

Federal Court



Cour fédérale

Date: 20130626

Docket: IMM-9778-12

Citation: 2013 FC 708

Toronto, Ontario, June 26, 2013

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

LUIS FERNANDO RAMOS AGUILAR

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION CANADA**

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 of a decision of the Refugee Protection Division of the Immigration and Refugee Board dated August 28, 2012, that the applicant Mr. Aguilar is not a Convention refugee or person in need of protection pursuant to section 96 and subsection 97(1) of the Act.

[2] The only issue in this application is whether the Board's decision to dismiss Mr. Aguilar's claim under subsection 97(1), because it found after a review of the case law that the risk he was facing was "faced generally by other individuals in or from that country" as described in subparagraph 97(1)(b)(ii), was reasonable.

[3] The Board said at various points after Mr. Aguilar had finished giving testimony at the hearing that it believed his story. The Board unfortunately failed to do justice to the detailed story told by Mr. Aguilar in his testimony and in the ten page single-spaced typed narrative he attached to his Personal Information Form. The Board's summary is found at paragraph 2 of its decision:

[2] The claimant and his brother went to USA in 2000 and over the next few years they saved enough money to return to Mexico and opened a restaurant in January 2005. Shortly after they opened the restaurant, they begin to face extortion along with all the other businesses in the area. A few months later in April 2005, they opened another restaurant. In August 2005, the criminals significantly increased the protection money demanded from the claimant and his brother. The claimant refused to pay the higher sum and had physical altercation with the criminals. The claimant reported to the police however the police told him that they cannot process this because they found no fire weapons as the claimant alleged. The claimant arrived in Montréal on October 28, 2005 along with his brother. The claimant returned to Mexico and opened another business, a mechanic workshop right beside the restaurant. The criminals revisited the claimant and the claimant came back to Canada in June 2006. He returned again to Mexico in April 2007 and after other incidents with the criminals he returned to Canada in April 2009 and claimed protection a few days later.

[4] What is noticeably absent from the Board's summary are the following critical facts:

- a. That in September 2005, the Applicant was stopped while driving his van, that he was taken from his vehicle, that he was hit, kicked, and forced onto his knees at which point one of the men said "Kill him now."

- b. That he heard the nick-name of one of his assailants (El Memo) and that through only good fortune he escaped death.
- c. That he reported all this to the police and in particular identified El Memo as one of the assailants. That the police arrested El Memo but released him within a week when his “boss” El Jarocho paid a bribe to the police.
- d. That the Applicant when told of this was also told that they wanted to “find me to kill me.”
- e. That the Applicant and his family then visited Canada for “some time” and upon his return to Mexico he opened a new business.
- f. That in May 2006 the Applicant and his family upon returning to his van from shopping saw a strange object on the roof of the van and something in the window. Upon inspection it was found to be a bag into which had been placed a dead and bloodied animal (probably a cat) and on the back window had been written “We found you jerk.”
- g. He and his family again left Mexico for Canada. Upon return, the criminals made a demand for 2,000,000 pesos because he had one of their members arrested and jailed. He negotiated to pay them 10,000 pesos a month for one year, which he did.
- h. After the payments were made, he mistakenly believed that he would be let be; however, he was told that “things were not over.”
- i. In March 2009 while driving in his car with his family, he was followed by a vehicle and the two men in it, when they came along side him told him to stop. Fearing the worst, he continued to drive and forcibly crashed into their vehicle. It was after this that he fled to Canada and sought protection.

[5] Also not mentioned by the Board in its summary is that these men are from a gang called La Hermandad which consists of a group of corrupt policemen and that El Jarocho was a member of the public security secretariat.

