Federal Court  Cour fédérale

Date: 20201029

Docket: IMM-234-19

Citation: 2020 FC 1016

Ottawa, Ontario, October 29, 2020

PRESENT: Mr. Justice Annis

BETWEEN:

DIANA JOHANNA CAMPAZ ARCE
VICTOR MANUEL IBARGUEN IBARRA

Applicants

and

THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP CANADA

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Diana Johanna Campaz Arce [The Principal Applicant] and her husband Victor Manuel Ibarguen Ibarra [together, the Applicants] seek judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, LC 2001, c 27 [IRPA]. This application concerns a decision of the Refugee Protection Division [RPD] to reject the Applicants' refugee claims.

[2] The RPD found that the Applicants failed to establish a serious possibility of persecution in Colombia based on a Convention ground. The RPD also found that the Applicants failed to establish, on a balance of probabilities, that they would be subject to a danger of torture or face a risk to life, of cruel and unusual treatment or punishment in Colombia, if they were to return to Colombia.

[3] This application for judicial review should be dismissed.

II. **Background**

[4] The Applicants are a married professional couple who are both Afro-Colombians from Cali, Colombia. They are both citizens of Colombia and no other country. The Applicants now have two Canadian-born children, who are not included on this claim.

[5] The Principal female Applicant and male Applicant, although Afro-Colombians, received 19 and 18 years of education respectively. Both are professionals, the Principal Applicant is a dentist and specialist in health administration; the male Applicant is an industrial engineer.

[6] The Applicants' work history indicates that they had been employed part-time and full-time in Cali after graduating from University in July 2006 through 2012.

[7] In 2010-11, the Principal Applicant upgraded her education to obtain her degree in health administration in order to obtain a promotion in the field of public health administration. In 2011 she was looking to advance her career and sent many job applications for health administrator

position vacancies, which were advertised online. However, she only received one invitation for one interview. She and her friend, not an Afro-Colombian person, were both invited for an interview. The Applicant alleged that in her opinion, despite her credentials and expertise, her friend was offered the position, which led her to conclude that she was a victim of discrimination based on race.

[8] The female Applicant indicated that the only place she could obtain work as a health administrator was with a government-run health clinic in Toribio, Cauca, where there was a large presence of indigenous people. Her husband moved from Cali to Toribio, where he also obtained employment with the clinic.

[9] There was a large presence of the Revolutionary Armed Forces of Colombia (FARC) in the Cauca area, and thereafter the dissident group that emerged from the National Liberation Army (ELN) after the peace accord was signed in November 2016.

[10] Events occurred at the clinic between July and September 2012, which led the Applicants to believe that they were targeted by FARC along with other professional staff as government supporters by working at the clinic. They were ordered to leave the area immediately or else they would be killed. Upon their and other staff leaving, the clinic subsequently closed.

[11] The RPD found the Applicants' evidence credible with respect to the reasons that propelled them to leave the clinic in 2012.

III. **Issues**

[12] Inasmuch as the Principal Applicant was pregnant at the time and they were in possession of a visitor's visa for the United States, they decided to leave Colombia for their safety. Their intention however, was to travel to Canada where the Principal Applicant's brother lived. They arrived in Canada on November 19, 2012, via Fort Erie and made a claim for asylum protection on the same day.

[13] The Applicants' counsel claims that they were subject to what was described as an "intersectional nature of risk". It was described in this instance as a situation where in order for Black professionals to work in their chosen professions, discrimination against them in the large cities requires them to move to rural regions of the country such as in Toribio, that resulted in them being targeted by the FARC as political supporters of the government.

[14] The Applicants could offer no jurisprudence supporting any concept of intersectional risk. The jurisprudence relied on by the Applicants referred to circumstances where the failure to consider the cumulative effect of different kinds of persecutory behaviour could be grounds to set aside a decision finding no persecution: *Ramirez* v. *Minister of Citizenship and Immigration*, [2008] 2008 FC 466 [*Ramirez*] and *Gorzas* v. *Canada*, (Citizenship and Immigration), 2009 FC 458 [*Gorzas*].

