Federal Court  Cour fédérale

Date: 20110301

Docket: IMM-913-10

Citation: 2011 FC 242

Ottawa, Ontario, March 1, 2010

PRESENT: The Honourable Mr. Justice O'Keefe
BETWEEN:

LUIS FERNANDO MURILLO GUEVARA
MARIA DE JESUS SÁNCHEZ RODRIGUEZ
CONSUELO ALAGUNA SANCHEZ
MARIA FERNANDA MURILLO DE ORO
LAURA CATALINA ALAGUNA SÁNCHEZ
GLORIA ESPERANZA ALAGUNA SANCHEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated December 24, 2009, wherein the applicants were determined not to be Convention refugees or persons in need of protection under

sections 96 and 97 of the Act. This conclusion was based on the Board's finding that state protection was available to the applicants.

The applicants request that the decision of the Board be set aside and the claim remitted for redetermination by a differently constituted panel of the Board.

Background

[2] Consuelo Alaguna Sanchez is the principal applicant (the principal applicant) in this application. The other applicants are related to her in varying degrees:

- Luis Fernando Murillo Guevara – spouse
- Maria de Jesus Sánchez Rodriguez – mother
- Gloria Esperanza Alaguna Sanzhez – sister
- Laura Catalina Alaguna Sánchez – daughter (step-daughter of Luis Guevara)
- Maria Fernanda Murillo De Oro – step-daughter (daughter of Luis Guevara)

[3] In 1992, the principal applicant and her family members started receiving letters threatening to kill or kidnap her young niece. Principally, these letters were from the Revolutionary Armed Forces of Colombia (FARC), but at times they were from the National Liberation Army (ELN). The letters always asked for money. The principal applicant and her family contacted the Bogotá police but after a short investigation, they were told that the police could do nothing to help.

[4] In 1992, the applicant's brother-in-law was severely beaten and stabbed. He told the police this was a robbery out of fear of reprisals. The principal applicant's family received a call allegedly from FARC taking responsibility for the attack and requesting 5 million pesos to prevent another attack from occurring. Calls of this nature continued regularly until the principal applicant took out a loan and left 4 million pesos in a location described by the caller.

[5] The principal applicant and her family members moved to another part of Bogotá and found new employment.

[6] In 1998, the principal applicant, her family and her partner Luis Guevara, began receiving threatening calls from FARC once again. These calls demanded 30 million pesos. Both the principal applicant and her partner began receiving calls at work. They changed their telephone numbers but still received calls. Their cars were vandalized. The applicants contacted the police but were told that the police did not have the resources to protect every citizen.

[7] The principal applicant, her husband Luis Guevara and his daughter left Colombia for the United States in November 1999.

[8] The principal applicant returned to Colombia in December 1999 to obtain documents and money to file for refugee status in the United States and to obtain visas for her daughter, mother and siblings. The principal applicant remained in Colombia and began working as an accountant.

[9] In May 2000, the principal applicant received another call at her home from FARC requesting 30 million pesos. She was also contacted at work. The principal applicant paid part of this money but the threats continued.

[10] In July 2000, the principal applicant's brother-in-law was killed. The principal applicant received a letter from FARC claiming responsibility for his death. However, the killer was arrested and sentenced for the crime.

[11] The principal applicant left Colombia again, with her daughter and sister, and returned to the United States. The principal applicant could not acquire an American visa for her mother and arranged to bring her to the United States illegally.

[12] In the United States, the applicants had paid a paralegal to begin an application for refugee status. This person disappeared with the applicants' documents and money in 2003. The applicants later contacted a lawyer but were informed that they could no longer make asylum claims because the one year time limitation had expired. The lawyer recommended that the applicants wait for immigration reform in the United States to legalize their status.

[13] The applicants came to Canada and claimed refugee status in March 2008.

Board's Decision

[14] The Board rejected the refugee claims of the applicants finding that they had failed to rebut the presumption of state protection in Colombia.

[15] The Board found that the last time the applicants sought help from the police was in 1998.

[16] The Board found that Colombia is a constitutional democracy which is making serious efforts to provide adequate protection to its citizens.

[17] The Board focused on two recent reports from 2008 and 2009 of the International Crisis Group. The Board reviewed these articles over four pages of its decision. It found generally that the internal command structure and communication of FARC has been disrupted and that FARC is most active now in the jungle and mountain areas. The Board found that the Colombian government's efforts to provide protection for its citizens who fear FARC have been most successful in urban areas like Bogotá.

[18] The Board then spent eight pages providing an overview of the documentary evidence submitted by the applicants. The Board found that based on the applicants' submissions, FARC is attempting to operate in Bogotá, but that these attempts were confined to three fronts: terrorist attacks on security forces and politicians, extortion of merchants and corporations and recruiting at the university level and poorer areas in southern parts of the city. The Board also found that none of these actions occurred with impunity. FARC terrorists have been captured and arrested and the

army has been deployed in areas were FARC targets politicians. The Board found that there is no evidence that victims of FARC attacks were persons who had been tracked to Bogotá.

