Federal Court  Cour fédérale

Date: 20131023

Docket: IMM-7898-12

Citation: 2013 FC 1068

Ottawa, Ontario, October 23, 2013

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

JESUS MARTINEZ DE LA CRUZ
MIRNA NOEMI MARTINEZ GUTIERREZ
JAZMIN ITZEL MARTINEZ MARTINEZ
GRETELL NAOMI MARTINEZ
MIRNA VIRGINIA MARTINEZ MARTINEZ

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 dated July 20, 2012, made by Judy Lewis (the Member), from the Immigration and Refugee Board of Canada (IRB, or the Board), Refugee Protection Division (RPD). The Member found that the Applicants are not Convention refugees and are not persons in need of protection as they face a generalized risk in Mexico and there is no nexus to a Convention ground.

[2] For the reasons that follow, I find that the Member misstated the nature of the risk faced by the Applicants and misinterpreted section 97(1)(b)(ii) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. As a result, this application for judicial review ought to be granted.

FACTS

[3] The Applicants consist of a family of two parents, Jesus and Mirna Noemi, two Mexican-born daughters, Jazmin and Mirna Virginia, and a daughter born in the United States named Gretell. Since arriving in Canada, the parents have given birth to a fourth daughter who is a Canadian citizen and not included in the present claim. As for Gretell, she is an American citizen and she makes a claim against the United States solely on the basis that she would be separated from her family if forced to return alone to the United States. The rest of the family's claims are tied to events experienced by Jesus, the principal claimant, who fears persecution at the hands of the Zetas, a dominant drug cartel in Mexico. Jazmin, who was born in December 1993, is now almost twenty years old and no longer a minor claimant.

[4] The Applicants are ordinarily residents in the city of Acapulco, Mexico. At different times beginning in the year 2000, various members of the family resided without status in the United States. Jesus travelled to the United States for the first time in April 2000, and was followed by his wife in September 2002. At first, their two eldest daughters remained in Mexico with their maternal aunt and grandmother, but were eventually sent to join their parents, returning to Mexico with their father in October 2005. Jesus visited the United States at least twice more and the couple's third daughter was born in the United States in December 2006. Both parents and the baby returned to Mexico permanently on May 3, 2007.

[5] Having saved a significant amount of money during their time in the United States, the family was able to purchase two taxis and some DJ equipment and had relative success with these businesses. In 2008, while working for a few days as a chauffeur for a fumigation company, Jesus became acquainted with Angel, an employee of the company who was also a member of the Zetas. Angel attempted to recruit Jesus to work for the organization as well and informed Jesus that he could obtain a taxi licence for a significantly reduced fee (600 instead of 3000 pesos) and would be given a password that he could give to the police if they ever stopped him. He also reportedly shared information regarding the clubs where Jesus would be required to take tourists to obtain or consume drugs sold by the Zetas, although this is not in the Applicants' amended Personal Information Form (PIF).

[6] Jesus refused Angel's offer and never heard from him directly again. He would occasionally see him on the street and made sure to avoid him.

[7] In August 2008, the couple was threatened at gun point outside their daughter's school. At the time, the Applicants did not make the connection between the incident and the refusal of Angel's offer and had no other reason to suspect they would be targeted. Thinking initially that it was an attempt to steal their car, they offered it up to the two armed men, but the men merely drove away claiming it was not the moment to kill Jesus since there were many people around. The couple called the police, but a patrol car never arrived and the police didn't follow up on the call. The Applicants, while petrified, hoped that the threat was a case of mistaken identity, as they had not had any previous problems. They thought the purchases made upon their return from the United States may have made them a target for theft.

[8] From late September to October 2008, Mirna Noemi stated that she was awarded a free trip for two to Canada by the hotel where she worked. She and her husband took the vacation together. The Applicants explained that they made no claim for protection at that time since their children were still in Mexico and they did not believe at that point in time that they were being specifically targeted.

[9] Upon their return to Mexico, however, a number of events ensued that convinced them that they were being directly targeted. On October 19, 2008, Jesus received an anonymous call at his home. The caller claimed to know where he lived and worked and threatened to kill him and his family. Jesus reported the incident to the police the next day and they stated that they would investigate, although he never heard back. While not stated in the PIF, the Applicants testified that Jesus had told the police about Angel's invitation to work for the Zetas but that the officer refused to write it down out of fear that something might happen to him (Certified Tribunal Record (CTR) 1219).

[10] The Applicants began receiving regular threatening phone calls and noticed that cars would frequently pull up outside their home and then drive away. Their eldest daughter Jazmin, while walking home from school one day, was followed very closely by a car the entire way, frightening the family.