[6] In its reasons, the Board noted that the approach to be taken when assessing a risk under subparagraph 97(1)(b)(ii) of the Act was that which I described in *Corado Guerrero v Canada (Minister of Citizenship & Immigration)*, 2011 FC 1210:

27 The majority of cases turn on whether or not the last condition has been satisfied, that is, whether the risk faced by the claimant is a risk faced generally by others in the country. I pause to observe that regrettably too many decisions of the RPD and of this Court use imprecise language in this regard. No doubt I too have been guilty of this. Specifically, many decisions state or imply that a generalized risk is not a personal risk. What is usually meant is that the claimant's risk is one faced generally by others and thus the claimant does not meet the requirements of the Act. It is not meant that the claimant has no personal risk. It is important that a decision-maker finds that a claimant has a personal risk because if there is no personal risk to the claimant, then there is no need to do any further analysis of the claim; there is simply no risk. It is only after finding that there is a personal risk that a decision-maker must continue to consider whether that risk is one faced generally by the population.

28 My second observation is that too many decision-makers inaccurately describe the risk the applicant faces and too many decision-makers fail to actually state the risk altogether. Subparagraph 97(1)(b)(ii) of the Act is quite specific: The personal risk a claimant must face is "a risk to their life or to a risk of cruel and unusual treatment or punishment." 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. [emphasis added]

[7] The Board's first error is that it did not follow this directive by identifying the risk facing Mr. Aguilar with any precision. It appears to have accepted that Mr. Aguilar faced a risk of

violence or death at the hands of the gang members who had been tracking him, but makes no mention of why they appear so determined to kill him. Contrary to the focus of the Board on the extortion, it appears equally plausible that it was revenge for having one of their own arrested and causing the gang to have to pay a significant amount to release him from jail.

[8] In any event, the Board's second error is seen in the following passage from its reasons:

[27] Even if the criminal [*sic*] want to take revenge on him for refusing to cooperate, there is no nexus to the Convention nor there [*sic*] personalized risk. This may have heightened the level of risk for the claimant, I am guided by the Canadian courts that even the heightened risk is still a generalized risk and this falls under the exception in section 97 of the Act – a risk generally faced by others. [emphasis added]

[9] This Court has not held that *all* heightened risks due to targeting are still generalized risks; it has held that heightened risks due to targeting *may* still be generalized if, based on the documentary evidence, that heightened risk is one a sufficiently large number of individuals face. Indeed, this Court could not make such a pronouncement. Deciding the issue of whether a heightened risk is faced by a large enough number of individuals in any given country involves, first, an assessment of the facts unique to each case and each country.

[10] Moreover, the fact that the risk faced by the Applicant arises from or has its genesis in criminal activity (extortion) does not in itself mean that the risk is one faced generally by others in Mexico. What is required is that the Board assess the particular facts and circumstances to determine if the particular risk facing the Applicant is one generally facing citizens. As was noted by Justice Rennie in *Vivero v Canada (Minister of Citizenship and Immigration)*, 2012 FC 138 at

para 25: “[S]ome risks arising from criminal activity will constitute a general risk, and others will not.” As he later noted at paragraph 29, the error there, and here, is “a misplaced focus on the reason for the risk.”

[11] As a result of its error, the Board never engages with any of the documentary evidence about Mexico to assess how many individuals are facing the kind of risk it seems to accept is facing Mr. Aguilar. It may be that a sufficiently large number of Mexicans face this kind of imminent and targeted risk of death or harm by criminals for the reason that the Applicant here does such that it is a risk generally faced by others, but that determination involves first a determination of fact based on the documentary evidence about Mexico which the Board must make. That factual determination cannot simply be taken for granted based on what is no more than a simple proposition that a heightened risk may still be a generalized risk. It may, or it may not be.

[12] In summary, what the Board failed to do is accurately describe the risk facing Mr. Aguilar and then engage in an assessment based on the documentary evidence about how prevalent that risk is in Mexico.

[13] For those reasons, the decision is set aside. Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, the decision under review is set aside, the Applicant's claim for protection is referred back to be determined by a differently constituted Panel of the Board, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-9778-12

STYLE OF CAUSE: LUIS FERNANDO RAMOS AGUILAR v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION CANADA

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 25, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** ZINN, J.

DATED: June 26, 2013

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