

Federal Court



Cour fédérale

Date: 20220316

Docket: IMM-2262-21

Citation: 2022 FC 354

Ottawa, Ontario, March 16, 2022

PRESENT: Mr. Justice James W. O'Reilly

BETWEEN:

**PABLO EDUARDO MORERA MESA,
RUTH MARY BENITEZ RODRIGUEZ,
EDWIN SANTIAGO AVILA BENITEZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants are a family – father, mother and son – who sought refugee protection in Canada based on their fear of persecution in Colombia by an organization called the National Liberation Army (ELN). In particular, they claimed that the ELN wanted the father to use his position as a courier at a military college to obtain personal information or documents about

armed services personnel. After he refused, the father said he received threats from ELN members who later attempted to kidnap him. The applicants also maintained that the mother was kidnapped and sexually assaulted by ELN members as a reprisal for the father's lack of cooperation.

[2] The applicants presented their claims to the Refugee Protection Division. The RPD found that the father's testimony lacked credibility, and that the applicants' alleged fears were contradicted by their return to Colombia to visit the father's ill parent, and by their failure to claim protection in the United States when they had a chance. With respect to the sexual assault of the mother, the RPD found she "may have experienced a sexual attack", but was not persuaded that it was connected to political persecution on the part of the ELN.

[3] On appeal to the Refugee Appeal Division, the panel accepted that the mother had been sexually assaulted, but found that sexual offences are common in Colombia, and that all women face a widespread risk of victimization unconnected to political persecution. The RAD also concluded that the father's lack of credibility tainted the mother's claim that the assault was politically motivated.

[4] The applicants argue that the RAD's decision was unreasonable because it wrongly concluded that a widespread risk of sexual violence could not support a refugee claim, mistakenly applied its credibility findings in respect of the father to the mother's allegations, and failed to properly apply the *Chairperson's Guidelines 4: Women Refugee Claimants Fearing*

Gender-Related Persecution. On this application for judicial review, they ask me to quash the RAD's decision and order another panel to reconsider their claims.

[5] I agree with the applicants that the RAD's decision was unreasonable. The RAD improperly dismissed the possibility that widespread sexual violence against women could support a refugee claim, and wrongly applied its credibility findings in respect of the father to the mother's claim. Accordingly, I will grant the applicants' application for judicial review.

[6] The sole issue is whether the RAD's decision was unreasonable.

II. Was the RAD's decision unreasonable?

[7] The applicants raise two main arguments. First, they submit that the RAD arrived at an unreasonable conclusion when it found that a widespread risk of sexual violence in Colombia could not ground a claim for refugee protection. Second, they argue that the RAD unreasonably applied its adverse credibility findings against the father to the mother's claim.

[8] The respondent maintains that the RAD reasonably concluded that the applicants had failed to establish that the sexual assault was connected to any political persecution. The fact that the father's evidence about persecution by the ELN lacked credibility weakened the mother's claim that the sexual assault was a reprisal for his failure to cooperate with the ELN.

[9] I disagree with the respondent's position.

[10] Widespread mistreatment of members of a particular social group falls within the categories of persecution recognized by the Refugee Convention. In particular, pervasive sexual violence against women can be a form of gender-based persecution (*Dezameau v Canada (Citizenship and Immigration)*, 2010 FC 559 at para 31; *Josile v Canada (Citizenship and Immigration)*, 2011 FC 39 at para 31; *Desire v Canada (Citizenship and Immigration)*, 2013 FC 167 at para 6; *Nel v Canada (Citizenship and Immigration)*, 2014 FC 842 at para 39; *Duversin v Canada (Citizenship and Immigration)*, 2018 FC 466 at para 34).

[11] This proposition is also recognized in the *Chairperson's Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution*, which state: "The fact that violence, including sexual and domestic violence, against women is universal is irrelevant in determining whether rape and other gender-specific crimes constitute forms of persecution." The RAD cited a different passage from the *Guidelines*, one that instructed decision-makers to distinguish persecution on a Convention ground from random violence. That was not an apt observation in the circumstances – the targeting of women for sexual violence is not random.

[12] Here, the RAD cited statistics on the frequency of sexual assaults in Colombia, which led it to conclude "the risk of sexual violence is a generalized risk to which all women are subject." In my view, the RAD failed to consider whether the risk of sexual violence was a form of gender-based persecution.

[13] The RAD went on to find that the applicants had failed to establish that the sexual assault was connected to the threats against the father by the ELN. The RAD noted that there was no

corroborating evidence of that connection and, indeed, the father's testimony about the threats was not credible.

[14] However, the RAD did not make any adverse credibility findings against the mother. It believed that she had been assaulted. She also testified that her assailants told her that the assault was in retaliation for the father's lack of cooperation. The RAD did not state that it disbelieved her testimony; rather, it discounted that testimony because it disbelieved the father's evidence. If the RAD did not believe the mother's testimony about what her attackers had told her, it had to make a specific credibility finding on that point and explain the basis for it.

[15] For these reasons, I find that the RAD's decision was unreasonable.

III. Conclusion and Disposition

[16] The RAD rejected the possibility of widespread sexual violence supporting a refugee claim and discounted the mother's testimony in the absence of a clear credibility finding. Its analysis led to an unreasonable conclusion. I must, therefore, allow this application for judicial review and refer the matter back to a different panel of the RAD for reconsideration. Neither party proposed a question of general importance for me to certify, and none is stated.

JUDGMENT IN IMM-2262-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The matter is returned to a different panel of the RAD for reconsideration.
3. No question of general importance is stated.

"James W. O'Reilly"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2262-21

STYLE OF CAUSE: PABLO EDUARDO MORERA MESA, RUTH MARY BENITEZ RODRIGUEZ, EDWIN SANTIAGO AVILA BENITEZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HEARING HELD BY VIDEOCONFERENCE IN TORONTO, ONTARIO

DATE OF HEARING: JANUARY 26, 2022

JUDGMENT AND REASONS O'REILLY J.

DATED: MARCH 16, 2022

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