Federal Court Cour fédérale

Date: 20190930

Docket: IMM-1758-19

Citation: 2019 FC 1241

Ottawa, Ontario, September 30, 2019

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

HERNAN CORTES LOBATON
RUTH CAROLINA LERMA HURTADO

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
AND
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

JUDGMENT AND REASONS

[1] The Applicants ask that the February 14, 2019, decision of an officer [the Officer] refusing their Pre-Removal Risk Assessment [PRRA] be set aside. They submit that the "Officer discounted the Applicants' new evidence based on reasoning that this Court has already – and

repeatedly – found to be objectionable … [and] failed to engage with clear and compelling country condition evidence which squarely contradicted determinative issues.”

[2] I advised the parties at the conclusion of the hearing that this application for judicial review would be granted.

[3] The Applicants, Hernan Cortes Lobaton [Hernan] and Ruth Carolina Lerma Hurtado [Ruth], are a couple from Buenaventura, Colombia. They each worked at Buenaventura’s seaport, where their jobs give them access to the port terminal.

[4] In May 2017, a group of men from the National Liberation Army [ELN] approached Hernan. They provided a list of individuals and told Hernan to let them into the port terminal. They also asked that Ruth create entry permits for the listed individuals. The men threatened to kill them if they did not comply. Hernan and Ruth refused.

[5] Hernan and his brother Hader went to the police station to file a report. However, they saw two of the ELN members who had threatened Hernan at the station and talking with the police. Hernan did not to file a report for fear that the ELN had ties to the police.

[6] Over the next two months, the ELN members continued to confront the couple. These interactions culminated with ELN members coming to Hernan and Ruth’s home and holding them at gunpoint. Following this incident, Hernan and Ruth fled to Cali to stay with Hernan’s uncle. However, soon after arriving in Cali, the ELN began calling Hernan on his phone, stating

that they knew the couple was in Cali, and insisted that they return to Buenaventura to carry out their demand.

[7] The couple decided that it was unsafe to stay in Colombia and fled the country on August 22, 2017. After passing through the United States, Hernan and Ruth arrived in Canada on September 14, 2017. They made a refugee claim upon arrival.

[8] The Refugee Protection Division [RPD] denied the couple's claim in December 2017, for two reasons: Hernan and Ruth failed to rebut the presumption of state protection and they had an Internal Flight Alternative [IFA] in Bogotá, Colombia. Their application for leave to judicially review the RPD decision was dismissed by this Court.

[9] In December 2018, Hernan and Ruth initiated their PRRA application. The Officer noted that it was not his role to "revisit the decision of the RPD" and that the PRRA "is restricted to new evidence that arose after the rejection of the refugee claim or evidence that was not reasonably available at the time of the rejection."

[10] As new evidence, the Applicants submitted statements from Hernan's brother and sister, Hader and Nasly. In his statement, Hader says that in September 2018, two strangers approached him asking about Hernan and told him that they would find Hernan because they had a "score to settle." Hader also describes being kidnapped, questioned about Hernan's whereabouts, and physically assaulted later in September 2018. Hader provided a medical report dated September

21, 2018, from when he sought medical help after the assault. In Nasly's statement, she describes receiving phone calls from unknown numbers asking about Hernan and Ruth.

[11] The Applicants also submitted recent country condition evidence which they say shows that protection measures for victims of ELN violence are very limited, that the ELN can monitor targets across the country, and that the ELN had bombed a police academy in the purported IFA, Bogotá, Colombia.

[12] The Officer accepted that this was new evidence, but gave Hader and Nasly's evidence little weight because he found it to be unreliable. The Officer stated that neither provided phone records to corroborate the calls from unknown numbers. The Officer noted that Hader's medical report did not indicate who assaulted him. The Officer also wrote that the lack of information regarding what steps the siblings took to protect themselves weakened the reliability of their evidence. Finally, the Officer found that because Hader and Nasly are close to Hernan and Ruth, they have a vested interest in the application's outcome and this further weakened the reliability of their evidence.

[13] Additionally, the Officer found that the evidence of worsening country conditions did not overcome the RPD's findings because the presumption of state protection requires evidence of broad law enforcement failure and the police's inaction regarding Hader's police report did not meet this threshold. The Officer also found that the evidence concerning ELN violence and general corruption in Colombia did not demonstrate a personalized risk to the couple.

[14] I agree with the submissions of the Applicants that the Officer's treatment of the new evidence is unreasonable and that the decision cannot stand. The following are the most significant errors made by the Officer in assessing the new evidence.

