Federal Court  Cour fédérale

Date: 20120604

Docket: IMM-4045-11

Citation: 2012 FC 682

Ottawa, Ontario, June 4, 2012

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

JOSÉ DANIEL LUNA PACHECO
AND MARTHA ANDREA NAVA ESPINOZA

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The male applicant, José Pacheco, is a citizen of El Salvador. His wife, Martha Espinoza, is a citizen of Mexico. They seek judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (hereafter the Board), dated 26 May 2011, which refused their applications to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection* Act, SC 2001, c 27.

[2] Mr. Pacheco is afraid of the Mara Salvatrucha (Maras) gang in El Salvador. He had an argument with members of the gang in 1998 and was beaten by them. In 2003 he was asked to join the Maras, refused and was threatened. He fled to Guatemala in January 2004 and from there to Mexico. He entered the USA in February 2004.

[3] Ms. Espinoza fears a family from her town in Mexico; the Muñiz family. In 2003 a feud began between the two families and damage was done to her home. The police were informed and a denunciation was filed. She fears that the Muñiz family are associated with a drug cartel, Los Zetas. Her family filed another denunciation against the Muñiz family in 2009 and a member of the Muñiz family was arrested, prosecuted and imprisoned. A protection order was issued by the Mexican authorities enjoining the Muñiz family from harming the applicant's family.

[4] Ms Espinoza fled Mexico for the USA in August 2006 where she met her husband and they had their child Nava. The family came to Canada and claimed protection on 17 December 2009. The claims were joined and heard together by the Board. Nava's claim, as a US citizen, was denied in oral reasons during the hearings. She is not a party to this application.

[5] The Board found that neither applicant's fear was linked to a Convention ground and that both applicants were afraid of crime. It analysed their claims only under section 97 of the Act. In the case of both applicants, the Board found that their failure to claim in the USA demonstrated a lack of subjective fear. It rejected their explanations that they believed their claims would be unsuccessful.

[6] With respect to Mr. Pacheco, the determinative issue for the Board was the generalized nature of the risk of harm he faced in El Salvador. The Board examined evidence from the Immigration and Refugee Board's National Documentation Package for El Salvador which indicated that El Salvador was one of the most dangerous countries in the world. The evidence before it led the Board to conclude that the risk of crime and violence at the hands of gangs and drug cartels was widespread in El Salvador. It found that the risk faced by the applicant was not personalized.

[7] Regarding the claim of Ms. Espinoza, the Board found that Mexico is a democratic republic with functioning police and security forces and a functioning judiciary. It found that there were avenues for the applicant to seek state protection, including in circumstances where protection might initially be denied because of corruption. Although Ms. Espinoza had alleged that the Muñiz family was linked to the Los Zetas who were in turn linked to the police, the Board noted that a member of the Muñiz family had been prosecuted for the attack on her family and a protection order had been issued against the Muñiz family. It concluded that the applicant had not provided clear and convincing evidence that she would not receive adequate state protection if she were returned to Mexico.

ISSUES:

[8] The parties raised a number of procedural issues respecting irregularities in the service and filing of documents and the content of affidavits. The applicant sought to have the respondent's memorandum of argument struck for failure to serve the notice of appearance in a timely manner.

The respondent asked that the applicants' affidavit evidence be struck for failure to comply with paragraph 10(2) (d) of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22. These problems arose through human error and a failure to communicate between counsel. The procedural issues were dealt with in oral reasons at the outset of the hearing. Neither the memorandum of argument nor the affidavit were struck. Counsel were reminded of the importance of conducting the preliminary steps in the proceedings so as to ensure a hearing on the merits in accordance with Rule 3 of the *Federal Courts Rules*, SOR/98-106.

[9] The applicants raised concerns about the adequacy of the Board's reasons in their written materials. These concerns were not pressed at the hearing. In any event, as instructed by the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 14, "the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes." The adequacy of reasons is no longer a matter of procedural fairness. The Board's reasons must be analysed in considering the reasonableness of the decision as a whole.

[10] The substantive issues on this application were:

1. Whether the Board erred in analyzing their claims only under s. 97 of the Act;

2. Whether the Board's findings of state protection and generalized risk were reasonable?

ANALYSIS:

Standard of Review

[11] The applicants challenge the Board's interpretation of the Convention refugee standard in section 96 of the Act and its application to their circumstances. The Board's understanding of the proper legal test is reviewable on the standard of correctness: *Singh Sahota v Canada (Minister of Citizenship and Immigration)*, 2011 FC 739 at para 7.

[12] Whether the Board properly considered both ss. 96 and 97 claims is a matter to be determined in the circumstances of each case. A failure to consider a ground advanced under s. 96 constitutes a misapprehension of the evidence and is to be evaluated on the reasonableness standard: *Vilmond v Canada (Minister of Citizenship and Immigration)*, 2008 FC 926 at para 13. It is well established that the standard of review on a determination under section 97(1) is reasonableness: *Guerilus v Canada (Minister of Citizenship and Immigration)*, 2010 FC 394 at para 9.

Did the Board fail to properly analyse the claims under section 96(1) of the Act?

[13] The applicants submit that they both claimed protection on the basis of their membership in a particular social group, but the Board did not consider these claims. They argue that the Board should have conducted at least a minimal analysis of their claims under section 96 because there was evidence before it on this issue and they had advanced their claims on this basis.

[14] The claims were: in the case of the male applicant, that he belonged to a group of young El Salvador males targeted for extortion and for recruitment by the Maras and; in the case of the female applicant, that she was part of a group of people targeted by Los Zetas with the complicity of the Mexican police.

[15] The Board's finding that the applicants had not established a nexus between their fears and one of the five enumerated Convention grounds outlined in section 96 of the Act was reasonable. It is well established that victims of crime individually cannot establish a nexus to a Convention ground: see *ML v Canada (Minister of Citizenship and Immigration)*, 2009 FC 770 at para 15; and *Vargas v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1019 at para 6. The fact that a number of people experience the same risk does not transform the risk from one of crime to one of persecution within the meaning of section 96. Accordingly, the Board did not err in analysing the applicants' claims only under s.97.

[16] Even if I were to find that the Board's s.96 determination in relation to the female applicant was flawed, the Board's state protection finding was fatal to her claim.

The State Protection finding

[17] The applicants challenge the Board's finding that Ms. Espinoza had not rebutted the presumption that Mexico would be able to protect her. The Board made the following relevant findings of fact:

1. Mexico is a democracy with functioning democratic institutions;

2. A member of the Muñiz family was arrested, convicted, and sentenced for acts perpetrated against the female applicant's family; and

3. The female applicant's family had been granted a protection order against the Muñiz family.

[18] Having regard to the Federal Court of Appeal's direction in *Canada (Minister of Citizenship and Immigration) v Flores Carillo,* 2008 FCA 94, the evidence to rebut the presumption of state protection must be clear and convincing. By her own testimony, the applicant had taken steps to seek protection from the Muñiz family and these efforts had been at least partly successful. Her evidence did not meet the clear and convincing threshold *Flores Carillo* requires to rebut the presumption.

Generalized or personalized risk

[19] The Board concluded that the male applicant faced only a generalized risk of crime, so he was excluded from protection by subparagraph 97(1) (b) (ii) of the Act.

[20] The applicants contend that the Board ignored evidence that the Maras had targeted him for recruitment and had threatened him when he refused to join the gang and because of his alleged interest in the leader's girlfriend. They say that the Board did not take into account the evidence provided by Mr. Pacheco's sister to the effect that the Maras were continuing to look for him. The evidence of his sister was to the effect that after years of annually visiting her family in El Salvador without incident, she received threatening phone calls in 2010 indicating that the Maras were still looking for her brother to pay a "debt" that remained owing to them.

[21] The applicants contend further that the Board ignored evidence that the police in El Salvador are corrupt and involved with the Maras, that the judiciary is corrupt, and that the Maras torture and kill people. They argue that the evidence before the Board showed that the male applicant was at a greater risk than the general population and it was unreasonable for it to conclude otherwise.

[22] Justice Russel Zinn helpfully parsed the elements of subparagraph 97(1) (b) (ii) in *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1210 at paragraphs 26-28. He found that if a claimant is to be determined a person in need of protection it must be found that:

> a. The claimant is in Canada;
>
> b. The claimant would be personally subjected to a risk to their life or to cruel and unusual treatment or punishment if returned to their country of nationality;
>
> c. The claimant would face that personal risk in every part of their country; and
>
> d. The personal risk the claimant faces "is not faced generally by other individuals in or from that country."

[23] Justice Zinn noted that the majority of cases turn on the last condition. Before determining whether the risk faced by the claimant is one generally faced by others in the country, the decision maker must (1) make an express determination of what the claimant's risk is, (2) determine whether that risk is a risk to life or a risk of cruel and unusual treatment or punishment and (3) clearly express the basis for that risk.

[24] In this case, the Board characterized the claimant's risk as being a "victim of crime and violence at the hands of criminal gangs and drug traffickers", a risk that was prevalent or widespread in El Salvador. It went on to say that:

> Although Cesar also accused the claimant of having interest in his girlfriend, based on the totality of the evidence adduced, the panel finds the claimant fears being a victim of generalized criminality due to a generalized risk of harm in El Salvador for persons such as in this claimant's particular circumstances.

[25] While not everyone in El Salvador is threatened with death for being interested in Cesar's girlfriend, it was open to the Board to conclude that it was unlikely that the Maras would continue to be interested in the applicant for that reason seven years after his departure. The basis for his claim was primarily that he had refused the Maras's recruitment offer and that he would be targeted for that reason.

[26] The Board noted that the fact that a claimant is personally at risk does not mean that the risk is not one faced generally by others in that country. It found that the risk was "widespread" or "prevalent" in the country. In *Paz Guifarro v Canada (Minister of Citizenship and Immigration)*, 2011 FC 182, Justice Paul Crampton, as he then was, stated at paragraph 32 that:

> [32] … [It] is not an error for the RPD to reject an application for protection under section 97 where it finds that a personalized risk that would be faced by the applicant is a risk that is shared by a sub-group of the population that is sufficiently large that the risk can reasonably be characterized as being widespread or prevalent in that country. This is so even where that sub-group may be specifically targeted. It is particularly so when the risk arises from criminal conduct or activity.

[27] The conclusion that the risk feared by the claimant is one that is faced generally by the population of El Salvador was within the range of possible outcomes defensible on the facts and law. It therefore meets the standard of reasonableness as defined by the Supreme Court in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47 and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59.

[28] The applicants proposed that I certify the following question:

> In light of the diverse rulings made by the Refugee Determination Division and by a great number of justices of the Federal Court, what is the standard to be applied or the true meaning of a person in need of protection when deciding a claim under s.97 of the IRPA?

[29] The respondent is opposed to certification of this question on the ground that it is "cryptic" and would not be dispositive of an appeal. I agree. The supposed divergence among the decisions of the Board and this Court does not stem from a difference of opinion on the interpretation of the law, in my view. Rather, if it exists, it arises from the varying circumstances that must be considered in applying subparagraph 97(1) (b) (ii) in particular cases. Those circumstances are not uniform and each case must be determined on its own facts.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the application for judicial review is dismissed; and

2. no questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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