

Federal Court



Cour fédérale

Date: 20190723

Docket: IMM-508-19

Citation: 2019 FC 976

Ottawa, Ontario, July 23, 2019

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

**JHON HEILER NUNEZ GARCIA
ET AL**

Applicants

And

**MINISTER OF IMMIGRATION AND
CITIZENSHIP**

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review of a December 31, 2018 decision made by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada. Pursuant to paragraph 111(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], the RAD confirmed the decision of the Refugee Protection Division [RPD], which found that the Applicants were excluded from the protection of Canada under section 98 of the IRPA and Article 1E of the *United Nations Convention Relating to the Status of Refugees*, 189 UNTS 150

[Article 1E of the Convention]. The RAD also confirmed the RPD's finding that the Applicants failed to rebut the presumption of state protection in Costa Rica.

I. Factual Background

[2] This application for judicial review concerns a family of three [together the Applicants]. Nancy Liliana Segura Portocarrero [Nancy] and her husband, Jhon Heiler Nunez Garcia [Jhon], are Columbian citizens of African descent [Afro-Columbians], who fled from gang persecution in Columbia to Costa Rica. In 2006, Jhon was granted refugee status in Costa Rica and in 2008 Nancy was also granted refugee status in that country. In 2008, they met and married in Costa Rica. In 2012, their daughter, Amy Juseth Nunez Segura [Amy] was born in Costa Rica. Nancy has a son from an ex-partner who lives in Columbia.

[3] The events underlying the Applicants' refugee claim in Canada began in January 2013 when they learned that members of a gang called Los Urabenos murdered Nancy's cousin, Yulian, after which Nancy's family members in Columbia began receiving death threats.

[4] In September 2014, two armed men came to Nancy's work while she was out on lunch break. They were looking for her. When Nancy's co-worker called her to warn her of this, she went home. Nancy's mother informed her that members of the Los Urabenos were on their way from Colombia looking for her, claiming that Nancy knew about money Yulian was supposed to have. Jhon's friend also told Nancy that the armed men were killers from the Los Urabenos.

[5] She did not report that incident or any other ones to the police. Her evidence at the RPD hearing was that she did not make any reports to the police because discriminatory police practices prevent Afro-Colombians from obtaining adequate police protection.

[6] Her husband's evidence to the CBSA officer was, "Well my wife has a cousin who belongs to the guerrillas. They are also drug traffickers, like you have seen them all over America and Central America. Wife [sic] cousin had lots of money, and after he was killed they took many things. They went after family. They know my wife was close to him. They started asking about her in Costa Rica. This is why we decided to leave."

[7] In October 2014, the Applicants left Costa Rica and went to Mexico. With assistance from a coyote, they crossed into the United States by jumping the border. The Applicants made refugee claims in the United States and were detained for immigration violations with the matter scheduled to be heard in 2019. The Applicants consulted with an attorney who advised that their refugee application would likely be rejected. For this reason, the family travelled to Canada in May 2016 and filed refugee claims again.

[8] On October 13, 2017, Jhon's brother, a Costa Rican citizen, was murdered in Costa Rica. The identity of the murderer and the motive are unknown.

[9] On December 6, 2016, following two hearing dates, the RPD determined, that Nancy and Jhon were excluded from refugee protection by operation of s 98 of the IRPA and Article 1E of the Convention and that the Applicants had failed to rebut the presumption of state protection.

[10] Article 1E of the Convention states that “the Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken residence as having the rights and obligations which are attached to the possession of the nationality of that country.” Section 98 of the *IRPA* confirms that a person referred to in Article 1E is not a Convention refugee or person in need of protection within the meaning of ss 96 and 97 of the *IRPA*.

[11] In relation to Article 1E, the RPD assessed Nancy and Jhon’s status in Costa Rica. Though there was some contradictory evidence from Nancy concerning her status in Costa Rica, on the day of the RPD hearing both parents were found to have permanent resident status or the equivalent in Costa Rica. The RPD also concluded that their status had not lapsed or been cancelled.

[12] In relation to state protection, the RPD rejected the Applicants’ explanations for failing to seek protection from police including that discrimination against Afro-Columbians in Costa Rica affected their ability to access state protection. On this specific point, it concluded that it did not find that general problems of discrimination for persons of colour in Costa Rica provided sufficient evidence to rebut the presumption of state protection and that the documentary evidence disclosed that Costa Rica had made serious efforts to address potentially discriminatory treatment in the country.

[13] On December 31, 2018, the RAD confirmed the RPD’s decision. This is the decision that the Applicants challenge in their application.

[14] For the reasons below, I will dismiss this application.

II. Issues

[15] The Applicants frame the issues as follows:

A. *Did the RAD Member err in her analysis of the Article 1E issue?*

B. *Did the RAD Member err in her analysis of state protection in Costa Rica?*

III. Standard of Review

[16] The standard of review for both issues is reasonableness.

IV. Analysis

[17] During the hearing, the parties agreed that the RAD stated and applied the correct test. The Applicants indicated that, in their opinion, the reviewable error was that the RAD was unreasonable in applying the test to the facts because it failed to conduct an independent assessment of the Article 1E issue and the state protection issue.

[18] In *Canada (Minister of Citizenship and Immigration) v Huruglica*, 2016 FCA 93 ["*Huruglica*"], the Federal Court of Appeal concluded that with respect to findings of fact and mixed fact and law that raise no issue of credibility of oral evidence, the RAD is to review the RPD decision on a correctness standard . This involves carefully considering the RPD decision and carrying out its own analysis of the record to determine whether the RPD erred (at para 103).

[19] On a number of occasions, this Court has held that the RAD must conduct “in substance, a thorough, comprehensive, and independent review of the kind endorsed in *Huruglica FCA*” (*Marin v Canada (Citizenship and Immigration)*, 2016 FC 847 at para 32, citing *Gabila v Canada (Citizenship and Immigration)*, 2016 FC 574 at para 20).

A. *Did the RAD Member err in her analysis of the Article 1E issue?*

[20] The Applicants argue that the RAD simply adopted the RPD’s finding and did not conduct an independent evaluation of the Article 1E issue on each Applicant, as the Federal Court of Appeal instructed in *Huruglica*. This error is evidenced by the RAD’s failure to assess whether Nancy and Jhon’s status in Costa Rica is different or whether Jhon’s permanent resident status had lapsed at the time of the RPD hearing. The Applicants’ submissions are that the RAD referred to the RPD’s conclusions, not to the evidence itself.

[21] The Applicants point out inconsistencies with respect to Nancy’s evidence of whether she was a permanent resident in Costa Rica. Contrary to her husband, Nancy had filed no proof she had permanent resident status. However, in her Generic Application Form for Canada dated June 9, 2016, she declared that she had permanent resident status and that the information she provided in her application form was truthful, complete and correct. In a CBSA interview dated June 1, 2016, she also stated that she had permanent resident status; however, on May 27, 2016 during another interview by a CBSA Officer, she said she had refugee status. In her RPD interview, her legal counsel asked the Applicant if “there was any difference in the privileges [she] enjoyed as a refugee document holder [in Costa Rica] and the privileges Jhon had as a permanent resident?” She explained that as a refugee she had to apply for a permit to leave and

return to Costa Rica, and her husband did not have to. At the second hearing, her counsel restated that Nancy had not applied for permanent resident status.

[22] The Applicants argue that the RAD did not conduct its own assessment of Nancy's situation or of the inconsistencies in her evidence. The Applicants submitted that when the RAD failed to do its own assessment of whether Nancy needed an exit visa, it adopted the error made by the RPD, making it a reviewable error.

[23] In addition, the Applicants argue that the RAD referred to what the Applicants did in Costa Rica rather than what their actual status was. Given there was no discussion of the differences in Nancy and Jhon's status, including whether Jhon had lost his, the Applicants say that all the RAD did was regurgitate the RPD's analysis without conducting a full review and an independent assessment.

[24] After assessing these arguments, in my view, the RAD was entirely reasonable and did not err.

[25] Contrary to the Applicants' argument, I find the RAD conducted an independent analysis of the Applicants' status when it stated as follows:

My review of the evidence is compatible with the RPD who concluded that at the time of the RPD hearing, the principal Appellant [Jhon] and his wife had status or access to status in Costa Rica which confers substantially similar rights to that of nationals. Their evidence is that they lived freely in Costa Rica for a period of 6 years until they decided to flee that country. They worked in Costa Rica where they had access to medical care and public insurance. They had legal documents authorizing

employment and a right of re-entry to Costa Rica [emphasis added].

[26] After reviewing the RPD's lengthy reasons concerning both Jhon and Nancy's status, the RAD clearly found that the RPD did not err in finding that Jhon and Nancy were treated the same whether they had the same status or not.

[27] The RAD noted that there was some controversy about Jhon and Nancy's status. This statement clearly indicates that the RAD was aware whether the couple's status had lapsed was in issue, otherwise there would have been no question as to Jhon's status. Therefore, although the RAD's explicit analysis of this issue was minimal, I am satisfied that when it stated that its review of the evidence was compatible with the RPD's findings, it was in fact expressing a general concurrence with the RPD's findings and reasons on this point.

[28] On this point, I would reach the same conclusion as the Honourable Madam Justice Strickland in *Irivbogbe v Canada (Citizenship and Immigration)*, 2016 FC 710 at para 39,

While it would have been preferable for the RAD to have explained why it agreed, as it was adopting the RPD's reasons it did not err by failing to repeat them. Further, the fact that the RAD did not refer specifically to the evidence does not preclude the Court from understanding why the RAD made its decision and permits it to determine whether the conclusion is within the range of acceptable outcomes (*NL Nurses*).

[29] The RAD also indicated that the Applicants themselves stated several times that they had permanent resident status in Costa Rica including in the memorandum of appeal in which they

stated: “indeed, [they] had the status equivalent to permanent residence and lived and worked in San Jose, Costa Rica without any problem for six years.”

[30] Before the RPD, the discussion surrounding equivalency, or as the RAD says “status or access to status”, centered on the fact the Nancy could leave and return to Costa Rica like her husband did, she just needed a permit that she had no trouble obtaining. The RPD also asked her several questions with respect to obtaining medical care, which she obtained without any difference from her husband’s medical care. In addition, like her husband, she could work without a permit or other permission.

[31] In *Dahal v Canada (Citizenship and Immigration)*, 2017 FC 1102 at para 37, the Honorable Chief Justice Crampton stated as follows:

By simply satisfying itself that no such additional errors were made, the RAD’s decision should not become vulnerable to being set aside on judicial review, based solely on its general concurrence with findings made by the RPD in respect of matters that were not raised on appeal by the Applicants. In my view, this would largely vitiate the purpose of Rule 3(3)(g) of the [*Refugee Appeal Division Rules, SOR/2012-257*], which requires an appellant to identify (i) the errors that are the grounds of the appeal, and (ii) where those errors are located in the RPD’s decision, or in the transcript recording of its hearing. [emphasis added]

[32] As in *Dahal*, the RAD cannot be faulted for its general concurrence with the RPD. There was little more to add than what the RPD had already said, as both Jhon and Nancy were treated the same in Costa Rica, and it was not argued before the RAD, nor obvious to the RAD, that it should do a separate analysis for the reasons I have set out.

B. *Did the RAD Member err in her state protection analysis in Costa Rica?*

[33] The Applicants further argue that the RAD did not conduct a contextual analysis when it analyzed why the Applicants did not seek state protection in Costa Rica. In particular, it failed to assess whether operational state protection was available to the Applicants in light of their status as Afro-Columbians.

[34] There is no disagreement between the parties that the Applicants did not ask for state protection; however, the parties disagree on whether the RAD erred in its assessment of state protection. The Applicants submit that it was not reasonable that the RAD did not do its own assessment of why, as Afro-Columbians, the Applicants did not seek state protection.

[35] The Applicants argue it is not enough to say that the state is making efforts, for example appointing an Ombudsman or a presidential commissioner for Afro-descendant affairs, as protection must come from the police. State protection must evaluate whether protection is effective at an operational level.

[36] Here, the RAD just restated the RPD's analysis, which speaks to the efforts made by the state to combat discrimination against Afro-Columbians, but fails to consider whether protection offered by the police to Afro-Columbians is effective at an operational level. Without adequate operational state protection in Costa Rica, the RPD should have accepted the Applicants' reasons as to why they did not seek state protection, and the RAD should have found that state protection was not available for the Applicants.

[37] Further, the Applicants argue that the RAD ignored documentary evidence (at page 272 AR) suggesting that Columbian refugees in Costa Rica may continue to face threats from, and be killed by, paid hitman from Columbia. The gang killing of the Applicants' family members evidences the fact that Costa Rica has serious issues protecting Columbian refugees from gang violence and that the state is not able to protect the Applicants.

[38] Considering the arguments laid out above, this issue must also fail as I find that the RAD was reasonable in its determination that the Applicants had state protection. I find that the RAD conducted its own review and determined that the RPD's finding would be upheld. The RAD accepted and gave consideration to new evidence, so the Applicants have failed to convince me that the RAD did not conduct its own assessment. The reasons indicate that the RAD set out the RPD's findings regarding state protection, as well as the new evidence it admitted and found as follows:

[49] All things considered, my review of the evidence reveals that the RPD fully and correctly addressed the issue of state protection in this case. After conducting a detailed and contextual assessment of the evidence, the RPD correctly determined that state protection is not perfect but it is adequate in Costa Rica and that it was unreasonable for the Appellants [Applicants] not to seek state protection against their fear of threats and criminality in that country." The RAD went on to say that as there was no identity of the assailant that killed his brother and no motive for the murder or details of the police intervention or lack of intervention that they did not have clear and convincing evidence to rebut the presumption of adequate state protection.

[39] The onus was on the Applicants to establish that there was no state protection to avail themselves of in Costa Rica. The documentary evidence reviewed and the evidence presented by

the Applicants does not rebut the presumption that state protection was available had the Applicants approached the authorities.

[40] The RPD reviewed in great detail the documentary evidence as well as the Applicants' evidence. Even though not addressed in the Applicants' Appeal Memorandum as an error, the RAD did review the findings regarding state protection as well as the availability of state protection to Afro-Columbians specifically.

[41] Although not explicitly stated, I am satisfied that the RAD's finding that the RPD fully and correctly addressed the issue of state protection, encompasses the RPD's finding that "[it was not satisfied that] the specific examples of incidents in which criminals were not apprehended by police, including in cases where the victim is Afro-Columbian...or general problems of discrimination for persons of colour in Costa Rica provide sufficient evidence to rebut the presumption of state protection."

[42] While the RAD's reasons for upholding this conclusion could have been clearer, a review of the record allows the Court to assess the reasonableness of this outcome (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador*, 2011 SCC 62 at para 15). Specifically, the Applicants pointed to incidents in which crimes against Afro-Columbians were not solved, but individual failures by police do not establish an inability of the state to provide operational state protect to this population. Further, none of the objective country condition evidence of discrimination against Afro-Columbians in Costa Rica actually tied it to the ability of the police to provide operational protection.

[43] The RAD's findings regarding the Applicants' failure to seek state protection are reasonable and supported by the evidence. The Applicants' submissions on operational adequacy must fail as the RAD's decision is reasonable.

[44] The application for judicial review is dismissed.

[45] No certified questions were presented to the Court and none arose from the materials.

JUDGMENT IN IMM-508-19

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed.
2. No question is certified

"Glennys L. McVeigh"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-508-19

STYLE OF CAUSE: JONH NUNEZ GARCIA ET AL v.
THE MINISTER OF
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CITIZENSHIP

PLACE OF HEARING: VANCOUVER, BRITISH COLUMBIA

DATE OF HEARING: JUNE 27, 2019

JUDGMENT AND REASONS: MCVEIGH J.

DATED: JULY 23, 2019

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