Federal Court  Cour fédérale

Date: 20110908

Docket: IMM-243-11

Citation: 2011 FC 1055

Ottawa, Ontario, September 8, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

ALBERTO TATEL GUTIERREZ, ZENAID PINGOL GUTIERREZ, MARY ANN PINGOL GUTIERREZ, AND GABRIELLE PINGOL GUTIERREZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated December 21, 2010, concluding that the applicants are not Convention refugees or persons in need of protection pursuant to sections 96 or 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the Act) because their claims have no nexus to a Convention refugee ground and because they do not face a personalized risk to

their lives, or of cruel or unusual treatment or punishment, nor are there substantial grounds to believe that they would be personally subjected to torture, in the Philippines.

FACTS

Background

[2] The applicants are the principal applicant, his wife, and their two adult children – a daughter, Mary Ann, and a son, Gabrielle. They are citizens of the Philippines. The principal applicant owned a meat shop in a market in their hometown of Valenzuela.

[3] On January 28, 2005, the principal applicant and his wife were returning home and the principal applicant was attacked as he got out of their car by someone among a group of people who were waiting at the applicants' home. He was held up by two of the men, robbed, and then shot three times. He required surgery and was hospitalized for over two weeks. His wife was also robbed in the attack.

[4] The applicants reported the robbery to the police and their statement was taken by two officers. An investigation was undertaken and the applicants were informed that warrants for the arrest of suspects had been issued. In April of 2007, the two officers who had taken their statements called the applicants into the police station to try to identify photographs of some of the suspects. The applicants did so. In March of 2008, the two police officers came to the applicants' home and demanded 50,000 pesos in exchange for speeding up the case and protecting the applicants. The applicants testified that they felt that they had no choice, and they paid the money. Between July and December of 2008, the applicants were forced to continually pay protection money to the police

officers. The principal applicant testified that although he hated to do it and could hardly afford the sums demanded, he felt he had no choice but to do so in order to protect his family.

[5] In April of 2009, the applicants refused the police officers' demand for 500,000 pesos in exchange for arresting or killing the applicants' assailant. The principal applicant testified that in addition to the sum, he was also frightened and shocked by the suggestion that the police would kill the gang member on the applicants' behalf. The applicants instead went to the police captain of the Barangay (an administrative division in the Philippines) to report the extortion and seek assistance. Although at first the captain offered to help the applicants, he later told them that he could not help them because the police involved included officials more senior than him.

[6] Meanwhile, beginning in March of 2009, the applicant Mary Ann testified that she began to be sexually harassed and threatened by one of the police officers who was extorting the family. He would call her and follow her when she went out. She began to insist that her brother accompany her to and from her home. On one occasion, her brother punched the officer.

[7] In July of 2009, Mary Ann was waiting for her brother to pick her up from the mall when two men came and grabbed her, telling her they were going to take her to see their boss. She screamed for help, and when the people around her paid attention, the two men fled. The police officer later telephoned her and asked her why she had not gone with "his boys." He threatened her if she resisted next time. He also told her that he would break her brother's arms and legs so that he would never dare assault a police officer again.

[8] On August 21, 2009, the principal applicant's wife and the two children were attacked by five men on their way home from the market. They believed that the police officers were involved in this robbery.

[9] Following the attempted kidnapping of Mary Ann and the apparently targeted robbery, the applicants decided to send Mary Ann out of the country, which they did.

[10] The police began assaulting Gabrielle, seeking to learn the whereabouts of his sister. Mary Ann stated in her Personal Information Form narrative that in addition to her family's general fears, she fears returning to the Philippines because she will be sexually and emotionally harassed by the police officer who has taken a liking to her.

[11] On October 2, 2009, the applicants' dog was killed and dropped on their doorstep with a threatening note. The family decided that all of them were in grave danger, and came to Canada.

Decision Under Review

[12] The Board dismissed the applicants' claim because it found that there was no nexus to a Convention ground and that the applicants faced only a generalized risk of persecution.

[13] The Board reviewed the details of the applicants' claim, which it described as "very well" detailed in their evidence, and accepted all of the facts.

[14] The Board stated that in order to be Convention refugees under section 96 of the Act, the applicants' fear of persecution must be by reason of one of the five grounds enumerated in the Convention refugee definition. The Board found that this was not the case. The Board rejected the applicants' submission that they could be members of a social group of "middle class business persons", and referred to *Vetoshkin v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 921, in which Justice Rothstein upheld a Board's finding that an applicant who was persecuted because he "operated a business and was a seaman with access to hard currency" was not persecuted on a Convention ground.