[11] On November 30, 2008, Jesus saw three men approach his home on motorcycles. The men were communicating with one another using radios of some sort and two men came up to the house, seemingly looking in the windows, before all three drove away. His wife, who was also at home

but had not seen the men, received a threatening call at the same time from someone accusing them of being rats or informants and suggesting she ask her husband what he was talking about: "The caller said that he knew who all of us are, where we are, and where we work. He also said that he knew that we were alone" (PIF, line 78).

[12] The Applicants were too frightened to report this final incident to the police, who in their view had failed to protect them in the past. They understood the call to mean that the caller was aware that they had gone to the police. Believing that it was no longer safe for them to be in Mexico, they fled to Canada on December 2, 2008.

[13] A letter from Mirna Noemi's mother and sister dated September 17, 2009 (Application Record (AR), Tab 6, p 80), noted that the Applicants' persecutors had been asking of their whereabouts via phone calls and threatening the two women to the point that the sister considered changing jobs. Mirna Noemi stated that she lived with her mother and sister prior to leaving for Canada (CTR 1290).

[14] Another letter from Jesus' parents dated September 21, 2009 (AR, Tab 6, p 77), noted that his wife's family was forced to leave the city and described some insecurity in the area where they live.

[15] These original letters are not entirely consistent with more recent letters received: (i) one from the sister and mother dated April 27, 2012, indicating that they consistently received 2 to 5 telephone calls a day after the Applicants' departure, threatening them in order to receive

information regarding their whereabouts, and that they ultimately moved to another city (Chilpancingo) in 2009 without reporting their change in address or acquiring a landline (AR, Tab 6, p 40); and (ii) another from Jesus' parents dated April 27, 2012, indicating that they had been receiving approximately 3 to 5 calls per month since their son's departure, threatening them with death if they wouldn't reveal his whereabouts; they indicated in that letter that they hadn't filed a report with the police since the authorities could not be trusted, and that they couldn't abandon their current employment since the owner of the house they cared for had fled the country.

[16] The Applicants first appeared before the IRB on November 26, 2009 and January 25, 2010, but their application was refused on the basis of inconsistencies between the Applicants' version of the relevant events and an initial PIF, which the Member did not question them on. After a successful application for judicial review (*Martinez de la Cruz v Canada (MCI)*, 2011 FC 259, CTR 173), the Applicants attended a second hearing on June 21, 2012. That application was refused in a decision dated July 20, 2012, the subject of this application for judicial review.

DECISION UNDER REVIEW

[17] The Member found the determinative issues in this claim to be a lack of nexus and generalized risk. As the risk faced by the claimants is one that is faced by the general population in Mexico, she concluded they were not personally at risk. The Member further found that there was no persuasive evidence submitted that the minor claimant Gretell, would face a serious possibility of persecution in the United States.

[18] Given that the Applicants have not contested the Member's finding of a lack of nexus, I will not address that portion of the Member's decision.

[19] In a section on generalized risk, the Member acknowledged that generalized risk has to do with the nature of the risk of harm, and set out her understanding of the law related to generalized risk. She noted that the fact that a person or group of people may have been victimized repeatedly or more frequently by criminals, because of perceived wealth or where they live, does not remove the risk from the exception if it is one faced generally by others. In addition, she submitted that the Courts have found that if a claimant faces retaliation for not complying with the demands of the criminals, it does not remove the risk from the exception if it is one faced generally by others. She relied on G*uifarro v Canada (MCI),* 2011 FC 182 for the following proposition:

> [22] Not everyone facing a risk to life or a risk of cruel and unusual treatment or punishment will be found to be a person in need of protection, because section 97(1)(b)(ii) of the *IRPA* specifically excludes those persons who face a risk that is "faced generally by other individuals in or from that country". There is nothing in s. 97(1)(b)(ii) that requires the Board to interpret "generally" as applying to all citizens. The [word] generally is commonly used to mean "prevalent" or "widespread". The risk must not be an indiscriminate or random risk faced by other citizens. The Federal Court underscored that it is now settled law that claims will not meet the requirements of section 97(1)(b)(ii) of the *IRPA* where (i) targeting is 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. A sub-group numbering in the thousands would be sufficiently large as to render the risk widespread or prevalent and therefore "general" even though that sub-group may only constitute a small percentage of the general population in that country. The Panel finds that taxi drivers and owners of taxi cabs may be such a sub-group that is targeted by criminals.

