particularized risk into a generalized one because others would be subjected to the same risk. The fact that others may be subjected to the same particularized risk does not change the nature of the risk faced by the applicants.

[21] It was the same kind of reasoning that was displayed in *Portillo*: “The Board thus concluded that the risk the applicant faced was generalized because the ‘nature of the crimes faced by the [applicant] is widespread in El Salvador and not specific to him’” (para 34). Justice Gleason went on to state at paragraph 36:

... It is simply untenable for the two statements of the Board to coexist: 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.

I agree.

[22] I would have thought that the right approach is that which was described by Justice Rennie in *Lovato v Canada (Minister of Citizenship and Immigration)*, 2012 FC 143:

[14] ... section 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. Instead of focusing on whether the risk is created by criminal activity, the Board must direct its attention to the question before it: whether the claimant would face a personal risk to his or her life or a risk of cruel and unusual treatment or punishment, and whether that risk is one not faced generally by other individuals in or from the country.

[23] Not wanting to go back to a particular country because of violence in that country is one thing: that defeats the purpose of section 97 of the Act, which is to offer protection for those who actually face a risk. Similarly, the allegation that someone is susceptible to extortion cannot do because of its generality. Conversely, it is not because others may face the same kind of personalized risk that the nature of the risk changes. As Justice O’Reilly found in *Gomez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1093, 397 FTR 170:

[38] 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 Mr. Tobias Gomez'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.

[Emphasis added.]

[24] In this case, it was not reasonable to conclude that the risk was generalized because of the applicants' profile as business people, a risk faced by other citizens in that country.

[25] This is not to say that every allegation of violence will suffice in order to open the door of section 97 of the Act. The credibility of the allegation and its gravity must be examined carefully, an expertise that the Board has and which will benefit from a measure of deference. But once an allegation has been received as credible, it will not suffice either to declare that other individuals might face the same risk for the door to close on section 97. To the extent the risk has been particularized, the analysis must continue in order to determine whether or not section 97 finds application. Justice Rennie captured the notion clearly in *Marroquin et al. v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1114:

[11] I find that the Board's analysis of whether the applicants faced a generalized risk was unreasonable and the decision must be set aside. As this Court has consistently held: *Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678; *Vaquerano Lovato v Canada (Citizenship and Immigration)*, 2012 FC 143; *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1210; *Alvarez Castaneda v Canada (Minister of Citizenship and Immigration)*, 2011 FC 724; *Barrios Pineda v Canada (Minister of Citizenship and Immigration)*, 2011 FC 403, and *Aguilar Zacarias v Canada (Minister of Citizenship and Immigration)*, 2011 FC 62, that the mere fact that the persecutory conduct is also criminal conduct

which may also be prevalent in a country does not end the analysis of a claim under section 97. The Board must consider whether the applicants faced a risk that was different in degree than that faced by other individuals in El Salvador.

[12] The applicants' testimony was found credible, and thus all the allegations were accepted. The Board therefore accepted that the applicant reported the theft of his truck to the police, that the Mara 13 became aware of this fact, and that the applicants fled El Salvador because they feared retaliation by the gang. This is the precise kind of factual scenario which may go beyond a generalized risk, as in the cases listed above.

[26] In view of the facts as found credible by the Board, the risk cannot be said to be general. As a result, the decision must be quashed.

JUDGMENT

The application for judicial review is granted. The matter is referred back to the Immigration and Refugee Board for reconsideration before a different member of the Board's Refugee Protection Division. No question for certification has been proposed and the Court finds that none arises.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-3509-12

STYLE OF CAUSE: Carlos Ervey HERNANDEZ LOPEZ, Janet BARRIENTOS GAMINO, Karla Janet HERNANDEZ BARRIENTOS, Marcos David HERNANDEZ BARRIENTOS, Jonatan Elven HERNANDEZ BARRIENTOS v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: March 5, 2013

REASONS FOR JUDGMENT AND JUDGMENT: Roy J.

DATED: June 3, 2013

APPEARANCES:

Me Maria Cristina Marinelli FOR THE APPLICANTS

Me Suzanne Trudel FOR THE RESPONDENT

SOLICITORS OF RECORD:

Maria Cristina Marinelli FOR THE APPLICANTS
Montréal, Quebec

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada