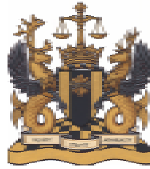
Federal Court  Cour fédérale

Date: 20110728

Docket: IMM-148-11

Citation: 2011 FC 949

Ottawa, Ontario, July 28, 2011

PRESENT: The Honourable Madam Justice Snider

BETWEEN:

SANTOS MANCIA, VERONICA MARGARITA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Background

[1] The Applicant is a citizen of El Salvador who claims protection in Canada. She alleges that she was attacked and raped by members of a violent gang (known as Mara 18 or MS-18) in El Salvador. In a decision dated December 16, 2010, a panel of the Immigration and Refugee Board, Refugee Protection Division (the Board) found that the Applicant was neither a

Convention refugee pursuant to s. 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) nor a person in need of protection pursuant to s. 97(1) of the Act.

[2] The Applicant seeks to overturn the decision.

II. Issues and Standard of Review

[3] This application raises the following issues:

1. In its s. 96 analysis, did the Board err

    a. by failing to recognize the nexus between the gender-related crime of rape and a Convention ground; or

    b. by failing to recognize the nexus between the applicant and membership in a particular social group (her family); or

    c. by importing the notion of "generalized risk" from s. 97 into its s. 96 analysis?

2. In its s. 97 analysis, did the Board err in its conclusion that the risk faced by the Applicant was a generalized risk?

[4] Issues 1(a), 1(b) and 2 are reviewable on a standard of reasonableness. As taught by the Supreme Court of Canada, on a standard of reasonableness, the Court should not intervene where the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

[5] Issue 1(c) is a question for which the standard of review is correctness.

III. Issue #1: Section 96 nexus

[6] With respect to the Applicant's claim for protection as a refugee under s. 96 of the Act, the Board found that

> The claimant has been a victim at the hands of the MS-18 gang, whose members act in a criminal manner. Her victimization is as a consequence of the MS-18, having pursued her brother because of his perceived wealth. She is, therefore, a victim of crime, which does not provide her with a nexus to one of the Convention refugee grounds.

[7] The first submission of the Applicant is that the Board failed to understand that her claim was gender-based. There is no doubt that the Applicant bears the burden in establishing that she requires the protection offered by the Convention and the Act. In general terms, a claimant's burden is to satisfy the Board that she was targeted as a woman. Stated differently, a claimant needs to demonstrate that she would not have been attacked but for the fact that she was a woman. For example, if a claimant's attackers robbed and attacked her, she would have to satisfy the Board that the robbery was not the motive. Otherwise, a man in her situation (even if he, too, had been raped) would not receive protection but would face the same risk of attack.

[8] The Applicant is challenging the Board's finding of fact that this was something other than a gender-related claim. The Board's finding was based on a review of all the evidence before the Board, and is not, in my view, unreasonable. While there may have been aspects of her allegations that relate to Convention grounds – such as her gender or family history – that does not automatically mean that there is a nexus to a Convention ground. There was no evidence that MS-18 systematically targets women.

[9] I agree that the Board has an obligation to consider all possible grounds for a claim that are raised by the evidence (see *Canada (Attorney General) v Ward*, [1993] 2 SCR 689; *Plaisimond v Canada (Citizenship and Immigration)*, 2010 FC 998 at para 42). However, the Board is not required to go beyond the evidence to find possible grounds for a claim. In this case, the Applicant's evidence and oral testimony strongly indicated that she claimed to be targeted because of her relationship to her brother.

[10] In addition to submitting that the Board failed to understand or assess her claim as gender-related, the Applicant also argues that the Board failed to appreciate that the claim also was made on the basis of her membership in a particular social group – namely, her family. The Applicant points to the transcript of the hearing where counsel for the Applicant suggests that the nexus between the Applicant's claim and a Convention ground was "As a family member of the one who has been targeted by the Maras". The transcript also demonstrates that the Applicant repeatedly testified that she feared attacks from the gangs because of her relationship to her brother.

