

Federal Court



Cour fédérale

Date: 20130802

Docket: IMM-12724-12

Citation: 2013 FC 846

Ottawa, Ontario, August 2, 2013

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

**ADRIANA PATRICIA GUTIERREZ INFANTE
FABIO ENRIQUE NIETO CARDENAS
JUAN CAMILO NIETO GUTIERREZ
PAULA VANESSA NIETO GUTIERREZ
SANTIAGO NIETO GUTIERREZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Ms Adriana Patricia Gutierrez Infante, with her husband and three children, sought refugee protection in Canada after receiving threats from the Revolutionary Armed Forces of Colombia (FARC). FARC members asked her to obtain information about students attending a private

Catholic school in Bogota where she worked as an administrator. The members explained that they were looking for information about wealthy families, presumably for purposes of extortion. They threatened to harm Ms Gutierrez Infante's family if she did not comply.

[2] Ms Gutierrez Infante went to the police who said they would increase their patrols of the area, but that they could not offer her personal protection. FARC members found out about Ms Gutierrez Infante's visit to the police station and threatened to harm her family if she went again.

[3] Further threats resulted from Ms Gutierrez Infante's failure to comply with FARC's demand. The family decided to flee to the United States. From there, they arrived in Canada in 2011.

[4] A panel of the Immigration and Refugee Board, while believing her account of events, refused Ms Gutierrez Infante's refugee claim on the basis that she had failed to make sufficient efforts to obtain state protection in Colombia before seeking asylum in Canada. The Board concluded that state authorities have improved their capacity to contain FARC's activities and, therefore, Ms Gutierrez Infante should have approached police on more than just one occasion.

[5] Ms Gutierrez Infante argues that the Board's conclusion on state protection was unreasonable because it failed to take into account FARC's threat to harm her if she went back to the police. Further, the Board emphasized the efforts that state authorities are making toward limiting FARC's criminal conduct, instead of considering their actual ability to protect someone in

Ms Gutierrez Infante's circumstances. She asks me to overturn the Board's decision and order another panel to reconsider her claim.

[6] I agree that the Board's conclusion on state protection was unreasonable. The Board failed to explain why Ms Gutierrez Infante's rationale for not contacting the police again should be rejected. Further, the Board did not consider whether Colombia's efforts to combat FARC would actually result in protection for someone in Ms Gutierrez Infante's circumstances. I must, therefore, allow this application for judicial review.

II. The Board's analysis of state protection

[7] The Board accepted the essence of Ms Gutierrez Infante's claim and stated that the determinative issue was state protection. It noted that she had approached the police only once. On that occasion, police told her that they would increase their surveillance but could not do anything more than that because of the number of people who were being threatened by FARC. FARC members knew that she had gone to the police, told her that they would know if she returned, and threatened to harm her and her family if she did so.

[8] The Board characterized Ms Gutierrez Infante's efforts to secure state protection as "minimal". She did not make inquiries about whether the police had contacted the school where she worked, she continued to walk to work, she did not use her cell-phone to call for help when she was approached by an armed man, she did not approach the police in Pacho when she received threats there, and she did not try to get help from any other agencies.

[9] Further, while FARC members told Ms Gutierrez Infante that they would know if she went back to the police station, she could not explain how they would find out. Documentary evidence showed that FARC's communications abilities are limited. Further, FARC did not act on any of its threats and has not harmed any members of Ms Gutierrez Infante's extended family since she left Colombia. Therefore, the Board found that her explanation for not making further complaints to police was unconvincing.

[10] The Board turned to the documentary which showed great improvements in Colombia over recent years. FARC's membership and capacity has declined. However, it still has 8,000 to 10,000 members and carries out small-scale operations. The Board noted that Colombia has made "serious efforts . . . to address problems with the FARC".

[11] In light of that evidence, the Board concluded that Ms Gutierrez Infante's efforts to obtain protection were inadequate.

III. Was the Board's conclusion on state protection unreasonable?

[12] In my view, the Board's conclusion was unreasonable on the evidence before it.

[13] When the issue of state protection arises, the real question is whether the claimant meets the definition of a refugee. A refugee is a person who has a well-founded fear of persecution in his or her country of origin and who cannot obtain protection there, whether it is because the state

apparatus is inadequate, the authorities are unresponsive, or the person fears reprisals for seeking out protection. The essential question to be answered, after considering all of the evidence – including the evidence relating to the state’s capacity to protect the claimant and the consequences that the claimant may face for seeking protection – is whether the claimant has shown that he or she likely faces a reasonable chance of persecution in the country of origin. If so, the claimant meets the definition of a refugee (*Muvangua v Canada (Minister of Citizenship and Immigration)*, 2013 FC 542, at para 7).

[14] Here, the Board accepted that FARC members threatened to harm Ms Gutierrez Infante and her family if she reported them to police a second time. However, the Board found that that was not a good enough reason not to go back to the police because it was not clear how FARC would find out that she had done so, and FARC had not yet harmed anyone in her family.

[15] The fact that Ms Gutierrez Infante could not explain how FARC would find out about her going to the police should not have caused the Board to discount her fear of reprisal. FARC already knew about her first complaint; there was no reason to doubt it would find out about a second one, even if FARC’s communication capabilities, overall, have been curtailed.

[16] Similarly, the fact that FARC has not yet harmed anyone in Ms Gutierrez Infante’s family is not inconsistent with her fear of the consequences of going to the police a second time. Her unwillingness to make another report may well have protected her and her family from harm.

[17] Finally, the Board reviewed the documentary evidence and reasonably found that the situation in Colombia is improving. However, it did not go on to consider whether those improvements would help someone in Ms Gutierrez Infante's circumstances. The fact that FARC's capabilities have generally been reduced does not necessarily mean that Ms Gutierrez Infante, a person specifically targeted by FARC members, was not at risk of serious harm.

[18] Again, the question to be answered is whether she would likely face a reasonable chance of persecution if she returned to Colombia. The Board did not address that question. Given the evidence, its conclusion on the issue of state protection was unreasonable.

IV. Conclusion and Disposition

[19] The Board's rationale for doubting Ms Gutierrez Infante's explanation for why she failed to seek out state protection did not take account of the fact that the persons who had threatened her already knew that she went to police and promised to harm her and her family if she did so again. Further, the documentary evidence did not show that state protection would be available to a person in Ms Gutierrez Infante's personal circumstances – someone whom FARC had specifically targeted.

[20] Accordingly, I find that the Board's conclusion did not fall within the range of defensible outcomes based on the facts and the law, and I must allow this application for judicial review. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The matter is returned to a different panel of the Board for reconsideration; and
3. No question of general importance is stated.

“James W. O’Reilly”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-12724-12

STYLE OF CAUSE: ADRIANA PATRICIA GUTIERREZ INFANTE, ET
AL
v
MCI

PLACE OF HEARING: CALGARY, ALBERTA

DATE OF HEARING: July 17, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: August 2, 2013

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