Federal Court  Cour fédérale

Date: 20170224

Docket: IMM-3761-16

Citation: 2017 FC 239

Ottawa, Ontario, February 24, 2017

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

JULIO ALBERTO PINEDA CABRERA
KAREN MELISSA LANZA ZAMORA DE PINEDA
SEBASTIAN ALBERTO PINEDA LANZA
NATALIA ISABEL PINEDA LANZA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada ("RPD"), dated August 4, 2016, that the Applicants are not Convention refugees nor persons in need of protection pursuant to s 96 and s 97, respectively, *Immigration and Refugee Protection Act*, SC 2002, c 27 ("IRPA").

Background

[2] Julio Alberto Pineda Cabrera ("Principal Applicant"), his spouse and his two children (collectively, the "Applicants") are citizens of Honduras. They claim that on July 3, 2015, the Principal Applicant was robbed at gunpoint and that the assailant took the Principal Applicant's wallet, cell phone and personal documents such as his driver's license, debit cards, personal computer, and planner. The Principal Applicant reported the incident to the police. On July 22, 2015, the Principal Applicant found a note on the windshield of his car identifying him by name and asking him for a weekly payment of 3,000 lempiras. The note stated that its authors knew that the Principal Applicant was a merchant, where his wife worked and where his children studied. It added that if the Principal Applicant refused to pay, then his family would pay with their lives. The note advised him to wait for another note with details of how to make the payment and to keep quiet. The Principal Applicant tried to report this second incident to the police, but was told that what happened to him was not serious.

[3] On July 27, 2015, the Principal Applicant found another note on the windshield of his car. This note stated that the authors could recognize his car, knew his daily routine, and that if he did not pay them, they would kill his family. This time, the note was identified as being written by the "Mara 18", a prominent gang in Honduras and throughout Central America. The Principal Applicant did not report this incident to the police. He drove to his in-laws' house in a different part of the city where his wife and children were, and remained in hiding there.

[4] After this he was pursued daily by people on motorcycles. On or about August 1, 2015, an individual on a motorcycle hit the window of the Principal Applicant's car with a gun. The Principal Applicant veered into the motorcyclist who went into a ditch. The Principal Applicant and his wife were able to escape, but heard two gunshots.

[5] They went to the police who reluctantly took a report of this incident. Two days after taking the report, a police officer sent a message via WhatsApp to advise that he was assigned to the case. No further action was taken. Fearing for their safety, the Applicants fled to the United States on August 8, 2015 where they remained for four months and eight days but did not make a refugee claim. They claim that during this time they discovered that acceptance rates for refugees were very low in the United States and began to explore how to immigrate to Canada. In this regard they contacted Freedom House, a Detroit-based organization that assists refugees. Ultimately, on December 16, 2015 they met with Canadian immigration border officials and made a claim for protection.

[6] The Applicants claim that they are at risk of harm by the Maras 18 everywhere in Honduras, that the state cannot protect them and that, since leaving Honduras, their family members still in that country have been targeted for extortion.

Decision Under Review

[7] The RPD found that the behaviour of the Applicants in delaying and then not claiming asylum in the United States was inconsistent with the subjective fear of persons who are fleeing persecution and, accordingly, drew a negative inference. Further, it found that the presumption

of truthfulness of allegations sworn to by a claimant (*Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (CA) had been rebutted because the Applicants' failure to claim asylum in the United States lacked a reasonable explanation. Additionally, the fact that the Applicants had failed to seek immigration advice while residing in the United States undermined their overall credibility. The RPD noted that the Principal Applicant acknowledged that he was not targeted because of his political opinion, race, nationality, religion, or his belonging to a particular social group.

[8] The RPD then went on to consider whether the Applicants were persons in need of protection pursuant to s 97 of the IRPA. The RPD stated that it accepted that the Principal Applicant and his spouse were subjected personally to a risk to their lives by a criminal group if they did not submit to its extortion demands. It found, however, that the documentary evidence established that the risk faced by the Applicants as targets of extortion is faced generally by all individuals in Honduras. The RPD stated that the fact that the Applicants had been identified personally as targets did not necessarily remove them from the generalized risk category since the nature of the risk is one that is faced generally by others in the country.

[9] The RPD found that *Correa v Canada (Citizenship and Immigration)*, 2014 FC 252 ("*Correa*") was factually distinguishable and referred to the two-step analysis for the interpretation of s 97(1)(b) (*Mejia v Canada (Citizenship and Immigration)*, 2015 FC 434 at para 37 ("*Mejia*")). It concluded that the degree of risk to the Applicants was not high as the threats were vague and unspecific. There was no evidence that the Applicants had been spied on and the names of the Principal Applicant's wife and children and where they worked and went to school

were not specified in the notes, although serious consequences, death to the family, had been specified. Thus, there was no credible evidence to suggest that the risk the Applicants faced was other than a generalized risk faced by a large proportion of the Honduran population. Accordingly, they were not persons in need of protection.

