Federal Court Cour fédérale

Date: 20130503

Docket: IMM-6076-11

Citation: 2013 FC 466

Toronto, Ontario, May 3, 2013

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

PEDRO IGNACIO CACERES SALAZAR
MARIA CRISTINA ALONSO PRIETO
KEVIN STIVEN CACERES ALONSO
CRISTIAN CAMILO CACERES ALONSO

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants apply for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (RPD), dated August 18, 2011. The RPD refused the Applicants' claim for refugee protection pursuant to section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] The Applicants are Pedro Ignacio Caceres Salazar, the father and principal applicant (PA), Maria Cristina Alonso Prieto, his wife, and their two sons, Kevin Stiven Caceres Alonso and Cristian Camilo Caceres Alonso. All are citizens of Colombia.

[3] The PA alleged that in 1998 he was targeted for extortion and threatened by the guerrillas of the Revolutionary Armed Forces of Colombia (FARC). He left Colombia for a time with his family for the United States of America (USA) but when he tried to re-settle in Colombia in 2010 he was again targeted by FARC. He came to Canada with his wife and sons and claimed refugee status in May 2010.

[4] The RPD determined that the Applicants are not Convention refugees and are not persons in need of protection.

[5] I conclude that the RPD's decision that the Applicants are neither Convention refugees nor persons in need of protection is reasonable and I dismiss the application for judicial review.

Background

[6] Since 1985, the PA had operated a business that designed and manufactures machinery for the poultry industry. Over a period of several months in 1998, he said he received approximately 15 threatening calls from FARC demanding that he pay $1000 US monthly or they would harm his family. The PA alleges he was warned by the callers not to go to the authorities and he did not contact the police.

[7] On November 28, 1998, the Applicants fled Colombia to the USA using visitor visas. The PA applied for and was granted E-1 investment visas for himself and his wife. His children were granted I-94 permits. When his daughter's I-94 expired, it was not renewed because she was by then married and over the age of 21. The PA's daughter went to Canada on September 30, 2008, filed for refugee status which was granted on July 14, 2009.

[8] When the PA's E-1 visa expired, he had to return to Colombia to have it renewed. The PA returned to Colombia in July 2009, but was twice denied the E-1 visas for himself and his wife. In January 2010, they obtained visitor visas and returned to the USA on January 26, 2010. The PA said, however, that he returned to Colombia in February 2010 to see if he could re-settle in Colombia.

[9] The PA claimed that on May 6, 2010 his secretary received a call from the FARC demanding that he pay them $10,000 US. The PA reported the incident to the CAI, the Immediate Attention Centre in Puente Aranda that same day.

[10] The next day, on May 7, 2010, the PA went to the police and they referred him to the United Action for Personal Freedom Group (GAULA). He spoke to a GAULA superintendent who confirmed his story with the secretary. The PA says the superintendent recommended the PA pay the demand and they, GAULA, would take care of the extortionists. The PA stated that GAULA said they could not give the PA anything in writing because they could not file a report based on a single call.

[11] The PA says on May 8, 2010 he stayed in hiding at his business warehouse some distance away. On May 9, 2010, he packed, went again to the police who referred him to the Extortion and Kidnapping Unit of the Paloquemao police department. The latter also said they would not write up a report because there was no evidence. He returned to the GAULA and again reported the threatening call. Although asked to stay, the PA then left Colombia for Panama.

[12] The PA said he left Colombia on May 9, 2010 for Panama, and continued to the USA on May 13, 2010. He came to Canada on May 14, 2010 with his family and filed for refugee status.

Decision Under Review

[13] The RPD considered the PA's credibility and subjective fear, the existence of an internal flight alternative (IFA) and state protection.

[14] The RPD accepted that the Applicants were Colombian, that the PA had a business in Colombia and that the PA has a daughter who obtained refugee status in Canada. The RPD also accepted the PA has a wife and children and is well travelled. Finally, the RPD believed that the PA spent a considerable length of time in the USA and that he had been granted an E-1 visa. Beyond this, the RPD believed very little of anything else the PA alleged.

[15] The RPD stated that it examined the inconsistencies and implausibilities in the PA's evidence and testimony. The RPD provided several examples.

[16] The RPD noted that the PA testified that he received about 15 threatening calls in 1998 from the FARC but never made any reports to the police because his family was threatened. The PA and his family went to the USA on November 28, 1998 seven or eight months after the threatening calls started. The RPD went on to note that when the PA returned to Colombia in February 2010, after receiving just one extortion call, the PA immediately made several reports to the police, all within a four-day period. The PA explained that he did not make a police report in 1998 because his family was then in Colombia but in 2010 his family was outside the country.

