Federal Court  Cour fédérale

Date: 20190117

Docket: IMM-1416-18

Citation: 2019 FC 65

Ottawa, Ontario, January 17, 2019

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

ROSA ELENA TORRES CHACIN
EDGAR AUGUSTO RINCON VERGARA
SANTIAGO ANDRES RINCON TORRES
GABRIEL ALEJANDRO RINCON TORRES

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Rosa Elena Torres Chacin, and her husband, Edgar Augusto Rincon Vergara, arrived in Canada from the United States on June 9, 2017 with their two sons, Santiago Andres and Gabriel Alejandro. They are citizens of Venezuela. Mr. Edgar Augusto Rincon also claims to be a citizen of Colombia as he was born there. The other Applicants were born in Venezuela.

[2] The Applicants made their claims for refugee protection at the port of entry, and claimed protection based on Ms. Torres Chacin's and Mr. Rincon Vergara's alleged fear of persecution based on their political opposition to the Venezuelan government.

[3] In a decision rendered orally on November 20, 2017, the Refugee Protection Division [RPD] of the Immigration and Refugee Board rejected their claims, finding that they possess or may acquire citizenship in Ecuador and had not established any possibility of risk in Ecuador. The Applicants have now applied under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [*IRPA*], for judicial review of the RPD's decision. They ask the Court to set aside the decision and return the matter for redetermination by another member of the RPD.

I. The RPD's Decision

[4] The determinative issue for the RPD was whether the Applicants faced a risk in Ecuador. The RPD found that the Applicants would not be at risk in Ecuador, and, hence, did not evaluate the risk they allegedly faced in Venezuela.

[5] The RPD considered the citizenship laws of Ecuador found in the National Documentation Package [NDP] for Ecuador dated March 31, 2017. The RPD referenced Article 7 of the Ecuadorian Constitution, which provides that persons born abroad of a mother or father born in Ecuador are Ecuadorians by birth, as well as Article 8, which states that persons who marry or have a common-law marriage with an Ecuadorian female or male, in accordance with the law, are Ecuadorians by naturalization. In view of these provisions of the Ecuadorian

Constitution, the RPD found the Applicants had acquired or could acquire Ecuadorian citizenship.

[6] The RPD noted that Ms. Torres Chacin and Mr. Rincon Vergara had testified that they were citizens of Venezuela, and that they were also either citizens of Ecuador or would be able to obtain citizenship in Ecuador. Although Ms. Torres Chacin and Mr. Rincon Vergara had sent letters to various government ministries in Ecuador and Colombia stating that they wished to renounce their citizenship in Ecuador and Colombia, the RPD found there was no indication that the letters had been received by either government, and that neither Ms. Torres Chacin nor Mr. Rincon Vergara had been declared not to be citizens of Ecuador or Colombia.

[7] After concluding that the Applicants could go to Ecuador, and that country was the country of reference, the RPD then turned to the objective evidence of risk in Ecuador.

[8] The RPD noted Ms. Torres Chacin's testimony that she believed agents of the Venezuelan government would be able to locate and persecute her in Ecuador, and due to the similar ideologies of the two countries she feared the Ecuadorian government would not offer her protection. The RPD also noted the testimony of the Director of Canadian Human Rights Program who testified that the Venezuelan government has operatives in Ecuador who gather information on political opposition members, and that there have been reports of several Venezuelans kidnapped in Ecuador by Venezuelan agents.

[9] Although the RPD accepted that there might be agents of the Venezuelan government in Ecuador, it found the presence of government agents alone did not mean the Applicants would face a serious risk of persecution if they were to reside in Ecuador. The RPD found there was insufficient credible and trustworthy evidence to establish that the Applicants would face a serious probability of persecution if they were to go to Ecuador.

[10] The RPD preferred the evidence in the NDP about Venezuelan agents in Ecuador over that of the Director of Canadian Human Rights Program since the NDP contained information that was corroborated, and the sources of information were cited; whereas, the Director's testimony in this regard was, in the RPD's view, speculative. The RPD found the documents within the NDP confirmed that there was no evidence demonstrating that Venezuelan opposition members would be persecuted in Ecuador.

II. Analysis

A. *Standard of Review*

[11] The standard of review to be applied to a determination of citizenship under foreign law by the RPD is reasonableness: *Asad v Canada (Citizenship and Immigration)*, 2015 FCA 141 at para 26, 474 NR 258 [*Asad*].

