

Federal Court



Cour fédérale

Date: 20110707

Docket: IMM-5584-10

Citation: 2011 FC 843

Ottawa, Ontario, July 7, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

JAIME ANTONIO CHICAS SANCHEZ

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks an order setting aside a September 7, 2010 decision of the Refugee Protection Division of the Immigration Refugee Board of Canada (the Board), which found the applicant to be neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*). The Board did not make any negative credibility findings. For the reasons that follow, the application for judicial review is dismissed.

[2] The applicant is a citizen of El Salvador. He is a civil lawyer and a Justice of the Peace in San Miguel, El Salvador - a city with a population of about 100,000. As a Justice of the Peace he would deal with - in the words of the applicant - the “preliminary parts” of criminal matters and in his civil practice he dealt with minor disputes. He fears the MS-13 also known as Mara Salvatrucha (the Maras). The Maras are a criminal organization involved in many enterprises, including extortion.

[3] The applicant claims that the Maras extorted him for protection money. In 2008, sitting as a Justice of the Peace, he presided over preliminary bail hearings involving Maras who were charged with assault and armed robbery. Then, in 2009, over a year later, he claims he received an extortion note which demanded payment and promised death if the money was not received. The applicant filed a denunciation with the Attorney General. The applicant believed the police and authorities were powerless to protect him, and less than two weeks following the filing of this denunciation, wound up his law practice and fled to Canada via the United States (U.S.). Claiming that only he had a valid entry visa into the U.S., he fled El Salvador leaving his wife and two daughters behind. In his absence, the applicant claims that the Maras monitored the home where his wife and children continue to live in El Salvador. The applicant made his claim for protection on March 31, 2009 which was denied on September 7, 2010.

[4] The determinative issue for the Board in the section 96 claim was lack of nexus to a Convention ground, and for the section 97 claim, lack of particularized risk. Additionally, as an

alternative finding, the Board found that adequate state protection exists in El Salvador to protect the applicant.

[5] The Board wrote:

[4] I find that the claimant is neither a Convention refugee nor a person in need of protection. I find that the claimant is not a Convention refugee because there is no nexus between the claimant's fear of persecution and any of the five enumerated Convention grounds under section 96 of IRPA. Moreover, I find that the claimant is not a person in need of protection because he faces a personal risk of harm that is faced generally by all people in El Salvador.

[5] In the alternative, if I have erred with respect to my analysis of generalized risk versus personalized risk, on a balance of probabilities, I find that the claimant does not face a risk to his life, or cruel and unusual treatment or punishment, or torture, at the hands of the MS-13 (Maras), if he were to return to El Salvador, because adequate state protection might reasonably be forthcoming to him.

[6] Counsel for the applicant argues the following issues before the Court:

- 1) Did the Board err in ignoring or failing to properly assess the documentary evidence related to El Salvador, in particular by assessing both generalized risk and state protection in light of outdated documentary evidence related to the situation in 2004 to 2006, and in ignoring or failing to consider more recent documentary evidence;
- 2) Did the Board err in its analysis of generalized risk and state protection in El Salvador; and
- 3) Did the Board err in its assessment of particular social group, and nexus to section 96.

Issue 1: Did the Board err in its assessment of particular social group, and nexus to section 96

[7] The Board wrote:

[6] The determinative issue in this section 96 analysis is whether there is a nexus between the claimant's fear of persecution at the

hands of the Maras gang in El Salvador and one of the Convention grounds under section 96 of the Act, namely, race, religion, nationality, political opinion, or membership in a particular social group. I find that there is no such nexus.

[...]

[8] The claimant was questioned about the detention orders that he made against Mara gang members who appeared before him on criminal charges while he was presiding as Deputy Justice of the Peace over the bail court. At first, the claimant said that he did not know if the problems he had with the MS-13 on March 2, 2009, were in any way related to his having made detention orders against members of the Mara gangs in 2008. When the claimant was being questioned by his counsel, he speculated that the events of March 2, 2009, when he received a threatening note from the MS-13, might be related to his having made detention orders against the Maras in 2008, because his having referred their cases to a higher court could have resulted in the gang members having been tried and convicted with respect to the criminal charges brought against them.

[9] I find, on a balance of probabilities, based on my review of all of the evidence, that the claimant was a victim of crime or a personal vendetta at the hands of the MS-13. There is no persuasive evidence before me to suggest that the actions of the MS-13, in leaving the threatening note at the claimant's law office on March 2, 2009, were motivated by any of the Convention grounds, namely race, religion, nationality, political opinion, or membership in a particular social group. I find that the threats directed at the claimant by the MS-13, by way of leaving a note at his law office, were solely carried out for criminal motives, namely, wanting to raise funds to finance their criminal, enterprise and organization, and for no other reason that might somehow be related to one of the Convention grounds.

