

Federal Court



Cour fédérale

Date: 20120316

Docket: IMM-4723-11

Citation: 2012 FC 322

Ottawa, Ontario, March 16, 2012

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

**GERMAN ORLANDO GUTIERREZ ARIAS,
LAURA CATALINA MARIN BARRIENTOS**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an Application for Judicial Review from the Decision of the Refugee Protection Division of the Immigration and Refugee Board [RPD or the Board] dated June 28, 2011 [the Decision] in which the RPD rejected the Applicants' claims for refugee protection, made under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The principal Applicant, German Orlando Gutierrez Arias, alleged that he was targeted by the members of the Revolutionary Armed Forces of Columbia [FARC], who threatened and

attempted to kill him. He claims he would be at risk of torture or death if returned to Columbia. The other Applicant, Laura Catalina Maria Barrientos, is Mr. Gutierrez Arias' wife and made her claim for protection by reason of her relationship to Mr. Gutierrez Arias.

[3] The RPD rejected the Applicants' claims because it found Mr. Gutierrez Arias was not credible and because it believed there would be adequate state protection available to the Applicants in Columbia.

[4] The Applicants allege that both these findings are unreasonable. More specifically, they assert that the Board's credibility determination hinged on two unreasonable findings of fact that were made with complete disregard for the evidence before the Board and that the finding regarding state protection was unreasonable because it was based on a mischaracterization of Mr. Gutierrez Arias' particular circumstances or "profile".

[5] The Board is to be afforded considerable deference in respect of its credibility determinations and conclusions regarding state protection. Both matters fall within the core of the Board's expertise and are intimately tied to the facts of a particular case. Thus, such determinations will be set aside only if they are unreasonable. This is a stringent test and requires the Court review not only the Board's reasons but also the record before the RPD. The Court may intervene only if it is satisfied that the reasons of the tribunal are not "justified, transparent or intelligible" and that the result does not fall "within the range of possible, acceptable outcomes which are defensible in respect of facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47). The yardstick for determining the reasonableness of the RPD's factual determinations, including

credibility findings and factual findings that support a conclusion regarding state protection, is set out in section 18.1(4)(d) of the *Federal Courts Act*, RSC, 1985, c F-7. It provides that findings of fact may be set aside if they are made in a perverse or capricious manner or without regard to the material before the tribunal.

[6] Despite the stringency of the applicable test, for the reasons set out below, I have determined that the RPD's Decision is unreasonable because the Board's determinations on the two points in issue were made without regard to the evidence before the Board. The Applicants' refugee claims will therefore be remitted to the RPD for re-determination by a differently constituted panel of the Board.

[7] The Applicants also raise a natural justice issue because the RPD referred in its reasons to a report – the 2009 US Department of State Report on Human Rights Practices in Columbia - that was not disclosed to the Applicants. As counsel for the Applicants candidly conceded during the hearing, though, nothing turns on this non-disclosure as the portions of the report relied on by the RPD were not substantially different from the 2008 version of that same report which was included in the Board's National Documentation Package for Columbia, which was provided to the Applicants.

THE RPD's CREDIBILITY FINDING IS UNREASONABLE

[8] The Board offered two principal reasons for disbelieving Mr. Gutierrez Arias.

[9] First, it held that the events claimed were unlikely to have occurred because Mr. Gutierrez Arias returned (or “re-availed”) several times to Columbia after certain of the alleged threats were made. The RPD reasoned that the fact of multiple re-availments undercut Mr. Gutierrez Arias’ claim of subjective fear of the FARC and therefore that the events reported by him likely did not occur. The Board wrote in this regard:

Considering the number of times he left and returned, despite having been threatened, and despite his alleged reasons for returning, the Panel finds it hard to believe the existence of his subjective fear or even that he was threatened by the FARC. It does not stand to reason that he would, if his story of being a target of the FARC were true, keep on returning to Bogota between 3 to 6 months after supposedly fleeing the country. On this basis, leaving little to no weight to the denunciation he said was filed against the FARC or the genuineness of the letter he allegedly received from the FARC, the Panel finds, on a balance of probabilities, that he was not or is not a target of the FARC (Decision at para 11).

[10] Secondly, the Board did not believe the assassination attempt occurred as it found it improbable that Mr. Gutierrez Arias would have made a police report and then immediately fled to the U.S. without following up upon that report. It viewed the filing of the report as “window dressing”, stating as follows:

The panel draws a negative inference from this apparent window dressing to his claim that he would not have been present to testify on this denunciation, if indeed he had filed the complaint, and if the police decided to proceed on the case. The only reason the panel can, therefore, see in alleging that he and/or his parents had filed a denunciation was to make it appear his story, that he was being targeted by the FARC, was true. From this, the panel, therefore, further believes that, on a balance of probabilities, his allegation of being a target of the FARC is not true (Decision at para 13).

