Federal Court  Cour fédérale

Date: 20120111

Docket: IMM-273-11

Citation: 2012 FC 37

Ottawa, Ontario, January 11, 2012

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

DAYANA ALEXANDER OSORIO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Ms. Dayana Alexander Osorio applies for judicial review of the December 21, 2010 decision by the Immigration and Refugee Board's Refugee Protection Division (RPD) which found that she is not a Convention refugee or a person in need of protection.

[2] The Applicant is a Colombian citizen. She claims a fear of persecution by FARC. She alleges the FARC attempted to extort one million pesos from her grandparents in Colombia in 2001.

The Applicant had been living in the United States since 1988. In 2009, the Applicant made a refugee claim in Canada; she and her mother had taken no previous steps to claim protection.

[3] The RPD found that the Applicant and her mother's failure to claim asylum status in the US was not consistent with a subjective fear of persecution in Colombia. The RPD found that this was fatal to the Applicant's claim. In the alternative, the RPD found that the Applicant had failed to rebut the presumption of adequate state protection in Colombia.

[4] I dismiss this application for judicial review for the reasons that follow.

Facts

[5] The Applicant, Dayana Alexander Osorio, is a citizen of Colombia. The Applicant's parents brought her to the United States to seek a better life when she was nine years old. She has never been back to Colombia since that time.

[6] In September 2001, when the Applicant was 13 years old, her grandparents allegedly received demands for one million pesos from the FARC. At the time, the Applicant was living with her parents who were in the US without any legal status; they did not take any steps to claim asylum in the US.

[7] In 2007, four of the Applicant's relatives came to Canada to claim refugee protection. They were all granted refugee protection on May 11, 2009, based on the 2001 demands from the FARC.

[8] In January 2009, the Applicant's mother married a US citizen and was able to regularize her status. The Applicant was not included in her mother's application for residency, because she was almost 21 years old by this time.

[9] In October 2009, when the Applicant was 21 years old, she came to Canada and made a refugee claim at the port of entry on the basis of the 2001 FARC threats against her grandparents.

[10] The Applicant relied on the narratives of her relatives, and attached three Personal Information Form (PIF) narratives from her relatives to her own PIF. These narratives describe the 2001 incident with the FARC in some detail, particularly the narrative of her aunt Maria Isabel Osorio Mejia, who was present when the alleged persecutory incidents occurred. Ms. Mejia states that the family initially received threatening phone calls from individuals who identified themselves as members of FARC. The callers stated that they knew everything about the family; they knew they had relatives in the US, and demanded that they make a monthly payment of one million pesos.

[11] The family changed their phone number, but the calls did not stop. At the end of October 2001, FARC members came to the house. They were armed, pointed a gun at the family members, and asked for money. They also asked Ms. Mejia to put properties that the FARC had taken from others in her name, so they could be sold. If the police came after the person who was involved in the land transaction, she would be seen as the person responsible. The FARC members said that if Ms. Mejia did not comply they would immediately kill all her family members in front of her.

[12] After the FARC members left the home, the Columbian family members fled to Medellin. They stayed in hiding at different locations until they were able to flee Colombia in November 2001. They went to the United States. They never contacted the police in Colombia.

[13] The family members learned after they had fled that the FARC continued to ask their neighbours about their whereabouts.

[14] Ms. Mejia's narrative states that they did not apply for asylum in the US because they were advised they could not do it because they had no status and did not have valid visas or passports.

[15] The Notice of Decision showing that four of the Applicant's relatives were granted refugee status was also before the RPD; however, the reasons for the Notice of Decision were not included in the record before the RPD.

Decision Under Review

[16] The RPD found that the family's failure to claim asylum status in the US was not consistent with a subjective fear of persecution in Colombia. The RPD noted that the Applicant testified that 14 members of her family left Colombia and went to the US, but none of them claimed protection in the US.

[17] The RPD also noted that the Applicant's mother took no action to normalize her status or her daughter's status for seven years after learning of the alleged persecutory events in 2001. The

Applicant's uncle was found by the US authorities and deported back to Colombia in 2007, where he still lives.

[18] The RPD found that there was no explanation why the Applicant's mother took no steps until 2009 to regularize her status. The RPD concluded that the Applicant's failure to claim refugee protection for eight years was fatal to her claim.

[19] The RPD recognized that a number of the Applicant's relatives were granted refugee protection, but concluded that, "I am not bound by those decisions as I am not privy to the evidence that was presented at the hearing".

