

Federal Court



Cour fédérale

Date: 20151117

Docket: IMM-1138-15

Citation: 2015 FC 1276

Toronto, Ontario, November 17, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**MARGARITA ROSA GARCIA OSORIO
RAFAEL CAMPI VARGAS
(A.K.A. RAFAEL ROVY CAMPI VARGAS)
ANTONELLA CAMPI GARCIA
MARGOTH OSORIO VILORIA
(A.K.A. MARGOTH REGINA OSORIO
VILORIA)**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] How many times must applicants be personally targeted before a recognition that incidents of assault are not ones of generalized risk but rather of an individualized risk to their lives?

[2] In this case, the Applicants had undergone more than one serious assault and warning; and, only, thereafter, did they finally decide that the last incident of assault was the last straw in respect of peril to their lives.

II. Introduction

[3] The Applicants seek judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision rendered by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada, wherein the RPD rejected the Applicants' claim for refugee protection under sections 96 and 97 of the IRPA.

III. Background and Decision under Review

[4] The Applicants, Margarita Rosa Garcia Osorio (age 37) [Principal Applicant], her husband Rafael Campi Vargas (age 34), their daughter Antonella Campi Garcia (age 6), and the mother of the Principal Applicant Margoth Osori Vioria (age 78) are citizens of Colombia.

[5] The Applicants lived in the city of Barranquilla. The Principal Applicant is a physiotherapist and every week-end she would go with her husband to the town of Sitio Nuevo to assist poor people and sick children by providing medicine, clothes and food. The Applicants believe that these activities displeased the Revolutionary Armed Forces of Colombia [FARC] as rumours started that the husband of the Principal Applicant was considered to be a strong candidate for the next mayoral election. The Applicants allege they were targeted by the FARC because they received death threats. The Principal Applicant was physically assaulted in August

2014; the Applicants, subsequently, received threatening phone calls; and, on October 10, 2014, a gunman fired gunshots at the Applicants while they were travelling in a taxi. The Applicants claimed that they tried several times to seek protection from Colombian authorities, without success. The day following the incident, the Applicants left Colombia, landed in the United States, rented a car and arrived in Canada on October 11, 2014. They made a refugee claim shortly thereafter.

[6] In a decision dated February 12, 2015, the RPD rejected the Applicants' claim for refugee status pursuant to sections 96 and 97 of the IRPA. In its decision, the RPD held that the Applicants lacked credibility; did not demonstrate a nexus between their fear of persecution and at least one of the grounds enumerated at section 96 of the IRPA. They also did not rebut the presumption of state protection in Colombia. Firstly, the RPD found that the risk feared by the Applicants was related to general criminality and not persecution for reasons of race, religion, nationality, or membership in a particular social group or political opinion. Secondly, the RPD found that, with regard to section 97 of the IRPA, the Applicants did not demonstrate a personalized risk as there are widespread incidents of extortion, kidnapping and threats in Colombia. The risk faced by the Applicants is generally faced by others in Colombia. The Applicants also did not establish, on a balance of probabilities, credible and trustworthy evidence that they were targeted for their work for the poor. Thirdly, the Applicants did not rebut the presumption of state protection as the documentary evidence does not support their allegations that they were unable to make a written statement to the police in Barranquilla regarding the August incident. Furthermore, the RPD found that the Applicants left the country before giving the authorities sufficient time to investigate the alleged incidents as the Applicants left Colombia only two months after the first incident and left the day after the shooting incident. Finally, the

RPD found that the documentary evidence demonstrates that, although not perfect, the Colombian government continues to battle the FARC throughout Colombia with some measure of operational effectiveness; and, as a result of the measures taken by the Colombian government, the FARC has felt the impact of the measures.

IV. Issues

[7] The central issues to be determined by the application for judicial review consist of the following:

- 1) Did the RPD err in finding the Applicants did not demonstrate a nexus?
- 2) Did the RPD err in finding the Applicants lacked credibility
- 3) Did the RPD err in its findings in respect of state protection in Colombia?

V. Legislation

[8] The following are the relevant legislative provisions of the IRPA:

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

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

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 of accepted international standards, and

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 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.

(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.

(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 qualifié 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.

VI. Position of the Parties

A. *Position of the Applicants*

[9] The Applicants submit that the RPD's findings that the Applicants lack credibility is unreasonable for several reasons: the RPD had the obligation to provide reasons or the basis for that conclusion (*Cobo v Canada (Minister of Citizenship and Immigration)*, 2005 FC 69); a presumption exists that sworn statements are true unless disbelieved on adequate grounds (*Roozbahani v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1524); the discrepancies between the Basis of Claim [BOC] Form and the testimony of the Applicants are minor (*Feradov v Canada (Minister of Citizenship and Immigration)*, 2007 FC 101); and, the failure to produce supporting documentation cannot reflect negatively on the Applicants' credibility in the absence of evidence contradicting the Applicants' testimony (*Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444).

[10] The RPD also erred by not examining the persecution on grounds of political opinion from the perspective of the persecutor (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689).

Regarding the issue of generalized risk, the RPD's conclusions are unreasonable as the RPD failed to conduct an individualized inquiry of the situation of the Applicants (*Chinchilla v Canada (Minister of Citizenship and Immigration)*, 2014 FC 546); and, to take into consideration that the Applicants have been personally targeted by the FARC (*Olvera v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1048 [*Olvera*]). Furthermore, the RPD failed to consider both the degree and the nature of the risk which the Applicants would face if they were forced to return to Colombia (*Melendez v Canada (Minister of Citizenship and Immigration)*, 2014 FC 700).

