Federal Court Cour fédérale

Date: 20150825

Docket: IMM-7383-14

Citation: 2015 FC 1007

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, August 25, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

CLAUDIA PATRICIA SILVA ANDRADE
ALEXANDER NINO CUELLAR
JUAN CAMILO NINO SILVA

Applicants

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

I. Introduction

[1] All three applicants are Colombian citizens. Alexander Nino Cuellar and Claudia Patricia Silva are husband and wife (the principal applicants or the parents); Juan Camilo Nino Silva

(Juan Camilo) is their son. Claiming to have been threatened by the Revolutionary Armed Forces of Colombia (FARC), they fled Colombia and sought Canada's protection in May 2006. Their claim was allowed in May 2008, and a few months later, they were granted permanent resident status.

[2] In the meantime, in October 2008, having been unable to recover their passports from Citizenship and Immigration Canada officials and expressing a desire to travel to the United States, the principal applicants filed an application for new passports with Colombian consular officials. After receiving their new passports, the applicants used them to make three trips to Colombia between June 2009 and December 2012, for periods of 50, 40, and 25 days respectively. They also made 15 trips to the United States.

[3] In June 2014, the respondent submitted an application to cease refugee protection with the Refugee Protection Division of the Immigration and Refugee Board of Canada (the RPD), pursuant to paragraph 108(1)(*a*) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [the Act], on the basis that the applicants, in applying for new Colombian passports and returning to that country three times, had voluntarily reavailed themselves of the protection of their country of nationality.

[4] On October 17, 2014, the RPD allowed the respondent's application and found that the refugee protection granted to the applicants in May 2008 was therefore lost. The RPD found, particularly because they had applied for new Colombian passports, that a presumption of an intention to reavail themselves of that country's protection had been raised against the applicants, a presumption which they had not, in its opinion, succeeded in rebutting.

[5] The applicants level a series of criticisms against the RPD's decision, most of them related to considerations of procedural fairness, and ask the Court to set aside said decision.

[6] More specifically, they argue that the RPD (i) provided the parties and the Court with an incomplete Certified Tribunal Record; (ii) refused to disclose all the evidence that was before it; (iii) gave rise, through the conduct of the Member who presided over the hearing (the Member), to a reasonable apprehension of bias; (iv) failed, both substantively and procedurally, to adequately consider the interests of applicant Juan Camilo, who was 17 years old when the hearing was held; and (v) erred in its assessment of the credibility of the explanations given by the parents with regard to the application for new passports and the trips to Colombia.

[7] In my opinion, the only argument with any merit is the one concerning how Juan Camilo was treated at the hearing, given his exclusion.

II. Analysis

[8] It is trite law the standard of review applicable to procedural fairness issues is correctness. This means that in such matters, the Court owes no deference to decision of the RPD (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paras 54, 79 and 87; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 44).

[9] In this case, counsel for the applicants submits that before excluding Juan from the hearing room, the Member was required to make inquiries and determine for herself, in light of the applicant's age and in accordance with Chapter 7 of the *Guide to Proceedings before the*

Immigration Division, which addresses, among other things, the attendance and participation of minors at RPD hearings, whether it was appropriate for him to be there and, if so, to what degree he should participate in the hearing. In counsel's view, the Member completely ignored this guideline, such that Juan was deprived of a hearing even though, according to the *Guide to Proceedings*, when the minor is old enough to testify, as was the case with Juan Camilo, it is preferable to require his or her presence.

[10] On this point, counsel for the applicants pleads that Juan Camilo had separate interests from those asserted by his parents. More specifically, she submits that when they applied for new passports and decided to travel to Colombia, he was too young to form a different opinion from that of his parents and that it was therefore impossible to say, in his case, whether the conditions for losing refugee protection were met, particularly the conditions relating to the voluntary nature of the impugned act and the intention to reavail themselves of Colombia's protection. Given that he was personally targeted by the FARC in the incidents that prompted the family to flee Colombia, she adds, it was reasonable to believe that Juan Camilo's intent may have been different from that of his parents, having regard to the facts and actions giving rise to the application to cease refugee protection.

[11] The respondent counters when Juan Camilo left the hearing room without testifying, he did so of his own free will. He adds that it was in fact at the request of counsel representing the applicants at that hearing, and after Juan Camilo's father, who was acting as designated representative, was consulted, that Juan Camilo left the room to look after the couple's second child, who was three years old at the time. From this, the respondent concludes that Juan Camilo was not denied the opportunity to testify.

[12] I disagree. The consequences of losing refugee protection are considerable, insofar as this also results in the loss of permanent resident status and in inadmissibility, as prescribed by paragraph 46(1)(*c.1*) and subsection 40.1(2) of the Act, respectively. This calls for heightened vigilance on the part of the RPD in applying the relevant rules of procedural fairness, particularly where the attendance and participation of minors at hearings are in question.

[13] Although the *Guide to Proceedings before the Immigration Division* does not have force of law, it nonetheless does reflect, in this regard, the concerns expressed by certain members of the Court (*Mandi v Canada (Minister of Citizenship and Immigration)*, 157 FTR 157; *Cadena v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 67). I find that the Member should not have simply agreed to the request of counsel for the applicants to exclude Juan Camilo from the hearing room. Even after seeking the consent of Juan Camilo's father to this request, she should have made inquiries and determined for herself whether it was preferable for Juan Camilo to be present and testify. As was the case in *Mandi*, above, no one asked the main person concerned what he wanted to do, even though he was 17 years old and had certainly acquired the capacity to form and express an opinion as to his intention to reavail himself of the protection of his country of origin.

[14] In a context where the consequences of losing refugee protection could be especially significant for him, particularly because he was personally targeted by the FARC, this inquiry was necessary, in my opinion, and it was up to the Member to do so.

[15] In this respect, and this respect only, the RPD's decision, when analyzed in accordance with the correctness standard of review, must be set aside and the file, referred back to a

differently constituted panel of the RPD so that Juan Camilo can be given an opportunity to be heard.

[16] As I stated above, in every other aspect, the application for judicial review must fail.

[17] First of all, I cannot agree with the argument that the RPD's decision is fatally flawed because the Certified Tribunal Record prepared by the RPD for the purposes of these proceedings is incomplete because it does not contain the file for the refugee protection claim that, according to the parents, was before the RPD at the time of the hearing.

[18] As the respondent notes, if the principal applicants thought that the Certified Tribunal Record was incomplete, they could have filed a motion to correct the situation, if such a correction was necessary and justified (*Yadav v Canada (Minister of Citizenship and Immigration*), 2010 FC 140, at para 23). For one reason or another, they did not do so. At any rate, this ground must be rejected for another reason: it is clear from the hearing transcript that the refugee protection claim file, even though it was erroneously submitted to the Member at the beginning of the hearing because of the RPD Registry's operating procedures, at least at the time, was separated from the file for the application to cease refugee protection and was not considered when that application was reviewed.

[19] The hearing transcript indeed reveals that the Member took care to point out to the parties, at the opening of the hearing, that she had both the file for the application to cease refugee protection and the refugee protection claim file before her. She also very clearly advised the parties that she had no intention of reading or considering the refugee protection claim file

for the purposes of the decision she had to render on the application to cease refugee protection and that said file would be returned to the Registry. She proposed, [TRANSLATION] "just to be sure", to show them the refugee protection claim file if they thought it desirable.

[20] It therefore seems clear to me, in this context, that the refugee protection claim file did not have to be included in the Certified Tribunal Record because, according to the hearing transcript, it was disregarded by the Member, as it should have been. In the circumstances, I find that the Member was as transparent as possible and dispelled any doubt as to what material was relevant for the purposes of considering the application to cease refugee protection.

[21] Moreover, the principal applicants did not contest this *modus operandi* before the RPD. As the Federal Court of Appeal very recently reiterated in *Maritime Broadcasting System Limited v Canadian Media Guild*, 2014 FCA 59, at paragraph 67, a party must raise an alleged procedural violation at the earliest practical opportunity, that is, as soon as it is reasonable to expect him or her to raise an objection. If that party does not do so, he or she is considered to have waived any rights to raise the matter on judicial review. Such is the case here.

[22] I cannot agree either with the argument that the Member breached the rules of procedural fairness by giving counsel for the applicants 15 minutes to look over the refugee protection claim file and select documents to photocopy, instead of disclosing the entire file to him.

[23] Once again, this is not what is to be understood from what happened at the hearing. This argument, too, is related to the refugee protection claim file. As I just noted, the Member, in the interests of transparency, offered to let the parties look over this file before returning it to the

Registry and identify the documents of which they wanted copies made. Only counsel for the applicants took advantage of this offer, as the respondent's representative stated at the outset that he did not need any documents. The hearing was suspended for 15 minutes to allow counsel for the applicants to look over the refugee protection claim file. After this break, counsel for the applicants stated that he needed only one document, namely, the list of exhibits. He was given a photocopy of said document. At no time did counsel for the applicants object to this way of proceeding.

[24] This argument is therefore without merit. In any event, on the basis of *Maritime Broadcasting System Limited*, the applicants are barred from raising it at this stage of the proceedings because there was nothing stopping them from telling the Member of their reluctance to proceed in this manner, or from asking her for more time to look over the file. None of this was done.

[25] The applicants are also barred from claiming that the Member was biased. As the Court has noted on numerous occasions, alleged bias must be raised promptly, so as to allow the decision-maker the opportunity to recuse him- or herself, and to save scarce judicial resources. This principle is well entrenched in the case law, and failing to comply with it usually precludes relying on a bias argument (*Acuna*, above at para 35; *Fletcher v Canada (Minister of Citizenship and Immigration*), 2008 FC 909, at para 17; *Cao v Canada (Minister of Citizenship and Immigration*), 2012 FC 1398, 422 FTR 108, at para 26).

