Federal Court  Cour fédérale

Date: 20130528

Docket: IMM-3460-12

Citation: 2013 FC 557

Ottawa, Ontario, May 28, 2013

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

HUGO HENRY PABON MORALES,
NANCY ALVAREZ PARRA,
AMALIA PABON ALVAREZ,
SOFIA PABON ALVAREZ,
SELENE PABON ALVAREZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision by a pre-removal risk assessment (PRRA) officer (the officer) dated March 5, 2012, wherein the applicants' permanent residence application was refused. The officer's decision was based on the finding that the

applicants would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to Colombia.

[2] The applicants request that the officer's decision be set aside and the application be referred for redetermination by a different officer.

Background

[3] The principal applicant, Hugo Henry Pabon Morales and his family are citizens of Colombia. The principal applicant was a detective in the Administrative Department of Security (DAS), an intelligence agency in Colombia. He investigated the bombing of Club Nogal in Bogata in 2003, which killed 36 people and injured 200 others. The investigation came to the conclusion that the Revolutionary Armed Forces of Colombia (FARC) was responsible for the bombing. As a result, the FARC vowed to kill the principal applicant and he became a military target. The principal applicant and his family fled Colombia in August 2003.

[4] They first made an asylum claim in the United Stated which was rejected. They then came to Canada, where the Refugee Protection Division (RPD) also rejected their claim on October 22, 2009. Judicial review was denied.

[5] The family made a PRRA application. On October 26, 2010, that application was rejected. On January 13, 2012, Madam Justice Sandra Simpson of this Court granted an application for judicial review of that decision.

[6] After that application was granted, the family made submissions updating the material in their application on February 16, 2012.

Officer's PRRA Decision

[7] In a letter dated March 5, 2012, the officer informed the family that their application had been rejected. Attached to the letter were reasons.

[8] The officer's reasons begin by summarizing the family's immigration status and the principal applicant's description of the risk he would face upon return to Colombia. The officer noted the applicants had submitted documentary evidence that predated the RPD determination, which was not given consideration for that reason. The officer accepted three documents based on the applicants' explanation that they were not available at the time of the RPD hearing.

[9] The officer then turned to assessing the risk alleged by the applicants. The officer excerpted the RPD finding that the applicants did not have a well-founded fear because it did not believe on a balance of probabilities that the FARC was still concerned with the principal applicant.

[10] The officer noted the judicial review of the first PRRA decision and excerpted Madam Justice Simpson's opinion concerning two pieces of evidence that had not been properly considered: a UNHCR report and a letter from the Toronto office of Amnesty International.

[11] The officer concluded that the risk asserted by the applicants was the same as during the RPD proceeding and that the RPD had rejected that claim based on credibility, lack of well-founded fear and the availability of internal flight alternative (IFA) to Bogota.

[12] The officer noted a variety of new documentary evidence, including DAS documents confirming the investigation, affidavits from the applicants and others and online sources.

[13] The officer concluded that while these documents did establish that the principal applicant worked on the Nogal bombing case, they did not establish a forward looking personalized risk as a result of this work.

[14] The officer noted the document showing the principal applicant had sent an email to the Minister of the Interior and Justice of Colombia requesting protection upon return to Colombia, but described how the principal applicant had not received a reply and had not stated whether he followed up on the letter. The letter also did not state how the principal applicant was still threatened by the FARC.

[15] The officer noted the affidavit submitted by the principal applicant's father, but found that it was vague and lacked sufficient detail. The officer made a similar conclusion about another affidavit sworn by a third party.

[16] The officer described two documents relating to the 2011 murder of one of the principal applicant's fellow investigators from the Nogal case, an affidavit sworn by the principal applicant

and a letter submitted by the principal applicant's counsel from his first proceeding in this Court**.** The officer noted there was no corroborating evidence of the FARC's involvement or the circumstances of the death.

[17] The officer described the Amnesty International letter. He accepted its evidence that state protection was questionable for those targeted by FARC, but concluded that the principal applicant had failed to present evidence that he had been targeted by FARC or would be in the future. The RPD had previously concluded the principal applicant was not targeted by the FARC and the applicants had failed to provide evidence to rebut the findings of the RPD.

[18] The officer considered the UNCHR report, which stated that persons involved in the administration of justice in Colombia may be at risk. The officer acknowledged that the principal applicant was involved in the administration of justice as a police officer, but noted the RPD's finding that the principal applicant had not been targeted by the FARC and would not be upon return.

