Federal Court  Cour fédérale

Date: 20110603

Docket: IMM-6210-10

Citation: 2011 FC 644

Ottawa, Ontario, June 3, 2011

PRESENT: The Honourable Madam Justice Tremblay-Lamer

BETWEEN:

BLANCA MIRIAN HERCULES SANTOS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Defendant

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of a decision of the Immigration and Refugee Board of Canada – Refugee Protection Division (the Board), dated September 23, 2010, whereby the Board determined that the applicant was neither a convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *IRPA*.

I. Background

[2] The applicant, born March 4, 1982, is a citizen of El Salvador. She came to Canada on June 25, 2008 and claimed refugee protection upon arrival. In her Personal Information Form (PIF), the applicant alleged the following as the basis of her claim:

> I fear persecution based on my membership in a particular social group, that is my family. I believe I am at a particular risk of harm and/or death if forced to return to El Salvador.

[3] In total, fourteen members of the applicant's extended family have been accepted as refugees in Canada.

[4] Four were accepted in the 1990s. The first claim was in 1991, when one of the applicant's family members alleged that the Salvadoran government suspected him of being an anti-government sympathizer. He said that the military had been searching for him and had already killed his father. The Board, which rendered its decision in 1992 subsequent to the end of the Salvadoran civil war, found that since the war had ended, the claimant was no longer at risk. Nonetheless, refugee protection was granted based on a "compelling reasons" analysis. The other three family members, whose claims came later in the 1990s, alleged that during the Salvadoran civil war members of their family had been targeted and executed by government "death squads" on suspicion of involvement with anti-government guerrillas. Their PIFs contained first-hand accounts of encounters with "death squads" during the post civil war period: in 1994 and again in 1998. In each incident, a member of the family had allegedly been executed. Although refugee protection was granted in these cases, the Board did not provide reasons.

[5] Another eight members of the applicant's extended family, including the applicant's brother and uncle, were granted refugee protection in 2005. They also alleged that they had been targeted by government affiliated "death squads". The Board adopted an analysis similar to the one it had employed in 1992 and found that since the Salvadoran civil war had ended, there was no longer any continuing threat to the family. Nonetheless, the group's claim was granted on the basis of a "compelling reasons" analysis under subsection 108(4) of the *IRPA*.

[6] A further two family members were granted refugee protection in August of 2009. Although the Board did not provide reasons in their case, it is worth noting that both of these family members, like the previous groups, had alleged being targeted by government affiliated "death squads" as a result of their family background and imputed political opinion.

[7] The applicant alleged the following facts in support of her claim.

[8] On October 30, 2001, the applicant was with her family at her grandmother's house in Santo Tomas, El Salvador, when four heavily armed men dressed in military clothing and wearing army boots and black hoods entered the home. They hit the applicant, forced her onto the floor, tied her hands and covered her mouth with tape. They then proceeded to rape her aunt and viciously beat her brother, Jaime Hercules Santos (Jaime), and her uncle, Dimas Santos Ayala (Dimas). They repeatedly inquired as to the whereabouts of the applicant's cousin, Nely Esmeralda Ayala Morales (Nely). Jaime and Dimas left El Salvador the following morning. They were granted refugee protection in Canada along with Nely who had fled separately to Canada, as part of the group of eight family members whose applications were decided collectively in 2005.

[9] It should be noted that Nely had indicated in her PIF that a group of militants was looking for her in connection with her attendance at a pair of anti-government protest meetings. They had been to her house. Two of her university classmates who had attended the meetings with her had already been killed.

[10] In May of 2006, the applicant and her husband were working with her uncle, Emilo Santos, at his hardware store. Shortly before closing, three men dressed in civilian clothes entered the store and pulled out guns. They ordered the applicant and her family to tell them the whereabouts of Jaime, Dimas and Nely. One of the men asked the applicant and her family if they remembered the incident in 2001 when they previously came looking for Nely. The men beat the applicant's uncle, hit the applicant in the face and pointed a gun at the applicant's husband. Upon leaving, the men indicated that they would be back and that the applicant and her family would have to either disclose the location of Jaime, Dimas and Nely or be killed.

