

Federal Court



Cour fédérale

Date: 20220623

Docket: IMM-491-21

Citation: 2022 FC 950

Ottawa, Ontario, June 23, 2022

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

**LINA MARCELA GOMEZ GIRALDO
JUAN PABLO WILCHES EGAS
JUAN JOSE WILCHES GOMEZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are a family from Columbia who are seeking judicial review of a decision by the Refugee Protection Division [RPD], denying their claim for refugee status under ss 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], based largely on credibility findings.

[2] As explained in more detail below, this application is allowed, because the RPD conducted an unintelligible analysis of the Applicants' claim under s 97 of *IRPA*.

II. **Background**

[3] The Principal Applicant, Juan Pablo Wilches Egas, is a citizen of Colombia who is seeking refugee status in Canada along with his wife and son, the other Applicants. They claim that they are at risk in Colombia because they are being extorted and targeted for violence by the Fuerzas Armadas Revolucionarias de Colombia [FARC] or another Bandas Criminales (BACRIM) group.

[4] According to the Principal Applicant's Basis of Claim, he opened a family business in La Union Nariño in August 2012. In June 2013, he received an anonymous phone call from a man who demanded protection money. The man did not identify which group he was working with. The Principal Applicant hung up the phone and refused to answer subsequent calls from unknown numbers. In July 2013, while opening his store, he was threatened by a man who stated they would make him pay if he refused to acquiesce to their demands.

[5] The Principal Applicant also states that he was stabbed in an attack outside a restaurant in December 2013. While he was standing on the sidewalk, he was approached by a man who he had never seen before, who began insulting him. A fight and the stabbing ensued. The Principal Applicant spent three days in hospital. Following the attack he learned the man's name and that he was affiliated with the FARC. The Principal Applicant filed a police report but the attacker

was never found. The Principal Applicant says he believes that the attack was retaliation for not having paid the protection money.

[6] In May 2014, two men came to the store and again demanded the protection money, which the Principal Applicant paid in part. In July 2014, the Principal Applicant's store was broken into and cash and merchandise were stolen. In late 2014, the Principal Applicant opened a second business, and his wife (who was then his girlfriend) moved from Cali to La Union to help him.

[7] In January 2016, the Principal Applicant again received a threatening call from a man demanding money. In February 2016, a man came to collect the money and the Principal Applicant paid it, fearing for himself and his then-pregnant wife. The Principal Applicant states that, following this incident, he concluded he would not be able to live safely in La Union. He sold his businesses, and he and his wife moved to Cali. The Principal Applicant also secured a visa to travel to the US and spent six months there between October 2016 and April 2017.

[8] The Principal Applicant says that in November 2017 his wife received a threatening WhatsApp message with a photo of a dead fish and a knife. He also says he received another threatening call in January 2018, after which he and his wife decided to leave Colombia and make a refugee claim in Canada. Their claim was heard by the RPD in November 2020.

III. Refugee Protection Division Decision

[9] In a decision dated December 23, 2020 [the Decision], the RPD refused the Applicants' claim. With respect to the Applicants' claim as Convention refugees under s 96 of *IRPA*, the RPD found that they had not established that they were being targeted by members of the FARC. The RPD also found that, even if it had concluded that the Applicants had been targeted by the FARC, the allegations about why they were targeted did not have a nexus to the Convention. The RPD explained that, while the FARC has a stated political objective, the Applicants' allegations about why they were targeted were rooted in general criminality, not an imputed anti-FARC political opinion.

[10] The RPD therefore proceeded to analyze the Applicants' claim under s 97 of *IRPA*, but it found that they had not credibly established that their return to Colombia would subject them personally to a risk to life or to a risk of cruel and unusual treatment or punishment. The RPD again explained that the Applicants had failed to establish that the FARC or its members were their agents of persecution. The RPD observed that the Principal Applicant had not reported the first extortion attempts in 2013 to the police and that, when he reported the subsequent stabbing, he did not mention the previous extortion attempts and did not mention that he suspected that his attacker was affiliated with FARC. Based on these omissions, the RPD drew a negative inference concerning the agents of persecution and their motive.

[11] Similarly, the RPD found that it was not credible that, as they claimed, the Applicants had made a second police report after deciding to leave Colombia but that the report did not mention the name of the 2013 attacker or the potential involvement of the FARC.

[12] The RPD questioned the Principal Applicant's wife about her port of entry [POE] statement made upon arrival in Canada. It observed that, when she was asked who stabbed her husband, she stated that it was a member of the ELN (a reference to the National Liberation Army). At the hearing, she explained that she said the attack could have been initiated by a group like the ELN or the FARC. The RPD concluded that the Applicants were not certain or consistent that the people extorting them or the person who attacked them were with the FARC.

[13] The RPD also noted the omission from the POE statement of the events that precipitated the Applicants' flight from Colombia (the November 2017 message and the January 2018 phone call) and drew a negative inference concerning these events and the Applicants' alleged fears in Colombia.

