

Federal Court



Cour fédérale

Date: 20230412

Docket: IMM-2661-22

Citation: 2023 FC 525

Ottawa, Ontario, April 12, 2023

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**MAURICIO GARCIA CRUZ
NICOLAS GARCIA RODRIGUEZ
YOLANDA RODRIGUEZ MUNAR**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] Under review is a decision of the Refugee Protection Division [RPD] denying the Applicants' claims for refugee protection. The decision was based on a finding that Mauricio Garcia Cruz lacked credibility.

[2] I generally agree with the submission of the Applicants that the Panel Member “based his negative credibility findings on his unwarranted assumption and speculation, not legal deductions from the evidence.”

[3] The Applicants are a family from Colombia. Their claim is based on that of the father, Mr. Garcia Cruz, a businessman and owner of Inproservinsa, a real estate investment business. He said that he had received threats from the National Liberation Army [ELN]. The focus of the decision of the RPD was his evidence of these threats and his business activities.

[4] Specifically, Mr. Garcia Cruz testified that the threats and extortion started on December 28, 2020 when he visited Cartagena to explore real estate investment opportunities. He says that when there he received a call from a man who lured him out for a meeting to discuss potential business cooperation at a local restaurant. He left the restaurant as no one came for the meeting and while walking through the parking lot, he was kidnapped by two armed men who identified themselves as members of the ELN. They demanded 20,000,000.00 Colombian pesos monthly in cash, a list of his wealthiest clients, and a list of people in charge of the properties the government confiscated from them.

[5] He was warned that they knew everything about him and that he was not to leave or go to the authorities. After his release, he immediately reported the incident to Estacion Caribe Norte of the National Police and returned to Bogota where he felt safe.

[6] Mr. Garcia Cruz provided testimony and evidence of further threatening contact with the ELN. However, in the view of the RPD, his narrative depended entirely on whether Inproservinsa was an investor in real estate projects on its own behalf, as was claimed by Mr. Garcia Cruz, and whether he was in Cartagena on the date he said.

[7] The RPD concluded that Inproservinsa was not an investor in real estate projects on its own behalf because the evidence offered would have placed it in a “clear violation of conflict of interest” as follows:

[T]he principal claimant stated that Inproservinsa would take for itself any opportunities that it came across ahead of its clients – a clear violation of conflict of interest principles. Indeed, the principal claimant did not understand that conflict of interest prohibits Inproservinsa from taking advantage of its clients who are in the business of investing in real estate projects. For these reasons, I find Inproservinsa probably has never been an investor in real estate projects on its own behalf which puts in doubt the principal claimant was in Cartagena on December 28, 2020.

[8] This alleged conflict of interest was put by the Panel Member to Mr. Garcia Cruz at the hearing, and he offered his explanation why, in his view, this was not a conflict:

Q. But I thought that you were in the business of selling real estate on behalf of clients, and buying real estate on behalf of clients, not doing your own investing?

A. Well, we did a little bit of everything. I could do my own buying for myself, I could do it for other people, we could do appraisals, we could rent, we could do repairs.

Q. Well, didn't that put you in a conflict of interest with your clients?

A. Not necessarily.

Q. Well, if you found an opportunity that looked profitable, how would you decide whether to take it for yourself or inform your clients of it?

A. If it was beneficial for me and I had the resources to acquire it, I would acquire it for me. Or if not, I would find a prospective client that could acquire it at a low price with some benefits.

Q. So your interests trumped your clients' interests, is that right?

A. I would -- my objective was to find properties that would be profitable for the client and profitable for me that -- for both sides.

[9] The Panel Member's finding that this is "a clear violation of conflict of interest" appears to be based on Colombian law and as such is well beyond his expertise and unreasonable. Alternatively, if he is importing Canadian law onto the situation in Colombia, that too is quite improper and unreasonable. Moreover, it is not clear to the Court that the circumstance as described by the Panel Member would be seen in Canada to be a conflict of interest. The Panel Member never explains why this is a conflict of interest.

[10] The second reason the RPD found that Mr. Garcia Cruz was not in Cartagena as he asserted rested on the evidence of his interaction with the ELN that day. It questioned the reasonableness of the ELN's demand for a list of people in charge of the properties that previously belonged to them as the ELN would have known the location of these properties because they used to belong to them. In the Board's view, the ELN did not need to know the administrators of the properties and could have repossessed the properties by force. Its finding is found in the following passage:

I find it beyond reasonableness that the ELN would want a list of people in charge of properties that had belonged to them for, if it was to find out the location of their confiscated properties, one would reasonably expect that they would know what they had

owned and had had confiscated. Further, if ELN's plan was to take back those confiscated properties by force then there would appear to be no need to know who are the people who have been looking after them. Certainly, the principal claimant did not offer a reasoned explanation for the ELN wanting the names of people involved with those properties.

[11] It is clear from a reading of the transcript that Mr. Garcia Cruz never testified that the ELN was asking for the location of these properties; rather they were interested in the identity of the administrators of the properties. This reference to location seems to be a creation of the Panel Member:

A. The ELN, because when they approached me, they told me that they need information about who had those properties.

Q. Well, help me with this, sir, because if someone took my property, I would know what property they took from me. Did the ELN tell you why they did not know what properties had been taken from them?

A. Yes, I -- they knew and they demanded that I gave information about the properties that the government had confiscated from them.

Q. But why did they need information if they already had it?

A. They needed to recuperate their properties. It didn't matter how. I imagine that they had buried money or weapons or something that was important to them.

Q. Did you understand my question, sir?

A. I understood that you asked if they knew which properties.

Q. No, what I -- you already answered that. What I asked is why did they demand information from you if they already had that information?

A. They had information about the government taking their properties, but they didn't know who was administering those properties.

[emphasis added]

[12] The Panel Member's analysis of the evidence is unreasonable. It is based on the Member's own characterization of the information demanded by the ELN and not that stated by the witness. As an aside, the question asked of the witness as to why the ELN would want the information was one that called for speculation from the witness, as he would have no direct knowledge of their reasons for wanting the information unless it had been given to him. Nothing in the record suggests that he was ever told why the information was requested.

[13] Although the Applicants raised several additional concerns with the decision under review, in my view these two aspects of the decision undermine its reasonableness and it cannot stand.

[14] No question was proposed for certification.

JUDGMENT in IMM-2661-22

THIS COURT'S JUDGMENT is that the application is allowed, the decision of the Refugee Protection Division is set aside, the Applicants' claims for protection are referred to a differently constituted panel for determination, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2661-22

STYLE OF CAUSE: MAURICIO GARCIA CRUZ, NICOLAS GARCIA RODRIGUEZ, YOLANDA RODRIGUEZ MUNAR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: MARCH 21, 2023

JUDGMENT AND REASONS: ZINN J.

DATED: APRIL 12, 2023

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