Federal Court  Cour fédérale

Date: 20100915

Docket: IMM-5660-09

Citation: 2010 FC 923

Ottawa, Ontario, September 15, 2010

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

LILIANA VELEZ
RODRIGO EMIRO GUTIERREZ RODRIGUEZ
CHRISTIAN GUTIERREZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Liliana Velez and her husband, Mr. Rodrigo Emiro Gutierrez Rodriguez, are citizens of Colombia. They claim to have fled that country on the basis that they feared harm from the Revolutionary Armed Forces of Colombia (FARC). They arrived in Canada with their son Christian, an American citizen, in 2008 after having lived in the U.S. for over eight years. The day following their arrival here, they claimed refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

[2] In October 2009, the Refugee Protection Division (RPD) of the Immigration and Refugee Board rejected their refugee claims.

[3] The Applicants seek to have the decision set aside on the basis that the RPD erred by:

i. rejecting their claims solely on the basis that they lacked a subjective fear of persecution or a risk contemplated by section 97 of the IRPA;

ii. ignoring and misapprehending important evidence;

iii. breaching the principles of procedural fairness and natural justice by specifically identifying only two issues towards the end of its hearing and then basing its decision on other issues that had been implicitly excluded; and

iv. failing to conduct a separate analysis under section 97.

[4] For the reasons that follow, this application is dismissed.

I. Background

[5] Ms. Velez worked for a coffee growers' co-operative in Colombia from January 1992 to January 1995. During that time, she claims to have received a number of telephone calls from representatives of the FARC who requested her to provide them with information about the coffee growers. She did not comply with those requests.

[6] In December 1998, while employed as an administrator at a credit and savings co-operative, she once again began to receive telephone calls from representatives of the FARC. On these occasions, she was requested to provide assistance in integrating guerrilla members into the co-

operative. After she refused these requests, she claims that she began to receive threatening telephone calls at home, in which she was told that she "would regret it dearly" if she did not comply with the callers' demands. In February 1999, during another wave of these types of telephone calls, she claims that she was told that nothing was impossible for the FARC, that they knew her routine and that they knew she lived with her sister. She informed her boss about these calls, but was told there was nothing he could do to help her.

[7] Ms. Velez then began noticing that a particular car was parked near her workplace or her home, and that it would follow her as she walked home from work. She claims to have reported this to the police, who told her to write down the license plate number and to take a picture of the car, if possible. After attempting to follow these instructions, she received a call from a man who identified himself as Simon and who claimed to be a member of the FARC. She asserts that he told her that if she took down the license plate number of the car in question, she "would not live to tell the story." He apparently added that the FARC would force her to provide the list of persons with large investments in the co-operative if she did not voluntarily comply. She claims that he also stated that if she did not cooperate she would be declared a military target and that she would see how nice she looked in a camouflaged uniform. She did not report this incident to the police.

[8] Shortly thereafter, Ms. Velez claims that she was contacted at work and told that someone from the FARC would come to get her in a week because the commander was anxious to see the first list of the co-operative's investors. As a result, she moved to Caicedonia with her aunt and made plans to leave the country. She fled Colombia on March 22, 1999 and shortly thereafter entered the United States on a visitor's visa, which expired in the fall of that year.

[9] Mr. Gutierrez Rodriguez (Gutierrez) claims to have been approached by representatives of the FARC in October 1999, while he worked as a bus driver for a transportation co-operative. Specifically, he claims that he received a telephone call on his cell phone from a member of the FARC, who told him that he was now at their service. The caller identified members of his family and their workplaces and demanded that he provide them with information about the children who rode his bus.

[10] After he refused to comply with that demand, he claims that he was stopped the following month at a FARC road block. Upon presenting his documents, he was told that the commander wanted to speak with him. He was detained for approximately 45 minutes before three men arrived and took him for a walk for about an hour. During that walk, he was told that he had mocked the FARC after they had requested his cooperation. The men then demanded that he provide them with information about the families that he drove and that he help them to deliver merchandise during the day when he was not transporting children. When he replied that he could not assist them, he claims that he was beaten and suffered injuries to his leg and clavicle. He then agreed to assist them and was released and told to await further contact from them.

