Federal Court  Cour fédérale

Date: 20140131

Docket: IMM-296-13

Citation: 2014 FC 114

Ottawa, Ontario, January 31, 2014

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ANGEL ANDRES VARGAS BUSTOS
ANDREA EUGENIA SABOGAL RIVEROS
EDILMA BUSTOS DE VARGAS

Applicants

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants' claims for refugee protection were denied by the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board). They now apply for judicial review of that decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act).

[2] The applicants seek an order setting aside the negative decision and returning the matter to a different panel of the Board for redetermination.

Background

[3] Angel Andres Vargas Bustos (the principal applicant) and Andrea Eugenia Sabogal Riveros (the first co-applicant) are a married couple from Colombia. Edilma Bustos de Vargas (the second co-applicant) is the principal applicant's mother and she lived with them there.

[4] In Colombia, the first co-applicant worked for a bank and she was in charge of an account held by Pabon Castro Co. The bank closed this account once it found out that the company was involved in a money laundering scheme. However, the legal representative of Pabon Castro Co. had been detained, so nobody claimed the balance of 34 million pesos and the bank held onto it.

[5] On December 26, 2008, the first co-applicant received a call from a potential client calling himself Jorge Tovar, who arranged a meeting. However, as the first co-applicant was leaving for the meeting, the man confronted her and told her that he would now be in charge of the Pabon account. She said no. Over the next couple of months, she, her husband and her mother-in-law, began receiving threats from this person and he soon revealed himself to be Commander Ruben from the Urban Blocque of the *Fuerzas Armadas Revolucionarias de Colombia* [FARC]. The worst encounter happened on February 13, 2009. As she was arriving home from work, two men pinned her against a fence, threatened her with a weapon and demanded information about the Pabon account. They insisted that the account held 300 million pesos that belonged to FARC and they threatened to kill her if she did not give them the money by February 22, 2009.

[6] At no point had she or her husband approached the police or the bank, but now they contacted one of her husband's friends, an army officer. He recommended that they move and they followed his advice. The first co-applicant resigned from her job in mid-February 2009 and she and her husband eventually ended up in Canada by March 13, 2009. There they joined the second co-applicant, who had been in Canada visiting her daughter since January 23, 2009. All three asked for refugee protection and their claims were joined and considered together.

[7] Their claims were denied on August 19, 2011, on the basis that there was no nexus to a Convention ground and they had an internal flight alternative. On judicial review, however, Mr. Justice James Russell decided that the decision about an internal flight alternative was unreasonable and he set it aside (see *Sabogal Riveros v Canada (Minister of Citizenship and Immigration)*, 2012 FC 547, [2012] FCJ No 565 (QL)). The matter was returned to the Refugee Protection Division for another hearing.

Decision

[8] In a decision dated December 5, 2012, a different panel of the Board again denied their claims for refugee protection.

[9] The Board accepted the applicants' evidence about what happened to them in Colombia, but found that their claims failed because they did not prove that state protection was inadequate. The applicants did not take any of the many good opportunities they had to seek protection. The Board also rejected the first co-applicant's explanation that the police only protect politicians and

dismissed any fear of reprisal from FARC for telling the police. The Board found that the first co-applicant gave no sound rationale for her failure to report and it was inconsistent with any genuine attempt to access state protection.

[10] Further, the Board was not convinced that attempting to access state protection would have been futile. The Board rejected some evidence submitted by the applicants, saying it preferred its own documentary evidence since it came from a wide range of reliable government and non-governmental organizations. The Board found that although there are human rights abuses in Colombia and the state is having trouble addressing the criminality and corruption within its security forces, Colombia was making serious efforts to combat that. The Board acknowledged that serious efforts are not enough, but found that those efforts had translated into adequate state protection state protection for victims of crime at the operational level.

