Federal Court

Cour fédérale

Date: 20110624

Docket: IMM-5598-10

Citation: 2011 FC 768

Ottawa, Ontario, June 24, 2011

PRESENT: The Honourable Mr. Justice Near

BETWEEN:

VICTOR LOZANO NAVARRO
GABRIELA HAMDAN LOPEZ
VICTOR SAID LOZANO HAMDAN
RICARDO LOZANO HAMDAN

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated August 18, 2010, wherein the Applicants were determined to be neither Convention refugees nor a persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, RS 2001, c 27 [IRPA].

[2] The Board found that the persecution feared by the Applicants lacked nexus to a Convention ground under section 96, and was a generalized rather than personalized risk, so failed to meet the requirements of section 97.

[3] For the reasons that follow, this application is dismissed.

I. Background

A. *Factual Background*

[4] The Principal Applicant (PA), Victor Lozano Navarro, his spouse Gabriela Hamdan Lopez and their minor children, Victor Said Lozano Hamdan and Ricardo Lozano Hamdan (collectively, the Applicants) are citizens of Mexico. The Applicants fear persecution at the hands of members of Antelmos, a branch of the drug cartel known as La Familia.

[5] The PA owned a mini-supermarket in Cuernavaca, Mexico. He claims to have first become the target of extortion by La Familia in September 2007. Members of the gang came to the PA's store to collect money because the sister of the PA's wife, a business owner and prior victim of extortion, had fled to Canada. The PA was to take her place and buy protection from the gang. Thereafter, men would come to the store weekly to take money. When the cash in the till was insufficient, they would take merchandise instead.

[6] The PA alleges that he reported the first incident to the Public Ministry, but to no avail. When he reported a second assault, the Public Ministry had no record of the first denunciation. The PA claims he returned to the Public Ministry several times, but they were never able to help him. He eventually turned to the Human Rights Commission to report the failure of the Public Ministry and police to act. Similarly, this produced no result.

[7] The extortion continued. The PA alleges that he was threatened, physically assaulted and his wife was sexually assaulted. In December 2007, the Applicants fled to Mexico City. They returned to Cuernavaca in March 2008. The extortion resumed. The PA claims that when the extortionists visited his shop on December 5, 2008 he told them that he had no money. They left empty-handed. Five days later, on December 10, 2008, the PA's son, Said, was kidnapped from school. He was returned to his family after they paid a 100,000 pesos ransom.

[8] The Applicants again fled to Mexico City. They stayed until January 2009 when they found La Familia graffiti on the front door of the PA's parents' house where they were staying. The Applicants then fled to PA's sister's home in the state of Cautitlan.

[9] The PA returned one last time to Cuernavaca in March 2009. He tried to report the kidnapping to the police and sold his business.

[10] The Applicants fled to Canada on March 16, 2009 and made claims for refugee protection on April 15, 2009.

B. *Impugned Decision*

[11] Although the Board made a negative credibility finding with respect to the PA's efforts to seek state protection, the determinative issue for the Board was generalized risk.

[12] The Board found that the Applicants failed to establish a link between their fear of persecution and one of the Convention grounds in the definition of Convention refugee. The Board determined that the Applicants were victims of crime, and that they were not targeted due to race, nationality, political opinion or membership in a particular social group. As a result, the claim failed under section 96 of the IRPA.

[13] The Board found that the risks feared by the Applicants were risks generally faced by other citizens in Mexico, and therefore their claim was excluded by sub-paragraph 97(1)(b)(ii) of the IRPA. The Board took "generally" to mean "prevalent" or "widespread" , and therefore even though counsel argued that the risk was somewhat particularized because the PA was a store owner and had a sister-in-law who had been extorted in the past, the risk was still a risk that is faced generally by other individuals in Mexico. This view was summed up at paragraph 23 of the decision:

> In view of the evidence before me, I find therefore, that the claimant was a victim of crime, but that these crimes are widespread in Mexico and not specific to the claimant. The Refugee Protection Division does not have a specific legal mandate that extends its protection to persons such as this claimant. I find the claimants' fear is a generalized one. The fear articulated by the claimants is one faced by the general population of Mexico.

