

Federal Court



Cour fédérale

Date: 20100826

Docket: IMM-6351-09

Citation: 2010 FC 847

Montréal, Quebec, August 26, 2010

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

**ROSA INES GARCIA GARCIA
LISETH DAYANA PELAEZ GARCIA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) for judicial review of a decision dated November 20, 2009, by the Refugee Protection Division of the Immigration and Refugee Board that the applicants are neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of the Act.

Factual background

[2] The applicant, Rosa Ines Garcia Garcia, and her daughter, Liseth Dayana Pelaez Garcia, are Colombian citizens. They submit that they left Colombia because they were being persecuted. They arrived in Canada on October 9, 2007, and made their refugee claims the day after they arrived.

[3] The principal applicant alleges that she left Colombia in August 2000, and her daughter left in 2001, to live in the United States illegally in order to flee the civil war in their country.

[4] The applicants allege that they lived in the United States until September 2007. They decided to enter Canada since they were unable to obtain legal status in the United States and feared returning to Colombia because a number of the principal applicant's nephews, who were members of the Revolutionary Armed Forces of Colombia (FARC), had allegedly been killed.

[5] The applicants allege that they cannot return to Colombia as a result of persecution because of their perceived political opinion and their membership in a particular social group (family). The principal applicant says that she fears the FARC, the paramilitaries and the Colombian army because she had advised her nephews not to join the guerillas. She also fears for her daughter's safety because she alleges that Colombia is a country where violence and organized crime are rampant.

Impugned decision

[6] The Board rendered a negative decision because it found that the applicants' lives were not at risk and that they did not have a fear of persecution, since the applicants did not establish that

they would be subjected to a risk that would not be encountered by the people living in Colombia. Furthermore, the Board noted that the principal applicant did not relate any events that happened to her personally.

[7] The Board also pointed out that the principal applicant is not able to identify her potential aggressors specifically and that, by default, she is naming all possible groups. Therefore, because the applicants have not been able to show that they were personally the targets of persecution and that a refugee claim cannot be recognized only by family relationship with a persecuted individual, the Board found that there was no serious possibility that they would be persecuted or subjected to a risk to their lives should they return to Colombia.

Relevant statutory provisions

[8] The following provisions of the Act are relevant to these proceedings:

Convention refugee

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,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

Définition de « réfugié »

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) 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 pays;

(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.

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.

Person in need of protection

Personne à protéger

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

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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,

(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) the risk is not inherent or incidental to lawful sanctions,

(iii) la menace ou le risque ne résulte pas de sanctions

unless imposed in disregard of accepted international standards, and

légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Issue

[9] In this application for judicial review, the issue is whether the Board rendered a decision based on erroneous findings of fact or findings of fact made in a perverse or capricious manner or without regard for the material before it.

Standard of review

[10] Since this is a question of mixed fact and law, this Court stated in *Acosta v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 213, [2009] F.C.J. No. 270 (QL), that deference was owed to the decisions of the courts when they are based on sections 96 and 97 of the Act.

[11] Furthermore, in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paragraph 53, the Supreme Court of Canada established that when the court undertakes a review of questions where legal and factual issues cannot be readily separated, the reviewing court will be deferential to the decision-maker. Therefore, the applicable standard in this case is “reasonableness”.

Analysis

[12] To determine whether a claimant is a refugee, the subjective fear of persecution in the mind of the claimant and the fact that this fear is well-founded in an objective sense must be assessed, as decided by the Supreme Court of Canada in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, [1993] S.C.J. No. 74, at paragraph 47:

[47] More generally, what exactly must a claimant do to establish fear of persecution? As has been alluded to above, the test is bipartite: (1) the claimant must subjectively fear persecution; and (2) this fear must be well-founded in an objective sense. This test was articulated and applied by Heald J.A. in *Rajudeen, supra*, at p. 134:

The subjective component relates to the existence of the fear of persecution in the mind of the refugee.
The objective component requires that the refugee’s fear be evaluated objectively to determine if there is a valid basis for that fear.

[13] The Court also notes that while she was in the United States from 2000 to 2007, Rosa Ines Garcia Garcia did not claim refugee status in the United States when she was there, which, in itself, demonstrates a lack of subjective fear.

[14] In this case, the facts lead us to believe that, although the applicant has a subjective fear of persecution given that eight of her nephews were murdered, this fear is not well-founded in an objective sense. In fact, the applicant is not a member of any political party or organization and, as the Board pointed out, she has never been personally threatened. For this reason, the Court could infer that just the family relationship of the applicant as the aunt of her nephews was not enough to show a well-founded fear of persecution.

[15] As the respondent justly notes, in this case, the concept of family unity is not a valid argument because it “does not relieve a claimant of the onus of demonstrating that he falls within the definition of ‘Convention refugee’ set out in subsection 2(1) of the Act” (*Bromberg v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 939, [2002] F.C.J. No. 1217).

[16] Furthermore, out of five of the applicant’s immediate family members, one sister and two brothers, one of whom is the father of five nephews who were killed, still live in Colombia. The evidence in the record also demonstrates that the applicant and her daughter do not match the profile of paramilitary targets (Human Rights Watch – Country summary – January 2009 – Respondent’s Supplementary Memorandum – not paginated and Tribunal Record at page 202).

[17] For the reasons given above, the Court finds that the applicant and her daughter did not demonstrate that there was a serious and objective possibility that they would be persecuted and personally subjected to a risk of cruel and unusual treatment should they return to Colombia. Under

the circumstances, the panel's decision is a possible and acceptable outcome (*Dunsmuir*).

Consequently, there is no reason for this Court to intervene.

[18] Since the parties did not submit a question for certification, none will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed. No question is certified.

“Richard Boivin”

Judge

Certified true translation
Catherine Jones, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6351-09

STYLE OF CAUSE: ROSA INES GARCIA GARCIA ET AL.
v. MCI

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REASONS FOR JUDGMENT: BOIVIN J.

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