Federal Court  Cour fédérale

Date: 20140626

Docket: IMM-2200-13

Citation: 2014 FC 623

Ottawa, Ontario, June 26, 2014

PRESENT: The Honourable Mr. Justice Annis

Docket: IMM-2200-13

BETWEEN:

MANUEL ALEJANDRO HERNANDEZ ESTEVEZ ET AL.

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada made on February 20, 2013. The Board Member determined that the applicant and principal claimant, Manuel Alejandro

Hernandez Estevez, as well as his common law partner and their two children, were not Convention refugees or persons in need of protection under sections 96 and 97 of *IRPA*.

[2] For the reasons that follow, the application is dismissed.

II. Facts

[3] The applicant and his business partner began a telecommunications business in his home country of Colombia on January 15, 2008. The company provided internet and data transmission services to areas that not all providers could service due to lack of infrastructure. Their main customers were flower farms on the outskirts of Bogota. In order to provide service they used repeaters on two hilltops. One of these repeaters was located 350 metres from a telecommunications station located within the base of an army battalion on the same hilltop.

[4] On November 7, 2010, the applicant's car was stolen. He reported the theft to the police Immediate Attention Centre, but alleges that the police were not very helpful. The next day he went to a police station to make a formal report, and was told to come back in a month to check on the matter.

[5] The applicant alleges that the same evening, he received a phone call from a caller who identified himself as a member of the FARC. The caller told the applicant not to go to the police because they would be the first ones to find out that he had made a report. The caller told him they would return his car if he did a favour for them, and then hung up.

[6] The applicant alleges that he did not report the phone call to the police because the FARC and the paramilitaries have infiltrated the police.

[7] On January 23, 2011, the applicant's business began receiving signals about a fault in their equipment on the hilltop where the military base was located. They tried to repair it remotely but were unsuccessful. They went to the hilltop location, where they discovered that the antenna and radio transmitter were missing. They replaced the missing equipment. The applicant stated that he did not make a report to the police because he was busy contacting clients about the interruption in service.

[8] The applicant alleges that he received a call on his cell phone that evening from a person who identified himself as a member of the FARC. The caller spoke of the theft of the car, and told him that they had also stolen the antenna and radio transmitter. The caller told the applicant that they needed him to install a video camera and internet access on the tower pointing towards the military base so that the FARC could use the camera remotely. The caller told the applicant not to go to the police, and said that they had all the details on his family. They would call him again to give him the camera.

[9] The applicant told his business partner about the phone calls, and his business partner advised him to leave the country to keep his wife and children safe. The next day the applicant took his family to his wife's brother's home, five hours away, abandoning their home, company and offices.

[10] The applicant alleges that his business partner subsequently received a phone call from the FARC stating that the applicant had promised to do something for them and needed to follow through on the promise. His partner told the applicant that he, too, was planning on leaving Colombia, but the applicant now does not know the whereabouts of his partner. They are not in contact.

[11] The applicant fled to the USA with his family on February 3, 2011, and entered Canada on February 15, 2011, where he and they claimed refugee protection.

III. Decision under review

[12] The Member made a negative credibility finding in regards to the applicant's business. The applicant was unable to provide financial information for his business, despite testifying that it was a successful business. Further, the applicant stated in his application for refugee protection that he fears the FARC because they have declared him a military objective, yet he was unable to provide persuasive evidence that he had been declared a military objective.

[13] Further, the Member found that there was adequate state protection in Colombia, and that the applicant had not rebutted this presumption. There was no evidence of government complicity in the matter. Colombia is a democracy, and therefore the presumption of state protection is a strong one. Furthermore, the evidence in the file indicated that the Colombian police arrest and prosecute the perpetrators of crimes, including when crimes are committed by members of the FARC.

[14] The Member acknowledged that the evidence indicated continuing serious problems, the most serious being the impunity for actions of certain groups, an inefficient judiciary, corruption, and societal discrimination. The Member pointed out however the acknowledgment by the government of its past problems and the serious efforts to rectify, amongst others, the corruption and impunity issues. With respect to weighing these problems against the government's efforts to combat them, the Member stated as follows:

> "The Board recognizes that there are some inconsistencies among several sources within the documentary evidence submitted by the Refugee Protection Division and the claimants; however, the preponderance of the objective evidence regarding current country conditions suggests that, although not perfect, there is adequate state protection in Colombia for victims of crime."