[11] The Board ostensibly went on to show that by reviewing the country conditions documents. It noted that Colombia was decreasing corruption in its security forces. It also discussed at length the success Colombia has had combating FARC and other armed groups, asserting control over more territory and decreasing their enemies' operational efficacy. It concluded that Colombia's national security is no longer threatened by illegal armed groups or criminal elements.

[12] After doing this, the Board found that the first co-applicant had not established that protection would not be reasonably forthcoming if she returned to Colombia today, nor that it would be objectively unreasonable for her to seek that protection. He therefore dismissed her

claim, along with those of the other applicants since their claims relied entirely on the same events.

Issues

[13] The applicants submit six issues for my consideration:

1. Did the Board err in law in determining that the applicants are not Convention refugees and not persons in need of protection?

2. Did the Board act without jurisdiction, act beyond their jurisdiction or refuse to exercise their jurisdiction?

3. Did the Board fail to observe a principle of natural justice, procedural fairness or other procedure that they were required by law to observe?

4. Did the Board err in law in making their decision or order whether or not the error appears on the face of the record?

5. Did the Board base their decision or order on an erroneous finding of fact that they made in a perverse or capricious manner or without regard to the material before them?

6. Did the Board act in any way that was contrary to law?

[14] The respondent says only that the applicants failed to demonstrate that the Board committed any reviewable error.

[15] Upon reviewing the arguments, I would reframe the issues as follows:

1. What is the standard of review?

2. Did the Board misunderstand the test for state protection?

3. Was the decision unreasonable?

Applicants' Written Submissions

[16] The applicants first state that the Board mischaracterized the evidence regarding the applicants' conversation with their friend in the army. They point to testimony showing that he had told them the harassment would not stop, that there was no safe place to hide and that they would not receive protection because the first co-applicant was neither a politician nor someone with a high profile. The applicants submit that their friend's advice should be trusted, since as an army lieutenant, he has first-hand knowledge about fighting guerillas.

[17] Citing *Majoros v Canada (Minister of Citizenship and Immigration)*, 2013 FC 421, [2013] FCJ No 447 (QL) [*Majoros*], the applicants also argue that the Board erred by placing a legal burden on the applicants to seek state protection and that documentary evidence is more relevant. Here, FARC is well-organized and even if the state arrested a couple people, it would not be able to relieve the applicants from persecution.

[18] Further, the applicants say the Board was wrong to dismiss the country evidence they had presented. Its preference for its own documentary evidence was based on reasoning that the applicants' documentary evidence was less objective, which the applicants say was the same type of reasoning that Madam Justice Judith Snider condemned as most disturbing in *Coitinho v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1037 at paragraph 7, [2004] FCJ No

1269 (QL) [*Coitinho*]. Further, the applicants say it was unreasonable since its submissions also included documents drawn from a wide range of non-government and government organizations. Ultimately, the applicants say that the Board erred by failing to consider all the evidence before it (see *Villa v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1229, 75 Imm LR (3d) 215).

[19] In particular, the applicants point to a report by Dr. Chernick, an expert on Colombia who has been cited by the Board in the past. They note that in *Villicana v Canada (Minister of Citizenship and Immgration)*, 2009 FC 1205 at paragraphs 72 to 79, 357 FTR 139, Justice Russell said it was unreasonable to dismiss without mentioning a report on Mexico by a professor with similarly impressive credentials. The applicants suggest the same result should be obtained here. As well, the Board did not consider a similarly supportive report by the Canadian Council for Refugees and the applicants say it was obligated to explain why this contradictory evidence was rejected (see *Cetinkaya v Canada (Minister of Citizenship and Immigration)*, 2012 FC 8 at paragraph 66, 403 FTR 46; and others).

[20] As well, the applicants say that the Board erred in applying the test for state protection and that it considered only the efforts the state was making and not its efficacy. The applicants say the Board did not consider the question really in issue, which was whether Colombia can protect a person who has been targeted by FARC (see *Avila Rodriguez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1291 at paragraphs 41 to 47, 14 Imm LR (4th) 89 [*Avila Rodriguez*]; and *Martinez Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2013 FC 898 at paragraphs 15 and 16, [2013] FCJ No 970 (QL) [*Martinez Gonzalez*]). Further, the

applicants say that the Board's analysis is questionable even based on its own documents, pointing to item 7.3 of the National Documentation Package: Response to Information Request, COL104011.E (30 March 2012).

[21] The applicants conclude by reiterating that the Board's failure to consider contradictory evidence made its decision unreasonable.

Respondent's Submissions

[22] The respondent says that the standard of review is reasonableness and argues that the applicants failed to provide documentary evidence on country conditions to rebut the presumption of adequate state protection. The respondent then summarized the law on state protection and noted that the applicants are required to submit reliable and probative evidence that proves, on a balance of probabilities, that state protection is lacking or inadequate (see *Canada (Minister of Citizenship and Immigration) v Flores Carillo*, 2008 FCA 94 at paragraphs 17 to 20, 24 and 30, [2008] 4 FCR 636).

[23] Here, the respondent notes that the Colombian authorities have already taken action against Margarita Pabon, one of the people involved with the money laundering operations and reached reasonable conclusions regarding the state's successes in battling FARC and corruption within its security forces. The respondent also says that recent cases from this Court have affirmed the reasonableness of finding that Colombia can adequately protect persons in situations similar to the applicants (see *Mendoza-Rodriguez v Canada (Minister of Citizenship and*

Immigration), 2012 FC 1367 at paragraphs 82 to 89, [2012] FCJ No 1471 (QL) [*Mendoza-Rodriguez*]; *Herrera Arbelaez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1129, [2012] FCJ No 1278 (QL); and others). Further, the respondent contends that it is not enough to point to mixed documentary evidence when the applicants have failed to seek protection from their home state (see *Borges v Canada (Minister of Citizenship and Immigration)*, 2005 FC 491 at paragraph 10, [2005] FCJ No 621 (QL); *Orduno v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1224 at paragraph 14, [2011] FCJ No 1495 (QL); and others).

[24] In a similar vein, the respondent argues that the Board's emphasis on the applicants' failure to seek protection was proper and his rejection of her excuses is well-supported by this Court's jurisprudence (see *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 724 [*Ward*]; and *Bolanos v Canada (Minister of Citizenship and Immigration)*, 2011 FC 388 at paragraph 60, [2011] FCJ No 497 (QL); and others). The respondent also says that asking for advice from a friend in the military does not count as an attempt to seek state protection.

[25] Finally, the respondent says that the Court must presume that boards have considered all evidence and they are not obliged to refer to contrary evidence within the documentary sources (see *Florea v Canada (Minister of Citizenship and Immigration)*, [1993] FCJ No 598 (QL) (CA) [*Florea*]; *Quinatzin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 937 at paragraph 29, [2008] FCJ No 1168 (QL) [*Quinatzin*]; *Salazar v Canada (Minister of Citizenship and Immigration)*, 2013 FC 466 at paragraphs 58 to 61, [2013] FCJ No 527 (QL) [*Salazar*]). Indeed, a similar argument was made about Dr. Chernick's report in *Andrade v Canada*

(Minister of Citizenship and Immigration), 2012 FC 1490 at paragraphs 14 to 19, [2012] FCJ No 1594 (QL), and there too the Board's decision was reasonable despite not referring to it by name. Altogether, the respondent says the applicants are really asking the Court to re-weigh the evidence, which this Court cannot do (see *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paragraphs 14 to 18, [2011] 3 SCR 708).

Analysis and Decision

[26] **Issue 1**

What is the standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 57, [2008] 1 SCR 190 [*Dunsmuir*]).

