

Federal Court



Cour fédérale

Date: 20121210

Docket: IMM-1734-12

Citation: 2012 FC 1460

Ottawa, Ontario, December 10, 2012

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

**PAULINA ALEXANDRA SANCHEZ
MANTILLA (A.K.A. PAULINA ALEXAND
SANCHEZ MANTILLA), JHONNY JAVIER
BILBAO MORILLO, EMILY GIULIANA
BILBAO SANCHEZ, and MARIA FABIOLA
MANTILLA PROANO**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision rendered by the Refugee Protection Division of the Immigration and Refugee Board of Canada (Board) on January 20, 2012, in which the applicants' claim for refugee protection pursuant to sections 96 and 97(1) of the Act was denied.

Factual Background

[2] The applicants are citizens of Ecuador and members of the same family. Paulina Alexandra Sanchez Mantilla (the principal applicant) is married to Jhonny Javier Bilbao Morillo (the second applicant). Emily Giuliana Bilbao Sanchez is their five (5) year-old daughter (Emily), and Maria Fabiola Mantilla Proano (Maria) is the principal applicant's mother.

[3] The principal and second applicants arrived in Canada on October 23, 2009 with their daughter Emily and applied for refugee status on the same day. Maria arrived in Canada on May 5, 2010, and also sought protection (Affidavit of the principal applicant, Applicants' Application Record, p 17).

[4] The second applicant is a psychologist. Using this training, the principal and second applicants developed a fourteen (14)-week motivational program based on Christian values towards the end of 2003 entitled "Skimming". Their first centers initially opened in the cities of Quito and Ambato in 2005. As their business expanded, they hired Ms. Patricia Mendoza and Mr. Santiago Lemos Jaramillo (Mr. Lemos) to work for them. Mr. Lemos was transferred to the Ambato location, but the applicants found out he was not following their program, was criticizing it and using their business name to make purchases. It is alleged that Mr. Lemos disagreed with the Christian focus of the program. The principal and second applicants dismissed Mr. Lemos and Ms. Mendoza on September 13, 2005. Mr. Lemos allegedly threatened the principal and second applicants that they would regret dismissing him.

[5] On September 14, 2005, the principal and second applicants travelled to the city of Riobamba to lease an additional space for their growing business. They were told that Mr. Lemos had already tried to rent the same space, but the owner rented it to the applicants because they had an existing relationship. On September 15, 2005, the principal and second applicants attended a public fair to promote their business. They were confronted by Mr. Lemos, who said they had stolen his facility in Riobamba. He then allegedly threatened to kill the second applicant and started fighting with him. The principal and second applicants managed to leave the fair with the help of bystanders. They claimed to have reported to the Attorney General's office the following day, but that they were told they would have to pay more money for a full investigation and chose not to pursue it further.

[6] In June 2006, the principal applicant's purse was stolen from her office, which contained her documents, bank statements, as well as keys to the office. Despite reporting the theft to the police, the principal applicant claims there was no investigation.

[7] The principal applicant asserts that when she was pregnant in 2007, they began receiving strange telephone calls at home and at their office in Quito. The callers were male, would ask for the principal or second applicant, and hang up. The callers allegedly knew when the principal applicant was alone at home and would threaten her on that basis, saying they knew she was alone and pregnant.

[8] In mid-February 2007, the principal applicant was alone in her home when individuals tried to break in. The principal applicant claims to have contacted the police, who told her no one was

available at the station to help. She called her neighbours who allegedly screamed at the men to leave, and they finally did. A similar episode is said to have occurred in October 2007, but the police came. Since no one had been hurt and nothing stolen, they could not do anything and did not let the principal applicant file a report. The principal and second applicants linked these events to Mr. Lemos because they both occurred when the second applicant was visiting Latacunga (and thus Mr. Lemos would have known the principal applicant was alone). The applicants state that they often called the police during the period of 2007-2008, but claim they never came.

[9] Following other problems with employees, the principal and second applicants had to dismiss a number of people. They encountered financial struggles which they attributed to Mr. Lemos's influence.

