

Federal Court



Cour fédérale

Date: 20220909

Docket: IMM-5415-21

Citation: 2022 FC 1277

Ottawa, Ontario, September 9, 2022

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

**BEATRIZ ELENA MEDINA ZAPATA
NATHALY ANTOLINEZ MEDINA
MELISSA ANTOLINEZ MEDINA
SEBASTIAN ANTOLINEZ MEDINA
RAFAEL LEONARDO ANTOLINEZ
OROZCO**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The Applicants seek judicial review, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of the Refugee Appeal Division's [RAD] July 22,

2021 decision [Decision]. The RAD upheld the Refugee Protection Division's [RPD] decision that the Applicants are not Convention refugees or persons in need of protection within the meaning of sections 96 and 97 of *IRPA*, having found that the Applicants failed to rebut the presumption of state protection.

[2] For the reasons that follow, the application for judicial review is dismissed.

II. Background

[3] Beatriz Elena Medina Zapata [Principal Applicant or PA], her spouse [Male Applicant], and their three adult children, Nathaly, Melissa, and Sebastien [collectively, the Applicants] are citizens of Colombia. They fear the Los Chivos cartel [Cartel], a Medellin-based gang that is associated with the Gulf Clan, a right-wing guerilla group.

[4] On November 20, 2018, a member of the Cartel visited the Applicants' family home in Medellin in an attempt to recruit Sebastien, who refused. The Applicants filed a complaint with the Attorney General's office [Fiscalia], following which they obtained a protection order, the direct telephone numbers of police officers, and advice on self-protection measures.

Subsequently, the Applicants temporarily relocated to another area of Medellin.

[5] In early December 2018, two men from the Cartel approached the Male Applicant's mother, who lived in a different suburb of Medellin, and inquired about Sebastien. On December 8, 2018, the Male Applicant's mother attempted to add this incident to the previous complaint with the Fiscalia; however, a holiday prevented her from doing so until December 10, 2018. That

same day, the Applicants travelled to Canada using plane tickets they had previously purchased for vacation purposes. Shortly after arriving in Canada, the Applicants filed for refugee protection.

[6] The RPD found that the Applicants failed to rebut the presumption that the Colombian state is capable of protecting its citizens. Not only did the Fiscalía and the police provide operationally adequate and effective assistance in response to the November 2018 incident, but the Applicants' departure following the December 2018 incident frustrated the Fiscalía's subsequent efforts. The RPD noted that the Applicants departed Colombia within 20 days of the November 2018 incident, and within two days of the December 2018 incident, leaving protection-seeking efforts to "another relative not directly involved in the previous incident." In short, the Applicants did not make sufficient efforts to seek protection from Colombian authorities.

[7] The RPD also noted that, while the documentary evidence is mixed, Colombia is not a failed state where groups such as the Cartel and Gulf Clan can operate freely absent countervailing government efforts.

III. The Decision

[8] The RAD dismissed the Applicant's appeal, concluding that the Applicants failed to rebut the presumption of state protection.

[9] In rendering its decision, the RAD drew a negative inference from the Applicants' failure to both accompany the Male Applicant's mother to file the complaint and follow-up on the complaint. These actions demonstrated that "the family did not take all objectively reasonable efforts to exhaust all courses of action reasonably available to them in Colombia."

[10] The RAD disagreed with the Applicants' that they did not receive adequate state protection after the November 2018 incident, as the measures proposed by the Fiscalía and the police are common preventive protection measures afforded to victims of crime. The RAD noted that adequate state protection does not equate to perfection.

[11] The RAD noted that the Gulf Clan is one of the largest and most dangerous criminal groups in Colombia, with nation-wide networks to other armed groups. However, the RAD also considered additional objective and country condition evidence, including: the government's significant efforts to deal with corruption and prosecution interference; the decline in rates of homicide, subversion, and domestic terrorism; and the institution of programs and resources to protect citizens, including failures in these efforts. Ultimately, the RAD found that, while not perfect, the protection measures met the standard for adequate state protection.

