

Federal Court



Cour fédérale

Date: 20140124

Docket: IMM-3307-13

Citation: 2014 FC 82

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, January 24, 2014

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

**ADRIANA LUCIA ARIAS ORTIZ
JORGE OCTAVIO RESTREPO RAMIREZ
CARLOS AUGUSTO JIMENEZ ARIAS
ELISA JIMENEZ ARIAS**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) of a decision dated February 18, 2013, wherein the Refugee Protection Division (RPD) of the Immigration and Refugee Board determined that the applicants were neither Convention refugees nor persons in need of protection within the meaning

of section 96 and subsection 97(1) of the Act. For the following reasons, the application for judicial review will be allowed.

Factual background

[2] Adriana Lucia Arias Ortiz (the female applicant), her two minor children, Carlos Augusto Jimenez Arias and Elisa Jimenez Arias, and the female applicant's spouse, Jorge Octavio Restrepo Ramirez (the male applicant) are citizens of Colombia (collectively, the applicants).

[3] The male applicant arrived in Canada and claimed refugee protection on December 12, 2012. The female applicant and her children arrived in Canada on December 18, 2012, and claimed protection from Canada that same day.

[4] The male applicant claims to have worked at the Department of national planning in Mocoa from June 2009 until December 2011, where he was in charge of auditing public contracts for various municipalities in the department of Putumayo. During one of his audits, he apparently discovered irregularities in the contracts of the municipality of Orito, which purportedly led to financial sanctions against the municipality that rendered it incapable of paying its sub-contractors. The sanctions allegedly made it impossible for these municipal sub-contractors to honour their own commitments towards the Revolutionary Armed Forces of Colombia (FARC).

[5] Following these sanctions, the FARC allegedly threatened the male applicant and female applicant on several occasions. In particular, a letter from the commander of FARC's Front 48 accused the male applicant of being on the government's payroll and described him and his family

as a [TRANSLATION] “military objective” of the FARC (Applicants’ Record at pages 41, 37, Exhibit D-10). The applicants moved to escape the FARC. In 2012, the female applicant purportedly eluded an attempted kidnapping.

[6] Following FARC threats, a number of complaints were lodged with the local police office or with the Attorney General of Neiva-Huila, to no avail.

[7] The applicants left Colombia for Miami on December 9, 2012. The principal applicant entered Canada on December 12, 2012, and the rest of his family joined him on December 18, 2012.

[8] The RPD heard the applicants’ claim for refugee protection on February 18, 2013, and rejected it on April 12, 2013.

Impugned decision

[9] The RPD found the applicants to be generally credible, but rejected their allegations that they had been persecuted by the FARC. The RPD further determined that the risks faced by the applicants were no different than those faced by any professional with a decent standard of living in Colombia. The RPD then asserted that the Applicants had failed to rebut the presumption of state protection.

Issue

[10] This application raises only one issue, namely, whether the RPD's decision was reasonable.

Standard of Review

[11] The applicants submit that the reasonableness standard applies here (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, [2008] 1 SCR 190 (*Dunsmuir*)). The respondent did not make submissions as to the standard of review.

[12] The Court is of the opinion that a review of a finding of the RPD on the credibility of refugee claimants is subject to a standard of reasonableness (*Roy v Canada (Minister of Citizenship and Immigration)*, 2013 FC 768 at paragraph 15, [2013] FCJ No 815; *Ortega v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1166 at paragraph 6, [2010] FCJ No 1474). The same applies to the issue of whether a claimant has discharged their burden of rebutting the presumption of state protection (*Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at paragraph 38, [2007] FCJ No 584).

[13] A court reviewing a decision on a standard of reasonableness must not reweigh the evidence, but must limit its review to verifying "the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para 47).

Analysis

Credibility

[14] The RPD did not challenge the general credibility of the applicants or the authenticity of the various pieces of evidence submitted. It did, however, cast doubt upon the credibility of the applicants when they stated that the FARC were behind all of the threats and intimidation directed towards them. In doing so, it concluded that the threats made against the applicants could have come from any criminal group and that it was a risk faced by all prosperous Colombians.

[15] The case law recognizes that the Court must show considerable deference when reviewing credibility findings, as such findings are highly factual in nature (*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 at paragraph 5, 160 NR 315; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 46, [2009] 1 RCS 339; *Francis v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1078 at paragraph 7, [2011] FCJ No 1336). While the RPD is free to examine the documentary and testimonial evidence from a logical and common sense perspective, noting any omissions or inconsistencies found therein, its negative findings must nonetheless be supported by the evidence (*Mboudu v Canada (Minister of Citizenship and Immigration)*, 2012 FC 881, [2012] FCJ No 973).

[16] In this case, the Court notes that the authenticity of the threatening letter describing the applicants as a “military objective” of the FARC, dated May 24, 2011, was not called into question, nor was the fact that it had been written by a member of the FARC (Applicants’ Record, page 41, Exhibit D-10). Nor did the RPD question the authenticity of the copies of complaints filed by the applicants with Colombian authorities, dated May 25, 2011, (Applicants’ Record at pages 34-36,

Exhibit D-10), July 18, 2011 (Applicants' Record at pages 42-49, Exhibit D-11), November 4, 2011 (Applicants' Record at pages 68-69, Exhibit D-17), August 1, 2012 (Applicants' Record at pages 52-57, Exhibit D-13), August 23, 2012 (Applicants' Record at pages 60-65, Exhibit D-15) and September 25, 2012 (Applicants' Record at pages 72-78, Exhibit D-19). In each one of these complaints, the applicants describe the incidents they experienced – threatening calls, attempted intimidation, kidnapping and assault – and expressly tie these incidents to the FARC.

