Federal Court Cour fédérale

Date: 20150922

Docket: IMM-1227-15

Citation: 2015 FC 1100

[UNREVISED ENGLISH TRANSLATION]

Montréal, Quebec, September 22, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ANA MARIA PLATA PEREZ
CAROLINA MENDEZ PLATA
FABIO ALBERTO MENDEZ DANGON

Applicants

and

THE MINISTER OF CITIZENSHIP AND
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB], dated January 28, 2015, dismissing the

appeal from a decision of the Refugee Protection Division [RPD] dated July 24, 2014, in which the RPD had rejected the applicants' claim for refugee protection.

II. Facts

[2] The principal applicant, Fabio Alberto Mendez Dangon, aged 39, and his spouse, Ana Maria Plata Perez, as well as their daughter, Carolina Mendez Plata, are citizens of Colombia who lived in Bogota before leaving Colombia.

[3] In 2007, when we was working at the Ministry of Transport in Colombia and acting as Director General of the National Institute of Concessions [INCO], the principal applicant publicly denounced acts of corruption. Following his denunciations, he was fired and was the subject of a criminal investigation for falsifying documents (i.e. curriculum vitae). In May 2009, the file was closed due to a lack of evidence.

[4] In September 2009, the principal applicant filed a new complaint about corruption, this time with the Presidency of the Republic. Following this, a number of officials were fired, including Messrs. Alvaro José Soto Garcia and Miguel Gomez. The principal applicant claims to have received threats to his safety, specifically from Messrs. Garcia and Gomez. In October 2009, the principal applicant and his family moved to a safer part of Bogota.

[5] According to the applicant's affidavit, Mr. Garcia is an influential person in the community and has influence in the Colombian government and judicial system. A second

criminal investigation of the principal applicant on the same charges as in 2007 was launched in December 2009.

[6] Threats against the principal applicant allegedly began again in 2011 after he filed a written denunciation of corruption within the Ministry of Transport. The applicants moved to a different part of Bogota once again. A request for protection was apparently made to the police, without success. The principal applicant's mother was purportedly assaulted, which the principal applicant interpreted as a message directed at him.

[7] Fearing the legal proceedings he was facing and believing that Mr. Garcia would influence those proceedings, the principal applicant left Colombia for the United States on July 21, 2013. The applicants found themselves in Panama on August 29, 2013; they arrived in Canada on September 1, 2013, and claimed refugee protection on September 30, 2013. The Colombian court ultimately found the principal applicant guilty and sentenced him to eight years of imprisonment. That decision, according to information in the record, is being appealed in Colombia.

III. Impugned decision

A. *RPD decision*

[8] In order to analyze the RAD's decision, it is necessary to understand the RPD decision that was appealed before the RAD; therefore, the Court must take into consideration the RAD's analysis of this previous decision.

[9] In its decision, the RPD rejected the applicants' claim, determining that they were not Convention refugees, pursuant to section 96 of the IRPA, or persons in need of protection, pursuant to section 97 of the IRPA. The RPD found that, on the whole, the applicants were credible, had properly established the facts and had testified in a detailed manner. However, it noted a few omissions and inconsistencies. The RPD therefore concluded that the applicants had not demonstrated a subjective fear of persecution and that they had not acted like individuals with a fear of persecution or a fear for their lives if they were to return to Colombia.

[10] The RPD arrived at this finding based on several elements. First, the applicants remained in Bogota and moved only 3 kilometres from their former residence following the threats they had received. Second, the principal applicant waited until 2011 before filing his written denunciations, over four years after his dismissal. Third, the principal applicant failed to establish a link between his mother's assault and the threats he had allegedly received. Fourth, the principal applicant had not demonstrated that Mr. Garcia had influenced the legal proceedings against him. Fifth, the applicants did not claim refugee protection at the first opportunity, either when the principal applicant was in the United States or when the applicants were reunited in Panama. Lastly, between the first threats received by the applicants in 2007 until their departure from Colombia in 2013, no incident against them occurred.

