

Federal Court



Cour fédérale

Date: 20121127

Docket: IMM-3359-12

Citation: 2012 FC 1374

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Ottawa, Ontario, November 27, 2012

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

**JOSE JERSAIN MEDINA CANCHON AND
MARTHA JANETH CANCHON CIFUENTES**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division [the RPD] of the Immigration and Refugee Board, dated March 9, 2012, determining that Martha Janeth Canchon Cifuentes and her son, Jose Jersain Medina Canchon, are not Convention refugees under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA], or persons in need of protection under section 97 of the IRPA.

I. Facts

[2] Since 1992, the female applicant had been operating a home-based day-care centre accredited by the Instituto Colombiano de Bienestar Familiar (Colombian family welfare institute). She opened the day-care centre after her husband, a prosperous merchant, left her. He left the female applicant and her two children in a difficult financial situation.

[3] On December 6, 2007, five armed persons came to her home, threatened and insulted her, and asked where her sons Johan and Jersain were. These people identified themselves as members of the Armed Revolutionary Forces of Colombia [the FARC] and explained that they were on a mission to kidnap her children. After realizing that her sons were not at home, they left, warning her not to report them to the authorities or they would kill her sons. The female applicant therefore contacted her sons and asked them to go to their maternal grandmother's home.

[4] Two days later, the female applicant closed the day-care centre and notified the agency that manages home-based day-care centres. After several weeks of discussions with her sons, they decided to go to the United States for a while. On February 16, 2008, her son Johan left to join his girlfriend in the United States, and the female applicant left to join him, along with her son Jersain, on February 28, 2008.

[5] The female applicant returned to Colombia in March 2008 to try to find her spouse and ask him for financial support, but she was unable to contact him because his family refused to

give her his contact information. She settled in Topaipí upon her arrival but did not feel safe there, so she moved to Ibagué first and later, to Bogotá.

[6] In November 2008, the female applicant was told by her brother that he had found pamphlets and letters containing death threats under the door where she had lived with her sons. Her neighbour also telephoned her to tell her that men were coming to her former residence late at night and knocking on the door.

[7] The female applicant alleges that she filed a complaint with the police on February 2, 2009, and that the police themselves had passed on the complaint to the Public Prosecutor's Office. Eight days later, the female applicant was assaulted in Bogotá when she was arriving at her mother's house. The assailants threatened her and tried to kidnap her. Neighbours heard her screams and threatened to call the police, which allowed her to escape and take refuge at a neighbour's home.

[8] The female applicant then went to a friend's home and telephoned her brother to tell him about the attack. The next day, a doctor came to treat her because she had been seriously injured. She and her brother therefore decided that she would leave the country. The female applicant could not understand why the FARC wanted to kidnap her sons, thinking that they perhaps wanted to ransom them or use them for forced labour.

[9] On February 18, 2009, the female applicant left Colombia for the United States. She then arrived in Canada on February 28, 2009, accompanied by one of her sons, Jose Jersain, and they immediately claimed refugee protection.

II. Impugned decision

[10] The RPD determined that the applicants are not Convention refugees and are not persons in need of protection under section 97 of the IRPA because they are not credible and because adequate state protection is available in Colombia.

[11] First, the RPD found that the fact that the applicants had not claimed refugee protection at the first opportunity, that is, upon their arrival in the United States in February 2008, undermined their credibility. The panel was not satisfied with the male applicant's explanation to the effect that he knew that the refugee protection claim process is very long and that he did not have legal status in the United States.

[12] Regarding the reasons given by the female applicant to justify why they had not claimed refugee protection at the first opportunity, in the United States, the RPD made an unfavourable finding because of a contradiction that emerged from her testimony. In addition, the explanation given by the female applicant to the effect that she was not aware she could claim refugee protection there was not satisfactory. As for the justification for her decision not to claim refugee protection in February 2009, she stated that she feared that such a claim would take too long and that her illegal status would play against her. The RPD found that these justifications were not reasonable.

[13] The RPD therefore found that the applicants had not shown that they have a subjective fear of returning to Colombia.

[14] It also drew an unfavourable conclusion from the fact that the female applicant had not filed a complaint after her attempted kidnapping and found it unacceptable that the female applicant had not made a complaint because there had been no follow-up on her complaint from February 2, 2009. Furthermore, the RPD was of the view that the document filed by the female applicant to show that she had filed a complaint on February 2, 2009, had no weight because it did not contain an address and was not printed on letterhead.

[15] The RPD was also of the opinion that the female applicant had not been threatened by the FARC since she left in February 2009. It also found that the female applicant did not know why the FARC was particularly interested in coming after her sons.

[16] Finally, regarding state protection in Colombia, the RPD concluded that the applicants did not rebut the presumption that the Colombian authorities are able to provide adequate protection. It found that although the situation in Colombia is not perfect, the documentary evidence shows that the Colombian government has implemented concrete measures to fight the FARC's criminal activities.

III. Applicants' position

[17] The applicants submit that the RPD's decision to reject the applicants' explanations for not having claimed refugee protection in the United States is unreasonable. They argue that the explanations they gave are clear and precise and that their testimonies do not contain any contradictions.

[18] Regarding the female applicant's reasons for not filing a complaint after the attempted kidnapping, she alleges that it was unreasonable to reject the explanations she gave about the infiltration of the police by the FARC, particularly since the documentary evidence confirms this fact. According to the female applicant, the fact that she was the victim of an attempted kidnapping eight days after filing a complaint against the FARC with the police should have been interpreted as proof of this infiltration of the police by the FARC. However, the Court notes that the female applicant did not give this explanation during her testimony before the RPD.

