Federal Court Cour fédérale

Date: 20121128

Docket: IMM-9792-11

Citation: 2012 FC 1372

Toronto, Ontario, November 28, 2012

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

ROBINS STRUSBERG RAMOS
ERIKA IRENE CRESPO PAEZ and
ASHLEY STRUSBERG CRESPO
by her litigation guardian,
ROBINS STRUSBERG RAMOS

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

<u>REASONS FOR JUDGMENT AND JUDGMENT</u>

[1] The Applicants apply for judicial review of the November 28, 2011 decision of a Member of the Refugee Protection Division (RPD) of the Immigration and Refugee Board. The RPD refused the Applicants' claims for refugee protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). The RPD determined that the Applicants are not Convention refugees or persons in need of protection.

Background

[2] The Applicants, Dr. Robins Strusberg Ramos, his spouse, Erika Irene Crespo Paez who is also a doctor, and their minor children, Ashley Strusberg Crespo and Caleb Joshua Strusberg Ramos, seek refugee protection under sections 96 and 97 of the *IRPA*. The Applicants are citizens of Columbia with the exception of Caleb who is a citizen of the United States of America (USA).

[3] In early 2005, members of the United Self-Defence Forces of Columbia (AUC) approached Dr. Strusberg at his medical clinic and demanded that he pay them protection money. He acquiesced and made regular payments to the AUC. In early 2005, members of the Revolutionary Armed Forces of Columbia (FARC) demanded he make monthly payments to them as well.

[4] In October 2007, an AUC leader asked Dr. Strusberg to purchase 12,000 doses of the medicine, Glucantime. Dr. Strusberg said he could not do so because it was a controlled substance. The AUC told Dr. Strusberg that he knew that Dr. Strusberg had treated members of the FARC, that he had paid members of the FARC and that he was under surveillance by the AUC as a FARC collaborator. Following that visit Dr. Strusberg began receiving threatening telephone calls from members of the AUC. They continued to insist that he provide them with the demanded medication and they also demanded a large additional payment. He complied with the monetary demand but continued to receive threatening phone calls.

[5] In December 2007, the Applicants left Colombia for the USA. They returned to Colombia six months later in May 2008. In June the threatening calls began again. Graphic threats of sexual

violence were directed against Ms. Crespo and their daughter, Ashley, resulting in Ms. Crespo suffering a miscarriage. The Applicants fled to the USA in August 2008 as soon as Ms. Crespo's medical condition permitted. Dr. Strusberg returned to Colombia every six months to renew his USA visa so he could live in the USA legally. Caleb was born in the USA on September 19, 2009.

[6] Dr. Strusberg returned to Colombia in May 2010 to apply for a pardon related to Erika's status in the USA. On June 11, 2010, he received a threatening telephone call from the AUC. The caller told Robins that as an enemy of the AUC he would pay with his life. Dr. Strusberg was advised by his uncle, a prominent lawyer who had information from confidential sources that his life was in danger. Dr. Strusberg fled Colombia to the USA on July 6, 2010.

[7] Dr. Strusberg entered Canada on August 21, 2010 and filed a claim for refugee protection on August 31, 2010. He was joined by Ms. Crespo, and their child, Caleb, on September 14, 2010. Their other child, Ashley, entered Canada on September 15, 2010. Their respective claims for refugee protection filed on their respective arrivals were all joined.

Decision Under Review

[8] The RPD doubted the Applicants' subjective fear as they failed to seek asylum at the first opportunity in the USA and given their re-availment to Colombia.

[9] The RPD also ruled the Applicants had not rebutted the presumption of adequate state protection. The RPD determined that the Applicants failed to show that they could not access adequate state protection in Colombia.

Issues

[10] The issues that arise in this case are:

1. Did the RPD err in law in finding that the Applicants lacked subjective fear of persecution in Colombia, because the Applicants could and should have claimed asylum in the USA and because they re-availed themselves of the protection of Colombia?

2. Was the RPD's analysis of state protection in Colombia unreasonable?

Standard of Review

[11] The Supreme Court of Canada held in *Dunsmuir v New Brunswick*, 2008 SCC 9, [*Dunsmuir*] that there are only two standards of review: correctness for questions of law and reasonableness involving questions of mixed fact and law and fact. *Dunsmuir* at paras 50 and 53. The Supreme Court also held that where the standard of review has been previously determined, a standard of review analysis need not be repeated. *Dunsmuir* at para 62.

[12] The standard of reasonableness applies when determining whether an Applicant has established a subjective fear of persecution and whether a person is in need of protection. *Cornejo v Canada (Minister of Citizenship & Immigration)*, 2010 FC 261 at para 17.

[13] Questions of the adequacy of state protection are "questions of mixed fact and law ordinarily reviewable against a standard of reasonableness." *Hinzman v Canada (Minister of Citizenship & Immigration)*, 2007 FCA 171, 282 DLR (4th) 413 [*Hinzman*] at para 38.