[20] The RPD analyzed the availability of state protection in the alternative. The RPD briefly reviewed some jurisprudence on state protection, and then reviewed at least 10 country documents in some detail, concluding that the Applicant failed to rebut the presumption of state protection.

[21] The RPD concluded that the documentary evidence showed that the state had been effective at responding to the needs of individuals, and was addressing corruption at the highest levels. The RPD recognized that the FARC was still operating, but its sphere of influence was getting smaller and is reduced to some remote border mountain areas. The defence forces have been going after the FARC, and other paramilitary groups, and have been achieving tangible results. Because of this, the RPD concluded that Colombia can provide adequate though not perfect state protection.

Legislation

[22] The *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) provides:

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 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	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) 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,

Issues

[23] This application for judicial review raises two issues:

1. Was the RPD's finding that the Applicant's delay in claiming was determinative of her claim unreasonable?
2. Was the RPD's state protection analysis unreasonable?

Standard of Review

[24] Determinations of delay in claiming protection are essentially fact based: *Rios v Canada (Minister of Citizenship & Immigration)*, 2006 FC 1437, 304 FTR 192 at para 28. The appropriate standard of review for questions of fact is that of reasonableness: *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 53.

[25] Questions of the adequacy of state protection are "questions of mixed fact and law ordinarily reviewable against a standard of reasonableness": *Hinzman v Canada (Minister of Citizenship and Immigration),* 2007 FCA 171, 282 DLR (4th) 413 at para 38.

Submissions of the Applicant

Delay as a determinative issue

[26] The Applicant submits the RPD failed to consider her explanation as to why she did not make a claim for political asylum in the US. The Applicant submits that she was a minor at the time, and had no say in whether a claim was made. By the time she reached the age of majority she was precluded from making a claim in the US.

[27] The Applicant submits that if delay is not generally a determinative factor, then it cannot constitute sufficient grounds on which to dismiss a claim. In support of this position, the Applicant relies on *Saez v Canada (Minister of Employment and Immigration)* (1993), 65 FTR 317, 21 Imm LR (2d) 15 at paragraph 5 where Justice Dubé held that "delay in making a claim, while relevant, is not a decisive factor in itself".

[28] The Applicant also points to the Federal Court of Appeal's decision in *Huerta v Canada (Minister of Employment and Immigration)* (1993), 157 NR 225, 40 ACWS (3d) 487, where the Court confirmed at paragraph 4 that delay was not a decisive factor, but it was a relevant element which a tribunal could take into account.

[29] The Applicant submits that even if there are exceptions to the general rule that delay is not determinative, the facts of this case do not amount to circumstances where the delay should be determinative of the claim.

State Protection

[30] First, the Applicant argues that the RPD has selectively considered the evidence on state protection. The Applicant submits the evidence before the RPD was mixed and often ambiguous. Rather than weigh this conflicting evidence, the Applicant argues the RPD only cited examples from the documentary evidence which support the RPD's position that adequate protection exists. The Applicant has provided a number of examples from the documentary evidence which contradict the RPD's findings. In general, these demonstrate that the FARC is still active.

[31] Second, the Applicant criticizes the RPD's summary of the country conditions in two paragraphs of the decision. The Applicant notes the member has not included a source for these paragraphs. The Applicant asserts that the RPD is not an expert witness, and cannot simply put forward its own views about the existence of state protection in Colombia.

[32] Third, the Applicant asserts that the RPD is biased. The Applicant points to the RPD's selective reliance on the country documents, as well as the RPD's expression of its own views on state protection in Colombia. The Applicant also points to the fact that the RPD brought its own documentary evidence to the hearing. The Applicant argues there was no need to supplement the documentary evidence available at the hearing. There was no recent change in country conditions which would require introducing new country evidence.

[33] Finally, the Applicant contends that the RPD ignored probative evidence that goes to determinative issues; in particular the Applicant's own evidence, and the Immigration and Refugee Board's Response to Information Request. The Applicant provided her own documentation, which indicated that the FARC had gained territory and maintained its fighting capacity, and was re-arming for extortion in Bogota. According to the Applicant, this information was particularly important to the decision, because it indicates that the FARC could track their victims over the long term, even when individuals return to Colombia after being away for an extended period of time.

Analysis

Was the RPD's finding that the Applicant's delay in claiming was determinative of her claim unreasonable?

[34] Delay can be a determinative factor in certain circumstances, where the Applicant fails to provide an explanation for the delay: *Espinosa v Canada (Minister of Citizenship & Immigration)*, 2003 FC 1324, 127 ACWS (3d) 329 at para 17.

