Federal Court  Cour fédérale

Date: 20140820

Docket: IMM-2781-13

Citation: 2014 FC 808

Ottawa, Ontario, August 20, 2014

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

OLGA LUCIA HERNANDEZ MONTOYA
GABRIELA LOPERA HERNANDEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants are citizens of Colombia. Lucia Hernandez Montoya is the mother of the other applicant, Gabriela Lopera Hernandez. They both left Colombia in early December 2012, and arrived in Canada on December18, 2012. Upon arrival, they immediately applied for refugee protection under s. 96 and 97(1) of the *Immigration and Refugee protection Act* (the *Act*) owing

to their fear of the Revolutionary Armed Force of Columbia (the FARC) of which they had become a target due to their membership in a particular social group.

[2] Their claim was denied by the Refugee Protection Division of the Immigration and Refugee Board of Canada (the RPD). The RPD did not question the applicants' story, but found that they had not established that state protection would be inadequate if they had to return to Colombia.

[3] The applicants challenge this finding as being unreasonable given the significant amount of evidence on record showing that state protection is still wholly inadequate for people targeted by the FARC.

[4] For the reasons that follow, I am of the view that this finding was indeed unreasonable and that, as a result, the present judicial review application should be allowed.

II. Background

A. *The Applicants' Alleged Fear*

[5] Mrs. Montoya alleges, in support of her refugee claim and that of her daughter, that her family has been the target of the FARC for a long time. In particular, she alleges that the FARC killed three of her uncles and has threatened her parents in 2000, eventually forcing her parents, brother and sister to flee the country.

[6] However, she did not flee the country with them, but rather stayed in Colombia with her husband, who had opened an electronic store. In late 2003, it was their turn to be targeted by the FARC which began extorting her husband by demanding monthly payments in the amount of two million pesos. Her husband paid for several years, but in January 2007 he allegedly reported the situation to the police and tried to rally other business leaders to his cause. He was murdered a few months later. The police, however, failed to identify any suspects.

[7] Following the tragic death of her husband, Mrs. Montoya says the police advised her to leave her current residence. She complied and moved to another part of the city of Bogota, where she was residing. She then opened a clothing store but in June 2012, the FARC left a letter at her place of business demanding two million pesos per month in addition to threatening her. She says that she reported these threats and extortion attempt to the Office of the Attorney General and then moved for her own safety and that of her daughter, to Ibagué, a city located four hours away from Bogota.

[8] Once in Ibagué, she was contacted by the Office of the Attorney General and asked to identify some members of the FARC. However, the FARC found her despite her relocation and intimidated her into refusing. She alleges that on December 10, 2012, while she was in Medellin where she had relatives, a member of the FARC attempted to abduct her but she escaped. She left Colombia two days later.

B. *The RPD's Decision*

[9] On March 7, 2013, the RPD dismissed the applicants' refugee claim. It concluded that state protection, although not perfect, is now adequate in Colombia after years of struggle with powerful guerrilla and paramilitary groups. Although it recognized that Colombia was still facing problems with internal conflict, drug, violence, corruption and an inefficient judiciary, it found that the overall incidence of crime related to the FARC, while not completely eradicated, had gone down in recent years due to governmental demobilization programs and policies.

[10] In particular, the RPD found that Mrs. Montoya had not given the Colombian authorities the opportunity to respond to her complaints and had not, as a result, exhausted, as she was bound to do, all of the recourses available to her domestically before claiming refugee status.

[11] In this regard, the RPD noted that the police and the Office of the Attorney General had taken action by recording Mrs. Montoya's complaints and investigating the crimes reported to them. He also pointed out that Mrs. Montoya left the country before receiving the results of these investigations and did not maintain contact with the Colombian authorities.

[12] The RPD ruled, as a result, that the applicants had not proven a lack of state protection and that this was enough to defeat their claims under both s. 96 and paragraph 97(1)(b) of the *Act*.

C. *The Applicants' Challenge to the RPD's Decision*

[13] The applicants criticize the RPD's decision for finding that there was adequate state protection in the face of a significant amount of evidence to the contrary. Although the RPD is presumed to have considered all the evidence, the applicants submit that this presumption can be rebutted when the decision-maker fails to discuss evidence that squarely contradicts its findings.

[14] In this regard, they contend that they expressly directed the RPD's attention to a great deal of evidence proving that state protection was inadequate. They say the RPD ignored that evidence and, in so doing, committed a reviewable error. They further claim that it was also a reviewable error on the part of the RPD, in its analysis of the adequacy of state protection, to rely on the fact Colombia had introduced some policies to help victims of crime without assessing whether those policies were in any way effective. They say that this contradicts the approach set out by many decisions of this Court, which requires adequate protection in practice, not just in theory.