[11] A few days later, he allegedly received a phone call requesting him to pick up some people in the mountains. He replied that his vehicle was being repaired and that he could not be assigned another one. Shortly thereafter, he loaned his car to his brother, who was hit by another car as he was getting out of the car. As a result of that attack, his brother required an operation on his leg and incurred head injuries.

[12] Mr. Gutierrez claims that he subsequently received a telephone call from a representative of the FARC who told him that he was lucky that it was his brother who had been hurt, that they knew he was a member of the Liberal party and had met with politicians they did not like, and that he should not go to the police to file a report. He was then told that the FARC wanted him to take some people to the Jamundi region.

[13] In February 2000, Mr. Gutierrez received another call from a representative of the FARC who told him that they would be contacting him to provide him with the details of where to go. However, he turned his phone off on the day he was supposed to receive his instructions.

[14] The following month, he claims that he received a telephone call at home from a FARC representative who stated that they would come after him and if they did not find him he would become a military target. After he fled to a friend's house a couple of hours away, his brother informed him that strange people had been asking about him. As a result, he left Colombia on March 8, 2000 and flew to Guatemala. He then traveled through Mexico to the U.S. border.

[15] Mr. Gutierrez Rodriguez and Ms. Velez met and were married in the United States, where their son was born. They remained in that country illegally until they came to Canada on April 30, 2008. During their stay in the United States, they did not make any attempt to legalize their status there.

II. The Decision under Review

[16] At the outset of its decision, the RPD rejected the claim of Christian Gutierrez, after finding it had not been established that he faced a serious possibility of being persecuted or suffering serious harm should he return to the United States.

[17] Regarding Ms. Velez and Mr. Gutierrez, the RPD identified the "core question" as being whether their failure to legalize their status in the United States during their long stay there was consistent with a fear of being harmed or murdered should they return to Columbia today.

[18] The RPD rejected their reasons for failing to regularize their status, noting that they are well-educated, claimed to fear serious persecution, and had plenty of time to become familiar with their various options. After noting that Ms. Velez and Mr. Gutierrez lived in an immigration neighbourhood in the United States, the RPD observed that many Colombian asylum claimants were being accepted in that country at that time and that many failed claimants had come to Canada and claimed refugee status here. Considering all of the evidence, together with the length of time without status in the United States and the seriousness of the harm feared, the RPD concluded that the principal Applicants' actions in the United States were not consistent with their stated fears.

[19] Although it stated that it had rejected the principal Applicants' claims on the basis that their actions were not consistent with their stated fears, the RPD then considered whether those fears were objectively supported by the documentary evidence. After reviewing and summarizing a number of documents reporting on conditions in Colombia, the RPD concluded that the documentary evidence does not support that persons such as the principal Applicants would be

harmed should they return to an urban area of Colombia such as Cali, where Mr. Gutierrez lived in the past and where members of his family currently live.

III. Standard of review

[20] The issues raised by the Applicants with respect to procedural fairness, natural justice and whether the RPD erred by rejecting the Applicants' claims under section 97 of the IRPA solely on the basis of their lack of subjective fear of a risk contemplated by that provision, are reviewable on a standard of correctness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 55 and 90; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at para. 44).

[21] With respect to whether the RPD erred in failing to conduct a separate analysis under section 97, the standard of review that has been applied by this Court has depended upon how the Court has characterized the nature of the question. Where the question has been characterized as being a question of law or adequacy of reasons, the Court has stated that a standard of correctness applies. (See, for example, *Mahmutyazicioglu v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 668, at para. 11; *Guzman v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1329, at para. 25; *Plancher v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1283, at para. 12; *Balakumar v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 20, at para. 9; *Nyoka v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 568, at para. 13; *Nagaratnam v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 204, at para. 17; *Emamgongo v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 208, at para. 14; *Jabari v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 225, at

para. 12; *Prieto v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 253, at para. 24.) However, where the question has been characterized as one of mixed fact and law, the Court has stated that a standard of reasonableness applies. (See, for example, *Ayaichia v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 239, at para. 12; *Nyathi v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1119, at para. 10; *Amare v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 228, at para. 10).

[22] In my view, the RPD ought to be accorded deference with respect to whether it deals with claims made under both sections 96 and 97 of the IRPA separately or in a single integrated analysis, particularly given (i) the RPD's substantial expertise with respect to the issues that are raised in claims made under sections 96 and 97 of the IRPA, and (ii) the nature of the issues raised when claims are made under both of those sections is such that it is often not necessary to conduct a separate analysis under each of these sections, especially where credibility or the adequacy of state protection is a determinative issue (*Dunsmuir*, above, at paras. 55, 56, 64 and 66; *Khosa*, above, at para. 44). In this context, a failure to accord some deference to the RPD in this regard would not be consistent with the view that the concept of deference is "central to judicial review in administrative law" (*Dunsmuir*, above, at para. 48).

[23] Accordingly, the manner in which the RPD assessed the Applicants' claims under section 97 will stand so long as it is within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47), and "fit[s] comfortably with the principles of justification, transparency and intelligibility" (*Khosa*, above, at para. 59).

[24] The remaining issues raised by the Applicants are reviewable on a standard of reasonableness (*Dunsmuir*, above, at paras. 51-54; *Khosa*, above, at paras. 45-46).

IV. Analysis

A. *Did the RPD err by rejecting the Applicants' claims under sections 96 and 97 solely on the basis of their lack of subjective fear?*

[25] At paragraph 21 of its decision, after concluding that the Applicants' actions were not consistent with their stated fears, the RPD explicitly rejected the Applicants' claims under sections 96 and 97 of the IRPA on "this basis alone."

[26] However, it then proceeded to assess whether, as an objective matter, the Applicants' stated fears were supported by the documentary evidence. After reviewing several authoritative sources reporting on conditions in Colombia, the RPD concluded that the objective evidence did not support that persons such as the Applicants would be harmed by the FARC should they return to an urban area of Colombia, such as Cali. The RPD also specifically found that the Applicants failed to establish that there is a serious possibility that they would be persecuted should they return to Colombia.

[27] In my view, it is clear from these passages of the RPD's decision that it did not, in fact, reject the Applicants' claims solely on the basis of their lack of subjective fear of persecution or a risk contemplated by section 97. The above-described conclusions, together with the RPD's finding that the Applicants' failure to legalize their status in the United States for over eight years was not consistent with their stated fears, notwithstanding their explanations, provided sufficient support for the RPD's rejection of the Applicants' claims pursuant to sections 96 and 97 of the IRPA.

[28] Given my conclusion on this point, it is not strictly necessary to address the Applicants' related argument that delay in making a refugee claim cannot provide a sufficient basis for rejecting a claim under section 96. However, I will briefly note that it is well established that, in the absence of a satisfactory explanation for the delay, the delay can be fatal to such claim, even where the credibility of an applicant's claims has not otherwise been challenged (*Duarte v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 988, at paras. 14-15; *Espinosa v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1324, at para. 17; *Fernando v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 759, at para. 3; *Gamassi v. Canada (Minister of Citizenship and Immigration)* (2000), 194 F.T.R. 178, at para. 6; *Castillejos v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1956; *Huerta v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 271 (C.A.); and *Cruz v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 1247, at para. 10).

B. *Did the RPD err by basing its decision on erroneous findings of fact made in an unreasonable manner or without regard for the evidence?*

[29] The Applicants allege that the RPD erred by dismissing evidence that was contained in a 2005 report issued by the United Nations High Commissioner for Refugees (UNHCR) and in a 2009 report prepared by Dr. Marc Chernick, who is a recognized authority on country conditions in Colombia.

[30] Among other things, the RPD drew an adverse inference from the fact that a more recent report by the United Nations High Commissioner for Human Rights (UNHCHR), which the RPD incorrectly characterized as being authored by the UNHCR, did not contain similar statements. However, given that the RPD also relied on a significant amount of other evidence, all of which

is more recent than the 2005 UNHCR report, in finding that there was not an objective basis for the Applicants' stated fears, I am satisfied that this error was not material. The fact that there was a substantial amount of more recent evidence supporting the RPD's conclusion distinguishes this case from *Ibarra-Lerma v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1611, at para. 9; and *Escobar v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1436, at para. 7.

[31] As to Dr. Chernick's report, the Applicants allege that the RPD erred by assigning little weight to important information that was contained in the report, while selectively referring to specific portions of the report that supported its decision. I disagree.

[32] The RPD specifically addressed important information contained in Dr. Chernick's report that was inconsistent with its decision, at paragraphs 31, 32, 35 and 36 of its decision. However, it preferred other recent evidence, including two reports by International Crisis Group (ICG), dated April 2008 and March 2009, which were extensively summarized at paragraphs 38 and 39 of its decision. The RPD noted that ICG "is guided by well known and respected international personalities, including a former Prime Minister of Canada and an internationally recognized Canadian jurist." Having specifically discussed the Chernick report, as well as a significant amount of other evidence submitted by the Applicants, and having explained why it did not accept much of that evidence, it was reasonably open to the RPD to prefer other evidence, all of which was fairly recent. In addition to the 2008 and 2009 ICG reports, other authoritative sources relied upon by the RPD included the United States Department of State's 2008 report on Columbia, dated February 25, 2009, and a report of the UNHCHR, dated February 29, 2008.

[33] Provided that the RPD reasonably takes into account important evidence in the record that may contradict its conclusions, there is no requirement for the RPD to refer to every piece of documentary evidence or to every passage from cited sources which contradicts the information upon which the RPD has chosen to rely, so long as the RPD's decision is within the bounds of reasonableness (*Rachewiski v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 244, at para. 17).

[34] The burden was on the Applicants to adduce clear and convincing evidence to satisfy the RPD, on a balance of probabilities, of the basis of their claims under sections 96 and 97 of the IRPA. In this case, the RPD found that the Applicants had failed to discharge that burden, particularly given the fact that the Applicants did not demonstrate that they had or now have a profile that would be of current interest to the FARC, having regard to the FARC's reduced base of operations and resources, as well as to the government's ability to constrain the FARC's activities.

[35] I am unable to conclude that the RPD's decision was unreasonable for any of the reasons put forth by the Applicants in relation to the RPD's assessment of the evidence. In my view, the RPD's conclusion regarding the lack of objective foundation for the Applicants' claims was well within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. The RPD's assessment was also appropriately justified, transparent and intelligible.

C. *Did the RPD err by breaching the principles of procedural fairness and natural justice by specifically identifying only two issues during its hearing and then basing its decision on other issues that had been implicitly excluded?*

[36] Towards the end of its hearing, the RPD stated the following:

> So counsel I only had the two issues here. Were each of the claimants' actions in the United States consistent with a fear of being murdered if returned to Colombia and now years later, is it reasonable that they would still be targeted by members of FARC if they were to return today.

[37] At the very end of its hearing, the RPD then confirmed that it had narrowed the outstanding issues to these two issues, and invited counsel to submit written submissions on them.

[38] The Applicants submit that in so framing the issues, the RPD implicitly communicated that it was not concerned with whether (i) the Applicants could seek state protection if the FARC targeted them, (ii) there was an internal flight alternative available to the Applicants within Colombia, or (iii) conditions in Colombia had changed since the Applicants fled that country, such that the FARC was no longer in a position to target them. The Applicants further submit that, after having implicitly communicated to them that it was not concerned with these three issues, it was a breach of fairness and natural justice for the RPD to then reject their claims on the basis of conclusions reached with respect to these issues.

[39] I disagree. By asking whether it was reasonable that they would <u>still be</u> targeted by members of the FARC, the RPD clearly communicated to the Applicants that it continued to be concerned about whether there was a reasonable, objective basis for believing that there was a serious

possibility that they would be persecuted or harmed by the FARC, given the passage of time and the existing situation in Colombia.

[40] In turn, that question clearly contemplates an assessment of whether there was a serious possibility that the Applicants would be persecuted or harmed by the FARC, having regard to (i) the FARC's existing activities, abilities and resources, (ii) the extent to which the government is able to constrain those activities or to confine them to certain regions of the country, and (iii) the significance of the Applicants to the FARC.

[41] Accordingly, in my view, it was entirely appropriate and correct for the RPD to assess these issues and to rely on its findings in respect of them in rejecting the Applicants' claims. In finding that the documentary evidence did not support the Applicants' claims, the RPD was simply stating that it was not reasonable to believe that there was a serious possibility that the Applicants would still be persecuted or harmed by members of the FARC if they were to return to Columbia at this time.

