Federal Court  Cour fédérale

Date: 20110419

Docket: IMM-4341-10

Citation: 2011 FC 477

Ottawa, Ontario, April 19, 2011

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

FREDIS ANGEL GARCIA VASQUEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the decision of the Immigration and Refugee Board, Refugee Protection Division (the "Board"), pursuant to s 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001 c 27 (the Act) by Fredis Angel Garcia Vasquez ("applicant"). The Board found that the applicant was neither a Convention refugee nor a person in need of protection under ss 96 and 97 of the Act.

I. Facts

[2] The applicant is a citizen of El Salvador, born on July 14, 1980. Around the year 2000, some of his classmates joined the Mara Salvatrucha (MS 13) gang. The applicant refused to join.

[3] On March 4, 2000, in order to avoid the MS 13, the applicant joined the armed forces of El Salvador under contract, for a period of 18 months, in the Third Brigade, in the province of San Miguel. When his contract ended, he left the armed forces and worked as a civilian security guard for the Serconce Company. The MS 13 continued in their attempts to recruit him.

[4] In October 2004, the El Salvadorian government enacted an "Antimaras" law, under which the civil national police force joined with the military in a joint task force to fight both the MS 13 and MS 18 gangs. The applicant rejoined the armed forces as part of the Sixth Brigade of Infantry in the Department of Usutlan under a one-year contract as part of this initiative. He received special training and was tasked with confiscating firearms and capturing gang members.

[5] In November 2004, while on leave, the applicant was approached by three well known gang members: El Buda, La Pantera, and El Singo. The applicant was physically assaulted, and would have been killed if bystanders had not intervened. He stated that the gang members told him that the attack was in retaliation for his part in putting other gang members in jail.

[6] In 2005, the applicant resigned and went to San Salvador. There, he was again recognized by gang members, who told him they had been ordered to kill him. The applicant left El Salvador on January 13, 2006, and made his way through Guatemala and Mexico to the United States, where he

stayed illegally for two and a half years. When an order of deportation was issued against him, he came to Canada on September 12, 2008, and requested refugee protection on September 15, 2008.

[7] The applicant's hearing before the Board was held on May 13, 2010. The decision was dated June 4, 2010, and received by the applicant on July 13, 2010.

II. The decision under review

[8] The applicant's identity and credibility were not put into question.

[9] With respect to s 96, the Board firstly noted that the Federal Court has held that victims of crime, corruption or vendettas generally fail to establish a link between their fear of persecution and a Convention ground. The Board noted the applicant's counsel's argument at the hearing that the nexus arose from the applicant's membership in the armed forces, more particularly members of the Anti-Gang Task Force, who were responsible for working with police to arrest members of MS 13 and MS 18. The Board quoted from *Ward v Canada (Attorney-General)*, [1993] 2 SCR 689 at page 739, where Justice La Forest identified three possible categories of social group:

> 70 "The meaning assigned to "particular social group" in the Act should take into account the general underlying themes of the defense of human rights and anti-discrimination that form the basis for the international refugee protection initiative. The tests proposed in *Mayers*, supra, *Cheung*, supra, and *Matter of Acosta*, supra, provide a good working rule to achieve this result. They identify three possible categories:
>
> > (1) groups defined by an innate or unchangeable characteristics;

> (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
>
> (3) groups associated by a former voluntary status, unalterable due to its historical permanence.
>
> The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the antidiscrimination influences, in that one's past is an immutable part of the person."

[10] The Board noted that the applicant joined the armed forces in order to escape the influence of MS 13, but found that because he joined for very short periods and was able to leave at the end of his contracts, he had not established that he belonged to a particular social group within the Convention ground. The Board found that the applicant was a victim of crime, but that this did not provide a nexus to a s 96 ground.

[11] Regarding s 97, the Board accepted the applicant's testimony and the documentary evidence demonstrating the widespread violence in El Salvador at the hands of MS 13. The Board noted that MS 13 is the largest criminal network in the Americas, and one of the most prolific in the world. It also accepted that if a recruit is unwilling to join the El Salvadorian Maras, the person's family and friends will all be in danger, as the Maras do not hesitate to eliminate those who defy them. However, the Board also found that the risks faced by the applicant were generalized, and therefore fell into the exception set out in s 97(1) (b)(ii). The Board referenced the National Documentation Package which indicated that the MS brought about major threats to public security in El Salvador, and that the risk of being a victim of violence or crime at the hands of organized gangs is one faced generally by all citizens and residents of El Salvador.

