

Federal Court



Cour fédérale

Date: 20141006

Docket: IMM-4137-13

Citation: 2014 FC 946

Toronto, Ontario, October 6, 2014

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

MARIBEL GARCIA ROJAS

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Rojas is a citizen of Colombia applying for judicial review of a decision of the Refugee Protection Division [RPD, Board] which determined she is not a Convention refugee or a person in need of protection according to the criteria specified in sections 96 and 97 of the *Immigration and Refugee Protection Act* (SC 2001, c 27) [IRPA]. The application was commenced pursuant to section 72(1) of IRPA.

II. Facts

[2] Maribel Garcia Rojas [the Applicant], is a 44 year old Colombian woman who made a refugee claim upon arrival in Canada on January 14, 2012. She is the single mother of a 16 year old girl who resides in Colombia (the status of her daughter is not in issue in this application). She fears for her life and safety at the hands of a leftist paramilitary force known as the Fuerzas Armadas Revolucionarias de Colombia, or the Revolutionary Armed Forces of Colombia - People's Army [FARC].

[3] In 2007, the Applicant was employed in the nursing profession in Bogota when she met a man named Henry. They struck up a friendship. Approximately a year later, he informed her of his affiliation with FARC and asked her if she would be interested in a position with them. She declined. Henry persisted in his efforts to recruit her, so she asked her employer to transfer her to the city of Ibague.

[4] Roughly a year and a half went by without incident in Ibague. On June 14, 2010, the Applicant was confronted by three people after work. They handed her a cell phone, and Henry, on the line, directed her to follow them. They blindfolded the Applicant and took her to a luxurious house on the outskirts of the city where she tended to a man who had been shot. The Applicant reported the incident to the police, who gave her numbers to call in the event the guerrillas contacted her again.

[5] The Applicant did not hear from Henry or his associates for two years. On July 20, 2012, she was approached outside of her work by a woman asking if she would take a look at her husband, who was waiting in a taxi and could not walk. Instead, there were two men in the taxi who wanted the Applicant to provide nursing services to FARC and told Ms. Rojas that harm would come to her mother and child if she did not co-operate. The Applicant reported the incident to the District Attorney's office.

[6] On September 4, 2012, the Applicant hopped in a taxi to go home, but she believes she was drugged. The Applicant woke up in a compound in the mountains, where she was tasked with tending to the father of a man the guerrillas called Commander Fernando. She cared for the Commander's father for two nights before he passed away, at which point she was blindfolded and dropped off at the side of a highway. She reported this incident to the police, who brought her to an anti-kidnapping, anti-extortion division [the GAULA - *Grupos de Acción Unificada por la Libertad Personal*] that gave her a number to call if she saw the men again and suggested she would be valuable as an informant.

[7] Over the next few months, Ms. Rojas went to the Office of the Ombudsman, which opened a file, but she was not contacted by the authorities subsequently.

[8] After Ms. Rojas learned from her cousin that two men visited her to ask about the Applicant's whereabouts, she applied for a visitor's visa to the United States. On January 14, 2012, she crossed the border from Buffalo, New York, into Canada.

III. Decision Under Review

[9] Ms. Rojas' hearing before the Refugee Protection Division was held on May 9, 2013, in Toronto, Ontario. The decision was released on May 21, 2013.

[10] The RPD found that the Applicant was neither a Convention refugee nor a person in need of protection based on a lack of clear and convincing evidence of the State's inability to protect her.

[11] The RPD based their finding on state protection primarily on the following documentation and analysis:

- a. The National Documentation Package notes that the Constitutional Court of Colombia has recognized the country's obligation to adopt special protective measures to defend the security interests of those whose level of risk is extraordinary. Furthermore, there are organizations which can assist the applicant, including the Government of Colombia's National Protection Unit and protection programs offered by non-governmental organizations [NGOs].
- b. Certificates of denunciation (reports to law enforcement authorities) submitted by the Applicant indicate authorities have been investigating the complaints. Less than perfect protection is not equivalent to the state being unwilling or unable to offer reasonable protection.
- c. The Applicant does not fall into one of the groups considered in objective documentary evidence as being at risk in Colombia, namely: members and

supporters of one of the armed groups or parties to the conflict; members of local or regional governments; judges and other individuals associated with the justice system; civil society and human rights activists; journalists and other members of the media; trade union leaders; teachers; university professors and students, indigenous peoples and Afro-Colombians; women and children with certain profiles and marginalized social groups.