[11] The applicant believes, based on what was said, that at least one of the men involved in the 2006 incident was present during the 2001 incident.

[12] After the 2006 incident, the applicant and her husband fled El Salvador for Mexico. They left the applicant's son in El Salvador in the care of his great aunt, Elena Sanchez. In January of 2007, the applicant and her husband left Mexico for the United States (the US). The applicant arrived in Canada on June 25, 2008 without her husband, who chose to stay in the US.

[13] Recently, the Mara Salvatrucha gang has been demanding that Elena Sanchez pay a $200 monthly bribe in order to ensure the safety of the applicant's son in El Salvador. They told Ms. Sanchez that they knew the applicant was in Canada and, thus, would be able to afford the bribe.

II. The decision under review

[14] The Board began its analysis by considering whether or not the applicant had established a nexus between her fear and one of the five Convention grounds listed in section 96 of the *IRPA*. It determined that she could not rely on membership in a particular social group, her family, because the 2005 decision regarding eight of her family members (including her brother Jaime, her uncle Dimas and cousin Nely) had found that the family was not, in fact, at any future risk since a peace accord had been signed in 1992. The Board further determined that there was no persuasive evidence suggesting that the applicant had been targeted on the basis of any imputed political opinion. The Board suggested that the motive behind the 2006 incident may simply have been robbery. Finally, the Board found that the recent demands from the Mara Salvatrucha gang amounted to criminal activity and, thus, provided no nexus to a Convention ground.

[15] The Board found that there was no persuasive evidence linking the 2001 and 2006 events with any government organization. Ultimately, it concluded that the applicant had merely been the target of crime or of a vendetta, neither of which provided a link to a Convention ground for the purposes of section 96 of the *IRPA*.

[16] The Board went on to consider the question of state protection. In terms of country conditions, the Board found that El Salvador was a democracy in effective control of its territory. Although it acknowledged that El Salvador suffered from a very high rate of crime, murder and gang activity, it pointed to evidence showing that the government was making serious and genuine efforts to address these problems. The government of El Salvador did not have a practice of refusing assistance to victims of crime and measures were being taken to deal with corruption in the police force.

[17] The Board noted that the applicant had not reported the 2001 and 2006 incidents to Salvadoran authorities. Since there was no persuasive evidence to support the applicant's belief that the government had been involved with the incidents, the Board concluded that El Salvador was both willing and able to provide protection. It concluded that the applicant had failed to rebut the presumption of state protection with clear and convincing evidence.

[18] Finally, the Board considered the question of "compelling reasons". It indicated that in order for a subsection 108(4) analysis to be warranted, two aspects must first be demonstrated: a) that the applicant was subject to persecution in El Salvador, and b) that she no longer faced a risk of persecution due to changed country conditions. The Board found that neither aspect had been established: there was no persecution and conditions had not changed since the applicant left El Salvador in 2006. Thus, despite evidence of emotional difficulties faced by the applicant, the Board concluded that it could not conduct a compelling reasons analysis under subsection 108(4) of the *IRPA*.

[19] Ultimately, the Board rejected the applicant's claim on the basis that she was neither a Convention refugee nor a person in need of protection.

III. Issues

a) Did the Board err in its nexus analysis under section 96 of the *IRPA*?

b) Did the Board err in its state protection analysis?

c) Did the Board err by failing to conduct a separate analysis pursuant to section 97 of the *IRPA*?

d) Did the Board err in its analysis of compelling reasons under subsection 108(4) of the *IRPA*?

IV. Standard of review

[20] The majority of the issues raised on this application are questions of mixed fact and law and, as such, will be reviewed against the reasonableness standard. The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 at para 47, described the reasonableness standard as being "concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as also being, "concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".

[21] Whether or not the Board failed to conduct a section 97 analysis, on the other hand, is a question of law and will attract the correctness standard of review (*Ferencova v Canada (Minister of Citizenship and Immigration)*, 2011 FC 443, [2011] FCJ No 553 at para 8).

