Federal Court  Cour fédérale

Date: 20200603

Docket: IMM-4055-19

Citation: 2020 FC 661

Ottawa, Ontario, June 3, 2020

PRESENT: Mr. Justice Norris

BETWEEN:

MYRIAM ROCHA CORTES
MARIA DEL TRANSITO CORTES JIMENEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The principal applicant, Myriam Rocha Cortes, arrived in Canada on September 23, 2010, with her mother, Maria Del Transito Cortes Jimenez, and her daughter, Gabriela Fernandez Rocha. All three are citizens of Colombia. They had left Colombia on September 3, 2010, for Miami, Florida. They then made their way to Fort Erie, Ontario, where

they claimed refugee protection on the basis of their fear of persecution in Colombia at the hands of the Revolutionary Armed Forces of Colombia (commonly known by its Spanish acronym FARC). At the time, the principal applicant was 55 years of age, her mother was 85, and her daughter was 25. Qualifying family members were already living in Canada so they were permitted to seek protection here under the Safe Third Country Agreement.

[2] In a decision dated March 11, 2013, the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada concluded that they were neither Convention refugees nor persons in need of protection under sections 96 or 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. However, this decision was set aside on judicial review and a new hearing was ordered: see *Cortes v Canada (Citizenship and Immigration)*, 2014 FC 598.

[3] The new hearing before the RPD took place on April 29, 2019. In the meantime, in September 2017 Gabriela Fernandez Rocha withdrew her claim for protection because she had become a permanent resident of Canada through a spousal sponsorship. The principal applicant acted as the designated representative for her mother.

[4] In a decision dated June 3, 2019, the RPD rejected the remaining claims. The determinative issue for the RPD was the "change of circumstances in Colombia and whether the claimants have a well-founded fear of persecution in Colombia today, nine years after their departure from Colombia." The RPD concluded that as a result of recent changes in Colombia, the applicants did not have a well-founded fear of persecution there.

[5] The applicants now apply for judicial review of the RPD's decision under section 72(1) of the *IRPA*. They contend that the decision is unreasonable.

[6] For the reasons that follow, I do not agree. This application must therefore be dismissed.

II. BACKGROUND

[7] The background to the claims can be summarized briefly.

[8] The principal applicant states that she was the owner of a real estate company in Santa Marta, Colombia. Among the properties she had listed for rent was a home belonging to a Dr. Daza. It was located behind a police station in Santa Marta.

[9] On May 14, 2010, a man named Wilfrido Ramirez came to the office and applied to lease Dr. Daza's house. With the assistance of the principal applicant's secretary, Mr. Ramirez filled out some paperwork but the transaction was not completed because he needed to provide some additional documentation.

[10] Mr. Ramirez returned to the office on May 18, 2010. He did not have the supporting documentation he needed to complete the lease agreement. The principal applicant told him these documents were required as a matter of policy. Mr. Ramirez then identified himself as a member of the FARC and said they had a serious interest in the house. He asked the principal applicant if she knew where they could find the owner. She said he was out of the country. Mr. Ramirez insisted on behalf of Commander Chalo that the principal applicant had to comply

with their demands. Money was not an object and she should simply turn over the keys. The principal applicant did not do so.

[11] The principal applicant reported this encounter to the police the same day; however, she did not make a formal "denunciation." The police officer suggested she should come back if anything further happened.

[12] On May 21, 2010, the principal applicant received a threatening phone call from Mr. Ramirez. He demanded that she lease the house to the FARC and turn over the keys by May 30, 2010, and to remember that squealers died. Following this, the principal applicant began to work from home.

[13] On May 30, 2010, the principal applicant was approached by three individuals as she was leaving a church service. She was told they had a message for her from Commander Chalo. Since she had not provided the house, the principal applicant had to pay a war tax of 45 million pesos within 20 days. She was also reminded that her mother had still not transferred ownership of her farm to the FARC. (This reference is explained further below.) If she paid, the FARC would guarantee her safety and that of her mother. The principal applicant did not report these events to the police because the militants had warned her not to.

[14] The next day the principal applicant moved in with a friend and closed her office. She provided a power of attorney to another person to deal with any matters arising with the real

estate business. On June 20, 2010, she moved with her mother to her daughter's home in Bogota. She sold the real estate business on July 10, 2010.

[15] Dr. Daza was still out of the country but he had left a friend's address as a point of contact. The principal applicant told this person that she was "giving back" Dr. Daza's house.