[15] The Applicants claim that the panel Member appeared to understand the intersectional argument at the hearing, but did not apply the concept in providing her reasons. I disagree,

inasmuch as I find that the Applicants mischaracterize the essence of the panel Member's decision, which comes down to whether they provided sufficient evidence to support the Principal Applicant's claim that she had to leave Cali on grounds of employment discrimination.

IV. **Standard of Review**

[16] By the revised principles in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] S.C.J. No. 65 at para. 26 [*Vavilov*], reasonableness is presumed to be the applicable standard of review for all aspects of the decision. None of the exceptions described in *Vavilov* would affect the presumption that the reasonableness standard should apply in this matter.

[17] A reasonable decision requires internally coherent reasoning and should be justified in light of the legal and factual constraints that bear on the decision such that the decision as a whole is transparent, intelligible and justified. Therefore, "it is not enough for the outcome of a decision to be justifiable... the decision must also be justified." (*Vavilov*, paras. 15, 83 and 86).

[18] The reviewing court may not re-weigh and reassess the evidence considered by the decision-maker, including the drawing of an inferred fact from the primary evidence. Applicants must demonstrate that exceptional circumstances apply which would permit the reviewing court to interfere with factual findings and inferential findings based on the evidence that was actually before the decision-maker. This would include where the decision maker has not taken the evidentiary record and the general factual matrix that bears on its decision into account. Examples include where there is a flawed logical process by which the fact is drawn from the

evidence, where the decision maker has fundamentally misapprehended the evidence, or there was no evidence to support the fact (*Vavilov*, paras. 77, 125 & 126, and citing *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 (CanLII), [2009] 1 SCR 339 at para 64; *Housen v Nikolaisen*, 2002 SCC 33 (CanLII), [2002] 2 SCR 235, at paras. 15-18, 22 & 23; *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31, [2018] 2 S.C.R. 230, at para. 55; *Dr. Q. v College of Physicians and Surgeons of British Columbia*, 2003 SCC 19 (CanLII), [2003] 1 SCR 226, at paras. 41-42).

V. **Analysis**

[19] The panel Member did not dispute that the Applicants were victims of persecution on the basis of their alleged political views when they fled Toribio, even if they were not political supporters of the government. However, this risk is contingent upon the Principal Applicant establishing that she was a victim of employment discrimination that required her to move to a region where she would be at risk, and thereafter whether, the situation of risk continues to exist given the change in political situation in Colombia.

[20] The Court concludes that the Applicant's claim of employment discrimination fails in that no clear error or unreasonableness can be attributed to the panel Member's factual conclusion that there was insufficient probative evidence to support a finding that she was discriminated in the hiring process referred to as the basis for her opinion that she was a victim of discrimination.

[21] These conclusions are supported in the Member's reasoning at paragraph 33, as follows, with my emphasis:

> [33] According to the female claimant's opinion, she was discriminated in getting a position in Health Administration in Bogota. The panel finds the alleged discrimination the female claimant may have experienced after one interview does not amount to persecution. It is her opinion that she was more qualified than the other applicant; the panel cannot make a finding in this respect.
>
> [Emphasis added]

[22] The Applicants claim that it was not necessary for the discrimination to a rise to the level of persecution in order for them being required to move to an area, such as Toribio where they are at risk. However, as noted, this was not the panel Member's conclusion. The Member stated at paragraph 33 that the evidence was insufficient to demonstrate that she was the subject of any discrimination. In other words, discrimination could not be established as the reason that she did not obtain her position as a hospital administrator, which in turn led her to seek work of this nature in Toribio.

[23] The only evidence in support of discrimination of the Principal Applicant was her personal opinion that she was more qualified than her friend who also applied for this position. An applicant's opinion of being the subject of discrimination requires some form of corroboration to attain a sufficient probative value to be a concluded fact. The panel Member indicated that "absent job criteria", she could not make a finding of discrimination. The Member could have said just as easily that absent any corroborative evidence, she could not make a finding of discrimination.

[24] There are any number of reasons why someone does not obtain a position. These include the level of the position and its requirements, having a bad interview, or just having graduated without the relevant or sufficient evidence of appropriate work experience. The first job in a field is normally the most difficult to obtain. It is not unusual in professions for persons to have to move to outer regions to obtain experience in order to be able to work in major centres of preference where there may be better opportunities and an improved quality of life. The Principal Applicant's opinion of discrimination is inherently speculative, unless objectively corroborated.

