Federal Court  Cour fédérale

Date: 20120831

Docket: IMM-1364-11

Citation: 2012 FC 1048

Ottawa, Ontario, August 31, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

DAVID DANIEL BALCORTA OLVERA
MARIA SOFIA RICALDE PEON
RODRIGO BALCORTA RICALDE
CARLA SOFIA BALCORTA RICALDE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

I. Overview

[1] "[I]f an individual is subject to a *personal* risk to his life or risks cruel and unusual treatment or punishment, then that risk is no longer general," even if it is widespread in his or her country of origin. Individual targeting cannot be said to be general or impersonal, as was ruled by Justice Mary Gleason in *Portillo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 678 (at para 36).

II. Introduction

[2] The principal Applicant, together with his spouse and two young children, seek refugee protection due to a fear of retribution for a refusal to pay extortion fees to a criminal gang. The Refugee Protection Division of the Immigration and Refugee Board [Board] has denied their claim determining that (i) no nexus to a Convention ground exists; and, (ii) that their risk was insufficiently personal.

III. Judicial Procedure

[3] This is an application, under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of a decision of the Board, dated January 4, 2011, rejecting the Applicants' refugee protection claim.

IV. Background

[4] The principal Applicant, Mr. David Daniel Balcorta Olvera, born in 1978; his spouse, Mrs. Maria Sofia Ricalde Peon, born in 1983; their daughter, Carla Sofia Balcorta Ricalde, born in 2004; and their son, Rodrigo Balcorta Ricalde, born in 2008, are Mexican citizens.

[5] The principal Applicant was a successful realtor in Cancun, Mexico.

[6] The principal Applicant alleges that a man claiming to belong to the Los Zetas, a criminal gang, called him on August 14, 2009. The man demanded 500,000 pesos stating, "all the companies were [paying] and ... it was [the Applicant's] turn". When the principal Applicant refused and hung up, the caller immediately called to repeat the demand.

[7] Such calls persisted and began to include threats to kill the principal Applicant or a family member. On August 17, 2009, the Applicant's spouse intercepted such a call.

[8] The principal Applicant then complained to police in Cancun. Shortly after complaining, he began to notice strange vehicles and people spying on his home.

[9] On August 30, 2009, the Applicant and his family returned home to find it had been broken into. Police did not respond to calls for assistance. On August 31, 2009, the principal Applicant reported the incident to police and the Procuraduria General de la Republica [PGR]. The PGR advised it would not become involved until someone was murdered or kidnapped.

[10] The Applicant's spouse received another call on September 2, 2009. The caller stated the gang "knew [where the family] lived because [it] already visited their home".

[11] On September 7, 2009, police told the principal Applicant that the PGR had the onus of protecting him. When he complained to the Quintana Roo State Human Rights Commission [Commission], the Commission advised that this position was incorrect but added that the police lacked resources and procedures necessary to protect him.

[12] In considering whether to move elsewhere in Mexico, the principal Applicant learned that the Los Zetas organization is ubiquitous in Mexico. It would likely find him anywhere he went in Mexico.

[13] The Applicants fled to Canada on September 13, 2009.

V. Decision under Review

[14] The Board denied the principal Applicant's claim under section 96 of the *IRPA* as his fear was unrelated to a Convention ground. The claim also fell outside subsection 97(1) of the *IRPA* because the principal Applicant's risks, as stated by the Board, were general, not personal.

[15] The Board did not accept that owning a business made the principal Applicant a member of a particular social group under section 96 of the *IRPA*. Citing *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, the Board stated that membership is measured by innate and immutable characteristics – by who a person is rather than what a person does. Occupation, which is neither immutable nor fundamentally connected to persona, could not in itself constitute a particular social group. In support of this, the Board referred to *Sanchez v Canada*, 2007 FCA 99.

[16] The Board did not accept that the Convention ground of political opinion applied. It rejected submissions that political opinion could be imputed to the principal Applicant because he had resisted the gang; reported this situation to the police, and complained of police inaction to the Commission. Rejecting a United Nations High Commission for Refugees "Guidance Note on Refugee Claims Relating to Victims of Organized Crime" [UNHCR Note] supporting this argument, the Board stated that resisting a gang does not constitute an expression of political opinion unless the resistance is rooted in political conviction.

[17] The Board found instead that the principal Applicant was targeted because of his business and perceived wealth. His fear, in short, resulted from criminality. Referring to *Larenas v Canada (Minister of Citizenship & Immigration)*, 2006 FC 159 and *Vickram v Canada (Minister of Citizenship & Immigration)*, 2007 FC 457, the Board observed that such fear had no nexus to a Convention ground. This criminality, moreover, pre-existed his complaints to the authorities – a sequence of events suggesting that his recourse to authority could not have motivated the persecution of the principal Applicant.

[18] The Board found that the principal Applicant's risks were insufficiently personal to withstand a section 97 of the *IRPA* analysis. The Board reasoned that section 97 of the *IRPA* protects against risks where "someone is targeted specifically because of who they are". Since criminal activity is a risk to all Mexicans, the principal Applicant's risk was considered not personal to him.

