

Federal Court



Cour fédérale

Date: 20141007

Docket: IMM-3421-13

Citation: 2014 FC 949

Toronto, Ontario, October 7, 2014

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

IRIS JANETTE UMANA RIVAS

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Iris Janette Umana Rivas [the Applicant] is a citizen of El Salvador applying for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada [RPD, Board], which determined that she is not a Convention refugee or person in need of protection according to the criteria specified in sections 96 and 97 of the *Immigration*

and Refugee Protection Act (SC 2001, c 27) [IRPA]. The application was commenced pursuant to section 72(1) of IRPA.

II. Facts

[2] The Applicant, Ms. Rivas, fears for her safety at the hands of the Mara Salvatruchas [MS], a ruthless criminal gang operating in El Salvador.

[3] It is undisputed that Ms. Rivas worked as a medical doctor in El Salvador. The Applicant claimed in an amended Personal Information Form [PIF], signed about a year after the original PIF, that she would occasionally treat MS members, whom she recognized by their distinctive tattoos.

[4] Around the first few days of April 2010, the Applicant claimed that she was visited by a man named Mario who told her that MS expected her to deliver medical services on demand. When she informed Mario that she could not go wherever they needed her, but would continue to treat them at her clinic, Mario became furious and told her that she'd be hearing from them. The Board questioned the credibility of this part of the "amended" PIF and the events surrounding Mario, and prior treatment of MS members in 2009 and 2010, but nonetheless found that the Applicant was "relatively credible."

[5] What the Board, and in turn the Respondent, did not take issue with, were incidents that took place in April 2010, after the alleged "Mario" events and earlier MS treatment. These three incidents were as follows:

[6] First, on April 13, 2010, the Applicant received a telephone call from a member of the MS demanding a sum of \$20,000 and threatening that her children would be kidnapped if she did not oblige. The Applicant told the caller she did not possess that money. He replied that he knew she could obtain such sums because she was a professional and had relatives in the United States and Canada.

[7] Second, the Applicant received a follow-up call from MS on April 14, 2010, reminding her of the demand.

[8] Third, on April 28, 2010, the Applicant was assaulted at her clinic, when MS assailants broke bones in her face, stating that this was so she knew they were serious, and needed to get them the money quickly.

[9] The Applicant did not file a police report herself, because she believed the MS and the police were working together and feared that filing the report would put her in further danger.

[10] However, police came to the scene to investigate on their own initiative. There was no police report entered into evidence.

[11] The Applicant moved to a friend's home in a more remote location on April 30, 2010, and left the country for the United States on June 7, 2010. She crossed the border from Buffalo into Canada on March 22, 2011, claiming refugee protection.

III. Issues

[12] Although other matters were raised by the Applicant, the hearing focused on one determinative issue - whether the RPD erred in rejecting the s. 97 claim on the basis of generalized risk, considering other elements of the decision that impacted on this issue, including credibility findings of the Board.

IV. Decision

[13] The RPD based its refusal on its following conclusions:

- There were inconsistencies between the PIFs and the hearing, concerning detail of and interactions with MS and Mario prior to April 13, 2010, resulting in credibility concerns regarding that particular part of the story; and
- The risk faced is a generalized one, faced by a large group, i.e. wealthy individuals targeted for extortion. The fact that a specific number of individuals may be targeted more frequently (e.g. wealthy individuals) does not mean they are not subject to a generalized risk of violence.

V. Submissions of the Parties

[14] The Applicant does not focus on an argument that the Board erred in its section 96 analysis determining that Ms. Rivas is not a Convention refugee.

[15] As for section 97, Ms. Rivas submits that she had been specifically targeted, threatened and assaulted by specific members of the MS, which cannot be categorized as a risk faced generally by other wealthy individuals in El Salvador. The Applicant contends that the Board found the Applicant to be credible with respect to the incidents on and after April 13, 2010 (it was the preceding events that the Board questioned) and argued that state protection cannot be said to be generalized if a person is individually targeted, per *Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678 at paras 38-39 and *Correa v Canada (Citizenship and Immigration)*, 2014 FC 252 at paras 41-46.

[16] The Respondent counters that the RPD's findings about credibility are entitled to deference, and that the Applicant's arguments are merely a request to reweigh evidence. The Board found that she feared the MS, but felt she was not personally targeted. The Respondent argues that credibility points were crucial to the Board's conclusion that the degree and nature of the incidents reasonably put her in the category of victims of general crime (extortion). On generalized risk, the Respondent asserts that while the reasons for a claimant's targeting may be unique, it is nonetheless a generalized risk if the nature of the risk (violence) and the basis of the risk (extortion) is the same as that generally faced by others in El Salvador: *Baires Sanchez v Canada (Citizenship and Immigration)*, 2011 FC 993. The Respondent argues that section 97 is a highly fact-specific area of the law: *Burgos Gonzales v Canada (Citizenship and Immigration)*, 2013 FC 426). The facts of this case does not warrant s. 97 protection.

VI. Analysis

[17] The standard of review herein is one of reasonableness, in accordance with the test in *Dunsmuir v New Brunswick*, 2008 SCC 9. Deference is therefore being accorded to the credibility findings of the Board with respect to the events in El Salvador prior to April 10, 2010, namely, the Board's finding that the Applicant "embellished" the MS history, given the discrepancies between the POE, the first PIF version of her story, her second PIF and her oral testimony at the hearing. The Board was best placed to make these credibility findings.

