

Federal Court



Cour fédérale

Date: 20120223

Docket: IMM-4500-11

Citation: 2012 FC 255

Ottawa, Ontario, February 23, 2012

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

LUISA FERNANDA AYALA NUNEZ

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant seeks judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board), dated June 16, 2011, which held that the applicant was not a Convention (United Nations' *Convention Relating to the Status of Refugees*, [1969] Can TS No 6) refugee or person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). For the reasons that follow, the application is dismissed.

Facts

[2] The applicant is a citizen of Colombia, and alleges a well-founded fear of persecution at the hands of the Revolutionary Armed Forces of Colombia (FARC). In November 2006, the applicant's mother was threatened by the FARC because she was working on the sale of a property they allegedly used. The applicant was also threatened. The applicant states that her mother ceased working on the sale, and reported the threats to the police.

[3] The applicant alleges that on November 27, 2009, she and her mother heard screams from their neighbour's house and saw several men that appeared to belong to the FARC taking their neighbour, a young girl, from the home. The applicant states that she saw one of the men coming towards her house so she and her mother fled through a window and hid. The men searched their home and called the applicant's name. The applicant and her mother went to the police station but the police said they were powerless against the FARC.

[4] The applicant's mother then sent the applicant to live in Bogota with her grandmother. The applicant and her mother continued to receive threatening phone calls. When a threatening letter was discovered at the applicant's home her mother decided to send her to Canada. She arrived on June 4, 2010 and made her refugee claim on June 7, 2010. The applicant states that her mother has continued to receive threats from the FARC and has gone to the police again but was again told that they could not protect her from the FARC.

Decision Under Review

[5] In the reasons for its decision, dated June 16, 2011, the Board found that the determinative issue was the availability of state protection.

[6] The Board reviewed the principles to be applied in the state protection analysis, including the presumption that a state is capable of protecting its citizens which must be rebutted with clear and convincing evidence, and that, in a functioning democracy such as Colombia, a claimant must do more than merely show she went to see members of the police force and those efforts were unsuccessful, rather, the claimant must exhaust all courses of action reasonably available to her.

[7] The Board then reviewed the documentary evidence on Colombia's ability to protect its citizens from the FARC. The Board noted Colombia's historical challenges fighting the FARC but found that advances have been made in recent years due to increased army and police efforts. The Board found that the size and strength of the FARC had been depleted and there was a decline in crimes such as homicide, kidnapping and extortion.

[8] The Board acknowledged problems of police corruption and collusion with the FARC but found that the state had made efforts to address this problem and punish those responsible. For example, the Board stated at paragraph 14:

In certain areas, such as Antioquia, Cordoba, Narino and Meta, corrupt dealings reportedly continued between local military and police forces and new illegal armed groups, which included some former paramilitary members. Although impunity for these police and military personnel remained a problem, the Ministry of Defence carried out investigations and handed over culpable parties to civilian authorities in a number of high profile cases...

[9] The Board noted that there was conflicting evidence regarding whether the FARC pursued victims who relocated or returned to Colombia after a prolonged absence. The Board noted that the evidence of FARC pursuing victims stated that individuals of high value to the FARC were those most likely to be pursued. The Board also found evidence that the FARC was not capable of pursuing victims who relocate.

[10] Based on the documentary evidence the Board found that the applicant had not presented clear and convincing evidence that state protection was not available. The Board noted the applicant's evidence that she and her mother went to the police and they said they were powerless against the FARC; however, the Board found that the applicant did not seek protection in another jurisdiction or at the state or federal level, which, based on the documentary evidence, may have been better equipped to provide protection.

[11] The Board went on to note several inconsistencies and implausibilities in the applicant's evidence. The Board found that the November 2006 denunciation filed by the applicant's mother was vague regarding whether the threats came from the FARC but the November 2009 denunciation stated definitively they were from the FARC; the Board also noted that the applicant's testimony differed from the November 2009 denunciation regarding the details of the incident.

[12] The Board found that the applicant was inconsistent in some of her testimony, including the timing of when the girl approached her with threats from the FARC. The Board concluded that the

applicant had not rebutted the presumption of state protection with clear and convincing evidence and her claim was rejected.