[19] In addition, the RPD did not give any weight to the female applicant's explanation to the effect that the FARC targets young people in particular because they are easier to exploit.

[20] Regarding state protection, the applicants submit that the RPD erred in concluding that it is adequate because recent documentary evidence indicates the opposite.

[21] Finally, the applicants argue that the RPD erred in not considering the psychological assessment of the female applicant.

IV. Respondent's position

[22] The respondent, on the other hand, suggests that the RPD's finding that the applicants lack credibility because they did not claim refugee protection at the first opportunity is well established in the case law and that the panel was entitled to take into account the delay in claiming refugee protection after the kidnappings on which the claim is based took place. Moreover, the female applicant even went back to Colombia, which indicates that she did not truly fear for herself. It was also reasonable for the RPD to reject the applicants' explanations for not having claimed refugee protection in the United States.

[23] Second, the female applicant did not file a complaint regarding the attempted kidnapping of February 10, 2009, arguing that there was no point in going to the police because in her opinion they had done nothing in response to the report she had filed on February 2, 2009. The RPD was correct to reject his explanation because it is not reasonable to refuse to make a complaint to the police simply because they still had not provided the results of their investigation eight days after the report was made. Furthermore, it was reasonable not to give any evidentiary weight to the police report because it did not bear the hallmarks of an authentic official document.

[24] Third, regarding state protection, the RPD correctly concluded that the applicants had not discharged their burden of proving that Colombian authorities were incapable of providing them with effective protection. Indeed, the female applicant did not submit any evidence to rebut the presumption of state protection. On the contrary, the female applicant did not seek state

protection when illegal acts were committed against her, and the documentary evidence supports the argument that Colombia is capable of protecting its citizens.

V. Issues

[25] This application for judicial review raises the following issues:

1) Did the RPD err in analyzing the applicants' credibility?

2) Did the RPD err in concluding that there is effective state protection in Colombia?

VI. Standard of review

[26] The standard of review applicable to both issues is reasonableness since an applicant's credibility is a question of fact (*Aguebor v Canada (Minister of Employment and Immigration)*, 160 NR 315 at paragraph 4, 1993 CarswellNat 303 (FCA)) and the question of the state protection available to the applicants is a question of mixed fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraphs 164-166, [2008] 1 SCR 190).

VII. Analysis

A. *Did the RPD err in analyzing the applicants' credibility?*

[27] The RPD's analysis of the applicants' credibility is reasonable, and the intervention of this Court is not required.

[28] First, the RPD was of the opinion that the fact that the female applicant returned to Colombia after arriving in the United States and that her son remained in the United States for a

year without claiming refugee protection are evidence indicating the absence of a subjective fear of persecution. Indeed, returning to the country of origin demonstrates that a refugee protection claimant does not really fear persecution there (*Lopez v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1318 at paragraph 5, 2004 CarswellNat 3462). Moreover, it is trite law that a delay in seeking the protection of a state that is in a position to provide adequate protection is a factor that may undermine the credibility of a refugee protection claimant when there is no convincing explanation for the delay (*Huerta v Canada (Minister of Employment and Immigration)* (1993), 157 NR 225, 40 ACWS (3d) 487 (FCA)).

[29] As regards the male applicant, the RPD correctly concluded that he could have claimed refugee protection in the United States on the basis that members of the FARC were looking for him and his brother in Colombia. Furthermore, when he learned of his mother's attempted kidnapping, he had additional reasons justifying a refugee protection claim.

[30] The RPD also came to the right conclusion when it stated that the fact that persons are in a country illegally should encourage them to regularize their status.

[31] The Court notes that the RPD found an inconsistency in the female applicant's testimony that affects her credibility. At first, the female applicant stated that she had not claimed refugee protection in February 2008 because the threats had been against her son, but she then changed her story and said that the FARC had also threatened her by asking her to co-operate with them in finding her sons. Such a finding is a reasonable one.

[32] As regards the psychological assessment filed by the female applicant, a reading of the RPD hearing transcripts shows that the assessment was presented to the panel before the hearing began, and that the panel took into consideration that the female applicant has problems with anxiety and her memory.

[33] Lastly, the RPD properly drew a negative conclusion regarding the authenticity of the police report of February 2, 2009. It does not contain an address and is not written on letterhead. Such a finding is appropriate in the circumstances.

B. Did the RPD err in concluding that there is effective state protection in Colombia?

[34] The RPD's conclusions regarding the availability of state protection to the female applicant and her son in Colombia are reasonable. The documentary evidence before the RPD shows that, although they are not perfect, concrete measures have been taken by the Colombian authorities to fight acts of aggression committed by the FARC. Therefore, the RPD did not engage in a selective analysis of the evidence.

[35] Moreover, the RPD was correct to consider the fact that the female applicant did not file a complaint after her attempted kidnapping in concluding that she had not made every effort to obtain state protection. A claimant is required to exhaust every option available to him or her when the state is a democracy (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at p 709, 20 Imm LR (2d) 85). The RPD's finding regarding the evidentiary weight of the police report of February 2, 2009, is also reasonable since it is clear, simply from looking at it, that it did not come from an official source.

[36] In closing, it is important to note that the RPD's decision is well written. It is a well-reasoned, detailed, precise decision that has been carefully drafted to ensure that it complies with the prescribed legal framework while making a balanced assessment of the evidence.

[37] The parties were asked to submit a question for certification, but no question was submitted.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed, and no question will be certified.

“Simon Noël”

Judge

Certified true translation
Michael Palles

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3359-12

STYLE OF CAUSE: JOSE JERSAIN MEDINA CANCHON ET AL
v THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: November 14, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** SIMON NOËL J.

DATED: November 27, 2012

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