[20] The Member described the claimant as a victim of crime and the Applicants as a "part of a subset of the population that faces a generalized risk in Mexico of violence at the hands of the cartels" or a "subset of business owners or successful persons perceived of having wealth [that] is more exposed to a risk that is faced generally by the population". The Member found that a claimant who faces retaliation for not complying with the demands of a criminal or who continues to be pursued after reporting to police or relocating, may nonetheless be a victim of generalized risk.

[21] The Member described the Applicants' belief that the Zetas will continue to pursue him to take revenge for his refusal to join the Zetas organization and that the presence of vehicles around his home and anonymous phone threats to their family in Mexico suggest a continued interest. The Member recounted as well, the Applicants' impression of the violence instituted by the Zetas and threats made to their neighbours. Despite acknowledging that the Applicants wanted to remain close to their work and school, she noted that it would have been reasonable to expect the claimants to take some steps to remove themselves from what they considered to be potentially dangerous.

[22] Describing the events central to the claim, the Member found that the Applicants showed a lack of subjective fear by not claiming protection during their first vacation to Canada. She noted that "[w]ithin a few weeks of their return and after some threatening phone calls the claimant's [sic] packed up and came to Canada to seek protection" (Decision, para 26). At paragraph 28 of the decision, she wrote that "[a]side from family members writing letters in support of the claimant's allegations that he will be targeted if he returns to Mexico there is no persuasive evidence that revenge has been taken on the family members in Mexico". She stated that the claimants believe

that the Zetas will want to take revenge on them for their non-compliance, but failed to confirm whether or not she accepted this belief as substantiated.

[23] The Member concluded that the harm feared by the Applicants does not amount to persecution or a personalized risk under section 97. With a reference to the prevalence of the Zetas' extortion practices, she noted the following (at para 29):

> The Panel took "generally" to mean "prevalent" or "widespread", and therefore even though Counsel argued that the risk was somewhat particularized because the claimant had knowledge from Angel about reduced rates for taxi licenses and codes for corrupt police the risk was still a risk that is faced generally by other individuals in Mexico. 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. The fear articulated by the claimants is one faced by the general population of Mexico.

[24] The Member acknowledged that the dividing line between a "personalized" and "generalized" risk may not always be clear. When it comes to a claimant who has been targeted in the past and who may be targeted in the future, she cited jurisprudence that distinguishes between an initial attack based on a generalized risk and an initial attack that took place for a unique or individualized reason. She cited a passage from *SM v Canada (MCI)*, 2011 FC 949, which suggests that, where an initial attack is based on a generalized risk, "it would likely not be unreasonable for the Board to find that any future risk of an attack was a risk faced generally by the population".

[25] As a result, the Member found that the Applicants' personal circumstances do not differ from those of the general population or others in their subgroup. Even if they were personally

subject to a risk of harm under section 97 involving extortion and gang violence, they did not face a personalized risk.

ISSUE

[26] This application for judicial review raises one issue: Did the Member make a reviewable error in finding that the Applicants do not qualify for protection because they will face a generalized risk upon their return to Mexico?

ANALYSIS

[27] The parties are not in agreement as to the appropriate standard of review. Counsel for the Applicants submitted that the Member erred by incorrectly interpreting section 97, which causes her to engage in an erroneous analysis of its application to the case at hand. On that basis, the Applicants submitted that the appropriate standard of review is correctness as the incorrect interpretation of the applicable provision is a question of pure law. Conversely, the Respondent argues that the Member's decision turned on findings of fact on the country's conditions and the application of section 97(1)(b)(ii) to those factual findings, and as such the standard of review is reasonableness since the issue is one of mixed fact and law.

[28] Justice Gleason thoroughly reviewed this issue and canvassed all the relevant case law in *Portillo v Canada (MCI)*, 2012 FC 678 [*Portillo*]. She acknowledged that there are conflicting decisions from this Court on that issue, but ultimately refrained from coming to a definitive conclusion as that case did not turn on what standard of review is applicable because in her view, the decision of the Board was both incorrect and unreasonable. That being said, she clearly leaned

towards the view that the correctness standard should be applied when the RPD's interpretation of sections 96 and 97 is at stake, as opposed to its application of the legal requirements enshrined in them to a particular set of facts. She noted that both sections of *IRPA* relate to Canada's international obligations, "which are matters of general law that could be considered to be beyond the unique expertise of the RPD", and that "[t]here is authority to support the proposition that interpretations of provisions in *IRPA* that flow from or involve Canada's obligations under international treaties are reviewable on a correctness standard" (*Portillo*, above, at para 26). She was also of the view that "the application of the correctness standard by the Federal Court of Appeal may well be foreseen by section 74 of *IRPA*, which provides that appeals lie only if a judge of this Court in his or her decision certifies that the case raises 'a serious question of general importance'" (*Portillo*, above, at para 20).