Issue

[13] The only issue in this application is whether the Board's conclusion regarding state protection was reasonable.

Analysis

[14] The applicant has challenged several of the credibility findings made by the Board. I agree that some of these findings were erroneous; however, that conclusion does not assist the applicant. The determinative issue in the claim was state protection and it is not affected by the credibility issues.

[15] The Board's review of the documentary evidence regarding state protection in Colombia was thorough and nuanced; the Board acknowledged the problems of continued fighting with the FARC and police corruption and also recognized areas in which the evidence was conflicting. However, the Board concluded that the preponderance of the evidence showed that Colombia had made advances in combating the FARC and as a result crime had decreased and the state's ability to protect had substantially improved. The Board supported these conclusions with detailed references to the documentary evidence.

[16] Thus, contrary to the applicant's submissions, this was not a decision in which the boilerplate statements regarding state protection were made without actual consideration of the

evidence. Rather, the Board thoughtfully considered and weighed the conflicting evidence and reached a conclusion that was reasonable and well supported.

[17] The applicant submits that the Board failed to consider all the evidence. Specifically, the applicant argues that the Board's decision was unreasonable because it failed to refer to the most recent Response to Information Request regarding the FARC and a comprehensive report about the FARC titled *Continued Insecurity: Documenting the Permanence of the FARC-EP within the Context of Colombia's Civil War*.

[18] Neither of these arguments is persuasive: the content of the Response to Information Request does not differ in substance from the other evidence referred to by the Board in its analysis; like the other evidence, it states that the FARC presents a continued problem for the state, but notes that the FARC has been weakened in recent years and is less coordinated as a result of military and police efforts. Thus, I agree with the respondent that the substance of the contrary evidence was considered and the failure to refer to this specific piece of evidence does not amount to an error: *Gilbert v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1186 at para 34.

[19] Regarding the *Continued Insecurity* report, the Board in fact refers to it in its analysis. The Board notes the evidence of "a professor of Sociology at Acadia University" when discussing some of the evidence that contradicts its conclusion. Thus, while the Board does not cite the report by its name, the Board clearly considered the report in its analysis but found it was outweighed by other evidence.

[20] The failure of local authorities to provide state protection is not determinative of the issue. The question of refusal to provide protection should be addressed on the same basis as the inability to provide protection, namely at a national level: *Zhuravljev v Canada (Minister of Citizenship and Immigration)*, [2000] 4 FC 3. The Board concluded that, in light of the documentary evidence, protection would have been forthcoming if the applicant and her mother had sought it from another jurisdiction or at the state or federal level after local police failed to assist them.

[21] Insofar as the unreasonableness of the Board's finding that the applicant, as a minor, could have approached the army or other aspects of the government for protection, the Board did have before it evidence that the applicant's mother did know how to approach the army. The Board did not expect the applicant, as a minor to seek protection, but it was reasonable for it to have expected her family to have pursued the matter; see, for example *Velasquez v Canada (Citizenship and Immigration)*, 2009 FC 109 at para 22 and *Osorio v Canada (Citizenship and Immigration)*, 2012 FC 37 at para 38 for similar applications of this principle.

[22] This finding was reasonably open to the Board: *Kadenko v Canada (Solicitor General)* (1996), 143 DLR (4th) 532 at paras 5-6. Thus, I do not accept the applicant's argument that the Board failed to consider the applicant and her mother's attempts to obtain state protection. While the Board erroneously states at one point that it was the applicant rather than her mother who was required to seek protection, I accept that this was inadvertent and the Board's reasons as a whole demonstrate that the Board was aware the applicant was a minor at the relevant time and it was her mother who was obligated to seek protection on her behalf.

[23] Therefore, the Board's conclusion that state protection was available was reasonably open to it and its decision can be upheld on that basis regardless of any errors in its credibility findings.

[24] The application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be and is hereby dismissed. No question for certification has been proposed and none arises.

"Donald J. Rennie"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4500-11

STYLE OF CAUSE: LUISA FERNANDA AYALA NUNEZ v. THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto

DATE OF HEARING: January 24, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** RENNIE J.

DATED: February 23, 2012

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