II. Issues

[14] This application raises the following issues:

(a) Did the Board err in finding that the Applicants' claim lacked nexus?

(1) Political opinion

(2) Social group

(b) Did the Board err in finding that the fear faced by the Applicants was generalized?

III. Standard of Review

[15] The issues raised by the Applicants are issues of mixed fact and law and are reviewable on a standard of reasonableness (see *Ospina v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1035 at para 16; *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

[16] As set out in *Dunsmuir*, above, reasonableness requires consideration of the existence of justification, transparency, and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of acceptable outcomes that are defensible in respect of the facts and law.

IV. Argument and Analysis

A. *Did the Board Err in Finding that the Applicants' Claim Lacked Nexus?*

[17] The Applicants submit that the Board erred in finding that there was no nexus between the Applicants' claim and the enumerated grounds under section 96. The Applicants argue that due to the nature and facts of their claim, the Board should have recognized that they fall into either political opinion, or social group, or both.

(1) Political Opinion as a Ground Under Section 96

[18] The Applicants submit that the political opinion ground under section 96 is engaged in the present matter because the Applicants resisted and defied the persecutors by reporting them to the authorities several times. The Applicants rely on the two-part test set out in *Klinko v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 327, [2000] FCJ No 228 (QL), to argue that this amounts to expressing a political opinion given that the government of Mexico has endeavoured to eradicate drug cartels such as La Familia, drug dealing in general, and the endemic corruption among agents of the state that contributes to its existence.

[19] The Respondent takes the position that the jurisprudence of this Court establishes that victims of criminal activity, including extortion, do not meet the requirement of having a political opinion merely by filing a report with the police. The Respondent distinguishes *Klinko*, above, on the facts.

[20] Both parties cite the definition of political opinion as a basis for a well-founded fear of persecution as articulated by the Supreme Court in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 746. For this purpose a political opinion includes any opinion on any matter in which the machinery of state, government, and policy may be engaged. The Applicants argue that filing a police report constitutes either having a political opinion or being imputed with one which engages the machinery of the state. The Respondent disagrees.

[21] I am not persuaded that the act of filing a police report alone or resisting criminality generally necessarily constitutes an imputed political opinion. The Applicants characterize such an act as an opinion about a matter that engages the machinery of the state, as the state itself generally opposes criminality. In my opinion, this is not a workable argument. The logical repercussion being that everyone who files a police report must be imputed with an anti-criminal, pro-government political opinion. The Applicants suggest that their refusal to cooperate with La Familia marked them as supporters of the government and the rule of law. However, in my view, absent any evidence that the Applicants' resistance to handing over their money to criminals was a political act, as opposed to an act of economic self-sufficiency, I am satisfied that it was reasonably open to the Board to find that the Applicants were not targeted due to a real, or imputed, political opinion. As the Supreme Court stated in *Ward*, above, at paragraph 86, "Not just any dissent to any organization will unlock the gates to Canadian asylum; the disagreement has to be rooted in a political conviction."

[22] The caselaw relied upon by the Applicants is, as argued by the Respondent, distinguishable on the facts. In *Klinko*, above, the claimant filed a formal complaint about widespread corruption among government officials with the regional governing authority. As a result, he suffered retaliation. The Court of Appeal found that the opinions expressed by the claimant fell within the definition of political opinion, as widespread government corruption is a matter in which the "machinery of the state, government and policy may be engaged". The Court explained, at para 35:

> [35] Indeed, the record contains ample evidence that the machinery of government in the Ukraine was actually "engaged" in the subject-matter of Mr. Klinko's complaint. The country information reports, in the present instance, contain statements by the President of Ukraine and two senior members of the Security Service of Ukraine about the extent of corruption within the government and the need to eradicate it both politically and economically. Where, as in this case, the corrupt elements so permeate the government as to be part of its very fabric, a denunciation of the existing corruption is an expression of "political opinion". Mr. Klinko's persecution, in my view, should have been found to be on account of his "political opinion".