IV. Issues and Standard of Review

[12] The sole issue for determination in the present case is whether the RAD's decision is reasonable.

[13] The merits of the Decision attract a reasonableness standard of review (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25 [*Vavilov*]). A reasonable decision is one “that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker” (*Vavilov* at para 85). In assessing reasonableness, the reviewing court must consider the decision as a whole, and refrain from conducting a line-by-line search for error (*Vavilov* at paras 85, 102). Where the reviewing court is satisfied that there are sufficiently serious shortcomings in the decision, such that it lacks the “requisite degree of justification, intelligibility and transparency”, the decision may be set aside (*Vavilov* at para 100).

V. Analysis

A. *Is the RAD’s decision reasonable?*

(1) Applicants’ Submissions

[14] First, the RAD failed to provide any reasonable explanation for drawing a negative inference from the Applicants’ failure to accompany the Male Applicant’s mother to complete her complaint on December 10, 2018. The Applicants were not present at the time of the incident, and could not have added any further evidence to supplement her report. The Applicants did accompany the Male Applicant’s mother on December 8, 2018, but were unable to file the report. It was reasonable for the Applicants to leave Colombia on December 10, 2018, in accordance with their original vacation plans, as they feared for their safety.

[15] Second, the RAD unreasonably found that the measures provided by the Colombian state were adequate. The protection measures offered by the Fiscalía and the police after the November 2018 incident were inadequate at the operational level, as they did not shield the Applicants from future incidents. The assessment of state protection must take into account operational effectiveness (*Dawidowicz v Canada (Citizenship and Immigration)*, 2019 FC 258 at para 10; *Mata v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1007 at para 13).

[16] Third, the RAD ignored contradictory evidence concerning the efficacy of Columbia's state protection efforts (*Cervenakova v Canada (Citizenship and Immigration)*, 2012 FC 525 at para 74; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC 53 at paras 14-17, 83 AWCS (3d) 264 [*Cepeda-Gutierrez*]). A review of the documentary evidence reveals that adequate state protection is not available on an operational level for similarly situated individuals.

(2) Respondent's Submissions

[17] The RAD's analysis of state protection was reasonable. The Applicants bore the burden of rebutting the presumption of state protection with clear and convincing evidence. The authorities provided the Applicants with protection after the November 2018 incident, including the direct phone numbers to the police, and the Applicants failed to sufficiently engage these protection measures following the second incident. A refugee claimant's decision to flee before the police have had an opportunity to investigate does not amount to a lack of state protection (*Montemayor Romero v Canada (Citizenship and Immigration)*, 2008 FC 977 at para 24).

[18] The RAD did assess contrary country condition evidence, having acknowledged that armed groups remained a problem in Colombia. However, the RAD also noted that state protection measures, including those against the Gulf Clan in 2015 and 2017, were working, as indicated by the declining rates of homicide, subversion, and domestic terrorism. While the evidence on state protection was mixed, it was reasonably open to the RAD to find that the Applicants had not met their burden (*Giraldo v Canada (Citizenship and Immigration)*, 2020 FC 1052 at para 19).

(3) Conclusion

[19] It is trite law that claimants must seek protection from their home state before going to a different country to obtain refugee protection (*Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at para 41; *Canada (AG) v Ward*, [1993] 2 SCR 689 at 709, 103 DLR (4th) 1 [*Ward*]). Absent a complete breakdown, there is a presumption that a state is able to protect its citizens. Accordingly, a claimant must provide clear and convincing evidence that the state is unable or unwilling to do so (*Ward* at 724; *Cosgun v Canada (Citizenship and Immigration)*, 2010 FC 400 at para 52). The burden of proof in such cases is proportional to the level of democracy in the state in question (*Capitaine v Canada (Citizenship and Immigration)*, 2008 FC 98 at paras 20-22).

[20] The test for state protection also requires consideration of operational adequacy beyond mere efforts on the part of the state to protect its citizens (*Garcia v Canada (Citizenship and Immigration)*, 2007 FC 79 at para 15). Protection offered by a state must have a certain degree of

effectiveness (*Soto v Canada (Citizenship and Immigration)*, 2010 FC 1183 at para 32; *Rstic v Canada (Citizenship and Immigration)*, 2022 FC 249 at para 30).

[21] Refugee claimants must also show that they have made all reasonable efforts to obtain protection in their home state, or that it would have been objectively unreasonable for them to do so (*Nugzarishvili v Canada (Citizenship and Immigration)*, 2020 FC 459 at para 34 [*Nugzarishvili*]).

[22] In my view, the RAD's conclusion that the Applicants failed to rebut the presumption of state protection is reasonable. I find this for several reasons.

[23] First, I see no error in the RAD drawing a negative inference from the Applicants' failure to accompany the Male Applicant's mother to file the complaint related to the December 2018 incident. The RAD explained that this event, coupled with the Applicants' failure to follow-up on this complaint, showed that they "did not take all objectively reasonable efforts to exhaust all courses of action reasonably available to them in Colombia" (Decision at para 11). The burden was on the Applicants to show that they, and not anyone else, made all reasonable efforts to obtain protection from the Colombian state (*Nugzarishvili* at para 34).

[24] Related to this point is that the Applicants left the country 20 days after the first incident and two days after the second incident, leaving their protection-seeking efforts in the hands of a relative. In this context, it was reasonable for the RAD, based on the evidence, to find that the Applicants did not make all reasonable efforts to seek obtain protection in Colombia.

[25] Second, I see no reason to interfere with the RAD's determination that the adequacy of state protection at the operational level was adequate. The Applicants simply did not allow for the operational aspect of state protection to take effect. The Fiscalia was responsive to the initial complaint filed and took some operational steps to provide protection. In my view, the Applicants are inviting this Court to reweigh and reassess the evidence that was before the RAD and to come to a different conclusion. This is not the Court's role on judicial review (*Vavilov* at para 125).

[26] Lastly, the Applicants plead that the RAD ignored country condition evidence pointing to the conclusion that effective state protection is unavailable for similarly situated individuals in Colombia. It is trite law that decision-makers are presumed to have considered the entirety of the evidence and that they do not have to refer to every piece of evidence before them (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 at para 1). This presumption can be rebutted when the decision-maker is silent on evidence that is critical and squarely contradicts its conclusion (*Basanti v Canada (Citizenship and Immigration)*, 2019 FC 1068 at para 24; *Cepeda-Gutierrez* at para 17).

[27] The RAD, at paragraph 16 of its Decision, expressly states that it reviewed the Applicants' appeal memorandum and the country condition evidence. The RAD even refers directly to documents that the Applicants allege it ignored. In my view, the RAD carefully examined the country condition evidence, including the evidence submitted in the appeal memorandum. After reviewing the country condition evidence, the RAD acknowledged that the Gulf Clan is one of the most dangerous paramilitary groups in Colombia, with nation-wide

networks to other armed groups. It also acknowledged that, while the Colombian government is making significant efforts to provide protection to its citizens and to victims of armed conflicts, there is evidence of failures in these efforts. Most importantly, the RAD considered the imperfect, yet effective protection measures available in Colombia, as evidenced in the declining rates of homicide, subversion, and domestic terrorism. As such, the RAD found that the standard for adequate state protection was met in the circumstances. It was entirely open for the RAD to make this finding, based on the available evidence (*Burai v Canada (Citizenship and Immigration)*, 2020 FC 966 at para 37).

VI. Conclusion

[28] The Applicants have not met their burden of showing that the RAD's decision is unreasonable. For the reasons set out above, the application for judicial review is dismissed.

[29] The parties have not proposed a question for certification and I agree that none arises.

JUDGMENT in IMM-5415-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no question of general importance for certification.

"Paul Favel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5415-21

STYLE OF CAUSE: BEATRIZ ELENA MEDINA ZAPATA, NATHALY ANTOLINEZ MEDINA, MELISSA ANTOLINEZ MEDINA, SEBASTIAN ANTOLINEZ MEDINA, RAFAEL LEONARDO ANTOLINEZ OROZCO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

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