[11] Merely being a family member of someone who has been the victim of crime does not mean that there is a nexus to a Convention ground. As explained in *Rivaldo Escorcia v Canada (Citizenship and Immigration)*, 2007 FC 644, at paragraph 39,

> Saying, however, that a claim is not extinguished does not relieve non-excluded family members from putting forward evidence that supports their claim. The jurisprudence of this Court has found that persecution against one family member does not automatically entitle all other family members to be considered refugees (see *Pour-Shariati v. Canada (The Minister of Employment and Immigration)* (1997), 215 N.R. 174 (F.C.A.), 39 Imm. L.R. (2d) 103;*Marinova v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.T. 178, 103 A.C.W.S. (3d) 1198). In *Granada v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1766, 136 A.C.W.S. (3d) 123, [2004] F.C.J. No. 2164 (F.C.) (QL), a similar case of a family claiming their refugee status dependent upon a family member's fear of persecution against the FARC, the Court stated at para. 16:
>
>> The family can only be considered to be a social group in cases where there is evidence that the persecution is taking place against the family members as a social group: Al-Busaidy v. Canada (Minister of Employment and Immigration) (1992), 139 N.R. 208 (F.C.A.); Casetellanos v. Canada (Solicitor General), [1995] 2 F.C. 190 (F.C.T.D.); Addullahi v. Canada (Minister of Citizenship and Immigration) (1996), 122 F.T.R. 150; Lakatos v. Canada (Minister of Citizenship and Immigration), 2001 FCT 408, [2001] F.C.J. No. 657 (F.C.T.D.) (QL). However, membership in the social group formed by the family is not without limits, it requires some proof that the family in question is itself, as a group, the subject of reprisals and vengeance or, in other words, that the applicants are targeted and marked simply because they are members of the family even though they themselves have never been involved in politics and never will be so involved. (Canada (Minister of Citizenship and Immigration) v. Bakhshi, [1994] F.C.J. No. 977 (FCA) (QL)).
>>
>> [Emphasis in original]

[12] The Board considered whether the Applicant's status as a family member of her brother constituted membership in a social group. The Board rejected this submission for the reason that membership in a particular job or profession does not, in general, constitute membership in a social group for the purposes of the Convention. In this case, there was no evidence that the Applicant's brother was targeted for any other reason than his perceived wealth. Because the Board found that the Applicant's brother was targeted on the basis of his employment and wealth, the Applicant could not claim to be a family member of someone targeted on a Convention ground. This is not an unreasonable finding.

[13] On this record, I do not conclude that the Board committed any error in either its understanding of s. 96 or in its application of the evidence to the determination of nexus to a Convention ground. Contrary to the Applicant's submissions, the Board's discussion of nexus demonstrates that the Board did consider "whether there is a link to one of the five Convention refugee grounds…." The Board's discussion of the risk of criminality faced by the Applicant is centred upon its finding that criminality does not generally establish a link to a Convention ground and that victims of crime are not members of a social group for the purposes of the Convention. The Board's comments in paragraph 15 of its reasons were not meant to suggest that the Board was applying s. 97 considerations of generalized risk to its s. 96 analysis. Thus, with respect to Issue 1(c), I find that the Board did not incorrectly incorporate a s. 97 analysis into its s. 96 analysis.

IV. Issue #2: Generalized risk

[14] The Board also considered whether the risk faced by the Applicant fell within s. 97(1) of the Act. The question before the Board was whether the risk faced by the Applicant would subject her personally to a risk of cruel and unusual treatment or punishment and whether that risk was one that is “not faced generally by other individuals in or from that country” (s. 97(1)(b)(ii)). While the Board accepted that the Applicant would be exposed to a risk from the MS-18, the Board was not satisfied that her risk was not one faced generally in El Salvador. The key findings of the Board on this point are as follows:

> In this case, it is accepted that the claimant was subjected personally to a risk to her life. She was threatened, assaulted and raped as a consequence of pursuit of her brother, who had not acceded to their extortion demands. Gang members, according to the claimant, were aware that her brother was working as a marine and would return on vacation, with what they perceived to be a lot of money.
>
> However, in accordance with the documentary evidence, the risk faced by a claimant is a risk faced generally by all individuals in El Salvador in terms of extortion against individuals who are perceived to have money and these risks are faced in every part of the country.
>
> Extortion is a part of the Maras modus operandi and constitutes a widespread risk for all citizens of El Salvador.