[19] The officer noted that risk is forward looking and that the principal applicant had severed his employment with the DAS on December 1, 2003. The officer concluded the evidence did not indicate the principal applicant would be at risk as he had severed his police ties.

[20] The remainder of the officer's decision was concerned with general country conditions evidence. The officer noted the differing opinions on the FARC's ability to locate its victims within Colombia, as well as general evidence about the state of human rights in the country and

demobilization from the FARC conflict. The officer concluded whether FARC would choose to continue pursuing a relocated individual depends on the value of that individual to the organization.

[21] The officer concluded there had been no material change in country conditions since the RPD's decision and that the evidence had not established any new forward looking risks. The officer acknowledged that the principal applicant may have been at risk at the hands of the FARC while a police officer, but was no longer one and there was no evidence the FARC would target him.

[22] The officer determined that there was less than a mere possibility that the applicants face persecution under section 96 of the Act and there were no substantial grounds to believe the principal applicant faced a risk of the harms in section 97 of the Act. The application was therefore rejected.

Issues

[23] The applicants submit the following point at issue:

1. Was the PRRA decision unreasonable in that the officer failed to have regard for material evidence and/or misconstrued material evidence before him?

[24] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the officer err in denying the application?

Applicants' Written Submissions

[25] The applicants submit the officer misunderstood the role of new evidence, particularly that the new evidence of the UNHCR report and the Amnesty International letter contradicted the finding of the RPD. The RPD finding was made without the benefit of the new evidence and particularly the UNHCR report. As this Court found in the previous judicial review, the new evidence stated that persons similarly situated to the applicants were at risk of persecution on the basis of their political opinion. The officer was therefore required to revisit the plausibility findings of the RPD as well as the documentary evidence before the RPD. The officer, like the previous PRRA officer, failed to do that and therefore committed the same reviewable error.

[26] The applicants submit the officer reached contradictory conclusions about whether the principal applicant had ever been at risk at the hands of the FARC, as one part of the decision states the principal applicant had never been at such risk, while another part says he may have been. The applicants also argue that the officer's statement that the principal applicant was required to lead evidence that the FARC "will" target him suggests the officer applied the wrong test for well-founded fear of persecution.

[27] The applicants argue that the officer's conclusion that there was no documentary evidence showing the FARC would target the principal applicant was a clear misreading of the UNCHR report, which clearly stated that previous status as a police officer could be a source of persecution. There was no evidence that leaving the DAS after having interfered with the activities of an illegal armed group would eliminate a person's risk of persecution. Therefore, the officer's conclusion that

the FARC would no longer be interested in the principal applicant because he had left the DAS was made without regard to the evidence.

[28] Similarly, the officer's rejection of the relevance of the murder of the principal applicant's colleague was based on the officer's assumption that the FARC was no longer interested in the principal applicant, which was contradicted by the UNCHR report. The corroborating evidence the officer required for the cause of the murder was provided by the UNCHR report itself.

[29] The letter sent to the Minister of the Interior did not need to state the source of the threats against the principal applicant, since this was clearly established elsewhere in the principal applicant's evidence. While the request for protection itself does not establish an objective risk, it was a formal statement to a high government official that the principal applicant had been threatened in the past. The officer did not accept this fact because he followed the negative credibility finding of the RPD, but he was required to consider new evidence that contradicted that finding.

Respondent's Written Submissions

[30] The respondent submits that a PRRA application is not meant to be a forum for relitigation of an RPD case. It is an opportunity to compensate for change of risk conditions between when a refugee claim is denied and when a failed claimant is removal ready.

[31] The officer reasonably considered the UNCHR report and acknowledged that as a former police officer, the principal applicant was a person involved with the administration of justice and therefore may be at risk. The officer was clearly aware that former police officers might be at risk. The officer considered this evidence and concluded that there was no evidence at all that police officers were at risk or that the principal applicant in particular had been targeted.

[32] As the officer had concluded the evidence did not establish that all police officers were at risk, he went on to conclude that the principal applicant had not presented any new evidence that his personal situation had changed since the RPD decision. This conclusion was open to him as the principal applicant had raised the same risk in his PRRA application that was raised before the RPD.

[33] The RPD had found that the principal applicant was not targeted by the FARC, since he had worked in a FARC "red zone" but had experienced no engagement with the FARC and his family members had not been contacted. Therefore, the starting point for the officer was that the FARC was not interested in the principal applicant. Much of the new evidence presented by the applicants simply reestablished that the principal applicant had been a DAS officer involved in the Nogal Club investigation.

