

Federal Court



Cour fédérale

Date: 20140610

Docket: IMM-5011-13

Citation: 2014 FC 557

Ottawa, Ontario, June 10, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**BERTA INES NUNEZ CALDERON
YESID LOZADA ROBLES**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants seek a judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board [RPD], dated May 9, 2013, wherein, it was determined that neither applicant was a Convention refugee under section 96 nor a person in need of protection under section 97 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [IRPA].

II. Background

[2] The Principal Applicant, Mrs. Berta Ines Nunez Calderon, and her husband, Mr. Yesid Lozada Nobles, are both citizens of Columbia.

[3] Prior to 2006, the Principal Applicant claims that she helped her uncle operate a farm in Libano Tolima, Columbia, by performing accounting duties and purchasing supplies for the farm. She also ran errands for him. At the time, the Principal Applicant resided in Bogota, which is located 7 hours away from Libano Tolima.

[4] The Principal Applicant claims that the Revolutionary Armed Forces of Colombia [FARC] largely controls the area where her uncle's farm was located. She claims he was, thus, frequently required to pay the gang money in exchange for protection.

[5] Over time, as the Principal Applicant's uncle's farm became more profitable, the FARC demanded more money. Her uncle, however, was unwilling to pay the increased amount demanded, and the FARC began to steal swine and cattle from his farm.

[6] On November 23, 2006, the Principal Applicant claims that armed men kidnapped her uncle from the farm. She states that she immediately contacted the police and the military, who were able to find the kidnappers and attempt to rescue her uncle on that same day; however, her uncle and three members of the FARC were killed in the rescue effort.

[7] After the death of her uncle, the Principal Applicant claims that the FARC began calling her home and threatening to kill her. In her affidavit, the Applicant explains that she believes this was due to her employment with the Congress of the Republic of Colombia and her connection with her uncle's farm. Additionally, she believes it was due to her having called the police and the military in regard to her uncle's disappearance.

[8] In 2007 and 2008, the Principal Applicant states that she received weekly threats by the FARC. She filed several complaints with the authorities in regard to the threats; however, they were unsuccessful in finding the perpetrators and decided to close her file.

[9] In March 2009, the Principal Applicant claims armed, masked men entered her condominium building, harassed the security guard, and wrote death threats in blood on the walls of the building. She states that they also left pamphlets referring to a criminal organization called the Aguilas Negras.

[10] The Principal Applicant claims that this new threat from the Aguilas Negras was likely caused by her association with her ex-spouse, Mr. Hernando Lopez Arango.

[11] In 2009 and 2010, the Principal Applicant claims she continued to receive threats, either from the FARC or the Aguilas Negras, despite changing her telephone number several times.

[12] On November 17, 2010, the Principal Applicant claims her home was broken into and the gas therein was left on while she and her husband were away at work. After this incident, she decided to leave her home to live with friends and family.

[13] Approximately one year later, in 2011, the Applicants obtained visitor visas for the United States. On or around November 30, 2011, they left Columbia, traveled through the United States and arrived in Canada on December 2, 2011. They claimed refugee status the same day.

[14] The RPD rejected the Applicants' claim for refugee status on May 9, 2013 which is the underlying application before this Court.

III. Decision under Review

[15] In its decision, dated May 9, 2013, the RPD rejected the Applicants' claim for refugee status after having determined that the Applicants were not credible. The RPD concluded that the Applicants were not credible based on the following reasons:

- a) It was implausible that the Principal Applicant helped manage her uncle's farm as she claimed (in essence, that she was his "right hand"), since she lived 7 hours away and worked full-time as a secretary for the Congress of the Republic of Colombia;
- b) The Principal Applicant provided contradicting information as to how she learned of her uncle's kidnapping. In her Personal Information Form [PIF], the Principal Applicant stated that an employee on the farm contacted her to inform her; however, at the hearing, she explained that her aunt had informed her.

- c) It was implausible that the Principal Applicant would have reported her uncle's disappearance and not that of his wife;
- d) It was implausible that the police and the military would have acted so quickly to locate the Principal Applicant's uncle as he was only a local farmer. The RPD was not convinced that she had sufficient influence as a secretary working for the Congress of the Republic of Colombia to mobilize such a response;
- e) It was implausible that the police and military found and captured the kidnappers on the same day that the Principal Applicant's uncle disappeared; the RPD noted that, even missing public figures in Columbia have taken weeks, sometimes months, to locate. Additionally, the Principal Applicant filed her report with the Bogota police, which made it further implausible that the police and military could be mobilized so rapidly in Libano Tolima;
- f) The Principal Applicant provided contradicting information as to where her uncle's wife resided. In her PIF, the Principal Applicant indicated that her uncle's wife and children moved from the farm following his death; however, when asked about his wife during the hearing, the Principal Applicant indicated that her uncle's wife did not reside on the farm with him, but rather, she resided in Libaye, Columbia;
- g) The Principal Applicant continued to live and work at the same place for 4 years, despite receiving weekly death threats. She was never attacked or kidnapped during that time;
- h) It was implausible for the FARC to have discovered the Principal Applicant's affiliation with her uncle, in addition to her contact information, from invoices left on her uncle's farm.