[17] The RPD writes a number of times that it does not doubt that the applicants have been victims of attempted theft and assaults by criminals (RPD Decision at paragraphs 17, 36), but asserts that “a number of individuals or groups could have been the source of the threats, including the entrepreneurs frustrated with his audit reports.” Given that the applicants did not produce documentary evidence corroborating the alleged sanctions imposed on the municipality of Orito following the male applicant's audit, and that there were certain chronological inconsistencies revealed at the hearing, the RPD found that “the male claimant's statements about the FARC threats are just speculative” (Panel's Decision at paragraph 26).

[18] However, although it was completely open to the RPD, faced with omissions or inconsistencies, to draw negative inferences with regard to the credibility of testimony or of a narrative, it cannot disregard evidence that corroborates the applicants' claims. In this case, the applicants submitted no less than six (6) copies of complaints filed with Colombian government and police authorities. Each of these complaints describe threats or acts of intimidation that the applicants clearly attribute to the FARC:

- The May 25, 2011, complaint describes receiving the letter signed by Danilo, commander of Front 48 of the FARC (Applicants' Record at pages 35-36, Exhibit D-10).
- The July 18, 2011, complaint recounts an exchange during a threatening call wherein an unidentified man suggests that family leave the department of Putumayo or suffer the consequences (Applicants' Record, page 42, Exhibit D-11).
- The November 4, 2011, complaint details a new call reiterating threats issued in July 2011 (Applicants' Record, page 68, Exhibit D-17).
- The August 1, 2012, complaint recounts the attempted kidnapping of the female applicant, during which her abductor allegedly declares, while holding her at gunpoint: [TRANSLATION] "Adriana, you are going to pay with your life, because you are jerking us around, brainwashing those peasants against us, we already warned your husband, now you are going to die." (Applicants' Record, page 54, Exhibit D-13).
- The August 23, 2012, complaint describes a call received by the male applicant in which he was told: [TRANSLATION] "listen, you goddamn son of a bitch, your wife escaped death, next time she won't be so lucky, we're telling you the FARC keeps its promises" (Applicants' Record, page 62, Exhibit D-14).
- The September 25, 2012, complaint recounts how the female applicant was chased by armed men on a motorcycle; no words were exchanged, but the female applicant ties the incident to the previous threats and blames the FARC (Applicants' Record, page 74, Exhibit D-19).

[19] The Court notes that none of the complaints refers to an attempted theft (RPD Decision, at paragraph 17). Given that the authenticity of the documents described above is not questioned and that none of the evidence contradicts the applicants' narrative, the Court cannot accept the RPD's

finding. The RPD found only minor deficiencies in the applicants' version of the facts. It was open to the RPD to reject the applicants' explanations, but in the face of evidence that corroborates essentially all of the main allegations in the claim, the RPD was required to make reference to it and to include it in its analysis.

Generalized risk

[20] The RPD's determination with regard to generalized risk was tainted by errors on the issue of credibility.

State protection

[21] Lastly, the RPD's finding on the matter of state protection consists of a single paragraph, in which the two key sentences are the following:

The fact that the claimants complained to the authorities and that they were unable to stop any attempted thefts or threats did not rebut the presumption. Moreover, case law has established that state protection does not have to be perfect. (RPD Decision at paragraph 38).

[22] The respondent acknowledged before this Court that the RPD's state protection analysis was insufficient.

[23] Thus, without deciding the issue of whether the applicants were able to rebut the presumption of state protection, the Court is of the view that the reasons and explanations of the RPD are deficient and insufficient. Indeed, as noted earlier, the applicants filed six (6) complaints with the Colombian authorities and contend that no action was taken. The RPD disregarded the six (6) complaints when it addressed the issue of state protection. In these circumstances, it is difficult

for the Court to fathom why the RPD could conclude that the efforts made by the applicants were insufficient and that protection in Colombia was adequate (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at paragraph 18, [1993] SCJ NO 74; *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004, [2013] FCJ No 1099).

[24] For all these reasons, the Court concludes that the RPD's decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and applicable law (*Dunsmuir*, above, at paragraph 47).

[25] For these reasons, the application for judicial review will be allowed.

[26] The parties did not propose any questions for certification and none arises from the matter.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The application for judicial review is allowed;

the matter is referred back to the Immigration and Refugee Board to be determined by a new and differently constituted panel;

no question of general importance is certified.

“Richard Boivin”

Judge

Certified true translation
Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-3307-13

STYLE OF CAUSE: ADRIANA LUCIA ARIAS ORTIZ, JORGE OCTAVIO RESTREPO RAMIREZ, CARLOS AUGUSTO JIMENEZ ARIAS, ELISA JIMENEZ ARIAS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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**REASONS FOR JUDGMENT
AND JUDGMENT:** BOIVIN J.

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