[15] The Applicant submits that the Board erred in this conclusion. In effect, the Applicant argues that the Board misapprehended her claim. Rather than being a victim of extortion, the Applicant asserts that she was targeted and raped because she was the sister of someone who was the subject of extortion. This, she argues, places her clearly outside a generalized risk and into a personalized risk which should have been assessed by the Board, much as was the situation in

such cases as *Surajnarain v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1165; *Pineda v Canada (Minister of Citizenship and Immigration)*, 2007 FC 365; *Diaz v Canada (Minister of Citizenship and Immigration)*, 2011 FC 705.

[16] In my view, the Board correctly applied the jurisprudence to the question of generalized versus personalized risk. The point to be drawn from the jurisprudence, including the cases cited by the Applicant, is that each case turns on its facts.

[17] One of the key elements of a s. 97(1) analysis is the characterization of the risk faced by a claimant. If the risk can be associated to a Convention ground, it should be considered under s. 96. Where, as in this case, the Board concludes that there is no nexus between the risk and a Convention ground, the Board must consider whether the risk falls within s. 97(1) of the Act. For s. 97(1) purposes, the Board must first evaluate the risk to determine whether it is the type of risk that is generally faced by citizens in the country (*Diaz v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 797 at para 40). It is at this first step that the Applicant failed to make her case to the Board.

[18] Someone who is attacked and fears that attacks may occur in the future will no doubt see the attack as personalized. However, if that initial attack was based on a generalized risk, it would likely not be unreasonable for the Board to find that any future risk of an attack was a risk faced generally by the population. That was the situation considered by the Court in *Prophète v Canada (Citizenship and Immigration)*, 2008 FC 331 (aff'd 2009 FCA 31). If however, the first

attack took place for a unique or individualized reason, it may be that the risk is not generalized (see, for example, *Pineda*, above).

[19] On the particular facts of this case, the Board's conclusion was reasonably open to it. First, the Board reasonably characterized the risk faced by the Applicant as one of extortion. The Applicant's attempt to characterize it otherwise to my mind is not persuasive because, whether the ultimate money will come from the Applicant or her brother, the fact is that she is being targeted for the purpose of extorting money. Second, the Board reasonably found that a risk of extortion by criminal gangs is one faced generally by individuals in El Salvador who are perceived to be wealthy. Finally, the Board correctly applied the jurisprudence, including *Prophète*, that states that even if wealthy people face an elevated risk, that does not constitute a personalized risk under s. 97.

[20] In sum, the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

V. <u>Conclusion</u>

[21] I appreciate that counsel for the Applicant (who did not represent the Applicant before the Board) views the crimes against the Applicant as gender-related and specific. The Board – reasonably, in my view – did not see the evidence in the same way. While I might have seen the

evidence differently and reached a different result, this does not constitute sufficient grounds to overturn the decision. As taught by the Supreme Court (*Dunsmuir*, above, at para 47):

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions.

[22] In this case, the Board's decision is within the range of acceptable and rational solutions. The application for judicial review will be dismissed.

[23] The Applicant proposes the following certified questions:

> Where the Refugee Protection Division accepts that a woman claimant has been personally subjected to a risk to her life and that she has been raped, and the evidence shows that, in her country, rape is widespread and the laws against rape are not effectively enforced,
>
> a) Is it an error of law for the Refugee Protection Division not to consider the claim as a gender-based claim under IRPA s. 96, women comprising a "particular social group"?; and
>
> b) Is it an error to find that her risk is one faced generally by the population and therefore that she is not entitled to Canada's protection under IRPA s. 97?

[24] In my view, the proposed questions do not meet the test for certification as set down in the jurisprudence (see, for example, *Zazai v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, 318 NR 365 at paras 11-12; *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145 at paras 22-29). The key problem with the proposed questions is that the Applicant did not present her claim to the Board as gender-related; rather she stated that

her fear came from her association with her brother. Further, the facts, as presented to the Board, did not, even indirectly, suggest that this particular Applicant was at risk due to her gender.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. the application for judicial review is dismissed; and

2. no question of general importance is certified.

"Judith A. Snider"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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