[29] There is certainly much to be said for the application of the correctness standard when the focus of the application for judicial review is really the proper interpretation of section 96 or 97. On the other hand, the Supreme Court made it clear in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 54, that "[d]eference will usually result where a tribunal is interpreting its own statute or statutes closely connected to its function, with which it will have particular familiarity" (see also *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36, at para 50). Like my colleague Justice Gleason, however, I need not say more on the subject as this application does not involve a pure question of law. Despite the Applicants' assertion to the contrary, what they really challenge is not so much the interpretation given to section 97 *per se*, but the characterization of the facts underlying the Applicants' claim and the application of section 97

to those facts. As a result, I find that the real issue to be determined by this Court is a mixed question of fact and law and, as a result, the relevant standard of review is that of reasonableness.

[30] Turning then to the substantive issue, counsel for the Applicants submitted that the Member both mischaracterized their fear and applied the wrong test in determining whether the Applicants face a generalized risk.

[31] According to the Applicants, the Member has mischaracterized their fear by generalizing it as a fear of crime and violence and, elsewhere, by completely misconstruing it as a risk of extortion as a result of being successful businesspeople. Relying on *Prophète v Canada (MCI)*, 2009 FCA 31, at para 7 [*Prophète*] and on *Portillo*, above, at para 40, they submit that if the risk is not appropriately identified as a result of an individualized inquiry, then the Board cannot properly determine whether or not such a risk is faced generally by people in the relevant country.

[32] Summarizing the evidence they submitted, the Applicants argue that their fear is properly characterized as "a fear of violence and murder in retaliation for the male Applicant's refusal to work for the Zetas as a taxi driver and for filing a report with the police, and because the Applicants possess sensitive information concerning the corrupt activities of the Zetas". As such, they allege that the Member erred in characterizing the risk as one of criminality or violence in a general sense, rather than a fear of retaliation for defying the Zetas. The decision is therefore fundamentally flawed, according to counsel for the Applicants, since the Member could not properly assess whether the risk is one faced generally in Mexico after having mischaracterized the risk faced by the Applicants.

[33] Whether or not the risk is accepted as mischaracterized, the Applicants argue that the Member applied the wrong test to determine whether the Applicants face a generalized risk of harm as they were never indiscriminately or randomly targeted by the Zetas. They further submit that the Member cannot accept, as she did, that even if the risk was somewhat particularized, it is still a generalized risk. According to the Applicants, a finding of personal risk necessarily negates a finding of generalized risk.

[34] Moreover, counsel for the Applicants argues that the Member failed to conduct an individualized inquiry since the Applicants were not indiscriminately or randomly targeted by the Zetas, nor were they targeted merely because they were successful businesspeople; instead, they claim they were specifically targeted because they stood up to the Zetas, refused to work for them, and reported them to the police, while also possessing sensitive information concerning their corrupt activities. The Board cites evidence in its reasons concerning the prevalence of extortion and violence by the Zetas in Mexico, but it does not address any evidence indicating that people in the Applicants' situation face a generalized risk in Mexico. They also submit that this is not a case where the Zetas were merely seeking to have the Applicants work for them, such that any cab driver would do to increase membership; instead, they argue that the Applicants are being targeted in retaliation for the reasons described above.

[35] Finally, the Applicants assert that the Member failed to consider that the male claimant was personally and individually targeted because he works in a position that suits the specific needs of the Zetas, namely a taxi driver in Acapulco who could shuttle both people and drugs.

[36] If I have set out in lengthy detail the arguments of the Applicants, it is because I find them for the most part compelling and I agree with them. In particular, I am of the view that the Member failed to determine the true nature of the risk faced by the Applicants and to conduct an individualized inquiry on the basis of the evidence adduced by the Applicants, as required by the Federal Court of Appeal in *Prophète*. As described in *Portillo,* above, at para 40, "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". As in that case, the Member here, while perhaps not failing to state the risk altogether, has used "imprecise language" and fails to take a firm position on whether or how the alleged incidents are connected.

[37] The Member seems to determine that the Applicants are merely victims of crime and extortion at the hands of the Zetas, and concludes on that basis that they are no more at risk than the rest of the population in Mexico. This is apparent from the following passage of the Board's reasons:

> [23] The claimant is found to be a victim of crime, but the crimes he and his family were victims of are widespread in Mexico. The claimants are therefore, part of a subset of the population that faces a generalized risk in Mexico of violence at the hands of the cartels. This subset of business owners or successful persons perceived of having wealth is more exposed to a risk that is faced generally by the population. But it is still a generalized risk faced by the claimants in Mexico.

