Federal Court  Cour fédérale

Date: 20140204

Docket: IMM-2847-13

Citation: 2014 FC 124

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 14, 2014

Present: The Honourable Mr. Justice Annis

BETWEEN:

JACINTO YAU WAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION OF CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) of a decision by the Refugee Protection Division (the panel) of the Immigration and Refugee Board, dated March 11, 2013 (the decision) rejecting the applicant's refugee claim. The applicant seeks to have the decision set aside and referred back before a differently constituted panel.

II. Background

[2] The applicant, a citizen of Panama of Chinese ethnicity, was born in China with a mixed Chinese/Panamanian father and he immigrated to Panama at around age 30, where he married and had four daughters with his wife. He bought and operated a hardware business that specialized in expensive power tools in a disadvantaged neighbourhood 10 kilometres from the capital city. Between 2003 and 2009, his business was robbed eight times by Panamanian criminal gangs and the Chinese mafia. He allegedly made a complaint to the police, in vain.

[3] In February 2009, during a robbery where he was allegedly beaten and his daughter kidnapped, the applicant signed an acknowledgment of debt for the amount of $50,000 USD, payable in June 2009.

[4] In March 2009, the applicant and his daughter travelled to the United States where they applied for and obtained a Canadian visa for six months. In May 2009, they arrived in Toronto, Canada. In June 2009, they went to Montreal, where the applicant's three other daughters and his wife joined them. They claimed refugee protection, alleging that they feared the Panamanian criminal gangs and the Chinese mafia who wanted to extort money from the applicant's business.

III. Impugned decision

[5] The panel decided that the applicant was not targeted because of his Chinese ethnicity, but rather because he was seen as a businessman who is a source of illegal and rapid gains. The panel's view is that the applicant's Chinese race and ethnicity are not at issue in the numerous robberies that he was subject to, especially considering that one of the agents of harm identified, the Chinese mafia, was of the same ethnicity as the applicant and his family. The panel noted that the applicant had not proven that his alleged fear, that of being found by the Chinese mafia because he had signed an acknowledgment of debt of $50,000 and that of being killed because he had not paid that debt, had a link with one of the five Convention grounds and section 96 of the IRPA.

[6] By conducting an analysis under section 97 of the IRPA, the panel noted that the applicant's testimony was consistent and unexaggerated and that he appeared credible. With respect to paragraph 97(1)(*b*) of the IRPA, the panel found that while the applicant was personally exposed to a risk because of the acknowledgment of debt that he signed, his risk would not be different from that of the other merchants who were the numerous victims of the greed of the Panamanian criminal gangs. This means that the applicant's fear is the same as a large sub group of the population, i.e. the merchants. This fear that the applicant would be exposed to is thus a generalized risk, the same as the population would be exposed to or at least those who are perceived as being able to provide the criminals with a rapid source of illegal gains through extortion.

[7] However, the panel determined that the fear of the applicant's young daughters is different from their father's, in that they are of Chinese ethnicity and their names and physical appearance are characteristics and make them easily identifiable as part of the Chinese community. The evidence on the record shows that criminal gangs in Panama specialize in kidnapping children of Asian

businessmen that may afterward be found killed. Thus, their fear is linked with two of the five Convention grounds, that of race and belonging to a particular social group, the family. Further, their alleged fear, i.e. being kidnapped and murdered, constitutes persecution.

[8] The evidence on file shows that protection in Panama would not be adequate given the inertia of the police when the applicant complained relating to his Chinese ethnicity and the treatment of Chinese persons and their children by the authorities and the population. Moreover, the risk that the applicant's daughters run would be the same throughout Panama, considering that there is no location in Panama where the applicant's daughters could seek refuge without the serious possibility of facing persecution.

[9] Therefore, the panel found that applicant's daughters are Convention refugees.

IV. Issue

Is the panel's decision that the applicant does not face a personalized risk under section 97 of the IRPA reasonable?