[15] Because of these errors, the applicants complain that the RPD went on to assess the applicants' attempts to access state protection whereas they had no burden to ask Colombia for protection as there was evidence that such protection would not be forthcoming.

III. Issue and Standard of Review

[16] The main issue in his case is whether the RPD, by finding that the applicants' refugee claim could not be accepted because state protection is available in Colombia for persons similarly situated, committed a reviewable error.

[17] The Respondent Minister (the Minister) submits that the standard of review applicable to this issue is the standard of reasonableness.

[18] I agree with the Minister. What the applicants are really challenging here is the RPD's treatment of the evidence and its conclusion that state protection was adequate. Those are questions of fact and of mixed fact and law that are reviewable on the basis of the reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 53 [*Dunsmuir*]; *Ruszo v Canada (Citizenship and Immigration)* [*Ruszo*], 2013 FC 1004, at paras 20-22; *Gulyas v Canada (Citizenship and Immigration)*, 2013 FC 254, 429 FTR 22, at para 37).

[19] In this regard, it is well established that to be reasonable a decision must be transparent, justifiable, intelligible, and defensible in respect of the facts and the law (*Dunsmuir*, above, at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 59 [*Khosa*]). This means that the reasons for decision must "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, at para 16).

[20] However, before getting any further into the analysis of this question, a preliminary issue needs to be addressed, that of the late filing of the present judicial review application.

IV. The Applicants' Request for an Extension of Time

[21] The applicants filed their Application for Leave and for Judicial Review on April 12, 2013, which is eight days passed the 15-day time limit prescribed by s. 72(2)(b) and 169(f) of the *Act*. As a result, they sought an extension of time to file their Application. Leave was eventually granted but the issue of the extension of time was not addressed by the Leave judge.

[22] According to s. 6(2) of the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22, as amended, a request for an extension of time is normally considered at the same time as the application for leave. When it is not, the jurisdiction over the request for an extension of time falls to the application judge (*Deng Estate v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 59, at para 17).

[23] The test applicable to requests for an extension of time was set out by the Federal Court of Appeal in *Canada (Attorney General) v Hennelly*, 244 NR 399, [1999] FCJ No 846 (QL), at para 3. This test usually requires an applicant to demonstrate: (1) a continuing intention to pursue his or her application; (2) that the application has some merit; (3) that no prejudice to the respondent arises from the delay; and (4) that a reasonable explanation for the delay exists.

[24] In the present instance, the reason for the delay was that the applicants' counsel initially appealed the matter to the Refugee Appeal Division. However, paragraph 110(2)(d) of the *Act*

precludes such an appeal when applicants entered Canada from a country which has been specially designated and with which Canada has an agreement sharing responsibility for refugee protection. In this case, the applicants entered Canada through the United States of America, which is such a country according to s. 159.3 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[25] The applicants' counsel soon realized his mistake and filed the present application eight days later. The Minister does not take issue with the late filing of the present proceedings.

[26] I am satisfied that the applicants meet the test for an extension of time. First, even though the original appeal was filed with the wrong institution, it was filed in time, which shows a continuing intention to challenge the RPD's decision. Second, leave would not have been granted if the application had no merit. Third, the delay was short and no prejudice to the respondent arises as evidenced by the fact the Minister is not challenging the request for an extension of time. Fourth, the Refugee Appeal Division is new and the applicants' counsel's mistake was understandable. This, therefore, reasonably explains the delay.

V. Analysis

A. *The Position of the Parties*

[27] As I have indicated previously, the applicants' challenge of the RPD's decision is two-fold.

[28] First, they claim that the RPD ignored copious relevant evidence that contradicted its finding that adequate state protection is available in Colombia and that, in any event, it applied the wrong test in arriving at that conclusion.

[29] As for their second point, the applicants assert that the RPD erred by expressing dissatisfaction with their attempts to seek out state protection because it is only in situations where state protection might reasonably have been forthcoming that the failure of refugee claimants to approach the state for protection will defeat their refugee claim.

[30] The Minister responds to the first point by arguing that the RPD was not required to refer to every piece of evidence in its decision and was entitled to prefer certain country conditions documents over others and to conclude that the preponderance of that objective evidence regarding country conditions suggested that there is now adequate state protection in Colombia for victims of crime, and especially, victims of crime by the FARC. In particular, the Minister points to the evidence on the FARC's demobilization, loss of influence and crime reduction as a clear indication of the success of the state's efforts in its ability to offer protection to FARC's crime victims.