[35] The Court has upheld findings that the delay pointed to a lack of subjective fear. In *Rahman v Canada (Minister of Citizenship & Immigration)*, 2006 FC 729, the Court upheld a finding that a seven year stay in the US before claiming protection in Canada demonstrated a lack of subjective fear. In *Mantilla Cortes v Canada (Minister of Citizenship & Immigration)*, 2008 FC 254, 165 ACWS (3d) 509, the Court upheld a finding that a 5 year delay in the US was inconsistent with a subjective fear. In *Espinosa*, above, the Court upheld a finding that a 14 month delay in seeking protection was inconsistent with a subjective fear. Finally, in *Jeune v Canada (Minister of*

Citizenship & Immigration), 2009 FC 835, the Court upheld a negative credibility finding based in part of a failure to claim protection at the first opportunity without a satisfactory explanation.

[36] In this case, the RPD found that the length of the delay was significant. The genesis of the Applicant's claim occurred in September 2001, but she did not claim protection until October 2009. The RPD considered the Applicant's explanation for this eight year delay; the Applicant stated she was only a minor and that she had no say in whether to claim asylum status in the US. This required the RPD to consider the actions and any explanation of the mother.

[37] The RPD found that there was no explanation as to why the Applicant's mother took no steps until 2009 to claim protection. The Applicant's mother did not testify on behalf of the Applicant to provide the RPD with an explanation for the delay. The only explanation provided by the Applicant as to the mother's failure to claim protection was that her mother got advice from lawyers and they told her that it was too late.

[38] I am satisfied the RPD's finding on the issue of delay is well within the reasonable outcomes available based on the evidence before the RPD. The RPD properly took into account the fact that the Applicant herself was unable to claim protection while a minor and focused on the actions of the Applicant's mother. While the Applicant's aunt testified at the hearing, it was the reasons for the Applicant's mother's failure to claim asylum that were directly relevant to this issue.

[39] The Applicant was unable to provide a satisfactory explanation for the delay and the RPD's finding on this issue, including the finding that this is determinative of the case, is reasonable. The application for judicial review can be dismissed on this issue alone.

Was the RPD's state protection analysis unreasonable?

[40] The RPD undertook a review of country documents from UNHCR, the US Department of State, Amnesty International, UK Home Office, Europa World Year book, and the International Crisis Group. The RPD noted that this evidence indicated that some FARC guerrillas were demobilized, government officials had been prosecuted for corruption, and government operations against the FARC had tangible results and resulted in the deaths of several members of the FARC central command. The FARC had largely withdrawn to the jungle and mountains, and is not active in large urban centres. FARC fronts were driven out of Cali, Bogota and Medellin in the early 2000s.

[41] The RPD acknowledged the existence of evidence setting out a contrary view. Specifically, the RPD acknowledged that the FARC has not been completely disarmed or disabled, and has continued to carry out attacks against civilians. Selective use of country document evidence does not necessarily amount to an error: *Gilbert v Canada (Minister of Citizenship & Immigration)*, 2010 FC 1186, 378 FTR 179. The RPD is expected to glean relevant aspects from the evidence. It is only when the RPD fails to mention the substance of critical documentary evidence which runs contrary to their findings that a reviewing court is likely to interfere; a failure to refer to the particularities of any specific article does not amount to a reviewable error. I find the RPD did consider the substantive content of the contrary evidence.

[42] I see no issue with the RPD bringing documents to the hearing. Rule 29(2) of the *Refugee Protection Division Rules*, SOR/2002-228 specifically provides that documents may be disclosed, not only by a party, but also by the RPD. These articles were relevant as they portrayed recent significant attacks by the government against the FARC occurring a month before the hearing. In any event, these articles are only mentioned in one paragraph of the decision, while there are nine pages of discussion of other country documents.

[43] Finally, I find the Applicant has failed to meet the high threshold for bias. The Applicant did not raise this issue during the RPD hearing. If there is any issue with bias, the Applicant waived it by failing to raise it at the earliest opportunity.

[44] I conclude the RPD applied the relevant legal principles and thoroughly reviewed the documentary evidence. The RPD's state protection analysis finding is reasonable.

Conclusion

[45] The Applicant's application for judicial review is dismissed.

[46] Neither party has proposed a question for certification and none is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Leonard S. Mandamin"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-273-11
STYLE OF CAUSE:	DAYANA ALEXANDER OSORIO v. MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	AUGUST 23, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	MANDAMIN J.
DATED:	JANUARY 11, 2012

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