[27] Chief Justice Paul Crampton explained the standard of review for decisions on state protection in *Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at paragraph 22, [2013] FCJ No 1099 (QL):

> The standard of review applicable to the RPD's assessment of the issue of state protection depends on whether the conclusion reached by Board turned on its understanding of the proper test for state protection or on its application of that test to the facts of this case. For essentially the same reasons discussed at paragraphs 20 and 21 above, the former would be reviewable on a standard of correctness (see also *Koky v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1407, at para 19 [*Koky*]), whereas the latter would be reviewable on a standard of reasonableness. In short, the jurisprudence has established a clear test for state protection (see,

> e.g., *Burai v Canada (Minister of Citizenship and Immigration)*, 2013 FC 565, at para 28 [*Burai*]; *Lakatos v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1070, at paras 13-14; *Kaleja v Canada (Minister of Citizenship and Immigration)*, 2011 FC 668, at para 25; and *Cosgun v Canada (Minister of Citizenship and Immigration)*, 2010 FC 400, at paras 42-52). Therefore, it is not open to the RPD to apply a different test, and the issue of whether the RPD applied the proper test would be reviewable on a standard of correctness. However, the issue of whether the RPD erred in applying the settled law to the facts in this case would be a question of mixed fact and law that is reviewable on a standard of reasonableness (*Dunsmuir*, above, at paras 51-53; *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, at para 38 [*Hinzman*]).

[28] Here, the applicants argue that the Board misunderstood two aspects of the test, so for those matters, the standard is correctness.

[29] The other issues argued by the applicants all regard the Board's appreciation of the facts or how the law was applied to the facts and for those issues the standard is reasonableness. This means that I should not intervene if the Board's decision is transparent, justifiable, intelligible and within the range of acceptable outcomes (see *Dunsmuir* at paragraph 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59, [2009] 1 SCR 339 [*Khosa*]). As the Supreme Court held in *Khosa* at paragraphs 59 and 61, a court reviewing for reasonableness cannot substitute its own view of a preferable outcome, nor can it reweigh the evidence.

[30] **Issue 2**

Did the Board misunderstand the test for state protection?

The applicants say that the Board misunderstood the test for state protection in two ways: (1) it placed a legal burden on the applicants to seek state protection, contrary to *Majoros*; and (2) it considered only the efforts the state was making and not whether state protection was operationally adequate. Neither complaint has merit.

[31] With respect to the first, the Board did emphasize that, for democratic countries, claimants will usually need to show that they sought state protection. That is no error and is consistent with the jurisprudence of this Court (see *Camacho v Canada (Minister of Citizenship and Immigration)*, 2007 FC 830 at paragraph 10, [2007] FCJ No 1100 (QL)). Even in *Majoros*, the case preferred by the applicants, Mr. Justice Russel Zinn recognized that it is often a practical requirement since clear and convincing evidence is required to rebut the presumption of state protection (at paragraph 10).

[32] It would only be an error if the Board did not understand that a claim can also succeed if the claimants can show that it would likely have been futile to approach the state for protection (see *Ward* at 724). In that regard, the Board correctly said at paragraph 23 of its decision that claimants must "… satisfy the Board that he or she sought, but was unable to obtain, protection from their home state, or *alternatively, that their home state, on an objective basis, could not be expected to provide protection*" (emphasis added). That is paraphrased from the Court of Appeal's decision in *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at paragraph 37, 282 DLR (4th) 413, and it plainly shows that the Board knew what the test

was. Further, that understanding is reflected in the Board's decision as it did not simply stop upon finding that the applicants never sought protection, but went on to consider country conditions.

[33] As for the applicants' second argument, the Board plainly stated at paragraph 30 of its decision that "… it is not enough to say that steps are being taken that some day may result in adequate state protection. […] Any efforts must have "actually translated into adequate state protection" at the operational level." The Board knew what the test was. Also, although I will question the focus of the Board's application of this test, its decision does show that Colombia has had operational success in combating FARC and reducing corruption within its security forces. It did not focus only on efforts and I believe it understood the test.

[34] **Issue 3**

Was the decision unreasonable?