[17] The RPD raised its concern with the PA. The PA answered that the FARC are capable of obtaining personal information about people. The PA testified that the 2010 FARC caller stated that they were watching the PA and his family. The RPD found this explanation unreasonable because the PA's family was not in the country at that time. The RPD found the PA's inconsistent explanation of why he did not originally report the calls to the police in 1998 and why that changed in 2010 undermined the PA's credibility.

[18] The RPD also noted the PA did not provide objective evidence that the PA went to the police despite allegedly going to three levels of policing. The RPD rejected the allegation that the PA was not given copies of his complaints. The RPD found that the PA fabricated his story about the threats and extortion demand by the FARC.

[19] The RPD found that the PA's original intention for returning to Colombia in February 2010 was to make a complaint against the FARC to the police in order to help his refugee claim. However, any police documentation would not be helpful on the issue of state protection. The RPD

found that the PA therefore simply did not submit police reports to the RPD, choosing rather to say that he made his complaints, but the authorities were so indifferent to his plight that they did not even record his complaint.

[20] The RPD also determined that the PA's actions did not support his allegation of a subjective fear. It was evident that the PA and his family had returned to Colombia at various times during the ten plus years after 1998. The RPD noted that the PA himself testified that he had stayed in Colombia at various times from 3 to 5 days, sometimes a week, and even up to a month. The RPD found that this did not demonstrate a subjective fear on the part of the PA.

[21] A further example of an implausibility identified by the RPD related to the lack of continuing extortion demands by the FARC against the PA's business in Colombia. The PA left his business in the hands of Mr. Garrote, his business manager. The RPD noted that there was no evidence that the FARC tried to extort money from Mr. Garrote who continued to run the PA's business. The RPD found it implausible that the FARC would call the PA at his business in 1998, make threatening calls, and then fail to call on the business again until 2010 when the PA decided to re-establish himself in Colombia.

[22] As a result, the RPD found that the PA was lacking in credibility.

[23] The RPD asked the PA if he considered moving to Medellin. The PA replied no because his life and those of his family would be endangered anywhere in the country. The RPD asked how the PA knew this to which the PA replied the FARC operate in the whole country. The FARC knew the

names of the schools his children were studying at, his home address and his personal information because the FARC have confidential information of government, bank and companies from their informants. Again asked how he knew this, the PA stated he just knew. The RPD found this explanation to be unreasonably speculative and rejected it.

[24] The RPD was unconvinced by the PA's statement that the police in Medellin could not protect him because there were too many Colombians for the authorities to protect. The RPD concluded that there was a viable IFA in Medellin.

[25] The RPD noted that the evidence showed that the Applicants returned to Colombia many times and nothing happened to him and his family. The PA testified that he returned to Colombia in July 2009 and only returned to the USA in January 2010. During these five to six months in the country, the PA had no problems with FARC.

[26] The RPD found the PA's testimony regarding the ineffectiveness of state protection was not persuasive, since it was largely unsubstantiated and not consistent with the documentary evidence.

[27] The RPD noted that when the PA was asked why the callers would hang up the phone when his secretary attempted to pass the phone to him, he explained that normally when the caller (FARC) makes a call, they are brief because GAULA could be listening, so they do not want to take the risk of being detected on the recording system and then be able to be located by GAULA. The RPD found the PA`s testimony confirmed that the authorities had taken steps to combat the activities of the FARC.

[28] The RPD found that the PA had not rebutted the presumption of adequate state protection existed or establish that it would not be available to him. The RPD found that the PA left before the police could have made any attempt to investigate, despite being asked to remain in the country.

[29] The RPD found state protection existed. The PA could have obtained protection but left without giving the authorities time to investigate.

[30] The RPD determined that the Applicants had not satisfied the burden of establishing a serious possibility of persecution for a Convention ground, or that they would personally be subjected, on a balance of probabilities, to a danger of torture, or a risk to life or a risk of cruel and unusual treatment of punishment upon return to Colombia.

Legislation

[31] The *Immigration and Refugee Protection Act*, SC 2001, c 27 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,
(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

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

[32] The *Federal Courts Act*, RSC 1985, c F-7 provides:

18.1(4) The Federal Court may grant relief under subsection (3) if it is satisfied that the federal board, commission or other tribunal	18.1(4) Les mesures prévues au paragraphe (3) sont prises si la Cour fédérale est convaincue que l'office fédéral, selon le cas:
…	…
(d) based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it;	d) a rendu une décision ou une ordonnance fondée sur une conclusion de fait erronée, tirée de façon abusive ou arbitraire ou sans tenir compte des éléments dont il dispose;

Issues

[33] The Applicants raise two issues in this judicial review. Were the RPD's findings reasonable and did the RPD ignore evidence?

