

Federal Court



Cour fédérale

Date: 20120213

Docket: IMM-2959-11

Citation: 2012 FC 209

Toronto, Ontario, February 13, 2012

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ROBERTO EDUARDO AMAYA JEREZ

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] In 2009, Mr. Roberto Eduardo Amaya Jerez fled his native El Salvador and claimed refugee protection in Canada. He claims to fear drug dealers who tried to force him to sell drugs in the restaurant he owned in the town of San Martin.

[2] A panel of the Immigration and Refugee Board dismissed Mr. Amaya Jerez's claim, finding that his fear was not related to any ground recognized in the Refugee Convention, and that he was not subject to a personal risk of mistreatment. Rather, he was exposed to a generalized risk of crime.

[3] Mr. Amaya Jerez argues that the Board erred in both of its findings. He submits that the Board ignored evidence that he was perceived to be a gay man and was persecuted, at least in part, for that reason. Further, he contends that the Board's conclusion that he was exposed to a generalized risk, not a personal risk, was unreasonable on the evidence.

[4] In my view, the Board did not overlook significant evidence. In addition, its conclusions were reasonable on the evidence before it.

[5] There are two issues:

- i. Did the Board overlook evidence?
- ii. Was the Board's decision unreasonable?

II. Factual Background

[6] In 2003, Mr. Amaya Jerez and his wife opened a small restaurant in San Martin, which attracted a wide range of clientele including gay customers and local drug dealers. One of those drug dealers, a man called "El Chino Tres Colas", attempted to enlist Mr. Amaya Jerez to sell drugs in the restaurant. Mr. Amaya said no.

[7] In 2004, two of Chino Tres Colas' associates, known as "Cousin" and "El Tabatha", told Mr. Amaya Jerez that he would have to cooperate. They put a gun to Mr. Amaya Jerez's head and threatened his pregnant wife by pointing a gun at her belly and vagina. Mr. Amaya Jerez was beaten. During the assault, the gang members forced a gun into Mr. Amaya Jerez's underwear and said, "[y]ou allow fags in the restaurant and therefore you must be one of them".

[8] Mr. Amaya Jerez made arrangements to send his wife to another town and started to close his business. Cousin and four other gang members told Mr. Amaya Jerez that he was not allowed to refuse, and that they knew where his wife was. They beat Mr. Amaya Jerez, suggested again that he must be homosexual, and assaulted him by putting a gun in his underwear.

[9] Mr. Amaya Jerez did not make a police complaint because he had seen prominent police officers, including the local chief of police, socializing at his restaurant with the same drug dealers he feared. However, Mr. Amaya Jerez sought medical attention and was hospitalized for three days. His family physician stated that he had injuries all over his body, including a head wound that required five stitches, serious bruising and lacerations on his back, and signs of sexual abuse in the anal and genital region.

[10] Mr. Amaya Jerez fled San Martin and moved to San Salvador with his wife, obtained a new job, and was living there until July 2007, when he was surrounded by people asking for money. One of them was Cousin, who recognized Mr. Amaya Jerez from San Martin.

[11] Cousin stole Mr. Amaya Jerez's wallet and keys, told him he would kill him if he went to the police, and reminded him that there was unfinished business with Chino Tres Colas. Mr. Amaya Jerez and his wife moved to another city, Chalchuapa, and hid at home when they were not working. He felt he could not live that way forever, so he decided to leave the country.

[12] Mr. Amaya Jerez obtained a Canadian work visa and entered Canada in 2009. After he left El Salvador, his wife was approached by gang members who attempted to kidnap their child. She was also approached by other men who asked where Mr. Amaya Jerez was.

[13] In Canada, the job Mr. Amaya Jerez had been promised never materialized and he was unable to renew his work permit. Fearing a return to El Salvador, he made a refugee claim in June 2010.

III. The Board's Decision

[14] The Board found Mr. Amaya Perez to be a truthful witness. Further, his account of events was consistent with the documentary evidence, which stated that El Salvador has an extremely serious crime problem, including extortion and violence by drug traffickers. Furthermore, the documentary evidence confirmed the existence of the drug dealer, Chino Tres Colas. He is a well-known, high-ranking leader of the Mara 18, an organization that is known for drug trafficking and committing street crimes. News reports stated that Chino Tres Colas has recently been prosecuted for his violent crimes.

[15] The Board noted Mr. Amaya Jerez's claim that he had been subject to sexual violence. While it concluded that his allegations were substantially true, it found that they did not support a claim under ss 96 or 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] (see Annex for statutory reference).

[16] First, he had not shown a nexus to a Convention ground. In essence, Mr. Amaya Jerez was a victim of criminality, having been extorted and pressured to sell drugs, and attacked when he refused. This treatment had no connection to any of the grounds of persecution recognized in s 96.

[17] Second, s 97 of IRPA protects those facing a risk not faced generally by others in the country. The Board noted that, although Mr. Amaya Jerez had been personally affected by the events in El Salvador, he did not face a personalized risk of mistreatment. Mr. Amaya Jerez came to the attention of Chino Tres Colas because he was a potential source of revenue. Furthermore, the documentary evidence confirmed that there are many gang members active in El Salvador who extort money from the general population. The Board concluded that all people with businesses, facilities or assets faced a generalized risk.

