

Date: 20080926

Docket: IMM-724-08

Citation: 2008 FC 1085

Ottawa, Ontario, September 26, 2008

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

RAUDA PANIAGUA, Jose Edenilson

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application by Jose Edenilson Rauda Paniagua for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (Board) rendered on January 23, 2008. The Board denied Mr. Rauda Paniagua's claim to refugee protection on the grounds that he had been the victim of a common and generalized crime not amounting to persecution and that he had failed to establish that state protection in El Salvador was unavailable. It is from those findings that this application arises.

I. Background

[2] Mr. Rauda Paniagua initially came to Canada under a work permit. When he was laid off from work in Manitoba in March 2006 he returned to El Salvador but by June of that year he was back in Canada seeking refugee protection. His claim to protection was based on an allegation of threats of death made against him and his family by members of the Mara Salvatrucha (MS) gang who were attempting to recruit him. For a time Mr. Rauda Paniagua attempted to avoid detection in El Salvador but he eventually fled the country. It is undisputed that at no time did he seek protection from state authorities before leaving for Canada.

The Board Decision

[3] The Board concluded that the risk faced Mr. Rauda Paniagua arose from general criminal activity that was “no greater than that faced by the population at large”. After reviewing the country condition evidence, the Board found that there were available options for seeking state protection from gang activity in El Salvador. Because Mr. Rauda Paniagua had failed to approach the state, the Board found that he had not reasonably exhausted the courses of action open to him to seek protection in El Salvador prior to seeking protection in Canada.

II. Issues

[4] Did the Board err in its treatment of the evidence dealing with the issue of state protection?

III. Analysis

[5] The standard of review for the issue raised by this application is reasonableness: see *De Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 514, [2008] F.C.J. No. 650, at para. 8.

[6] The Board's finding that Mr. Rauda Paniagua faced only a generalized risk of harm from criminal activity in El Salvador is at best ambiguous. The decision seems to acknowledge that as a young unemployed male from a poor neighbourhood in San Salvador he fit the basic profile for gang recruitment. The Board also recognized the serious risk of reprisal that could arise from a refusal to join the MS once approached. The Board concluded this aspect of its analysis by stating that "the risk faced by the claimant was criminal activity and was no greater than that faced by the population at large". On its face this statement is contradicted by the Board's earlier observation that Mr. Rauda Paniagua fit the profile of a person who did face a heightened risk of harm from the MS. When read in the context of the entire decision, however, the above statement may be nothing more than an awkward attempt to say that, even with a profile of heightened risk, Mr. Rauda Paniagua's situation was not unique and fell within a generalized criminal risk experienced by many others in El Salvador. In the end, I need not decide whether this apparent contradiction constitutes a reviewable error because I cannot find fault with the Board's state protection finding.

[7] The Board decision acknowledged the seriousness of the gang problem in El Salvador and the very high crime and murder rates associated with that activity. Clearly the Board was aware of the problems with gang related law enforcement in El Salvador.

[8] I do not agree that the failure by the Board to specifically refer to all of the documentary evidence dealing with the gravity of the problem of gang violence in El Salvador constitutes a reviewable error. The Board understood that state protection in El Salvador was not perfect but it also recognized correctly that perfection is not the standard by which the sufficiency of protection is to be measured. The Board identified several state initiatives directed at combating gang activity; indeed some of the country condition reports relied upon by Mr. Rauda Paniagua speak directly to the effectiveness, in part, of the government's "tough" anti-gang reforms. Against this evidentiary record it was open to the Board to be very concerned that Mr. Rauda Paniagua had made no effort to seek state protection before coming to Canada. Although the problems of gang violence in El Salvador were unquestionably profound, there was plausible evidence that the state protection apparatus in that country continued to function. It is not for the Court to reweigh the evidence or to substitute its views of that evidence for those of the Board. While a different conclusion could have been reached on this evidence, I am not satisfied that the Board's treatment of the state protection evidence or the conclusions it reached were unreasonable.

[9] The circumstances of this case seem to me to be materially indistinguishable from those addressed by Justice Michel Shore in *Ayala v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 690, [2007] F.C.J. No. 939, where he held as follows:

23 It is well established that the Board is assumed to have weighed and considered all of the evidence unless the contrary is shown. Hence, the Court has also ruled on numerous occasions that it is also within the Board's discretion to exclude evidence that is not material to the case before it. The Board's decision, not to admit evidence submitted before it or to refer to each and every piece of evidence,

does not amount to a reviewable error. (*Yushchuk v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1324 (QL), at paragraph 17.)

24 In fact, the Board has great flexibility in terms of the evidence that it may consider. It is not bound by any legal or technical rules of evidence and may rely on any evidence it considers credible or trustworthy in the circumstances. (IRPA, subsection 173(c) and (d); *Thanaratnam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 349, [2004] F.C.J. No. 395 (QL), at paragraph 7.)

25 The Applicants' contentions, that the Board's conclusions were not based upon the facts of the case and that it ignored the Applicants' documentary evidence that they were threatened by members of the gang not to go to the police out of fear of these threats, are not well founded. Albeit, the Board noted in its decision that the principal Applicant simply did not bother to approach the Salvadorian authorities after allegedly receiving **a note on his truck**, it is clear that the Board properly understood the facts of the case, despite the fact that there is no mention of such a note in the principal Applicant's PIF. (Decision of the Board, at pages 1-2; Transcript of the hearing, at pages 4-7.)

26 Furthermore, contrary to the Applicants' allegations, the Board based its decision on reliable documentary sources. (Decision of the Board, at pages 8-9; Transcript of the hearing, at pages 9-10.) The general documentary evidence submitted by the Applicants indicating that there are problems with the protection regime for victims of gang violence is of no bearing since the Board recognized that there were gang violence issues in El Salvador.

27 Nonetheless, in considering the Applicants' particular circumstances, the Board concluded that they failed to demonstrate, with clear and convincing evidence, that they would not be able to obtain state protection especially since the police did respond in this particular case; however, the principal Applicant chose not to take advantage of such state protection.

28 The onus was on the Applicants to provide clear and convincing evidence to show that state protection would be unavailable. The existence of documents suggesting that the situation in El Salvador is not perfect, is not, by itself, clear and convincing confirmation that state protection is unavailable, especially when

there are numerous other documents indicating that state protection is available...

(Emphasis in original.)

[10] In the result this application for judicial review is dismissed. No issue of general importance arises from these reasons and no question will be certified.

JUDGMENT

THIS COURT ADJUDGES that this application for judicial review is dismissed.

“ R. L. Barnes ”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: Rauda Paniagua
v.
MCI

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**REASONS FOR JUDGMENT
AND JUDGMENT BY:** Mr. Justice Barnes

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