Federal Court Cour fédérale

Date: 20110819

Docket: IMM-223-11

Citation: 2011 FC 1012

Ottawa, Ontario, August 19, 2011

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

ADRIAN MONTOYA CASTENEDA
MARIA CRISTINA OSEGUERA PUERTO
JOWAR UNICE MONTOYA OSEGUERA
JUAN CARLOS MONTOYA OSEGUERA
ALEX ADRIAN MONTOYA OSEGUERA
KAREN PATRICIA MONTOYA OSEGUERA

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants are citizens of Honduras. Adrian Montoya Casteneda (Adrian) and Maria Cristina Oseguera Puerto (Maria) are the parents of the other Applicants. They fear that if they return to Honduras, they will be threatened with violence at the hands of the Mara Salvatrucha (Maras) street gangs.

[2] In December 2010, the Refugee Protection Division of the Immigration and Refugee Board rejected their claims for refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[3] The two issues in this case are whether the Board erred by: (i) finding that the Applicants fear criminal activities of the Maras, rather than persecution linked to one of the five grounds identified in section 96 of the IRPA; or (ii) finding that the risk faced by the Applicants is a risk that is faced by all Hondurans, namely that of being victims of violence and crime at the hands of the Maras.

[4] For the reasons that follow, I have concluded that the Board did not err in making either of these two findings. Accordingly, this application will be dismissed.

I. **Background**

[5] Prior to fleeing Honduras, Adrian operated a grocery store which was attached to the family home, as well as a bicycle repair shop, in Choloma, Honduras. Both of those businesses were located in areas of Choloma which are permeated by the Maras street gangs.

[6] The Maras threatened the family by frequently demanding money ("renta"), by damaging their property and by demanding that the male children in the family become members of their gang. The Maras also stole new bicycles as well as bicycle parts from Adrian's repair shop.

[7] Adrian was able to keep his business open and operating because he regularly paid renta, ranging from 100 to 1,000 Pesos, to the Maras.

[8] On December 31, 1999, the Maras threw a homemade bomb at the Applicants' house, causing extensive damage to the roof of the house and to neighbouring properties. This act was allegedly made in retaliation for Adrian's refusal or failure to promptly pay renta that had been demanded by the gang's members.

[9] Approximately one year later, on December 16, 2000, Adrian, Maria and two of their children (Juan Carlos and Karen) left Honduras for the United States. Because of financial constraints, their two other sons, Jowar and Alex remained in Honduras with their grandparents, approximately 250 kilometers away from the family home, until they departed Honduras to join the other members of the family in 2003.

[10] All of the Applicants traveled to Canada on June 23, 2008 and made claims for refugee protection.

II. <u>The Decision under Review</u>

[11] With respect to the Applicants' claims under section 96 of the IRPA, the Board relied on Adrian's testimony and documentary evidence to conclude that what they feared was criminal conduct of the Maras, rather than persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion. Accordingly, the Board rejected those claims.

[12] With respect to the Applicants' claims under section 97, the Board concluded that the risk of being victimized by criminal conduct at the hands of the Maras is a risk that is faced by all Hondurans. Accordingly, once again, the Board rejected the Applicants' claims.

III. **Standard of Review**

[13] The issues that the Applicants have raised with respect to the Board's assessment of their claims under sections 96 and 97 of the IRPA are questions of mixed fact and law (*Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213, at paras 9-11). Such questions are reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paras 51-55). The same is true with respect to the Board's interpretation of the words "not faced generally by other individuals in or from that country", in paragraph 97(1)(b)(ii) of the IRPA (*Guifarro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 182, at paras 13-19).

IV. **Analysis**

A. *Did the Board err by finding that the Applicants' fears did not have a nexus to a Convention ground set forth in section 96 of the IRPA?*

[14] The Applicants submitted that the Board erred by failing to find that they had established a nexus to a fear of persecution for reasons of their perceived political opinion. In this regard, the Applicants submitted that the Board failed to consider the mixed motivations of the Maras and the fact that the Applicants' refusal to comply with their demands, including their extortion demands, amounted to an imputed political opinion since the Maras were the *de facto* authority in Cholomo. In their oral submissions, the Applicants attempted to draw a parallel between the Maras and the Fuerzas Armadas Revolucionarias de Colombia (FARC), a leftist guerrilla group in Colombia. The Applicants noted that the Board has in the past accepted some refugee claims on the basis of a fear of politically based persecution at the hands of the FARC. The Applicants asserted that the mere fact that the Maras does not maintain the same "veneer" of political ideology as the FARC is not a

basis upon which to distinguish the Maras from the FARC, in respect of the political opinion category of persecution that is set forth in section 96 of the IRPA.