[18] Mr. Amaya Jerez had argued that he faced a personalized risk because his mistreatment, in part, was based on the fact that he was perceived to be homosexual. The Board disagreed. It found no evidence that the claimant was perceived to be a gay man in El Salvador. The alleged agents of persecution knew he was a married man with children. Furthermore, when questioned, Mr. Amaya Jerez did not allege that he has any gay self-identity. The Board stated that, although the criminals

who assaulted Mr. Amaya Jerez suggested he must be gay, they did not do so because they genuinely believed that he was homosexual.

[19] Accordingly, the Board found that the issue of persecution on grounds of sexual orientation was not supported by the evidence. It found Mr. Amaya Jerez not to be a person in need of protection under s 97 of IRPA, nor a Convention refugee under s 96.

IV. Issue One – Did the Board overlook evidence?

[20] Mr. Amaya Jerez submits the Board stated incorrectly that “[t]here is no evidence the claimant is perceived to be a gay man in El Salvador”. This finding contradicted the evidence provided by Mr. Amaya Jerez, whom the Board found to be a credible witness. He testified that the gang members made homophobic statements during both sexual assaults, accusing him of being gay because he served homosexual customers at his restaurant.

[21] In my view, the Board did not overlook this evidence. It concluded that the agents of alleged persecution knew that Mr. Amaya Jerez was not actually homosexual. They knew that he was married. The fact that he served homosexuals in his restaurant was an aggravating factor affecting the language and conduct they employed in expressing their threats. However, it was not the reason they were interested in Mr. Amaya Jerez or the real basis for their threats. The Board’s conclusion that the real reason the gang pursued Mr. Amaya Jerez was because it wanted to sell drugs in his restaurant was not unreasonable on the evidence before it.

V. Issue Two – Was the Board’s decision unreasonable?

[22] Mr. Amaya Jerez submits that, because the Board ignored his evidence about his perceived sexual orientation, it incorrectly concluded that Mr. Amaya Jerez’s evidence did not show a nexus to a Convention ground. Furthermore, he argues that the Minister erroneously suggested that because Mr. Amaya Jerez is married, he cannot be perceived to be a homosexual. Further, the Board’s incorrect analytical framework is expressed in the last sentence of the decision, which states that “[o]ne does not become gay as a result of being assaulted”.

[23] As I see it, the Board considered Mr. Amaya Jerez’s claim that he had been persecuted based on perceived sexual orientation and implicitly acknowledged that the gang members could have had mixed motives. However, as discussed above, the Board took into account the evidence relating to this issue and concluded that the gang’s motives were financial.

[24] It is certainly possible for a claimant to support a refugee claim based on imputed membership in a particular social group when he or she is not actually a member of that group. Here, the Board did not rule out that possibility. It simply concluded that Mr. Amaya Jerez was targeted not for his sexual orientation but for his ownership of a restaurant. Based on the evidence before it, I cannot conclude that its determination was unreasonable.

[25] In addition, Mr. Amaya Jerez submits that the Board incorrectly applied the law on generalized risk and overlooked his particular circumstances. He maintains that he was subjected to multiple incidents of sexualized violence because he was perceived to be homosexual.

[26] However, the Board considered the evidence related to the allegedly imputed sexual orientation and concluded that Mr. Amaya Jerez was not targeted on that basis. Accordingly, he was not subjected to a personalized risk. Based on the evidence before it, the Board's conclusion was not unreasonable.

VI. Conclusion and Disposition

[27] The Board's decision was intelligible, justified and defensible based on the law and evidence before it. It was not unreasonable. Further, the Board did not ignore evidence regarding Mr. Amaya Jerez's alleged imputed sexual orientation. Accordingly, I must dismiss this application for judicial review. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;
2. No question of general importance is stated.

“James W. O’Reilly”

Judge

Annex “A”

Immigration and Refugee Protection Act, SC 2001, c 27

Loi sur l’immigration et la protection des réfugiés, LC 2001, ch 27

Convention refugee

Définition de « réfugié »

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 opinion,

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 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 themselves of the protection of each of those countries; or
- (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.

- 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) 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.

Person in need of protection

Personne à protéger

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
- (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 themselves of the 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

- 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) 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 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-

accepted international standards,
and
(iv) the risk is not caused by the
inability of that country to provide
adequate health or medical care.

(2) A person in Canada who is a member of a
class of persons prescribed by the regulations as
being in need of protection is also a person in
need of protection.

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.

(2) A également qualité de personne à protéger
la personne qui se trouve au Canada et fait partie
d'une catégorie de personnes auxquelles est
reconnu par règlement le besoin de protection.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2959-11

STYLE OF CAUSE: ROBERTO EDUARDO AMAYA JEREZ v
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Vancouver, British Columbia

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**REASONS FOR JUDGMENT
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DATED: February 13, 2012

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