Federal Court		Cour fédérale

Date: 20100722

Docket: IMM-5292-09

Citation: 2010 FC 770

Ottawa, Ontario, July 22, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

ELIZABETH ALVAREZ CORTES
SAMUEL DARIO VASQUEZ ALVAREZ
NICOLAS ZABALA ALVAREZ
MATEO ZABALA ALVAREZ

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the RPD) dated September 22, 2009 concluding that the applicants are not Convention refugees or persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act* (IRPA), S.C. 2001, c. 27.

FACTS

Background

[2] The applicants are citizens of Colombia. Ms. Elizabeth Alvarez Cortes is the forty (40) year old applicant mother. She has three minor children who are also applicants in this matter, nineteen (19) year old Mr. Nicholas Zabala Alvarez, fifteen (15) year old Mr. Mateo Zabala Alvarez, and eleven (11) year old Mr. Samuel Dario Vasquez Alvarez.

[3] The applicant family entered Canada in November 28, 2007 from the United States and immediately applied for refugee status. Their claim was heard by a panel of the RPD on June 23, 2009.

[4] Ms. Cortes was born and raised in Bogota, Colombia. She married and had two children, Nicholas and Mateo. The marriage ended in divorce in 1993. The applicant met her second husband, Mr. Dario Vasquez in 1995. They married on February 19, 2001 and had one child, Samuel. Mr. Vasquez worked at the Office of the Prosecutor General where he was the Second Judicial Investigator. Ms. Cortes was not informed of her husband's specific duties or tasks, which involved criminal searches and arrests. In May 1999, while living in Bosques de Suba, the family began receiving threatening phone calls which were attributed to Mr. Vasquez's work as a judicial investigator. They moved to Cartagena and made arrangements to obtain travel documents and visitor visas for the United States. Mr. Vasquez resigned his position. Ms. Cortes travelled to the U.S. in April 2004. Mr. Vasquez and the children followed in December 2004.

[5] Ms. Cortes separated from Mr. Vasquez approximately two months after the family's move to the U.S. The applicants remained in the U.S. without status until they decided to join the applicant mother's sister in London, Ontario. The applicants crossed into Canada on November 28, 2007 and claimed refugee status, fearing persecution in Columbia as a result of Mr. Vasquez's previous employment.

Decision under review

[6] The refugee claim was dismissed by the RPD on September 22, 2009 because Ms. Cortes' actions were inconsistent with her stated fears. The RPD further determined that there is less than a serious possibility that the applicants will be subject to persecution as a result of Mr. Vasquez's past employment if they were to live in Bogota, Columbia.

[7] The RPD made an adverse inference with respect to credibility from the applicants' failure to claim refugee protection in the U.S., their stay in the U.S. without status for two and a half years, and the consequent delay in entering Canada and claiming refugee status. Ms. Cortes stated that she was not aware at the time that asylum requests must be made within one year of arrival in the U.S. Ms. Cortes testified that living without status in the U.S. was not problematic until 2007 when the risk of deportation increased.

[8] The RPD determined at paragraphs 20-24 of the decision that there is no basis for the applicants' subjective or objective fear:

> ¶20 In the past there is no evidence that the claimant, her ex-husband, or her children, were ever harmed due to the ex-husband's

> employment. The only reason the claimant believes she is at risk is because her ex-husband told her.
>
> ¶21 The claimant seemed unsure as to what group had been threatening her ex-husband. However I have reviewed the documentary evidence as it pertains to the current situation for cities such as Bogota and the possibility of a person being found or harmed by either militant left wing organizations that is FARC or the ELN.
>
> ¶22 Counsel in her country condition documents Exhibit C-6, item 3, includes a UNHCR report for Colombia from March 2005. In the 2005 report, paragraph 58 states "The irregular armed groups have the capacity to track down victims throughout Colombia and indeed have done so frequently in the past.
>
> ¶23 In the current document published four years later by the same agency, there is no longer such a reference.
>
> ¶24 I am satisfied this reference has been removed since it no longer applies.