[15] The Member referred to evidence which shows that the Colombian government has formed a National Policy for Territorial Consolidation and Reconstruction which focuses on combatting guerrillas, and which has successfully neutralized the threat posed to Bogota, according to various NGOs. The Member also referenced other successful measures taken by the Colombian government, including the creation of an elite unit of the Ministry of Defence called the Unified Action Groups for Personal Freedom, an intelligence organization called the Intelligence Consolidation Centre of the Armed Forces General Command, and a strategy called Operation Sword of Honour for air force and navy surveillance. The Member canvassed some successful operations carried out by the military against the FARC, including the killing of a group of guerrillas, the detention of another group of guerrillas, the capture of the FARC's plans to attack Bogota police stations, the discovery of clandestine hospitals belonging to the FARC, and the seizure of mortar shells and other explosives and equipment belonging to FARC urban militias.

[16] The Member also discussed the government's creation of the National Protection Unit that has provided protection to 10,806 at-risk individuals, including human rights defenders and trade unionists, and various other programs including an association of NGOs that work together to prevent attacks and protect the lives of people at risk such as those working as human rights advocates.

[17] Most relevant to this discussion was the Member's description of a program recently initiated by the Attorney General and open to victims and witnesses who are providing information in a criminal proceeding. The assistance provided free of charge includes: relocating a person to another part of the country in a place chosen by program authorities to enable a person to be subjected to any necessary security measures; financial and other support during the relocation, issuance of documents, psychological and medical support. In 2011, 5,307 applications were received of which 10 percent, 540 applications, were accepted.

[18] The Member characterized all of this evidence as a reflection of the importance that Colombia has placed on the protection of its citizens, as well as the success it has had in improving the safety and security of all its citizens.

[19] In regard to the applicant's actions, the Member pointed out that the applicant never reported to the police or any other authority that he had been asked to place a video camera on the tower and to configure software so that the FARC could remotely observe activity at the military base. However, he did report the car theft, to which the police responded by taking a report and telling him to check back within a month. The member indicated that this did not

mean that the police failed to investigate the matter and perform their required duties. In any event, the applicant failed to advise the Police that FARC had stolen it. Further, even if the police didn't respond sufficiently to the car theft, the potential breach of military activity via potential espionage would be much more significant than the car theft, and would have elicited a stronger reaction from the police. The Member remained unconvinced that the police would not investigate all the applicant's allegations if he were to return to Colombia and continue to have problems with the FARC.

IV. Issues

[20] The relevant legal issues that arise in this case are the following:

1. Was the member's conclusion that the applicant had failed to rebut the presumption of state protection reasonable?
2. Did the Member commit an error in failing to conduct an individualized analysis for each claimant in the file?

V. Standard of review

[21] The Federal Court of Appeal stated in *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, at paragraph 38 that questions of the adequacy of state protection are questions of mixed fact and law reviewable on a standard of reasonableness; see also *Cobian Flores v Canada (Citizenship and Immigration)*, 2010 FC 503 at paras 20-21.

VI. Analysis

1. The Presumption of State Protection

(a) *Onus, Standard of Proof and Contextual Approach for State Protection*

[22] The jurisprudence is clear that there is a presumption of state protection and a claimant seeking to rebut it must adduce ". . . relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate" (see *Canada (Minister of Citizenship and Immigration) v Carrillo*, 2008 FCA 94 at paragraph 30 [*Carrillo*]).

[23] The applicants cited the decision of *Salamanca v Canada*, 2012 FC 780 [*Salamanca*] at paragraph 17 as stipulating the test for adequacy of state protection as follows:

> If only one in a great number receives protection, can it be said to be adequate? While no state offers perfect protection, and there will always be instances of persons who were not able to obtain adequate or any protection, in my view, the level necessary to show "adequate" state protection is a level where it is far more likely than not that the individual will be protected.