[19] Although criminal gangs target this Mexican subgroup – wealthy business owners – disproportionately, the principal Applicant's risks were generalized. The Board cited several cases, including *Osorio v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1459, *Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31, and *Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213, for the proposition that risks are not personal when faced generally by a large subgroup.

VI. Issues

[20] (1) Was it reasonable for the Board to find that there was no nexus to a Convention ground?

(2) Was it reasonable for the Board to find that the principal Applicant faced a general risk?

(3) Did the Board fail to consider material and contradictory evidence?

VII. Relevant Legislative Provisions

[21] The following legislative provisions of the *IRPA* are relevant:

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 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.
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

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

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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,

(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) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(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) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

VII. Position of the Parties

[22] The Applicants submit that the Board, in analyzing the existence of a section 96 nexus, did not conduct an individualized assessment. The Applicants argue that the Board misconstrued the law by stating that any act of persecution that is criminal cannot form a nexus. This alleged error in legal analysis caused the Board to overlook the particular facts of the case and, thus, to assess it on its own specific narrative.

[23] The Applicants dispute the Board's decision that the principal Applicant did not face a personal risk. Relying on *Pineda v Canada (Minister of Citizenship and Immigration)*, 2007 FC 365, the Applicants submit that an individual who is specifically targeted faces a personalized risk, even if the population faces risks generally. The Applicants argue that a specifically targeted individual person is necessarily subject to a greater risk than the general population.

[24] The Applicants also submit that the Board did not adequately consider material and contradictory evidence in the form of the UNHCR Note. The Applicants cite *Lopez v Canada (Minister of Citizenship & Immigration)*, 2007 FC 1341 for the proposition that failing to address contradictory evidence is a reviewable error. Relying on discussions of the UNHRC Handbook in *Lebedev v Canada (Minister of Citizenship & Immigration)*, 2007 FC 728, 314 FTR 286, the Applicants argue that the document should receive greater weight.

[25] The Respondent submits it was reasonable to find there was no section 96 nexus. Citing *Martinez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 502, the Respondent argues a nexus exists if persecution is based on an unchangeable and fundamental part of identity;

accordingly, occupation is not a nexus. Relying on *Karaseva v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 1725 (QL/Lexis) and *Suarez v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1036 (QL/Lexis), the Respondent continues that criminal victimization is not a nexus. Citing *Deheza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 521, the Respondent asserts that denouncing corruption will not constitute a nexus unless it is a "challenge to the corrupt state as a whole".

[26] The Respondent also argues that asking whether the principal Applicant's risk is personal involves re-weighing evidence. Citing several cases, including *Prophète*, above, and *Acosta*, above, the Respondent submits it was reasonable to find that the principal Applicant's risk was general simply due to the fact that a sufficiently large subgroup had experienced this risk generally. According to the Respondent, that is the case even if a claimant in such a subgroup is specifically targeted (*Perez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 345; *Katwaru v Canada (Minister of Citizenship and Immigration)*, 2010 FC 196).

[27] Finally, the Respondent argues that the Board was not required to consider the UNHCR Note more extensively because the Board was following Canadian law on point.

IX. Analysis

Standard of Review

[28] Whether the principal Applicant is a member of a particular social group is a question of mixed fact and law reviewable on a reasonableness standard (*Samuel v Canada (Minister of*

Citizenship and Immigration), 2012 FC 973). The reasonableness standard also applies to the Board's assessment of the principal Applicant's risk as generalized (*Samuel*, above).

[29] Since the reasonableness standard applies, the Court may only intervene in a case where the Board's reasons are not "justified, transparent or intelligible". To satisfy this standard, the decision must also fall in the "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).

(1) Was it reasonable for the Board to find that there was no nexus to a Convention ground?

[30] *Ward*, above, states that a "particular social group" under section 96 of the *IRPA* refers to: (i) groups defined by innate or unchangeable characteristics; (ii) groups whose members voluntarily associate for reasons so fundamental to human dignity that they should not be forced to forsake the association; or, (iii) groups associated by a former voluntary status, unalterable due to its historical permanence.

[31] Occupation does not ordinarily constitute a nexus under this ground. It relates to what one does rather than who one is; it does not fit within the first of the *Ward* groups (*Martinez*, above, at para 9-10). Nor is a particular occupation so fundamental to human dignity that one should not be forced to forsake it. In *Sanchez*, above, the Federal Court of Appeal held that requiring an applicant to abandon a side business interest would "not affect a fundamental principal of human rights" (at para 19). Finally, this Court has held that a building contractor is not within the third *Ward* category (*Chekhovskiy v Canada (Minister of Citizenship and Immigration)*, 2009 FC 970 at para 19-20).

[32] Given this jurisprudence, the Board's decision that the principal Applicant's business could not constitute a section 96 nexus was reasonable.

[33] The Federal Court of Appeal has held, in *Klinko v Canada (Minister of Citizenship and Immigration)* (2000), 3 FC 327, [2000] FCJ No 228 (QL/Lexis), that "a denunciation of ... existing [government] corruption is an expression of 'political opinion' [if] the corrupt elements so permeate the government as to be part of its very fabric" (at para 35). In *Deheza*, above, however, this Court found that a denunciation of police did not amount to an expression of a political opinion if it is "not against corrupt elements that have become part of the fabric of government" but rather "against one tightly-knit group of three individuals" (at para 32).

