Federal Court Cour fédérale

Date: 20140605

Docket: IMM-12628-12

Citation: 2014 FC 546

Ottawa, Ontario, June 5, 2014

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

LEIDY CAROLINA HERRERA CHINCHILLA
LUIS FERNANDO MARADIAGA ZELAYA
LUIS DIEGO MARADIAGA HERRERA
ANGIE MELISSA MARADIAGA HERRERA
DAVID MARADIAGA ZELAYA

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of Roslyn Ahara, Board Member (the Board) of the Refugee Protection Division (RPD), refusing the claim for refugee protection of Luis Fernando Maradiaga Zelaya (the Principal Applicant), his wife Leidy Carolina Herrera Chinchilla, their two children Luis Diego Maradiaga Herrera and Angie Melissa Maradiaga

Herrera, as well as the Principal Applicant's brother, David Maradiaga Zelaya (all of them referred to as the Applicants). The decision was rendered on November 15, 2012.

[2] For the reasons set out below, this application for judicial review is granted.

I. Facts

[3] The Applicants are citizens of Honduras. They claim they fear the Mara Salvatrucha (MS-13), a criminal gang that operates in Latin America, including Honduras.

[4] The Applicants' family owns a prosperous children's clothing business. The Principal Applicant is also the sole owner of two other businesses.

[5] The Principal Applicant alleges that his mother received a phone call at the children's clothing store on June 30, 2010 from a man who said he was involved with organized crime, asking for 50 000 Lempiras and threatening that he knew the family's daily routine and address. The Principal Applicant's mother filed a report with the Criminal Investigation Department, who recommended that she disconnect the store's telephone service.

[6] On July 1, 2010, the Principal Applicant's mother received a call on her cell phone, once again from someone who claimed to be involved with organized crime. She immediately hung up and told her children not to return to the store. She asked her sister to take over the store.

[7] On July 5, 2010, there was a note on the door of the store threatening the family's life if they continued to ignore the phone calls. The Principal Applicant's mother also alleged she received more threats on her cell phone.

[8] On July 7, 2010, when the Principal Applicant's brother drove his aunt home after picking her up from the store, they were shot at by hooded individuals.

[9] The Principal Applicant stated that he was so frightened as a result of this episode, that he asked his mother to gather the money demanded by the individuals. He called the number displayed on his mother's phone, but no one answered. The next day, on July 8, 2010, a man called, asking if the money was ready. On July 9, 2010, the man called back, giving instructions to the Principal Applicant as to where the money should be left. He also instructed the Principal Applicant not to call the police. The Principal Applicant complied with the instructions.

[10] On August 27, 2010, the Principal Applicant received a call on his cell phone from a man, allegedly from the criminal organization, asking for a further 50 000 Lempiras, and advising the Principal Applicant he would regret if he did not comply with the request. On that same day, the Principal Applicant told his wife to take the children and go live with her mother.

[11] On September 1, 2010, the Principal Applicant received a call on his cell phone, threatening him that his daughter would get hurt. The Principal Applicant went to file a criminal report. Someone called back, stating that he had not followed the orders and that he should not disobey the MS-13.

[12] On September 3, 2010 while the Principal Applicant's wife was picking up baby clothing at their house, individuals pointed a gun at her and abducted her, stating it was because her husband had not complied with their instructions. She was able to jump out of the car window. The Principal Applicant came out of the house at that moment and recognized one of the individuals as being a police officer who was present when he filed the criminal report two days earlier.

[13] The Principal Applicant, his wife and children left Honduras on September 27, 2010 for the United States. According to their Personal Information Forms (PIF), they arrived in Canada on November 14, 2010 and made their refugee protection claim on November 18, 2010.

[14] Apart from the facts alleged in the Principal Applicant's PIF, on which he also relies, the Principal Applicant's brother submits that further events occurred after the Principal Applicant and his family fled from Honduras.

[15] On December 20, 2010 while he was working at the store, the Principal Applicant's brother saw three suspicious men enter the store. He was able to get out using the back door, but when he returned to the front of the store, he saw that one of the men was holding a gun. He tried to get help from the neighbours, as he could not find the police. The men finally left the store after having robbed some customers and stolen the Principal Applicant's mother's purse. The security guard was unable to do anything as the men had stolen his gun.

[16] An employee noticed that one of the men was wearing a police badge, and her husband recognized him as being a notorious criminal who was involved with the MS-13. The Principal Applicant's brother and his mother reported the incident to the police.