V. Standard of review

[10] A decision of the panel regarding whether the perception of richness is a particular risk under section 97 is a question of mixed fact and law that is reviewable on a standard of reasonableness (see e.g. *Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213 at para 9, [2009] FCJ No 270 (QL); *Pineda v Canada (Minister of Citizenship and Immigration)*, 2012 FC 493, at para 5, [2012] FCJ No 520 (QL) (*Pineda*)).

VI. Parties' submissions

The applicant

[11] The applicant refers to paragraph 15 of *Pineda v Canada (Minister of Citizenship and Immigration*) 2007 FC 365 [2007] FCJ No 501, for the notion that "It cannot be accepted, by implication at least, that the applicant had been threatened by a well-organized gang that was terrorizing the entire country, according to the documentary evidence, and in the same breath surmise that this same applicant would not be exposed to a personalized risk if he were to return to [his country of origin]." In this case, the fact that the applicant signed an acknowledgment of debt means that he is exposed to a personal risk. The applicant argued that since Panama is a very small country it would be very easy for the Chinese mafia to find him.

The respondent

[12] The respondent argues that the victims of crime are not a social group within the meaning of the Convention, based on *Rizkallah v Canada (Minister of Employment and Immigration)*, (1992) 156 NR 1 (FCA).

[13] As for the notion of generalized risk versus personalized risk, the respondent refers to *Prophète v Canada (Minister of Citizenship and Immigration)*, 2008 FC 331, [2008] FCJ No 415 (QL), rendered by Justice Tremblay-Lamer, which was affirmed by the Court of Appeal, for the principle that the Court may be faced with an individual who may be exposed to a personalized risk, but a risk shared with several other individuals, and that in such a situation the risk is general, although a specific number of individuals may be targeted by such a risk.

[14] The applicant alleged that he faces a personalized risk because of the fact that he signed an acknowledgment of debt. The respondent submitted that the simple fact that the applicant had personally been the victim of crime in Panama does not mean that he is entitled to protection under section 97 of the IRPA. It is up to the applicant to show that other individuals who find themselves in a similar situation are not generally exposed to the same risk. In this case, it is a generalized risk that other persons in the same neighbourhood are exposed. The fact that the applicant signed an acknowledgment of debt does not mean that his situation differs from that of the other citizens of Panama.

[15] The fact that the applicant had been a victim of a widespread problem in Panama and that he did not demonstrate that he was personally targeted, i.e. for reasons other than pecuniary, means that the panel was right to find that his risk was generalized.

VII. Analysis

[16] The determination of the panel's facts and findings as to the degree of personalized risk under subparagraph 97(1)(*b*)(ii) of the IRPA were summarized in paragraphs 13 and 17 of its decision as follows:

> [TRANSLATION]
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> [13] The applicant's testimony contained the following elements: the applicant fears the Chinese and Panamanian criminal gangs because they targeted him for the purpose of stealing his money. He is perceived, as are the other merchants, as a source of illegal and rapid gains. His Chinese race and ethnicity are not at issue in the numerous robberies of which the applicant and his family were victims, as one

> of the agents of harm identified, the Chinese mafia, was of the same ethnicity as the applicant and his family. The applicant did not testify that he had a fear related to his Chinese ethnicity.
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> …
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> [17] After analyzing the documentary and testimonial evidence, the panel, who conducted an analysis under paragraph 97(1)(*b*) of the IRPA, is of the view that the applicant would face a generalized risk if he were to return to Panama, since he did not establish, despite his personal circumstances, that his risk would be different than that of the other merchants, with any mistaken ethnicity, who are also at risk with criminal gangs.

[17] Although the applicant and his family were seriously threatened, I find that the panel's decision falls within the range of reasonable and acceptable outcomes by finding that the risk that the applicant would face is not sufficient to distinguish it from the other merchants who were subject to extortion by gangs in the exclusion described under subparagraph 97(1)(*b*)(ii) of the IRPA.