[34] In the present case, the Board found that the principal Applicant's resistance to the criminal gang did not amount to political opinion because it was not "rooted in political conviction". The record does not demonstrate that the principal Applicant reported the gang or the police out of a strong personal conviction in respect of corruption in Mexico. Rather, the record suggests that the principal Applicant sought help from authorities because he had been criminally victimized. As he did refuse to pay extortion fees and was afraid of retribution. Moreover, although the Board acknowledged evidence that criminal activity had increased after the principal Applicant's recourse to authority, it found that the principal Applicant had been targeted before he had complained. It was reasonable to conclude, as the Board did, that recourse to authority did not cause the principal Applicant's victimization.

[35] It was also reasonable for the Board to conclude that, in essence, the principal Applicant feared criminal victimization and that this could not serve as a nexus. This finding was consistent with the evidence and the case-law. In *Larenas*, above, the Federal Court held that "victims or potential victims of crime, corruption or personal vendettas, generally cannot establish a link between fear of persecution and Convention reasons" (at para 14).

(2) Was it reasonable for the Board to find that the principal Applicant faced a general risk?

[36] To be a person in need of protection under section 97 of the *IRPA*, an applicant must show, on a balance of probabilities, that his/her removal to Mexico would subject him/her personally, in every part of Mexico, to a risk to his/her life or cruel and unusual treatment that is not faced generally by other individuals in or from Mexico. The jurisprudence has consistently held that a risk may still be general, even if it is felt disproportionately by a large subgroup of a population (*Prophète*, above, at para 3 and 10).

[37] The jurisprudence is less settled, however, on whether persons personally targeted by criminal gangs face a generalized risk. One strand holds that claimants who have been specifically targeted face general risk if most of their countrymen (or a subgroup to which they belong) experience that risk generally (*Acosta*, above). The other is of the opinion that it is unreasonable to accept that a claimant has been specifically targeted and yet, nevertheless, to conclude that the risk is not personal simply because it is widespread in his or her country (*Pineda*, above).

[38] In the *Portillo* decision, above, Justice Gleason held that it was unreasonable to find that an applicant, who had been personally threatened by a criminal gang, faced a risk of general

criminality simply because criminal gang violence was rampant in the applicant's country of origin. "It is simply untenable," she wrote, "for the two statements of the Board to coexist: if an individual is subject to a *personal* risk to his life or risks cruel and unusual treatment or punishment, then that risk is no longer general." Such an approach, Justice Gleason held would strain section 97 of the *IRPA* to the point of irrelevance: "If the Board's reasoning is correct, it is unlikely that there would ever be a situation in which this section would provide for crime-related risks" (at para 36).

[39] Justice Gleason proposed the following test for determining the nature of the risk faced by an applicant. Firstly, one must assess whether the claimant "faces an ongoing or future risk ... what the risk is, whether such risk is one of cruel and unusual treatment or punishment and the basis for the risk" (at para 40). Secondly, the risk faced by the claimant must be compared to "that faced by a significant group in the country to determine whether the risks are of the same nature and degree" (at para 41).

[40] The undersigned member of this Court is in agreement with Justice Gleason's decision. Firstly, it is problematic to accept that a person who has been specifically targeted faces a risk that is faced generally by other individuals. The risk of an individual who is being targeted is qualitatively different from the risk of an individual who has a strong likelihood of being targeted. As such, the former cannot be faced generally. Secondly, the approach taken by the Board seems to empty section 97 of the *IRPA* of any application in the criminal context. As this Court has written in *Lovato v Canada (Minister of Citizenship and Immigration)*, 2012 FC 143, "section 97 must not be interpreted in a manner that strips it of any content or meaning. If any risk created by 'criminal

activity' is always considered a general risk, it is hard to fathom a scenario in which the requirements of section 97 would ever be met" (at para 14).

[41] It was unreasonable for the Board to find that the principal Applicant faced a general risk. It is irrational for the Board to accept the principal Applicant's allegations that he was specifically targeted by the Los Zetas and, yet, conclude that his particular risk was faced generally by other Mexicans. The risks of those standing in the same vicinity as the gunman cannot be considered the same as the risks of those standing directly in front of him.

(3) Did the Board fail to consider (pertinent) material and contradictory evidence?

[42] In respect of the UNHCR Note, the Board did not err in its approach. It did consider the document and found it to be inconsistent with Canadian jurisprudence; it did not assign the UNHCR Note any weight as specified above.

X. Conclusion

[43] For all of the foregoing reasons, the Applicants' application for judicial review is granted and the matter is returned for a hearing anew (*de novo*) before a differently constituted panel.

ORDER

THIS COURT ORDERS that the Applicants' application for judicial review be granted and the matter be returned for a hearing anew (*de novo*) before a differently constituted panel of the Refugee Protection Division. No question for certification.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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