[14] Ultimately, the RPD accepted that the Principal Applicant was attacked in December 2013 but was not satisfied that the attack was related to the extortion attempts or to the robbery in 2014 or that the agents of persecution were the FARC or its members.

[15] Regarding the Principal Applicant's time spent in the US, the RPD found that his subsequent reavilment to Colombia undermined the credibility of the allegations regarding the fears the Applicants had in Colombia. The RPD reasoned that he was inconsistent about his

motives for going to the US and that his failure to make a refugee claim in the US and his return to Colombia impugned the credibility of the central allegations in the claim.

[16] Finally, the RPD considered supporting affidavits from individuals who worked at the Principal Applicant's shop. It assigned insufficient weight to these affidavits to overcome its credibility concerns.

IV. **Issues and Standard of Review**

[17] The Applicants describe the issues for the Court's consideration as follows:

- A. Did the RPD commit reviewable errors in requiring that the Applicants establish the specific agents of persecution?
- B. Having accepted the evidence of extortion and attack to be credible, did the RPD commit reviewable errors in failing completely to conduct a s 96 or 97 analysis?

[18] The parties agree, and I concur, that these substantive issues related to the Decision are subject to a reasonableness standard of review.

V. **Analysis**

[19] As identified in the issues set out above, the Applicants argue that the RPD erred in both its s 96 and s 97 analyses. In relation to s 96, they submit that the RPD failed to recognize that there was a political aspect to the extortion and threats to which they were subjected. In relation

to s 97, they argue that the RPD imported into its s 97 analysis elements that are relevant only to consideration of a claim under s 96. My decision to allow this application for judicial review turns on the RPD's s 97 analysis, which I find does not disclose an intelligible basis for rejecting the Applicants' claim.

[20] The Decision focuses significantly on inconsistencies and uncertainty surrounding the Applicants' identification of their agents of persecution. It is difficult to understand the relevance of this point for purposes of the s 97 analysis. As Justice Zinn explained in *Diaz v Canada (Citizenship and Immigration)*, 2010 FC 797 at para 22, the identity of an agent of persecution is relevant to establishing a nexus to the Convention under s 96 but not to the probability of risk under s 97.

[21] The Respondent submits that the Applicants' claim was not denied simply because they did not accurately identify their alleged persecutors. Rather, the Respondent argues that the manner in which the Applicants provided their evidence surrounding the identification of their persecutors undermined their credibility and therefore their claim. I accept that there are circumstances in which credibility concerns surrounding the identification of agents of persecution can be relevant to a s 97 analysis, for instance if such concerns lead to doubt that the incidents giving rise to the claim actually occurred. However, this does not appear to be the nature of the RPD's analysis in the case at hand.

[22] The RPD clearly accepted that the December 2013 attack took place. While the RPD did not make a clear finding surrounding the extortion demands, I agree with the Applicants'

submission that there is no indication in the Decision that the RPD doubted that those incidents occurred. Rather, the RPD's finding on those incidents was simply that the Applicants had not established that the extortion demands were related to the attack or the 2014 robbery or that the FARC was responsible. I agree with the Respondent's submission that the RPD appears to have doubted the occurrence of the November 2017 and January 2018 events that allegedly precipitated the Applicants' flight to Canada. However, if the previous incidents occurred, it is difficult to understand how the Applicants' failure to credibly establish the FARC's responsibility for these incidents resulted in a conclusion that they were not at risk.

[23] In the absence of an identified and organized agent of persecution linking various criminal incidents together, a decision-maker could potentially reason that a claimant would not face a forward-looking risk because such incidents were unlikely to recur. However, the RPD does not base the rejection of the claim on such reasoning. In my view, the Decision is unintelligible, because the RPD does not explain how credibility concerns surrounding the Applicants' identification of their agent of persecution undermined their claim.

[24] I also agree with the Applicants that the RPD's reavilment analysis appears to import into its s 97 assessment a consideration that is relevant only to a s 96 claim. The test under s 97 of *IRPA* does not require determination of subjective fear of persecution (see, e.g., *Shah v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1121 at para 16).

[25] The Respondent submits that the Principal Applicant's reavilment to Columbia presented a reasonable basis for the RPD to find additional support for its conclusion that the

Applicants' central allegations were lacking in credibility. I accept that, even when subjective fear is not directly relevant, reavilment might be taken into account in assessing whether a claimant's assertions of past events are credible. However, as explained above, with the exception of the precipitating events, the RPD appears to have accepted that the incidents alleged by the Applicants occurred. Therefore, as with the RPD's focus on the identity of the agents of persecution, I find its reliance on the Principal Applicant's reavilment unintelligible.

[26] Having found the RPD's s 97 analysis unreasonable, this application for judicial review will be allowed and the matter returned to a differently constituted panel of the RPD for redetermination. Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-491-21

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the Decision is set aside, and the matter is returned to a differently constituted panel of the RPD for redetermination. No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-491-21

STYLE OF CAUSE: LINA MARCELA GOMEZ GIRALDO
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CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HEARD VIA VIDEOCONFERENCE

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