Federal Court  Cour fédérale

Date: 20130124

Docket: IMM-3767-12

Citation: 2013 FC 65

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, January 24, 2013

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

LUIS ANGEL PARRA
GLADYS FRANCISCA BELTRAN URREA
LILIANA PATRICIA PARRA BELTRAN
IVON LORENA PARRA BELTRAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants are challenging the lawfulness of a decision by the Refugee Protection Division of the Immigration and Refugee Board (panel) rejecting their refugee claim filed under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (as amended) (Act).

[2] The principal applicant, his spouse and their two adult children are citizens of Colombia. The children and spouse based their claims on the allegations of the principal applicant. His credibility was not seriously questioned by the panel, which rejected the refugee claims simply because there was an internal flight alternative (IFA) in Bogotá, Guaviare and Santander.

[3] The principal applicant worked for a Family Compensation Fund (CAFAM) in Bogotá for 18 years. After an initial unsuccessful attempt to form a local union, the principal applicant and about twenty colleagues succeeded in circumventing Colombian law by forming a national union in 1993 known as SINALTRACAF (union). The successes obtained in defending the 5,000 CAFAM workers greatly troubled management and caused a lot of difficulty for the principal applicant. As a union activist, his name was blacklisted. He was harassed and threatened several times by management and paramilitaries because of his union activities.

[4] In fact, on December 28, 1998, the principal applicant was assaulted by three men who severely beat him as a final warning. Among his attackers was the CAFAM chief of security, a paramilitary and a former member of the national police. It was then that the principal applicant left his job and took refuge at the home of his parents-in-law in the city of Gacheta, five hours from Bogotá. He took great precaution to not be found while he prepared for his departure from Colombia and was still being sought by paramilitaries [TRANSLATION] "who are his enemies".

[5] In March 1999, the principal applicant arrived in the United States; the rest of the family joined him later. Their asylum claim was rejected by the American authorities, and on

October 19, 2008, the family crossed the American border by car. The next day, they claimed refugee protection in Canada. More than 13 years have passed since the principal applicant left Colombia. Still, in his testimony, the principal applicant stated the following: [TRANSLATION] "I am marked for life for being the founder of a union. I am on the black list of the paramilitaries as a military target and I do not want to run the risk with my family and me".

[6] The panel readily acknowledged that there is indeed a nexus between the refugee claims and two of the five Convention grounds: membership in a particular social group and political opinion of the principal applicant. The panel also did not challenge the fact that the principal applicant was persecuted and that there could be a personalized risk under paragraph 97(1)(*b*) of the Act, but excluded, however, the application of paragraph 97(1)(*a*) of the Act (because no state agent was believed to be involved). Finally, even though the panel may have had certain doubts with respect to the principal applicant's credibility, it did not reject the refugee claim based on that aspect but based its determination exclusively on the existence of an IFA.

[7] The existence of an IFA involves two separate components: (1) the panel must be satisfied that the circumstances in the part of the country to which the refugee claimant could have fled are sufficiently secure to ensure that the claimant would be able to enjoy the basic and fundamental human rights; and (2) conditions in that part of the country must be such that it would not be unreasonable, in all the circumstances, for the refugee claimant to seek refuge there. See *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] FC 706, 140 NR 138 (FCA).

[8] The panel stated the following at paragraphs 21 and 22 of its decision:

> . . . In this case, the panel determines that the claimants did not submit evidence demonstrating that their attackers are willing or have the means to find them anywhere in Colombia. Consequently, given the testimonies and the evidence on file, the panel concludes that the claimants did not establish that there is a serious possibility that they would be subjected to persecution regardless of where they settle in their country.
>
> With respect to the second prong, when asked in turn to state whether, according to them, there were obstacles in the suggested regions making it unreasonable for them to seek refuge there, they did not raise other obstacles to their settling in the suggested locations.