[12] The Board noted that the applicant had refused to join the MS 13, and found that subsequent threats and attacks against him were escalations as a result of his original decision not to join. The Board accepted that there were further consequences because the applicant joined the armed forces and worked against the gangs, but found that the subsequent threats and actions against him arose from the initial attempts to recruit him. The Board found that the applicant could not personalize the risk to him beyond membership in the subgroup of young men who are recruited to become gang members. The Board noted that in *Perez v Minister of Citizenship and Immigration,* 2010 FC 345, in which the circumstances were somewhat similar, the Court upheld the Board's finding that recruitment of young men by MS in Honduras constituted a generalized risk even when there had been repeated attempts with threats and violence.

III. Relevant legislation

The relevant portions of the *Act* are as follows:

Convention refugee	Définition de « réfugié »
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

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

Personne à protéger

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

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles

disregard of accepted international standards, and	infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

IV. Issues and standard of review

[13] This application raises the following issues:

a. Did the Board err in finding that the applicant did not belong to a particular social group under s 96?
b. Did the Board err in finding that the applicant faces a generalized risk under s 97?
c. Did the Board ignore, misconstrue or misapprehend cogent and important evidence?

[14] The applicable standard is reasonableness, as the issues raised by the application are mixed questions of fact and law. The Court's role is not to reweigh the evidence or to substitute its own opinion, but rather to ensure that the Board's decision fits with the principles of justification, transparency and intelligibility, and falls within the range of "possible, acceptable outcomes" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 53; *Gabriel v Minister Of Citizenship and*

Immigration, 2009 FC 1170 at para 10; *Khosa v Minister of Citizenship and Immigration*, 2009 SCC 12 at paras 59, 61-62).

V. Analysis

a) Did the Board err in finding that the applicant did not belong to a particular social group under s 96?

[15] The applicant cites extensively from the Supreme Court of Canada's decision in *Ward*, and argues that the applicant's situation places him in the third category enumerated by Justice La Forest (as cited in the Board's decision), namely "groups associated by a former voluntary status, unalterable due to its historical permanence". The applicant points to Justice La Forest's explanation that this group is "included because of historical intentions, although it is also relevant to the anti-discrimination influences in that one's past is an immutable part of the person".

[16] The applicant submits that the Board failed to consider whether the applicant's former membership in the armed forces fell under this third category of social group, in that the applicant cannot alter the "historically permanent" fact of his former membership in the armed forces.

Respondent's submissions

[17] The respondent argues that the Board reasonably found that short and temporary involvement with the military did not establish that the applicant was a member of a particular

social group. The respondent notes that the Board specifically found that the applicant was not a member of the armed forces social group, because he joined for very short periods and was able to leave at the end of his contracts.

[18] The respondent argues that the Board specifically considered the third category of social group from *Ward*, but found no historical permanence to the applicant's status as a former participant in the armed forces. The respondent contends that with no permanence, there is no membership in the social group for the purpose of s 96. The applicant was found not to be a member of the armed forces in this sense.

[19] In *Ward*, cited above, the court defined the three possible categories of persons who could be described as members of a "particular social group" for the purposes of s 96, and who, therefore qualify as Convention refugees and are entitled to refugee protection. This membership would form the required nexus between the persecution feared and the grounds claimed as a basis for that fear (see for example *Xie v Minister of Citizenship and Immigration*, 2004 FCA 250 at para 5; *Lai v Minister of Citizenship and Immigration*, 2005 FCA 125 at paras 84, 93).