[31] In response to the applicants' second point, the Minister stresses that refugee protection is meant to be a form a surrogate protection and can only be invoked, as a result, in situations where a refugee claimant has unsuccessfully sought the protection of his or her home state. This is not the case here, pleads the Minister, as the evidence shows that the police did took reports and initiated investigations when approached by the applicants.

B. *The RPD's Treatment of the Evidence is Fatally Flawed*

(1) The Applicable Legal Principles

[32] The Minister is correct in saying that the RPD is presumed to have considered all the evidence and that it did not have to refer in its decision to all the documentary evidence before it (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (QL), at para 1).

[33] However, it is also correct to say, as do the applicants, that where evidence on record is important and directly contradicts an essential element of a finding, a failure on the part of the decision-maker to address that evidence or to explain why it was disregarded may lead to an inference that the decision has been made "without regard for the material before it" and is, therefore, reviewable on that basis, as provided for by ss 18.1(4)(d) of the *Federal Courts Act*, RSC 1985, c F-7 (*Hinzman v Canada (Citizenship and Immigration)*, 2010 FCA 177, [2012] 1 FCR 257, at para 38, citing *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35, [1998] FCJ No 1425 (QL) [*Cepeda-Gutierrez*], at para 17; (*Toriz Gilvaja v Canada (Citizenship and Immigration)*, 2009 FC 598).

[34] The fact a decision-maker refers in some detail to evidence supporting its finding but is silent on evidence pointing to the opposite conclusion may also lead to the same inference (*Cepeda-Gutierrez*, above, at para 17).

[35] I recognise that the inference that a decision has been made without regard for the material before the decision-maker may be harder to draw when the purportedly overlooked evidence consists of country conditions documents. As this Court pointed out in the recent case of *Vargas Bustos v Canada (Citizenship and Immigration)*, 2014 FC 114 [*Bustos*], sheer volume and diversity of country conditions documents will often make it administratively impractical to require a decision-maker to spell out exactly how much weight it assigns to every document (*Bustos*, at paras 35-39).

[36] However, as this Court also pointed out in *Bustos*, above, if the overlooked contrary evidence is overwhelming and the decision-maker does not explain what documentary evidence supports its conclusions, then it may be easier to conclude that the decision was unreasonable (*Bustos*, at para 39).

[37] This, in my view, is what happened here.

(2) The Documentary Evidence Relied on by the RPD Does Not Support its Finding that State Protection is Available

[38] The RPD reasonably found that the FARC had suffered some major military reductions since 2005, but the report upon which it relied to support that finding also concluded that the FARC was "weakened but not defeated" (Certified Tribunal Record, vol 1, at p 118). As this Court observed in *Bustos*, above, the "FARC's reduced military capacity does not mean that the state can protect people who have been specifically targeted by FARC for harassment or extortion." (*Bustos*, above, at para 40).

[39] Here, the RPD, to support its conclusion that "there exists adequate albeit not perfect state protection for victims of crime" in Colombia, relied on a long excerpt from the executive summary of the United States Department of State report on Colombia in its Country Reports on Human Rights Practices for 2011 (24 May 2012) [the USDOS Report].

[40] The problem with this evidence is that apart from identifying that Colombia's president was elected democratically in June 2010, it is difficult to see how it is relevant to whether the state can protect the applicants.

[41] If anything, this excerpt from the USDOS Report tends to support the applicants' claim as it reveals that :

i. The internal armed conflict continued between the government and terrorist organizations, particularly the FARC and the National Liberation Army (ELN);

ii. Impunity and an inefficient justice system subject to intimidation limited the state's ability to prosecute effectively those accused of human rights abuses and to process former paramilitaries;

iii. Illegal armed groups, including the FARC, ELN, and organized crime groups that included some former paramilitary members, committed numerous abuses, including the following: political killings; killings of members of the public security forces and local officials; widespread use of land mines; kidnappings and forced disappearances; subornation and intimidation of judges, prosecutors, and witnesses; infringement on citizens' privacy rights; restrictions on freedom of movement; widespread recruitment and use of child soldiers; attacks against

human rights activists; violence against women, including rape and forced abortions; and harassment, intimidation, and killings of teachers and trade unionists;

iv. Illegal armed groups continued to be responsible for most instances of forced displacement in the country.

