Federal Court  Cour fédérale

Date: 20100804

Docket: IMM-6553-09

Citation: 2010 FC 797

Ottawa, Ontario, August 4, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

YOLANDA AVILA DIAZ
NORA CONSUELO AVILA-DIAZ
(a.k.a. NORA CONSUELO AVILA DIAZ)
ANDREA LILIANA SEGURA
(a.k.a. ANDREA LILIANA SEGURA AVILA)
ADRYNAH JAELEE CASTILLO
DIEGO ALEJANDRO SEGURA
VANESSA SEGURA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review, pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), of a decision of the Refugee Protection Division of the Immigration and Refugee Board (Board). The Board determined that the applicants were neither Convention refugees nor persons in need of protection.

[2] The Board's decision is riddled with numerous and significant errors. For the reasons that follow, this application is allowed.

Background

[3] Yolanda Avila Diaz, her sister Nora Consuelo Avila-Diaz, her daughters Andrea Liliana Segura and Vanessa Segura, her son Diego Alejandro Segura, and her granddaughter Adrynah Jaelee Castillo are citizens of Colombia. The three minor applicants are citizens of the United States of America and their claims were rejected because they had not claimed against the U.S.; this finding is not challenged and it will not be addressed further.

[4] The principal applicant's claim was based on alleged persecution that her husband experienced in the late 1980s. She claimed that her husband, who was a judge in Colombia, and his co-worker, were approached by narco-traffickers and offered a bribe to decide a case regarding fraudulent documents in a particular manner. When her husband refused, they were threatened. She claimed that the family was again threatened some two years later when her husband continued to investigate the case in question. It appears from the record that judges in Colombia at that time had a dual role of prosecutor and judge.

[5] The family contacted the police the next day, but were told "that they could not offer them protection." Given the serious nature of threats to the judiciary, the family moved to their parents' home and left Colombia shortly thereafter on June 11, 1991.

[6] The applicants went initially to the U.S. where they filed a claim for asylum. This claim was denied and the family was ordered deported. The family remained in the U.S. without status until the principal applicant's husband was detained by American immigration officers and deported back to Colombia. The officers' discretion was exercised not to detain the remaining family members at that time.

[7] At this point, the principal applicant and her remaining family made inquiries about how to enter Canada surreptitiously and eventually crossed undetected at an unguarded border crossing. Shortly thereafter the family made a claim for refugee protection.

[8] The principal applicant states that her other family members received at least two additional threats in the intervening years in relation to her husband's refusal to accept the bribe in question.

[9] The Board rejected the applicants' claim on December 2, 2009. It is from this decision that the applicants seek judicial review.

[10] The Board found that there was no evidence of persecution based on a nexus ground so the claim was analysed only on the basis of s. 97 of the Act.

[11] The Board stated that "[t]he determinative issue in this case is credibility as to the well-foundedness of the claimant's fear." The Board based its lack of well-founded fear determination

on five reasons: (1) that the principal applicant's oral testimony stated that the agent of persecution was the FARC whereas her Personal Information Form (PIF) stated that she was unsure of the agent of persecution; (2) that the principal applicant testified that her husband's co-worker (who was also offered a bribe and refused) was murdered without knowing whether this murder was linked to the alleged persecution; (3) that the principal applicant was unable to explain why her husband continued to be threatened upon his return to Colombia; (4) that the FARC were known to be more ruthless and efficient in tracking down their victims, which suggested that the applicants were not in fact targeted by them; and (5) that the passage of time had diminished the possibility that the applicants would be identified and targeted. The Board concluded that "[b]ased on the totality of the foregoing, the panel is not persuaded to believe that the claimants were or are targets of the FARC."

[12] The Board then turned to the availability of an internal flight alternative (IFA) and concluded that an IFA would be available in another part of Bogota, Colombia, even if the agent of persecution was in the same city, because of the size of the city. The Board stated that the principal applicant's husband could find other employment that would lessen his risk. The Board based its IFA finding on the apparent removal, between a 2005 UNHCR report and a 2008 UNHCR report, of a reference to the ability of irregular armed groups to track their victims throughout Colombia. The Board also cited the "high concentration of civic, social, medical, government and security services that generally look after its [Bogota's] large population."

[13] In the alternative, the Board determined that the applicants faced a generalized risk of being victims of crime, which brought them outside the definition of s. 97 of the Act. The Board found that "[l]aw enforcement officials and those in the judiciary system face a risk that is a 'prevalent' or 'widespread' risk generally faced by these people, as a subset or subgroup of the general population of that country." The Board reviewed *Vickram v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 457, and *Prophete v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 331, and concluded:

> Based on the foregoing, the panel is of the view that the risk faced by the claimants, if such risk were true, would be a generalized and prevalent risk faced by a subset or subgroup of the population at large. As such, this risk is an excluded risk.

On this basis, the Board determined that the applicants were neither Convention refugees nor persons in need of protection.