[19] The Board found that the interest FARC may have had in the applicants in the past no longer exists and that the applicants have not provided reliable evidence to establish that for them state protection would be inadequate should they return to Colombia today.

Issues

[20] The applicants submitted the following issues for consideration:

1. Did the Board member err in law in determining that the applicants are not Convention refugees and not persons in need of protection?

2. Did the Board act without jurisdiction, act beyond its jurisdiction or refuse to exercise its jurisdiction?

3. Did the Board fail to observe a principal of natural justice, procedural fairness or other procedure that they were required by law to observe?

4. Did the Board err in law in making its decision or order whether or not the error appears on the face of the record?

5. Did the Board base its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner without regard to the material before it?

6. Did the Board act in any way that was contrary to law?

[21] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the Board misstate the facts of the case?
3. Did the Board err by finding that state protection was available in Colombia?

Applicants' Written Submissions

[22] The applicants submit that the Board erred in its state protection analysis. The Board was required to assess the quality of the state's efforts to provide protection. Laws alone are not adequate protection if the Colombian government's efforts do not provide a level of security that actually protects the applicants.

[23] The applicants submit that the Board ignored documentary evidence which contradicted its conclusions and relied on the documentary evidence selectively to justify its finding. The Board ignored evidence of killing and hostage-taking by FARC. It also ignored evidence of claims of impunity.

[24] The Board ignored information about intimidation faced by members of the judiciary and the inefficiency of the judiciary. The Board also ignored documentary evidence that the Colombian government cannot provide protection and evidence that FARC is capable of adapting.

[25] The applicants further submit that the Board erred in giving little probative weight to a report by Dr. Chernick. Dr. Chernick has extensive credentials and has done much research on

Colombia and this report was noted in the Board's persuasive decision in 2004 which is still in effect.

[26] The applicants submit that the Board did not consider the particular circumstances of these applicants. In addition, the Board gave no evidence for the statement that FARC is no longer interested in the applicants.

[27] The applicants submit that the Board misstated the fact that the last time the applicants contacted the authorities was in 1998.

Respondent's Written Submissions

[28] The respondent submits that the applicants did not discharge the onus of providing clear and convincing proof of the state's inability or unwillingness to protect them. The onus was on the applicants to rebut the presumption that the state is not capable of protecting its citizens. The applicants last sought help from the authorities over ten years ago. They have not shown that at that time they persevered in seeking help, that they approached other Colombian authorities or that there were no other avenues of state protection available to them. In addition, during the hearing, the Board questioned the applicants on whether they had close family still living in Bogotá. They responded that they did. It was open to the Board to find that they had not rebutted the presumption of state protection.

[29] The Board did not err in finding that adequate state protection exists. The Board acknowledged that FARC is still present in Colombia, even in Bogotá, but the Board found that Colombia is making serious efforts to contain crime by FARC in order to protect its citizens and that these efforts are the most successful in Bogotá. The jurisprudence is clear that the state does not have to provide perfect or effective protection as the test for state protection is now adequateness.

[30] The respondent submits that the Board did not ignore the documentary evidence. The Board is presumed to have considered and weighed the evidence. It does not have to refer to all of the documentary evidence in its decision unless its findings contradict the documentary evidence taken as a whole. The Board in this case thoroughly reviewed and summarized the applicants' documentary evidence.

[31] The respondent submits that the Board took into account the applicants' profile in its analysis. The Board was aware that the applicants claimed they were a target of persecution from FARC because of previous extortion. The Board questioned the principal applicant during the hearing about when she last went to the police and she responded that it was in 1998. The Board did not misstate the facts.

[32] The respondent submits that it was open to the Board to afford the report from Dr. Chernick little probative weight. The Board considered the report and found that the professor did not support his conclusion with evidence. It was reasonable for the Board to afford it little weight.

Analysis and Decision

[33] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 57).

[34] It is established that assessments of the adequacy of state protection raise questions of mixed fact and law and are reviewable against a standard of reasonableness (see *Hinzman, Re*, 2007 FCA 171 at paragraph 38).

[35] In reviewing the Board's decision on the standard of reasonableness, the Court should not intervene unless the Board came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47. As the Supreme Court held in *Khosa*, ". . . it is not up to a reviewing court to substitute its own view of a preferable outcome", nor is it " . . . the function of the reviewing court to reweigh the evidence" (see *Khosa v. Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, [2009] 1 S.C.R. 339 at paragraphs 59 and 61).

[36] **Issue 2**

Did the Board misstate the facts of the case?

