

Federal Court



Cour fédérale

Date: 20181119

Docket: IMM-1482-18

Citation: 2018 FC 1165

Ottawa, Ontario, November 19, 2018

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**ENVER AUGUSTO LOSADA CONDE
LISA CATHERINE PRIETO CASTAÑEDA
JULIANA LOSADA PRIETO
SEBASTIEN LOSADA PRIETO**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicants asks the Court to set aside the decision by a Refugee Protection Division [the RPD] finding that they are not refugees because they did not rebut the presumption that state protection is available to them in Colombia. They submit that this decision is unreasonable, and also that the RPD breached procedural fairness.

[2] Their procedural fairness allegation is that the RPD “breached natural justice by making ambiguous findings, and by relying on specific doubts he did not seek to clarify in the hearing.” This alleged error does not need to be addressed, as I have found that the decision under review is unreasonable, considering the record and the evidence before the RPD, and for that reason it must be set aside and the applications of the Applicants redetermined by a differently constituted panel.

[3] As an initial observation and one that may provide some assistance to the next decision-maker, I note, having read the transcript of the hearing, the basis of claim form, and the decisions of two Members of the RPD (the first having been sent back on consent to be redetermined), that the events, even though they are few, are not outlined with precision as to timing by the RPD or counsel in this application. In part, this may be the result of the obvious nervousness of Mr. Losada Conde at the hearing, and the fact that he suffers with post-traumatic stress disorder.

[4] Both Members of the RPD that have examined the Applicants’ claims for protection found Mr. Losada Conde to be credible, and that what he says happened to him, did in fact happen. Mr. Losada Conde swore an affidavit in this proceeding in which he attests that what he wrote in the basis of claim “is true, and that my testimony at the hearing was consistent with it.” Having read the transcript of the latest hearing, I agree that his testimony before the RPD is consistent with the facts he set out in the basis of claim. It is also consistent with the events as found by the first Member who assessed these claims. As I find the basis of claim sets out the chronology of events most clearly and is consistent with his testimony, I rely on it.

[5] Mr. Losada Conde is a veterinarian residing and working in Bogota, Colombia. On August 12, 2013, he attended at the residence of Mr. Ramirez Rubio to treat his dogs. After the treatment, the two men went to a café for a drink. They were seated in the outdoor patio when a man approached them with a gun. Mr. Ramirez Rubio was his target. He was shot, as was Mr. Losada Conde. The gunman was fought off by Mr. Losada Conde and Mr. Ramirez Rubio, and Mr. Losada Conde then identified the gunman to the police when they arrived. The assailant was arrested. Mr. Ramirez Rubio died as a result of his injuries but told Mr. Losada Conde that the “guerrillas have killed me.” Mr. Losada Conde assumed that by this he meant the Revolutionary Armed Forces of Colombia [FARC]. The assassin claimed his arrest was unlawful and was released for a short time.

[6] Mr. Losada Conde was hospitalized and while there, on about August 15, 2013, the police came and took his declaration. He identified a photograph of the assassin and confirmed that he was the shooter. As a result, the assassin was re-arrested. During this conversation, Mr. Losada Conde told the officers that he wanted police protection for himself and his family “since I had heard in the news that the guerillas often kill witnesses. They told me this would be difficult, as they do not have enough police officers to protect witnesses.”

[7] Later that day, one of Mr. Losada Conde’s brothers visited him. As he was leaving, he was approached by two men who told him that Mr. Losada Conde “was going to be killed for being an informant” and that his wife and children would also be killed. As a consequence, Mr. Losada Conde’s family went to stay with his mother-in-law.

[8] A few days later another brother of Mr. Losada Conde was approached at his home by two hooded men who told him that they were going to kill Mr. Losada Conde and his family. When Mr. Losada Conde was released from the hospital, he joined his wife and children in hiding at his mother-in-law's residence.

[9] On August 23, 2013, Mr. Losada Conde made a written request to the *Fiscalía* (Attorney General) National General Prosecutor's Office, Immediate Response Unit, referencing the file of the homicide of Daniel Andrés Ramirez Rubio, seeking police and/or military protection for himself and his extended family at their home and at his clinic.

[10] The next day, August 24, 2013, the *Fiscalía* wrote to the Fontibon (a locality of Bogota) Police Station, National Police, referencing "URGENT PROTECTION" as follows: "I am pleased to request that appropriate measures take place to provide police protection and avoid future damages to the life and safety" to Mr. Losada Conde and his family at their residence and his clinic, and that the writer be advised of any action taken by the police.

[11] Mr. Losada Conde says that he then spoke with the police "but they told me that they did not have any officers available." Hoping to obtain a higher priority for protection, he wrote to the Ombudsman (the Public Defender's Office) attaching his earlier request to the *Fiscalía*, "to request the intervention of the OMBUDSMAN'S OFFICE, to assess the risk level and degree of threat against the undersigned Applicant and his family." He testified that he followed up this request: "However, when I would call [the Ombudsman's Office] and ask about the processing of

this request I was simply told that I would have to wait, because there are not enough police officers to deal with all the demands for protection.”

[12] Mr. Losada Conde had visas for his family to go to the United States as they had planned to take their children to Disneyland. He writes: “I decided we should leave Colombia since it was obvious we were not going to get protection from the police.” On September 8, 2013, the family flew from Bogota to New York, and later crossed into Canada on September 12, 2013, and sought protection.