Issues and Standard of Review

[10] In their written submissions the Applicants identified as an issue the question of whether the RPD ignored or misconstrued relevant evidence in connection with the delay in making their claim for protection. This was not pursued when appearing before me and, in any event, in my view the determinative issue in this matter is whether the RPD erred in determining that the Applicants face a "generalized risk" in Honduras, and thus were not persons in need of protection within the meaning of s 97 of the IRPA.

[11] The RPD's finding as to whether a claimant faces a generalized risk is a question of mixed fact and law and is reviewable on a standard of reasonableness: *Gomez v Canada (Citizenship and Immigration)*, 2015 FC 504 at para 13 ("*Gomez*"); *Flores v Canada (Citizenship and Immigration)*, 2015 FC 201 at para 7 ("*Flores*"); *Arevalo Pineda v Canada (Citizenship and Immigration)*, 2012 FC 493 at para 5; *Balcorta Olvera v Canada (Citizenship and Immigration)*, 2012 FC 1048 at para 28 ("*Olvera*").

Did the RPD err in determining that the Applicants face a "generalized risk"?

Applicants' Position

[12] The Applicants submit that in light of the evidence that their agents of persecution stole the Principal Applicant's personal documents and were able to locate him on three different occasions, the RPD's finding that the risk to the Applicants did not amount to a personalized risk runs against the evidence. This is particularly so as the RPD explicitly stated that it accepted that the Principal Applicant and his wife were subjected personally to a risk to their lives. That finding did not leave the RPD the possibility of finding that the risk that they face in Honduras is generalized (*Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678 at para 36 ("*Portillo*")).

[13] Further, in finding that the Applicants' risk was no different than that faced by many other individuals who face extortion in Honduras, the RPD failed to recognize that the nature of the risk that the Applicants now face is not the same as the risk they faced prior to their agents of persecution stealing their personal information and starting a campaign of extortion against them. Previously they were susceptible to the possibility of extortion or violence, like many other people in Honduras, but now they are specifically and individually targeted, unlike the general population (*Portillo*; *Olvera* at paras 40-41; *Correa* at para 46). It is not permissible to dismiss personal targeting as an extension of generalized risk (*Correa* at para 46).

[14] In reply, the Applicants also submit that the Respondent's reliance on *Guifarro v Canada (Citizenship and Immigration)*, 2011 FC 182 ("*Guifarro*") ignores the subsequent jurisprudence

developing the interpretation of s 97(1)(b)(ii) of the IRPA, and erroneously interprets that case. This Court has consistently held that in interpreting s 97 of the IRPA, where an individual is subject to a personal risk to his life, then that risk is no longer general (*Guerrero v Canada (Citizenship and Immigration)*, 2011 FC 1210 ("*Guerrero*"); *Vaquerano Lovato v Canada (Citizenship and Immigration)*, 2012 FC 143 ("*Lovato*"); *Olvera*; *Correa*; *Banegas v Canada (Citizenship and Immigration)*, 2015 FC 45 ("*Banegas*"); *Gomez*). Further, *Guifarro* does not say that a personalized risk to someone's life can be reasonably characterized as being widespread or prevalent in that country when shared by a sub-group of the population that is sufficiently large. Rather, the relevant passage (para 32) states that a risk that may be faced by an individual may also be faced by a sub-group of the population for that risk to be considered general. Here the Applicants do not fear common crime, they fear death for not complying with the extortion demands.

[15] The Applicants also submit that the RPD failed to distinguish the heightened degree of risk that the Applicants personally face, which is not common to a large number of people in Honduras. The evidence before the RPD showed that many people in Honduras are at a potential risk of robberies and other crimes; however, the evidence does not show that a large number of the population is specifically identified, followed and repeatedly threatened with death by criminal organizations (*Lovato* at paras 9-14).

[16] Accordingly, the RPD's finding that the Applicants face a generalized risk is unreasonable.

Respondent's Position

[17] The Respondent submits that the RPD accepted that there was a personal targeting of the Applicants based on the Principal Applicant's evidence of a robbery and subsequent threats, but determined that the evidence did not show that this differed from the type of risk, crime, to which everyone in Honduras is exposed and that this finding was reasonable. The RPD based its determination on the fact that the Applicants had experienced no more than a robbery and subsequently vague and unspecified threats (*Johnson v Canada (Citizenship and Immigration)*, 2014 FC 868). The RPD is an expert country conditions tribunal and is best placed to assess the risk advanced by the Applicants and determine whether it differs from the types of risks faced generally by residents of a particular country.

