Federal Court  Cour fédérale

Date: 20150108

Docket: IMM-3935-13

Citation: 2015 FC 20

Ottawa, Ontario, January 8, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

SANDRA JOHANA CASTANEDA OSORIO
JULIAN ANDRES VELEZ SALDARRIAGA
AND SARA VELEZ CASTANEDA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

UPON application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) of a decision made on May 16, 2013 by the Refugee Protection Division of the Immigration and Refugee Board of Canada (the RPD), wherein the RPD rejected the applicants' claim for refugee protection under sections 96 and 97 of the Act;

AND UPON considering the written and oral submissions of the parties and reviewing the RPD's Certified Record;

AND UPON considering that the applicants are a family including the principal applicant Ms Castaneda Osorio (Ms Osorio), her spouse Mr Velez Saldarriaga and their daughter Sara Velez Castaneda and that all are citizens of Colombia;

AND UPON considering that they left Columbia for Canada on January 23, 2013 and filed for refugee protection on February 4, 2013 alleging fear of the Revolutionary Armed Force of Columbia (the FARC) as a result of Ms Osorio having been targeted by the FARC because of her work as a teacher in a pre-school program for children of low income families, including children of former FARC members;

AND UPON considering that on May 16, 2013, the RPD rejected the applicants' refugee claim on the basis that Ms Osorio had failed to rebut the presumption of state protection in Columbia;

AND UPON considering that the issue raised by this judicial review application is whether the RPD, in concluding as it did, committed a reviewable error as contemplated by section 18.1(4) of the *Federal Courts Act*, RSC, 1985, c F-7;

AND UPON determining that the applicants' judicial review application should be dismissed for the following reasons:

[1] Ms Osorio's fear of the FARC rests on two incidents which occurred in September 2011 and November 2012. In the first incident, she claims to have been threatened by two men on the basis that she was helping demobilized guerrillas through her teaching. After that incident, she moved to another part of the city of Medillin, where she was residing, and stopped teaching for a while. The second incident occurred after she had returned to work at a different school facility. A shooting occurred while she was outside the school and the perpetrators, believed to be members of the FARC, shouted that they knew where she lived. Shortly thereafter, she left Colombia for Canada with her husband and daughter.

[2] The evidence is that Ms Osorio did not attempt to access state protection after either of the two incidents that lead to the applicants refugee claim. She explained that she did not do so because the Colombian authorities are usually not willing or able to protect victims of FARC. When questioned on her fear of contacting the police in Colombia, Ms Osorio testified that her husband's cousin had disappeared after contacting the police regarding an incident involving the FARC.

[3] The RPD noted that there was an obligation on the part of Ms Osorio to approach the state for protection unless she could show that it was unreasonable for her to do so. After reviewing the country documentation on Colombia's continuous efforts to protect its citizens from the FARC, the RPD was not persuaded that, had Ms Osorio approached the state regarding her two encounters with FARC members, the state would not have made reasonable efforts to assist her. It concluded that Ms Osorio had not given the Colombian authorities an opportunity

to provide protection and that she had not provided an objectively reasonable explanation for not doing so.

[4] Issues relating to state protection are reviewable on a standard of reasonableness as such issues are questions of mixed fact and law which, given the RPD's expertise on this subject matter, attract deference (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 51, [2008] 1 SCR 190 [*Dunsmuir*]; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 44, 59, [2009] 1 SCR 339; *The Minister of Citizenship and Immigration v Flores Carrillo*, 2008 FCA 94, [2008] 4 FCR 636, at para 36; *Romero Davila v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1116, at para 26; *Gulyas v Canada (Minister of Citizenship and Immigration)*, 2013 FC 254, 429 FTR 22, at para 38).

[5] As the Supreme Court of Canada stated in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, refugee protection is meant to be a form of surrogate protection, invoked only in situations where a refugee claimant has unsuccessfully sought the protection of his home state (*Ward*, at para 18). This means that, absent a complete breakdown of the state apparatus, it is presumed that state protection is available for a refugee claimant and to rebut this presumption, the claimant must provide clear and convincing evidence of the state's inability or unwillingness to provide adequate – not perfect - protection (*Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, at para 43 and 44; *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 FCR 636 at para 19; *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004, at para 29; *Salamon v Canada (Minister of Citizenship and Immigration), 2013 FC 582*, at para 5; *Ward*, above at para 52).

[6] Here, the RPD rejected the applicants' refugee claim because they had not provided clear and convincing evidence of Colombia's inability or unwillingness to provide adequate protection.

[7] What is required with respect to the "inability" branch of the test is evidence that all objectively reasonable efforts were unsuccessfully made by the claimants to exhaust all courses of action reasonably available to them before seeking refugee protection. Absent a compelling or persuasive explanation, the failure to make those efforts prior to seeking refugee protection will typically provide the RPD with a reasonable basis to conclude that the presumption of state protection has not been rebutted (*Ruszo*, above at para 31-33). This is the case here as Ms Osorio made no attempt whatsoever to seek state protection after either of the incidents that lead to her refugee protection claim.

[8] As for the "unwillingness" branch of the test, refugee claimants must show that it was reasonable for them not to have sought the protection of their home state. However, their reluctance in doing so needs to be objective, established and proven. A subjective perception that one would simply be wasting one's time by seeking police protection or mere doubts as to the effectiveness of state protection does not constitute compelling or persuasive evidence in this regard, unless the refugee claimant has unsuccessfully sought state protection on multiple occasions (*Ruszo*, above, at para 33; *Yang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 930, 416 FTR 110 at paras 25 and 83; *Rio Ramirez v Canada (Citizenship and Immigration)*, 2008 FC 1214, at para 28).