[9] Counsel for the respondent acknowledged at the hearing that the panel's few comments elsewhere in the impugned decision (paragraphs 10 to 12) on how the applicants were able to cross the American border and on the severity of the attack on December 26, 1999 (whether he was kicked and/or hit with a pistol), were not determinative in this case. Instead, the basis of the panel's reasoning for an IFA is found in paragraphs 16 to 20, where the panel explained why it was of the opinion that Bogotá, Guaviare and Santander were safe locations.

[10] First, more than 13 years have passed since the principal applicant left his company. Also, the panel "does not believe that it is plausible that these same individuals who were set against him and his companions by CAFAM management would still be motivated enough, after so many years, to want to spend the money and the time to look for him across Colombia in order to hurt him" (paragraph 17).

[11] Second, by noting that "no evidence on file indicates that his agents of persecution are still active in CAFAM" (paragraph 18), the panel diminished the role the principal applicant supposedly played within the union. It noted that he "has not been a member of the union since December 1998" (paragraph 16), adding "that he was not a manager of the national union and that he was a member of a national committee" (paragraph 18). The panel assumed that the principal applicant could return to Bogotá, which continues to be a safe location, and that he could resume his previous activities without danger.

[12] On this point, the principal applicant testified that he would resume his union or activist activities if he were to return to Colombia, which is corroborated by his daughter's testimony and the psychological report in the record. Furthermore, after leaving Colombia in 1999, the principal applicant continued to be actively involved in fighting for justice, but this time through his work with sporting officials. In its decision, the panel simply pointed out in passing that if he "returns to Colombia, nothing is preventing him from continuing to believe that he should be a union member" (paragraph 17).

[13] However, it is very dangerous for the panel to rely on the existence of an IFA based solely on plausibilities because that does not allow the panel to be satisfied that the circumstances in the part of the country to which the refugee claimant could have fled are sufficiently secure to ensure that the claimant would be able to enjoy the basic and fundamental human rights. In the absence of a careful consideration of the documentary evidence available, it takes no great leap to conclude that the panel's finding is unfounded or speculative. See, for example, *Sabogal Riveros v Canada*

(Citizenship and Immigration), 2012 FC 547 at paragraphs 32, 35 and 44 to 49, 215 ACWS (3d) 188.

[14] Yet, if the panel had carefully reviewed the testimony and the documentary evidence in the record, it would have found that the situation in Colombia has not improved since 1998 for human rights advocates and union activists. That is why the panel's restrictive approach, which bases the existence of an IFA on the plausibility that the principal applicant is no longer being sought by paramilitaries or that paramilitaries do not have the means to find him in Bogotá, Guaviare or Santander, seems problematic to me here.

[15] According to the evidence in the record, since his departure from Colombia in 1999, the principal applicant has remained in contact with the union even though he had already made several enemies among management and the paramilitaries. In passing, the panel erred when it stated that the applicant is no longer part of the union. According to the letter dated December 16, 2010, from the union, the principal applicant is an honorary member and continues to advise the union.

[16] The principal applicant is who he is: an activist because of his political beliefs. Furthermore, the principal applicant was not simply an active member of the union in Colombia; to the contrary, he is one of the <u>founders</u> of a national union that is present throughout the entire territory of Colombia. The principal applicant's name, if one believes him, was blacklisted.

[17] It is odd for the panel to have stated that the principal applicant would have an IFA in Bogotá because that is the very place where the national union was founded, where he is known,

where he worked for 18 years and where he was persecuted in 1998, when he was forced to flee to a location five hours from Bogotá. The panel also did not assess the extensive documentary evidence on Colombia, which is directly related to the current situation of trade unionists and human rights advocates.

[18] To be clear, this Court cannot substitute itself for the panel, but the fact is that "the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts" (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35 at paragraph 17, [1998] FCJ No 1425). In this case, the current conclusion to reject the refugee claims could not reasonably be justified without a true contextual analysis by the panel of the prospective risks the applicants face. That is where the trouble lies and it renders the panel's finding unreasonable (*Delgado Ruiz v Canada (Citizenship and Immigration)*, 2012 FC 163, 211 ACWS (3d) 175).