IV. Issue

[12] The sole issue to be decided is whether the RPD err in finding that Colombia offered adequate state protection.

V. Submissions of the Parties

[13] The Applicant submits that while the RPD acknowledged Colombia's legal obligation to protect her, it did not take into consideration whether that obligation had been given any effect. To the contrary, the Applicant maintains that the RPD cited evidence of insufficient resources devoted to protection. The Applicant also contends that the evidence contradicted the findings and showed that FARC continues to be a potent force, and Colombia cannot adequately protect her.

[14] Second, the Applicant submits that the RPD misconstrued the evidence pertaining to her experiences with law enforcement authorities. The lack of follow-up from the authorities is

indicative that investigations were not occurring, and if they were, involved considerable risk to the Applicant because she was asked to be an informant against FARC.

[15] In addition, the Applicant argues that the RPD also made an error in finding that her profile did not match that of a person considered to be at risk. This runs counter to the Applicant's credible testimony that she had been abducted on three separate occasions. Moreover, certain objective documentary evidence on the record clearly shows medical personnel as among those targeted by FARC.

[16] The Respondent, on the other hand, submits that the test for state protection is adequacy measured by serious efforts to protect, as opposed to "effectiveness", per *Canada (Minister of Citizenship and Immigration) v Flores Carillo*, 2008 FCA 94 at para 30. There is a presumption of state protection, which, to be rebutted, requires clear and convincing evidence of a state's inability to protect. The Respondent argues that the Applicant is seeking perfect protection. The RPD reasonably weighed the evidence and found adequate, if imperfect, state protection to exist, supported by documentary evidence citing potential avenues of redress.

[17] The Respondent further asserts that the RPD also found evidence that the Applicant's complaints were being investigated. However, as there was no documentary evidence regarding the level of detail Ms. Rojas provided to the police, any perceived lack of police action could have resulted from a lack of information communicated. Furthermore, the Applicant did not follow up on her complaint to the Ombudsman. The Respondent asserts that the Applicant's position amounts to a disagreement over the RPD's weighing of evidence.

[18] Since the RPD's finding on state protection is determinative of the claim, the Respondent contends that there is no need to address whether the RPD erred in its finding regarding the Applicant's risk profile.

VI. Analysis

[19] The standard of review with respect to the single issue to be decided is that of reasonableness. As the Respondent points out, this is a highly deferential standard: *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at para 22.

[20] Per the well-known case law in this area, this Court cannot interfere in the decision below, unless its conclusions fall outside the range of possible acceptable outcomes, and it is not defensible in respect of the facts and law. The decision of the Board must be intelligible, transparent and justifiable such that it does not fall outside of the said reasonable range of outcomes: *Dunsmuir v New Brunswick*, 2008 SCC 9; *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12.

[21] The protection that states offer to their citizens must be inadequate if Canadian protection is to be granted under the Act. As stated by the Federal Court of Appeal in paragraph 30 of *Flores Carrillo*, "a claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate."

[22] Further to this general proposition, this Court has held on numerous occasions that state protection does not need to be perfect. Rather, it is sufficient for the protection to be adequate: *Canada (Minister of Employment and Immigration) v Villafranca*, (1992) 99 DLR (4th) 334; *Ortiz v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1365; *Blanco v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1487.

[23] Indeed, it would be unrealistic in most circumstances to expect states to provide witness protection programs or state-funded bodyguards in the aftermath of most reported incidents, or for that matter, to expect that authorities will fully pursue every matter reported to them. Just as this level of protection would not be the expected of Canadian law enforcement authorities for the average incident, we cannot expect foreign states to be held to any higher standard.

