Federal Court  Cour fédérale

Dated: 20130603

Docket: IMM-9623-12

Citation: 2013 FC 593

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, June 3, 2013

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

Reyna Johana LOYO DE XICARA
Eilyn Fernanda XICARA LOYO
Hillary Andrea XICARA LOYO

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 of the Refugee Protection Division (the RPD) of the Immigration and Refugee Board dated August 24, 2012. The RPD rejected the claim by Reyna Johana Loyo de Xicara and her children Eilyn Fernanda Xicara

Loyo and Hillary Andrea Xicara Loyo (the applicants) that they were Convention refugees or persons in need of protection within the meaning of sections 96 and 97 of the Act.

The facts

[2] The applicants are citizens of Guatemala. They are seeking the protection of Canada on the basis of sections 96 and 97 of the Act. The mother has been designated the representative of her children.

[3] On September 16, 2008, members of Mara Salvatrucha (the Maras) allegedly telephoned the applicant's husband demanding 15,000 quetzals. He was given six weeks to come up with the money.

[4] On October 31, 2008, the applicant's husband paid the required amount. The Maras called back the same night, this time giving him 45 days to come up with 150,000 quetzals. They threatened to kill his family if he did not comply.

[5] On November 3, 2008, the applicant's husband allegedly filed a complaint with the police. Three days later, on November 6, 2008, the Maras attacked his home. He was severely beaten for having reported them; they warned him not to file any more complaints, since the police and the Maras were one and the same. The applicant's husband spent three days in the hospital following the attack. On February 27, 2009, the applicant's husband left the country to seek Canada's protection. However, he returned to Guatemala on March 9, 2009, because one of the couple's daughters was gravely ill.

[6] More than 15 months later, on June 3, 2010, the Maras contacted the applicant's husband to tell him that he had been seen in the area and that they had an old score to settle with him. On June 6, 2010, the Maras allegedly came to the applicant's house while she was out and shot bullets into the walls. The applicant contacted the Public Prosecution to report the incident; apparently the Public Prosecution did not even record the complaint, and even refused to come and see the bullet holes, arguing that it would be a waste of time.

[7] On June 8, 2010, the applicants arrived in Canada to seek protection. It appears that the applicant's husband has remained in the United States, out of fear of the Maras.

The impugned decision

[8] The RPD concluded that there was no connection with section 96 of the Act and that the application had to be reviewed under section 97. The applicant's credibility was not challenged, as her testimony contained no contradictions and her story was plausible. Indeed, this type of situation is common in Guatemala.

[9] Essentially, the RPD held that the applicants did not satisfy subparagraph 97(1)(*b*)(ii) of the Act, in that the violence they faced was generalized violence faced by the general population on a daily basis. That subparagraph reads as follows:

97. (1) A person in need of protection is a person in Canada whose removal to their 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	**97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait 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 :

(*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 :
(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,

The standard of review

[10] In this case, the applicants have not provided a detailed analysis of the applicable standard of review; instead, they refer to the RPD decision as unreasonable. This is also the position adopted by the respondent. Since the Court is dealing with questions of mixed fact and law, the applicable standard of review is reasonableness (see *Zacarias v The Minister of Citizenship and Immigration*, 2011 FC 62, *Guerilus v The Minister of Citizenship and Immigration*, 2010 FC 394, and *Guifarro v The Minister of Citizenship and Immigration*, 2011 FC 182).

Analysis

[11] The issue is quite narrow. The RPD held in a few short pages that "[t]he claimant and her family are facing generalized violence. Although the state is attempting with difficulty to protect its citizens, the police is experiencing problems, and because it is infiltrated by the Maras, it is also afraid of attacking the Maras". Note the following statement from paragraph 14 of the decision:

> [14] The claimant is facing generalized violence that the entire population is familiar with and lives with daily in Guatemala. . . .

[12] Thus, the RPD held that violence is not personalized and that the risk to life is less serious insofar as the general population faces the same risk.

[13] In my view, this cannot be the state of the law without doing violence to the purpose of section 97 and leading to an absurd outcome.

[14] The purpose of section 97 is to provide protection to those who need it. To do this, the Act establishes a mechanism by which the applicant must demonstrate that that the risk to his or her life or the risk of cruel and unusual treatment or punishment is personalized. An applicant who invokes section 97 to avoid returning to his or her country merely because the society there is violent cannot succeed. That is a generalized risk, faced by all of the country's residents and citizens.

[15] However, that is not the case here. The RPD has held that because many people are attacked by the Maras in Guatemala, the applicant's situation is no different from that of the rest of the population or subpopulation.

[16] The real question that must be asked is whether the alleged risk is personalized, in the sense that the risk or threat to life is suffered by specific individuals, regardless of whether others in a given state suffer the same personalized risk.