[20] The Board did not err in finding that the applicant was not a member of any particular social group relevant to s 96. Since the applicant's time with the military was brief and contractual in nature the Board's finding was in the range of "possible, acceptable outcomes". The jurisprudence of this Court indicates that a temporary employed position does not rise to the level of a social association worthy of protection by the Convention. In *Chekhovskiy v Minister of Citizenship and Immigration*, 2009 FC 970 at para 23, Justice de Montigny states the following:

> [23] The applicant also tried to make much of the fact that the RPD accepted that the applicant, as a member of the building contractors group, was part of a group associated by a former voluntary status, unalterable due to its historic permanence. In this respect, I would stress two points. First, the RPD was not categorical and merely said that "one could argue" along these lines. But more importantly, it seems to me that it would trivialize the notion of "a particular social group" if one were to consider that vocational groups pertain to that concept. This would be inconsistent with the historical roots of that notion, incompatible with the analogous grounds approach developed in the context of anti-discrimination law, and inimical to the whole purpose of Convention refugee protection.

[21] On a similar note, Justice Phelan stated the following in the recent case of *Martinez v Minister of Citizenship and Immigration*, 2010 FC 502:

> [9] The Board was correct in its interpretation of s 96. The Applicant experienced his issues not because of what he was but because of what he did. As set forth in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, the groups included in s 96 are determined by reference to basic principles underlying the Refugee Convention (e.g. anti-discrimination).

[22] These cases emphasize the following point made by Justice La Forest in *Ward* at para 67, quoting from the United States Board of Immigration Appeals, *Matter of Acosta*, Interim Decision 2986, 1985 WL 56042 (B.I.A.) (Database FIM-81A), pp 37-39 :

> … we interpret the phrase “persecution on account of membership in a particular social group” to mean persecution that is directed toward an individual who is a member of a group of persons all of whom share a common, immutable characteristic. […] whatever the common characteristic that defines the group, it must be one that the members of the group either cannot change, or should not be required to change because it is fundamental to their individual identities or consciences.

Justice La Forest emphasizes at para 67 that “what is excluded by this definition are groups defined by a characteristic which is changeable or from which disassociation is possible, so long as neither option requires renunciation of basic human rights”.

It was therefore reasonable for the Board to conclude that the applicant’s temporary membership in the armed forces did not rise to the level of an “immutable characteristic” that would be analogous to an anti-discrimination ground, and therefore that the applicant was not a member of a “particular social group” that would provide a nexus to a Convention ground.

b) Did the Board err in finding that the applicant faces a generalized risk under s 97?

[23] The applicant argues that when the Board found that the applicant faced only a generalized risk because of his membership in the subgroup of young men recruited to become gang members, the Board failed to consider the heightened risk faced by the applicant as a member of the joint task force assigned to combat MS 13 and MS 18, as a former participant in the military, and as someone who had been threatened in the past.

[24] The applicant notes that the Federal Court of Appeal declined to answer the certified question in *Prophète v Minister of Citizenship and Immigration* as to whether a subgroup of individuals facing a significantly heightened risk of crime in a country at generalized risk is still subject to the limitation of s 97(1)(b)(ii). The applicant notes that the court declined to answer this question in a factual vacuum, and indicated that it could not simply find that the risk feared in Haiti

in that case was generally faced by all citizens, without evaluating the specific circumstances of the case.

[25] In the present case, the applicant argues that the Board failed to assess whether the applicant was more likely to be targeted in the future because he had been targeted in the past, and takes issue with the fact that the Board restricted its analysis to young men at risk of recruitment even after noting the applicant's military participation.

[26] The respondent responds that the Board considered how MS 13 recruits members and noted the consequences of refusing to join, but found that the applicant could not personalize the risk he faced beyond membership in the subgroup of young men recruited by the Maras. The respondent notes that the applicant is not contesting the Board's findings based on the documentary evidence, but is arguing that the Board failed to evaluate the specific circumstances of the applicant's case. The respondent submits that the Board did consider these circumstances, but simply found them to be part of a generalized risk. The Board did acknowledge the threats and attacks faced by the applicant, but found that they all arose from his initial refusal to join, and that the risk he faced was not sufficiently personalized.

[27] The respondent argues that the fact that recruitment is personal does not constitute a personalized risk, according to *Perez v Minister of Citizenship and Immigration*, 2010 FC 345 at paras 36 and 39.