[19] According to Human Rights Watch, "Colombia remains the country with the most murders of trade unionists to register more than 175 in the last three years and only a handful of these crimes have been solved . . . " According to the Colombian Commission of Jurists, paramilitary groups are in collusion with the state's security forces in the departments of Antioquia, Arauca, Bolivar, Chocó, Córdoba, Cundinamarca, Veta, Santander North, Santander, Sucre, Tolima and Valle (National Documentation Package on Colombia; Colombia: State protection). Finally, according to another independent analysis of the situation, "it is likely that the FARC . . . and successor groups to the AUC have the capacity to pursue victims even after they have spent many years outside the country" (Response to Information Requests COL103286.E dated February 23, 2010) [Emphasis added.].

[20] This application for judicial review therefore falls within those cases where the panel misunderstood or too narrowly characterized the profile of a refugee claimant with respect to his or her specific risk profile. See, for example: *Olivares v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1010 at paragraph 6, [2012] FCJ No 1116; *Arias v Canada (Minister of Citizenship and Immigration)*, 2012 FC 322, [2012] FCJ No 1105; and *Walcott v Canada (Minister of Citizenship and Immigration)*, 2011 FC 415 at paragraph 44, [2011] FCJ No 540.

[21] I note that, in *Garcia v Canada (Minister of Citizenship and Immigration)*, 2012 FC 366, [2012] FCJ No 431 (*Garcia*), the Court decided to intervene in a case very similar to this one. Even though the applicant in *Garcia* left Colombia 13 years earlier, she was, however, very involved in the union movement in 1997 and 1998 and planned on resuming her activities if she were to return to Colombia. However, the panel decided that the people who threatened her 13 years earlier would not have the capacity to find her even if they were still trying to locate her. By finding the decision unreasonable, the Court found that the panel was required to, namely, consider the connection between the documentary evidence relating to the current situation in Colombia and the situation in which the principal applicant would find herself if she returned there.

[22] Thus, my colleague, Justice Barnes, stated the following at paragraphs 9, 10, 13 and 14 of *Garcia*:

> The issue of concern, however, is with the Board's assessment of the evidence of a new risk to Ms. Osorio if she returned to Colombia and resumed, as she said she would, her political and socially progressive activities. The Board appears to have accepted her evidence on this point but it carried out no meaningful analysis of the evidence bearing on her current risk profile.

> In its IFA assessment the Board simply repeats its state protection finding that the risk that prevailed in 1997 and 1998 was no longer relevant. The Board's only other assessment of current risk conditions was limited to the observation that the evidence on point was "mixed" as reflected in a few passages from country-condition reports. What is notably absent from the Board's reasons is any attempt to reconcile the country-condition evidence and to connect that evidence to Ms. Osorio's situation if she returned to Colombia and again took up political causes in opposition to the governing regime or contrary to the interests of the AUC or its paramilitary successors.
>
> . . .
>
> The record indicates very clearly that the historical links among state security forces, some government representatives and paramilitary groups have not disappeared in Colombia and that human rights advocates and trade union leaders remain at risk with questionable recourse to state protection.
>
> I am not satisfied that the Board's decision is justified by the reasons it gave. In the result, the application must be redetermined on the merits by a different decision-maker.

[23] Justice must not only be done, but it must also be seen to be done. In deciding here to set aside the impugned decision, I am not saying that the refugee claim must succeed, but I am certain that a new assessment is necessary. This time, the panel must carry out a more focused reading of the relevant documentary evidence in light of any prospective risk, and even redetermine the principal applicant's credibility and the allegations that he will resume his involvement in social causes in Colombia, if need be.

[24] For these reasons, this application for judicial review will be allowed. The panel's decision will be set aside and the matter will be referred back to the panel for redetermination by a different decision-maker. There is no question of general importance for certification.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application for judicial review is allowed. The panel's decision is set aside and the matter is referred back for redetermination on the merits by a different decision-maker. No question is certified.

"Luc Martineau"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3767-12
STYLE OF CAUSE:	LUIS ANGEL PARRA GLADYS FRANCISCA BELTRAN URREA LILIANA PATRICIA PARRA BELTRAN IVON LORENA PARRA BELTRAN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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