[11] In short, the RPD found that the principal applicant had a fear of prosecution, not persecution, if he were to return to Colombia.

B. *RAD decision*

[12] In its decision, the RAD re-examined the RPD's decision as to whether the applicants were Convention refugees or persons in need of protection. However, the RAD deferred to the RPD's findings with regard to the credibility of the applicants.

[13] The RAD confirmed the RPD's decision and concluded that applicants' claim for refugee protection had to be rejected for a number of reasons. First, the fact that the applicants had waited four years before leaving Colombia and had moved only 3 kilometres from their former residence, while remaining in Bogota, shows that they did not have a subjective fear. Second, Mr. Garcia was forced to resign from his position at INCO in 2009. Had he wished to cause the applicants harm, he had ample time in which to do so prior to their leaving Colombia, but did not do so. Third, the RAD did not find it credible that Mr. Garcia could influence the criminal investigation of the principal applicant, further concluding that if Mr. Garcia had such influence, he would not have been forced to resign from his position. Fourth, the RAD found that although there are many challenges for Colombia to overcome, the Colombian legal system was not manipulated in a manner that resulted in the persecution of the principal applicant; and, at any rate, the applicants had not met their burden of establishing that the legal proceedings had been influenced by Mr. Garcia. Lastly, the RAD found that the applicants had failed to rebut the presumption of state protection.

[14] In short, the RAD concluded that the applicants' claim for refugee protection under sections 96 and 97 of the IRPA should fail.

IV. Issues

[15] The Court considers that the application raises the following issues:

1) Did the RAD err in finding that the applicants had not demonstrated subjective fear?

2) Did the RAD err in its analysis of the risk of persecution, in particular by failing to consider the cumulative nature of the harassment?

3) Did the RAD err in finding that the applicants had failed to rebut the presumption of state protection?

V. Statutory provisions

[16] The following statutory provisions of the IRPA apply in this case:

Convention refugee	**Définition de « réfugié »**
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,	**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*) 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	*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*) 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.	*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.

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 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 of accepted international standards, and

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

(2) A person in Canada who is a member of a class of persons prescribed by the regulations

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 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.

(2) A également qualité de personne à protéger la personne qui se trouve au

as being in need of protection is also a person in need of protection.	Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VI. Positions of the parties

[17] With regard to the first issue, the applicants argue that the RAD erred in finding that they had no subjective fear. Thus, they contend that the RAD could not have arrived at the conclusion that the applicants lacked subjective fear when the RPD had acknowledged that the [TRANSLATION] "applicants gave detailed testimony and that, in general, the facts were properly established and credible" (Memorandum of Argument, para 16) (*Ramirez-Osorio v Canada (Minister of Citizenship and Immigration)*, 2013 FC 461 [*Ramirez-Osorio*]; *Tranquino v Canada (Minister of Citizenship and Immigration)*, 2010 FC 793). In addition, the RAD erred by failing to consider everything the applicants had done to ensure their protection, taking into consideration only the fact that they had moved a distance of 3 kilometres within Bogota.

[18] Second, the applicants submit that the RAD erred in its determination that the applicants had failed to establish that they were persecuted. Thus, the RAD ought to have considered the cumulative nature of the harassment the applicants were subject to (*Mete v Canada (Minister of Citizenship and Immigration)*, 2005 FC 840). Moreover, the RAD erred by omitting several elements mentioned during the principal applicant's testimony, including: the re-opening of the investigation in 2009 following Mr. Garcia's resignation, irregularities during his criminal proceeding, contradictory testimony by the investigator who had conducted the investigation of the principal applicant and the lengthy delays during the proceeding.

[19] Third, as to the issue of state protection, the applicants maintain that the RAD disregarded objective evidence that the Colombian legal system may be subject to corruption. In addition, the RAD failed to consider the fact that the applicants had made several attempts to seek state protection, without success. Consequently, a charge issued by a corrupt court would amount to persecution of the applicants.