[34] On the issue of the murder of the principal applicant's colleague, there was no link between the man's death and the FARC. The fact that the UNCHR report refers to police as targets is not evidence that this particular police officer was a target of the FARC. It was open to the officer to conclude that the RPD's finding that the principal applicant was not a target of the FARC had not

been changed by the evidence presented. It is clear that an applicant must establish personalized risk.

[35] The officer also assessed the state protection in Colombia to conclude there had not been a material change in country conditions since the RPD's negative decision. The applicants have not challenged the assessment of documentary evidence.

[36] The RPD determined that the applicants could move within Bogota, a city of eight million people. The documentary evidence indicated key units of the FARC had withdrawn to rural areas. The officer's analysis was balanced and his conclusion was reasonable.

Analysis and Decision

[37] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 57, [2008] 1 SCR 190).

[38] It is trite law that the standard of review of PRRA decisions is reasonableness (see *Wang v Canada (Minister of Citizenship and Immigration)*, 2010 FC 799, [2010] FCJ No 980 at paragraph 11; and *Aleziri v Canada (Minister of Citizenship and Immigration)*, 2009 FC 38, [2009] FCJ No 52 at paragraph 11). Similarly, issues of state protection and of the weighing, interpretation and

assessment of evidence are reviewable on a reasonableness standard (see *Ipina v Canada (Minister of Citizenship and Immigration)*, 2011 FC 733, [2011] FCJ No 924 at paragraph 5; and *Oluwafemi v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1045, [2009] FCJ No 1286 at paragraph 38).

[39] In reviewing the officer's decision on the standard of reasonableness, the Court should not intervene unless the officer came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47 and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59, [2009] 1 SCR 339). As the Supreme Court held in *Khosa* above, it is not up to a reviewing court to substitute its own view of a preferable outcome, nor is it the function of the reviewing court to reweigh the evidence (at paragraph 59).

[40] **Issue 2**

Did the officer err in denying the application?

In an earlier decision on this file (*Morales v Canada (Minister of Citizenship and Immigration*, 2012 FC 49 [2012] FCJ No 48), Madam Justice Simpson stated:

> 13 The first document in the New Evidence is a report dated May 27, 2010 titled UNHCR Eligibility Guidelines for Assessing International Protection Needs of Asylum Seekers from Colombia [the UNHCR Report].
>
> 14 The UNHCR Report speaks about the possibility of an IFA for individuals fleeing persecution by illegal armed groups and says that it "considers an internal flight or relocation alternative is generally not available in Colombia..." and recommends that further consideration be given to, among other things, "the reach and ability of the network of the illegal armed groups to trace and target

individuals including [in] large cities such as Bogota, Medellin and Cali;"

15 A footnote to this quotation reads as follows:

> Reportedly, the guerrillas and paramilitary groups often employ highly sophisticated databases and computer networks and are able to trace people even years after their initial search, see Immigration and Refugee Board of Canada, *Colombia: Availability of state protection to those who fear harassment threats or violence by armed groups since the election of President Alvaro Uribe Vélez*

16 The UNHCR Report lists "Present and Former Members and Supporters of one of the Parties to the Conflict" as the first category under the heading "Main Groups at Risk". Under this heading, it specifically mentions that Colombian policemen and security forces that interfere with the illegal activities of various illegal armed groups or investigate their criminal acts are, along with their families, at risk of deadly attacks and kidnappings. The supporting footnotes for this conclusion include material dated in February 2008, and March and September 2009.

17 The second document in the New Evidence is a letter dated June 29, 2010, from a Refugee Coordinator with the Toronto Office of Amnesty International [the AI Letter].

18 The AI Letter addresses the possibility of an IFA in Colombia in the following terms and endorses the UNHCR Report. It says:

> **Capacity to pursue victims and Flight Alternatives**
>
> A recent information note from the immigration and Refugee Board [of Canada] discusses the likelihood and ability of the FARC, ELN or AUC to pursue victims in Colombia.14 The majority of sources consulted in this note are of the opinion that these groups have a capacity to pursue victims throughout Colombia.
>
> Amnesty International shares the view that the FARC, ELN and successor groups to the AUC have the capacity to pursue victims throughout many regions of the country and may do so where the individual is of particular interest to warrant such

> effort. This is also true for those who have fled the country and return after a period of time.
>
> Amnesty International is also of the view that while there have been some military advances against paramilitary and guerrilla groups in Colombia, these advances do not translate into state protection for those who have been targeted by the FARC, ELN or former AUC.
>
> Similarly, UNHCR's 2010 eligibility guidelines notes the following when assessing internal flight alternatives for individuals fleeing persecution at the hands of non-state agents such as illegal armed groups:
>
> > "...the reach and ability of the network of the illegal armed groups to trace and target individuals, both in rural areas and in urban centres, including large cities such as Bogota, Medellin and Cali"

19 Footnote 14 in the above quotation refers to a Canadian Immigration and Refugee Board document dated February 23, 2010.

