Federal Court  Cour fédérale

Date: 20110622

Docket: IMM-6897-10

Citation: 2011 FC 746

Toronto, Ontario, June 22, 2011

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

LUIS HUBER CAMACHO PENA
ANA CECILIA CARDENAS DUARTE
LINA VANESA CACERES CARDENAS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, of a decision of the Refugee Protection Division of the Immigration and Refugee Board. The Board determined that the applicants were neither Convention refugees nor persons in need of protection.

[2] Although I have been convinced that the Board made some errors and unreasonable findings, the applicants have failed to establish that the Board erred in finding that they had not rebutted the presumption of state protection.

Background

[3] The applicants are a family from Bogota, Colombia: husband Luis Huber Camacho Pena, his wife Ana Cecilia Cardenas Duarte, and their adult daughter Lina Vanesa Caceres Cardenas. The applicants' fear relates to the experiences of the wife, Ana.

[4] Ana's extended family has had a long history of being persecuted by the Revolutionary Armed Forces of Colombia (FARC). Prior to meeting Luis in 1993, she was married to Pedro Fernando Caceres. Pedro's family had a close relationship with the Colombian Liberal Party, and his father was a Councillor for the municipality of El Penon. Ana also became involved with the Liberal Party in the mid-1980s.

[5] During this time, a number of trucks were being set on fire by FARC. Pedro, who worked for an insurance company, was assigned to investigate. He began to receive threats from FARC, and was ultimately killed in February 1986, presumably by FARC.

[6] Ana's brother-in-law, Jairo Hernan Caceres Escobar, was also targeted by FARC, in his case for being an active member of the Liberal Party. He was threatened with death and it was demanded that he make a financial contribution to FARC, which he refused. Jairo was killed by FARC in August 1993.

[7] Despite the death of her husband and brother-in-law, Ana continued contributing to the Liberal Party, participating in “health brigades” intended to provide basic health care to low-income communities while raising support for the Party.

[8] In May 1995 Ana’s father, Ramon Cardenas Daza, was fatally struck by a vehicle in front of the family home. Two weeks later, Ana received a phone call from an individual who identified himself as a member of FARC and threatened to kill all the members of Ana’s family forming part of the “corruption” of the country. Ana hired a lawyer to investigate, and the investigation revealed that the driver of the vehicle was a member of the police who was a FARC informant.

[9] After Ramon’s death, Ana’s family split up and relocated, and Ana ceased her activities with the Liberal Party. In February 1996, she and Luis opened an IT consulting business. Ana required professional help to overcome the tragedies she had suffered, and is still not fully recovered. It was her husband, Luis, who testified at the hearing.

[10] In 1999-2000, Ana resumed her activities with the Liberal Party health brigades. In late October 2001, she received a phone call at her house from a FARC member. The caller told her that she should stop being a member of the corrupt Liberal Party, that FARC knew that she had a business, and that she had to provide financial support to FARC to avoid being killed. The caller said payment details would be resolved later, and warned Ana not to contact police or the applicants would be killed immediately. The caller also warned that non-compliance would result in the applicants being declared as FARC military targets. The applicants received subsequent calls in which FARC requested 2 million pesos and warned them that they were under surveillance.

[11] The applicants assert that the phone calls put them in a state of panic. They refused to contribute to FARC, moved in with relatives, and shut down their business. They say that they knew the authorities would not be able to protect them and decided their only option was to seek protection abroad. Accordingly, they fled to the United States in January 2002. Their US asylum claims were rejected, and an appeal from the rejection was dismissed in May 2009, at which time the applicants sought protection in Canada.

[12] They say that Ana's mother received phone calls asking for the applicants' whereabouts and that she was forced to relocate.

[13] The Board found that the applicants were neither Convention refugees nor persons in need of protection. Under the heading "Nexus," the Board wrote that "As the panel does not believe the claimants to have been or are targeted by the FARC, the panel does not see any connection to a Convention ground."

[14] The Board found that credibility was a determinative issue in this case. The Board noted that none of the applicants had had any personal confrontation with the FARC. The Board determined that this lack of personal confrontation and the absence of supporting evidence did not lend a "ring of truth" to their story of being targeted by FARC, who, the Board stated, are known to aggressively chase down and confront their targets.

[15] The Board acknowledged that a claimant's testimony must be presumed to be true unless there is reason to doubt it but stated that since the applicants' story did not have a "ring of truth" it did not believe the phone calls from FARC ever occurred.

[16] The Board found that state protection was an alternative determinative issue. The Board held that the applicants had not established clear and convincing proof of lack of state protection for individuals like them in Colombia. They had not filed any denunciation with the police or GAULA (the government's anti-terrorism unit dealing with extortion and kidnapping) because they had been warned against doing so by FARC. Accordingly, the Board determined that the applicants had not taken any reasonable steps at all to obtain state protection before seeking international protection.