[15] I disagree.

[16] The Board recognized that there may be “some societies where criminal and political activities heavily overlap”, such that opposition to criminal activities may be perceived to have a political dimension. However, the Board proceeded to find that the Applicants had presented “no credible evidence … to show that the Honduran state agents are closely intertwined with the Mara [sic] activities to indicate that the Maras exercise direct or indirect influence on a segment of the state or individual government officials.” Based on my review of the certified tribunal record (CTR), I am satisfied that it was reasonably open to the Board to reach this conclusion. The same is true with respect to the related conclusion reached by the Board, to the effect that the Applicants had not presented any evidence “to show that their disagreement with the demands of the Maras is in any way rooted in any political convictions they may have.” There was no evidence whatsoever in the CTR which suggested that there was a political dimension to any of the threats made, or actions taken, by the Maras towards the Applicants.

[17] In my view, the foregoing facts distinguished the case at bar from cases in which refusals to comply with the demands of the FARC, an organization which does claim to have an active political agenda, have been found to have a nexus with a risk of persecution based on political opinion. I do not mean by this to suggest that applicants who allege a fear of violence at the hands of the FARC will always or even usually be able to establish a nexus to political opinion. Each case will turn on its own facts.

[18] The Applicants further submitted that the Board erred by failing to consider and address in its decision whether the Applicants were persecuted, and feared future persecution, on the basis of their membership in various social groups, namely, their family, young males and females.

[19] I recognize that "the Board must consider all grounds for making a claim to refugee status, even if the grounds are not raised during a hearing by a claimant" (*Viafara v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1526, at para 6). However, the Board is not required to specifically address each of the five potential grounds set forth in section 96, and all theoretically possible "social groups", in each and every case, without regard for the evidentiary record. Where there is no, or virtually no, evidence in the record to suggest that an applicant may have a basis for making a claim in respect of some of those five grounds, or theoretically possible social groups, the Board is under no obligation to consider and specifically address in its decision such grounds and groups.

[20] In the case at bar, I am satisfied that there was no, or virtually no, evidence in the CTR to suggest that the Applicants might have a potential basis upon which to claim refugee status based on their membership in any of the social groups that they assert ought to have been addressed by the Board.

[21] Specifically, contrary to the Applicants' assertions, I am satisfied that there was no evidence in the CTR that might suggest that Adrian or any of the other Applicants were being persecuted as a member of the social group consisting of their family. The evidence was that Adrian was targeted by the Maras for extortion, his sons may have been the subject of recruitment efforts by the Maras, and his daughter (Karen) was the subject of unwanted romantic advances on the part of a particular

member of the Maras gang, and was the target of a random, and minor, assault by another gang member, who grabbed her leg on one occasion.

[22] There was no evidence whatsoever to link any of these things together, such that the Board might have been obliged to consider whether all or any of the Applicants were being persecuted as members of their family. Although there was one incident in which a homemade bomb was thrown inside the porch of their home, their own evidence was that this may have had something to do with the Maras' extortion of Adrian, and it happened on New Year's Eve in 1999 when gang members who routinely hung around a billiard hall in front of the Applicants' home "were behaving particularly badly."

[23] Accordingly, I am satisfied that it was reasonably open to the Board to refrain from specifically addressing in its decision whether any of the Applicants might have had a basis for refugee protection as members of the social group consisting of their family.

[24] Similarly, given that the only evidence in the CTR with respect to potential "persecution" of Karen involved the fact that one member of the Maras gang apparently "fell in love" with her and another member randomly grabbed her leg on a single occasion, I am satisfied that the Board did not err by failing to consider and specifically address in its decision whether she might have a basis for refugee protection as a member of the social group consisting of all females, or even young females.

[25] With respect to the Applicants' submission that the Board ought to have specifically addressed whether the male children in the family had a basis for refugee protection based on their membership in a social group consisting of young males in Honduras, there was only passing

mention in the two Personal Information Forms filed by the Applicants to the fact that the Maras had attempted to recruit those children. Virtually nothing was said on this point during the Board's hearing. Rather, Adrian, who did most of the testifying on behalf of the Applicants, testified that basically everyone in their neighbourhood was harassed, threatened, robbed or subjected to violence on a daily basis. He also testified that anyone who failed to cooperate with the Maras' demands faces a risk of death.

[26] After noting this testimony, the Board noted that the documentary evidence reflected that the Maras groups engage in a broad range of crimes, including "extortion, theft, armed robbery, credit card cloning, kidnapping for ransom, rape, murder and drug trafficking." The Board cited other evidence which reported that the "gangs increasingly targeted neighbourhood residents that happened to be in the wrong place at the wrong time, local businesses and those who do not comply with gang demands for 'renta'."