[15] The Board then considered whether the harm feared by the applicants constituted a risk that they personally face to their lives, of cruel and unusual treatment or punishment, or of torture per section 97 of the Act. The Board found that the critical issue was that the applicants do not face a personal risk of persecution:

> ¶19. According to section 97(1)(b)(ii) of the *Act*, protection is limited to those who face a specific risk that is not faced generally by others in or from the country. The evidence must establish that the claimants would face a risk different from those faced by the general population. This would generally exclude risks associated with widespread crime, abuse of authority or indiscriminate violence. I find that the risk of harm feared by the claimants I one faced generally by others in their country….

[16] The Board cited *Castillo Mendoza v. Canada (Citizenship and Immigration)*, 2010 FC 648, at paragraphs 33, to distinguish between a targeted crime and particularized persecution:

> ¶20. As the Honourable Justice Zinn stated in *Mendoza v. MCI*, a crime does not become particularized persecution just because the criminals, even when they are police agents, pursue their victims. The fact that the claimants were being targeted does not make the risk one that is not faced generally by other individuals in or from that country.

[17] The Board further relied on that case, at paragraph 36, to find that a risk may be generalized if it is posed by one agent of persecution, but particularized if the risk is posed by a different agent.

[18] The Board found that in this case the applicants faced the same risks as are posed generally in the Philippines—namely, a risk of gang violence and police corruption. The Board relied on the following facts to support its conclusion that the risk is a generalized one:

a. The applicants personally know that extortion, threats of harm, sexual harassment and physical harm at the hands of police agents are endemic in the Philippines, based on their knowledge of extortion in the market in which they work, and from newspaper, television and radio reports that they have seen (paragraph 22).

b. The applicants provided documentary evidence demonstrating that the police "have been involved in a range of human rights violations, including killings." The Board found that police in the Philippines commit serious crimes "with relative impunity" and that they are widely perceived by Filipinos as corrupt (paragraph 24). The Board noted that police officers are "frequently named as suspected gunmen in cases of violence against journalists in the Philippines" (paragraph 25, reference omitted).

c. The documentary evidence showed that police corruption is a contributing factor to kidnappings and that the police collude with kidnapping gangs in Manila (paragraph 25).

d. The documentary evidence showed that the institutions of criminal justice in the Philippines are "so barbaric that together they bear no resemblance to any modern system of justice" (paragraph 27). For example, the Board cited a report finding that "the arrest and torture of ordinary persons, in order to have them to confess to crimes that they did not commit, is common in the Philippines."

[19] The Board rejected the applicants' submission that the Gender Guidelines should be considered in the case of Mary Ann's claim. The Board concluded that Mary Ann did not fear rape or gender violence:

> ¶30. …There is no general allegation of fear of rape, sexual harm or domestic violence on the part of Mary Ann Pingol Gutierrez in general or from any of the other claimants. It is not that she, Mary, fears rape in general in the Philippines. It is all wrapped up in the impunity of one police officer. I find that it, too, falls outside section 97 as a generalized risk of harm.

LEGISLATION

[20] Section 96 of the Act, grants protection to Convention refugees:

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	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

opinion,	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.

[21] Section 97 of the Act grants protection to persons whose removal from Canada would subject them personally to a risk to their life, or of cruel and unusual punishment, or to a danger of torture:

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	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 (i) the person is unable or, because of that risk, unwilling to avail themself of the	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : (i) elle ne peut ou, de ce fait, ne veut se réclamer de la

protection of that country, (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, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	protection de ce pays, (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) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles, (iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

ISSUES

[22] The applicants raise the following two issues:

a. Did the Board base its decision on negative findings made capriciously and without regard to the evidence, and in turn render an unjust and unreasonable decision?

b. Did the Board err in failing to consider the totality of the applicants' evidence or the particular situation of the applicants when assessing the issue of generalized risk?

[23] The applicant has not identified any negative findings made by the Board. Indeed, the Board accepted the applicants' evidence in its totality. I would reframe the issues as follows:

a. Did the Board err in failing to consider the totality of the applicants' evidence or the particular situation of the applicants when assessing the issue of generalized risk?

b. Did the Board err in failing to consider whether there is a nexus to the Convention in the claim of the applicant Mary Ann, and by failing to apply the Gender Guidelines in that context

STANDARD OF REVIEW

[24] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether

the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at para. 53.