[17] The Board drew on the documentary evidence and made a series of observations about Colombia addressing, among other things, law enforcement agencies and efforts to provide state protection, democracy and fair elections, the existence of a witness protection program, procedures to promote the rule of law, investigations and prosecutions of human rights abuses, the trend towards higher conviction rates, and increased security in Colombia. This review led the Board to conclude that Colombia is a functioning democracy where civilians have recourse to security forces when they require protection from criminal acts, and that those accused of criminal acts are held accountable for their actions through the rule of law.

[18] The Board then turned its focus to FARC, noting that since 2002 the government has committed significant resources to protecting citizens from FARC and other paramilitary groups. It noted that it had been eight and a half years since the applicants left Colombia and reiterated that the

applicants have not had any contact with FARC besides phone calls. The Board reasoned that even if FARC had targeted the applicants in the past, it would be unlikely that FARC would try to track them down years later in a metropolis like Bogota, especially given FARC's diminished resources and the fact that the applicants do not have a profile that would attract continuing attention.

[19] The Board found that FARC's lack of action in chasing, tracking down, or confronting the applicants when it had the chance to do so suggested that the applicants are not persons of continuing interest to FARC (if FARC had indeed targeted them at all). Accordingly, the Board did not believe FARC would target the applicants if they returned to Bogota.

[20] Noting that that state protection must be adequate but not necessarily perfect, the Board concluded that adequate state protection existed for the applicants in Colombia, and particularly in Bogota. The Board found that the applicants had not provided clear and convincing proof of the lack of state protection, and concluded that there was not a serious possibility the applicants would face persecution or a risk to life if they were to return to Colombia. The applicants' claims were accordingly rejected.

Issues

[21] The applicants raise four issues:

1. Did the Board err in concluding there is no nexus to a Convention ground?
2. Did the Board err in its credibility assessment?
3. Did the Board err in its conclusions on state protection and internal flight alternative?

4. Did the Board err by failing to conduct a separate s. 97 analysis and by importing into a general s. 97 conclusion considerations of credibility and subjective fear?

Analysis

1. Nexus

[22] The applicants are right that the following statement from the Board on nexus is problematic: "As the panel does not believe the claimants to have been or are targeted by the FARC, the panel does not see any connection to a Convention ground." It is problematic because, contrary to the Board's reasoning, the truth of the applicants' story and nexus to a Convention ground are two separate issues. The issue of nexus involves determining whether a claimant's alleged well-founded fear of persecution can be tied to one of the grounds listed in s. 96 of the Act. Credibility involves determining whether the alleged persecution occurred at all. If the applicants' evidence had been believed, then nexus to a Convention ground, political opinion, would have been established.

[23] Nonetheless, this apparent conflating of credibility and nexus does not render the decision as a whole unreasonable. The statement is tangential to the Board's two determinative findings in this case: that the applicants were not credible and that state protection was available to them. The Board's statement on nexus does not amount to an error sufficient to warrant allowing this application.

2. Credibility Assessment

[24] The Board's negative credibility finding was unreasonable. The Board did not, as it purported to do, presume the applicants' evidence to be true. It made its credibility finding based on an implausibility finding and an apparent expectation of corroborating evidence.

[25] In *Leung v Canada (Minister of Employment and Immigration)* (1994), 81 FTR 303 (TD), Associate Chief Justice Jerome held, at paras. 14 and 15, that:

> … the Board is under a very clear duty to justify its credibility findings with specific and clear reference to the evidence.
>
> This duty becomes particularly important in cases such as this one where the Board has based its non-credibility finding on perceived "implausibilities" in the claimants' stories rather than on internal inconsistencies and contradictions in their narratives or their demeanour while testifying. Findings of implausibility are inherently subjective assessments which are largely dependant on the individual Board member's perceptions of what constitutes rational behaviour. The appropriateness of a particular finding can therefore only be assessed if the Board's decision clearly identifies all of the facts which form the basis for their conclusions.

[26] Here, the evidence the Board offered for its implausibility finding was a general reference to the Board's National Documentation Package for Colombia, which according to the Board indicated that FARC is known to aggressively chase down and confront its targets.

[27] It must be pointed out that a statement of alleged fact supported only by the Board's National Documentation Package and with no reference to a specific document or page is virtually useless to the Court or to any person attempting to understand the basis for the statement. In this case, even the Minister's counsel was unable to locate a passage in those numerous pages that

reflected or supported the Member's bald statement of fact. If it is in the Board's National Documentation Package, it was not apparent to anyone involved in this case, except apparently to Member Lim.

[28] In any event, this evidence, if it exists, is simply not a sufficient basis to doubt the applicants' narrative. The Board made no finding that there was any inconsistency or contradiction in the applicants' version of events and nowhere in its reasons does it suggest that the principal applicant was anything but straightforward and honest in his testimony. Just because FARC is known to aggressively track down its victims does not mean that it is reasonable to brand any narrative that strays from this pattern as implausible. Such a determination, without more, is wholly inconsistent with a presumption that the applicants were telling the truth.