[8] The conclusion that there is no nexus to the Convention ground is reasonable. It is supported by an ample evidentiary foundation. As counsel for the respondent notes, there was no evidence that the applicant was a lawyer whose practice was dedicated to opposing gangs, nor that he was an anti-gang activist in his personal life, and therefore more likely to be targeted by gangs as a result.

[9] The applicant's own Personal Information Form (PIF) indicates that he had a general, civil and criminal practice. The applicant also indicated that his civil practice involved conciliation of civil disputes. There was no indication that the applicant's civil practice involved opposing the activities of the Maras.

[10] The applicant has not indicated that in the ordinary course of his duties as a Justice of the Peace, he was active in opposing the activities of Salvadoran Maras. As a Justice of the Peace the applicant would hear preliminary aspects of criminal matters. He presided over bail hearings involving members of MS-13 on only two occasions.

[11] The threatening letter the applicant received was silent as to his position as a Justice of the Peace and did not take note of his profession. Nor is there any evidence that the threats the applicant received would necessarily have frustrated the continuation of his civil and criminal private practice. As the Federal Court of Appeal ruled in *Sanchez v Canada (Citizenship and Immigration)*, 2007 FCA 99, at para 20:

...persons claiming to be in need of protection solely because of the nature of the occupation or business in which they are engaged in their own country generally will not be found to be in need of protection unless they can establish that there is no alternative occupation or business reasonably open to them in their own country that would eliminate the risk of harm.

[12] In this case, there is no evidence that the applicant was threatened because of his involvement in either of his professional activities. In sum, the Board approached the issue of nexus from the correct legal perspective and its determination that the applicant had not established a nexus to a Convention social group was reasonable.

Issue 2: Did the Board err in its analysis of “generalized risk” and “state protection” in El Salvador

[13] The Board wrote:

[14] The claimant testified that other lawyers who were colleagues of his were also affected by the Maras gang. He said that he spoke to several of his professional colleagues about the problems they had experienced at the hands of the Maras. He said that some of his colleagues had to remove the signs above their offices in order to avoid attracting the Maras. The claimant said that by removing their signs it would give the Maras the impression that they had closed down their offices or had left. He said that some of his lawyer friends had decided to pay the Maras extortion money, and for that reason, no harm came to them. He said that one of his lawyer colleagues had been threatened by the Maras, and as a result, had to flee the country. The claimant testified that he could not avoid the Maras by relocating to another part of the country because they had a presence all over the country and had established a network through which they could communicate with each other. The claimant testified that his partner in his law practice was also affected by the Maras and had to move the practice to another part of the city of San Miguel.

[15] The claimant was questioned by his counsel and asked to explain what he meant in his PIF when he said that “there was an atmosphere of fear regarding the Maras in San Miguel”. The claimant explained that there were extortions, deaths for failure to comply with their extortion demands, which was the immediate consequence, and that the Maras were everywhere. He said that businesses, offices, transportation services, and all productive sectors of the economy were affected by the Maras gang. He said that because of the amount of money that the Maras extort, all people are assigned a certain amount that they must pay and if they fail to cooperate they end up dead and get coverage on the news. I find that the claimant, by his own admission, in essence, is saying that the problems associated with the Maras are not limited to one particular group or profile of persons in El Salvador society but rather that it affects everyone in all parts of El Salvador, including all productive sectors of the El Salvadorian economy. [Emphasis added]

[14] The Board found as a fact that there was no evidence that the applicant was targeted specifically because he was a lawyer or a Justice of the Peace. At best, the applicant's own evidence was that he might have been subject to extortion because of his referral of two cases involving members of the Maras gangs. As the Board noted, the connection is thin and speculative. The extortion note came a year after he dealt with these cases and made no reference or link to his position and no extrinsic evidence linking the extortion to the two cases. In the result, it would be speculative to make the connections urged, something the Board declined to do.

[15] To conclude, the question of personalized risk was assessed in the correct legal framework and the related factual determinations find support in the evidence and are reasonable.

Issue 3: Did the Board err in failing to properly assess the documentary evidence related to El Salvador, in particular by assessing state protection in light of outdated documentary evidence?