[42] Apart from this excerpt of the USDOS Report, the only other source the RPD is referring to in its decision is item 7.3 of the National Documentation Package: Response to Information Request, COL104011.E (30 March 2012). The RPD states that this document is evidence that authorities in Colombia seek to improve the security situation within the country and continue to implement programs aimed at protection improvements. Specifically, the RPD refers, in this regard, at paragraph 20 of its decision, to two programs: the National Protection Unit and the Protection Program for Victims and Witnesses.

[43] It is unclear why the RPD considered evidence from that National Documentation Package to be relevant considering that the RPD failed to assess whether the National Protection Unit and the Protection Program for Victims and Witnesses had actually improved state protection and were, therefore, more than mere attempts to do so. As this Court has said on many occasions, while states' efforts are indeed relevant to an assessment of state protection, they are neither determinative nor sufficient. What matter is whether these efforts "have "actually translated into adequate state protection" at the "operational level" (*Meza Varela v Canada (Citizenship and Immigration)*, 2011 FC 1364, at para 16, citing *Beharry v Canada (Citizenship*

and Immigration), 2011 FC 111, 383 FTR 161, at para 9; and *Jaroslav v Canada (Citizenship and Immigration)*, 2011 FC 634, 390 FTR 248, at para 75).

[44] Here, the same document that informed the RPD about these two programs also spends a great deal of time describing their ineffectiveness. This document quotes from many sources to that effect, and it includes the following passage:

> In its evaluation report, the Office of the Inspector General writes that delays in processing protection applications are frequent and take [translation] "more than two months" (ibid. Jan. 2011, Sec. 4.2). In addition, the Office has found that authorities at the regional level do [translation] "little or nothing" with regard to protection, and that governors and municipalities do not have "strategic security plans for vulnerable populations" (ibid.). It concludes by stating that the Directorate for Human Rights, which is in the Ministry of the Interior and Justice and is responsible for protection programs in Colombia, [translation] "does not truly assume its function of directing and coordinating" such programs (ibid.). It also says that the National Police are not assuming their full responsibility for conducting surveillance "rounds".(Certified Tribunal Record, vol. 1, at p. 179)

[45] The Response to Information Request goes on to say that there are not enough resources to adequately fund programs like the National Protection Unit and the Protection Program for Victims and Witnesses, and it quotes the Minister of the Interior and Justice as saying that it “is impossible to provide every peasant with a personalized security plan; in some cases it is done due to very serious threats, but it is not possible to do it on a large scale.” (Certified Tribunal Record, vol 1, at p 179).

[46] Consequently, neither of the documents upon which the RPD relied upon for its finding of adequate state protection actually supports that contention.

(3) The RPD Ignored the Evidence that Contradicts its Finding that State Protection is Available

[47] In such context, the applicants referred to many documents to prove that state protection was inadequate, none of which were acknowledged by the RPD. Although I agree with the Minister that many of those documents predate the successful offensive against the FARC, or are not important enough to warrant an inference that they were overlooked, there are a couple exceptions.

[48] The report of Dr. Marc Chernick, a document entitled "Country Conditions in Colombia Relating to Asylum Claims in Canada" (20 August 2009), is one of them. It reports that the FARC "continues to finance activities through massive extortion practices (what it refers to as "revolutionary taxes") and continues to kidnap and assassinate unarmed, civilian "enemies" to further its objectives despite its reduced military capacity". Dr. Chernick asserts in his report that the "FARC still has the capacity to kidnap, torture and kill individuals that it classifies as enemies". He further asserts that it is clear "that the Colombian state is unable to protect those who have been targeted" and that "[a]lmost all human rights violations in Colombia occur with impunity". (Certified Tribunal Record, vol. 3, at p. 500-521)

[49] On several occasions, this Court has found that a failure to consider Dr. Chernick's reports was unreasonable (*Nino Yepes v Canada (Citizenship and Immigration)*, 2011 FC 1357 at para 10; *Ortiz Rincon v Canada (Citizenship and Immigration)*, 2011 FC 1339 at paras 14-17).

[50] Of course, the RPD did not have to accept that report (*Bustos*, above, at para 34; *Guevara v Canada (Citizenship and Immigration)*, 2011 FC 242 at para 44), nor was it "required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (*Newfoundland Nurses*, above, at para 16; *Herrera Andrade v Canada (Citizenship and Immigration)*, 2012 FC 1490, at para 21).

[51] However, in this case, the RPD not only failed to explain why this evidence was rejected but it also misapprehended the evidence upon which it relied for its finding of adequate state protection. The end result is that I cannot understand how the RPD concluded that state protection was adequate.