[11] Finally, in respect of state protection, the Applicants submit that the documentary evidence clearly demonstrates that there is no state protection available for individuals who are personally targeted by the FARC in Colombia. The RPD erred by placing the legal burden of seeking state protection on the Applicants (*Majoros v Canada (Minister of Citizenship and Immigration)*, 2013 FC 421); and, also erred by not considering whether the efforts of the Colombian authorities translated into adequate state protection – that is whether the programs put in place by the Colombian authorities have actually translated into adequate state protection (*Henguva v Canada (Minister of Citizenship and Immigration)*, 2013 FC 912).

B. *Position of the Respondent*

[12] Conversely, the Respondent submits that the RPD's credibility findings regarding the Applicants are reasonable as the RPD was entitled to draw negative inferences based on inconsistent allegations; contradictory evidence; the failure to mention significant facts in the BOC, and the Point of Entry Notes; and, implausible or incredulous testimony (*Abid v Canada*

(*Minister of Citizenship and Immigration*), 2012 FC 483). It was also reasonable for the RPD to find that there was no nexus between the fear of persecution of the Applicants and a ground on the basis of section 96 of the IRPA as the Applicants, themselves, admitted that the allegations that the husband of the Principal Applicant was running for the mayoral election are based on rumors. Moreover, the Respondent submits that the RPD reasonably found that the Applicants were not personally persecuted, but were victims of general criminality, given that their allegations of being targeted for political aspirations were based on rumors and conjecture; and, given that the Applicants asserted that they had no political aspirations.

[13] Regarding the issue of state protection, the Respondent submits that the Applicants had the burden to rebut the presumption of state protection by adducing relevant, reliable and convincing evidence which demonstrates, on the balance of the probabilities, that state protection in Colombia is inadequate (*Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 30). Contrary to the submissions of the Applicants, the RPD applied the proper test as the test for state protection is adequacy and not effectiveness (*Flores v Canada (Minister of Citizenship and Immigration)*, 2008 FC 723 at paras 9-11). Furthermore, according to the Respondent, it was reasonable for the RPD to find that the Applicants did not take reasonable steps to pursue available protection within Colombia (*Santos v Canada (Minister of Citizenship and Immigration)*, 2007 FC 793). As a result of the foregoing, the Respondent submits that the RPD's conclusions regarding state protection were reasonable as the RPD based its findings on objective documentary evidence as well as comprehensive evidence based on the entire file.

VII. Standard of Review

[14] Undoubtedly, findings by the RPD regarding whether Applicants have established a nexus to one of the Convention grounds, whether the risks faced by the Applicants are generalized, and, findings of credibility are questions of fact and law reviewable on the standard of review of reasonableness (*Cerrato v Canada (Minister of Citizenship and Immigration)*, 2015 FC 179 at paras 23-25; *Acosta v Canada (Minister of Citizenship and Immigration)*, 2009 FC 213).

VIII. Analysis

[15] The Applicants have been personally targeted by a gang; their allegations of assaults have not been disputed. The Applicants, in their memorandum, at paragraph 43, submit that it was unreasonable for the panel to find that a refugee claimant who has been personally threatened by a criminal gang faces a risk of general criminality simply because criminal violence was rampant in the Applicant's country of citizenship (*Olvera*, above; *Portillo v Canada (Minister of Citizenship and Immigration)*, 2012 FC 678 at para 38).

- In this case as alleged by the Applicants, the FARC personally targeted them. The first incident occurred when the Principal Applicant was pushed in the street and suffered injuries; then phone calls to the husband of the Principal Applicant confirmed that it was not an accident; and, finally, as was the shooting while the Applicants were riding in a taxi. Given the number of incidents in such a short period of time, it is more than likely they were personally targeted by a criminal organization

due to attributed political opinion of the Principle Applicant and her spouse without adequate state protection.

[16] The RPD found that there was no nexus between their alleged fears and a convention ground. The Applicants relied on *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*], to submit that the examination of persecution based on political opinion should be approached from the perspective of the persecutor. The Applicants are alleging that they were persecuted because of rumors that the Principal Applicant's husband was running for a mayoral position. From the perspective of the FARC, it would make sense that they would try to prevent someone from the outside to run for a mayoral position – they would want someone favorable to them. From that point of view, the Applicants have provided a nexus between their fear of persecution and a convention ground (political opinion):

[82] Two refinements must be added to the definition of this category. First, the political opinion at issue need not have been expressed outright. In many cases, the claimant is not even given the opportunity to articulate his or her beliefs, but these can be perceived from his or her actions. In such situations, the political opinion that constitutes the basis for the claimant's well-founded fear of persecution is said to be imputed to the claimant. The absence of expression in words may make it more difficult [page747] for the claimant to establish the relationship between that opinion and the feared persecution, but it does not preclude protection of the claimant.

[83] Second, the political opinion ascribed to the claimant and for which he or she fears persecution need not necessarily conform to the claimant's true beliefs. The examination of the circumstances should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution. The political opinion that lies at the root of the persecution, therefore, need not necessarily be correctly attributed to the claimant. Similar considerations would seem to apply to other bases of persecution.

(*Ward*, above)

IX. Conclusion

[17] For the above reasons, the application for judicial review is granted.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be granted.

The file be sent back to a differently constituted panel of the RPD for an assessment anew. There is no serious question of general importance for certification.

"Michel M.J. Shore

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-1138-15

STYLE OF CAUSE: MARGARITA ROSA GARCIA OSORIO, RAFAEL CAMPI VARGAS (A.K.A. RAFAEL ROVY CAMPI VARGAS), ANTONELLA CAMPI GARCIA, MARGOTH OSORIO VILORIA (A.K.A. MARGOTH REGINA OSORIO VILORIA) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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