[28] The respondent submits that the Board did not fail to consider the applicant's participation in the anti-gang joint task force, and notes that the Board commented that the applicant "faced further consequences" in this regard but concluded that the risk resulted from the gang's unsuccessful attempts to recruit him and not from his involvement in the armed forces. The respondent contends that the applicant's argument that the Board limited its analysis to the risk facing young men while ignoring the consequences of the applicant's military participation is illogical, as the applicant himself admits in his memorandum that the Board specifically mentioned the military participation. The respondent argues that the applicant is simply attempting to have the Court substitute its own opinion for that of the Board.

[29] In *Prophète v Minister of Citizenship and Immigration*, 2009 FCA 31, the Federal Court of Appeal stated that a person in need of protection is one for whom the return to his home country would subject him personally, in every part of that country, to a risk to his life or to a risk of cruel or unusual treatment that is not faced generally by other individuals in or from that country (para 3). The Court found as follows :

> 6 Unlike section 96 of the Act, section 97 is meant to afford protection to an individual whose claim "is not predicated on the individual demonstrating that he or she is [at risk] ... for any of the enumerated grounds of section 96" (*Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1, [2005] 3 FCR 239 at para 33).
>
> 7 The examination of a claim under subsection 97(1) of the Act necessitates an individualized inquiry, which is to be conducted on the basis of the evidence adduced by a claimant "in the context of a present or prospective risk" for him (*Sanchez v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 99 at para 15) (emphasis in the original).

[30] In the underlying case, *Prophète v Minister of Citizenship and Immigration*, 2008 FC 331, Justice Tremblay-Lamer noted at para 18 that:

> [t]he 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.

[31] In our view the applicant's situation can be distinguished from that envisioned by Justice Tremblay-Lamer in *Prophète* (cited above), as the applicant has been personally targeted in the past, and will be in the future; this risk of targeted recruitment is, contrary to what the Board found, limited and personalized in that the participation of the applicant in the Antimaras task force significantly heightened his risk relative to that of young men in El Salvador.

[32] The Board cited documentary evidence about the influence of the Maras gangs throughout the Americas, and specifically about the dangers inherent in their recruitment practices. The Board found that the applicant's participation in the armed forces stemmed from the fact that he had been targeted for recruitment, and found that the threats and attacks made against him were mainly due to his refusal to join the gang. The Board's view appears to be that there is no relevant distinction between a refusal to join the gang and participation in an anti-gang task force. This Court finds that this is not a reasonable possible conclusion because the applicant's participation in the Antimaras operation has affected and significantly altered the risk he faces from MS 13, so as to make it a personalized risk not faced by other young men in the armed forces or in the population at large. The attempt on his life was triggered by the fact that he had openly fought and participated in the imprisonment of MS 13 gang members.

c) Did the Board ignore, misconstrue or misapprehend cogent and important evidence?

[33] The applicant cites several cases holding that the Board is required to specifically refer to evidence running contrary to its finding on a central issue, including *Garcia v Minister of Citizenship and Immigration*, 2005 FC 807 at paras 11-17; *Armson v Minister of Employment and Immigration* (1989), 9 Imm LR (2d) 150 (FCA) at paras 9-10; and *Padilla v Minister of Employment and Immigration*, [1991] FCJ No 71 (FCA). The applicant then states that the Board's decision is defective because it failed to consider all the evidence.

[34] The respondent argues that the applicant does not explain what evidence was ignored by the Board. The respondent states that the Board is presumed to have considered all evidence, unless the contrary is shown, and argues that the applicant has not pointed to any evidence supposedly missed by the Board.

[35] The Federal Court of Appeal in *Cepeda-Gutierrez v Minister of Citizenship and Immigration*, [1998] FCJ No 1425 at paras 15-17, held that the reasons of an administrative agency are not to be read hypercritically by a court, nor is the agency required to mention every piece of evidence before it, but that the more important a piece of opposing evidence that goes unmentioned, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact without regard to the evidence. A statement by the agency that it considered all the evidence before it will often otherwise suffice, and the Board is generally presumed to have considered all evidence before it (*Provost v Minister of Citizenship and Immigration*, 2009 FC 1310 at paras 30-31).

[36] As the applicant has not pointed to any evidence that he considers as running contrary to the Board's finding on a central issue. In the absence of any such specific indication, the Board is presumed to have considered all of the evidence.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. This Court allows this application for judicial review.

2. There is no question of general interest to certify.

" André F. Scott "
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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