[29] Furthermore, in the circumstances of this case a lack of documentary evidence cannot be used to impugn the applicants' credibility. The Board refers to a lack of "necessary documentary evidence" without identifying what evidence it expected the applicants to present. Given that the threat was by telephone one must question what documentary evidence could be adduced. The only document that comes to my mind is a police report. However, given that the applicants explained that they never contacted the authorities, the absence of a police report cannot be used to impugn their credibility. In fact, had there been a police report it would have been evidence that their testimony, at least in this respect, was false. Given the facts before the Court, the absence of a police report may be an issue when considering state protection, but not when considering the applicants' credibility.

3. State Protection and Internal Flight Alternative

[30] The Board clearly stated that its determination on state protection was an "alternative" finding to credibility and was "determinative." The state protection analysis addressed country condition evidence and was not based on the applicants' credibility. I find that there is no basis for the applicants' submission that the Board's credibility finding tainted its entire decision.

[31] What is absent in the applicants' submissions on state protection is a meaningful response to the fact that they made no effort to seek protection in Colombia. All of the Board's findings must be read in the context of its undisputed finding that the applicants "did not take any reasonable step at all to obtain state protection first in their home country before seeking international protection."

[32] The essence of the parties' dispute on the Board's state protection analysis is whether the documentary evidence that the Board did not refer to contradicts its findings to such an extent that the Board erred by not specifically addressing it.

[33] In my view, the evidence the applicants say the Board should have referred to is not of such relevance that the failure to specifically address it results in a decision made without regard to the evidence. The applicants point to evidence that FARC remains an ongoing threat in Colombian society; however, the Board accepted that FARC continued to pose a threat, noting that the evidence shows that the country is still wrestling with security problems and that crime is still very much a problem in Colombia. The applicants' reference to a UK Home Office Operational Guidance Note from 2008 indicating that the state "cannot currently offer sufficient protection from [FARC]" is on point, but it is not sufficient to demonstrate that the Board failed to evaluate these issues or ignored

evidence. The UK Home Office's statement was made in the context of reference to the government's weak authority in some parts of the country, and the Board made extensive reference to increased security in urban areas, particularly Bogota, where it concluded the applicants would be protected from FARC. The Board also provided extensive evidence of the decline in FARC's operational capacity and the effectiveness of government initiatives.

[34] Furthermore, the evidence the applicants allege the Board ignored is general country condition evidence and it is not specifically tied to the applicants' own situation. The requirement to specifically refer to contradictory evidence applies to evidence specific to a claimant: *Shen v Canada (Minister of Citizenship and Immigration)*, [2007] FCJ 1301 (TD), at para. 6; *Quinatzin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 937, at para. 29.

[35] In any case, I am not convinced that the Board failed to consider the evidence in question. The Board clearly acknowledged that FARC posed a serious threat to citizens of Colombia. This and the Board's statement that it had considered "counsel's submissions, country articles and reports tendered by the claimants into evidence, and the National Documentation Package" satisfies me that no error was committed in the Board's assessment of the documentary evidence on state protection.

[36] The applicants' allegation that the Board relied on irrelevant considerations is without merit. First, the fact that Colombia is a democracy is, in fact, relevant because the burden on a claimant to rebut the presumption of state protection is higher where the state in question is a democracy, and the more the democratic the state and its institutions, the higher the burden. The Board's

observations regarding Colombia's democratic political structure and its successful efforts to stamp out corruption were directly relevant to calibrating the level of evidence required to rebut the presumption of state protection.

[37] Second, the Board's findings with respect to increased controls on military and civilian authorities are in fact relevant even though the claim of the applicants is that they fear FARC. The Board's findings that Colombia has a police force, military, and judicial system capable of apprehending and prosecuting FARC agents was directly relevant to the ability of the applicants to turn to the authorities for protection. Further, the Board's recognition of Colombia's witness protection program is of particular relevance.

[38] I also do not accept the applicants' submission that the Board dealt with initiatives and efforts without assessing whether adequate state protection was actually available. Throughout its reasons the Board referred not only to the government's initiatives, but also to the tangible impact those initiatives had.

[39] Despite the applicants' submission that the Board erred on its supposed internal flight alternative determination, it is clear that the Board made no such finding. The Board found that the applicants, who are from Bogota, would be able to obtain state protection in Bogota.

4. Failing to conduct a separate s. 97 analysis

[40] Distinct analyses under ss. 96 and 97 were not required. An absence of state protection is, as suggested by the respondent, an essential component of both sections. Furthermore, throughout

its reasons the Board referred to both sections, making it clear that its analysis applied to both persecution and risk to life. The Board's approach was permissible given that there was no evidence calling for a distinct state protection analysis vis-à-vis s. 97: *Sida v Canada (Minister of Citizenship and Immigration)*, 2004 FC 901, at para. 15 and *Brovina v Canada (Minister of Citizenship and Immigration)*, 2004 FC 635, at paras. 17-18.

Conclusion

[41] For these reasons and despite the Board's earlier-identified failings, the finding on state protection is determinative and was reasonable. This application is dismissed. Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is dismissed and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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