[12] The reasonableness standard tasks the Court with reviewing an administrative decision for "the existence of justification, transparency and intelligibility within the decision-making process" and determining "whether the decision falls within a range of possible, acceptable

outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). In cases where no evidence of foreign law is adduced, there is a wide margin of appreciation and, hence, a wider range of possible and acceptable outcomes (*Asad* at para 30).

B. *The Parties' Submissions*

[13] The Applicants say the RPD erred by finding Ecuador was a country of reference for all of them. According to the Applicants, Mr. Rincon Vergara is not an Ecuadorian citizen and the RPD erred in law by ignoring Ecuadorian citizenship requirements which require fulfilment of various conditions for naturalization as stated in the Report on Citizenship Law: Ecuador (Gabriel Echeverría, Report on Citizenship Law: Ecuador (Italy: Global Citizenship Observatory (GLOBALCIT) Robert Schuman Centre for Advanced Studies in collaboration with Edinburgh University Law School, Feb 2017) [the Report]).

[14] The Applicants point to significant impediments for Mr. Rincon Vergara meeting the conditions for naturalization, notably his political activity in opposition to the Venezuelan government and whether he could be economically self-sufficient for two years. The Applicants contend that it was unreasonable for the RPD to look only to Ecuadorian citizenship laws as stated in Ecuador's Constitution; and in view of *Diawara v Canada (Citizenship and Immigration)*, 2017 FC 1106 at paras 20 and 22, 286 ACWS (3d) 530, the RPD should have investigated further as to Mr. Rincon Vergara's ability to obtain Ecuadorian citizenship.

[15] In the Respondent's view, the documentary evidence clearly shows the Applicants have or can acquire Ecuadorian citizenship. The onus is on the Applicants, the Respondent says, to demonstrate the RPD's findings were made capriciously or without regard to the evidence. According to the Respondent, it is not sufficient that another interpretation of the evidence exists, and the Applicants have failed to show that the RPD's interpretation was not open to it based on the evidentiary record.

C. *Was the RPD's Decision Reasonable?*

[16] It is well established that even if a claimant has a well-founded fear of persecution in one country, the claimant is not entitled to seek refugee status in Canada if, through dual nationality, dual citizenship or habitual residence, there is another country obliged to accept the claimant which does not pose a fear of persecution on one of the grounds set forth in section 96 of the *IRPA* (*El Rafih v Canada (Minister of Citizenship & Immigration)*, 2005 FC 831 at para 2, 140 ACWS (3d) 348).

[17] This principle flows from a long line of jurisprudence commencing with the decision in *Canada (Attorney General) v Ward*, [1990] 2 FC 667 at para 44, 10 Imm LR (2d) 189 [*Ward*], which held that: "a refugee claimant must establish that he is unable or unwilling to avail himself of all of his countries of nationality. It is the nationality of the claimant which is of prime importance. The right to live in his country of nationality becomes relevant … in the discharge of the onus on him of proving that he is unable to avail himself of the country of which he has established he is a national." This principle is now embedded in section 96 of the *IRPA*, which says a Convention refugee must be a person "outside each of their countries of nationality" and is

unable or, by reason of their fear of persecution on one of the listed grounds, unwilling to avail themself of the protection of each of those countries.

[18] The onus is upon a claimant to establish why acquiring citizenship would be an unreasonable burden (*Ward* at para 46; and *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at para 97, 103 DLR (4th) 1).

[19] In this case, the RPD panel member asked Ms. Torres Chacin whether her husband could obtain Ecuadorian citizenship:

> **RPD Board Member:** Having reviewed the documents for Ecuador, it appears that your husband would also be able to obtain Ecuadorian citizenship. Do you know what process you might have to take for that to happen?
>
> **Ms. Torres Chacin:** I know the process, but it is not as easy as the process for the children.
>
> **RPD Board Member:** Would your husband be able to obtain citizenship in Ecuador?
>
> **Ms. Torres Chacin:** I think so.