[13] Quite some time after they were in Canada, they learned that while Mr. Losada Conde was hospitalized, another veterinarian was captured by the FARC and taken to the countryside. When the captors were told by a superior that the person they brought was not the man they had been ordered to get, he was released. Ms. Castaneda, Mr. Losada Conde’s wife, says: “It was clear from what was said that they had been expected to abduct Enver or me.”

[14] Counsel for Mr. Losada Conde by letter dated October 31, 2013, addressed to the *Fiscalia*, asked to be informed of Mr. Losada Conde’s “risk in Colombia if he requested protection and what is the actual status of his request for assessment of risk in Colombia.” The response appears to address only the second question and is as follows:

[A] Risk and Threat Evaluation ... has been done, by request of the Regional Ombudsman.

That in conformity with the provisions of Resolution No. 0-50101 of 2008, the legal norm which establishes the specific requirements for association with the Program of Protection of Witnesses and Victims within the Criminal Process, they were not fully accredited by Mr. ENVER AUGUSTO LOSADA CONDE.

One of the basis [sic] the Program of Protection has for not accrediting him consisted in that currently Mr. LOSADA CONDE is abroad and thus in that place he cannot suffer any threat or risk as a result of the events which are the object of the criminal process in which he was a victim, and therefore, it is considered that in these circumstances his risk is ordinary.

[15] The RPD Member was of the view that Mr. Losada Conde should have waited in Colombia for the response as to the risk assessment request. Moreover, he appears to be of the view that it would only have been appropriate for Mr. Losada Conde to take his family from Colombia if protection was then not forthcoming. He writes: “I do not consider it to be a situation where they should not have been expected to continue their requests for protection in Colombia, and that if they remain to do so, they would put themselves at risk.”

[16] I agree with counsel for the Applicants that the RPD Member in analyzing the evidence leading up to this result “misstated and omitted some key evidence” and that his decision is therefore unreliable.

[17] First, the RPD misstates Mr. Losada Conde’s evidence about his discussion with the police office. The Member writes:

He also states that he called the police and asked about the processing of his request. He was told that he would have to wait, because there were not enough police officers to deal with all the demands for protection. [emphasis added]

[18] The Member’s summary is not a summary of the discussion had with the police. It is a summary of the discussion Mr. Losada Conde had with the Ombudsman’s office. The record shows that in his first discussion with the police asking for protection he was told “this would be

difficult, as they do not have enough police officers to protect witnesses.” In his second conversation with the police after the *Fiscalía* had written to the police asking that they protect the Applicants, he was told that “they did not have any officers available.” It was as a result of that conversation, and hoping that he might receive priority, that he made the request to the Ombudsman. When he followed up on that request, both the Ombudsman and the police told him that he would have to wait for the risk assessment as there were many demands for protection.

[19] The police never said that he would have to wait for protection, thus there was never any suggestion from the police that protection would come at some point in time; rather, the police twice told Mr. Losada Conde that they did not have resources to protect him. It is with this proper background that the RPD had to decide whether it was reasonable to expect him to “wait” longer before leaving Colombia.

[20] Second, the Member fails to consider the evidence that another veterinarian was abducted by FARC; presumably a case of mistaken identity. This coupled with the two affidavits from Mr. Losada Conde’s brothers about their discussions with men who made death threats also had to be considered by the RPD when assessing the imminence of risk whether Mr. Losada Conde was obliged to continue waiting for protection (that might never materialize) before leaving Colombia.

[21] Third, the Member appears to consider that the refusals of the police to provide protection were refusals of a local police force when in fact it was an office of the National

Police. The Member is also confused in suggesting that the Ombudsman and the Applicants' counsel were communicating with the National Protection Unit, when both were dealing with the Attorney General's office. As a result of this confusion, the Member appears to be of the view that the referral of the Ombudsman was to some higher protective authority, when it was not.

[22] I find the Member's conclusion, framed as a double negative to be nonsensical: "I do not consider it to be a situation where they should not have been expected to continue their requests for protection in Colombia, and that if they remain to do so, they would put themselves at risk."

[23] First, waiting would not put the Applicants at risk; they already were at risk. Their risk is evident from the two threats reported to Mr. Losada Conde's brothers, and the abduction of the other veterinarian. Clearly the *Fiscalía* were of the view that there was a real risk, as it asked the National Police on an urgent basis to provide protection.

[24] Second, it defies common sense that one should expect a person at risk to "continue their requests for protection" in the face of advice from those who would provide it – the National Police – that they did not have the resources to provide protection. There is no evidence that the position of the police was likely to change regardless of the finding of the risk assessment. Most certainly the view of Mr. Losada Conde was that he had waited long enough without protection being put in place. Having no assurance or expectation in light of the comments of the National Police that protection would be provided, can it reasonably be said that his decision to leave Colombia was unreasonable in terms of a state protection analysis?

[25] Mr. Losada Conde, who has had his claim assessed twice, and been found credible on both occasions, asks that the Court direct the RPD to accept that finding and deal only with the state protection issue. I am not prepared to do so. I agree with the Respondent that it is not appropriate as the claims of these Applicants will have to be heard anew by a different Member and the Court has no way of knowing what evidence will be presented. That being said, it would seem unlikely in the face of evidence similar to that previously given and set out in the basis of claim, that a different credibility finding would occur.

[26] I agree with the parties that there is no question to be certified in this application.

JUDGMENT in IMM-1482-18

THIS COURT'S JUDGMENT is that this application is allowed, the decision under review is set aside, and the claims of the Applicants for protection is to be determined by a differently constituted panel of the Refugee Protection Division.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1482-18

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MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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