

Federal Court



Cour fédérale

Date: 20241009

Docket: IMM-10356-23

Citation: 2024 FC 1596

Toronto, Ontario, October 9, 2024

PRESENT: Mr. Justice Diner

BETWEEN:

**OSCAR JAVIER OLAYA BUSTOS
ADRIANA CUESTA CAJAMARCA**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review of a decision made by the Immigration and Refugee Board of Canada, Refugee Protection Division [RPD] dismissing the Applicants' refugee claim [Decision]. The RPD found that the Applicants have three viable internal flight alternatives [IFA], and the Applicants did not have an ability to appeal their decision, thus bringing this application, which, for the reasons explained below, is granted.

[2] The Applicants are a married couple and are citizens of Colombia. They seek refugee status in Canada on the basis of fear of persecution by the Revolutionary Armed Forces of Colombia – People’s Army (Spanish: Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo) [FARC] dissidents’ groups, which are descendants of the FARC guerrilla group. The FARC no longer exists after a peace deal with the government of Colombia. The Applicants fear violence or death for refusal to share information regarding the security and distribution of expensive goods.

[3] The RPD concluded, on the first prong of the IFA test (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA)) that the Applicants failed to establish that they would be personally at risk in the identified cities. On the second prong of the test, the RPD concluded that the Applicants have not established, on a balance of probabilities, that it would be unreasonable to seek refuge in the three proposed IFAs.

[4] By the time the hearing took place, the Applicants had focused their issues, a measure appreciated by the Court in these times of scarce judicial resources given the surge of immigration applications.

[5] The Applicants argue that the RPD erred on a basis of (i) fact, by failing to properly assess evidence which was presented to it and which it used for its findings, resulting in statements which undermine its conclusion; and (ii) law, by engaging only with section 97(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] rather than section 96 – when the Applicants feared persecution based on the nexus ground of political opinion.

[6] The Respondent argues, on the other hand, that the Decision was reasonable when read as a whole and suffered from no reviewable errors whether in fact or law.

[7] I cannot agree with the Respondent, having been persuaded by the Applicants that, in relying on select documentary evidence from the very extensive national documentation package for Columbia, the RPD failed to address sections of that objective evidence which contradicted its findings, rendering the decision internally inconsistent and lacking in transparency.

[8] Specifically, the RPD wrote at paragraphs 25-6 of its decision:

There are multiple FARC dissident groups that are loosely confederated into two national structures. Not all dissident groups are structured the same way, and operate independently of each other. FARC dissidents operate in 85 municipalities in Colombia. As of 2020, FARC dissidents have been known to have a presence in approximately 19 departments, although none of the departments listed include Bolivar or Atlántico which are where the departments Cartagena and Barranquilla are located.

Documentary evidence does not show a FARC dissident presence in Cartagena as of 2020. I do note that the situation with armed groups in Colombia is fluid, and maps and information can become static and do not often reflect a moment by moment update of what groups operate where. However, the most recent information in the NDP is that FARC dissidents do not have operations in the IFA locations. There was no evidence provided by the claimants on FARC dissident presence or operations, and as such the panel relies on the information in the NDP.

[Emphasis added.]

However, in its documentary package submitted to the Board, the Applicants' counsel submitted an article dated March 16, 2021 stating the opposite: “[a] leader of what was once Colombia's largest guerrilla organization has announced the revival of one of its most formidable blocs in

northern Colombia – a region with a competitive criminal landscape,” and the group would operate in various parts of the North including Bolivar and Atlantico (“Ex-FARC Expand into Northern Colombia”, *insightcrime.com*, CTR at p. 583). The RPD should have addressed this evidence, given that it was presented by counsel, and countered central findings with respect to the IFAs.

[9] Second, the RPD found as follows in its Decision at paragraphs 31-2, citing twice within this extract to Exhibit 3, National Documentation Package for Colombia (August 31, 2022),

Tab 7.21:

Counsel submitted that organized criminal groups in Colombia have shown that they are willing to go to extreme lengths when tracking people that they refer to as “military objectives”. It is counsel’s position that the PC, as someone who has reported to the authorities the threats he received from FARC, would be considered such a class of person

However, the documentary evidence states that the reason a person is declared a “military objective” is to “eliminate the presence of a leader or prominent person in the community”. It further states that these are formal statements, usually done through pamphlets or written declarations. While there were threats and insults, no such declaration was made against the claimant.

[Emphasis added.]

[10] Tab 7.21 of the National Documentation Package [NDP] is a document entitled “Colombia: What it means to be a ‘military objective,’” a Response to Information Request (RIR) published by Research Directorate of the Immigration and Refugee Board. That document states at its Overview at p. 1:

In correspondence with the Research Directorate, an assistant professor of sociology at Winthrop University in South Carolina who has conducted research on Latino populations, including

internally displaced populations in Colombia, indicated that ... the “most common” reason why a person is declared a “military objective” is to “eliminate the presence of a leader or prominent person in the community.”

[Emphasis added.]

[11] Clearly, the unnamed Professor did not limit a military objective to one reason. Rather, they noted other examples of people who were military objectives, beyond simply a leader or prominent person in the community (sections 2 and 3 of the RIR).

[12] Interpreting the words “the most common reason” as “the [only] reason” is unreasonable. By overstating what the Professor had asserted, the Board overlooked or omitted a key statement in the very article that it relied on in coming to its conclusions regarding safety for the Applicants in the IFAs. This factual error, once again, undermines the Decision in that the Board might have arrived at a different outcome had it not misconstrued a central component of the evidence that it relied on.

[13] As there were fatal errors of fact with respect to the assessment of the first part of the IFA test, there is no need to examine other arguments raised by the Applicants, including with respect to the second prong of that test and the failure to examine their section 96 claim under political opinion within the Decision, which focused on a section 97 assessment.

[14] Finally, it should be noted that the Applicants sought to certify the following question:

To rebut an internal flight alternative location under s.97(1)(b) IRPA, require a refugee claimant to prove 1- motivation to harm the refugee claimant and 2-capacity to locate the refugee claimant?

And if so, do those two elements have to be proven on the balance of probabilities or balance of probabilities of a risk?

The Respondent opposed the certification of the proposed question. While I did not feel that the question passed the “national interest” component of the test for certification, there is no need to further comment on the weaknesses that I find with the question, given the outcome of these proceedings.

JUDGMENT in file IMM-10356-23

THIS COURT'S JUDGMENT is that:

1. The judicial review is granted.
2. The matter shall be sent back to the RPD for redetermination by a different member.
3. There is no question to certify.
4. No costs will issue.

"Alan S. Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-10356-23

STYLE OF CAUSE: OSCAR JAVIER OLAYA BUSTOS ET AL v MCI

PLACE OF HEARING TORONTO, ONTARIO

DATE OF HEARING OCTOBER 1, 2024

JUDGMENT AND REASONS: DINER J.

DATED: OCTOBER 9, 2024

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