Federal Court  Cour fédérale

Date: 20181010

Docket: IMM-1414-18

Citation: 2018 FC 1011

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 10, 2018

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

LUIS ANGEL VANEGAS
YAJHANA PAOLA PONCE FULA

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Nature of the case

[1] Mr. Luis Angel Vanegas and Ms. Yajhana Paola Ponce Fula, a couple of Colombian citizens, are challenging an immigration officer's decision to reject their pre-removal risk assessment application. The officer concluded that they would not be exposed to a risk of

persecution, torture, a threat to their lives, or a risk of cruel and unusual treatment or punishment if they were removed to Colombia.

[2] The central issue in this challenge is Colombia's ability to adequately protect the Applicants.

II. Facts

[3] The Applicants claim to have been persecuted by a criminal gang that extorted them, murdered members of their family and uttered death threats to them.

[4] On August 15, 2017, they left Colombia and went to Miami, United States. A few days later, they went to Bellingham, Washington and crossed the border into British Columbia. The day after they arrived, they were issued an exclusion order and were sent back to the United States. They spent a week at a shelter in Buffalo, New York, and then again crossed the Canadian border at Saint-Bernard-de-Lacolle, where they filed a claim for refugee protection.

III. Decision being challenged

[5] The officer first summarized the Applicants' claims; Ms. Fula states that, in 2004, two of her cousins were murdered by members of the *Autodefensas Unidas* paramilitary group in Colombia for refusing to join the group. One of the attackers was arrested and imprisoned in 2008.

[6] Since the attackers suspected the Applicants of reporting them, Ms. Fula claims that she received death threats in 2010 and 2014.

[7] Mr. Vanegas states that, on October 31, 2016, when he was with Ms. Fula, he was attacked by armed men who took his money and the personal documents that he had with him. From December 2016 to April 2017, those same attackers extorted one million Colombian pesos (approximately $430 Canadian) from him, multiple times. That amount was then increased to 1.5 million Colombian pesos and then to 2 million Colombian pesos. In June 2017, his attackers gave him the choice of working for them or paying them 5 million Colombian pesos. He was released after convincing them that he did not have that money.

[8] Mr. Vanegas adds that, in August 2017, when he was driving in a car with Ms. Fula, two men on motorcycles approached them and one of them shot at them with a firearm. They were not hit and immediately went to the police station. They then hid for a few days in the village where Mr. Vanegas' mother lives, until a police officer informed them that the countryside was not a safe place to escape from their attackers.

[9] On August 14, 2017, they went to the police station and filled out an application for protection, but were informed that the best option for them was to leave the country. They left for Miami the next day.

[10] In view of that story, the officer concluded that the Applicants had not rebutted the presumption that the Colombian state is capable of protecting them. Drawing on the Supreme

Court of Canada decision in *Canada (Attorney General) v. Ward*, [1993] 2 SCR 689, the officer wrote:

> I have carefully considered the evidence before me. I find that the applicants have not rebuted [*sic*] the presumption of state protection. The state is presumed capable of protecting its citizens unless there is a complete breakdown of the state apparatus. This presumption arises out of the idea that international protection is required when there are no other alternatives available to the applicant. Applicants are expected to approach the state for assistance unless they can offer "clear and convincing" proof of the state's inability to protect its citizens.
>
> [TRADUCTION]
>
> J'ai pris pleinement connaissance de la preuve présentée, et je conclus que les demandeurs n'ont pas réfuté la présomption de la protection de l'État. L'État est en effet présumé capable de protéger ses citoyens, à moins d'un effondrement complet de la structure étatique. Cette présomption découle du principe selon lequel les demandeurs ne peuvent se prévaloir de la protection internationale que s'ils ont épuisé tous les autres recours disponibles. On s'attend donc à ce que les demandeurs demandent à l'État de les protéger à moins qu'ils n'aient une preuve « claire et convaincante » que l'État est incapable de protéger ses citoyens.
>
> [Citation omise.]

[11] The officer cited the U.S. State Department's 2016 Country Report (Colombia) to conclude that Colombia is not in a state of complete breakdown. The country is a constitutional republic with free elections, the civil authorities usually maintain control over the security forces, and the courts usually enjoy judicial independence.

[12] In particular, the officer noted the country's recent efforts to bring perpetrators to justice and protect human rights, although much of the legal system is still overloaded and ineffective.

In addition to that, there are problems with bribery and intimidation of judges, attorneys and witnesses.

[13] The officer found that the police had received the Applicants' complaint and had offered them protection. He added that there is no evidence to conclude that the state is not making sufficient efforts to apprehend the suspects or protect the Applicants. When a state maintains control over its territory and has an army, a police force and civil authorities that make serious efforts to protect its citizens, the fact of the protection not being effective in all cases is not enough to rebut the presumption of state protection (*Canada (Minister of Employment and Immigration) v. Villafranca*, [1992] FCJ No. 1189 (QL); 1992 CanLII 8569 (FCA) at para. 7).

