Federal Court  Cour fédérale

**Date: 20170104**

**Docket: IMM-5038-15**

**Citation: 2017 FC 13**

**Ottawa, Ontario, January 4, 2017**

**PRESENT: The Honourable Mr. Justice Gleeson**

**BETWEEN:**

**MARIA DIAZ CASTRO**
**BRIGETTE LORENA BALLESTEROS DIAZ**
**JULIETTE JOHANA ESPITIA DIAZ**
**MARIAN ESPITIA DIAZ**
**JUAN ALEJANDRO MONTOYA ESPITIA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

## I. Overview

[1] Ms. Maria Brigitte Diaz Castro [principal applicant], her daughter Brigette Lorena Ballesteros Diaz, her niece Juliette Johana Espitia Diaz and Juliett's two children Mariana Espitia Diaz and Juan Alejandro Montoya Espitia [the applicants] are citizens of Colombia. They

arrived in Canada in March 2013 and initiated a refugee claim on arrival alleging they had been targeted by the Revolutionary Armed Forces of Colombia [FARC].

[2] The claim was rejected by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada on the basis that aspects of the principal applicant's testimony were not credible and the applicants had failed to rebut the presumption of adequate state protection. The RPD decision was upheld on judicial review by this Court.

[3] The applicants applied for a Pre-Removal Risk Assessment [PRRA] and submitted a number of documents in support of their application. The applicants submit that in rejecting the application, The PRRA Officer [Officer] erred in failing to address their request for an oral hearing and that the state protection findings were unreasonable in light of the evidence. They ask that the negative decision be set aside and the matter returned for redetermination.

[4] This application raises the following issues:

A. Did the Officer identify and apply the correct test when considering the adequacy of state protection?

B. Did the Officer err by not addressing the request for an oral hearing?

[5] I am of the opinion that the Officer applied a state efforts test when considering the question of state protection. The decision must be set aside on this basis alone. The application is granted for the reasons that follow.

## II. Standard of Review

[6] Justice John O'Keefe in *Dawidowicz v Canada (Citizenship and Immigration)*, 2014 FC 115 and Chief Justice Paul Crampton in *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 [*Ruszo*], concluded that in considering whether or not a decision-maker identified the appropriate test for state protection, the correctness standard is to be applied by the Court.

## III. Analysis

### A. *Did the Officer identify and apply the correct test when considering the adequacy of state protection?*

[7] The respondent argues that the Officer reasonably concluded that the applicants had failed to rebut the presumption of adequate state protection. In advancing this position, the respondent notes that the Officer assessed the 2014 United States Department of State Human Rights Practices Report [US DoS Report] and based on that review, concluded that Columbia is actively addressing issues pertaining to FARC criminality and corruption. The respondent further argues that the Officer did consider the documentary evidence the applicants relied on to argue inadequate state protection but assigned it little weight as it did not relate to the applicants' personalized risks or demonstrate that anyone in Colombia had a continued vested interest in the applicants. In effect, the respondent argues that the Court is being asked to reweigh the evidence. I am not convinced.

[8] After reviewing the applicants' evidence and determining that it deserved little weight, the Officer then quoted at length from the US DoS Report. The extracts taken from the Report highlight problems in Columbia relating to the justice system in general and more specifically to the state's limited ability to prosecute individuals accused of human rights abuses and the occurrence of extrajudicial killings. The extracts make express reference to the FARC, noting FARC involvement in the infringement of citizens' privacy rights, restrictions on movement and the responsibility of illegal armed groups for most instances of forced displacement in Colombia. The report describes recent state efforts in the area of state protection of citizens. It references continued efforts to increase resources for the Attorney General's office, the prioritization of human rights cases and the implementation of a new strategy when analyzing human rights and other cases. Despite these efforts the Report concludes "[n]onetheless, a high rate of impunity persisted."

[9] In *Kumati v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1519, Justice O'Keefe stated at paragraphs 27 and 28:

> [27] … "adequate protection" and " serious efforts at protection" are not the same thing. The former is concerned with whether the actual outcome of protection exists in a given country, while the latter merely indicates whether the state has taken steps to provide that protection.
>
> [28] It is of little comfort to a person fearing persecution that a state has made an effort to provide protection if that effort has little effect. For that reason, the Board is tasked with evaluating the empirical reality of the adequacy of state protection.

[10] The Officer correctly identified the applicants' burden of providing clear and convincing evidence to rebut the presumption of state protection and the requirement to approach the state

for protection in situations where that protection might be reasonably forthcoming. However, I am not convinced that the Officer recognized that in assessing the adequacy of state protection and whether the burden had been satisfied, there was a requirement to do more than simply consider state efforts. The Officer did not address how state efforts might provide operational level protection to the applicants and individuals in a similar situation, a necessary step in the analysis if the Officer had been applying an adequacy of state protection test (*Camargo v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1044 at para 35).

[11] The failure to address the adequacy of state efforts at the operational level is a reviewable error and on that basis alone, the application is granted.

B. *Did the Officer err by not addressing the request for an oral hearing?*

[12] It is not necessary that I consider the Officer's failure to address the request for an oral hearing. However, I am of the opinion that the failure to do so in the specific context of this application is troubling.

[13] The applicants sought an oral hearing in part because this Court, on judicial review of the RPD decision, held that the negative credibility findings rendered by the RPD were unreasonable (*Castro et al v Canada (Minister of Citizenship and Immigration)*, 2015 FC 132 at paras 9 - 11).

[14] In the PRRA decision, there is no acknowledgement of the request for an oral hearing and the issue is not addressed. While it may well have been reasonably open to the Officer to refuse

the request for an oral hearing, the failure to acknowledge and address the request in the unique circumstances of this case undermines the transparency of the decision.

## IV. Conclusion

[15] I am of the opinion that the Officer erred in addressing the issue of state protection and on that basis the decision is set aside.

[16] The parties have not identified a question of general importance, and none arises.

## JUDGMENT

**THIS COURT'S JUDGMENT is that** the application is granted, the matter is returned to be redetermined by a different decision-maker. No question is certified.

"Patrick Gleeson"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-5038-15 |
| **STYLE OF CAUSE:** | MARIA DIAZ CASTRO BRIGETTE LORENA BALLESTEROS DIAZ JULIETTE JOHANA ESPITIA DIAZ MARIAN ESPITIA DIAZ JUAN ALEJANDRO MONTOYA ESPITIA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | OCTOBER 11, 2016 |
| **JUDGMENT AND REASONS:** | GLEESON J. |
| **DATED:** | JANUARY 4, 2017 |

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