[20] For his part, the respondent submits that the RAD's decision was reasonable. First, it was reasonable for the RAD to conclude that the applicants had no subjective fear of persecution. As far as credibility is concerned, the respondent points out that RPD had not found all of the evidence and facts presented to be credible. The RPD did not find it credible that Mr. Garcia would have had an influence on the legal proceedings against the principal applicant. Furthermore, the RAD concluded that there was an absence of subjective fear when it considered the applicants' conduct in Colombia between 2007 and 2013, in addition to the fact that the applicants waited a lengthy six years before claiming refugee status in another country. Second, the respondent maintains that it is not persecution that the principal applicant fears, but rather judicial prosecution following criminal charges. Third, the applicants' argument regarding the cumulative effect must be dismissed because it is a new argument that had not been raised before the RAD. Lastly, the respondent submits that the RAD reasonably confirmed the decision of the RPD with respect to state protection. As a result, the respondent did not put forth an argument in that regard. For these reasons, in the respondent's opinion, the RAD's decision was reasonable.

VII. Standard of review

[21] RAD decisions relating to the credibility of applicants and state protection are to be reviewed on a reasonableness standard (*Celaj v Canada (Minister of Citizenship and Immigration)*, 2014 FC 761 at para 14; *Carranza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 914 at para 16). As such, the Court will only intervene if the RAD's decision does not fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law, or if the decision-making process lacks justification, transparency or intelligibility (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9).

VIII. Analysis

A. *Subjective fear of persecution*

[22] The RAD must extend deference to findings of credibility made by the RPD (*Sajad v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1107). The RPD found that although the applicants provided detailed testimony, [TRANSLATION] "there were a number of omissions and some inconsistencies between their narrative and testimony, but on the whole, the facts were properly established and credible" (RPD decision, at para 18). In its decision, the RPD raised several elements in respect of which they determined that the applicants were not credible, and which resulted in the RPD concluding that the applicants had not demonstrated a subjective fear:

- They moved only 3 kilometres from their former residence while going about their normal lives as before;
- The principal applicant was vague and hesitant as to why he waited four years before making his denunciations;

- He had failed to establish a link between his parents' assault and his denunciations;
- Although he claimed to fear Mr. Gomez, the principal applicant only talked about Mr. Gomez when the RPD questioned him on the subject.

Those findings remain unresolved following the inconclusive results of the RAD with respect to those findings.

[23] This Court has consistently applied the principle set out in *Shanmugarajah v Canada (Minister of Employment and Immigration)*, [1992] FCJ 583, [*Shanmugarajah*] that "it is almost always foolhardy for a Board in a refugee case, where there is no general issue as to credibility, to make the assertion that the claimants had no subjective element in their fear" (*Shanmugarajah*, above, at para 3). Further, in *Ramirez-Osorio*, the Court extended this principle when it wrote that "in the absence of a <u>negative general credibility finding</u>, [the RPD could not] reasonably determine that the principal Applicant lacks subjective fear" [Emphasis added.] (*Ramirez-Osorio*, above, at para 46).

[24] In this case, the RPD found that the applicants were generally credible, therefore, the RPD made a favourable finding as to their credibility. According to the principles in *Ramirez-Osorio*, in the absence of a negative general credibility finding, the RAD's determination that the applicants lacked subjective fear was not reasonable.

[25] It is possible that a future decision of the RAD following the judicial review that returns the matter to it for redetermination may be the same as the previous decision, but that decision

would have to provide reasons to address the serious concerns identified by this Court following its analysis of the case law.

IX. Conclusion

[26] The Court finds that the RAD's decision is not reasonable. Accordingly, the application for judicial review is allowed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be allowed and the matter be referred back to the RAD for redetermination. There is no question of importance to certify.

"Michel M.J. Shore"

Judge

Translation

FEDERAL COURT

SOLICITORS OF RECORD

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