[17] On December 21, 2010, an individual left a package in the store for the Principal Applicant's mother. This package contained personal information about her family and a note asking for 100 000 Lempiras. This note also mentioned that if she did not comply, her sons' lives would be in danger. The Principal Applicant's brother and mother decided not to return to the store.

[18] Following the December 20, 2010 robbery, the individuals frequently returned to the store, asking about the Principal Applicant's brother and mother. On February 28, 2011, the employees received a note addressed to the Principal Applicant's mother, saying that her sons' lives were in danger since she had not complied with the request. The Principal Applicant's brother left the country on March 16, 2011, and his parents fled to Guatemala one week later. The Principal Applicant's brother arrived in Canada on May 3, 2011, after visiting his brother who lives in the U.S, and made his claim for refugee protection that same day.

II. Decision under review

[19] After reviewing the facts leading to the refugee claim and acknowledging that the Applicants' identities were not questioned, the Board identified two issues: nexus to Convention grounds and generalized risks.

[20] The Board concluded that the Applicants, as victims of crime, did not fear persecution under one of the Convention grounds; consequently, their claim under section 96 of the *Immigration and Refugee Protection Act,* SC 2001, c 27 (*IRPA*) failed. The Board also mentioned that since no torture was alleged, paragraph 97(1)(a) of *IRPA* did not apply either. The main issue in the present case is the issue of generalized risk versus personalized risk under paragraph 97(1)(b) of *IRPA*.

[21] The Board mentioned that the Principal Applicant declared, on various occasions during the hearing, that he was aware that people who have money in Honduras are targeted, and that his family was targeted because they were perceived as having money. The Board also stated that the Principal Applicant mentioned it is known that some Honduran police members are in collusion with the MS-13 gang.

[22] The Board considered and cited the evidence, finding that due to significant corruption within Honduran police forces, the general population has low trust in those police forces. The Board also found that there is a serious gang problem in Central America, including Honduras. Consequently, the Board found that it was "conceivable that the incident that occurred was tied in to the Modus Operandi of the Maras [MS-13] and the [Applicants] were personally targeted due to their perceived wealth": Board's decision at para 26.

[23] The Board then cited various case law in which this Court held that "[t]hough certain groups may be targeted <u>more frequently or repeatedly</u> because of their perceived wealth, occupation, or business ownership, for example, everyone in the country is deemed at risk

because of the general conditions there" and that "[a] generalized risk need not be experienced by every citizen in the country. The word 'generally' is commonly used to mean 'prevalent' or 'widespread'": Board's decision at paras 33-34.

[24] Consequently, the Board concluded that the Applicants did not face a personalized risk since other citizens of Honduras who are economically successful face the threat of extortion.

III. Issue

[25] The only issue raised by this application for judicial review is whether the Board's conclusion regarding the generalized risk is reasonable.

IV. Analysis

[26] The Applicants allege that the Board failed to conduct an analysis of their personal and individual circumstances to determine if they were facing a personalized or generalized risk as required by the jurisprudence of this Court (the Applicants cite, among other cases, *Monroy Beltran v Canada (Minister of Citizenship and Immigration)*, 2012 FC 275 at paras 18-20 and *Escamilla Marroquin v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1114 at paras 13-15 [*Marroquin*]). The Applicants claim that the Board failed to apply this principle to the situation at hand, and submit that they were targeted by the gang, not only because of their successful economic situation, but rather because they reported the threats and attacks by filing criminal reports. While all citizens in Honduras, particularly prosperous business owners, can be

at risk of extortion, there is no generalized risk of kidnapping or death threats for making police reports.

[27] There is a long line of cases from this Court over the last few years reviewing the notion of generalized risk in subparagraph 97(1)(b)(ii) of *IRPA*. It is fair to say that a consensus has emerged as to the proper approach to be followed when faced with an allegation of risk, which has been well captured by my colleague, Justice Gleason, in *Portillo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 678 [*Portillo*]:

> [40] In my view, the essential starting point for the required analysis under section 97 of IRPA is to first appropriately determine the nature of the risk faced by the claimant. This requires an assessment of whether the claimant faces an ongoing or future risk (i.e. whether he or she continues to face a "personalized risk"), what the risk is, whether such risk is one of cruel and unusual treatment or punishment and the basis for the risk. (…)
>
> [41] The next required step in the analysis under section 97 of IRPA, after the risk has been appropriately characterized, is the comparison of the correctly-described 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. If the risk is not the same, then the claimant will be entitled to protection under section 97 of IRPA(…)
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> See also: *Corado Guerrero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1210 at paras 27-30 [*Guerrero*]; *Vivero v Canada (Minister of Citizenship and Immigration)*, 2012 FC 138 at paras 11 and 21; *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 993 at para 25.

