

Federal Court



Cour fédérale

Date: 20130823

Docket: IMM-9710-12

Citation: 2013 FC 898

Ottawa, Ontario, August 23, 2013

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**JOHN JAIRO MARTINEZ GONZALEZ
PAOLA DEYANIRA MONTOYA MAHECHA
LAURA SOFIA PEREIRA MONTOYA**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants ask the Court to set aside a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada, denying protection to the applicants, citizens of Colombia, under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. For the reasons that follow, their application is allowed and the Board's decision is set aside.

Background

[2] John Jairo Martinez Gonzalez is a publisher in Colombia. Paola Deyanira Montoya Mahecha is his common-law spouse, and Laura Sofia Pereira Montoya is her daughter.

[3] On May 26, 2010, an unknown man asked Mr. Gonzalez to publish a book about the history of the Revolutionary Armed Forces of Colombia (FARC), a dangerous guerrilla organization in Colombia. Mr. Gonzalez refused when the man was unwilling to comply with certain legal requirements.

[4] The man returned to Mr. Gonzalez' business on June 10, 2010 and again demanded that his book be published. Mr. Gonzalez again refused and the man then threatened Mr. Gonzalez and his family.

[5] The applicants remained home and did not answer the phone for several days as a result of this threat. They relocated to a friend's house on June 18, 2010 and did not return to their home until ten days later.

[6] On July 6, 2010, the applicants applied for Canadian visas in order to leave Colombia. Subsequently, on July 16, 2010, Mr. Gonzalez reported the June 10, 2010 threat to the Coordinator of the Antiterrorism Unit of the Attorney General's Office in Colombia. The Coordinator told Mr. Gonzalez that he wanted to involve him in their investigation and wanted Mr. Gonzalez to lure the perpetrator into further activity to obtain more information about him.

The Coordinator also told Mr. Gonzalez that someone would contact him the following Monday.

No one followed up with Mr. Gonzalez.

[7] On July 26, 2010, Mr. Gonzalez also reported the threat to the Director of the GAULA unit of the National Army of Colombia which is dedicated to combating kidnapping and extortion. The Director agreed to investigate and, like the Coordinator, wanted to use Mr. Gonzalez as bait to lure the perpetrator into further activity in order to identify him.

[8] On August 3, 2010, a threatening letter from the FARC was left at Mr. Gonzalez' place of business. The applicants fled Colombia 20 days later on August 23, 2010 and filed claims for protection on August 26, 2010.

[9] The Board determined that the applicants were neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97(1) of the *Act*. It was determined that the applicants had failed to rebut the presumption of state protection. The Board found that Colombia has made significant progress in combating terrorist activities by the FARC, that it has adequate operations systems in place to investigate and deal with the FARC's activities, and that in this specific instance, even though the applicants initially engaged the state's protection mechanisms, the applicants did not give the state enough time or information to provide protection.

Issue

[10] The only issue is the reasonableness of the Board's finding that the applicants had failed to rebut the presumption of adequate state protection in Colombia for civilians targeted by the FARC.

Analysis

[11] The strongest evidence that there is not adequate state protection is a report prepared by Dr. Chernick:

The Colombian state is unable to protect those who have been targeted, be they communities facing forced internal displacement, or individuals threatened with kidnapping, extortion or extra-judicial assassination. Almost all human rights violations in Colombia occur with impunity. [emphasis added]

[12] The same report states that "in 2009 ... the threat faced by those who have been targeted by the FARC, the paramilitaries or by rogue state actors has not lessened; in some cases, the dangers and risks have increased," and that "the successful military operations against the FARC that occurred in 2008 have weakened the FARC but this has not translated into a reduced risk to individuals who have been directly targeted by the FARC." [emphasis added] Although the Board quoted a passage from this report, it makes no mention of this specific passage. That is because the Board failed to examine state protection from the viewpoint of the specific risk these applicants faced as targeted persons.

[13] Justice Shore recently dealt with an application very similar to this one: *Avila Rodriguez v Canada (Citizenship and Immigration)*, 2012 FC 1291 [Avila]. Although this decision was not

referred to by either party, the Court brought it to their attention and received written submissions on its applicability, post-hearing.

[14] In *Avila*, Justice Shore analyzed much of the same evidence regarding Colombia that was before the panel in this case including the report of Dr. Chernick. On the issue of state protection, at paragraph 41 of his judgment, Justice Shore found that “the principal Applicant submitted clear and convincing reports from reliable sources that appear to demonstrate, on a balance of probabilities, that Colombia cannot protect those who have been targeted by paramilitaries.” [emphasis added]

[15] At paras 43-44, Justice Shore concludes that:

It was not reasonable to find that Colombia's anti-criminality efforts outweigh evidence of human rights violations by paramilitaries. The RPD claims it weighed country conditions evidence in finding that adequate and effective state protection exists:

[32] ... The Board recognizes that there are some inconsistencies among several sources within the documentary evidence; however, the preponderance of the objective evidence regarding current country conditions suggests that, although not perfect, there is an adequate state protection in Colombia for victims of crime, that Colombia is making serious efforts to address the problem of criminality, and that the police are both willing and able to protect victims. The evidence also suggests that the state's efforts addressing the problem of criminality have been effective.

The preponderance of evidence in the record and the NDP suggests otherwise; that Colombia cannot effectively protect those who are targets of paramilitaries. [emphasis added]

[16] In the decision under review, the Board examined state protection generally, but failed to do so with an eye to the specific circumstances facing these applicants, namely that they were specifically targeted by the FARC. In doing so, the Board committed a reviewable error: *Flores Alcazar v Canada (Minister of Citizenship and Immigration)*, 2011 FC 173. For this reason, the decision must be set aside.

[17] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is allowed, the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada that the applicants are not persons in need of protection under the *Immigration and Refugee Protection Act* is set aside and is remitted to a differently constituted Board for determination, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-9710-12

STYLE OF CAUSE: JOHN JAIRO MARTINEZ GONZALEZ ET AL v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: August 12, 2013

**REASONS FOR JUDGMENT
AND JUDGMENT BY:** ZINN, J.

DATED: August 23, 2013

APPEARANCES:

Alla Kikinova FOR THE APPLICANTS

Jane Stewart FOR THE RESPONDENT

SOLICITORS OF RECORD:

MICHAEL LOEBACH FOR THE APPLICANTS
Barrister and Solicitor
London, Ontario

WILLIAM F. PENTNEY FOR THE RESPONDENT
Deputy Attorney General of Canada
Toronto, Ontario