V. Analysis

a) Did the Board err in its nexus analysis under section 96 of the *IRPA*?

[22] In order for a person to be considered a Convention refugee pursuant to section 96 of the *IRPA*, they must establish a nexus between themselves and the alleged persecution based on one of the Convention grounds – race, religion, nationality, membership in a particular social group or political opinion.

[23] The primary Convention ground advanced by the applicant in her PIF and before the Board was her "membership in a particular social group", namely her extended family. The jurisprudence of this Court establishes that membership in a family can constitute membership in a social group for the purposes of refugee protection (*Ndegwa v Canada (Minister of Citizenship and Immigration)*, 2006 FC 847, [2006] FCJ No 1071 at para 9; *Al-Busaidy v Canada (Minister of Employment and Immigration)*, 139 NR 208, [1992] FCJ No 26).

[24] The applicant submitted that her family was being persecuted because it was believed that certain members held, or had held, anti-government political opinions. The Board relied on its decision in 2005 to dismiss this potential nexus. It reasoned that since the Board had found, in 2005,

that eight of the applicant's family members were not at future risk of persecution in El Salvador, then the applicant could not now claim that she was at risk of persecution based on her membership in the family.

[25] The applicant argues, however, that in coming to this conclusion the Board failed to adequately consider the totality of the evidence before it. Not only had the applicant provided evidence as to her own experiences, she had also provided evidence of persecution faced by fourteen relatives. The applicant contends that it was wrong for the Board to rely solely on the 2005 decision and that it should have undertaken its own analysis. I agree.

[26] The PIF filed by the applicant's cousin, Nely, in relation to her claim for refugee protection in 2001 was before the Board. In it, Nely indicated that in September of 2001 a group of men had been to her house in El Salvador while she was at work. They had interrogated her maid as to her whereabouts. They told the maid that they intended to kill Nely because of her involvement with an anti-government group at the university. Nely indicated in her PIF that she had, indeed, attended two anti-government protest meetings held on campus and that two of her friends who had attended with her had already been killed. The Board, in 2005, found that this evidence was, "credible and entirely consistent with well-established historical fact".

[27] Also in evidence before the Board was the applicant's uncontradicted testimony that two months later - on October 30, 2001, a group of men broke into her grandmother's house and interrogated and tortured her family in an attempt to elicit information as to Nely's whereabouts.

[28] The PIF filed by Dimas (the applicant's uncle) in support of his 2002 claim for refugee protection was also in evidence before the Board. It corroborates the applicant's account of the October 30, 2001 attack. The PIF filed by Jaime (the applicant's brother) in 2002 adopted Dimas' account as true. Again, the Board in 2005 found that these allegations were credible.

[29] The Board also had before it the applicant's evidence regarding the 2006 attack at the hardware store. The assailants involved in that incident allegedly made reference to the 2001 incident and questioned the applicant and her family not only as to Nely's whereabouts, but also as to the whereabouts of Dimas and Jaime. The assailants then indicated that they would return and kill the applicant, as well as her husband and uncle, if they did not reveal the location of their family members.

[30] This uncontested evidence, considered as a whole, reveals a chain of events whereby one of the applicant's family members was initially targeted because of a political opinion (or because of an imputed political opinion), and a subsequent group of family members, including the applicant, was targeted on the basis of their relation to that initial family member. Given the principle set out by Justice John Evans in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, 83 ACWS (3d) 264 (TD) [*Cepeda-Gutierrez*] – that a decision-maker's obligation to mention, analyze and consider evidence increases with the relevance of the evidence in question to the disputed facts – I find that it was incumbent on the Board to engage with this evidence as a whole and explain why a sufficient nexus had not been established despite it.