[16] The principal applicant learned subsequently that the FARC had visited her office on June 18 and June 28, 2010, asking about her and her mother and claiming that they owed a debt to the FARC.

[17] On August 19, 2010, there was an attempt to abduct the principal applicant's daughter in Bogota. This was reported to the police the next day. On August 21, 2010, the principal applicant received a threatening call from someone claiming to be Commander Chalo. She was told that if she did not pay the war tax in fifteen days, she and her family would pay with their lives. She did not report this call to the police.

[18] On September 3, 2010, the principal applicant, her mother and her daughter fled Colombia together.

[19] Some additional background concerning the mother's farm is found in the May 8, 2015, decision of the RPD allowing a claim for refugee protection by the principal applicant's sister, Ofelia Rocha Cortes. This decision was filed by the applicants at the re-hearing of their claim by the RPD.

[20] The principal applicant's parents owned a farm about four hours outside Santa Marta. After the principal applicant's father died, ownership of the farm passed to her mother. In 2004, the FARC took control of the area where the farm was located. The family was told to leave because the farm was now under the FARC's dominion. The family sold their livestock and abandoned the farm. Apparently, squatters then moved onto the property. According to the principal applicant's July 2012 amended Personal Information Form, she was informed by neighbours at some unspecified time that "FARC continued to have possession of the farm."

[21] The FARC attempted to have the principal applicant's mother sign over title to the farm but she never did so. They tried to enlist the principal applicant in this effort but she refused.

[22] In 2014, after receiving power of attorney from their mother, the principal applicant's sister, Ofelia Rocha Cortes, began a legal action to reclaim possession of the farm. This led to threats against her by the FARC, which in turn caused her to flee Colombia in February 2015 and, eventually, to seek refugee protection in Canada.

[23] At the hearing on April 29, 2019, the principal applicant testified that she had had no further contact with the FARC after she left Colombia in September 2010. She also testified that she had not contacted Dr. Daza to find out whether the FARC had continued to pursue its interest in his house or whether he had had any problems with the organization. Further, the principal applicant testified that while her mother was still the legal owner of the farm, the FARC was still "occupying" it. She did not explain how she knew this. When asked by her counsel if the farm

was “empty with nobody on it,” the principal applicant replied that she had “no idea who is there, who is living there, what they are doing.”

III. DECISION UNDER REVIEW

[24] The RPD found that there were “some credibility issues” with respect to the evidence it heard but, as already noted, the determinative issue was whether the applicants’ fear of persecution was objectively well-founded given the change in circumstances in Colombia since 2010. As a result, the RPD was prepared to accept the applicants’ account of their experiences in Colombia at face value.

[25] The RPD cited the legal test for whether a change in country conditions supports the conclusion that a fear of persecution is no longer well-founded. The change must be meaningful, effective, and durable. The RPD member instructed herself that she had to assess the current conditions in Colombia and determine whether, as a question of fact, the applicants’ experiences before they left supported a finding that their subjective fear of persecution is objectively well-founded if they returned today.

[26] The RPD found that country conditions “have greatly changed in Colombia” since the events in 2010 (and earlier) the applicants described. There had been a durable, long-lasting, and effective change in the operation of FARC guerrillas throughout Colombia. The RPD found that the majority of FARC members had embraced the peace agreement that was concluded in November 2016. Although not all members of the FARC had signed onto the agreement, the RPD was “not persuaded that the presence of a minority of dissidents detracts from the durability

of the change of circumstances that has occurred since the claimant[s] left Colombia almost nine years ago." Effective state protection measures had also been implemented. While there were still documented cases of violence in the country, these mostly stemmed from groups other than the FARC. The RPD also found that there was no evidence that the FARC had continued to pressure the principal applicant for payment of the war tax. The status of the FARC had changed in such a way that there was no objective basis to fear that the applicants would be targeted upon return to Colombia. Further, there was nothing in the applicants' profiles that would make them of interest to the FARC today in any event.

[27] With respect to the family farm, the RPD found that, if they returned to Colombia, the principal applicant and her mother were under "no obligation" to attempt to regain possession of it.

[28] Finally, the RPD observed that there were other parts of the country that were safer than Santa Marta and suggested that "the claimants can return to Cali, or other areas far from Santa Marta where they are anonymous." The RPD did not conduct a full Internal Flight Alternative [IFA] analysis, however.

[29] In sum, the RPD concluded that "a durable and lasting peace had been attained in Colombia, and the claimants do not have a profile that gives rise to a risk on return." Accordingly, the RPD concluded that the applicants were neither Convention refugees nor persons in need of protection.