[10] The principal and second applicants moved on January 1, 2009 and continued to receive threatening phone calls. In May 2009, they moved in with the principal applicant's mother, Maria. The phone calls allegedly persisted.

[11] Ms. Mendoza allegedly told the principal and second applicants that Mr. Lemos believed they had cursed him, and that the only way to break the curse was to have sexual relations with their daughter, Emily. In September 2009, the principal and second applicants saw Mr. Lemos in church. Afraid for her daughter, the principal applicant went to the nursery where she claims she saw Mr. Lemos asking the person in charge for their daughter. The principal applicant took her daughter and Mr. Lemos allegedly ran away from the premises. Fearing for their daughter, they decided to leave in the last week of September 2009.

[12] The principal applicant's mother, Maria, had money stolen from her bank account in October 2009. Maria allegedly received several threatening phone calls after the principal and second applicants left with their daughter, and a vehicle reversed in her front door damaging it. In January 2010, a man allegedly tried to get into Maria's car without success since she managed to drive away. On January 29, 2010, a man succeeded in breaking the passenger window of her car and taking her purse with Maria's cell phone. That same evening, a man allegedly called the principal applicant's brother and other friends asking for her and the second applicant. Maria was able to make a police report for lost identification only, the theft being deemed minor. She was subsequently hit by a taxi driver, and when three (3) men got out of the taxi, they allegedly called out something similar to "say hi to Paulina (the principal applicant)". Maria tried to report all these events to the police, feeling they were connected, and went to the Prosecutor General's office on March 31, 2010. The police told her they could not act unless she made formal accusations and identified her attacker, which she could not do.

[13] The applicants' hearing before the Board was held on September 16, 2011 and November 24, 2011. The decision was rendered on January 20, 2012.

Impugned Decision

[14] The Board provides an extensive summary of the facts and allegations in the applicants' case (Tribunal Record, pp 4-9). It found no issue with their identities. The Board concluded that the applicants were not Convention refugees as they were allegedly persecuted by Mr. Lemos as victims of crime, corruption or vendettas – motives which are generally not within the definition of

a Convention refugee because of lack of nexus with one of the five grounds enumerated in section 96.

[15] Therefore, the Board followed with its analysis of factors under section 97, which it elaborated under the single subheading “Credibility”. The Board referred to the death threats received and the assault initiated by Mr. Lemos at the public fair in September 2005. The Board was ultimately of the view that there was no persuasive evidence that Mr. Lemos was involved in the series of events which the applicants claim have happened, aside from the incident at the public fair and the church. The Board held that Maria’s statement in her PIF that her attackers during the taxi incident had said “Say hi to Paulina” was an embellishment of her story, based on her uncertainty during questioning at the hearing.

[16] The Board concluded that, on a balance of probabilities, it was not credible that the claimants would be at risk to their lives or at risk of cruel and unusual treatment or punishment should they return to Ecuador. The applicants were therefore neither Convention refugees, nor persons in need of protection.

Issue

[17] The sole issue before the Court in this case is whether the Board’s decision is unreasonable. The applicants are not disputing the Board’s finding as it pertains to section 96 of the Act, but are arguing that his conclusion that they face no risk under section 97 of the Act is unreasonable.

Statutory Provisions

[18] The following provisions of the *Immigration and Refugee Protection Act* are applicable in these proceedings:

<p>PART 2 DIVISION 1 REFUGEE PROTECTION, CONVENTION REFUGEES AND PERSONS IN NEED OF PROTECTION</p>	<p>PARTIE 2 SECTION 1 NOTIONS D'ASILE, DE REFUGIE ET DE PERSONNE A PROTEGER</p>
<p>Convention refugee</p> <p>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,</p> <p>(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</p> <p>(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.</p> <p>Person in need of protection</p> <p>97. (1) A person in need of protection is a person in Canada whose removal to their</p>	<p>Définition de « réfugié »</p> <p>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 :</p> <p>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;</p> <p>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.</p> <p>Personne à protéger</p> <p>97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait</p>

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

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 themselves 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.