[14] While acknowledging the challenges that Colombia is still dealing with, the officer concluded that there is no evidence that it cannot protect its citizens. Since the Applicants did not rebut the presumption of state protection, they did not prove, on a balance of probabilities, that if they were to return to Colombia, they would face a risk of persecution, torture, threat to life, or cruel and unusual treatment or punishment.

IV. Issues and standard of review

[15] The Applicants submit the following questions to the Court:

A. *Did the officer err in his assessment of the evidence?*

B. *Did the officer err in his analysis of protection by the Colombian state?*

[16] However, since I am of the opinion that the second question requires consideration by the Court, these reasons will deal only with state protection.

[17] The standard of review that applies to this issue is reasonableness (*Hinzman v. Canada (Citizenship and Immigration)*, 2007 FCA 171; *Arenas Pareja v. Canada (Citizenship and Immigration)*, 2008 FC 1333 at para. 12).

V. Analysis

[18] I will first briefly discuss the Applicants' efforts to avail themselves of the protection of the Colombian state, and then analyze the officer's conclusions regarding the adequacy of that state protection.

A. *The actions taken by the Applicants*

[19] The evidence of a fear of persecution must have a subjective component and an objective component; the applicant must have a subjective fear of being persecuted, and that fear must be objectively justifiable (*Canada (Attorney General) v. Ward*, [1993] 2 SCR 689).

[20] However, it is well recognized that an applicant does not have to risk his/her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness (*Ward, supra* at pg. 724).

[21] According to the evidence accepted by the officer, the Applicants have been victims of violence in Colombia for a number of years; they were extorted and threatened multiple times, were shot at with a firearm, and were told several times by the authorities that the best way to protect themselves from their attackers, given their powerful organization, was to leave the country.

[22] The officer adequately analyzed the evidence and concluded that the Applicants' fear is subjective.

[23] However, he deals only very briefly with their efforts to obtain protection by the Colombian state. In my view, that incomplete analysis of the objectivity of the Applicants' fear, likely the result of a weak analysis of state protection, contributes to the unreasonableness of his decision (*Ortiz v. Canada (Citizenship and Immigration)*, 2014 FC 82 at para. 23).

B. *State protection*

[24] A careful reading of the officer's reasons leads me to find that his analysis deals almost exclusively with the fact that Colombia is a democracy that is not in a state of complete breakdown, and that the Colombian authorities are making considerable efforts to improve the protection that they provide to their nationals. The officer reasonably concluded that Colombia is not in a state of complete breakdown, which gives rise to the application of the presumption of state protection. However, the officer appears to have failed to continue his analysis of the evidence for determining whether the Applicants had rebutted the presumption that Colombia is able to provide them with adequate protection in the alleged circumstances.

[25] First, the analysis of the documentary evidence consulted by the officer appears to have been selective. Although he mentions having considered all the documentary evidence, he failed to address the problems with the administration of Colombian justice, including some instances of collusion between the state and criminal gangs and of infiltration of the state by members of those gangs. Yet, these were relevant factors in the Applicants' situation. The officer's reasons do not enable me to understand why he failed to consider that evidence or attributed little weight to it (see, for example, *Barragan Gonzalez v. Canada (Citizenship and Immigration)*, 2015 FC 502 at para. 41).

[26] It is well known that the protection that a state provides to its citizens does not have to be perfect, but it must be adequate, and merely the fact of that state making serious efforts at it is not determinative of the adequacy of that protection (*Burai v. Canada (Citizenship and Immigration)*, 2013 FC 565 at para. 28; *Ruano v. Canada (Citizenship and Immigration)*, 2015 FC 1023 at paras. 39-44).

[27] The officer appears to have inferred from Colombia's efforts to improve the protection of its citizens that it was able to adequately protect its citizens in general and the Applicants in particular.

[28] All in all, the officer's reasons do not enable me to determine whether he truly analyzed the adequacy of the protection provided to the Applicants by Colombia because he barely considered the evidence to the contrary in this respect, especially the evidence submitted by the Applicants in support of their claim that the state protection was inadequate. The reasons should

have made it clear why the evidence as a whole rebutted (or did not rebut) the presumption of state protection.

[29] Since that is not the case, I find that the officer's decision does not have the required reasonableness, intelligibility and transparency (*Varon v. Canada (Citizenship and Immigration)*, 2015 FC 356 at para. 59; *Henguva v. Canada (Citizenship and Immigration)*, 2013 FC 912 at paras. 6-10; *Oliveros Rubiano v. Canada (Citizenship and Immigration)*, 2011 FC 106 at para. 35; *Gonzalez v. Canada (Citizenship and Immigration)*, 2014 FC 750 at paras. 57-59).

VI. Conclusion

[30] For these reasons, I allow the Applicants' application for judicial review, I set aside the officer's decision, and I remit the matter back for a fresh analysis of the all the evidence. The parties did not submit for certification any questions of general importance, and none are raised by this case.

JUDGMENT in IMM-1414-18

THE COURT'S JUDGMENT is that:

1. The Applicants' application for judicial review is granted;
2. The decision of the Immigration and Refugee Board of Canada dated January 23, 2018 is set aside and the matter is remitted back for reconsideration by a different immigration officer;
3. No question of general importance is certified.

"Jocelyne Gagné"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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