[26] In this case, the applicants, despite being assisted by counsel at the hearing, neither asked that the Member recuse herself nor expressed their concerns regarding what they now claim to be

reprehensible conduct on her part. On this basis alone, this argument must fail. In any event, it is entirely without merit.

[27] I would point out that an allegation of bias is a serious matter, since it challenges the decision-maker's integrity. According to the case law, such an allegation cannot be taken lightly and must therefore be supported by material evidence demonstrating conduct that derogates from the standard. In other words, it cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of a party or his or her counsel (*Arthur v Canada (Attorney General*), 2001 FCA 223, at para 8; *Gabor v Canada (Citizenship and Immigration)*, 2010 FC 1162, at para 34; *Ramirez v Canada (Minister of Citizenship and Immigration*), 2012 FC 809, at para 11; *Maxim v Canada (Minister of Citizenship and Immigration*), 2012 FC 1029, at para 30).

[28] In the case, the criticisms levelled against the Member do not hold water. First, the applicants take offence to the fact that they were not allowed to obtain a copy of the entire refugee protection claim file, supposedly for environmental reasons. The matter of the refugee protection claim file has already been discussed, and there is no more to add. The Member's so-called [TRANSLATION] "environmentalist speech" was, for her, a colourful way of saying that there was no point in copying the entire file if it was not strictly necessary to do so.

[29] It goes without saying that this would not raise a reasonable apprehension of bias in the eyes of an "informed person, viewing the matter realistically and practically—and having thought the matter through" (*Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369, page 394).

[30] The principal applicants also criticize the Member for having asked them—or for allowing them to be asked—on two occasions questions that could mislead or confuse them. I agree with the respondent that the applicants are sinking into an *ex post facto* microanalysis of how the hearing was conducted. I also agree with the respondent that the hearing transcript shows that the Member was patient and attentive. The Member did indeed ask the parents to stop whispering to each other, but it should also be mentioned that their counsel, too, deemed it necessary to tell them to stop.

[31] The bias argument is dismissed.

[32] Finally, the claim that the Member erred in her assessment of the credibility of the explanations provided by the two parents with regard to application for new passports and the trips to Colombia do not, in my view, warrant the Court's intervention. Here, the standard of review is different. This ground must be reviewed on the reasonableness standard because it raises questions of mixed fact and law falling within the expertise of the RPD. According to this standard of review, the Court must defer to the conclusions drawn by the RPD and will therefore not intervene unless these conclusions, first, do not exhibit justification, transparency and intelligibility and, second, do not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47).

[33] Under this standard, the Court cannot substitute its own appreciation of the evidence in the record for the one at which the RPD arrived (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 59).

[34] As the RPD correctly noted, three conditions must be met to conclude that the protection granted by Canada to a foreign national has ceased because of an act of that foreign national: (i) the act must be voluntary; (ii) the foreign national must intend by this action to reavail him- or herself of the protection of his or her country of origin; and (iii) the foreign national must actually obtain such protection. Moreover, if the foreign national applies for a passport from his or her country of origin, the intent to reavail him- or herself of that country's protection is presumed (*Nsende v Canada*, 2008 FC 531, 327 FTR 315).

[35] In this case, the RPD found that by returning three times to Colombia, a country where they believed their lives and that of their son were in danger, to seek medical care (treatment for tendonitis, orthodontic work and an annual check-up) which, by the way, was not urgent and was available in Quebec or places other than Colombia, the principal applicants had reavailed themselves of the protection of that country within the meaning of paragraph 108(1)(*a*) of the Act. The RPD called into question, among other things, the fact that on each occasion, despite the imminent danger, the entire family travelled to Colombia—to Cali, no less, the place where the threats that led them to leave the country were made—and that they did so for clearly non-imperative reasons.

[36] In light of the evidence in the record, I cannot say that this conclusion falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law. In other words, it has a rational basis, such that the Court's intervention on this point is unwarranted.

[37] This application for judicial review will therefore be allowed only in respect of applicant Juan Camilo Nino Silva, so as to give him the opportunity to be heard.

[38] Neither party submitted a question for certification by the Federal Court Appeal, as paragraph 74(*d*) of the Act permits. I also find that there is no question to be certified.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is allowed with respect to applicant Juan Camilo Nino Silva;

2. The matter is referred back to a differently constituted panel of the Refugee Protection Division to give applicant Juan Camilo Nino Silva the opportunity to be heard;

3. The application for judicial review is otherwise dismissed;

4. No question is certified.

"René LeBlanc"

Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7383-14
STYLE OF CAUSE:	CLAUDIA PATRICIA SILVA ANDRADE, ALEXANDER NINO CUELLAR, JUAN CAMILO NINO SILVA v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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