[17] The RPD's logic, if pushed further, leads to an incongruous and even an absurd outcome. Thus, in the case of a country in the throes of genocide, an individual could not invoke

section 97, because the fact that he or she will be killed along with his or her fellow citizens makes the risk generalized within the meaning of section 97. In a sense, the greater the danger and the more people facing it, the harder it is to claim protection under section 97 of the Act.

[18] It is difficult to believe that such an interpretation is consistent with Parliament's intent. Not only does this interpretation quickly lead to absurdity, but it contradicts the very purpose of the provision. Parliament did not want generalized allegations to be accepted. However, a highly personalized allegation, even one that is shared by other members of the state, meets the conditions of subparagraph 97(1)(*b*)(ii) of the Act.

[19] This was the finding of my colleague Justice Mary Gleason in *Portillo v The Minister of Citizenship and Immigration*, 2012 FC 678. That case also dealt with the Maras, but in El Salvador.

[20] I am indebted to Justice Gleason for her analysis of the applicable standard of review. Like her, I do not believe that the choice of standard governing the interpretation of section 97 of the Act by the RPD affects the outcome of the analysis. It matters little whether the standard of review is correctness or reasonableness because, like her, I do not believe that the decision in this case can be justified even on a standard of reasonableness.

[21] Having already noted the incongruity, if not the absurdity, that results from the RPD's approach, I can only agree wholeheartedly with the following statement found at paragraph 36 of Justice Gleason's reasons:

> . . . It 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.

[22] I am certainly not proposing that all one must do is allude to a fear of the Maras to be successful under the section 97 analysis. However, it is not the RPD's task to declare, however vaguely, that a risk exists, only to set it aside on the basis that other nationals of the same country face the same risk. It is one thing for the RPD to find that it is not persuaded that a risk exists. It is another to hold that there is a personalized risk, but that it is shared by others. In the first case, section 97 does not apply. In the second, the risk must be recognized for what it is—a personalized risk. I share the view of Justice Donald Rennie in *Lovato v The Minister of Citizenship and Immigration*, 2012 FC 143 at para 14:

> . . . 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. Instead of focusing on whether the risk is created by criminal activity, the Board must direct its attention to the question before it: whether the claimant would face a personal risk to his or her life or a risk of cruel and unusual treatment or punishment, and whether that risk is one not faced generally by other individuals in or from the country. . . .

[23] Justice Edith Snider's comments in *Pineda v The Minister of Citizenship and Immigration*, 2011 FC 403 provides a good illustration of my position:

> [12] [O]n a basic level, the Applicant is a victim of crime. However, the facts of this case are unusual in that the Applicant claims to have been personally and directly targeted by MS-18. The Board did not question the credibility of this aspect of his claim. In other words, this is not a generalized fear of being targeted by MS-18 just because the Applicant is a citizen or because of his profile as a doctor. The nature of the risk he now

> faces is not the same as the risk he faced prior to treating the gang member — before he treated the gang member, he was susceptible to extortion or violence, whereas now he is specifically and individually targeted for his perceived actions, unlike the general population.
>
> [13] In virtually all of the cases cited by the Respondent, the applicants were not targeted personally *per se*. While the gangs may have known their names, their personal information, and may have even threatened them or assaulted them on a number of occasions, the nature of the threat was still generalized. The gang could have gone after anyone with perceived wealth, or any young person who may be recruited into their gang. These people were essentially means to an end for the gang members. I doubt that it really mattered whether person A or person B gave the gang the money for which they were searching, even if both parties were personally threatened. Similarly, I doubt that it really mattered whether person C or person D joined their cause, provided that they continued to increase their membership. The situation before me is fundamentally different. The Applicant presented a story to the Board of being at risk because he was perceived to be a person who "ratted out" an individual gang member.

[24] As the preceding analysis shows, the Court is of the view that the RPD's decision must be set aside because of its conclusion that a personalized risk or threat loses this characteristic based on the mere fact that the criminal conduct in question is common in a given country. This approach strips section 97 of the Act of its meaning, as this Court has noted more than once.

JUDGMENT

The application for judicial review is allowed. The matter is referred back to the Immigration and Refugee Board for reconsideration before a different member of the Refugee Protection Division. No question for certification has been proposed, and the Court finds that none arises.

"Yvan Roy"
Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9623-12
STYLE OF CAUSE:	Reyna Johana LOYO DE XICARA, Eilyn Fernanda XICARA LOYO, Hillary Andrea XICARA LOYO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	April 10, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	Roy J.
DATED:	June 3, 2013

APPEARANCES:

Oscar Fernando Rodas	FOR THE APPLICANTS
Anne-Renée Touchette	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Oscar Fernando Rodas Montréal, Quebec	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT