Federal Court  Cour fédérale

Date: 20150828

Docket: IMM-7643-13

Citation: 2015 FC 1023

Ottawa, Ontario, August 28, 2015

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ISABEL CRISTINA VELOSA RUANO
JULIAN ANDRES ARZAYUS ESCOBAR and
SAMUEL ARZAYUS VELOSA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants' claim for refugee protection was denied by the Refugee Protection Division of the Immigration and Refugee Board of Canada [the Board]. They now apply for judicial review of that decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

[2] The applicants seek an order setting aside the negative decision and returning the matter to a different member of the Board for redetermination.

I. Background

[3] The principal applicant, Isabel Cristina Velosa Ruano and her spouse, Julian Andres Arzayus Escobar and their minor child, Samuel Arzayus Velosa, are citizens of Colombia. They operated a farm belonging to the principal applicant's grandmother in the mountains of the municipality of Pradera.

[4] In early 2010, Luis Alberto Bermudez Potes (Bermudez), the farm's former foreman, illegally took over the farm. Allegedly having ties with the Revoluntionary Armed Forces of Colombia [FARC], he threatened the applicants' family with extortion.

[5] In December 2010, the principal applicant's mother and aunt filed a complaint with the local Fiscalia and requested protection because Bermudez threatened to send the FARC to kill them.

[6] The same day, the Attorney General of Colombia issued a "Request for Measure of Protection" to the police. However, no protection was ultimately provided by the police.

[7] Bermudez left after the principal applicant's grandmother paid him 2,500,000 Colombian pesos, but continued calling the applicants' family in 2011 and 2012 with extortion demands.

[8] In 2013, members of the FARC went to the farm and left the message that the principal applicant must pay a vacuna of 2 million pesos per month to help their cause. The applicants feared for their lives and made arrangements to leave Colombia.

[9] On May 10, 2013, the applicants left Colombia to go to the United States. They stayed in the United States until August 14, 2013 and then came to Canada. They made a claim for refugee protection at the Canadian border. On September 8, 2013, their daughter was born in Canada.

II. Decision Under Review

[10] In a negative decision dated November 7, 2013, the Board found that the principal applicant is not a Convention refugee or a person in need of protection pursuant to section 96 and subsection 97(1) of the Act. It found the same for the male applicant and the minor applicant.

[11] The Board determined that the issue in this case is state protection. It found that the principal applicant has not provided clear and convincing evidence of the state's inability to protect. It stated, "[i]n a functioning democracy, a claimant will have a heavy burden when attempting to show that they should not have been required to exhaust all of the recourses available to them domestically before claiming refugee status." It noted that the applicants must show that they have taken all reasonable steps in the circumstances to seek protection.

[12] The Board observed that the principal applicant had assumed that the threat that was made by members of the FARC in 2013 originated from Bermudez. The principal applicant stated that she did not report this threat to the authorities because she had already reported threats

made by Bermudez and had a protective order against him. She also stated that reporting the FARC to the authorities was something that had to be handled carefully because the FARC had a presence in many areas of the country and might retaliate against the principal applicant if it learned that she had made a report. The Board determined it was unreasonable for the principal applicant not to seek protection from the authorities who were in a position to provide it.

[13] The Board found, on a balance of probabilities, that the principal applicant has not provided the requisite clear and convincing evidence that state protection is inadequate in Colombia. It then noted, based on documentary evidence, that Colombia is a democratic country with the willingness and the apparatus necessary to provide protection to its citizens. It acknowledged that FARC attacks increased by 44% between 2010 and 2011, but noted that the Colombian government has made efforts to reduce the hold of the FARC and has had some success. It cited excerpts from documentary evidence to demonstrate the effect of these efforts. For example, the third in command of the Jefferson Cartagena company of the FARC's Column 18 was arrested and courts have convicted some FARC members of kidnappings, according to the U.S. Department of State reports.

[14] The Board noted that contrary to the principal applicant's assertions that the FARC has infiltrated the Colombian government, all cases of human rights violations received by the government were referred for prosecution. The government obtained convictions in 192 cases since 2000. For reference, it referred to the U.S. Department of State report "Colombia: Country Report on Human Rights Practices for 2012".

[15] The Board concluded that the principal applicant has failed to rebut the presumption of state protection with clear and convincing evidence.

III. Issues

[16] The applicants raise the following issues for my consideration:

1. Did the Board formulate and apply the correct test for state protection?
2. Did the Board ignore evidence?

[17] The respondent raises one issue: was the Board reasonable in determining that the applicants had not rebutted the presumption that Colombia provided adequate state protection to its similarly situated nationals at an operational level?

[18] I would rephrase the issues as follows:

1. What is the standard of review?
2. Did the Board misunderstand the test for state protection?
3. Was the Board's decision reasonable?

IV. Applicants' Written Submissions

[19] The applicants submit that the Board committed two errors in its analysis of state protection. First, they argue that, for a refugee protection claim to fail on grounds of state protection, more is required than mere reasonable efforts on the part of a state to protect a refugee claimant. Second, they claim that there was a considerable body of country

documentation before the Board that corroborated the applicants' assertion that the Colombian government had been infiltrated by the FARC and the Board ignored it and failed to discuss it (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at paragraph 17, 157 FTR 35 [*Cepeda-Gutierrez*]; and *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at paragraph 60, [2007] FCJ No 584 [*Hinzman*]).

V. Respondent's Written Submissions

[20] The respondent submits that the standard of review for factual issues is the standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraphs 47, 51 and 57, [2008] 1 SCR 190 [*Dunsmuir*]). The standard of review for determinations of fact and mixed fact and law, such as the determination on state protection, is also reasonableness (*Hinzman* at paragraph 38; and *Hippolyte v Canada (Minister of Citizenship and Immigration)*, 2011 FC 82 at paragraph 23, [2011] FCJ No 93).

[21] First, the respondent submits that the appropriate test for state protection is stated in the case *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at paragraph 30, [2008] FCJ No 399 [*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." It argues that the more democratic the state is, the more a refugee claimant has to show what was done to exhaust all available options for seeking state protection.

[22] Second, the respondent submits that the Board applied the proper legal test for state protection. It argues that the test for state protection is adequacy, not effectiveness. The Board may consider the efforts made by a country, but ought not regard the effectiveness of the protection. The respondent cites *Florez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 723 at paragraphs 9 to 11, [2008] FCJ No 969 for support. It argues that the Board applied the correct test because the Board stated, "[i]n view of the evidence before me, I find that the principal claimant has not provided the requisite clear and convincing evidence that, on a balance of probabilities, state protection in Colombia is inadequate."

[23] Third, the respondent submits that the presumption of state protection was not rebutted. It noted that the applicants' approach in dealing with the 2010 extortion was to report it to the authorities and obtain a protective order. This differed from their approach in dealing with the 2013 extortion. There, they fled the country without reporting the threats to the authorities. The applicants thereby did not give the authorities an opportunity to provide adequate protection. They failed to meet the burden of adducing relevant, reliable and convincing evidence to rebut the presumption.

[24] The respondent highlights a few of the Board's findings, such as Colombia's recent free and fair 2010 election, its independent judiciary, its measures in human rights prosecution and its military campaign against the FARC. The respondent argues that the totality of evidence shows that the Board objectively and reasonably determined that Colombia was a state where protection might be reasonably forthcoming.

[25] Fourth, the respondent submits that the Board considered all the relevant evidence. Here, the Board considered the country conditions evidence and acknowledged the increased FARC attacks, the existence of some corrupt officials and extortion from the FARC. It examined both positive and negative country conditions evidence and was reasonably aware of the adequacy of Colombia's protection of its citizens. The respondent submits that the finding was reasonable and falls within the range of possible, acceptable outcomes defensible by the facts in this matter and the applicable law (*Riczu v Canada (Minister of Citizenship and Immigration)*, 2013 FC 888, at paragraphs 23 to 24, [2013] FCJ No 923).

VI. Applicants' Reply and Further Memorandum

[26] The applicants submit that the issue of whether the Board misunderstood or misapplied the test for state protection is an issue of law and hence is subject to a correctness standard of review (*Dawidowicz v Canada (Minister of Citizenship and Immigration)*, 2014 FC 115 at paragraph 23, [2014] FCJ No 105 [*Dawidowicz*]; and *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at paragraph 22, [2013] FCJ No 1099 [*Ruszo*]).

[27] The applicants submit that for the purpose of the state protection analysis, adequacy means the adequacy of protection at an operational level concerning the quality of protection. Also, they submit that the likely reason for the Board not referring to certain submitted evidence is that the Board misunderstood the test to only involve the consideration of state efforts. They reference *Giraldo v Canada (Minister of Citizenship and Immigration)*, 2014 FC 169 at paragraphs 17 to 19, [2014] FCJ No 204, where Madam Justice Sandra Simpson found that the

Board erred in not referring to the evidence of a 97.5% impunity rate. The applicants argue that this is the same evidence ignored by the Board in the case at bar.

[28] The applicants emphasize that, although protection was requested in 2010, none was provided by the police and the principal applicant's grandmother had to resort to self-help measures.

[29] In further support of the applicants' submission that the Board ignored evidence, they cite *Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2014 FC 750 at paragraphs 54 to 59, [2014] FCJ No 816 for the proposition that it is unreasonable for the Board to not specifically address contradictory evidence on state protection.

VII. Respondent's Further Memorandum

[30] The respondent disagrees with the applicants on the applicable standard of review for the test for state protection. It submits that, although the formulation of the test is a question of law, the issue of state protection is not outside the comprehension and specialized area of expertise of the Board. Therefore, the standard of review for this issue should be reasonableness (*Dunsmuir* at paragraph 55).

[31] The respondent reiterates that the Board formulated the state protection test reasonably, and found reasonably that the applicants did not provide sufficient evidence to rebut the presumption of state protection.

[32] As for seeking police protection, the respondent cites *Ruszo* at paragraphs 40 and 51, highlighting that "[f]or greater certainty, a subjective perception that one would simply be wasting one's time by seeking police protection or by addressing local police failures by pursuing the matter with other sources of police protection, would not constitute compelling or persuasive evidence, unless the applicant had unsuccessfully sought police protection on multiple occasions".

[33] In response to the applicants' argument that contrary evidence was ignored, the respondent submits that the Board was not required to consider and comment upon every issue raised by the parties in its reasons, provided that its decision viewed as a whole was reasonable.

VIII. Analysis and Decision

A. *Issue 1 - What is the standard of review?*

[34] Where the jurisprudence has satisfactorily resolved the standard of review, the analysis need not be repeated (*Dunsmuir* at paragraph 62).

[35] Insofar as the test for state protection is concerned, I agree with the applicants that the standard of correctness should be applied. In *Ruszo* at paragraphs 20 to 22, Chief Justice Paul Crampton found the standard of correctness should be used in examining whether or not the Board misunderstood the test for state protection. I further confirmed this in *Dawidowicz* at paragraph 23.

[36] Insofar as the state protection analysis is concerned, I agree with the parties that the standard of reasonableness should be applied. The Federal Court of Appeal has determined in *Carrillo* at paragraph 36 that the standard of review is reasonableness for the analysis of state protection.

[37] The standard of reasonableness means that I should not intervene if the Board's decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (*Dunsmuir* at paragraph 47). Here, I will set aside the Board's decision only if I cannot understand why it reached its conclusions or how the facts and applicable law support the outcome (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraph 16, [2011] 3 SCR 708). As the Supreme Court held in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59 and 61, [2009] 1 SCR 339, a court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

B. *Issue 2 - Did the Board misunderstand the test for state protection?*

[38] It is not in dispute that a country is presumed to be able to protect its citizens. A claimant must rebut that presumption of state protection in order to succeed with his or her refugee claim.

[39] It is also accepted that even though a state's state protection of its citizens need not be perfect, it must be adequate in practice; that is, it must be adequate at the operational level. It is not enough to say that the state has made efforts to provide state protection. These efforts must be adequate in practice.

[40] In the present case, the Board did state at paragraph 13 of its decision that the applicants did not provide:

> … clear and convincing evidence that, on a balance of probabilities, state protection in Colombia is inadequate.

[41] However, at paragraph 15, the Board states:

> … the Colombian government has made efforts to reduce the hold of the FARC in hot spots in Colombia.

At paragraph 16:

> The government of Colombia is making concerted efforts to address the ongoing challenges resulting from criminal actions of groups such as the FARC …

And at paragraph 21:

> I am not persuaded that should the principal claimant approach the state with the details of the attack and threats of any future attacks or threats, the state would not make reasonable efforts to assist her or her family.

[42] From a reading of the whole decision, I am not convinced that the Board applied the correct test, in light of its repeated references to "efforts".

[43] I am of the opinion that this makes the Board's decision unreasonable and the decision must be set aside and the matter referred to a different panel of the Board for redetermination.

[44] Because of my finding on this issue, I need not deal with the remaining issue.

[45] 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 and the matter is referred to a different panel of the Board 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	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait

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

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

DOCKET:	IMM-7643-13
STYLE OF CAUSE:	ISABEL CRISTINA VELOSA RUANO JULIAN ANDRES ARZAYUS ESCOBAR and SAMUEL ARZAYUS VELOSA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 3, 2015
REASONS FOR JUDGMENT AND JUDGMENT:	O'KEEFE J.
DATED:	AUGUST 28, 2015

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