[9] The RPD requested information and submissions on whether Colombians who have lived abroad for along time and adults who have left Colombia as minors are at risk if they return to their homeland. The RPD panel indicated to counsel that it was of the view that the lack of objective evidence on this issue was because such persons are not at risk. The applicants took a contrary view and commissioned and submitted an expert report dated August 2009. The identity of the author is known to the parties in confidence. From the biographical sketch which accompanies the report and counsel submissions, it is evident that the author is an Associate Professor at a prestigious university in the U.S. who has been studying the country conditions of Columbia for a number of years. The expert was quoted in the March 2005 UNHCR report where he stated that Bogota was not a safe city for relocation. In the 2009 report, the expert stated that the violence between the FARC, government, and various paramilitary groups is now characterized by guerrilla, drug crime, and

terrorist acts. The expert found that human rights abuses are committed by all parties to the conflict with impunity. The expert concluded that it is not safe for Colombians to return at this time.

[10] The RPD examined a number of country condition documentation from 2008 and 2009 and the expert's report and found that the FARC or ELN continue to persecute persons of interest, but their capacity to conduct operations in Bogota has been curtailed significantly and the warfare between the parties continues mostly in rural areas. The RPD noted that there is no evidence that the applicants were former members of the FARC. The RPD concluded that the documentary evidence does not support the applicants' claims of a possibility of serious harm from left wing guerrillas such the FARC that still operate in rural areas of Columbia. The claim for refugee status was therefore dismissed.

LEGISLATION

[11] Section 96 of IRPA grants protection to Convention refugees:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	pays; *b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

[12] Section 97 of IRPA grants protection to certain categories of persons:

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	*a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international	*b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, (ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas, (iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes

standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	internationales — et inhérents à celles-ci ou occasionnés par elles, (iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

ISSUES

[13] In their submissions the applicants focused on the following determinations by the RPD which have been reformulated as the relevant issues in this proceeding:

a. Were the adverse credibility findings based on the applicants' failure to apply for status in the U.S. reasonably open to the RPD?

b. Was it reasonably open to the RPD to determine that the applicants did not have a subjective fear of persecution in light of the evidence of objective risk?

c. Was it reasonably open to the RPD to find that Bogota is a valid internal flight alternative?

STANDARD OF REVIEW

[14] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at para. 53.

[15] Questions of credibility, state protection and IFA concern determinations of fact and mixed fact and law. It is clear that as a result of *Dunsmuir* and *Khosa* that such issues are to be reviewed on a standard of reasonableness. Recent case law has reaffirmed that the standard of review for determining whether the applicants have a valid IFA is reasonableness: *Mejia v. Canada (MCI)*, 2009 FC 354, per Justice Russell at para. 29; *Syvyryn v. Canada (MCI*), 2009 FC 1027, 84 Imm. L.R. (3d) 316, per Justice Snider at para. 3; and my decision in *Perea v. Canada (MCI)*, 2009 FC 1173 at para. 23.

[16] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir*, *supra*, at paragraph 47; *Khosa*, *supra*, at para. 59.

ANALYSIS

Issue No. 1: Were the adverse credibility findings based on the applicants' failure to apply for status in the U.S. reasonably open to the RPD?

[17] The applicants submit that the RPD's credibility finding is unreasonable because it fails to consider in the reasons for the decision the applicants' explanation for their failure to claim refugee status in the U.S. and their extended stay without status.

[18] When read as a whole, the RPD's impugned finding forms only a small part of the overall decision, which is focused instead on the substance of the applicants' alleged fears. The RPD's analysis on this point is found at paragraphs 8 and 43 of the decision:

> ¶8 The US visitor status of all claimants had expired by June 2005. The claimants lived in the US for approximately another two and a half years, without status, and subject to deportation if discovered. They made no attempt to renew their visitor permits or make claims for asylum.
> […]
> ¶43 The claimant's actions of living in the United States of America, without status, are inconsistent with a well-founded subjective fear.

[19] Reading the above paragraphs demonstrates that the RPD was not impugning the applicants' credibility but rather assessing their subjective fear in light of their actions in the U.S. The RPD questioned Ms. Cortes not only on her failure to seek to U.S. status but also on her failure to promptly join her relative (sister) in Canada:

> MEMBER: Knowing that your sister had made a claim in 2004, fearing that you'd be murdered if you went back to Colombia, and having learned from your co-workers that there was little chance of making a successful claim in the US, why didn't you come to Canada at that time?
> […]
>
> CLAIMANT: …honestly, I didn't come before because…at that time I was working. At that moment, the police wasn't really bothering, you know, with those raids, or you know, with those search. I was living okay with my children there.

[20] This Court has held that failure to claim refugee status in a foreign state or delay in claiming refugee status in Canada is an important factor which the RPD is entitled to consider in assessing

the basis of the applicants' subjective and objective fear of persecution: *Huarta v. Canada (MCI)* (1993), 157 N.R. 225 (F.C.A.), per Justice Létourneau; *Nimour v. Canada (MCI)*, [1999] F.C.J. No. 1356 (QL), 93 A.C.W.S. (3d) 732, per Justice Denault; *Mughal v. Canada (MCI)*, 20006 FC 1557, 154 A.C.W.S. (3d) 938, per Justice Lemieux at paras. 34-36.

[21] The explanations given by Ms. Cortes in her testimony for her failure to seek U.S. status were found to be not compelling by the RPD. The transcript of the hearing demonstrates that due consideration was given to Ms. Cortes' evidence. It was reasonably open to the RPD to reject Ms. Cortes' testimony and determine that her actions were not consistent with her stated fear of persecution. This ground of review must fail.

Issue No. 2: Was it reasonably open to the RPD to determine that the applicants' did not have a subjective fear of persecution in light of the evidence of objective risk?

[22] The applicants submit that it was not reasonably open to the RPD to determine that they did not possess a subjective fear of persecution and to dismiss the refugee claim on that basis in light of the evidence of objective risk. The applicants rely on the Federal Court of Appeal's decision in *Yusuf v. Canada (MEI)*, [1991] 1 F.C. 629, 133 N.R. 391 (F.C.A.), where Justice Hugessen held:

> It is true, of course, that the definition of a Convention refugee has always been interpreted as including a subjective and an objective aspect. The value of this dichotomy lies in the fact that a person may often subjectively fear persecution while that fear is not supported by fact, that is, it is objectively groundless. However, the reverse is much more doubtful. I find it hard to see in what circumstances it could be said that a person who, we must not forget, is by definition claiming refugee status could be right in fearing persecution and still be rejected because it is said that fear does not actually exist in his conscience. The definition of a refugee is certainly not designed to

> exclude brave or simply stupid persons in favour of those who are more timid or more intelligent. Moreover, I am loath to believe that a refugee status claim could be dismissed solely on the ground that as the claimant is a young child or a person suffering from a mental disability, he or she was incapable of experiencing fear the reasons for which clearly exist in objective terms.

[23] In my view, *Yusuf*, *supra*, has no application to the present facts. In the case at bar the RPD found that there was no subjective or objective basis for the applicants' fear. Ms. Cortes was never privy to the contents of the threatening phone calls, except for overhearing her husband's end of the conversation and the invective from the threatening agent on the other side of the line. Ms. Cortes consequently does not know who may persecute her. The RPD assessed the applicants' possible fear of the FARC or ELM but there is no evidence that either of these organizations or for that matter any persecuting agent poses a risk to the applicants. The threats were directed at the husband, and that situation has completely changed. In my view there is no evidence of either subjective or objective risk to the applicants from any known organizations or individuals. It was reasonably open to the RPD to determine that the applicants did not posses a well founded fear of persecution based on Ms. Cortes' testimony.

Issue No. 3: Was it reasonably open to the RPD to find that Bogota is a valid internal flight alternative?

[24] The applicants submit that the RPD failed to notify the applicants that it intended to consider Bogota as an internal flight alternative (IFA). The applicants submit in the alternative that the RPD's assessment of the risk to the applicants in Bogota was made without regard to the documentary evidence.

[25] If IFA will be an issue, the RPD must give notice to the refugee claimant prior to the hearing (*Rasaratnam*, [1991] F.C.J. No. 1256, supra, per Mr. Justice Mahoney at paragraph 9, *Thirunavukkarasu*, [1993] F.C.J. No. 1172) and identify a specific IFA location(s) within the refugee claimant's country of origin (*Rabbani v. Canada (MCI)*, [1997] 125 F.T.R. 141 (F.C.), supra at para. 16, *Camargo v. Canada (Minister of Citizenship and Immigration)* 2006 FC 472, 147 A.C.W.S. (3d) 1047 at paras. 9-10).

[26] In *Cardenas v. Canada (MCI)*, 2010 FC 537, Justice Crampton held in a recent case involving citizens of Colombia that it was reasonably open to the RPD to find that adequate state protection was available to the applicants in Bogota, Colombia, by reason of the following factors cited by the RPD which can be found at paragraphs 13-14 of the decision:

> 1. FARC's bases of operation are now confined to rural areas of Colombia;
>
> 2. FARC no longer has the ability to track an individual from one area of the country to another, due to the surveillance of security forces and their ability to interrupt communications;
>
> 3. Security forces maintain close control of roads and rivers connecting urban centres with areas of combat; and
>
> 4. FARC's activities in urban areas now appear to be limited to (i) attempts to influence youth at universities, to provide a new political base, and (ii) random attacks on government offices, to show a continued presence. The only reported attack in an urban area in 2008 appears to have been in Cali.
>
> ¶14 Earlier in its decision, the RPD also observed that “security forces currently have made it difficult for the FARC to move freely out of [its rural bases of operation]” and that “threats without the capacity of the FARC to carry out these threats in urban centres

> would not raise the risk of persecution to the required level to qualify for Canada's protection." In addition, the RPD noted that there was "no evidence that FARC has been able to carry out any threats of personal harm against any individual who resides in Bogota in the last 12 months."

The applicants in that case relied on the same report which is also relied upon by the applicants at bar. Justice Crampton held at paragraphs 21 and 24 of the decision that it was reasonably open to the RPD to refer to equally recent but different country condition documentation than the expert's August 2009 report and reaching the opposite conclusion by determining that adequate state protection is available in Bogota, Colombia.

[27] The RPD in my view was not evaluating the risk in Bogota, Colombia with a view to designating it as an IFA. The applicants hail from Bogota. The RPD's analysis was therefore confined to assessing the basis of the risk persecution to the applicants in their home town.

[28] The applicants' focus their submissions on the RPD's failure to deal with the expert's 2009 report which concluded that it was not safe to return the applicants to Bogota, Colombia, and the inappropriate contrast between the 2004 and 2008 UNHCR reports. The applicants rely on the Federal Court of Appeal's decision in *Lai v. Canada (MCI)*, [1992] F.C.J. No. 906 (QL), per Justice MacGuigan which held that summarily dismissing expert evidence was unreasonable.

[29] In this case the RPD did not summarily dismiss the expert's evidence. It reasoned that the expert stated at paragraph 2 of his report that "many guerrilla activities are now concentrated in

rural areas and along the nation's borders". The expert repeats this observation at paragraph 6 where he states:

> ¶6 For much of the civilian population residing in the country's large urban centers, since about 2004, the cities in general have begun to feel safer…

The expert states that the frequency of certain acts of violence against specific members of the population have not changed in the same paragraph:

> ¶6 …Yet the political violence persists and is targeted against specific groups such as journalists, labour activities, human rights defenders, farm owners, political party workers, community and grassroots activists, judges, local politicians and elected officials.

[30] The applicants are not part of this select group of individuals. Assuming that Ms. Cortes' ex-husband would be included in this group, the evidence is that he no longer works as an investigator. The expert does not state that the families of former judicial investigators are likely targets for violent retaliation. It was reasonably open to the RPD to determine that the expert evidence does not indicate that the applicants have a well-founded fear of persecution in Bogota. The same conclusion inevitably follows with respect to the balance of the country condition documentation. It was reasonably open to the RPD to determine that since Ms. Cortes and Mr. Vasquez are no longer a couple, neither she nor her children face a possibility of persecution in Bogota, Colombia. This ground of review must therefore fail.

CERTIFIED QUESTION

[31] The respondent advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees. The applicant suggested

two questions related to “failure to claim in the U.S.” and “not identify Bogota as an IFA”, but these questions have already been clearly settled by the jurisprudence in the Court of Appeal.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	*Elizabeth Alvarez Cortes et al. v. The Minister of Citizenship and Immigration*
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