To begin, I agree with the respondent that the Board did not err by rejecting the applicants' documentary evidence. It explicitly said that it preferred the evidence in the National Documentation package because the sources were more reliable. In other words, it weighed the applicants' documentary evidence and found it wanting. This is not a situation like in *Coitinho*. There, the Board erred by rejecting a claimant's personal evidence without making any credibility finding. Here, the conflict is only between documentary evidence and boards must choose between contrary reports. It is not my role to criticize that choice now.

[35] Also, boards are presumed to have considered all the evidence (*Florea* at paragraph 1). Sometimes, when a probative piece of evidence that is contrary to a board's conclusions is not mentioned, the Court will draw an inference that the board overlooked it (see *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL) at paragraphs 15 to 17, 157 FTR 35).

[36] The respondent points out that this Court has sometimes been more reluctant to draw such an inference when it comes to country documentation evidence (see *Shen v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1001 at paragraph 6, [2007] FCJ No 1301 (QL); *Quinatzin* at paragraph 29; and *Salazar* at paragraph 59). There are good reasons for this. Country documentation usually consists of hundreds of pages of secondary sources reporting information derived from many more primary sources and other secondary sources. They report many different perspectives and there will inevitably be conflicting information on many important issues. Because of that, it will almost always be possible to mine from the materials a few quotations that support a position and then argue that the Board ignored that evidence because it did not specifically mention those documents by name.

[37] However, judicial review should not be a "line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34 at paragraph 54). Expecting a board to meticulously spell out how much weight it assigns to the evidence of each source and source-within-a-source for every issue on which conflicting data exists is neither practical nor efficient. At most, it would promote a "magic word" approach to reasons where boards would have an incentive to generically list

documents in an attempt to prove that they read them, but which adds nothing of any value to the decision.

[38] Moreover, because of the volume of documentary evidence, it is much harder to reliably infer that a particular piece of evidence was ignored merely because it was not specifically mentioned.

[39] Therefore, if the board explains what documentary evidence it relies on and that evidence is reliable and reasonably supports its conclusions, then finding a few contrary quotations that it did not specifically explain away will not make the decision unreasonable. If, on the other hand, the contrary evidence is overwhelming and the board does not explain what documentary evidence supports its conclusions, then it may be easier to conclude that the decision was unreasonable.

[40] Nevertheless, the Board did err in this case. Although the Board understood the test, I ultimately agree with the applicants that the Board erred by failing to address the main question: is state protection available for people who have been specifically targeted by FARC? Rather, the Board's review of the country conditions document was focused on corruption within the security forces and military victories against FARC and other guerillas. The applicants are not fleeing from front-line combat; they are fleeing from crime. FARC's reduced military capacity does not mean that the state can protect people who have been specifically targeted by FARC for harassment or extortion. The Board member was required to consider that issue and the reasons

do not show that he did. I find that the decision is therefore unreasonable (see *Martinez Gonzalez* at paragraph 16; and *Avila Rodriguez* at paragraph 46).

[41] Finally, the respondent also observed that this Court has many times upheld decisions that found state protection in Colombia adequate for people in the applicants' situation. A few of the cases it cites for that are distinguishable. In *Mendoza-Rodriguez* for instance, the Board had found that the applicants had lied about being pursued by a member of a paramilitary organization (at paragraph 84), so there was nobody from whom they needed protection. Anyway, this Court only reviews factual findings about state protection for reasonableness, and each case is decided on its own merits (see *Konya v Canada (Minister of Citizenship and Immigration)*, 2013 FC 975, [2013] FCJ No 1041 (QL)). The possibility that a board could reasonably find that state protection in these situations is adequate does not excuse the Board's failure to actually consider whether it was in this case.

[42] I would therefore allow the application for judicial review, set aside the Board's decision, and remit the matter to a different panel of the Board for redetermination.

[43] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, the decision of the Board is set aside and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

***Immigration and Refugee Protection Act*, SC 2001, c 27**

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
…	…
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans

	le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

FEDERAL COURT

SOLICITORS OF RECORD

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