[28] It is crucial, therefore, to conduct an individualized inquiry as to the nature of the risk faced by the Applicants before assessing whether that risk is one that is prevalent or widespread in that country. In that spirit, it will not be sufficient to conclude that the risk of criminal activity encountered by a person is generalized because the population at large, or an important segment

of that population, is subject to that same risk. To conclude otherwise would make a mockery of section 97 of *IRPA*, as Justice Rennie pointed out in *Vaquerano Lovato v Canada (Minister of Citizenship and Immigration)*, 2012 FC 143 at para 14 [*Lovato*]:

> As noted in *Vivero* [2012 FC 138], 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. Because the Board failed to properly undertake this inquiry in this case, the decision must be set aside.

[29] In the case at bar, the Applicants were not only targeted because they were perceived to have money. The Board accepted that the Applicants faced death threats, robbery, kidnapping attempts and gun shots. The Principal Applicant further testified that shortly after reporting an extortion demand, he received a call and was told he would pay the price because he had gone to the police. Moreover, the Board did not question the involvement of at least one police officer in the activities of the gang and in the targeting of the Applicants. These factors clearly escalate the risk faced by the Applicants beyond the generalized risk faced by other individuals in Honduras.

[30] Instead of focusing on the fact that wealthy people are frequently targeted by the MS-13 gang in Honduras, the Board should have looked at the particular situation of the Applicants. They were not simply at risk of theft and extortion because they were successful business people; they were also repeatedly threatened, shot at and subjected to kidnapping attempts as a result of having made a police report. Combined with the fact that a police officer was involved with the

MS-13 gang, this is clearly a risk situation that is much more serious than that faced by the average Honduran or even by the wealthy citizens of that country.

[31] In short, I find that the decision of the Board must be quashed because it failed to properly conduct the required individualized inquiry. The Board focused on the prevalence of gang related criminality in Honduras and on the generalized risk faced by persons perceived to be prosperous in that country, but failed to first assess appropriately the nature of the risk encountered by the Applicants. Having failed to do so, the Board was not in a position to determine whether the risk that the Applicants would be facing upon their return to Honduras is of the same nature and intensity as that faced by a significant group of people in that country. As stated repeatedly by this Court, the mere fact that the risk stems from criminality and that it affects a significant segment of the general population, does not, in and of itself, put an end to the required inquiry under section 97 of *IRPA*: see *Portillo*; *Lovato*; *Guerrero*; *Alvarez Castaneda v Canada (Minister of Citizenship and Immigration)*, 2011 FC 724; *Barrios Pineda v Canada (Minister of Citizenship and Immigration)*, 2011 FC 403; *De La Cruz v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1068.

[32] Counsel for the Respondent tried to argue that refusal to pay extortionists does not create a personalized risk under paragraph 97(1)(b) of *IRPA* absent any special distinguishing circumstances. The fact that criminals may act on their threat does not bring them outside of a generalized risk.

[33] While this view may find support in some decisions of this Court (see e.g. *Romero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 772), I believe it has been superseded by more recent decisions (see e.g. *Vivero v Canada (Minister of Citizenship and Immigration)*, 2012 FC 138; *Lovato* and *Marroquin*. One must not conflate the reason for the risk with the risk itself. If paragraph 97(1)(b) is not to be emptied of any real meaning, one must be careful not to put too much emphasis on the motivation of the persecutor. In a carefully crafted and well reasoned decision, my colleague Justice Russell extensively reviewed the jurisprudence of this Court on "generalized risk" in *Correa v Canada (Minister of Citizenship and Immigration)*, 2014 FC 252, and drew the following principle from his analysis (at para 84) which provides a complete answer to the Respondent's argument:

> It is an error to dismiss reprisals or the carrying out of threats as merely "consequential harm" or "resulting risk" stemming from the initial risk of extortion or forced recruitment. The question is not whether others could eventually find themselves in the Applicant's position; it is whether others "generally" are in that position now. This error usually stems from conflating the reason for the risk with the risk itself.

[34] As a result, I am of the view that the decision of the Board was unreasonable. The Board failed to properly assess the Applicants' risk before coming to the conclusion that it is a risk faced generally by others in Honduras. The application for judicial review is therefore granted. No question has been raised for certification, and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is granted. No question is certified.

"Yves de Montigny"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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