[20] When Mr. Rincon Vergara testified about Ecuadorian citizenship, he stated as follows:

> **Mr. Rincon Vergara:** When you were asking her if there was any way possible that my children and I should get the… could get the Ecuadorian citizenship, it is possible to obtain it, but in this case for us, it is not advisable, since the incidents that happened to us five months ago, we are not a normal family that we should be. … these incidents have traumatized us deeply.
>
> …
>
> **Mr. Rincon Vergara:** So when you asked her about the possibility of acquiring Ecuadorian citizenship it is possible but under any circumstance is recommended for us, for that fear, that she feels,

> and I feel as well, for children, and because in any country that will be we are going to protect our rights in a democracy in Venezuela.

[21] In view of this testimony as well as the Articles of the Ecuadorian Constitution referenced by the RPD, it was reasonable for the RPD to conclude that the Applicants could go to Ecuador and that Ecuador was the country of reference. The RPD informed the Applicants on September 29, 2017, nearly two months prior to their hearing, that the main issue at the hearing would be whether Ecuador was a country of reference. It also was reasonable for the RPD to prefer the documentary evidence in the NDP over that of the Director of Canadian Human Rights Program as to whether Venezuelan government operatives in Ecuador posed a significant risk for the Applicants.

[22] It may be, as the Report referenced by the Applicants suggests, that there are impediments for Mr. Rincon Vergara to obtain status in Ecuador on the basis of naturalization, and that obtaining such status is a discretionary act on the part of the Ecuadorian government. However, that information was not before the RPD. The Report was contained in the NDP dated February 7, 2018; it was not contained in the NDP dated March 31, 2017, which was the NDP referenced by the RPD in its decision rendered on November 20, 2017.

[23] The Applicants did not produce documentary evidence on Ecuadorian citizenship law at the RPD. The Report, upon which the Applicants rely for their argument that the RPD should have investigated further as to Mr. Rincon Vergara’s ability to obtain Ecuadorian citizenship, was not before the RPD and, consequently, its decision should not be reviewed against evidence

not contained in the Certified Tribunal Record. Only the documents and information that were before the RPD can be considered by a reviewing court on judicial review.

[24] As a general rule, the record for judicial review is usually limited to that which was before the decision-maker; otherwise, an application for judicial review would risk being transformed into a trial on the merits, when a judicial review is actually about assessing whether the administrative action was lawful (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 14-20, 428 NR 297 [*Association of Universities*]; *Bernard v Canada (National Revenue)*, 2015 FCA 263 at paras 13-28, 261 ACWS (3d) 441).

[25] The Report does not fall within any of the recognized exceptions (as stated in *Association of Universities* at para 20) to the general rule against the Court receiving evidence which was not before the decision-maker in an application for judicial review. It does not offer evidence as to whether the decision under review was rendered in a procedurally unfair manner. It does not highlight a complete absence of evidence before the decision-maker in making a finding. And it does not provide general background information in circumstances where such information might assist the Court in understanding the issues relevant to the judicial review. The NDP before the RPD contained documentation upon which it could reasonably ground its finding as to the Applicants' status in Ecuador.

III. Conclusion

[26] The RPD's reasons for rejecting the Applicants' claims for refugee protection are intelligible, transparent, and justifiable, and its decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and law. The Applicants' application for judicial review is therefore dismissed.

[27] Neither party proposed a serious question of general importance to be certified under paragraph 74(d) of the *IRPA*; so, no such question is certified.

[28] The Respondent has been incorrectly named in the Notice of Application as the Minister of Immigration, Refugees and Citizenship. According to the federal Registry of Applied Titles, the applied title for the Department of Citizenship and Immigration is Immigration, Refugees and Citizenship Canada. The correct Respondent to this application for judicial review is the Minister of Citizenship and Immigration by virtue of subsection 4(1) of the *IRPA*. Accordingly, the style of cause will be amended, with immediate effect, to name the Minister of Citizenship and Immigration as the Respondent in lieu of the Minister of Immigration, Refugees and Citizenship Canada.

JUDGMENT in IMM-1416-18

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed; no serious question of general importance is certified; and the style of cause is amended, with immediate effect, to name the Minister of Citizenship and Immigration as the Respondent in lieu of the Minister of Immigration, Refugees and Citizenship Canada.

"Keith M. Boswell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	ROSA ELENA TORRES CHACIN, EDGAR AUGUSTO RINCON VERGARA, SANTIAGO ANDRES RINCON TORRES, GABRIEL ALEJANDRO RINCON TORRES v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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