IV. STANDARD OF REVIEW

[30] The parties agree, as do I, that the substance of the RPD's decision should be reviewed on a reasonableness standard. Reasonableness is now the presumptive standard of review, subject to specific exceptions "only where required by a clear indication of legislative intent or by the rule of law" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10). There is no basis for derogating from the presumption that reasonableness is the applicable standard of review here: see *Lin v Canada (Citizenship and Immigration)*, 2020 FC 34 at para 15. As well, pre-*Vavilov* jurisprudence indicates that an analysis of changes in country conditions will be assessed on a reasonableness standard (*Sivalingam v Canada (Citizenship and Immigration)*, 2012 FC 1046).

[31] An assessment of the reasonableness of a decision must be sensitive and respectful yet robust (*Vavilov* at paras 12-13). Reasonableness review focuses on "the decision actually made by the decision maker, including both the decision maker's reasoning process and the outcome" (*Vavilov* at para 83). On review, "close attention" must be paid to a decision maker's written reasons and they "must be read holistically and contextually, for the very purpose of understanding the basis on which a decision was made" (*Vavilov* at para 97).

[32] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The reasonableness standard "requires that a reviewing court defer to such a decision" (*ibid.*). A court applying this standard "does not ask what decision it would have

made in place of that of the administrative decision maker, attempt to ascertain the ‘range’ of possible outcomes that would have been open to the decision maker, conduct a *de novo* analysis or seek to determine the ‘correct’ solution to the problem” (*Vavilov* at para 83).

[33] The burden is on the applicants to demonstrate that the RPD’s decision is unreasonable. They must establish that “there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency” (*Vavilov* at para 100) or that the decision is “untenable in light of the relevant factual and legal constraints that bear on it” (*Vavilov* at para 101).

V. ISSUES

[34] The applicants challenge the RPD’s decision on three grounds which I would state as follows:

a) Is the RPD’s determination that the applicants’ fear of persecution is not well-founded given current country conditions unreasonable?

b) Is the RPD’s determination that the applicants would not be at risk in Colombia because they were under “no obligation” to try to reclaim possession of the family farm unreasonable?

c) Is the RPD’s determination that the applicants could live safely elsewhere than in Santa Marta unreasonable in the absence of a full IFA analysis?

VI. ANALYSIS

[35] As I will explain, I am not persuaded that, read as a whole, the RPD's decision is unreasonable. The RPD considered the issue of whether the applicants' subjective fears were objectively well-founded given the changes in country conditions to be determinative. The RPD's resolution of this issue was reasonably open to it on the evidence and it is explained in a way that is justified, intelligible and transparent. While the RPD's comments concerning the family farm and the possibility of living elsewhere than in Santa Marta would not necessarily stand up to scrutiny standing on their own, this does not vitiate the overall reasonableness of the decision.

A. *Is the RPD's determination that the applicants' fear of persecution is not well-founded given current country conditions unreasonable?*

[36] The applicants submit that the RPD's finding that their fear of persecution is not objectively well-founded because of recent changes in the country is unreasonable. They accept that the RPD stated the legal test correctly but contend that the decision is unreasonable in light of evidence describing the ongoing prevalence of violence and extortion in the Santa Marta region and evidence that there are FARC "dissidents" who disagree with the peace process and who have retained their arms.

[37] I do not agree.

[38] It was reasonably open to the RPD to conclude that recent changes in Colombia – in particular, the conclusion of the peace accord in November 2016 – are meaningful, effective, durable, and long-lasting. The RPD recognized that there were FARC dissidents who had rejected the peace accord but found that this had not detracted from the durability of that accord. Although, as the RPD acknowledged, violence remains a problem in Colombia, little if any of the evidence relied on by the applicants could link that violence to the FARC, their agent of persecution. As well, the RPD found no convincing evidence that the FARC continued to demand payments of a "war tax" or continued to pursue past grievances. The RPD's reasons explain how these findings were grounded in the evidence in a way that is justified, intelligible, and transparent. Further, the RPD did not rely simply on the changes in country conditions to conclude that the applicants' fears were not objectively well-founded. The RPD also found that the applicants did not have a profile that would put them at risk of persecution in any event. This finding was reasonably open to the RPD on the evidence.

B. *Is the RPD's determination that the applicants would not be at risk in Colombia because they were under "no obligation" to try to reclaim possession of the family farm unreasonable?*

[39] The RPD stated the following regarding the family farm:

> If the [principal claimant] and her mother are fearful about retaliation for efforts to gain repossession of their farm, they are certainly not obligated to do so on return. While safely in Canada, there is no evidence that the claimants pursued repossession of their farm in Santa Marta over the past nine years, and there is no obligation to undertake this on their return either.

