Federal Court  Cour fédérale

Date: 20110923

Docket: IMM-6423-10

Citation: 2011 FC 1093

Ottawa, Ontario, September 23, 2011

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

MELVIN ALBERTO TOBIAS GOMEZ,
LUIS ENRIQUE TOBIAS GOMEZ,
MONICA PATRICIA RAMIREZ DE TOBIAS,
DANIELA SARAI TOBIAS RAMIREZ,
ALISSON NAHOMY TOBIAS RAMIREZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Mr. Melvin Alberto Tobias Gomez, his wife Ms. Monica Patricia Ramirez De Tobias, their two children, Daniela and Alisson, and Mr. Tobias Gomez's brother, Luis, are citizens of El Salvador.

[2] The applicants sought refugee protection in Canada based on their fear of the Mara-18 criminal gang. They relied on sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] (see Annex).

[3] A panel of the Immigration and Refugee Board dismissed their claims on the basis that they did not relate to grounds recognized under the Refugee Convention (s 96) and, further, that the risk of crime and violence the applicants faced was a general one faced by many citizens of El Salvador (s 97).

[4] The applicants argue that the Board erred in respect of both conclusions. They ask me to overturn the Board's decision and order a new hearing. I agree that the Board made reviewable errors and must, therefore, allow this application for judicial review.

[5] The issues are:

1. Did the Board err in its interpretation of s 96 of IRPA?
2. Did the Board err in its interpretation of s 97 of IRPA?

[6] In respect of each of these issues, involving questions of mixed fact and law, I can overturn the Board's decision only if it was unreasonable.

I. Factual Background

[7] Mr. Tobias Gomez and his family operated a shop in San Salvador. Beginning in June 2005, members of the Mara-18 gang threatened Mr. Tobias Gomez and demanded merchandise and cash from him. Gang members told him that they knew where he lived and what schools his children attended. They also threatened his wife and daughter when he was not at the store. Mr. Tobias Gomez says he attempted to make a police report, but he was told that there was nothing the police could do.

[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.

[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.

[11] The applicants all arrived in Canada in October 2008 and sought refugee protection at the Canada-U.S. border.

II. The Board's Decision

1. Section 96

[12] The Board found that the applicants had not established a link between their fear of the Mara-18 and their race, religion, nationality, political opinion, or membership in a particular social group. They had argued that they were members of a particular social group because of their innate and unchangeable characteristics as a family who owned a business, which distinguished them from the general population. However, the Board concluded that to be a member of a particular social group, a person must belong either to a group whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association, or a group whose members are associated by a former voluntary status which is unalterable due to its historical permanence. The first type of group would include individuals fearing persecution on the basis of gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists.

[13] The Board found that, while the applicants had been subjected to various criminal acts, this did not establish a link to a Convention ground. As such, their claims could only be assessed against s 97.

2. Section 97

[14] The Board first considered the claims of Mr. Tobias Gomez, his wife, and their two children. It began by noting that protection is limited to those who face a personal risk not generally faced by others in or from that country (s 97(1)(*b*)(ii)).

[15] The Board observed that the applicants had testified about threats and widespread violence in El Salvador. The documentary evidence confirmed the prevalence of deadly violence in El Salvador, especially gang violence. Gangs such as the Mara-18 commit various criminal acts including robberies, extortion, kidnappings and murders, and they recruit people to expand their power and reach.

[16] The Board noted that the documentary evidence indicated that criminal gangs and the crimes they commit have caused major threats to public security in El Salvador. The government has enacted legislation and put in place tactical initiatives to address rampant gang violence. However, despite these efforts, gang violence remains widespread. Therefore, being a victim of crime and violence at the hands of criminal gangs is a risk that is prevalent in El Salvador.

[17] The Board observed that a generalized risk need not be experienced by every citizen, and that a subgroup of the population can still face a risk that is generalized. In the present case, Mr. Tobias Gomez and his wife belong to a subgroup of business owners who are targeted for extortion by the Mara-18. An increased risk experienced by a subgroup of the population is not personalized

where that same risk is experienced by the whole population, albeit at a reduced frequency (*Ventura De Parada v Canada (Minister of Citizenship and Immigration)*, 2009 FC 845).

[18] With respect to Luis, the Board reviewed documentary evidence specific to the recruitment of new gang members. The Board adopted the reasoning of Justice Richard Boivin in *Perez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 345 [*Perez 1*], in which he concluded that the fact that forced recruitment to a gang is personal does not necessarily mean that the risk is personalized or that the activity is not faced generally by other individuals.

[19] Documentary evidence showed that many young people were vulnerable to recruitment and extortion by gangs in El Salvador. Thus, the Board found that there was insufficient evidence to establish that Luis faced a specific, individualized risk of harm.

[20] The Board concluded that all of the applicants' claims fell under the exception in s 97(1)(*b*)(ii) because the risk of harm they faced was generalized.

III. Issue One - Did the Board err in its interpretation of s 96 of IRPA?

[21] The applicants submit that the Board should have considered whether there was a nexus to any Convention ground, not just a "particular social group". They had proposed the alternate nexus of "political opinion" and maintain that Mr. Tobias Gomez's confrontation with gang members after they threatened Daniela should have been considered persecution on the basis of a political opinion, namely, opposing the gang.

[22] The applicants also submit that Luis fits within the definition of a particular social group as documentary evidence showed that young people in El Salvador are particularly vulnerable to recruitment and extortion by gangs. The applicants also rely on jurisprudence from the United States Board of Immigration Appeals which has found that "youth who have been targeted for recruitment by, and resisted, criminal gangs may have a shared past experience, which by definition, cannot be changed": Matter of S-E-G-, et al, 24 I&N Dec 579, U.S. Board of Immigration Appeals, 30 July 2008.

