Federal Court  Cour fédérale

Date: 20110811

Docket: IMM-422-11

Citation: 2011 FC 993

Ottawa, Ontario, August 11, 2011

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

MANUEL ALONSO BAIRES SANCHEZ,
DORA ALICIA GONZALEZ LOPEZ,
IVAN ALONSO BAIRES GONZALEZ and
VALERIA ELIZABETH GONZALEZ LOPEZ

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The principal Applicant, Mr. Baires Sanchez, is a citizen of El Salvador. He claims that his life will be in danger if he is forced to return to El Salvador. Specifically, he alleges that a gang called the Maras Salvatrucha, also known as the "MS," the "MS-13" and the "MSX 13," has threatened him with death for refusing to join the gang. Shortly after his arrival in Canada in July

2008, he claimed refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] In December 2010, the Refugee Protection Division of the Immigration and Refugee Board rejected his claims and the dependent claims of his common-law spouse and their children.

[3] The principal issue in this case is whether the Board erred in concluding that the risks alleged by Mr. Baires Sanchez are risks that are "faced generally by other individuals in or from" El Salvador, as contemplated by paragraph 97(1)(b)(ii) of the IRPA. The Applicants also alleged that the Board erred by failing to consider, or by failing to refer in its decision, to short written submissions that the Applicants sent to the Board shortly after its oral hearing on December 14, 2010.

[4] For the reasons that follow, I have concluded that the Board did not err by concluding that the risks faced by Mr. Baires Sanchez are risks faced generally by other individuals in or from El Salvador. I have also concluded that the Board's failure to consider, or to refer in its decision, to the above-mentioned written submissions did not constitute a reviewable error. Accordingly, this application will be dismissed.

I. Background

[5] Mr. Baires Sanchez claimed that his problems with the MS-13 began in February 2002, when the gang attempted to recruit him to do "little jobs", such as stealing and kidnapping innocent people. When he initially refused to join them, he allegedly was beaten, threatened with death, told that they were watching him, and told that they would shortly return for his answer. After he

experienced essentially the same thing three days later, he hid in his parents' home until he fled to the United States in March 2002.

[6] Subsequent to his departure, he claims that members of the gang continued to inquire about him and told his parents that they intend to kill him "at the first chance they have."

II. The Decision under Review

[7] The Board began its analysis by briefly dismissing Mr. Baires Sanchez's claim under section 96 of the IRPA, after it concluded that he had been a victim of crime, rather than a victim of persecution linked to his race, religion, nationality, political opinion or membership in a particular social group.

[8] With respect to his claim under section 97 of the IRPA, the Board referred to documentary evidence reporting upon the prevalence of deadly violence in El Salvador, especially at the hands of gang members. It also noted that Mr. Baires Sanchez had (i) testified that violence and criminality by the MS-13 is widespread in El Salvador; and (ii) provided documentary evidence to substantiate this fact. After reviewing some of the documentary evidence in this regard, the Board concluded that the risks faced by Mr. Baires Sanchez were both personal and generalized, in the sense that they were risks faced generally by all Salvadorans. Accordingly, the Board rejected his claim under section 97.

[9] The Board then proceeded to reject the dependent claims of Mr. Baires Sanchez's common-law spouse and their children.

III. Standard of Review

[10] The issue that the Applicants have raised with respect to the Board's assessment of their claims under section 97 of the IRPA is a question 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).

[11] The issue that the Applicants have raised regarding the Board's failure to consider written submissions that they sent shortly after the Board's hearing is a question of whether the Board reached its decision without regard to the material before it, as contemplated by paragraph 18.1(4)(d) of the *Federal Courts Act*, RSC 1985, c F-7. This is reviewable on a standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 46). To the extent that the Applicants have also suggested that their written submissions were not even forwarded to the Presiding Member of the Board who considered their applications, this would be a question of procedural fairness that is reviewable on a standard of correctness (*Dunsmuir*, above, at paras 55, and 79; *Khosa*, above, at para 43).

IV. Analysis

A. *Did the Board err in concluding that the risks alleged by Mr. Baires Sanchez are risks faced generally by other individuals in or from El Salvador?*

[12] The Applicants submitted that the Board erred by finding that the risks that Mr. Baires Sanchez will face if he is required to return to El Salvador are risks that are faced generally by all Salvadorans. I disagree.

[13] 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 and 13-17). However, in the case at bar, the Board explicitly addressed the claims of personal risk alleged by Mr. Baires Sanchez and found that risk to be both personal and generalized in nature.

[14] Since the decision in *Pineda*, above, this Court has had occasion to revisit the distinction between personalized and generalized risk on several occasions. Some of those occasions involved facts that are more similar to the facts in the case at bar than are those in *Pineda*, above.