[9] Ms Osorio claims that her reluctance to seek state protection was prompted by the fact her husband's cousin mysteriously disappeared after contacting the police regarding an incident involving the FARC. The RPD found that this was not compelling evidence of the Colombian authorities' inability or unwillingness to provide protection to Ms Osorio. In particular, it found that the evidence on record was not supportive of the fact that the disappearance was linked to the act of seeking protection from the police and concluded, as a result, that Ms Osorio had not established it was objectively unreasonable for her to seek protection. In my view, this finding was reasonably open for the RPD to make. It falls within the range of possible outcomes given the record that was before the RPD and I see no reason to interfere with it (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

[10] The applicants contend that the RPD used the wrong test to assess whether state protection was available to them by focusing its analysis on the efforts made by Colombia to fight the FARC rather than the operational adequacy of the protection.

[11] In my view, there are three problems with that argument. First, the RPD, in its review of the country documentation, describes a series of operational initiatives that have produced tangible results in addressing ongoing challenges resulting from criminal actions of guerrilla and paramilitary groups such as the FARC. The RPD decision must be read as a whole, requiring the reader to go beyond the semantics and focus on the substance of it (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board),* 2011 SCC 62, [2011] 3 SCR 708 at para. 14; *Lainez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 707, at para 21; *Ragupathy v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 151, [2007]

1 FCR 490 at para 15; *Sinnasamy v Canada (Citizenship and Immigration*), 2008 FC 67, at para 31). Here, I am satisfied that the RPD paid sufficient attention to the operational adequacy of the measures taken by the Colombian government in recent years to both cope with the social disturbances caused by the FARC and to protect its citizens. I am equally satisfied that the use of the word "efforts" does not impact negatively on the RPD's analysis of the country documentation.

[12] Second, as the RPD reasonably concluded that Ms Osorio had not taken all objectively reasonable steps to avail herself of state protection, the error in the enunciation of the state protection test, assuming there was one, would not be enough for this Court to overturn its decision. As Chief Justice Paul S. Crampton expressed in *Ruszo*, above, at para 28:

> Nevertheless, the RPD's misunderstanding or misapplication of the "adequate state protection" test is not necessarily fatal in cases where, as here, the RPD also reasonably concluded on other grounds that the Applicants had failed to rebut the presumption of adequate state protection with "clear and convincing evidence of the state's inability to protect [them]." In this case, those grounds were the failure of the Applicants to demonstrate that they had taken all objectively reasonable steps to avail themselves of state protection, and to provide compelling or persuasive evidence to explain their failure to do more than make a single attempt to seek protection from the police. As discussed below, it is clear from various parts of the decision that these were very important considerations for the RPD, and, indeed, provided an alternate basis for the RPD's decision. Having regard to the RPD's determinations on these points, its decision was not unreasonable.

[13] Here, the RPD clearly expressed its concern with the applicants not having discharged their burden of proof. Indeed, it is the applicants' failure to provide evidence of their reluctance to engage the state that was fatal to their claim and not, as the applicants contend, the use of the wrong legal test. The RPD's approach to the state protection analysis is fully consistent with the

above principle that refugee protection is meant to be a form of surrogate protection (*Ward*, above, at para 18).

[14] Third, the concept of state protection does not require a refugee claimant's home state to provide perfect protection to its nationals as this is an unattainable standard. State protection only needs to be adequate (*Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at paragraphs 41, 43-44; *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 FCR 636 at paragraphs 18, 30). In this regard, the situation is far from perfect in Colombia, a country which has been struggling over the last 40 years with violence and social and political instability due to internal conflicts with guerrilla and paramilitary groups. Nevertheless, the evidence that was before the RPD in this case shows that both the army and the police have, in recent years, managed to conduct successful operations against the FARC**.** Thus**,** it was reasonably open to the RPD to find that Ms Osorio had not established it was objectively unreasonable for her to seek Colombia's protection.

[15] This result is consistent with a number of recent cases where RPD findings that adequate state protection for those who were threatened by the FARC is available in Colombia were confirmed by this Court as being reasonable (*Jimenez v Canada (Minister of Citizenship and Immigration)*, 2014 FC 780; *Vargas v Canada (Minister of Citizenship and Immigration)*, 2014 FC 484; *Calderon v Canada (Minister of Citizenship and Immigration)*, 2014 FC 557; *Andrade v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1490; *Mendoza-Rodriguez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1367).

[16] In *Cruz Vergara v Canada (Minister of Citizenship an Immigration)*, 2013 FC 138, at para 35, Justice Richard Mosley summarized this recent trend in the case law in the following terms:

> Recent cases from this Court support the reasonableness of decisions finding there to be adequate state protection in Colombia for those who were in similar circumstances to those of the applicant and who were threatened by the FARC. A list of those cases is set out in Andrade v Canada (MCI), 2012 FC 1490 at para 18. As noted at paragraph 20 of that decision, this Court has overturned RPD decisions on state protection in Colombia only where the RPD was shown to have failed to properly assess the background or "profile" of the claimant and the claimant fell into one of the groups that the documentary evidence indicates may be at risk in Colombia such as "judges and other individuals associated with the justice system".

[17] There is no evidence on record indicating that Ms Osorio, a rather low profile teacher in Colombia, or her husband for that matter, has the profile of someone falling into a group that may be at risk in Columbia at the hands of the FARC if she were to return to that country.

[18] For these reasons, I find that the RPD's finding on state protection falls within the range of possible, acceptable outcomes defensible in respect of the facts and the law. Since this is fatal to the applicants' case, the application for judicial review is dismissed.

[19] No question of general importance has been proposed by the parties. None will be certified.

ORDER

THIS COURT ORDERS that

1. The application for judicial review is dismissed.

2. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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