[23] Though the government of Mexico may be dedicated to eradicating drug cartels, I agree with the Respondent that the extortion practiced by drug cartels does not permeate the Mexican government so as to be part of its very fabric. Furthermore, the PA's denunciations were limited to specific incidents and did not incorporate any general criticisms regarding the cartel's lack of respect for the rule of law.

[24] The Applicants also rely on *Gomez v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 647, 213 FTR 54. *Gomez* stands for the proposition that victims of extortion may establish nexus to the definition when the motivation for the extortion may be political. However, here, unlike in *Gomez*, there was no evidence before the Board to suggest that the cartel viewed

non-payment as an act of political support for their opponents. Also, as noted by the Respondent, unlike the present matter, in *Gomez*, the Board made no negative credibility finding.

(2) Social Group as a Ground Under Section 96

[25] Both parties cite the definition of social group established in *Ward*, above. The Supreme Court recognized three categories:

> (1) groups defined by an innate, unchangeable characteristic; (2) groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and (3) groups associated by a former voluntary status, unalterable due to its historical permanence.

[26] The Applicants submit that the Board ought to have considered that they might fit into the third category. That is, reporting to the authorities and refusing to co-operate with the cartel is an immutable part of the Applicants' past such that they constitute a particular social group.

[27] Again, this argument fails. As the Respondent points out, the Supreme Court in *Ward*, above, rejected the broad interpretation of particular social group. The Court reasoned that due to the surrogate nature of the international refugee system, viewing "an association of people as a "particular social group" merely by virtue of their common victimization as the objects of persecution," (at paragraph 56) would not be sufficient to meet the definitions of the Convention because, "[a]lthough the delegates inserted the social group category in order to cover any possible lacuna left by the other four groups, this does not necessarily lead to the conclusion that any association bound by some common thread is included" (at paragraph 61). The Court cautioned that

"Canada should not overstep its role in the international sphere by having its responsibility engaged whenever any group is targeted." (Paragraph 69)

[28] The Board's finding regarding lack of nexus was entirely reasonable. It was neither perverse, nor capricious, and was made with regard to the totality of the evidence.

B. *Did the Board Err in Finding that the Risk Faced by the Applicants was Generalized?*

[29] The Board found generalized risk to be the determinative issue, because the risk of extortion is a risk of general criminality that is faced by everyone in Mexico. The Applicants submit that this is in error, as the evidence plainly showed that the Applicants were targeted because the PA's sister-in-law failed to make her extortion payments. The Applicants were specific targets over a period of time, and as such, the risk was individualized.

[30] The Respondent disagrees. The evidence showed that La Familia were known for extortion and there were rumours of extortion in the neighbourhood. Thus, the Board reasonably concluded, "the risk faced by the Applicants is a generalized one, due to the nature of the activities and widespread influence of La Familia." The evidence showed that the risk was not personalized, and accordingly the Board reasonably concluded that the Applicants did not fall within the scope of section 97.

[31] I accept the Respondent's submissions on this point. In order to fall under section 97 of the IRPA, a claimant must show that a return to her country will expose her personally to a risk to life

or serious harm. Systemic and generalized violations of human rights evidenced through country documentation will not be sufficient to ground a section 97 claim absent proof that links the general documentary evidence to a claimant's specific circumstances. The risk cannot be indiscriminate or random (*Vickram v Canada (Minister of Citizenship and Immigration)*, 2007 FC 457, 157 ACWS (3d) 609 at para 14). It is an objective test, which considers the present or prospective risk faced by the claimant (*Sanchez v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 99, 62 Imm LR (3d) at para 15).