[25] The Board's interpretation of the requirements of sections 96 and 97 of the Act is a question of law to be reviewed on a standard of correctness: *Josile v. Canada (Citizenship and Immigration)*, 2011 FC 39, at paragraph 8.

[26] The Board's assessment of whether the applicants are persons in need of protection and whether they face a particularized risk, however, is a question of mixed fact and law and subject to review on a reasonableness standard: see, for example, my decision in *Michaud v. Canada (Citizenship and Immigration)*, 2009 FC 886, at paragraphs 30-31.

[27] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, supra, at paragraph 47; *Khosa*, supra, at para. 59.

ANALYSIS

<u>Issue 1</u>: Did the Board err in failing to consider the totality of the applicants' evidence or the particular situation of the applicants when assessing the issue of generalized risk?

[28] The applicants submit that their evidence was that they face a specific risk of persecution by agents of the state – police officers. They submit that the Board failed to consider their evidence regarding how they were personally targeted by the police for persecution. Moreover, the applicants submit that the Board's finding that Filipino police are so corrupt as to pose a general risk to all Filipinos does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and the law. The applicants submit that in reaching this conclusion, the Board ignored much documentary evidence that demonstrated that although the Filipino state faces problems of corruption, the general evidence is that the Philippines is a functioning democracy with a competent security force and criminal justice system. The applicants failed, however, to point the Court to any specific evidence in this regard.

[29] The respondent submits that because generalized risk and state protection are determined on different standards, there is nothing unreasonable in a Board finding that there is a generalized risk posed to citizens by state actors and, at the same time, that there is state protection available to citizens. The respondent states that this is, "by inference", what the Board decided in this case, and states that it is reasonable.

[30] The Court disagrees with the respondent on this point. In *Mendoza*, above, Justice Zinn addressed this question, and stated that it is difficult to reconcile a finding of generalized police corruption and criminality with a finding of state protection:

> ¶39. There is an obvious discrepancy between Mexico as a state that generally provides state protection to its citizens, and Mexico as a state where kidnapping and extortion committed by police is so pervasive as to constitute a generalized risk. If this decision is correct, then every subsequent unsuccessful refugee claimant from Mexico may be expected to cite it as evidence that police corruption and criminality is so pervasive that the police itself pose a

> generalized risk for all Mexican citizens such that state protection is not available.

[31] In this case, the Board did not find that there is state protection available to the applicants. The Board found, rather, that because there is an absence of state protection, the applicants' risk is not personal. The applicants have failed to point the Court to any evidence that contradicts this conclusion of the Board. The Board cited a number of reports and articles that support this position. The Court finds no error in this determination.

[32] Nevertheless, the Court finds that the Board was unreasonable in its assessment of the risk faced by the applicants. While it may be that all Filipinos face a risk of random attack and extortion by Filipino police officers, in this case the applicants face much more than a random risk of attack. Instead, the applicants' evidence, which the Board accepted, was that they had been the victims of a gang attack, and that the police officers assigned to investigate then extorted and arrested them.

[33] Whereas the Board relied on documentary evidence that spoke of police officers demanding bribes at traffic stops, torturing suspects to elicit confessions, or collaborating with gangs, none of those situations reflects the risks faced by the applicants. The applicants' evidence was that they faced a risk from specific police officers, whom they had tried to report for corruption, who Gabrielle had fought with in the past, who had tried to kidnap Mary Ann, and to whom they had refused, finally, to pay bribes.

[34] The Board had a duty to clearly consider these details of the applicants' claim in the context of its risk assessment, rather than simply state that it was "police corruption" like all other police corruption.

<u>Issue 2</u>: Did the Board err in failing to consider whether there is a nexus to the Convention in the claim of the applicant Mary Ann, and by failing to apply the Gender Guidelines in that context?

[35] The Board has a duty to consider all potential grounds for a refugee claim that arise on the evidence, even when they are not raised by the applicant: *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, at pages 745-6, *Viafara v. Canada (Citizenship and Immigration)*, 2006 FC 1526, at paragraph 6.

[36] In this case, the applicant Mary Ann clearly stated in her affidavit that she fears gender violence, based on the manner in which one of the police officers had pursued her before she left:

> I am particularly afraid of going back to Philippines as I am sure that PO 3 Griete will sexually and emotionally harass me. He is capable of doing anything to me including kidnapping, rape and any other worst thing to me.