[25] Such evidence should have been readily available. This includes job offers that set out essential and relevant qualifications, letters or emails of applications, letters or emails of invitations to an interview, refusal letters, or even an affidavit from her friend deposing that the Principal Applicant participated in and was not successful in the competition or position that she won. Such evidence would have supported her narrative sufficiently to make a finding of discrimination.

[26] Where evidence is expected to be available to support an essential fact such as not succeeding in a job competition, it should be brought forward, or some reasonable explanation given, why it could not be obtained or be available. Section 11 of the *RPD Rules* provides that "[t]he claimant must provide acceptable documents establishing their identity and other elements of the claim. A claimant who does not provide acceptable documents must explain why they did not provide the documents and what steps they took to obtain them". See also *Kallab v. Canada (Citizenship and Immigration)*, 2019 FC 706 at paragraphs 153 et seq, endorsing the UNCHR refugee handbook that requires a refugee claimant to "[m]ake an effort to support his statements

by any available evidence and give a satisfactory explanation for any lack of evidence. If necessary, he must make an effort to procure additional evidence" as a requirement to establish "trustworthiness" pursuant to subparagraph 170 (h) of the IRPA to allow the RPD to "base a decision on evidence that is adduced in the proceedings and considered credible or trustworthy in the circumstances".

[27] If allegations of discrimination are not upheld, the motivation for moving to Toribio is speculative, i.e. just as likely to obtain first job experience. This leaves only the question as to whether the Applicants were or would be at risk if living in Cali, or some other large centre where it is not alleged that political or criminal organizations carry out similar threats as in the outer regions.

[28] The panel Member's decisions directly respond to this issue at paragraphs 34 to 36, as follows with the Court's emphasis:

> [34] The panel finds the claimants were able to earn a livelihood as professionals. The female claimant was employed as a dentist, but not necessarily in the field of Health Administration, which she desired.
>
> [35] The claimants' evidence indicates that they did not experience any discrimination in obtaining education, housing or any other area [of discrimination].
>
> [36] In view of the totality of the evidence, the panel finds the discrimination the claimants may have experienced in the past, does not rise to the level of persecution.

[29] The evidence related in paragraphs 34 to 36 above supports a factual conclusion that the Applicants were able to maintain a reasonable middle-class livelihood as professionals living in

Cali. While being employed as a dentist was not the preferred profession of the Principal Applicant, as opposed to being a health administrator, and (somewhat surprisingly) may not have entailed the same earnings, these circumstances do not rise to the level of persecution or cruel and unusual treatment.

[30] It is a difficult enough submission that discrimination limiting employment opportunities can rise to the level of persecution or any form of cruel or unusual treatment or punishment. There is no issue, however, that the inability to earn one's potential salary in a professional category due to discrimination, but which nevertheless allows the Applicants' to meet their economic and social needs, when not be subject to other discriminatory limitations, does not rise to the requirements of either section 96 or 97 of the IRPA.

[31] As a third reason to dismiss the application, the panel Member found that the former risk based upon the Applicants' perceived political affiliation as working for a government-sponsored clinic had radically changed since the Applicants' departure from Columbia in 2012. The FARC has become the government of the country. All issues of political association by working for a government health institution have abated.

[32] The panel Member also rejected the Applicants claim of a new risk issue represented by the thousand or so dissident FARC members who remain in the outer regions. It was noted that the dissidents had abandoned their political motivation that inspired past threats to the Applicants, and instead pursue criminal activities in regions where members of Colombian society were previously at risk to the FARC.

[33] The panel Member's review of the country condition evidence on a forward looking assessment concluded that the change in country conditions, whereby the transformation of FARC to a political party, was sufficiently meaningful and effective to render any genuine fear of the Applicants unreasonable and hence without foundation. There is sufficient evidence to support this conclusion, which is reasonable. It is not the Court's function to reweigh this evidence that forms the basis for the Member's conclusion.

VI. **Conclusion**

[34] Accordingly, the application is dismissed. No questions were advanced for certification on appeal, and none are certified.

JUDGMENT in IMM-234-19

THIS COURT'S JUDGMENT is that:

1. Accordingly, the application is dismissed.

2. No questions were advanced for certification on appeal, and none are certified.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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