[42] I am satisfied that the Applicants were not misled by the language used by the RPD when it described the two outstanding issues towards the end of its hearing. In the following passage from the Applicants' subsequent written submissions, their counsel described the issue regarding the objective basis of the Applicants' stated fears as follows:

> … the Member's concern as I understand it is twofold. Would the passage of time outside of the country render them of no further interest to the FARC, and <u>what recent evidence is there to corroborate their fear that people returning to Colombia have a</u>

> reasonable risk of being subjected to persecutory actions. [Emphasis added].

[43] Those written submissions then extensively addressed various sources of documentary evidence, in an attempt to establish the objective basis for the Applicants' stated fears at the hands of the FARC. With respect to one of those documents, the Applicants stated:

> Information contained in C4 at pages 190 to 195, states that despite some recent setbacks, FARC continues to be very active and at best can be said to be shifting strategy from normal military actions to more traditional guerrilla tactics targeting cities. The urban operatives are vital for their survival as the militias are where they get their intelligence and where they get their logistical support from – the ones who maintain connection with the population. They are reported to be retaking the offensive. Markus Schultze-Kraft, Latin America program director for the International Crisis Group states that the FARC is not close to defeat. It is submitted that given their setbacks and their well documented intention to continue their struggle, eliminating enemies and coercing cooperation from a terrified civilian population is arguably more important than ever.

[44] In short, the Applicants clearly understood that the RPD continued to be interested in the issues that it subsequently discussed, in concluding that the Applicants had not established the requisite objective basis for their stated fears.

[45] Contrary to the Applicants' assertions, the RPD did not base its decision on the issue of state protection, although it was necessary for the RPD to address the extent to which the state is able to constrain and confine the FARC's activities, in assessing whether the FARC continues to have the ability, resources and incentive to persecute or harm the Applicants.

D. *Did the RPD err by failing to conduct a separate analysis under section 97?*

[46] The Applicants submit that the RPD's failure to conduct a separate analysis under section 97 of the IRPA constituted a reviewable error. I disagree.

[47] In contrast to the situation in *Bouaouni v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211, the RPD did not fail to analyse the Applicants' claims under section 97. Rather, it analysed them together with their claims under section 96, which is permissible (*Sida v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 901, at para. 15).

[48] Whether the omission of a separate section 97 analysis amounts to a reviewable error depends on the particular circumstances of each case (*Kandiah v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 181, at para. 16). Where no claims have been made or evidence adduced that would warrant such a separate analysis, it will not be required (*Brovina v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 635, at paras. 17-18).

[49] In this case, the RPD's integrated assessment focused on two issues, both which were relevant to the claims made by the Applicants under each of sections 96 and 97 of the IRPA. These issues were (i) whether the failure of the Applicants to seek asylum or to otherwise legalize their status in the United States for over eight years was consistent with their stated fears, and (ii) whether the documentary evidence provided any objective basis for those fears. In this context, it was not necessary for the RPD to conduct a separate analysis of the Applicants' claims under sections 96 and 97 of the IRPA, as the Applicants' claims and the evidence adduced could comfortably be assessed in an integrated fashion.

[50] The RPD's decision makes it clear that the Applicants' claims and the evidence adduced were assessed in terms of the distinct requirements of each of sections 96 and 97. As in *Nagaratnam v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 204, at paras. 42-43, the RPD's conclusions plainly apply to both sections of the IRPA. This was very different from the type of situation that arose in *Kilic v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 84, where the RPD failed to explain the basis for its determination with respect to section 97 and to discuss in its integrated assessment claims that were relevant under that section.

[51] In my view, on the particular facts of this case, it was reasonably open for the RPD to conduct a single integrated assessment of the Applicants' claims under sections 96 and 97 of the IRPA. I am unable to agree with the Applicants' submission that the RPD erred in doing so.

V. Conclusion

[52] The application for judicial review is dismissed.

[53] There is no question for certification.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES THAT this application for judicial review is dismissed.

« Paul S. Crampton »
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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