[27] Given the foregoing, I am satisfied that the Board did not err by failing to specifically consider and address in its decision the possibility that the male children in the Applicants' family had been persecuted based on their membership in a social group comprised of "young males".

[28] In my view, *Mohan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 847 is distinguishable on the basis that the applicants in that case, who were of Indo-Guyanese descent, specifically claimed that there was an ethnic dimension to the crimes to which they had been subjected by members of the Afro-Guyanese community. The Court quashed the Board's decision on the basis that the Board had failed to address why it concluded that the threats and violence to which the Applicants had been subjected had no connection to the Applicants' ethnic background. In the case at bar, there was no similar evidence in the record before the Board with respect to

persecutory conduct linked to any of the grounds mentioned in section 96 of the IRPA, including any particular social group. On the contrary, the evidence strongly indicated that the Applicants had been victims of criminal conduct.

B. *Did the Board err by finding that the risk faced by the Applicants was a risk that is faced generally by all Hondurans?*

[29] The Applicants submitted that the Board erred by failing to appreciate that the Applicants were at a heightened risk compared to the general population because: (i) in the case of Adrian, he was a small business owner who was specifically and repeatedly targeted for extortion and faced reprisals for failing to comply with those demands; (ii) in the case of the male children in the family, they were members of a segment of the population (young males) who were targeted for recruitment into the gang; and (iii) in the case of Karen, she was a young female who had been repeatedly harassed by a gang member who had specifically “fallen in love” with her.

[30] I disagree.

[31] In support of their position, the Applicants relied on this Court’s decision in *Pineda v Canada (Minister of Citizenship and Immigration)*, 2007 FC 365. There, my colleague Justice de Montigny quashed a decision of the Board on the basis that the Board: (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 the risk he would face if he were to return to El Salvador was the same as the risk faced by any other person in that country (*Pineda*, above, at paras 8, 13-17). However, in the case at bar, the Board explicitly addressed the claims of personal risk alleged by the Applicants and accepted that they “lived and worked in areas which were controlled by Maras gangs and that they were continually subject to harassment and extortion by the gang members.”

[32] Moreover, there was evidence before the Board, including that which is discussed at paragraphs 25 and 26 above, which reasonably allowed the Board to conclude that "all Hondurans are at risk of becoming victims of violence and crime [at the hands] of the Maras gangs anywhere in Honduras … [and] that the risk the claimants' fear is one faced generally by others in Honduras" (*Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31, at para 10). Other evidence noted by the Board which supported this finding included the fact that "[r]esidents of areas controlled by gangs are constantly subjected to extortion and threats of violence by gang members regardless of age or sex."

[33] Even if it could not be said that all, or virtually all, Hondurans face the same type of risks that are faced by the Applicants, I am satisfied that the evidence demonstrated that the risks faced by the Applicants are sufficiently prevalent and widespread in Honduras that the Board did not err in rejecting the Applicants' claims under section 97 of the IRPA (*Osorio v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1459, at para 26; *Cius v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1, at para 23; *Carias v Canada (Minister of Citizenship and Immigration)*, 2007 FC 602, at paras 23-25; *De Parada v Canada (Minister of Citizenship and Immigration)*, 2009 FC 845, at para 22; *Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213, at paras 15-16; *Guifarro v Canada (Minister of Citizenship and Immigration)* 2011 FC 182, at paras 30-33; *Gabriel v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1170, at para 20; *Perez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 345, at para 39; *Sanchez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 993, at paras 25-27; *Fraire v Canada (Minister of Citizenship and Immigration)*, 2011 FC 763, at paras 4 and 10).

[34] As recognized in the aforementioned jurisprudence, the fact that a claimant for protection under section 97 may face a heightened risk of violence at the hands of the Maras gangs or other criminals, relative to the general population, is not sufficient to meet the requirements of section 97 where that heightened risk is faced by such a large segment of the population that such risk may reasonably be found to be widespread or prevalent. In my view, where a heightened risk is faced by a segment of the population numbering in the thousands, such risk can reasonably be characterized as widespread or prevalent.

[35] Accordingly, I am satisfied that the Board did not err by failing to appreciate that the Applicants were at a heightened risk compared to the general population.

V. Conclusion

[36] The application for judicial review is dismissed.

[37] 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

DOCKET:	IMM-223-11
STYLE OF CAUSE:	CASTENEDA ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	August 8, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	Crampton J.
DATED:	August 19, 2011

APPEARANCES:

Matthew Jeffery	FOR THE APPLICANTS
Jane Stewart	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Matthew Jeffery Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT