Federal Court  Cour fédérale

Date: 20130325

Docket: IMM-3671-12

Citation: 2013 FC 298

Ottawa, Ontario, March 25, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

CANVILLE ROBERTS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant has brought this application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board [panel], made on March 20, 2012, whereby the panel dismissed his claim for protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The applicant does not question the legality of the determination that he is not a Convention refugee given that there is no nexus with any of the grounds listed in section 96 of the IRPA. The issue is the panel's finding that the applicant is not a person in need of protection under subparagraph 97(1)(b)(ii) of the IRPA because although he was

personally targeted by a criminal gang, his alleged risk was a generalized one in his country of origin.

[2] For the reasons that follow, this application for judicial review is granted.

Facts

[3] The applicant is a citizen of Saint Vincent and the Grenadines. Based on a number of past assaults and threats, he alleges that he is victim of a criminal vendetta situation in his country and fears for his life at the hands of a gang of criminals.

[4] According to the narrative found in his Personal Information Form, which was found credible by the panel, on March 8, 2008, the applicant witnessed an argument between two men, one of whom was a suspected gang member named Orendal James. The applicant intervened in the dispute and was attacked by Orendal James with a bottle of acid. The applicant's treating doctor called the police and Orendal James was arrested and charged with assault causing injury and bodily harm.

[5] The applicant alleges that after this incident he was targeted and threatened by Orendal James who was angry about the outcome of the charges. In June 2010, the applicant and a friend, named Carl, were attacked by three individuals who smashed the windows of their car and started a fight with them. Carl ended up in a fight with an individual named Gaza and killed him. The applicant alleges that Carl was accused with murder and is currently in prison awaiting his trial. The

two other individuals involved in the fight were imprisoned for one year and six months respectively.

[6] Fearing retaliation by the gang members after Gaza's death, the applicant decided to come to Canada where his sister lives. The applicant had already stayed in Canada for two years (between 1998 and 2000) and travelled to Canada in August 2001. The applicant arrived in Canada on December 16, 2010 and immediately sought asylum as a person in need of protection.

[7] The applicant alleges that since arriving in Canada, he has received death threats from his persecutor's father through two of his friends. He also alleges that other refugee claimants from Saint Vincent have recognized him in the detention centre where he has been detained since his arrival in Canada and, Saint Vincent being a small country where almost everyone knows each other, his aggressors now know that he might be deported back to Saint Vincent and are awaiting to kill him.

Decision under Review

[8] Considering the matter within the entire context of the testimony and of the country documents, the panel identified the basic genesis and nature of the risk to the applicant as being "one that arose out of, and therefore is, a type of generalized risk: generalized crime activity in Saint Vincent."

[9] The panel cited Justice Zinn's decision in *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1210, [2011] FCJ No 1477 in support of its conclusion that "if the claimant

faces no personal risk, there would be no point in analyzing whether the claim fell under the generalized risk exception: it is required by subsection 97(1) that the risk faced by the claimant be personal." In fact, while the panel did not challenge the applicant's credibility or question any of his allegations, and while it admitted that the applicant has been specifically and personally targeted by a gang of criminals in Saint Vincent, it found that the prospective personal risk that he faces at their hands is a type of risk that is faced generally by others in that country.

[10] Inconsistently with this finding, the panel further stated that the words "not generally," as found in subparagraph 97(1)(b)(ii) of the IRPA, cannot be interpreted as "personally." The panel went on to state that the word "generally" should rather be interpreted as an antonym to "exactly, rarely, and seldom," and that these adjectives cannot be used in descriptive conjunction with a widespread phenomenon. Yet the panel found that based on the documentary evidence, criminal gang activity is a widespread problem in Saint Vincent and that this entails real and probable threats to innocent lives which are patently part of the usual parcel when it comes to such activities. Accordingly, the panel concluded that in such circumstances, the fact that the applicant may particularly face an even higher degree of risk than only a probable risk because of his particular circumstances "does not displace the appropriate application of the generalized risk exception to his claim."

Issues and Standard of Review

[11] The following issues are raised in this application for judicial review:

1) Did the panel err in its application of subsection 97(1) of the IRPA by finding that the applicant is not a person in need of protection as he merely faces a generalized risk?

2) Did the panel err by ignoring the evidence that the applicant faced a heightened personal risk of harm?

[12] Both parties submitted, and I concur, that the applicable standard of review in respect of each of the alleged errors is reasonableness.

[13] In *Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213 at para 11, [2009] FCJ No 270, the Court asserted that interpreting the exclusion of generalized risks of violence under paragraph 97(1)(b) of IRPA was typically an issue of application of law to the particular facts of a case and therefore reviewable against the standard of reasonableness, as set out by the Federal Court of Appeal in *Prophète v Canada (Minister of Citizenship and Immigration)*, 2009 FCA 31 at para 7, [2009] FCJ No 143.

[14] It has also been held that the standard of reasonableness applies to the panel's assessment of an applicant's evidence of personalized risk: *Kanga v Canada (Minister of Citizenship and Immigration)*, 2012 FC 482 at paras 5-6, [2012] FCJ No 730.

[15] Under the standard of reasonableness the Court's intervention is required where the decision does not fall within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" and where the reasons given in the impugned decision are not "justified, transparent or intelligible" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190).

Analysis

[16] There is divided authority within the jurisprudence of this Court over the issue of the appropriate interpretation to be given to the notion of "generalized risk" as contemplated in paragraph 97(1)(b) of IRPA and what is required to establish that a refugee claimant's risk is not a generalized one. Subparagraph 97(1)(b)(ii) defines a person in need of protection as "a person in Canada whose removal to their country or countries of nationality ... would subject them personally to a risk to their life or a risk of cruel and unusual treatment or punishment if 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."

[17] In the decision under review, the panel seems to suggest that there was no requirement of a personalized risk under subparagraph 97(1)(b)(ii) of the IRPA, which in turn, lead the panel to completely disregard the applicant's personal circumstances and evidence of alleged risk. The impugned decision contains no analysis of the applicant's testimony and corroborating documents tendered in support of the allegation that he was particularly and personally at risk if he was to return to Saint Vincent. However, the panel's conclusion is based on its unsupported and unexplained finding that the threats of future harm made to the applicant did not place him at any greater risk than the rest of the population.

[18] Justice Gleason thoroughly reviewed the relevant jurisprudence in *Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678 at paras 38 and following, and described the analysis required under section 97 claim as follows:

> In my view, the essential starting point for the required analysis under section 97 of IRPA is to first appropriately determine the

> nature of the risk faced by the claimant. This requires an assessment of whether the claimant faces an ongoing or future risk (i.e. whether he or she continues to face a "personalized risk"), what the risk is, whether such risk is one of cruel and unusual treatment or punishment and the basis for the risk. Frequently, in many of the recent decisions interpreting section 97 of IRPA, as noted by Justice Zinn in *Guerrero* at paras 27-28, the "... decision-makers fail to actually state the risk altogether" or "use imprecise language" to describe the risk. Many of the cases where the Board's decisions have been overturned involve determinations by this Court that the Board's characterization of the nature of the risk faced by the claimant was unreasonable and that the Board erred in conflating a highly individual reason for heightened risk faced by a claimant with a general risk of criminality faced by all or many others in the country.
>
> The next required step in the analysis under section 97 of IRPA, after the risk has been appropriately characterized, is the comparison of the correctly-described risk faced by the claimant to that faced by a significant group in the country to determine whether the risks are of the same nature and degree. If the risk is not the same, then the claimant will be entitled to protection under section 97 of IRPA…
>
> [my emphasis]

[19] I find that the panel erred in conducting both steps of the required analysis. First, it made an unreasonable characterization of the nature of the risk faced by the applicant, stating on one hand that the applicant was "a victim in a criminal vendetta situation" in Saint Vincent and yet determining his risk as being a generalized risk due to generalized crime activity. As stated earlier, the panel made no reference to any of the applicant's evidence, including written testimony from the applicant's friends who received death threats against the applicant. Given that the panel had to determine on the basis of that evidence whether the applicant suffered a heightened risk of harm as compared to the risk of harm faced by the general population – including the risk of reprisal – and considering the panel's erroneous statement that "the fact that this claimant has been specifically and personally targeted by the gang of criminals is irrelevant to the determination of whether the risk that he faces at their hands is generalized" (my emphasis), I find that the panel's failure to

conduct an individualized assessment in light of the applicant's evidence in its entirety constitutes a reviewable error.

[20] Although the respondent failed to deal with the most recent jurisprudence on this issue, the jurisprudence is replete with cases where the Court found that the panel's failure to conduct an appropriate individualized assessment to be in contradiction with a finding of generalized risk, especially where the decision under review "completely negates an admitted situation of individualized risk simply because the actions giving rise to that risk are also criminal" (*Lovato v Canada (Minister of Citizenship and Immigration)*, 2012 FC 143 at para 9, [2012] FCJ No 149 [*Lovato*].

[21] On this point, I fully concur with Justice Gleason's reasoning in *Portillo*, above, at para 36, where she states that "[i]t is simply untenable 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. If the Board's reasoning is correct, it is unlikely that there would ever be a situation in which this section [97 of the IRPA] would provide protection for crime-related risks." Also, in *Lovato* at para 14, the Court held that "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." (see also *Olvera v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1048 at paras 38-41, [2012] FCJ No 1128; *Malvaez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1476 at paras 13 and following, [2012] FCJ No 1579; *Gomez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1093 at para 38, [2011] FCJ

No 1601; *Tomlinson v Canada (Minister of Citizenship and Immigration)*, 2012 FC 822 at para 19, [2012] FCJ No 955; and *MACP v Canada (Minister of Citizenship and Immigration)*, 2011 FC 81 at paras 43-44, [2011] FCJ No 92).

[22] The respondent relies on *Perez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1029, [2009] FCJ No 1275 [*Perez*] and *CACF v Canada (Minister of Citizenship and Immigration)*, 2011 FC 763**,** [2011] FCJ No 967 [*CACF*]. In both cases the Court held that the fact that the applicant fell into an identified group which faced a specific danger was insufficient to conclude that the risk had become "personalized". In *Perez*, above, at para 35, the Court found that the applicants' status as small business owners in Guatemala, who were seen as a subset of the general population perceived to be relatively wealthy, did not transform a generalized risk of criminal violence to a personalized risk. In *CACF*, above, a similar conclusion was reached respecting the "group of those who were enemies of Los Zetas," a gang of organized crime in Mexico.

[23] It is clear that this jurisprudence is of no assistance in the present case. The panel did not make any finding to the effect that the applicant shared the same risk as other persons similarly situated, a conclusion that could only be reached after having considered the specific circumstances of the applicant in light of the evidence; it simply overemphasized the risk to the general population and failed to consider any facts related to the applicant's particular situation.

[24] These are reviewable errors sufficient to conclude that the panel's determination that the applicant is not a person in need of protection is unreasonable and must be set aside. No question

of general importance has been proposed by counsel representing the parties and none arises from this case as the panel's errors are closely tied to the facts at hand.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. the present application for judicial review be granted;
2. the decision under review, dated March 20, 2012, is quashed and the matter is remitted to the Refugee Protection Division for redetermination by a differently constituted panel.
3. No question is certified.

"Jocelyne Gagné"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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