[31] Simple reliance on the 2005 decision was not sufficient in the circumstances. While it is true that the Board in 2005 decided that the applicant's eight family members - including Nely, Dimas and Jaime - were not at future risk in El Salvador, it did so based entirely on the fact that the situation in El Salvador had improved as a result of the signing of a "durable and sustainable" peace accord. However, I note that peace accord was signed in January of 1992 and the evidence before the Board at the time was that the applicant's eight family members - including Nely, Dimas, and Jaime – had fled El Salvador as a result of events which had taken place between 1998 and 2001; i.e. up to a decade after the peace accord.

[32] In any event, when considering the applicant's claim in 2010, the Board had access to evidence that was not before the Board in 2005 – chiefly, the applicant's testimony regarding the 2006 incident. That new evidence suggested that, despite the Board's conclusion as to risk in 2005, Nely, Dimas and Jaime were in fact at continued risk in El Salvador based on imputed political opinion and family membership. Although the Board did review this evidence, it appeared to reject it as unrelated to the 2001 incident. It indicated that, "The motive may have been robbery". However, the applicant had testified at the hearing, and had stated in her PIF, that the individuals involved in the 2006 incident were focused solely on determining the whereabouts of Nely, Dimas and Jaime. More than that, one of the men made a direct reference to the 2001 incident. Given this evidence, and given that the Board did not question its reliability or credibility, it was unreasonable for the Board to disregard this incident as being potentially unrelated without providing further explanation.

[33] Ultimately, in failing to consider the totality of the evidence before it, the Board committed a reviewable error. Its conclusion that the applicant had not demonstrated a sufficient nexus based on membership in a particular social group was unreasonable.

b) Did the Board err in its state protection analysis?

[34] The applicant submits that the Board's state protection analysis was also flawed. She first argues that the Board erred by failing to sufficiently analyze her individual circumstances and the nature of her alleged fear as part of its analysis of state protection. The applicant points to the decisions of this Court in *Flores v Canada (Minister of Citizenship and Immigration),* 2010 FC 503, [2010] FCJ No 607 at paras 4, 33, [*Flores*] and *Torres v Canada (Minister of Citizenship and Immigration),* 2010 FC 234, [2010] FCJ No 264 at paras 37-43, [*Torres*] for the proposition that state protection cannot be determined in a factual vacuum.

[35] However this case is not similar to *Flores*, above, where the Board conducted its state protection analysis entirely in the abstract. In the current case, the Board did consider the applicant's alleged fear – that she would be targeted by government affiliated death squads if she returned to El Salvador. The Board rejected this as a justification for not approaching the state for protection after finding that there was "no persuasive evidence" to suggest that the Salvadoran government was somehow involved in the 2001 and 2006 incidents.

[36] Although the Board did not ignore the applicant's alleged subjective fear, I nonetheless find that its treatment of the evidence was inadequate in this regard.

[37] The Supreme Court of Canada in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at para 49, 103 DLR (4th) 1 indicated that "only in situations in which state protection 'might reasonably have been forthcoming', will the claimant's failure to approach the state for protection defeat his claim". Relevant to the question of whether or not state protection "might reasonably have been forthcoming" is the question of whether or not the state, itself, is the applicant's persecutor. The Board's central determination in this regard was that there was a lack of persuasive evidence suggesting government involvement. This determination, however, was arrived at without addressing important evidence to the contrary.

[38] As previously discussed, Nely was clear in her PIF that she was targeted as a result of a perception that she was involved with an anti-government movement at her university. The applicant's evidence, combined with the evidence contained in Dimas' and Jaime's PIFs, links Nely's pro-government persecutors to the October 30, 2001 incident. The Board did not address any of this evidence, despite the fact that much of it had been found to be reliable. Moreover, as stated above, the Board unreasonably dismissed the 2006 incident as being potentially motivated by robbery, without explaining why it was discounting the applicant's testimony that the individuals involved were focused on extracting information as to the whereabouts of her family.

[39] There was reliable evidence linking the government, or at least a pro-government group, to both the 2001 and 2006 incidents. The Board did not address it. I find that its treatment of this critical evidence undermines its conclusion as to lack of government involvement which, in turn, undermines its entire state protection analysis.