[23] In *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*], the Supreme Court made clear that political opinion was to be defined broadly, and included the persecution of persons holding opinions contrary to government or its policies, or other groups. The Court defined political opinion as "any opinion on any matter in which the machinery of state, government, and policy may be engaged" (at para 81).

[24] A person's opinion may be actually held or imputed from his or her actions. As Justice La Forest observed, "[t]he absence of expression in words may make it more difficult for the claimant to establish the relationship between that opinion and the feared persecution, but it does not preclude protection of the claimant" (at para 82). The assessment of whether the claimant holds a political opinion, or whether one can be attributed to him or her, should be "approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution" (at para 83).

[25] However, Justice La Forest cautioned that "[n]ot just any dissent to any organization will unlock the gates to Canadian asylum; the disagreement has to be rooted in a political conviction" (at para 86). In this case, to establish a nexus to the Convention ground of "political opinion", the applicants bore the burden of presenting evidence demonstrating that their opposition to the Mara-18 amounted to a political conviction, or that it was construed as such by the gang. However, they did not actually provide any evidence that their resistance to extortion demands and recruitment efforts was a result of either a conscious political act, or an act that would be viewed as such by the Mara-18.

[26] The applicants point to objective evidence that suggests that those who resist gangs in El Salvador may be subject to retribution. However, the documentary evidence does not suggest that this opposition, in the eyes of the Mara-18, is perceived to be a political stand against them. It appears that the applicants' refusal to comply with escalating extortion demands, and Luis' resistance to recruitment, were acts of economic and personal preservation, not a political stance.

[27] In addition, while the applicants mentioned "political opinion" as a ground of persecution in their written narratives, they did not strenuously advance that position before the Board. It falls to the Board to identify grounds of persecution, even if they are not raised by a claimant, but one must consider whether the issue was seriously presented and nourished by the evidence. Here, political opinion appears to be an issue the applicants have invoked to attack the Board's decision after the fact (as in *Suvorova v Canada (Minister of Citizenship and Immigration)*, 2009 FC 393, at para 56).

[28] I find that the Board properly considered the applicants' allegations of persecution but could not find any nexus to a Convention ground. I cannot conclude that the Board's decision was unreasonable – with one exception.

[29] I find that the Board erred by failing to consider whether Luis was a member of a "particular social group" on the basis of his status as a young, male Salvadoran living in San Salvador, or as a youth who refused to join a gang.

IV. Issue Two - Did the Board err in its interpretation of s 97 of IRPA?

[30] The applicants submit that the Board's analysis with respect to s 97 misinterprets the case law and is inconsistent with the purposes of the section. They suggest that the term "generally" in s 97(1)(*b*)(ii) was conceived as a threshold to guard against claims based on threats that affect an entire country equally, such as natural disasters or random violence.

[31] The applicants rely on Justice Eleanor Dawson's approach which gives a broad meaning to the words "faced generally" in s 97. She accepted that a claimant could receive protection even if other persons shared the same circumstances (*Surajnarain v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1165, at para 11).

[32] The applicants say that the Board erred in finding that they belonged to a subgroup of business owners who were a target group for extortion, which was insufficient to "personalize" the risk. They submit that the Board erred because, while the family's persecution began with moderate

extortion (which may be a generalized risk), it escalated dramatically after Mr. Tobias Gomez confronted a gang member. Thus, the risk turned from harassment to a personal threat directed at the members of the family. The applicants submit that the risk they face is a consequence of their firm stance against the Mara-18 and, as such, it is not a risk faced generally by all Salvadorans.

[33] In the case of Luis, the Board concluded that he was not treated differently from others who are targets of gang recruitment in El Salvador. But the applicants say that Luis was targeted because of his age, gender, and geographic location, factors which do not apply to all Salvadorans. Further, he was personally targeted, followed, physically assaulted, threatened with death, and kidnapped.

[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.

[39] The same is true in respect of Luis. Although recruitment by gangs is a widespread and prevalent phenomenon in El Salvador, Luis was singled out and subjected to threats, assaults and kidnapping. These events show that the risk to Luis was personalized, not generally felt by the rest of the population.

[40] Therefore, the Board's conclusions in respect of s 97 were unreasonable. The Board considered that the applicants were targeted merely as business owners or, in Luis's case, as a young man. It did not go on to consider the subsequent threats and actual harm directed at the applicants personally.

V. Conclusion and Disposition

[41] Given the evidence before it, the Board's failure to consider whether Luis was a member of a particular social group was unreasonable. Its findings with respect to the other applicants in respect of s 96 were reasonable. In addition, given the evidence of the particularized threats to the applicants, the Board's conclusion that they faced risks that are felt generally by the population of El Salvador was also unreasonable. Neither conclusion was a defensible outcome based on the facts and the law. Therefore, I must allow this application for judicial review, and order a new hearing before a different panel. The panel will reconsider the applicants' s 97 claims, and Luis's claim under s 96. Neither party proposed a question of general importance for me to certify and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that :

1. The application for judicial review is allowed and a new hearing before a different panel is ordered;

2. No question of general importance is stated.

"James W. O'Reilly"
Judge

Annex

Immigration and Refugee Protection Act, SC 2001, c 27

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 themself 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 themself of the protection of that country,

(ii) the risk would be faced by the person

Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27

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

in every part of that country and is not faced generally by other individuals in or from that country,	pays alors que d’autres personnes originaires de ce pays ou qui s’y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l’incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	Personne à protéger
(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.	(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

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