[41] Madam Justice Simpson concluded as follows at paragraph 23:

> The New Evidence included information about risks faced by similarly situated individuals such as former police officers who investigated the criminal conduct of illegal groups. Accordingly, in my view, the PRRA Officer was obliged to consider it in that light. This, the Officer failed to do.

[42] The same pieces of documentary evidence were at issue in the present application and the PRRA officer dealt with this new evidence in the following manner:

> Included in their submissions is a letter, dated 29 June 2010, from Grace Wu, a Refugee Coordinator with the Toronto Office of AI. The letter presents information from various sources regarding the country conditions in Colombia. The letter provides AI's opinion regarding state protection and states that, "*Amnesty International is*

of the view that while there have been some military advances against paramilitary and guerilla groups in Colombia, these advances do not translate into state protection for those who have been targeted by the FARC". While I accept the opinion on behalf of AI regarding the state protection in Colombia, the applicants have failed to present evidence which demonstrates that they were previously targeted by the FARC or would now be targeted should they return to Colombia. The RPD previously concluded that the applicants were not targeted by the FARC nor would they be targeted in the future. The applicants have failed to provide evidence to rebut the findings of the RPD.

The applicants have submitted the *UNHCR Eligibility Guidelines for Assessing International Protection Needs of Asylum Seekers from Colombia* and the *Report of the United Nations High Commissioner for Human Rights (OHCHR) on the situation of human rights in Colombia* in support of their risk. The reports state that Colombian policemen and security forces, along with their families, that interfere with the illegal activities of various armed groups are at risk of deadly attacks and kidnappings. The UNHCR report states that persons involved in the administration of justice "may be at risk". It is established that the PA was involved in the administration of justice while he worked as a policeman in Colombia and was similarly situated to individuals mentioned in the report. However, the RPD made several factual determinations regarding the risks stated by the applicants and their credibility. The RPD determined that the FARC would not target the applicants should they return to Colombia and found their fear in this regard not to be well founded. Further, the RPD determined that the applicants were not targeted by the FARC. The documentary evidence does not establish that all policemen are at risk and the applicants have not submitted evidence with their PRRA application to establish that they face forward-looking personalized risks in Columbia that were not previously considered by the RPD.

Risk by definition is forward-looking, and as a result, I must consider the personal situation of the applicants should they return to Colombia. The PA stated that he severed his employment with the DAS on 01 December 2003. I have considered whether the PA and his family would be considered Convention refugees or persons in need of protection due to risk to life or serious harm should they return to Colombia and the PA not be employed with the DAS. Documentary evidence does not indicate that the PA or his family would be subject to risk or serious harm considering that the PA has already severed his ties as policeman with the DAS.

[43] In my view, the PRRA officer made the same error as the previous PRRA officer. This new evidence indicates that similarly situated individuals such as the principal applicant, a former police officer, are targeted by FARC and there is no internal flight alternatives for these types of individuals in Colombia. The officer merely states that the RPD determined that the principal applicant would not be targeted by FARC and not subject to risk or serious harm as he is a former police officer. This is not what the new documentary evidence states. The officer did not consider the RPD findings in light of this new evidence. There is no analysis of how the new evidence would impact or change the RPD decision. The failure of the officer to carry out this analysis makes the decision unreasonable.

[44] The officer also stated at page 6 of the decision:

> The applicants have provided a copy of a letter, dated 30 May 2010, that was sent by email to Fabio Valencia Cossio, the Minister of the Interior and Justice of the Republic of Colombia. In their letter the applicants request protection from the FARC if they are returned to Colombia. The applicants have stated that they have not received a response to their email. The applicants have not stated whether they have followed up on their letter. The letter does not state that the applicants were threatened by the FARC or how the applicants know the FARC is interested in their whereabouts since they departed Colombia in 2003. The letter is of low probative value in establishing that risks exist for the applicants in Colombia.

[45] A review of the letter (application record at page 68) clearly establishes that the letter states that the principal applicant was threatened by the FARC. The officer was in error in making this statement. Again, this would make the decision unreasonable.

[46] The application for judicial review must be allowed and the matter referred to a different officer for redetermination.

[47] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the officer is set aside and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"

Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

SOLICITORS OF RECORD

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