[34] In my view, these issues are essentially the same. The issue is whether the RPD's decision was reasonable or not.

Standard of Review

[35] The Supreme Court of Canada held in *Dunsmuir v New Brunswick*, 2008 SCC 9 (*Dunsmuir*) that there are only two standards of review: correctness for questions of law and reasonableness for questions of mixed fact and law and fact. The Supreme Court also held that where the standard of review has been previously determined, a standard of review analysis need not be repeated. *Dunsmuir* at paras 50 and 53

[36] This Court has held that implausibility and credibility determinations are factual in nature. The appropriate standard of review applicable to credibility and plausibility assessments is that of reasonableness with a high level of deference. *Wu v Canada (Minister of Citizenship and Immigration)*, 2009 FC 929 at para 17 (*Wu*)

[37] 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 & Immigration)*, 2007 FCA 171 at para 38 (*Hinzman*). The RPD's determination regarding the viability of an IFA is also a question of mixed law and fact to be assessed on a standard of reasonableness. *Rahman v Canada (Minister of Citizenship & Immigration)*, 2012 FC 127 at para 21 (*Rahman*)

<u>Analysis</u>

[38] The Applicants argue that the RPD's findings with regards to the PA's credibility and the finding of state protection and IFA are unreasonable.

[39] The Applicants submit the RPD based its decision, in part, on a finding that it was implausible that the FARC did not continue extorting the PA's business after he left Colombia in 1998. The Applicants submit the evidence was that the PA liquidated his company and formed a new company. The Applicants submit the PA's name did not appear in the registration or documentation concerning the new company and that this evidence had been provided to the RPD in a business certificate from the Bogota Chamber of Commerce, dated December 1999. The Applicants submit the RPD did not acknowledge this documentary evidence and did not discuss this point. The Applicants argue the RPD failed to consider whether the closing of one company and opening of another not registered in the PA's name could have provided an explanation for the failure of the FARC to continue with the extortion demands against the PA's business in his absence.

[40] In my view, the RPD did not err by not specifically mentioning the business certificate. First, the testimony of the PA was that the business was left in the hands of Mr. Garrote who continued as the business manager. Second, the business certificates and indeed a number of other documents are in Spanish. These documents were not fully translated into English. Instead, only selected portions are translated. The Applicants cannot rely on documents submitted in a language other than English or French. The RPD cannot be faulted for not specifically relying on nor mentioning these documents.

[41] The Applicants also submit the RPD did not confront the PA with its concern about the extortion demands not continuing after he left the country. The Applicants submit that this was a breach of the rules of natural justice.

[42] The Applicants rely on a decision by Chief Justice Lutfy in *Martinez de la Cruz v Canada (Minister of Citizenship and Immigration)*, 2011 FC 259 at paragraph 4 where he stated:

> It is trite law that not every inconsistency must be put to a claimant. Here, however, the inconsistencies were directly related to the member's negative credibility finding. It was necessary, in the circumstances of this case, for the member to confront the claimants with the first narrative by raising her concerns during the hearing. The member failed to do so.

[43] As the Applicants have stated, this particular inconsistency was part of the RPD's determination that the PA was not credible. However, there is no legal or natural justice obligation for the RPD to confront a witness with inconsistencies in the evidence. *Guci v Canada (MCI)*, 2004 FC 1033 [*Guci*] at para 26.

[44] While this specific implausibility may not have been brought to the attention of the PA, a number of others were. It was the cumulative effect of all the implausibilities and inconsistencies in the PA's testimony and documents that led the RPD to find that the PA was not credible.

[45] I find the RPD did not err by not confronting the PA with this inconsistency at the hearing.

[46] The Applicants also take issue with the RPD's treatment of the notarized statement from the PA's secretary stating that she received the threatening phone call from the FARC in 2010. The Applicants submit this evidence corroborated the PA's claim that he was targeted in 2010.

[47] It does appear the RPD's determination to afford Ms. Beltran's statement little weight is vague and not well explained. However, it is clear that the RPD had already determined, based on

the evidence, that the PA's actions did not demonstrate a subjective fear because he often returned to Colombia. The RPD determined that the Beltran statement although corroborating the PA's claim, was not further corroborated by any police report. The Beltran statement was insufficient to outweigh the other inconsistencies and examples of re-availment. While it may have been more desirable for the RPD to have explained more clearly why Ms. Beltran's evidence was given little weight, I nevertheless conclude the RPD reasons clearly demonstrate that the inconsistencies and implausibilities in the PA's narrative are the reason the RPD found the PA to be not credible.