[37] It is well established that gender is a ground for protection under the Convention ground of membership in a social group: *Ward*, above, at page 739, *Josile*, above, at paragraphs 28-30.

[38] Thus, the Board had a duty to consider whether the applicant Mary Ann faces persecution because she is a woman. The Board found, as quoted above, that:

> …It is not that she, Mary, fears rape in general in the Philippines. It is all wrapped up in the impunity of one police officer. I find that it, too, falls outside section 97 as a generalized risk of harm.

[39] This passage shows that the Board committed an error of law by failing to consider Mary Ann's claim under section 96 of the Act and the Gender Guidelines which apply to section 96. The Board does not appear to have considered whether Mary Ann faces persecution because of her gender. Mary Ann's evidence, which the Board appeared to accept, was that she does. Whereas the

other members of her family fear attacks to their lives or well-being, Mary Ann fears rape and kidnapping because one of the police officers has targeted her as a woman.

[40] The requirements of the Board to evaluate an applicant's risk in such a circumstances were reviewed in detail in *Josile*, above. In that case, Justice Martineau overturned a decision of the Board that found that the applicant, a female citizen of Haiti, was not a refugee because the rape that she feared did not constitute persecution on a Convention ground and that her risk was generalized. The Court in that case stated the following:

> ¶36 In light of Canadian law and the evidence before the Board, the conclusion that as a Haitian woman, the applicant does not have reasonable fear of persecution because of her membership in that group is unreasonable. Had the Board accepted that a risk of rape is grounded in the applicant's membership in a particular social group, then the inquiry should have resulted in a determination of whether there is "more than a mere possibility" that the applicant risks suffering this harm in Haiti. The particular circumstances and situation of the applicant in the case of return to Haiti have not been thoroughly considered and analyzed. The next step of the failed analysis would have been to determine whether in the alleged absence of male protection in her particular case, adequate state protection is available to the applicant.

[41] In this case, the Board failed to consider whether the applicant Mary Ann's fear of rape by the police officer constitute risk on the ground of gender. In its decision, the Board states that her fear is "wrapped up" in the rest of the claim. But the fact is that the applicant Mary Ann faces a distinct risk that arises from the fact that she is a young woman. In *Josile*, above, the Court considered jurisprudence surrounding the relationship between a claim of rape and the Convention:

> ¶24. With respect to the establishment of nexus, the Court in *Dezameau*, above, at paragraphs 34 and 35, notes that "it is well established in Canadian law that rape, and other forms of sexual assaults, are grounded in the status of women in society", and adds to this effect that "[t]he notion that rape can be merely motivated by

> common criminal intent or desire, without regard to gender or the status of females in a society is wrong according to Canadian law".
>
> ¶25. Canadian jurisprudence is also emphatic on the point. For example, in *R. v. Osolin*, [1993] 4 S.C.R. 595, Justice Cory for the majority of the Supreme Court of Canada stated that "it cannot be forgotten that a sexual assault is very different from other assaults. It is true that it, like all the other forms of assault, is an act of violence. Yet it is something more than a simple act of violence. Sexual assault is in the vast majority of cases gender based. It is an assault upon human dignity and constitutes a denial of any concept of equality for women" (*Osolin*, above, at paragraph 165).
>
> ¶26. Indeed, rape is referred to as a "gender-specific" crime in Guideline 4. The latter specifically categorizes rape as a gender-specific crime:
>
> > The fact that violence, including sexual and domestic violence, against women is universal is irrelevant when determining whether rape, and other gender-specific crimes constitute forms of persecution. (My emphasis.)
>
> ¶27. Consequently, I entirely agree with the approach taken by the Court in *Dezameau*, above.

[42] Finally, the Court notes that whether young women in general face a risk of rape is not relevant under section 96, and to the extent that the Board may have imported the section 97 concern with generality into a section 96 analysis (which it did not clearly conduct), the Board erred: *Josile*, above, at paragraph 11.

CONCLUSION

[43] The Court concludes that the Board was unreasonable in its analysis of the risks faced by the applicants. While it was open to the Board to find that the applicants face a generalized risk of persecution, the Board had a duty to refer to the applicants' evidence in that context.

[44] The Court finds that the Board also erred in not considering the applicant Mary Ann's claim under section 96 of the Act, as persecution based on gender.

[45] This application for judicial review is granted.

[46] No question will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for Judicial Review is allowed, the Board's decision dated December 21, 2010 is set aside, and this claim is remitted to another panel of the Board for re-determination.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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