[40] The applicants focused on this determination at the hearing of this application for judicial review. They submit that it is erroneous and that it taints the decision as a whole.

[41] While not raised by the applicants, I begin by noting that the RPD does appear to have misapprehended the evidence in this connection. There was evidence that in 2014, the principal applicant's sister, Ofelia Rocha Cortes, acting on a power of attorney from her mother, had initiated a legal proceeding to reclaim possession of the farm on her mother's behalf. This step was taken after the applicants were in Canada. Indeed, it was the consequences that followed from her having taken this step that ultimately led to Ms. Rocha Cortes being recognized by Canada as a Convention refugee. Thus, contrary to the RPD's finding, there was evidence that the principal applicant's mother did attempt to reclaim possession of the farm after she came to Canada. Given how the RPD frames this issue – "While safely in Canada, there is no evidence that the claimants pursued repossession of their farm in Santa Marta over the past nine years" – and despite mentioning Ms. Rocha Cortes' experiences elsewhere in the decision, it appears that the RPD simply overlooked the evidence that she was acting on her mother's power of attorney, as opposed to disbelieved this evidence.

[42] That being said, the applicants' main objection to the RPD's determination is that it is analogous to the clearly invalid form of reasoning that one can avoid persecution simply by concealing the characteristic that would otherwise attract persecution (e.g. one's religious beliefs or sexual orientation): see *Golesorkhi v Canada (Citizenship and Immigration)*, 2008 FC 511 at para 18, and *Sadeghi-Pari v Canada (Citizenship and Immigration)*, 2004 FC 282 at para 29. It is firmly established in the jurisprudence that having to suppress an essential aspect of one's identity to avoid persecution can itself amount to persecution.

[43] I do not necessarily agree that the analogy between the pursuit of a legal remedy relating to ownership of property and the enjoyment of a fundamental human right is as strong as the applicants suggest. Nevertheless, I do agree that it is no answer to a claim to fear persecution if one exercised a civil right that one could just forego the exercise of that right. The protections of the Refugee Convention would be modest indeed if they did not extend to someone who would be at risk simply because they exercised a civil right enjoyed by every citizen of a country.

[44] However, the RPD's statement cannot be read in isolation. As the respondent points out, the real problem for the applicants in this connection is that it follows from the RPD's findings concerning the changes in country conditions that they would not be at risk even if they decided to exercise this civil right and reclaim possession of the farm. Importantly, the experiences of Ms. Rocha Cortes in 2014 have little probative value given that they preceded the ratification of the peace accord in November 2016 and all the changes ensuing from that. Given the RPD's findings concerning the changes in country conditions, which the RPD reasonably considered determinative of the claim, the comment about the farm, while erroneous, can properly be characterized as *obiter*: see *Golesorkhi* at para 19. It does not vitiate the overall reasonableness of the decision.

C. *Is the RPD's determination that the applicants could live safely elsewhere than in Santa Marta unreasonable in the absence of a full IFA analysis?*

[45] The RPD stated the following about the possibility of the applicants living elsewhere than in Santa Marta if they returned to Colombia:

> Documents provided by the claimants [footnote omitted] confirm that Santa Marta is located in a conflict area. Certainly, the

> claimants can return to Cali, or other areas far from Santa Marta where they are anonymous. The [principal claimant's] sibling located close to Santa Marta in Barranquilla has no problems with FARC according to the [principal claimant]. In fact, all the other family members have lived peacefully in Colombia since the claimants' departure in 2010, outside of Santa Marta.

[46] The applicants contend that this determination is unreasonable because the RPD effectively found that the applicants had an IFA without conducting a proper analysis. More particularly, the RPD neither stated nor applied the test for an IFA, leaving the determination lacking justification, intelligibility, and transparency.

[47] If their claims had been rejected on the basis that the applicants had an IFA, there would be some force to their objection; however, this is not what the RPD has done. It is far from clear that the reference to Santa Marta being located in a "conflict area" has anything to do with the FARC. In any event, and more importantly, given that the RPD found that the issue of whether the applicants' fear of persecution was objectively well-founded was determinative, this passing comment can properly be characterized as *obiter* as well. It does not vitiate the overall reasonableness of the decision.

VII. CONCLUSION

[48] For these reasons, the application for judicial review is dismissed.

[49] The parties have not suggested any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-4055-19

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed.

2. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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