[40] The applicant also argues that the Board failed to adequately consider the documentary evidence regarding country conditions in El Salvador. The applicant points to a number of articles which indicate that state protection in El Salvador is inadequate and that “death squads” continue to operate there. Given that this evidence was relevant and reliable, the applicant argues that the Board had an obligation to specifically consider it.

[41] The Respondent points out that the Board did, in fact, acknowledge El Salvador’s high crime rates and high levels of gang activity. The respondent submits that, despite this acknowledgement, it was open to the Board to consider and appreciate state efforts to address criminality and corruption.

[42] I find that the Board’s treatment of the documentary evidence in this case was not sufficiently particularized to the fear alleged by the applicant. The Board referred to a document from its National Documentation Package for El Salvador (March 17, 2010) entitled “Issue Paper: Youth Gang Organizations in El Salvador” in support of the proposition that serious efforts were being made by the Salvadoran government to address the country’s gang violence problem. However, it was not the general risk of gangs or criminal activity that the applicant feared. Instead, the evidence before the Board was that the applicant and her family feared being attacked or murdered by government affiliated “death squads”. The Board’s National Documentation Package contained documentation which addressed that specific issue, but it was not considered by the Board in its reasons.

[43] Included in the National Documentation Package was a report dated August 2008 and commissioned by the United Nations High Commissioner for Refugees entitled, “Central America (Guatemala, El Salvador, Honduras, Nicaragua): Patterns of Human Rights Violations”. That document specifically addressed the question of “death squads” and their continued existence in El Salvador. The report indicated that there had been an alleged, “resurgence of police attacks on activists and other dissidents and of murders by illegal death squads” (page 17). It cited the research of one human rights organization for the proposition that, as of 2006, extrajudicial executions continued to occur in large numbers:

> …Tutela Legal del Arzobispado (Tutela Legal) is a human rights organization under the Archbishop of San Salvador that has monitored the sources of violence in the country for the past 25 years. It investigated 233 of the homicides committed in 2006, selecting those murders that suggested an extrajudicial execution had occurred. And, of the 233 cases, Tutela Legal found a majority (139 cases, 59.66 per cent) had the characteristics of extrajudicial executions.

The report further indicated that death squads continued to be linked to the police and other politically associated forces and institutions (page 22):

> The death squads in El Salvador have been connected both to the [national police] and to other politically associated forces and institutions. Some of the death squads focus on "social cleansing" and target gangs and other criminal elements in the community. Other death squads focus on human rights activists working on policies and programmes which threaten the agendas of the conservative political forces within the country...

[44] Also before the Board was an article dated September 4, 2007, by the Inter Press Service news agency indicating:

> For years, human rights organizations and experts have said the death squads that operated during the counterinsurgency war in the 1980s never disappeared, but merely became groups of paid killers that still

> operate with impunity, and are hired to "settle scores, carry out vengeance killings, eliminate a businessman's competitor, carry out 'social cleansing' or work for organised crime".

[45] While the Board was not required to accept this evidence of continued "death squad" activity in El Salvador, given that it was directly related to the applicant's alleged fear and is relevant to the question of whether or not the applicant was required to approach the state for protection, it was incumbent on the Board to engage with it. I find that the Board's failure to do so further undermines its decision as to state protection.

[46] On the whole, I find that the Board's determination as to state protection lacks the justification, transparency and intelligibility required and, thus, is unreasonable.

[47] Since I have determined that the Board's nexus analysis and state protection analysis render its ultimate determination as to the applicant's claim for refugee protection unreasonable, there is no need to discuss the remaining two issues raised by the applicant regarding section 97 and subsection 108(4) of the *IRPA***.**

[48] For these reasons, the application for judicial review is allowed and the matter is remitted to a differently constituted Board for reconsideration.

JUDGMENT

THIS COURT ADJUDGES that the application for judicial review is allowed and the matter is remitted to a differently constituted Board for reconsideration.

"Danièle Tremblay-Lamer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Timothy Wichert	FOR THE APPLICANT
Leena Jaakkimainen	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Jackman & Associates Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT