Federal Court  Cour fédérale

Date: 20110215

Docket: IMM-3097-10

Citation: 2011 FC 182

Ottawa, Ontario, February 15, 2011

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

OSMAN JOSE PAZ GUIFARRO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicant, Mr. Osman Jose Paz Guifarro, is a citizen of Honduras. He claims that his life will be in danger if he is forced to return to Honduras. In short, he alleges that a gang known as the "Mara 18" and the "MS-18" has threatened him with death for refusing to pay a "war tax" that it repeatedly demanded from him. Upon his arrival in Canada in February 2008, he claimed refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[2] In May 2010, the Refugee Protection Division (RPD) of the Immigration and Refugee Board rejected the Applicant's claims.

[3] The single issue in this case is whether the risks alleged by Mr. Guifarro are risks that are "faced generally by other individuals in or from" Honduras, as contemplated by paragraph 97(1)(b)(ii) of the IRPA.

[4] For the reasons that follow, I have concluded that the risks alleged by Mr. Guifarro are in fact risks that are faced generally by other individuals in Honduras. Accordingly, this application will be dismissed.

I. Background

[5] Mr. Guifarro owned a cargo transportation business in Honduras, which he started in November 2002. In July 2004, he was approached by members of the Mara 18 and told to pay a war tax. He originally refused to pay the tax. However, in September 2004 he gave into the gang's demands. He paid the tax on a monthly basis until January 2005, when the gang demanded more money, which the Applicant claims he could not afford. He therefore told the gang that he would rather give up his business than accede to their demands.

[6] On February 12, 2005, the Applicant claims he was assaulted and robbed by members of the Mara 18. He reported the incident to the police, who arrested three men. However, he claims that two of these men were released two days later, after having been beaten during their detention. The

Applicant claims that this caused them to blame and threaten the Applicant that he would pay for having reported them to the police. He further claims that, on March 15, 2005, he was again beaten and that he sustained injuries to most of his upper body.

[7] On March 28, 2005, the Applicant fled to the United States. He remained there until he came to Canada on February 23, 2008 and submitted a refugee claim.

II. The Decision under Review

[8] The RPD began its assessment of the risks claimed by Mr. Guifarro by noting that he had indicated that the Mara 18 gang targets all businesses and the working class. It then observed that, in *Ventura De Parada v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 845, at para. 22, my colleague Justice Zinn confirmed "that an increased risk experienced by a subcategory of the population is not personalized where that same risk is experienced by the whole population generally, albeit at a reduced frequency."

[9] The RPD then noted that the documentary evidence indicates that there is a serious gang problem in Central America, and notably so in Honduras. It observed that the major gangs are the MS-13 and the MS-18, that those gangs are responsible for a large percentage of violent crimes committed in Honduras, and that they are well structured criminal gangs which engage in extortion and robberies. It further noted that the MS-13 and MS-18 are heavily armed, that they have little value for life, and that revenge killings are common.

[10] After reviewing the documentary evidence, the RPD accepted that the Applicant "was subjected personally to a risk to his life" and that the MS-18 "threatened him if he did not accede to their demands for money."

[11] However, the RPD concluded that the Applicant does not meet the requirements set forth in paragraph 97(1)(b)(ii) of the IRPA because "[e]xtortion is part of the Maras' *modus operandi* and constitutes a widespread risk for all citizens who are working in Honduras," particularly those who are perceived to have money.

III. Standard of Review

[12] The issue raised by the Applicant is a question of mixed fact and law (*Acosta v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 213, at paras. 9-11). Such questions are typically reviewable on a standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 51-55).

[13] That said, to assess this issue, the RPD was required to interpret the words "not faced generally by other individuals in or from that country," in paragraph 97(1)(b)(ii) of the IRPA.

[14] In *Dunsmuir*, the Supreme Court observed: "Deference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (*Dunsmuir*, above, at para. 54). The Court then proceeded to state, at para. 55, that a consideration of the following factors "will lead to the conclusion that the decision maker should be given deference and a reasonableness test applied": (i) whether the statute in question contains a privative clause (i.e., a statutory direction from Parliament indicating the need for

deference); (ii) whether the administrative regime in question is discrete and specialized; (iii) whether the decision-maker has special expertise; and (iv) whether the question of law is of "central importance to the legal system … and outside the … specialized area of expertise" of the decision-maker.

[15] In *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] S.C.J. No. 12, at para. 25, Justice Binnie, speaking for a majority of the Supreme Court, elaborated upon this point as follows:

> *Dunsmuir* recognized that with or without a privative clause, a measure of deference has come to be accepted as appropriate where a particular decision had been allocated to an administrative decision maker rather than to the courts. This deference extended not only to facts and policy but to a tribunal's interpretation of its constitutive statute and related enactments because 'there might be multiple valid interpretations of a statutory provision or answers to a legal dispute and that courts ought not to interfere where the tribunal's decision is rationally supported' (*Dunsmuir*, at para. 41).

[16] Justice Binnie proceeded to apply, in the context of paragraph 67(1)(c) of the IRPA, the "contextualized analysis" described in *Dunsmuir* and found that the appropriate standard of review to apply in connection with the IAD's approach to paragraph 67(1)(c) is reasonableness (*Khosa*, above, at paras. 55-58).

[17] *In Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, at paras. 28 and 37, and in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, at para. 34, and the Supreme Court reiterated the view that an administrative tribunal's interpretation of its home statute "will usually attract a reasonableness standard of review."

[18] In my view, the following considerations support the view that a reasonableness standard of review should be applied in reviewing the RPD's interpretation and application of paragraph 97(1)(b)(ii) of the IRPA to the specific factual situations with which it may be presented:

a. The existence of subsection 162(1) of the IRPA and the fact that decisions of the RPD are reviewable only if this Court grants leave to commence judicial review suggest that some level of deference should be extended to the RPD in this regard (*Khosa*, above, at paras. 55 and 56; *Canada (Minister of Citizenship and Immigration) v. Pearce*, 2006 FC 492, at para. 24).

b. In assessing claims for protection under section 97 of the IRPA, the RPD is required to develop and exercise considerable expertise in connection with often difficult issues of fact, mixed fact and law, and "the imperatives and nuances of the legislative regime" (*Khosa*, above, at para. 25).

c. The nature of the question of that has been raised in the case at bar is not of "central importance to the legal system … and outside the … specialized area of expertise" of an immigration officer (*Dunsmuir*, above, emphasis added). In contrast to constitutional questions, true questions of jurisdiction, questions that are at the heart of the administration of justice and questions regarding the jurisdictional lines between two or more competing specialized tribunals (*Dunsmuir*, above, at paras. 58-61), the interpretation and application of section 97 of the IRPA is a narrow legal exercise that arises solely in the highly

specialized area of immigration and refugee law. Moreover, in this context, the interpretation of paragraph 97(1)(b)(ii) is "clearly intertwined with the factual matrix in which [it] arise[s]" (*Ramsawak v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 636, at para. 13; *Smith*, above, at para. 32; *Acosta*, above, at para. 11; *Osorio v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1459, at para. 26).

d. The existing jurisprudence supports the adoption of a reasonableness standard (*Khosa*, above, at para. 53; *Osorio*, above; *Ventura De Parada*, above, at para. 19; *Acosta*, above; *Carias v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 602, at para. 20).

e. The parties have not identified any considerations, as contemplated by *Dunsmuir*, *Khosa* and *Smith*, above, which suggest that a standard of correctness should be applied in reviewing this issue. The fact that a reasonableness standard of review might allow for alternative interpretations of paragraph 97(1)(b)(ii) does not preclude such a standard from being adopted (*Smith*, above, at paras. 38 and 39).

[19] Based on all of the foregoing, I find that reasonableness is the appropriate standard of review to apply in connection with the RPD's interpretation and application of paragraph 97(1)(b)(ii) to the facts in the case at bar. However, nothing turns on this, as I have determined that even on a correctness standard, the RPD did not err.

IV. Analysis

A. *Did the RPD err in concluding that the risks alleged by Mr. Guifarro are risks faced generally by other individuals in or from Honduras?*

[20] The Applicant submitted that the RPD erred by finding that he faces a generalized risk, rather than a personalized one. I disagree.

[21] In support of his position, the Applicant relied on this Court's decision in *Pineda v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 365. However, that case is distinguishable. There, my colleague Justice de Montigny quashed a decision of the RPD on the basis that the RPD (i) had failed to take into account the applicant's evidence that he had been personally subjected to danger; and (ii) had unreasonably concluded that he would not be in personal danger if he were to return to El Salvador (*Pineda*, above, at paras. 13-17). By contrast, in the case at bar, the RPD explicitly noted the Applicant's evidence that he had been the subject of personal attacks and specifically accepted that the Applicant "was subjected personally to a risk to his life … if he did not accede to [the Mara 18's] demands for money."

[22] The jurisprudence that is more directly relevant to the case at bar is set forth in *Prophète v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 331. That case addresses the second of the two conjunctive elements contemplated by paragraph 97(1)(b)(ii) in circumstances in which the first of those elements (personal risk) has been established. There, Justice Tremblay-Lamer observed:

> [18] The difficulty in analyzing personalized risk in situations of generalized human rights violations, civil war, and failed states lies in determining the dividing line between a risk that is "personalized"

> and one that is "general". Under these circumstances, the Court may be faced with applicant who has been targeted in the past and who may be targeted in the future but whose risk situation is similar to a segment of the larger population. Thus, the Court is faced with an individual who may have a personalized risk, but one that is shared by many other individuals.

[23] Justice Tremblay-Lamer proceeded to find that the applicant in the case before her did not face a risk that was not faced generally by other individuals in or from Haiti, because "[t]he risk of all forms of criminality is general and felt by all Haitians." She added: "While a specific number of individuals may be targeted more frequently because of their wealth, all Haitians are at risk of becoming the victims of violence" (*Prophète*, above, at para. 23).