Issues

[14] The applicants listed five issues in their memoranda; however, I am of the view that they may be compressed to the following:

a. Whether the Board erred in determining that the applicants would not be at risk if returned to Colombia;

b. Whether the Board erred in determining that Bogota represented a viable internal flight alternative; and

c. Whether the Board erred in determining, in the alternative, that the risk the applicants faced was one faced generally by other individuals in or from Colombia?

Analysis

1. *Whether the Board erred in determining that the applicants would not be at risk if returned to Colombia?*

[15] The applicants submit that the Board's negative credibility and lack of well-founded fear determination was unreasonable. They say that the Board engaged in speculation in stating that the agent of persecution was likely "drug cartel people" and not the FARC and that in any event the specific agent of persecution is immaterial to a s. 97 analysis. The applicants further submit that their testimony regarding the murder of principal applicant's co-worker was not an "embellishment", as found by the Board, because they never testified as to a link between his murder and their persecution. The applicants further submit that the Board made a mistake of fact in stating that the principal applicant's husband was living in Bogota and that he was attempting to ascertain evidence to support their claim in the U.S.. The applicants contend that the Board failed to reference a police report that was filed relating to recent threats that the principal applicant's husband had experienced, and that this report is directly contrary to the Board's statement that the passage of time would minimize the risk faced by the applicants. The applicants further contend that the Board failed to provide any specific evidence for its finding that the actions of the agent of persecution were insufficiently ruthless to be indicative of FARC involvement.

[16] The respondent submits that despite some errors made by the Board, the totality of the Board's reasons are reasonable, and fall within the range of possible, acceptable outcomes. The respondent further argues that there is a presumption that the Board considered all the evidence, and that even if the Board had considered the recent police report filed by the family, it does not increase the credibility of their story. The respondent submits that the Board's finding with respect to the FARC's *modus operandi* was supported by evidence.

[17] Determinations of whether a claimant is credible and whether he or she is at risk are questions of fact reviewable on the reasonableness standard.

[18] The Board stated that its negative credibility/well-founded fear determination was made based on the totality of its reasons. Each of the Board's five reasons is flawed, some to a greater degree than others. The Board's determination on the risk the applicants faced is unreasonable and cannot stand.

[19] The principal applicant was forthright in her testimony that she could not definitively state that people persecuting them were members of the FARC or members of a drug cartel. The applicant speculated that the agent of persecution could be the FARC, but this does not undermine her credibility regarding her allegations that the family was threatened following her husband's refusal to take a bribe. In any event, in the circumstances of this case, the identity of the agent of persecution is not relevant when assessing the prevalence of risk.

[20] The principal applicant did not embellish her testimony when she stated that her husband's co-worker, who was also approached to take a bribe, was murdered around the time their family was receiving threats. The Oxford English Dictionary defines "embellish" as "to 'dress up', heighten (a narration) with fictitious additions": *The Oxford English Dictionary*, 2d ed., *s.v.* "embellish". There was nothing fictitious about the principal applicant's recitation of the murder of her husband's co-worker. The principal applicant did not testify that this murder was directly linked to her family's persecution which, if she had, would arguably have been embellishment. It was open to the Board to discount this aspect of the applicant's testimony given its unproven relevance; however, it was unreasonable for the Board to use this testimony to cast a negative aspersion on her credibility.

[21] The Board erred in determining that the principal applicant's husband was living in Bogota and that he was gathering evidence for the family's asylum claim in the U.S.; both of these factual findings were incorrect. The principal applicant testified that her husband was not living in Bogota but was moving around Colombia. The principal applicant's daughter testified that her mother misspoke when she stated that her father was collecting evidence for the U.S. claim – he was collecting evidence for the claim in Canada. These factual errors are not reviewable in themselves, but they cast some doubt on the thoroughness and accuracy of the Board's assessment in its totality.

[22] The Board finds that the applicants' persecution was not ruthless enough to have been committed by the FARC. The Board cites to the national documentation package for this finding, but provides no reasons or explicit discussion to support this finding. It appears to be purely

speculative. In any event, as the Board had previously noted, the identity of the agent of persecution is relevant to nexus, and not to the probability of risk under s. 97. That the agent of persecution is underdetermined does not negate the probability of risk the applicants alleged they faced if returned to Colombia nor their credibility.

[23] There are many ways that the passage of time can minimize the risk to individuals. The applicants presented evidence, in the form of a police report, to the effect that the passage of time had not minimized the risk they faced. The Board failed to refer to this evidence, which directly contradicted its finding. The respondent is correct that a police report is not necessarily conclusive proof of persecution, in that any individual can file a complaint with the police; however, the Board made no reference to this evidence and did not explain why it discounted this evidence.

[24] The Board's finding on credibility and the risk the applicants faced if returned was riddled with errors that in their totality render the Board's finding unreasonable. However, given the Board's determinative finding with respect to the availability of an IFA and/or the existence of generalized risk, this error does not constitute a reviewable error.

2. *Whether the Board erred in determining that Bogota represented a viable internal flight alternative?*

[25] The applicants submit that the Board erred in its reasoning regarding the apparent changes between the 2005 UNHCR report and the 2008 report relied on by the Board. The applicants note that the 2005 report was from the United Nations High Commissioner for Refugees whereas the

2008 report was from the United Nations High Commissioner for Human Rights. The applicants further submit that even if the reports had been from the same agency their different titles suggest they have distinct purposes, which does not necessarily support the conclusion that the absence of a particular paragraph is indicative of a change in country conditions. The applicants submit that the Board failed to support its country conditions finding with any evidence.