Person in need of protection	Personne à protéger
(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.	(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.

Standard of Review

[19] The parties agree that the applicable standard of review for questions of credibility assessment is that of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190). As such, the decision must fall “within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.” (*Dunsmuir*, above, at para 47).

Analysis

[20] The Court acknowledges the respondent’s argument that much deference must be shown to administrative decision-makers on questions of credibility. However, the Court is of the opinion that this case warrants its intervention.

[21] While an important portion of the Board’s decision is written under the “Credibility” subheading, it does appear from a careful reading of the reasons that the events recounted by the applicants were believed. However, the Board did not believe that Mr. Lemos was involved in all of the events. This is not a negative finding with regards to credibility since the applicants have no knowledge or proof of Mr. Lemos’s personal involvements in the events. They have, however, asserted their belief that he is the source of the incidents of the past few years. Without drawing any

negative conclusions with regards to the applicants' credibility, the Board goes on to dismiss their application because it was not persuaded that the same person was behind all the incidents that had plagued the applicants. The Court finds this conclusion to be unreasonable. The Court agrees with the applicants that the Board made an "adverse plausibility finding" without referring to contradictions or inconsistencies to support this conclusion (*Mahmood v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1526 at paras 14 and 16, 143 ACWS (3d) 1091 [*Mahmood*]).

[22] The Board stated that it did not find there was "persuasive evidence that Lemos was involved in any of these matters." [Emphasis added]; (Board's decision at para 37, Tribunal Record, p 14). The fact remains that there were many such "matters" and the applicants strongly believed that Mr. Lemos was responsible. The Board failed to refer and address the evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FCT 35, 1998 CanLII 8667) even though many documents were provided:

- a. a lease showing the applicants moved on January 1, 2009 (Applicants' Application Record, p 106);
- b. a declaration from Maria's maid pertaining to the phone calls received at Maria's house and ambushes of the vehicles (Applicants' Application Record, p 110);
- c. a letter from the church with regards to the incident allegedly involving Mr. Lemos with their daughter Emily (Applicants' Application Record, p 135);
- d. a letter from an employee about Mr. Lemos' threats upon dismissal and subsequent phone calls received at the office (Applicants' Application Record, p 139);
- e. a letter from a neighbour about the men breaking into the principal and second applicants' home (Applicants' Application Record, p 146);
- f. a complaint made in regards to the September 2005 incident at the fair (Applicants' Application Record, p 175);
- g. a complaint to the police about the principal applicant's purse and documents being stolen (Applicants' Application Record, p 177);
- h. a complaint to the police about Maria's money being stolen from her bank account (Applicants' Application Record, p 179);

- i. a complaint to the police about phone calls received at Maria's house (Applicants' Application Record, p 184);
- j. a complaint to the police about Maria's documents being stolen (Applicants' Application Record, p 187).

[23] However, despite this evidence, the Board concludes that "it is not credible that the claimants would be at risk to their lives [...] if they returned to Ecuador" (Board's decision at para 39, Tribunal Record, p 13). The Court finds it unreasonable to accept the sequence of incidents that has happened to the applicants, as the Board did, to make no negative assessment of credibility but to conclude that there is no risk on a balance of probabilities because the Board had concerns over Mr. Lemos' participation. In *Theophile v Canada (Minister of Citizenship and Immigration)*, 2011 FC 961, 396 FTR 33, Justice Russell held that a proper analysis under section 97 should have been done even though the applicant could not prove who his attacker was. Justice Russell also held that the evidence indicated "some kind of targeting of the Applicant and strenuous attempts to kill him" (*Theophile*, above, at para 62).

[24] In the case at bar, the Court is of the view that to seemingly accept the factual basis supporting the applicants' claim and then to conclude that it is not credible that they would be at risk is a contradictory and unreasonable finding. The decision does not fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, para 47). The application for judicial review will therefore be granted.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted. No question is certified.

“Richard Boivin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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