[15] For example, in *Prophète v Canada (Minister of Citizenship and Immigration)*, 2008 FC 331, Justice Tremblay-Lamer specifically addressed the second of the two conjunctive elements contemplated by paragraph 97(1)(b)(ii), in circumstances in which the first of those elements (personal risk) had been established. In this regard, she observed:

> [18] The difficulty in analyzing personalized risk in situations of generalized human rights violations, civil war, and failed states lies in determining the dividing line between a risk that is "personalized" and one that is "general". Under these circumstances, the Court may be faced with an applicant who has been targeted in the past and who may be targeted in the future but whose risk situation is similar to a segment of the larger population. Thus, the Court is faced with an individual who may have a personalized risk, but one that is shared by many other individuals.

[16] Justice Tremblay-Lamer proceeded to find that the applicant in the case before her faced a risk that was faced generally by other individuals in or from Haiti, because "[t]he risk of all forms of criminality is general and felt by all Haitians." She added: "While a specific number of individuals may be targeted more frequently because of their wealth, all Haitians are at risk of becoming the victims of violence" (*Prophète*, above, at para 23).

[17] In recognizing that a heightened risk faced by a sub-group of the population can nevertheless be characterized as being a generalized risk, Justice Tremblay-Lamer noted that this approach had been adopted in *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; and *Carias v Canada (Minister of Citizenship and Immigration)*, 2007 FC 602, at paras 23-25. That approach has since been followed in *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*, above, at paras 30-33; *Gabriel v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1170, at para 20; and *Perez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 345, at para 39.

[18] In *Osorio*, above, Justice Snider stated that there is nothing in paragraph 97(1)(b)(ii) which requires the Board to interpret the word "generally" as applying to all citizens. She added: "The word 'generally' is commonly used to mean 'prevalent' or 'widespread'. Parliament deliberately chose to include the word 'generally' in subsection 97(1)(b)(ii), thereby leaving to the Board the issue of deciding whether a particular group meets the definition. Provided that its conclusion is reasonable, as it is here, I see no need to intervene." Justice Snider proceeded to find that it was reasonably open to the Board to conclude that the risk faced by the principal applicant in that case

was “general”, because it “is difficult to define a broader or more general group within a nation than the group consisting of ‘parents’” (*Osorio*, above, at para 25).

[19] The Applicants urged the Court to distinguish the above-mentioned line of cases on the basis that the Board found that the risk that would be faced by Mr. Baires Sanchez is a risk that is “faced generally by all people in El Salvador” (emphasis added), rather than simply by the subset of the population consisting of “young males.” They asserted that this conclusion was not borne out by the evidence.

[20] I disagree.

[21] When the Board’s decision is read as a whole, it is clear that the Board concluded that the risk that young males in El Salvador face when they rebuff efforts by the MS-13 to recruit them is a risk of essentially the same type of violence that is faced generally by individuals in that country who do not comply with the gang’s demands. For example, after noting that Mr. Baires Sanchez testified that he has a fear for his life at the hands of the MS-13, the Board proceeded to observe, at paragraph 12 of its decision, that “being a victim of violence and other crimes at the hands of criminal or organized gangs in El Salvador is a risk faced generally by all citizens and residents of El Salvador.” After reviewing some of the documentary evidence which described, among other things, the broad range of violence and other criminal activities engaged in by the MS-13, the Board essentially repeated this observation, and drew a parallel with the risk of violence that was at issue in *Prophète*, above. Later, at paragraph 18 of its decision, the Board repeated that “[t]he personal nature of the consequences the claimant and his family experienced are an escalation of threats and violence stemming from the claimant’s refusal to join the gang.”

[22] Among other things, the documentary evidence reviewed by the Board reported that the violence perpetrated by the MS-13 in El Salvador includes murder, extortion, rape and robbery. The Board also quoted one estimate that over 25,000 people belong to street gangs in that country, and that the MS and the Mara 18 have between 10,000 and 13,500 members in El Salvador. In addition, the Board referred to three cases in which this Court upheld the Board's finding that the risks faced by victims of the Maras Salvatrucha were generalized in nature.

[23] In my view, it was reasonably open to the Board to conclude, based on its finding that violence at the hands of the Maras Salvatrucha gang is a risk faced widely by people in El Salvador, that the risk faced by Mr. Baires Sanchez is a risk "faced generally by other individuals in or from El Salvador," as contemplated by paragraph 97(1)(b)(ii) of the IRPA. The fact that the particular reason why Mr. Baires Sanchez may face this risk may differ from the particular reason why others face this risk is of no consequence, given that (i) the nature of the risk is the same, namely, violence (including murder); and (ii) the basis for the risk is the same, namely, the failure to comply with the MS-13's demands, whether they be to join their organization, to pay extortion money, or otherwise. As the Board appropriately recognized, "[a] generalized risk does not have to affect everyone in the same way."

[24] That said, the Board did in fact specifically recognize, at paragraph 14 of its decision, that Mr. Baires Sanchez "may face a greater risk of being targeted because he fits the profile of those who are targeted for recruitment by the MS." It essentially repeated this observation at paragraph 23 of its reasons. Given the conclusions that it reached regarding the similar nature of that risk and the risk faced by other members of the general population at the hands of the MS-13, it was not

necessary for the Board to specifically find that the risk faced by young males is "prevalent or widespread." Had it done so, its conclusion would not have changed.