[26] The respondent submits that it was open to the Board to assign more weight to the 2008 UNHCHR report than to the 2005 UNHCR report. The respondent cites *Brar v. Canada (Minister of Employment and Immigration)*, [1986] F.C.J. No. 346 (C.A.), for the proposition that arguments of weight afford no legal basis for granting judicial review. The respondent says that the different report author provides no support to the applicants' argument because the Board "considered both documents and ultimately decided to assign more weight to one…."

[27] The availability of an IFA is a question of mixed fact and law reviewable on the reasonableness standard. Questions of appropriate weight for specific pieces of evidence are factual determinations reviewable on the reasonableness standard.

[28] In *Augusto v. Canada (Solicitor General)*, 2005 FC 673 at para. 9, Justice Layden-Stevenson (as she then was) held that:

> [i]n the absence of having failed to consider relevant factors or having relied upon irrelevant ones, the weighing of the evidence lies within the purview of the officer conducting the assessment and does not normally give rise to judicial review.

[29] In this case the Board relied on factors that were perverse.

[30] The Board's principal reason for concluding that an IFA was available was the "removal" of a paragraph from a 2005 UNHCR report and a subsequent report. The Board stated:

> While the previous 2005 UNHCR report of March 2005, in paragraph 58, said that 'irregular armed groups have the capacity to track down victims throughout Colombia and indeed have done so frequently in the past,' such reference no longer exists in the current report published four years later by the same agency. The panel is satisfied that this reference has been removed, since it no longer applies (emphasis added).

[31] The reports the Board referred to were not from the same organizations. The 2005 report was from the United Nations High Commissioner for Refugees. The 2008 report was from the United Nations High Commissioner for Human Rights. These are separate entities, with different commissioners, and different mandates. The Board's error renders its conclusion that the paragraph was "removed" because it no longer applied perverse.

[32] I find little merit in the submission of the respondent that the Board considered each report independently and preferred the more recent report from UNHCHR over the older report of UNHCR. It is obvious from the Board's reasons that its conclusion was predicated on the reports' authors being the same organization and the reports being issued for the same purpose. It is plain and obvious that the Board did not consider these reports independently, and that it relied on its error in reaching its conclusion.

[33] Furthermore, the Board provided no reasons for its conclusion that the state institutions in Bogota "generally look after its large population;" a conclusion that seems to fly in the face of the Board's own high acceptance rate of Colombian nationals.

[34] But for the Board's finding on issue 3 (generalized versus individualized risk) I would have found that the error on IFA was a reviewable error.

3. Whether the Board erred in determining, in the alternative, that the risk the applicants faced was one faced generally by other individuals in or from Colombia?

[35] The applicants submit that the Board failed to make reference to extensive documentary evidence before it that "makes it very clear that members of the judiciary in Colombia…and their families are facing a particularized risk in that country."

[36] The respondent says the Board determined that the risk faced by the applicants was qualitatively the same as that faced by the general population of Colombia and that the Board's finding with respect to s. 97(1)(b) of the Act was reasonable.

[37] The question of whether the applicants faced a generalized or particularized risk is a question of mixed fact and law reviewable on the reasonableness standard: *De Parada v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 845.

[38] In *De Parada*, at para. 22, I held that:

> … an increased risk experienced by a subcategory of the population is not personalized where that same risk is experienced by the whole population generally, albeit at a reduced frequency. I further am of the view that where the subgroup is of a size that one can say that the risk posed to those persons is wide-spread or prevalent then that is a generalized risk.

[39] In this case, the Board never made a finding that citizens of Colombia are generally at risk of violence for refusing to accept bribes; such a finding can be found nowhere in the decision. The Board concluded that "[l]aw enforcement officials and those in the judiciary system face a risk that is a 'prevalent' or 'widespread' risk generally faced by these people, as a subset or subgroup of the general population" (emphasis added).

[40] In order to rely on the decisions in *Vickram*, *Prophete* and *De Parada*, the Board must first find that the type of risk alleged is one generally faced by citizens in that country. Only after this finding is made can the Board then say that a heightened risk within the applicants' subgroup does not bring them within the ambit of s. 97(1)(b) of the Act. The Board only determined that the risk to the judiciary was widespread, and not that the risk the applicants faced was generally also faced by the population at large. Furthermore, I agree with the applicants that the Board made insufficient reference to the documentary record on the prevalence of risk faced by the judiciary in Colombia.

[41] For these reasons this application must be granted and the applicants' application referred to a different Board for a redetermination based on the facts as presented and the applicable law.

[42] Neither party proposed a question for certification; there is none on the record before the Court.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application is allowed, the decision of the Refugee Protection Division of the Immigration and Refugee Board is quashed, and the application is remitted to a different panel for determination in accordance with these Reasons for Judgment; and

2. No question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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