Analysis

Subjective Fear Assessment

[14] The RPD stated that genuine refugee claimants would be expected to seek protection as soon as practical once out of the reach of their oppressors. The RPD rejected the adult Applicants' explanation for failing to file asylum claims in the United States. The RPD focused solely on the Applicants' explanation why they did not file refugee claims in the USA: two lawyers advised the Applicants that their claims would not be successful because of the protection money paid to terrorists.

[15] The Applicants submit the RPD erred by failing to consider other material evidence. I agree. The evidence before the RPD was that once Ms. Crespo decided she would not return to Colombia after the May 2008 threats she tried to regularize her US status through sponsorship by her mother who was a US citizen. That approach was not successful because Ms. Crespo would have to first

regularize her status by returning to Colombia which she was not prepared to do. Dr. Strusberg continued to return to Colombia until he was advised by his uncle that his life was in danger and he fled Colombia.

[16] It is clear that the RPD did not consider Ms. Crespo's efforts to regularize her status in the USA since the RPD stated: "I am persuaded that if Robins and Erika were genuinely fearful of returning to Colombia they would have made further attempts to normalize their status in the USA." [emphasis added] On this point I am satisfied the RPD erred in not considering Ms. Crespo did make further efforts to regularize her status in the USA.

[17] The Applicants also submit the RPD failed to grasp the evidence as to the Applicants' conduct regarding the re-availment. The Applicants argue that the first time the Applicants went back to Colombia as a family it was with the intention to settle back into their life in Colombia. When they fled in August 2008 as a result of the renewal of the threatening phone calls, Ms. Crespo and her daughter Ashley never returned to Colombia. Dr. Strusberg returned to Colombia because he wanted to get his life back in Colombia and tried to fix the problem. He finally abandoned that effort when he was warned his life was in danger.

[18] The Respondent submits the RPD appreciated the Applicants' attempts to gain status in the USA. However, such temporary visa status is no substitute for the permanent status that refugee protection would afford. The Respondent argues the RPD appreciated why the Applicants returned to Colombia – their visitor's status in the USA had expired and their application for permanent status as members of the family class was refused. However, the Respondent submits the Applicants

freely returned to Colombia when their status in the USA expired. They returned multiple times for extended periods on each occasion. The Respondent submits it was reasonable for the RPD to conclude that the Applicants' pattern of return constituted a re-availment to Colombia.

[19] The RPD relies on *Caballero, Fausto Ramon Reyes v Canada (Minister of Employment and Immigration)*, [1993] FCJ No. 483 (FCA) [*Caballero*] which "suggests that a negative inference may be drawn in instances where a claimant takes sojourns outside of the country of alleged persecution and fails to take advantage of the opportunity to seek asylum elsewhere, and then re-avails him or herself." The RPD found the Applicants' actions were not consistent with subjective fear of persecution.

[20] The RPD offers no reasons as to why the Applicants' explanations were not accepted. The RPD explanation conflates Ms. Crespo's single return with Dr. Strusberg's several returns and fails to have regard for the turning point for each Applicant when each came to their own realization that a return free from persecution was not possible.

[21] The RPD drew its negative inference from *Caballero* without regard to the different circumstances of these Applicants from those applicants in *Caballero*. In doing so I find the RPD erred.

State Protection

[22] The RPD found that the Applicants, in the circumstances of this case, had failed to rebut the presumption of state protection with clear and convincing evidence.

[23] The Applicants argue that the RPD's state protection analysis is completely inadequate as the RPD produced, for the most part, a "boilerplate" set of reasons in which the RPD spoke in generalities about the measures put in place by the Colombian state.

[24] The Applicants also submit the RPD ignored several critical factors. The Applicants argue that not only had the Applicants been systematically targeted by the AUC over several years, but the group had shown its ability to locate Dr. Strusberg. The Applicants submit the RPD made no attempt to analyse the availability of state protection, as it should have, against the factual context of the risk the Applicants because of the targeting by the AUC.

[25] The Respondent submits the RPD's state protection analysis is not boilerplate. The Respondent points out that the RPD was entitled to outline the general principles that apply as well as review the documentary evidence on the protection available in Colombia. The Respondent submits the RPD's careful review of both highlights the care that it applied when considering the state protection issue.

[26] The Respondent notes the Supreme Court recently observed that reasons are not inadequate because they do not reference every piece of evidence. *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 1.

[27] The Respondent submits the RPD did not ignore evidence of the Colombian authorities' inability to protect persons from the AUC. The Respondent submits the Applicants have not shown that they specifically directed the panel to this evidence and the panel cannot be faulted for not considering evidence the importance of which was not highlighted. *Owusu v Canada (Minister of Citizenship & Immigration)*, 2004 FCA 38 at paras 5-8. The Respondent also submits that the Applicants' argument presumes that the onus and burden of the sate protection is reversed. It is not for the RPD to be satisfied that state protection exists, but rather for the Applicants to rebut the presumption of adequate state protection with clear and cogent evidence demonstrating that adequate protection is not available to them.