[11] In my view, both these findings are indefensible in light of the evidence that was before the Board.

[12] In terms of the re-availments, the evidence demonstrated that Mr. Gutierrez Arias has not returned to Colombia after the assassination attempt although he did come and go following the preceding threat incidents.

[13] More specifically, in both his Personal Information Form and his testimony before the RPD, Mr. Gutierrez Arias explained that in January 2000, when he was 20 years old, he obtained a job as a process server in one of the penal courts in Bogotá, Columbia, where his duties required him to notify accused persons and detainees of their trial dates. He obtained this position through his aunt, who was a judge in one of the penal courts in Bogotá.

[14] Mr. Gutierrez Arias also stated that shortly after starting this job, he served a trial notice upon an incarcerated FARC member, who threatened him and stated that the FARC knew Mr. Gutierrez Arias' aunt was in charge of several of their cases, had jailed some of the FARC leaders and Mr. Gutierrez Arias and his family would "pay for that with blood and death".

[15] Mr. Gutierrez Arias then consulted with his aunt, who advised him to leave Colombia as soon as possible. He followed her advice and fled to the United States, using a visitor's visa that he already possessed. When no more threats were forthcoming, he returned to Colombia in September 2000, but not to his job as a process server. In the interim, his aunt had become a so-called "faceless judge" in Columbia, went into hiding and received round-the-clock security protection.

[16] In November 2000, Mr. Gutierrez Arias returned to the United States for personal reasons and went back to Colombia in December 2000, both times using a valid U.S. visitor's visa. He

stated that on February 2, 2001 his family received a threatening letter from the FARC that was hand-delivered to the doorman of his family's apartment building. The letter was on paper that bore the heading "FARC – EP" and threatened the Gutierrez Arias family with death, in rather graphic terms. It also stated that the FARC did "not like the fact that our family is judged and sentenced by yours". The letter was filed as an exhibit with the RPD. Although the Board concluded it would not give the letter much weight, it provided no reasons for its conclusion and there is nothing in the record to suggest that the letter was not authentic.

[17] After receiving this letter, the Gutierrez Arias family moved to another apartment in Bogotá. Because he already possessed a valid U.S. visa (which his parents did not), Mr. Gutierrez Arias fled again to the United States in early June 2001. He once again re-availed to Colombia in November 2001 because no further threats had been received, because he did not want to overstay his visa in the U.S. and because he wanted to get on with his life. However, instead of returning to live with his family in Bogotá, he went to stay with a relative in Cali.

[18] In approximately March 2002, Mr. Gutierrez Arias' parents received a telephone call in which an unnamed caller said they were aware of Mr. Gutierrez Arias' arrivals and departures from Columbia and sooner or later they would locate him. Shortly thereafter, Mr. Gutierrez Arias fled again to the U.S. and stayed there until July 2002, when he again returned to Colombia. He explained in his testimony before the Board that, while fearful, the threats were verbal and he wanted to resume his life so decided on balance that he would return to Colombia.

[19] Mr. Gutierrez Arias also testified that in April 2003 he was followed by two men on a motorcycle, who wore facemasks and shot at him while he was driving. His car crashed and he was injured by broken glass. He made a complaint to the police and filed a copy of the complaint (as well as pictures of his car with bullet holes in it) with the RPD. In his testimony before the Board, Mr. Gutierrez Arias stated that both his aunt and the Colombian police suggested that he should flee Colombia for his safety.

[20] Mr. Gutierrez Arias fled to the United States, where he remained until 2009. While in the U.S., he met and married Ms. Barrientos and they had two children (who are American citizens). They claim they did not make a timely refugee claim in the United States because they received poor service and advice from an unlicensed immigration consultant, who was a fellow refugee and had been a lawyer in Colombia (but could not practice law in the U.S.) The Applicants eventually retained American counsel and filed refugee claims in 2008, but these were rejected as being out of time and because Mr. Gutierrez Arias' credibility was questioned by the decision maker of first instance. They appealed the decisions and their appeals were dismissed.

[21] In May 2009, within days of being advised that their U.S. appeals had been dismissed, the Applicants came to Canada and at the border made the refugee claims that the Board rejected in the Decision.