[16] The applicant challenges the Board's finding that adequate state protection exists in El Salvador. Although the Board performed a lengthy analysis of existing state protection the following sufficiently summarizes the findings:

[21] I find that there is adequate state protection in El Salvador, and that the claimant did not make diligent efforts nor did he take all reasonable steps in the circumstances of this case to pursue the different avenues of state protection that were available to him. Moreover, I find that the claimant failed to rebut the presumption of state protection with clear and convincing evidence.

[...]

[36] In this case, the claimant testified that after receiving a threatening note from the MS-13 gang at his law office on March 2, 2009, he sat down with the partner of his law firm and they both drafted a denunciation. The claimant said that he and his partner went to the Office of the Attorney General where they were able to file the denunciation. The claimant testified that when he approached

officials responsible for taking denunciations within the Office of the Attorney General he asked if the Attorney General's Office might be able to offer him protection from the Maras. The claimant said that he was told that the problem of the Maras was national in scope and that they could not offer him protection. The claimant said, however, that they did agree to investigate this matter. There is no persuasive evidence before me to suggest that the Attorney General's Office did not take any steps to investigate the extortion demands and death threats made against the claimant by members of the MS-13. On the contrary, the evidence in this case would seem to suggest that the authorities did follow up with the claimant's complaint and started to investigate the matter. The claimant testified that after he filed his denunciation with the Attorney General's Office he spoke with his partner who told him that the Attorney General's Office had sent a notice to the claimant indicating that they required the claimant to bring the person, who witnessed the threatening note left at the law office, before the Attorney General's Office to give testimony concerning the note that the claimant had received at his office. There is no persuasive evidence the claimant ever complied with this request for a material witness to the note. Furthermore, there is no persuasive evidence to indicate that the claimant ever returned to the Attorney General's Office to follow up with his complaint to see if there had been any new developments with respect to the denunciation that he had filed in regards to the threats from the MS-13 gang. Rather than following up with his complaint or complying with the request of the Attorney General's office for a material witness, the claimant instead wound up his law practice, transferred all of his files to his law partner at the firm, and immediately began making arrangements to leave El Salvador. I find that the claimant not only failed to act diligently by following up with his denunciation and complying with the requirements of the Attorney General's Office, but also failed to give the Attorney General's Office sufficient time in which to properly investigate his complaint against the MS-13 gang. The claimant received the threatening note on March 2, 2009. The claimant's PIF indicates that he returned to his law office to wind down his practice on March 9, 10, and 14, 2009. The PIF also indicates that the claimant obtained his airline ticket on March 10, 2009 and that he left El Salvador on March 16, 2009, only around 2 weeks after having received the threatening note from the MS-13. I find that it would be unreasonable to expect in any society that all threats reported the authorities would result in immediate prosecutions or convictions. [Emphasis added]

[17] There is undoubtedly a real live issue as to the viability of state protection in El Salvador. In support of its finding that the presumption of state protection existed, the Board relied on evidence from 2004-2006. There was however, in the record, evidence from 2009-2010, which would support an alternative conclusion as to the ability of El Salvador to provide adequate state protection.

[18] The jurisprudence is clear that while the Board need not refer to all of the evidence before it, it does have an obligation to refer to relevant, material evidence which supports an alternative conclusion: *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC).

[19] The applicant, however, faces a further hurdle in that the Board found that he did not take steps to seek state protection. The Board notes that his decision to flee was precipitous; he left El Salvador only 14 days after receipt of the single threatening note. While a claimant is not required to risk their life seeking state protection that would not be forthcoming: *Canada (Attorney General) v Ward* [1993] 2 SCR 689, para 48, there was nothing on the record to support the conclusion that to seek state protection was either futile or would put him at further risk. While he filed a denunciation with the Attorney General's office he did not follow-up with the request of that office to have the individual who received the note to attend to make a statement. A claimant's decision to flee before the authorities have had an opportunity to respond cannot circumvent the presumption of state protection.

[20] In sum, the finding of the Board is, in respect of state protection, a question of mixed fact and law, to be assessed on a standard of reasonableness. The more recent evidence, while painting a somewhat bleaker picture of the capacity of the El Salvadorian government to provide state protection, did not negate or otherwise render the conclusion unreasonable. In my view, the decision falls within the range of acceptable outcomes having regard to the entire record before the Board.

[21] The application for judicial review is dismissed.

[22] No question for certification has been proposed and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. No question for certification has been proposed and none arises.

"Donald J. Rennie"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5584-10

STYLE OF CAUSE: JAIME ANTONIO CHICAS SANCHEZ v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

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**REASONS FOR JUDGMENT
AND JUDGMENT:** RENNIE J.

DATED: July 7, 2011

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