[52] In my view, that mistake is fatal to the RPD's entire decision. As the applicants contend, a refugee claimant's failure to approach the state only becomes relevant if he or she cannot show that it would be futile to do so. In *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, the Supreme Court of Canada stated that "it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness" (*Ward*, at p. 724).

[53] Since I cannot understand the RPD's reasons for finding that state protection is adequate, I cannot understand either its dissatisfaction with the applicants' attempts to seek out state protection.

[54] The role of this Court in reviewing decisions denying a refugee claim is obviously not to reweigh the evidence that was before the decision-maker and to prefer its own view of the facts to that of the decision-maker (*Dunsmuir*, above, at para 47, *Khosa*, above, at paras 61-66).

[55] In a case like this one, the Court's role is not to decide whether or not state protection would be available to refugee claimants should they be returned to their home country. Rather, it is to ensure that whatever decision is reached by the RPD in that regard, the decision is transparent, justifiable, intelligible, and defensible in respect of the facts and the law and that its reasons "allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Dunsmuir*, above, at para 47; *Khosa*, above, at para 59).

[56] This means that the Court must ensure that the impugned decision has been made with regard to the material before it. This, in turn, means that where there is evidence on record that directly contradicts an essential element of a finding, some form of explanation as to why this evidence was disregarded has to be provided by the decision-maker.

[57] The present case, in my opinion, is a clear illustration of a case where such an explanation was warranted, especially in light of the fact that the failure to provide that explanation occurred in a context where the evidence relied upon by the decision-maker did not exactly support its finding.

[58] It is therefore clear to me that the applicants' refugee claim was decided by the RPD without regard for the material before it.

(4) The Applicants' Efforts to Access State Protection Were Adequate in the Circumstances

[59] In addition, I have some reservations about the RPD's comments about the applicants' attempts to access state protection.

[60] The Minister rightly points out that refugee protection is meant to be a form a surrogate protection, invoked only in situations where an applicant has unsuccessfully sought the protection of his home state. However, it is also true that someone claiming refugee protection is only "required to demonstrate that he or she took all objectively reasonable efforts, without success, to exhaust all courses of action reasonably available to them, before seeking refugee protection abroad" (*Ruszo*, above, at para 32) (my emphasis).

[61] Here, Mrs. Montoya reported every crime. In fact, the RPD only criticizes her for: (1) not following up with the police after her husband's murder, (2) leaving Bogota after the extortion attempt on her clothing store, (3) not assisting the Office of the Attorney General when they asked for her help identifying suspects, (4) not asking the authorities for updates on the status of their investigations; and (5) fleeing the country after her attempted kidnapping in December 2012.

[62] However, after her husband's murder, the police said they would contact her if they had any information but they never did. It is unclear why the RPD is holding Mrs. Montoya's failure to follow-up with the authorities against her, unless it meant to say that the police only do their jobs when victims of crime pester them. As this Court observed in *Ferko v Canada (Citizenship and Immigration)*, 2012 FC 1284, at para 60, "it was unreasonable for the RPD to dwell on the lack of follow-up by the applicant given that the applicant had consistently reported to the police".

[63] Moreover, the police specifically advised Mrs. Montoya to move after her husband's murder. It is not surprising that she would move again once the threats restarted. Indeed, she testified that this was the advice the police gave her when she was almost abducted too (Certified Tribunal Record, vol 1 at pp 6-8). It is unclear why the RPD felt that her taking this modest action to protect herself and her daughter would impinge in any way on the state's ability to protect her.

[64] As for her failure to help the Office of the Attorney General, Mrs. Montoya and her daughter were found by the FARC and specifically threatened not to provide that help (Certified Tribunal Record, vol 1 at pp 7-8). Given the state's failure to protect her husband or her three uncles, it is unsurprising that the FARC's threat would work on her. After all, her husband stood up to the FARC and was murdered for it. Given that, the RPD, in my view, held Mrs. Montoya to an unrealistic standard of conduct. After all, to paraphrase *Ward*, above, she was not required to risk her life seeking ineffective protection of the state, merely to demonstrate its ineffectiveness.

[65] As a result, the RPD's findings in this regard are flawed too. Those findings are hardly defensible in respect of the facts and the law and they hardly fall within the range of acceptable outcomes. In other words, they are unreasonable.

[66] For all these reasons, the applicants' judicial review application shall be allowed and the RPD's decision, set aside.

[67] Neither party has proposed a question of general importance. None will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The applicants' judicial review application is granted.
2. The decision of the Refugee Protection Division of the Immigration and Refugee Board, dated March 19, 2013, is quashed.
3. The matter is referred back to a different member of the RPD for redetermination.
4. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

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