[22] Mr. Gutierrez Arias also testified that his parents continued to receive telephone calls from unknown callers until 2005, who called asking for him. He stated that he was convinced that if he returned to Colombia the FARC would have the ability to hunt him down and would be likely to

search for him due to his association with his aunt and the events that had transpired. He filed letters from his family that corroborated these assertions as well as voluminous country documentation, some of which is discussed below.

[23] Dealing, first, with the Board's treatment of the re-availments, it is my view that it was unreasonable for the Board to conclude that Mr. Gutierrez Arias lacked subjective fear. In this regard, by far the most serious event that is alleged to have occurred is the assassination attempt. Mr. Gutierrez Arias did not re-avail after that event, even though this has meant that his parents and Ms. Barrientos' parents have not ever seen his two children. It is unreasonable, in my view, for the RPD to have held the previous returns against him, when they followed much less serious events. One simply cannot infer that because Mr. Gutierrez Arias was not frightened previously, when he had merely received threats, that he was not fearful when he narrowly escaped being shot to death in 2003. From the point of the shooting forward, he has not re-availed. The RPD nowhere considered this fact and instead conflated Mr. Gutierrez Arias' previous behaviours (which followed far less serious events) with his completely different reaction following the shooting. On these facts, there is no basis upon which the Board could assume that Mr. Gutierrez Arias did not fear death from the FARC from 2003, forward. Accordingly, the Board's treatment of the earlier re-availments is completely unreasonable and the fact of the previous re-availments cannot be used to find Mr. Gutierrez Arias' claim to lack credibility.

[24] Likewise, in my view, the Board's treatment of the complaint made to the police is not reasonable. There is no evidence in the record to suggest that Mr. Gutierrez Arias determined he would flee Colombia before he made the complaint. Rather, he testified that he made the police

report the day of the shooting, and that it was after speaking with the police and his aunt (who both suggested leaving Colombia) that he decided to seek asylum in the United States. In this regard, his testimony about the police report before the Board was as follows (Tribunal Record at page 716):

PRESIDING MEMBER: And again did the police do anything about this incident?

PRINCIPAL CLAIMANT: They told me, as soon as you leave the hospital come to the police station to file a report, so I did. So when I left the hospital I went to the police station and the report was made.

PRESIDING MEMBER: And what did the police do?

...

PRINCIPAL CLAIMANT: The police told me that if I can find myself a safe place to be that would be good, or if I could leave the country because they would not be providing me any protection unless I pay for it.

PRESIDING MEMBER: And what did you decide to do?

PRINCIPAL CLAIMANT: I immediately got a ticket to the states. My parents found the money or got the money. So until today I have not been ... I have not gone back to Colombia.

[25] The Board completely ignored this explanation and the sequence of events. There was no basis upon which the Board could reasonably conclude that Mr. Gutierrez Arias' police complaint was "window dressing" to support a refugee claim as he did not decide to flee until *after* he made the report and was counseled to leave Colombia by the police and his aunt.

[26] As these two findings are the only underpinning for the Board's credibility determination, it must be set aside. In so doing, I recognize that the Court should be circumspect in setting aside the RPD's credibility findings under section 18.1(4)(d) of the FCA. As I held *Sandeep Kaur Rahal v*

Canada (Minister of Citizenship and Immigration), 2012 FC 319, in matters of credibility

“...intervention by the Court is not warranted if there is some evidence to support the Board’s conclusions, if the RPD offers non-generalized reasons for its findings (that are not clearly specious) and if there is no glaring inconsistency between the Board’s decision and the weight of the evidence in the record”(at para 59). Here, the RDP’s credibility finding falls short on all three points. For the reasons noted, there is no evidence to support the impugned findings and, indeed, the evidence is to the contrary. The Board’s reasons are therefore clearly specious.

THE RPD’S STATE PROTECTION FINDING IS UNREASONABLE

[27] In terms of its state protection finding, the Board held that, even if Mr. Gutierrez Arias’ version of events were true, it was unlikely that the FARC would still be interested in pursuing him. It premised its decision on a significant mischaracterization of Mr. Gutierrez Arias’ profile, terming him a “lowly court clerk” and completely ignored his relationship with his aunt, who was a penal judge in Colombia who convicted and jailed FARC members. The RPD wrote in this regard:

Furthermore, based on the principal claimant’s story, he was merely a process server or lowly court clerk, a fact that would have been obvious to the imprisoned FARC man in January 2000. He had apparently left that job in March 2000 when he left for the U.S. that is 11 years ago. It is, therefore, reasonable to assume that with his relatively low profile and the fact he had left the court clerk job, the FARC would turn their attention to more pressing matters or more high profile targets. The Panel is, therefore, not persuaded to believe that he is, if he had once been, a person of interest to the FARC today. (Decision at para. 37)