[18] However, the Board did not contest the events after April 13, 2010, as per its finding of "relative credibility".

[19] Section 97 is all about future risk. Justice Gleason clarified the two-part test one must satisfy to find s. 97 protection:

First, the RPD must correctly characterize the nature of the risk faced by the claimant. This requires the Board to consider whether there is an ongoing future risk, and if so, whether the risk is one of cruel or unusual treatment or punishment. Most importantly, the Board must determine what precisely the risk is. Once this is done, the RPD must next compare the 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...

The second step in the inquiry is to compare the nature and degree of the risk faced by the claimant to that faced by all or a significant part of the population in the country to determine if they are the same. This is a forward-looking inquiry and is concerned not so much with the cause of the risk but rather with the likelihood of what will happen to the claimant in the future as compared to all or a significant segment of the general population. It is in this sense that in *Portillo* I held that one cannot term a "personalized" risk of death "general" because the entire country is not personally targeted for death or torture in any of these cases. There is in this

regard a fundamental difference between being targeted for death and the risk of perhaps being potentially so targeted at some point in the future. Justice Shore provides a useful analogy to explain this difference in *Olvera*, where he wrote at para 41, “The risks of those standing in the same vicinity as the gunman cannot be considered the same as the risks of those standing directly in front of him”.

Ortega Arenas v Canada (Citizenship and Immigration), 2013 FC 344 at paragraphs 9, 15;

Justice Gleason’s reference to Justice Shore’s judgment is in *Balcorta Olvera v Canada (Citizenship and Immigration)*, 2012 FC 1048.

[20] Other cases have held that just because the risk arises out of criminal activity, which would include extortion, one cannot automatically state that it is a generalized risk, lest one strips. 97 of all meaning.: See *Vaquerano Lovato v Canada (Citizenship and Immigration)*, 2012 FC 143.

[21] The cases mentioned above all happen to have been similar to the present, where the applicant suffered at least one criminal event at the hands of a gang in Latin America, accompanied by violence, and where the Board failed to properly analyse whether the risk had become personalized or particularized, rather than simply being a general risk, i.e. whether the applicant was targeted to an extent beyond that experienced by the population at large, or a subgroup thereof.

[22] In fact, violence does not have to occur for risk to become personalized: in *Tobias Gomez v Canada (Citizenship and Immigration)*, 2011 FC 1093, the applicant had only been threatened

with violence by MS as part of an extortion attempt, unlike in this case, yet was found to be at the subject of a personalized risk.

[23] With respect to the part of the story where credibility was questioned, “exaggerated” evidence has still been accepted in an analogous context: *Hernandez Lopez v Canada (Citizenship and Immigration)*, 2013 FC 592, at paras 24-25.

[24] Despite the very able advocacy and efforts of counsel for the Respondent, I do not agree that the conclusions reached by the Board were reasonable given the Board’s acceptance of the three key April 2010 events as fact regarding the application of the s. 97(1)(b)(ii) exception, and the conclusion that the risk had not become “personalized”, but rather remained a general threat to the applicant who was perceived to be part of the wealthy subset of El Salvador’s population.

[25] I arrive at the same conclusion as did Justice O’Reilly in *Tobias Gomez*, cited as follows:

[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).

[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.

[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.

[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.

[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.

[26] In Ms. Rivas' case, the nature and degree of the April, 2010 assault which resulted in severe injury to the Applicant's face, preceded by the two extortive telephone calls, transformed what may have been a general crime (extortion) into one with a high degree of personalization.

[27] In my view, unfulfilled extortion demands, followed by significant violence, when committed by a gang with considerable clout where police are not able to provide adequate protection, is not a risk that can be said to be faced by a subset of the state's population – whether that subset is defined to be professionals (a doctor, in this case), or perceived wealthy individuals (with family abroad, in this case).

[28] The judicial review is allowed and the matter will be sent back to the Board for reconsideration. No certified questions were proposed and none ensue.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, and the matter will be sent back to the Board for reconsideration. There will be no costs ordered, and no questions certified.

"Alan S. Diner"

Judge

ANNEX A

Immigration and Refugee Protection Act (SC 2001, c 27) Sections 96 and 97

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

- (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or
- (b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

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

- (a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or
- (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if
 - (i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,
 - (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,
 - (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard

Loi sur l'immigration et la protection des réfugiés (LC 2001, ch 27) Articles 96 et 97

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

- (a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
- (b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

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 :

- (a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
- (b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
 - (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
 - (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,
 - (iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au

of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Personne à protéger

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3421-13

STYLE OF CAUSE: IRIS JANETTE UMANA RIVAS v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 24, 2014

JUDGMENT AND REASONS: DINER J.

DATED: OCTOBER 7, 2014

APPEARANCES:

David Orman FOR THE APPLICANT

Charles Jubenville FOR THE RESPONDENT

SOLICITORS OF RECORD:

David Orman FOR THE APPLICANT
Barrister & Solicitor
Toronto, Ontario

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of
Canada