[28] The appropriate standard of review for determinations of state protection is reasonableness. The RPD's finding of adequate state protection should not be interfered with unless it can be demonstrated that the RPD based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it. *Federal Courts Act*, RSC, 1985, c F-7, s 18.1(4)(d).

[29] There is a presumption that state protection exists and the burden is on the Applicant to adduce clear and convincing evidence to rebut this presumption. The jurisprudence of this Court is clear that absent a situation of complete breakdown of the state apparatus, there is a presumption

that a state is able to protect its citizens. *Pacasum v Canada (Minister of Citizenship & Immigration)*, 2008 FC 822 at para 19. To rebut this presumption, an applicant must adduce clear and convincing evidence that state protection is inadequate or non-existent. *Carrillo v Canada (Minister of Citizenship & Immigration)*, 2008 FCA 94, [2008] 4 FCR 636 at para 38.

[30] It is also evident from a review of the jurisprudence on state protection that a state's ability to protect its citizens need not be perfect. *Canada (Minister of Employment and Immigration) v Villafranca*, (1992), 99 DLR (4th) 334, 18 Imm LR (2d) 130 at para 7.

[31] In this case, the evidence is clear that the Applicants never sought the protection of the Colombian state. The question is therefore whether the Applicants provided evidence that no adequate state protection would be available if they returned to Colombia.

[32] In *Da Souza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1279, Justice Lemieux stated:

> It is clear from Ward, above, that the fact a claimant did not approach the state for protection will not automatically defeat a claim. An objective assessment must be undertaken to establish is the state is able to protect effectively. In other words, the test is whether effective state protection may be reasonably forthcoming. What has to be determined, in each case is whether it was objectively unreasonable for the claimant not to have sought the protection. If it was not objectively unreasonable for the claimant not to have sought state protection, she need not have approached the police in St. Vincent. The answer to the question is a matter of the evidence produced on the point.

[33] The evidence before the RPD is that the AUC told Dr. Strusberg they considered him to be a FARC collaborator and an enemy of the AUC. Although the question of state protection is prospective, the Applicant's status as being targeted and at high risk is a factor the RPD must consider in its analysis.

[34] The RPD stated:

> [26] Robins testified that he did not report any of the threats or extortion demands made by members of the AUC or FARC to police. He also indicated that he spoke with friends, acquaintances and patients who were police officers about his problems but did not want to report it because something bad could happen and they recommended against it. Robins was asked if state protection would be available to him today in Colombia. He testified that he watches the news and everything seems rosy but new emerging criminal gangs known as Bandas Criminales Emergentes (BACRIM) have formed and the director of the domestic intelligence agency (DAS) is accused of crimes. He went on to say that the first process to prosecute the director of DAS was dismissed and they are attempting to re-try him.
>
> [27] Robins' evidence regarding the prosecution of the DAS director demonstrates that Colombia is serious about curbing corruption. Robins' oral testimony regarding the advice he received from friends in the security forces and the news of emerging criminal gangs does not rebut the presumption of state protection existing in Colombia.

[35] The RPD skirts around Dr. Strusberg's evidence that he was specifically warned by his uncle, a prominent lawyer with access to confidential information, advising Dr. Strusberg that he and his family were in such danger that they must "immediately abandon the country". This was for Dr. Strusberg the strongest evidence that the risk to himself was real and immediate.

[36] The evidence also included documentation that the Colombian security forces continue to "turn a blind eye" to paramilitary atrocities and continued to collaborate with paramilitary forces. The government response to the violence and human rights violations of the AUC requires examination by the RPD.

[37] The RPD was not obliged to accept the Applicant's opinion that they could not safely remain in Colombia and obtain official protection but it could not ignore evidence which is at the crux of the Applicants' claim.

[38] These Applicants did not lightly abandon their country. They moved to Bogota. They then tried leaving Colombia for six months to allow for things to cool off. When they returned to Colombia, violent sexual threats were levelled against Ms. Crespo and their daughter Ashley. Dr. Strusberg continued to return with a determined effort to, as he put it, "get his life back". The RPD is obligated to examine the evidence about events upon which the Applicants based their decision to flee Colombia and seek refugee status.

Conclusion

[39] I find the RPD did not consider the evidence that Dr. Strusberg was specifically targeted by the AUC nor did it consider evidence concerning the inadequacy of state protection for those who are at risk from paramilitary groups allied with the government. In failing to do so, the RPD erred.

[40] Neither party proposed a question of general importance for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, the decision of the RPD is quashed and the matter is referred to a differently constituted panel for redetermination.

2. No question of general importance is certified.

"Leonard S. Mandamin"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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