[25] The Board's finding that young males may face a somewhat greater risk of violence at the hands of the MS-13 was not inconsistent with its conclusion that the risk of such violence is not faced generally by other individuals in or from El Salvador, as contemplated by paragraph 97(1)(b)(ii) (*Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31, at para 10; *De Parada*, above; *Acosta*, above; *Cius*, above; *Guifarro*, above; *Perez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1029, at paras 34-35). This is because the nature of the violence faced by younger males and by the general population is similar, as is the context in which the risk of such violence arises, namely, a refusal to comply with the gang's demands.

[26] Indeed, given that the evidence before the Board demonstrated that young males face a widespread risk of recruitment by the Maras Salvatrucha, and violence if they do not comply with those recruitment attempts, it was not necessary for the Board to find that the risk faced by Mr. Baires Sanchez is a risk faced generally by all citizens and residents of El Salvador. Based on the jurisprudence discussed at paragraphs 17 and 18 above, it would have been reasonably open to the Board to reject Mr. Baires Sanchez's application for protection under section 97 on the basis that the risk he faced was a risk that is "prevalent or widespread" in El Salvador, because young males comprise a substantial subset of the general population.

[27] It bears emphasizing that, given the conjunctive nature of the test set forth in paragraph 97(1)(b)(ii), it is not sufficient for an applicant for protection under section 97 to establish that he or she faces a personalized risk that has manifested itself in the form of escalating and targeted reprisals for failing to comply with demands that may initially have been made on a random basis.

The applicant must go further and also establish that the risk of actual or threatened similar violence is not faced generally by other individuals in or from that country. In this latter regard, the applicant must demonstrate that the risk he or she faces is not prevalent or widespread in his country of origin, in the sense of being a risk faced by a significant subset of the population.

B. *Did the Board err in failing to consider or to address in its decision the written submissions made by the Applicants subsequent to its hearing?*

[28] The Applicants submitted that the Board erred by failing to make any reference whatsoever to the short written submissions that they sent to the Board shortly after their hearing on December 14, 2010. Those submissions addressed both section 96 and section 97 of the IRPA.

[29] With respect to section 97, the Applicants submitted that Justice Snider's decision in *Osorio*, above, was superseded by Justice Dawson's decision in *Surajnarain et al v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1165, at paras 9-20. There, Justice Dawson observed that it did not appear that Justice Snider's attention has been drawn to prior jurisprudence, such as *Sinnappu v Canada (Minister of Citizenship and Immigration)*, [1997] 2 FC 791, at para 37 (TD). In the latter case, Justice McGillis reviewed guidelines that had been issued by the Department of Citizenship and Immigration in respect of the second part of the conjuctive test in what is now paragraph 91(1)(b)(ii), and concluded that this part of the test contemplates a risk faced by <u>all</u> residents or citizens of an applicant's country of origin. Justice Dawson then adopted that test, rather than the "prevalent or widespread" test that was articulated by Justice Snider in *Osorio*, above.

[30] In my view, it was not unreasonable for the Board to fail to refer to the Applicants' supplementary written submissions dated December 14, 2010, and in particular to the decisions in *Surajnarain*, above, and *Sinnappu*, above. This is because the Board ultimately adopted the precise

test that was set forth in those decisions. That is to say, the Board rejected the Applicants' claims under section 97 on the ground that the risk faced by Mr. Baires Sanchez is one that is "faced generally by all individuals in El Salvador" (emphasis added). The Board articulated this precise test a number of times in its decision.

[31] That said, as I have noted above, the Board also recognized that the risk faced by Mr. Baires Sanchez may be "greater … because he fits the profile of those who are targeted for recruitment by the MS." As recognized by the jurisprudence mentioned at paragraph 25 above, it was not inconsistent for the Board to find that the risk faced by Mr. Baires Sanchez may be greater than the risk faced by individuals who are not young males, while also finding that such risk is faced generally by others his country, as contemplated by paragraph 97(1)(b)(ii) of the IRPA. Indeed, for the reasons discussed at paragraph 26 above, it would have been reasonably open to the Board to dismiss Mr. Baires Sanchez's application under section 97 of the IRPA on the basis that the risk he faces is a risk faced by a subset of the population consisting of young males who are potential targets of recruitment by the Maras Salvatrucha (*Smith v Alliance Pipeline Ltd*, 2011 SCC 7, at paras 38-39).

[32] The Applicants further submitted that they have no idea as to whether their written submissions dated December 14, 2010 were ever received and read by the Presiding Member of the Board. They asserted that this was both procedurally unfair and unreasonable.

[33] I agree that the Board erred by not acknowledging receipt of the Applicants' supplementary written submissions. However, for the reasons discussed at paragraphs 30 and 31 above, I am satisfied that the Board's error was not material. In short, even if it is the case that those supplementary submissions were not forwarded to, and read by, the Presiding Member, I am

satisfied that this did not affect the conclusions reached by the Board in respect of the Applicants' claims under section 97 of the IRPA (*Mobil Oil Canada Ltd v Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202, at para 53; *Yassine v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 949, at paras 10-11).

V. Conclusion

[34] The application for judicial review is dismissed.

[35] 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

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