[24] Absent one crucial finding regarding the Applicant and her particular experiences at the hands of FARC, there was documentation on the record to allow the Board to come to a reasonable conclusion that Colombia has, particularly in recent years, provided adequate -- but not perfect -- state protection. This evidence included institutions and offices such as the Inspector General, the Constitutional Court, the National Protection Unit, the GAULA and Ministry of the Attorney General's Protection Program.

[25] Indeed, the Board was well aware of imperfections, and mentioned these in the decision, including a lack resources, and admission by the President blemishes in security, including a growth in kidnappings.

[26] The Board did not err due to its conclusion that conditions have been improving in Colombia, and state protection may be available to average Colombians. Rather, the RPD erred in failing to account for key evidence that contradicted its finding that the Applicant did not have the “profile” of an at-risk person.

[27] Specifically, the Board found that the Applicant’s job as a nurse (or nurse’s aide) was not in a profession identified as “at risk” in Colombia. In failing to acknowledge the contradictory evidence, the Board failed to evaluate whether the Applicant’s personal situation would create a risk to her \under s. 97 of the Act. *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL) at paras 15-17.

[28] The key evidence testifying to medical professionals’ risk follows:

Yet even as the FARC has been weakened politically and militarily, it is still able to operate throughout all of Colombia’s national territory. All indications are that it is regrouping and is still able to commit terrorist attacks and target its enemies, including politicians, grassroots activists, local businessmen, **medical personnel**, humanitarian workers, ex-government officials and others... Another category and pattern of threat involves those with special skills: **Nurses** or and doctors have been kidnapped and forced to perform abortions, to treat wounded combatants and to provide other medical services... When the nurse or doctor is approached again and refuses, s/he may be again kidnapped and threatened. Resistance often brings threats and reprisals. [emphasis added]

Cherniak Report, Exhibit F to the Rojas Affidavit; Application Record p. 77

[29] As a nursing professional, the Applicant clearly fell into the risk profile. She sought police protection, and was still kidnapped on more than one occasion. the Board was under an

obligation to consider evidence related to at-risk profiles at the hands of FARC, Justice Gleason made the following finding, with respect to state protection of “at risk” profiles in *Andrade v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1490:

[20] In the past year, this Court has overturned RPD decisions on state protection in Colombia only where the RPD was shown to have failed to properly assess the background or "profile" of the claimant and the claimant fell into one of the groups that the documentary evidence indicates may be at risk in Colombia... These cases turn on the failure of the Board to consider the heart of the claims advanced by the claimants and to assess their profiles against the documentary evidence, which indicated that they might be at risk. Simply put, in these cases, the Board failed to conduct the analysis it was required to undertake. [Emphasis added]

[30] Other Court decisions directly on point have also faulted the Board for failing to address whether state protection is available to those personally targeted by FARC. Those cases have included very similar fact situations, i.e., where the threat has become personalized to someone in a risk profile. See *Hernandez Montoya v Canada (Citizenship and Immigration)*, 2014 FC 808; *Gonzalez v Canada (Citizenship and Immigration)*, 2014 FC 750; *Vargas Bustos v Canada (Citizenship and Immigration)*, 2014 FC 114.

[31] When the Board found out that Ms. Rojas lacked the profile of a person at risk, it ignored key contradictory evidence, resulting in an unreasonable decision. The Applicant’s judicial review application is allowed. The parties proposed no questions of general importance for certification, and none will be certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Applicant's judicial review application is allowed.
2. The matter is referred back for redetermination by a different Board member.
3. No question is certified.

"Alan S. Diner"

Judge

ANNEX A

Immigration and Refugee Protection Act (SC 2001, c 27) Sections 96 and 97

Convention refugee

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.

Person in need of protection

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

- (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

Loi sur l'immigration et la protection des réfugiés (LC 2001, ch 27) Articles 96 et 97

Définition de « réfugié »

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.

Personne à protéger

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) 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

of accepted international standards, and

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

Person in need of protection

(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.

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.

Personne à protéger

(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.

FEDERAL COURT
SOLICITORS OF RECORD

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