[48] The Applicants submit several of the RPD's credibility findings in relation to the Applicants' evidence were based on the RPD's view of the plausibility of events in Colombia, including the way it expected the FARC to behave in the circumstances. The Applicants submit this Court has often the point that FARC is a terrorist group whose actions cannot be predicted with any degree of certainty and that it is an error to require an applicant to prove that violent agents of persecution act rationally or justifiably.

[49] The Applicants submit there is nothing truly implausible about the following:

a. the PA having complained to the authorities about his 2010 persecution but not about his persecution in 1998 given his explanation that the difference was that he was concerned about the safety of his family and in 2010 they were outside the country;

b. the FARC not having interfered with his selling of his home in Columbia; and

c. the police authorities refusing to provide a written report concerning the PA's 2010 extortion complaint.

[50] With regards to the first, the RPD found the testimony of the PA implausible because when the PA received the call in 2010, the FARC member stated that FARC was "watching him and his family". The RPD found that this allegation implausible because the PA's family was not in Colombia in 2010.

[51] With regards to the second, the RPD did not believe that the PA sold his home. The RPD stated:

> He also said that he sold his home, but he presented no documents of his house having been sold. The panel does not believe that he sold his home in Colombia; if he did, on a balance of probabilities, he would have presented documentation, but he did not.

As such, the RPD had a basis for coming to the conclusion it did.

[52] With regards to the third, it was not unreasonable for the RPD to anticipate that the Colombian authorities would provide a written report concerning the PA's complaint. I do not agree that there is nothing implausible about the Colombian authorities not providing the PA with a copy of the police report when the PA testified the GUALA superintendent did followed up on his compliant, interviewing the secretary and viewing the business.

[53] In my view, the RPD's finding that the PA was not a credible witness was reasonable given the inconsistencies in the PA's evidence. The RPD has expertise in assessing the credibility of refugee claimants.

[54] I concur with Justice Mactavish when she stated in *Guci*:

> As has often been observed, the Immigration and Refugee Board has a well-established expertise in the determination of questions of fact, including the evaluation of the credibility of refugee claimants. Indeed, such determinations lie at the very heart of the Board's jurisdiction.

The RPD is to be afforded significant deference with regards to its credibility findings. I am not persuaded the RPD made any reviewable errors on these findings.

[55] The Applicants submit that if the Court sets aside the RPD's credibility determination, the RPD's alternative state protection and IFA findings should not be upheld. The Applicants submit that the errors in the RPD's credibility assessment tainted its state protection and IFA findings. As I have concluded that the RPD's credibility determination was reasonable, this particular argument of the Applicants does not stand.

[56] The Applicants also submit the RPD failed to consider evidence before it that was contrary to the RPD's finding that adequate state protection or a viable IFA was available. Specifically, the Applicants submit the RPD erred by not referring to reports made by Drs. Brittain and Chernick in *Ortiz Rincon v Canada (MCI)*, 2011 FC 1339 [*Ortiz Rincon*] at paragraphs 15-16 which suggest that state protection is not available and the extensive reach of the FARC means there is no safe IFA available.

[57] In my view, this case is distinguishable. In *Ortiz Rincon*, the RPD accepted that the applicant had been targeted, but found that the FARC had not located the applicant after he moved to Bogota. In that case, the RPD made several findings that were contrary to the evidence before the RPD. There was no issue in that the respondent in that case acknowledged there was contrary evidence. As a result the RPD there was necessarily to have regard to the documentary evidence contrary to the RPD’s ultimate conclusion.

[58] In this case, no such errors were made by the RPD. The RPD reasonably found that the PA did not have a subjective fear of the FARC, that the PA did not receive the threatening phone call in 2010, and that the PA did not make a genuine attempt to seek state protection.

[59] In *Quinatzin v Canada (Minister of Citizenship and Immigration)* 2008 FC 937 (*Quinatzin*) this Court held that the RPD’s duty to expressly refer to evidence that contradicted its key findings as per *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 (*Cepeda-Gutierrez*) does not apply where the contrary evidence in question is only general country documentary evidence.

[60] *Quinatzin* applies. The reports submitted by the Applicants are general country documents which are not specific to the Applicants. The RPD stated that it considered all the evidence submitted and acknowledged documentary evidence was mixed.

[61] I find the RPD reasonably found that the PA failed to rebut the presumption of adequate state protection not did the PA demonstrate a viable IFA did not exist in Medellin. These

determinations were available to the RPD based on the evidence before it including both the country documentation as well as the PA's own testimony.

Conclusion

[62] I conclude that the RPD's decision that the Applicants are neither Convention refugees nor persons in need of protection is reasonable. I would dismiss the application for judicial review.

[63] The issues in this case generally involve questions of fact finding. As such I see no need to certify a question of general importance.

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

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