[18] As a general comment on this issue, I do not think that the method used to extort money, i.e obligating the applicant to sign a promissory note, should be analyzed in such cases. Extortion through threats of violence does not really differ from the application of force by any means when goods or money are unlawfully stolen or will be stolen.

[19] We must also remember that most of the crimes are personalized by their very nature. The crime of extortion, which is raised in the context of refugee claims, is based on personalized threats of severe violence or of cruel or unusual treatment, so as to induce the victim's payment by causing him to fear for his life. In a country such as Panama where extortion is endemic, the issue is whether

the personalized threats raise a sufficient risk to distinguish the applicant's situation from that of the general population.

[20] Because crimes of extortion based on violence or threats of violence are always "personalized", the use of this term to describe the exceptional risk described in subparagraph 97(1)(*b*)(i) may create confusion. Subparagraph 97(1)(*b*)(ii) speaks of a risk that must be superior to those experienced generally by the other persons who are part of the same group as the applicant. In this case, the group that the applicant belongs to is the merchants in Panama.

[21] The question that the panel addressed in this matter was whether the applicant had provided sufficient evidence to meet his burden of showing that the crime of extortion that he was facing represented a threat to his life or a risk of cruel and unusual treatment sufficient to differentiate it from the risk that the other owners of businesses in the country experienced, which also subject to extortion by gangs.

[22] Therefore, the key element in such cases involving threats or future dangers is the evaluation of risk in relation to that suffered by the general population, victim of the same offence.

[23] *Gomez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1093, [2011] FCJ No 1601 (QL), is a particularly appropriate case that shows the process of risk assessment in such circumstances. Specifically, the fact that Mr. Gomez had signed a promissory note of $50,000 for his attackers, because they kidnapped his wife and daughters, means that the matter is relevant insofar as it resembles the circumstances of this case. I quote paragraphs 34 to 38:

> [34] The applicants also suggest that where a risk exists for the entire population, that risk is no longer generalized if a person is individually targeted (*Pineda v Canada* (*Minister of Citizenship and Immigration*), 2007 FC 365 [*Pineda*]). Similarly, a claimant who has been targeted personally by a known adversary no longer qualifies as a victim of "random" threats and extortion (*Munoz v Canada* (*Minister of Citizenship and Immigration*), 2010 FC 238).
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> [35] Justice Paul Crampton recently considered the analysis to be applied to these types of claims (*Guifarro v Canada* (*Minister of Citizenship and Immigration*), 2011 FC 182 [*Guifarro*]). In *Guifarro,* the claimant was a victim of extortion by the Mara-18 in Honduras. After he stopped paying the gang, gang members assaulted him.
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> [36] According to Justice Crampton, the Board does not err when it rejects an application for protection under s 97 after finding that the alleged risk 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 result is valid even where that sub-group of persons may be specifically targeted, such as persons perceived to be wealthy.
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> [37] Similarly, Justice Michael Kelen has observed in *Perez v Canada* (*Minister of Citizenship and Immigration*), 2009 FC 1029 at para 34 [*Perez 2*], that when a claimant is initially harassed by a criminal gang because he or she owns a business, and then receives a threat for failing to pay money to the gang, this is simply a continuation of the extortion, not a personalized risk.
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> [38] In my view, the circumstances of this case are closer to *Pineda* and *Munoz*, above, than to *Guifarro* and *Perez 2*, above. The applicants were originally subjected to threats that are widespread and prevalent in El Salvador. However, subsequent events showed that the applicants were specifically targeted after they defied the gang. The gang threatened to kidnap Mr. Tobias Gomez's wife and daughter, and appear determined to collect the applicants' outstanding "debt" of $40,000. The risk to the applicants has gone beyond general threats and assaults. The gang has targeted them personally.

[24] As already noted above, I do not think that it is useful to speak of a threshold of risk that is reached where the life of an applicant is targeted "personally" because of the confusion created by this standard. In my view, the panel's task is to determine whether there is sufficient evidence to

find that the attackers will carry out the threats in a way that differentiates the applicant's situation and that generally faced by the other individuals who experienced less concrete threats of violence.