[32] The Applicants in the present matter can link their personal circumstances to the documentary evidence submitted. As recognized by the Board, however, the problem for the Applicants is that the documentary evidence equally illustrates the prevalence of La Familia's extortion practices throughout Mexico. In short, the fear articulated by the Applicants is shared by many citizens of Mexico.

[33] In recent years, this Court has been tasked with specifying what constitutes a personalized risk as required by section 97. Justice Danièle Tremblay-Lamer succinctly summed up the challenge presented by a section 97 analysis in *Prophète v Canada (Minister of Citizenship and Immigration)*, 2008 FC 331, 70 Imm LR (3d) 128, affirmed 2009 FCA 31, 387 NR 149 at para 18:

> [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 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.

[34] Justice Paul Crampton recently synthesized the Court's jurisprudence on claims advanced under section 97 featuring exactly the issue identified by Justice Tremblay-Lamer in *Prophète*, above – that is, a risk that is personalized but also widespread in nature. At the end of his judgment in *Guifarro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 182, Justice Crampton neatly laid out the current approach of the Court with respect to claims similar to those of the Applicants in the present matter:

> [33] Given the frequency with which claims such as those that were advanced in the case at bar continue to be made under s. 97, I find it necessary to underscore that is now settled law that claims based on past and likely future targeting of the claimant will not meet the requirements of paragraph 97(1)(b)(ii) of the IRPA where (i) such targeting in the claimant's home country occurred or is likely to occur because of the claimant's membership in a sub-group of persons returning from abroad or perceived to have wealth for other reasons, and (ii) that sub-group is sufficiently large that the risk can reasonably be characterized as being widespread or prevalent in that country. In my view, a subgroup of such persons numbering in the thousands would be sufficiently large as to render the risk they face widespread or prevalent in their home country, and therefore "general" within the meaning of paragraph 97(1)(b)(ii), even though that subgroup may only constitute a small percentage of the general population in that country.

[35] I share my colleague's position. Whether the sub-group of the population affected indiscriminately in this case is described as people who appear wealthy, or small business-owners, or small business owners with sisters-in-law who own small businesses, the Board did not err in determining that the risk of extortion faced by the Applicants is a generalized risk faced by all people in Mexico.

[36] With respect to the Applicants' submission that the Board erred in failing to individually assess the risk faced by the minor applicant, I also accept the Respondent's submission. The

evidence showed that the kidnapping of the minor son was inextricably linked to the extortion, and thus to the same generalized risk faced by the entire family. The Applicants' submission that kidnapping in Mexico cannot possibly be considered a generalized risk due to the population size is nonsensical. To be characterized as generalized, a risk must only be random or indiscriminate, not statistically-probable, as the Applicants seem to suggest.

Other Arguments raised by the Applicants

[37] The Applicants raise two other issues in their written submissions. Neither is serious.

[38] Firstly, the Applicants argue that the Board's decision violates section 7 of the Charter and the principle of non-refoulement. As the Respondent submits, this argument is premature. The Applicants will not be removed to Mexico without an opportunity to have their risk re-assessed through a pre-removal risk assessment.

[39] Secondly, the Applicants submit that the Board made unreasonable credibility findings with respect to the PA's efforts to seek state protection. I disagree. Even if I am wrong, the Board made it clear that the determinative issue was generalized risk.

V. Conclusion

[40] No question to be certified was proposed and none arises.

[41] In consideration of the above conclusions, this application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

" D. G. Near "

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-5598-10**
STYLE OF CAUSE:	**VICTOR LOZANO NAVARRO ET AL. v. MCI**
PLACE OF HEARING:	**TORONTO**
DATE OF HEARING:	**APRIL 20, 2011**
REASONS FOR JUDGMENT AND JUDGMENT BY:	**NEAR J.**
DATED:	**JUNE 24, 2011**

APPEARANCES:

Daniel M. Fine	FOR THE APPLICANTS
Nur Muhammed-Ally	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Daniel M. Fine Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General Canada Toronto, Ontario	FOR THE RESPONDENT