[15] First, the Officer unreasonably discounted Hader's medical report because it did not specifically mention that ELN members attacked him. Justice Brown, properly in my view, held in *Tabatadze v Canada (Citizenship and Immigration)*, 2016 FC 24 at para 10 that such a requirement is unreasonable:

> This medical report is criticized because it does not name the victim's assailant(s). This is a questionable basis on which to attack a medical report. This is so because when a medical report fails to identify an assailant (as here) it is criticized for incompleteness or inconsistency with the claimant's narrative. But where a medical report does identify the causes of harm to the claimant, it is subject to attack as based on hearsay despite it being both complete and consistent. The Supreme Court of Canada criticized this latter attack in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthansamy*], concerning a health care professional's report that identified a source of harm to the claimant. At para 49, the majority said: "[o]nly rarely will a mental health professional personally witness the events for which a patient seeks professional assistance. To suggest that applicants for relief […] may only file expert reports from professionals who have witnessed the facts or events underlying their findings, is unrealistic and results in the absence of significant evidence." Reports of health care professionals are of most value to the extent they contain health care-related evidence; they should not be rejected because they fail to name a claimant's assailant(s). In my view, this finding was unreasonable.

[16] Similarly, I am concerned that the Officer gave little weight to the medical report for what it did not say (which, as Justice Brown observed would be hearsay), rather than assessing it for what it does say. This approach has been observed by the Court to be erroneous. Justice

Russell in *Yahia v Canada (Minister of Citizenship and Immigration)*, 2019 FC 84 at para 41, stated:

> [T]he RPD finds that the medical report "provides insufficient evidence to corroborate that his described injuries were caused by physical abuse while in detention" (para 31). Why the RPD would expect a medical report to diagnose the cause of the Applicant's injuries is not explained, and there is no suggestion that the report's detailing of body bruises and facial injuries is not consistent with the Applicant's evidence of his mistreatment in detention. At the very least, the RPD makes the mistake of using what the report does not say to support its overall negative credibility finding, which is a reviewable error (see *Mahmud v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 729 at para 11).

[17] Second, the Officer unreasonably gave the evidence of Hader and Nasly little weight because of their relationship to Hernan. Justice Grammond in *Magonza v Canada (Minister of Citizenship and Immigration)*, 2019 FC 14 at para 44, noted the flaw in this reasoning:

> Immigration decision-makers have on a number of occasions discounted evidence provided by members of the family of an applicant, for the sole reason that these persons, having an interest in the well-being of the applicant, would have a propensity to make false statements. This Court has repeatedly held that this is unreasonable. In doing so, the Court has shown its awareness of the challenges of obtaining evidence of persecution. In the vast majority of cases, the family and friends of the applicant are the main, if not the only first-hand witnesses of past incidents of persecution. If their evidence is presumed to be unreliable from the outset, many real cases of persecution will be hard, if not impossible to prove.

[18] Justice Grammond's remarks hold true in this case. While Hader and Nasly may have a "vested" interest in the case's outcome, it is precisely their relationship to Hernan that puts them in the position to provide evidence regarding the ELN's ongoing threat to Hernan and Ruth. The ELN wanted to know where Hernan and Ruth were hiding. Therefore, they targeted their family

members as they would be most likely to know Hernan and Ruth's whereabouts. Without that relationship, Hader and Nasly would not have been targeted and would not be able to provide evidence relevant to Hernan and Ruth's case. By using Hader and Nasly's relationship to Hernan to discount their evidence, the Officer made it almost impossible for Hernan and Ruth to bring evidence that was specific to their situation and that would also receive positive weight.

[19] Third, the Officer unreasonably found that the Applicants "have not objectively established with sufficient reliable evidence that they are at risk in Colombia at the hands of ELN members." This finding is arguably contrary to and a departure from that of the RPD which did not question their risk allegation, but focused on state protection and an IFA. I concur with the submission of the Applicants that the Officer's statement "begs the question: what other corroborative evidence could the Applicants reasonably be expected to have put forward?"

[20] Fourth, the Officer failed to engage with evidence contrary to his finding on the availability of state protection and an IFA. The result of this failure is that the Officer's reasons lack transparency. The extent of the Officer's discussion of Hernan and Ruth's evidence is as follows: "the applicant and Hernan provided a number of reports and articles on the general country conditions, country violence, and violence related to the ELN in Colombia; however, I find that these documents do not demonstrate personalized risks that they would face and I have, therefore, assigned little weight to them." This statement does not explain what the evidence is or why it fails to demonstrate a personalized risk. Most specifically, the Officer fails to engage with evidence that the ELN was active in Bogotá (having bombed a police academy), which was new and different from the evidence before the RPD that the ELN had no presence there.

[21] For all of these reasons, the Officer’s assessment of the evidence is unreasonable and the decision cannot stand.

[22] No party proposed that a question be certified.

JUDGMENT IN IMM-1758-19

THIS COURT'S JUDGMENT is that the application is granted, the decision under review is set aside, the Applicants' PRRA application is to be considered by a different officer in keeping with these Reasons, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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