

Federal Court



Cour fédérale

Date: 20110209

Docket: IMM-3768-10

Citation: 2011 FC 154

Ottawa, Ontario, February 9, 2011

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

**ANGELA DIANNE LEAL ALVAREZ
JOSE JAIR OROZCO FAJARDO**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of the May 28, 2010, decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB) that determined the applicants were neither Convention Refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act (IRPA)*. For the reasons that follow, the application is granted.

[2] The applicants are citizens of Colombia. Angela Alvarez is the principal applicant. Her common-law spouse who she met in the United States, also filed a claim with the RPD, but he admitted that he did not leave Colombia based on a fear of persecution. The principal applicant claimed that she was a victim of violence, serious threats of extortion and death threats made by the Fuerzas Armadas Revolucionarias de Colombia (FARC) – Revolutionary Armed Forces of Colombia. The RPD rejected her claim on the basis of credibility and on the objective test for fear found in sections 96 and 97 of *IRPA*. In addition the RPD found that Ms. Alvarez had a viable internal flight alternative within Colombia. There are two reviewable errors in this decision.

[3] The first error arises from the RPD's approach to the evidentiary basis of the applicant's fear of persecution or harm. The RPD framed the determinative issue as one of credibility in the following manner:

[9] The determinative issue in this case is credibility, and, in relation to that, the well-foundedness of the claimant's fear. The panel finds the principal claimant's story not to be wholly credible in its material aspects due to the following reasons.

[10] She said that in June 2006, she and fellow employees encountered the FARC at one of their roadblocks in the area. The FARC people had examined their *cedulas* (national identity cards) and then let them go. On learning of this, the mayor had advised them to cease their social work. However, she said that despite her compliance, she received a phone call from the FARC in September 2006 declaring her to be an enemy of their organization, was beaten up by them and even received a *sufragio* note from them. Noting that she was merely an assistant and/or a secretary in this mayor's program, and had, in fact, complied with the FARC's demand, the panel finds it hard to believe that the FARC would focus so much attention on her and continue to harass her with threats and phone calls even after she had left and then returned to Medellin from Costa Rica. [Application Record of the Applicants, pp. 8-9]

[4] First, by focusing on the principal applicant's position in the civil administration of the municipality, as opposed to the functions that she performed in that capacity, the RPD departed from the direction of the Supreme Court of Canada in *Canada (Attorney General) v Ward* [1993] 2 SCR 689. The evidence before the RPD was that the principal applicant's responsibilities included working with displaced persons in areas where the FARC was active, visiting areas previously occupied by the FARC, examining the dead, photographing their belongings and working with villagers, "... to make sure that the peasants really understood the dire consequences of joining these unlawful groups." By focusing on the position or rank the principal applicant held in the civil administration of the municipality, the RPD ignored her actual responsibilities in the implementation of a relief program, including those noted above. The RPD thus ignored material evidence and neglected to consider whether her activities would be perceived as political activity by the FARC. This is a reviewable error.

[5] With respect to the second error, the applicant testified that she had been kidnapped and beaten by the FARC. The RPD insisted on "conclusive proof" of this allegation. The RPD also rejected Ms. Alvarez' claim as it was not satisfied "on a balance of probabilities, she was not or is not a target of the FARC." Neither of these findings are predicated on the appropriate legal standard. The principal applicant did not have the burden of providing either conclusive proof or proof on a balance of probabilities. The test is whether there was a serious possibility of persecution or harm. As O'Reilly J. noted in *Alam v Canada (Minister of Citizenship and Immigration)* 2005 FC 4, where the Board has incorrectly elevated the standard of proof, or the court cannot determine what standard of proof was actually applied, a new hearing can be ordered; see also *Yip v Canada*

(Minister of Employment and Immigration) [1993] FCJ No 1285. This too is, therefore, a reviewable error.

[6] For the foregoing reasons, it cannot be said that the RPD's finding that the applicants were neither Convention Refugees nor persons in need of protection is within the range of possible and acceptable outcomes defensible in respect of the facts and law.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted. The matter is referred back to the Immigration Refugee Board for reconsideration before a different member of the Board's Refugee Protection Division. No question for certification has been proposed and the Court finds that none arises.

"Donald J. Rennie"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3768-10

STYLE OF CAUSE: ANGELA DIANNE LEAL ALVAREZ, JOSE JAIR OROZCO FAJARDO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 19, 2011

REASONS FOR JUDGMENT AND JUDGMENT: RENNIE J.

DATED: February 9, 2011

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