[25] However, it is not because of the wording of the threshold of risk that I chose not to apply *Gomez*, above, to this matter, but rather for two other reasons. First, I would like to distinguish the facts of *Gomez*, above, that seemed to have foreshadowed a greater risk for the applicant than in this case. I reproduce the facts of *Gomez*, above, so as to compare them to the facts of this case:

> [8] In August 2008, a Mara-18 member threatened to kidnap his daughter, Daniela. The next month, Mr. Tobias Gomez claims he received a telephone call informing him that the head of the gang wanted $50,000 or the gang would kidnap his wife and daughters. Gang members subsequently visited the store to remind him to pay the $50,000.
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> [9] Luis also claims that the gang threatened him. In 2008, he was approached by a gang member who told him that he knew where he lived and went to school. Luis claims that gang members followed him home, demanded that he join the gang, and threatened him with death if he refused. When he resisted, they punched him. Luis also claimed he was abducted at gunpoint and threatened that if he did not join the Mara-18 within 24 hours, he would be shot. Luis went into hiding until September 2008 when he fled to the United States.
>
> [10] That same month, the other applicants left El Salvador for the United States. While there, they learned that gang members had visited Mr. Tobias Gomez's father demanding that he pay the $50,000 "debt". He withdrew $10,000 from his savings account, and then was beaten.

[26] Second, I am of the view that one must show deference when the Court makes the decision to replace the panel's decision by its own, especially when addressing the issue of the degree of risk run by the applicant. It is difficult to assess the nature of the violence and the degree of the applicant's in relation to the other victims of this type of crime.

[27] As a result, this is an assessment on which opinions may vary considerably, even when it is based on recognized facts. It is also a task and a subject that fall directly within the area of expertise of the court, for example as concerns the conditions of the country and experience of the court in this area drawn by other cases (for example, as it relates to country conditions and the experience of the Board in these matters from other cases).

[28] In *Dunsmuir v New Brunswic*k, 2008 SCC 9, [2008] 1 SCR 190, the Supreme Court of Canada set out the standard of review and its basis in the following terms:

> [47] Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result.
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> Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process.
> But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.
>
> [48] The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-Southam formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making

> process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Canada* (*Attorney General*) *v Mossop*, 1993 CanLII 164 (SCC), [1993] 1 S.C.R. 554, at p. 596, per L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., The Province of Administrative Law (1997), 279, at p. 286 (quoted with approval in Baker, at para. 65, per L'Heureux-Dubé J.; Ryan, at para. 49).
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> [49] Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D.J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 C.J.A.L.P. 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[29] For the purposes of comparison, there are cases where the degree of violence perpetrated by gangs is such that the victim of extortion is subject to a degree of risk of loss of life or cruel and unusual treatment to the point where the Court may find that the panel's assessment is sufficiently unreasonable so that does not fall within the range of acceptable and rational solutions.

[30] For example, in *Lovato v Canada (Minister of Citizenship and Immigration)*, 2012 FC 143, [2012] FCJ No 149 (QL), Rennie J. set aside the panel's decision where one of the uncles of the applicant had been killed and then the same attackers threatened the applicant with death if ever he

did not make the extortion payments. Similarly, in *Guerrero v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1210, [2011] FCJ No 1477 (QL), the applicant's grandmother was killed before his eyes, and then the same attackers threatened him. In this case, Zinn J. reversed the panel's decision, indicating at paragraph 34 that "where a person is specifically and personally targeted for death by a gang in circumstances where others are generally not, then he or she is entitled to protection under s. 97 of the Act if the other statutory requirements are met" [Emphasis added].

[31] In these circumstances, because of the deference due to the panel, who is specialized in the analysis of risk, I do not find that the applicant's personal situation is such that I can set aside the panel's decision as not falling within the range of possible acceptable outcomes which are defensible in respect of the facts and law.

[32] Consequently, the application is dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed.

"Peter Annis"

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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