The respondent has shown that the Board did not misstate the fact that the last time the applicants sought aid from the police was in 1998. The principal applicant stated several times in her testimony in front of the Board that she did not go to the authorities after 1998.

[37] **Issue 3**

Did the Board err by finding that state protection was available for the applicants in Colombia?

The Board found that there would be adequate state protection available to the applicants in Bogotá. Refugee protection is a surrogate protection which is comes into effect only when protection is unavailable anywhere in the applicant's home state (*Ward v. Canada (Minister of Employment and Immigration)*, [1993] 2 S.C.R. 689, [1993] S.C.J. No. 74 (QL) at paragraph 18).

[38] Subject to a complete breakdown of the state apparatus, states are presumed to be able to protect their citizens (see *Ward* above, at paragraph 50). An applicant bears the onus to rebut this presumption on a balance of probabilities with "clear and convincing evidence confirming a state's inability to protect" (*Ward* above, at paragraph 50).

[39] The applicants must show that the state is not providing adequate protection. The protection provided by the state does not have to be effective at all times in order to be adequate (*Gomez Espinoza v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 806 at paragraph 30). Likewise, as the nature of refugee protection is forward-looking, evidence that the state did not provide adequate protection to its nationals in the past will not always be sufficient to overcome the burden on the applicants.

[40] The applicants submit that the Board did not take into account their specific circumstances in analyzing state protection. A complete lack of analysis of an applicant's personal circumstances may render a decision unreasonable (see *Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, 295 F.T.R. 35 at paragraph 32). However, the Board in this case noted that the agents of persecution of these applicants were FARC which had targeted them for extortion and that they had refused to pay money to FARC. The Board's review of the documentary evidence focused on the deterioration of FARC's command and communication structure and the Colombian government's efforts to protect citizens who fear FARC. The Board sufficiently considered the specific realities of these applicants.

[41] The applicants further submit that the Board ignored or selectively relied on the documentary evidence. Board members are presumed to have considered all of the evidence before them (see *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 157 F.T.R. 35, [1998] F.C.J. No. 1425 (F.C.T.D.) (QL)). The Board need not summarize all of the evidence in its decision so long as it takes into account evidence which may contradict its conclusion and its decision is within the range of reasonable outcomes (see *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (F.C.A.).

[42] The Board recognized that there is conflicting evidence about the strength of FARC in Colombia. It found that FARC is still a problem in Colombia and does have a presence in Bogotá. It noted FARC has used landmines and explosives, that it is managing to infiltrate armed forces, that it is reinforcing its urban militia, that it continues to use extortion and that it still engages in political killings and intimidation of judges. However, after reviewing the documentary evidence, the Board

concluded that Colombia is making serious efforts to provide adequate protection to citizens who fear FARC and these efforts are most successful in Bogotá. The Board found that FARC's presence in Bogotá is limited to three main activities: terrorist attacks on security forces and politicians, extortion of merchants and corporations and recruiting at the university level and poorer areas in southern parts of the city. The Board also found that none of these actions of FARC occurred with impunity.

[43] Moreover, the evidence pointed to by the applicants as ignored by the Board, highlights that the Colombian government is not able to provide sufficient protection throughout the entire state. However, as noted above, the onus was on the applicants to show that the Colombian state cannot provide adequate protection anywhere in the country. I do not find that the Board ignored probative evidence.

[44] Similarly, it was open to the Board to give the report from Dr. Chernick limited probative weight. Board members have considerable discretion in deciding how much weight should be afforded to the evidence (see *Velychko v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 264 at paragraph 26). The Board gave little weight to the report by Dr. Chernick because it found that the professor did not provide evidence to support his opinion and did not indicate whether the people mentioned in his report who were targeted by FARC had attempted to seek state protection. This was a transparent and justified decision and was open to the Board to conclude in this manner. It is not the role of this Court to reweigh the evidence.

[45] The Board reviewed the documentary evidence, including that of the applicants, acknowledged the applicants' submissions and arguments, but found that based on the totality of the evidence, the applicants had not met the onus of providing that state protection would not be adequate for them, particularly in Bogotá. The Board's conclusion was transparent and intelligible and within the range of possible outcomes.

[46] Finally, while the Board provided no evidence for the statement that FARC had no interest in the applicants, the applicants testified that their close relatives still living in Bogotá have not been harassed by the FARC. In light of this, I do not consider the statement by the Board to be an error which undermines it's otherwise reasonable decision.

[47] In summary, I am unable to conclude that the Board's decision was unreasonable. Its finding regarding the adequacy of state protection was well within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[48] As a result, the application for judicial review must be dismissed.

[49] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[50] **IT IS ORDERED that** the application for judicial review is dismissed.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, S.C. 2001, c. 27

72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
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 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.
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	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

former habitual residence, would subject them personally	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 themself 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, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions 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.

FEDERAL COURT

SOLICITORS OF RECORD

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