[38] To reiterate, the Applicants themselves believed initially that they had been targeted because of their perceived wealth and the success of their business (CTR, at p 816, 1258-59 and 1280). The situation evolved after the male Applicant was first approached by Angel to work as a taxi driver, especially once he made a formal denunciation to the police as a result of receiving a threatening

phone call. Yet, the Member did not explicitly assess the Applicants' claim that the incidents following that denunciation were prompted by a desire to take revenge on them for being "informants" or contacting the police about the Zetas while in possession of sensitive information.

[39] Nor did the Member come to grip with the male Applicant's assertion that he was individually targeted because he was working in a position that suited the specific needs of the Zetas, and also because the Zetas had to retaliate to send the message that you cannot refuse to work for them. While the onus was on the Applicants to set out their case and the underlying connections between the alleged incidents is not entirely clear, it was not open to the Member to rely on the lack of clarity in the Applicants' submissions to justify a lack of clarity in her section 97 analysis. The Applicants are right to assert that the Member does not question their credibility. Indeed, it is entirely possible that they did not appreciate the underlying motive behind the various threats they received and did not connect the various incidents for a period of time. Based on their own testimony and evidence, the Applicants themselves once believed the unexplained threats issued at gunpoint outside their daughter's school, to be a case of either mistaken identity or as a result of their perceived wealth. That did not relieve the Member from evaluating the Applicants' allegations and from indicating which inferences she accepts or how the harm feared connects with her assessment of the risk.

[40] It may well be that no single incident would be sufficient on its own to ground a risk under section 97 of *IRPA*. At the same time, it is not at all clear that when they are considered as a whole and as a chain of events, they can be characterized as another instance of criminality and violence. In many respects, this case bears many similarities with many instances where the Board casually

concluded that the Applicants merely experienced general criminality and violence despite having been repeatedly assaulted, threatened, stalked and intimidated: see, for example, *Portillo*; *Guerrero v Canada (MCI)*, 2011 FC 1210; *Pineda v Canada (MCI)*, 2012 FC 493; *Zacarias v Canada (MCI)*, 2011 FC 61; *Tobias Gomez v Canada (MCI)*, 2011 FC 1093. While the Member understood the facts of the claim before her in a general sense, she did not address the true nature of the risk faced by the Applicants. This is a fatal error. Although the Member considers jurisprudence relating to past and future risks, repeated victimization, and risks of retaliation, I agree with the Applicants that vague or unexplained references in parallel to general crime and extortion render the Member's findings unreasonable in light of her failure to analyze the specific circumstances of the risk alleged on the basis of the evidence adduced.

[41] As a result of this error, the Member could not properly compare the risk faced by the Applicants to that faced by the general population or a significant group thereof in the country to determine whether the risks are of the same nature and degree. If, as the Applicants claim, the risk they face is not simply to be susceptible of being targeted to work for the Zetas or to be extorted because they are perceived as successful businesspeople, but rather a fear of retaliation for defying the Zetas and even reporting them to the police, then that risk is not of the same significance than the risk to which the general population or a significant group of that population is exposed.

[42] Contrary to what the Member seems to believe, this is not just a case where an applicant claims that he faces a risk of being targeted by criminal gangs, be it in a country where those gangs operate with impunity and are all pervasive. This is what the Member seems to be implying when she wrote that "[t]he fact that a claimant is personally at risk of harm does not necessarily mean that

the risk is not one faced generally by other persons in the claimant's country" (Decision, para 34). In the case at bar, however, the Applicants have been personally and specifically targeted by the Zetas in circumstances where others are generally not, and this has occurred more than once. To borrow from Justice Gleason in *Portillo,* above, at para 36, "[i]f the Board's reasoning is correct, it is unlikely that there would ever be a situation in which this section would provide protection for crime-related risks. […]. The RPD's interpretation would thus largely strip section 97 of the Act of any content or meaning".

[43] For all the foregoing reasons, I am therefore of the view that the Member's decision is unreasonable and must be quashed.

CONCLUSION

[44] In light of the foregoing, the Board's decision will be set aside and the Applicants' claim will be remitted to the RPD for re-determination by a differently constituted panel of the Board.

[45] No question for certification under section 74 of *IRPA* has been presented and none arises.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted and the matter is remitted for re-determination by a differently constituted panel. No question is certified.

"Yves de Montigny"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7898-12
STYLE OF CAUSE:	JESUS MARTINEZ DE LA CRUZ ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MAY 28, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	DE MONTIGNY J.
DATED:	OCTOBER 23, 2013

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