[24] In concluding that a heightened risk faced by a sub-group of the population can nevertheless be characterized as being a generalized risk, Justice Tremblay-Lamer followed a similar approach that was embraced in *Osorio*, above; *Cius v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1; and *Carias*, above. That approach has since been followed in *Ventura De Parada*, above, and *Acosta*, above.

[25] In *Osorio*, above, at para. 26, Justice Snider stated there is nothing in paragraph 97(1)(b)(ii) that requires the RPD to interpret the word "generally" as applying to all citizens. She then added: "The word 'generally' is commonly used to mean 'prevalent' or 'widespread'. Parliament deliberately chose to include the word 'generally' in s. 97(1)(b)(ii), thereby leaving to the Board the issue of deciding whether a particular group meets the definition. Provided that its conclusion is reasonable, as it is here, I see no need to intervene." Justice Snider proceeded to find that it was reasonably open to the RPD to conclude that the risk faced by the principal applicant in that case

was “general”, because it “is difficult to define a broader or more general group within a nation than the group consisting of ‘parents’” (*Osorio*, above, at para. 25).

[26] In *Cius*, above, at paras. 18 and 23, Justice Beaudry reached a similar conclusion. After accepting that people who are perceived to be wealthy “are more frequent targets of criminal activity,” he nevertheless found the risk faced by such persons to be generalized.

[27] Likewise, in *Carias*, above, at paras. 25 and 27, Justice O’Keefe found that membership in “a large group of people who may be targeted for economic crimes in Honduras on the basis of their perceived wealth” is not a sufficient basis upon which to ground a claim under section 97.

[28] Essentially the same approach was adopted by Justice Gauthier in *Acosta*, above, when she held:

> [16] […] It is no more unreasonable to find that a particular group that is targeted, be it bus fare collectors or other victims of extortion … who do not pay, faces generalised violence than to reach the same conclusion in respect of well known wealthy business men in Haiti who were clearly found to be at a heightened risk of facing the violence prevalent in that country.

[29] The approach adopted in the foregoing line of cases was followed by Justice Zinn in *Ventura De Parada*, above, when he observed:

> [22] I agree with my colleagues that an increased risk experienced by a subcategory of the population is not personalized where that same risk is experienced by the whole population generally, albeit at a reduced frequency. I further am of the view that where the

> subgroup is of a size that one can say that the risk posed to those persons is wide-spread or prevalent then that is a generalized risk.
>
> [23] That is precisely what the Board found in this case. The subgroup of the population of El Salvador that the Applicants were found to belong to was described by the Board as "business people" whom it stated were those who "operate a business, work for a business or own and operate transportation units in El Salvador." That is a very large subgroup, encompassing almost all in the country who legitimately work for a living. That determination, based on the evidence was not unreasonable; neither was the finding of generalized risk.

[30] In my view, the reasoning adopted in the cases discussed above is equally applicable to the case at bar. In short, I am satisfied that it was reasonably open to the RPD to conclude that (i) the risk faced by the Applicant "is one faced generally by many individuals in Honduras … who are perceived to have money," and (ii) therefore the Applicant is not a person protected by section 97. Indeed, I am satisfied that the RPD, which specifically purported to apply the interpretation of paragraph 97(1)(b)(ii) articulated in *Ventura De Parada*, above, correctly applied that interpretation.

[31] In my view, the basis for the RPD's conclusion, which was otherwise entirely sound, was reinforced when the Applicant acknowledged, during the RPD's hearing, that it is "fair to say that the Mara 18 were after people with money" (Certified Tribunal Record, at p. 22).

[32] Given the conjunctive nature of the two elements contemplated by paragraph 97(1)(b)(ii), a person applying for protection under section 97 must demonstrate not only a likelihood of a personalized risk contemplated by that section, but also that such risk "is not faced generally by other individuals in or from that country." Accordingly, it is not an error for the RPD to reject an application for protection under section 97 where it finds that a personalized risk that would be

faced by the applicant is a risk that is shared by a sub-group of the population that is sufficiently large that the risk can reasonably be characterized as being widespread or prevalent in that country. This is so even where that sub-group may be specifically targeted. It is particularly so when the risk arises from criminal conduct or activity.

[33] Given the frequency with which claims such as those that were advanced in the case at bar continue to be made under s. 97, I find it necessary to underscore that is now settled law that claims based on past and likely future targeting of the claimant will not meet the requirements of paragraph 97(1)(b)(ii) of the IRPA where (i) such targeting in the claimant's home country occurred or is likely to occur because of the claimant's membership in a sub-group of persons returning from abroad or perceived to have wealth for other reasons, and (ii) that sub-group is sufficiently large that the risk can reasonably be characterized as being widespread or prevalent in that country. In my view, a subgroup of such persons numbering in the thousands would be sufficiently large as to render the risk they face widespread or prevalent in their home country, and therefore "general" within the meaning of paragraph 97(1)(b)(ii), even though that subgroup may only constitute a small percentage of the general population in that country.

V. Conclusion

[34] The application for judicial review is dismissed.

[35] There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT this application for judicial review is dismissed.

"Paul S. Crampton"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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