[16] The RPD did find it plausible that the Principal Applicant's uncle may have owned a farm and may have been targeted by the FARC; however, the RPD found that the Applicants had not demonstrated that they, themselves, had been victimized by the FARC.

IV. Issue

[17] Did the RPD err in making its decision without regard to the evidence before it?

V. Relevant Legislative Provisions

[18] The following legislative provisions of the IRPA are relevant:

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,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(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.

97. (1) A person in need of

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) 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) 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 qualité de personne à

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

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

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

(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,

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

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

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) 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

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

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

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VI. Position of Parties

[19] The Applicants claim that the RPD erred by failing to consider all of the relevant evidence before it; namely, complaint letters to the Columbian authorities found at Exhibits P-10 to P-16 of the Applicant's Record. The Applicants argue that these letters confirm the credibility of their narrative.

[20] The Respondent submits that the RPD did not fail to consider any corroborative documentary evidence. The Respondent asserts that there was no objective evidence presented to corroborate that the Applicants were being targeted by the FARC or that the Principal Applicant's uncle had been kidnapped and killed. Moreover, as the Principal Applicant's testimony was deemed not credible, the Respondent maintains that the RPD appropriately assigned little probative value to the documentary evidence.

VII. Standard of Review

[21] The applicable standard of review in respect of findings of credibility and assessment of evidence is that of reasonableness (*Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315 (FCA) at para 4).

VIII. Analysis

[22] It is trite law that the RPD cannot make an adverse credibility finding while ignoring evidence by a claimant explaining apparent inconsistencies in their application (*Soto v Canada (Minister of Citizenship and Immigration)*, 2008 FC 354). Where such a situation arises, this Court will be inclined to infer that the RPD made an erroneous finding of fact (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, 83 ACWS (3d) 264 at para 15); however, it is important to note that the onus falls on an applicant to show that such evidence was ignored. As a general rule, the RPD is presumed to have weighed and considered all of the evidence before it (*Hassan v Canada (Minister of Employment and Immigration)*, (1992), 36 ACWS (3d) 635, 147 NR 317 (FCA); *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) (QL/Lexis); *Cepeda-Gutierrez*, above). Therefore, in the absence of clear proof that a relevant and significant piece of evidence was not considered by the RPD, the RPD's conclusions on credibility must stand (*Hosseini v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 402, 116 ACWS (3d) 95 (FCTD)).

[23] In the present case, the Applicant claims that the RPD did not consider their complaint letters to the Columbian authorities found at Exhibits P-10 to P-16 of the Applicant's Record in making its adverse credibility findings; however, in their submissions, the Applicants indicate that they will "refrain from making representations on the Tribunal's credibility findings" (Applicant's Written Representations at para 12). The Court is perplexed as to what the Applicants are then seeking, if not specifically a review of the RPD's credibility findings?

[24] A review of the record clearly shows that the RPD acknowledged this documentary evidence in its decision, confirming that the Principal Applicant had filed several complaints with the Columbian authorities after her uncle's death (RPD decision at para 7 and 15). While it may not have fully engaged with it in its decision, it is clear that the RPD was alive and alert to it. The Court is not convinced that the RPD did not take this evidence into consideration.

[25] In any event, the Applicants have not demonstrated how this evidence assists them whatsoever in corroborating their narrative. The Applicants are correct that the complaint letters do corroborate an attempt to obtain state protection; however, state protection was not at issue before the RPD. The evidence in question does not address (or rebut) a single credibility concern raised by the RPD; which was at the very heart of the present matter.

[26] As recently reminded by this Court in *Jia v Canada (Minister of Citizenship and Immigration)*, 2014 FC 422, findings of credibility lie at the heart of a tribunal's expertise in determining the plausibility of testimony and drawing inferences from the evidence. When negative findings with respect to an applicant's credibility are made, they are generally dispositive of the claim; unless the record contains reliable and independent documentary evidence to rebut it (*Sellan v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 381, 384 NR 163).

[27] In light of its many credibility concerns, and without any reliable and independent evidence on the record to assuage those concerns, the RPD was open to decide as it did. The Applicants have not demonstrated how its decision does not fall within the range of possible,

acceptable outcomes which are defensible in respect of the facts and law therein (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

IX. Conclusion

[28] For all of the above reasons, the Applicants' application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the Applicants' application for judicial review be dismissed with no question of general importance for certification.

"Michel M.J. Shore"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: BERTA INES NUNEZ CALDERON, YESID
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