[28] In coming to its conclusion on state protection, the RPD quoted from and made reference to some of the facts contained in the voluminous country documentation in the record. In so doing, though, the Board did not review the documentation with a view to Mr. Gutierrez Arias’ profile and

instead focused on the situation of clerical employees. Also, inexplicably, the RPD's analysis of the country information focused at several points on risks to those who have been victims of extortion. The Applicants, however, never claim to have faced extortion nor did they claim to fear it. These comments are therefore completely irrelevant. It would appear that the RPD may have "cut and pasted" findings regarding the situation in Colombia from previous decisions, but did not review and modify the precedent to tailor it to fit the Applicants' situation.

[29] This Court has often held that a mischaracterization of a refugee claimant's profile may vitiate the state protection analysis because the analysis is purely contextual, and the availability of protection in a refugee claimant's home state may well depend on who the claimant is and why he is being targeted. For example, in *Walcott v Canada (Minister of Citizenship & Immigration)*, 2011 FC 415 at para 44, 98 Imm LR (3d) 216, Justice de Montigny stated that, "[h]aving mischaracterized the risk alleged by the Applicant, the Officer could not properly assess it. For that reason alone, this application for judicial review ought to be granted".

[30] Similarly, in *Corado Guerrero v Canada (Minister of Citizenship & Immigration)*, 2011 FC 1210, 208 ACWS (3d) 815, Justice Zinn wrote at paras 22 and 23:

The Board analysed its view of the applicant's risk under s. 97 of the Act. The Board acknowledged the general violence that is prevalent in Guatemala and noted that it is primarily drug related. The Board then noted that the applicant was a prime target for recruitment because of his vulnerable age and social profile. It was noted that he was young, naïve, unsophisticated and uneducated. It was also noted that he was orphaned and had lived with his elderly grandmother since he was eight years old, without a family and strong social support to help him make crucial decisions in life. The Board stated that he was a particular target because of his geographic location of being so close to the El Salvador border. The Board also noted that what made the applicant "a particular target of the drug

trafficking gang was his refusal to deliver drugs to the border of El Salvador." Notwithstanding its finding that the applicant was targeted, the Board found that the risk he faced was a generalized one, given the pervasiveness of gangs in Guatemala.

In my view, the errors outlined above resulted in the Board mischaracterizing the personal circumstances of the applicant and thus led the Board to inaccurately find that his circumstances and his risk of harm was one faced generally by others. He was not, like many his age, merely at risk of recruitment by a criminal gang. Rather, he was at risk of death having been specifically and personally targeted by a criminal organization for death at the hand of Mara 18 who had been hired to kill him. [Emphasis added]

[31] In the voluminous documentary evidence regarding Colombia before the RPD, there were numerous references to the fact that those associated with the judiciary may well be at risk from the FARC. Perhaps the most relevant of these was the 2010 Report entitled "UNHCR Eligibility Guidelines for Assessing the Internal Needs of Asylum Seekers from Columbia", which stated as follows (Certified Tribunal Record at p 658):

FC/CF3. Judges and Other Persons Involved in the Administration of Justice

Judges, public prosecutors, witnesses, lawyers and other persons who participate in legal proceedings and investigations relating to violations of human rights or IHL, involving members of the public security forces or paramilitary and guerrilla groups, are reportedly at risk of being killed, kidnapped, or subjected to torture, ill-treatment and forced disappearance. Those investigating corruption, narco-trafficking, and land disputes are similarly at risk.

[32] The RPD's failure to consider the country documentation in light of Mr. Gutierrez Arias' situation and personal circumstances renders its conclusion on state protection unreasonable.

CONCLUSION

[33] In light of the foregoing, the RPD's Decision will be set aside and the Applicants' claims will be remitted to the RPD for re-determination by a differently constituted panel of the Board.

[34] No question for certification under section 74 of IRPA was presented and none arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. This Application for Judicial Review of the RPD's Decision is granted.
2. The RPD's Decision is set aside.
3. The Applicants' refugee claims are remitted to the RPD for re-determination by a differently constituted panel of the Board.
4. No question of general importance is certified.
5. There is no order as to costs.

“Mary J.L. Gleason”

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-4723-11

STYLE OF CAUSE: GERMAN ORLANDO GUTIERREZ ARIAS, LAURA
CATALINA MARIN BARRIENTOS v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 6, 2012

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

DATED: March 16, 2012

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