[18] The Respondent also submits that there is tacit acknowledgment from the Applicants that the situation they experienced in Honduras is routine. For instance, the Principal Applicant's own account of his experience with the police describes the long lines at the police station and the police officer's attitude that his victimization was not serious. The Respondent states that the Applicants are "merely random Honduran crime victims". Further, that the Applicants, although personally targeted by the threats, were facing risks that the population in general in Honduras face and the RPD relied on jurisprudence which confirms that a generalized risk need not affect everyone in the same way (*Maija v Canada (Citizenship and Immigration)*, 2006 FC 12; *Guifarro*).

[19] The Respondent submits that the RPD reasonably determined that the Applicants failed to demonstrate that they would more likely than not be personally subjected to a risk to their lives, upon return to Honduras, which is not faced generally by other individuals in Honduras. The Applicants' fear of living in a country with a high level of crime is not different from the fear possessed by the general population (*Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1).

[20] It is the Respondent's submission that the Applicants' position that a risk cannot be both personal to them and generally faced by individuals in Honduras contradicts the language of s 97(1)(b)(ii) of the IRPA. A plain reading of the provision clearly indicates that the Applicants can be at personal risk to their lives, while at the same time face a risk generally in Honduras. This is precisely what the RPD found. The RPD followed *Guifarro* which provides that the RPD does not err in regarding a risk claim when the personalized risk to a claimant is a risk shared by a sufficiently large sub-group in a given population.

[21] The Respondent argues that the Applicants' claim, that the risk they faced after the robbery and threats was changed from the risk they faced before those events, is an engagement in obfuscation. While they may well face a different risk than the day before they were robbed and threatened, "this fact is not legally significant". Their risk claims under s 97 are not made out by showing that their risk increased in the weeks and months before they left Honduras, but are made out only if they show that the risk they now face, on a balance of probabilities, is not a risk faced generally by the population as a whole in Honduras.

Analysis

[22] Section 97 of the IRPA states as follows:

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 of former habitual residence, would subject them personally	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 nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(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 :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(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,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by	(iv) la menace ou le risque ne

the inability of that country to provide adequate health or medical care.	résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[23] Thus, an applicant making a claim under s 97(1)(b) of the IRPA must establish on a balance of probabilities that his or her removal to their country of origin would subject them to a risk to their life or to a risk of cruel and unusual treatment or punishment and that he or she is personally subject to a risk that is not faced generally by the other individuals from or living in that country (*Prophète v Canada (Citizenship and Immigration)*, 2009 FCA 31 at para 3 ("*Prophète*")). The examination of a claim under s 97(1) necessitates an individualized inquiry to be conducted on the basis of the evidence advanced by the claimant in the context of present or prospective risk to them (*Prophète* at para 7 per *Correa* at para 49).

[24] Jurisprudence has identified a two-step analysis when considering s 97. In *Portillo* Justice Gleason stated that the RPD must first appropriately determine the nature of the risk faced by the claimant which requires an assessment of whether the claimant faces an ongoing or future risk, what that risk is, whether it is one of cruel and unusual treatment or punishment and the basis for the risk. Second, the correctly described risk faced by the claimant must then be compared to that faced by a significant group in the country at issue to determine whether the risks are of the same nature and degree (*Portillo* at paras 40-41; *Flores* at para 13; *Mejia* at para 37).

[25] In reasoning similar to that applied by the RPD in this matter, in *Portillo* the RPD found that the claimant faced a unique personalized risk of death but that the risk was generalized

within s 97(b)(ii) because gang related crime was rampant in El Salvador. The RPD specifically stated that it accepted that the claimant was subjected personally to a risk to his life but concluded that the fact that he had been personally targeted did not remove him from the general risk category because the crimes to which he fell victim were widespread and not specific to him. That reasoning was rejected by Justice Gleason who stated:

> [36] As noted, in my view, the interpretation given by the RPD to section 97 of IRPA in the decision is both incorrect and unreasonable. **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**. If the Board's reasoning is correct, it is unlikely that there would ever be a situation in which this section would provide protection for crime-related risks. Indeed, counsel for the respondent was not able to provide an example of any such situation that would be different in any meaningful way from the facts of the present case. The RPD's interpretation would thus largely strip section 97 of the Act of any content or meaning.
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> (See also *Olvera* at para 40; *Mejia* at paras 41-42, 44)

[26] Justice Gleason did acknowledge another line of authorities upholding the RPD's decisions in situations where gangs made threats of future harm to the claimants but the threats were found to be insufficient to place the claimant at a greater risk than others in the country. She noted, however, in many of those cases the RPD did not make a determination that the applicant had been personally targeted and was at risk of death (*Portillo* at para 39).

[27] She also reviewed case law which supported her view, including *Lovato*, in which Justice Rennie set aside the RPD's decision as unreasonable because the RPD inappropriately characterized the nature of the risk faced by the claimant as the risk of gang violence. He stated the following at para 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.

[28] More recently, in *Correa*, Justice Russell addressed in detail the divergence in the jurisprudence as to whether, or in what circumstances, individuals targeted by criminal gangs for extortion will qualify for protections under s 97(1)(b):

> [45] In my view, the differences between these two lines of cases arise both from different facts and different approaches to interpreting and applying the language of s. 97(1)(b)(ii). I agree with Justice Gleason that whether or not personal targeting is found to have occurred has been an important and even decisive factor in many cases, but there have also been cases where a denial of the claim has been upheld despite a finding of personal targeting or circumstances that clearly demonstrate it. The Respondent in the present matter cites several examples, including: *Rodriguez*, *Paz Guifarro*; *Ventura*; *De Munguia*; *Perez (2009)*, all above.
>
> [46] While a full consensus has yet to emerge, I think that there is now a preponderance of authority from this Court that personal targeting, at least in many instances, distinguishes an individualized risk from a generalized risk, resulting in protection under s. 97(1)(b). Since "personal targeting" is not a precise term, and each case has its own unique facts, it may still be the case that "in some cases, personal targeting can ground protection, and in some it cannot" (*Rodriguez*, above, quoted with approval in *Pineda v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 1543 [*Pineda (2012)*]. However, in my view there is an emerging consensus that it is not permissible to dismiss personal targeting as "merely an extension of," "implicit in" or "consequential harm resulting from" a generalized risk. That is the main error committed by the RPD in this case, and it makes the Decision unreasonable.
>
> (Also see paras 82-84).

[29] In this matter the evidence before the RPD was that the Principal Applicant had been robbed, including of personal information, his vehicle was located twice and notes were left in extortion attempts in which his and his family's lives had been threatened. He was followed and, in a third incident, a motorcyclist caught up with his vehicle and hit the window with a gun. When the Principal Applicant, in an effort to escape, ran the motorcyclist off the road, shots were fired. The RPD did not dispute the credibility of the Applicants' documentary evidence, which included the two demand notes and the police reports filed, or their account of events.

[30] The RPD explicitly stated "In this case, it is accepted that the claimant and his spouse were subjected personally to a risk to their lives" and that a criminal group threatened the Principal Applicant and his wife if they did not submit to their extortion demands. However, the RPD concluded that the risk that they faced as a result of being targets of extortion is faced generally by all people in Honduras.

[31] It has been suggested that *Portillo* and subsequent decisions stand for the proposition that, once the RPD accepted that there was a personal risk to the Applicants' lives, it was not open to it to conclude that this was a generalized risk. Whether or not this view is accepted as being applicable in all circumstances, the Court has also held that it is impermissible to dismiss personal targeting as merely harm resulting from a generalized risk (*Correa* at paras 36, 57) which, in my view, is what the RPD did in this case.

[32] Here the RPD failed to conduct an individualized inquiry considering the events as relayed by the Applicants in the context of the risk that they claimed. It simply concluded that

the risk they face as a result of being targets of extortion is a generalized risk in Honduras, without an analysis of the degree of that risk or whether the events caused the Applicants to be more than mere victims of random crime.

[33] In reaching this conclusion, the RPD refers to and appears to distinguish the Applicants' claim from *Correa*, a case they had submitted as an authority. The RPD noted that in *Correa* the gang members knew the claimant, spied on him, took photos of his family, and extracted information from his employee. It found that in this case the degree of risk to the Applicants was not high as the threats they received were vague and unspecific. There was no evidence that the Applicants were spied on other than vague statements that the agents of persecution knew where the Principal Applicant's wife worked and the school his children attended, but that the notes failed to specify the names of his wife and child and the names of his wife's place of work and the children's school.

[34] In my view, the RPD was required to take a broader view of these events than simply comparing them to the facts in *Correa* and dismissing the risk as lesser. Moreover, as acknowledged but not addressed by the RPD, it was clear that the authors of the threatening notes sent to the Applicants did specify serious consequences, namely the death of the family members. The RPD was required to determine if the risk the Applicants faced, a threat to their lives if they did not pay extortion demands, was one not faced generally by other individuals in Honduras. This inquiry required an analysis of how the personal circumstances of the Applicants compared with the risk faced by other individuals in the same situation in Honduras

(*Ortega Arenas v Canada (Citizenship and Immigration)*, 2013 FC 344 at para 14; *Benegas* at paras 34-37). However, the RPD did not conduct that analysis.

[35] Further, the RPD appears to have conflated the reason for the risk (crime) with the risk itself. As stated in *Guerrero* at para 29, "[w]hen 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" (see also *Correa* at paras 59, 83-84, 91; *Gomez* at para 19).

[36] For these reasons the RPD's decision was not reasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted. The decision of the RPD is set aside and the matter is remitted for redetermination by a different panel;
2. No question of general importance is proposed by the parties and none arises; and
3. There will be no order as to costs.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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