[24] In my view, this passage was taken somewhat out of context and does not represent the law on state protection either as to the measure of the adequacy of state protection or the party bearing the onus to demonstrate it. Given that "more likely than not" describes an onus of proof of a balance of probabilities, adding "far" to this standard describes a higher onus than a balance of probabilities.

[25] In addition, I do not understand that the respondent has any onus to demonstrate that a level of state protection is adequate. As indicated in the passage cited from *Carrillo* above, it was for the applicants to satisfy the Board by relevant, reliable and convincing evidence on the balance of probabilities that the state protection was inadequate. In addition, before this Court the applicants must demonstrate that the Board's decision on adequacy of protection (accepting it as the determinative issue) falls outside of the range of acceptable reasonable outcomes reached on the basis of the facts and the law.

[26] It is certainly true that a state protection analysis must take into consideration the individual circumstances of the applicant. In *LAO v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1057 at paragraph 24, and in *Torres v Canada (Minister of Citizenship and Immigration)*, 2010 FC 234 at paragraphs 37 to 43, Justice Zinn observed that state protection cannot be determined in a vacuum, and the analysis of state protection instead calls for a contextual approach that takes into account the individual circumstances of each refugee claimant. Justice Zinn also pointed out in Salamanca at para 8 the need to consider, weigh, mention, and distinguish evidence that is in "stark contrast" to the Board's findings.

(b) *The Applicants' Arguments*

[27] The applicants, who bear the onus, contend that the Member failed to consider evidence before him which they argue clearly refuted his state protection finding. They argue first that the evidence shows that Mr. Estevez would not qualify for any of the protection programs on which the member relies, and second that even if he qualified, the protection was not adequate and did not extend to his family.

[28] With respect to the issue of eligibility, the applicants note that the National Protection Unit only protects documented members of organizations and human rights defenders, which the applicant is not. They further attribute a limitation to protection under the Attorney-General's Protection and Assistance Program for Victims and Witnesses which requires that a person be a witness in a criminal proceeding and experience risk as a result of their role as a witness, which the applicant has not. In any case, only 10% of applicants to the program were accepted. Further, the applicants infer that to qualify for this program, Mr. Estevez would have to make a criminal report to the police and charges would have to be laid against the perpetrators, and they suggest that this is unlikely in light of the impunity that prevails in the vast majority of cases, as they argue is shown by the evidence.

[29] I am satisfied with the reasonableness of the Member's inference that had the applicants disclosed the threats by the FARC to use Mr. Estevez's towers to carry out surveillance against army facilities they could well have been accorded the witness protection referred to in the Attorney-General's plan. Protecting the integrity of military programs is of the utmost importance to security agencies as intelligence about their operations would render their efforts less effective. It is also logical that the Attorney-General would want to encourage community whistleblowers to come forward to prevent criminals from undermining the policing system. A further reasonable inference is that reporting FARC's plans to breach military security would cause Mr. Estevez to become an important witness in proceedings which would increase the probability of the applicants receiving protection under the Attorney-General's program.

[30] The applicants' second submission is that there exists extensive documentation concluding that the police would not be able to adequately protect Mr. Estevez and his family. They argue that the Member selectively read from the Response to Information Request, failing to cite the information from reliable sources which indicated that FARC could act with impunity to search out and harm or kill targeted members of Colombian society.

[31] As already noted, the Member made reference to security failures by the police and other protection forces in Columbia, noting "the inconsistencies among several sources within the documentary evidence submitted by the Refugee Protection Division and the claimants." It is to be remembered that the Supreme Court in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] emphasized that the principles outlined in *Dunsmuir v New Brunswick*, 2008 SCC 9 provide significant scope for specialized decision-makers to decide cases within a range of reasonable outcomes without the necessity to refer to items of evidence in the reasons.

[32] In any event, my review of the materials referred to by the applicants stipulating the inadequacies of the Colombian Government to protect its citizens does not reveal descriptions of any inadequacies of the Attorney-General's witness protection program apart from the limitations on available places described above. The Member placed reliance on the serious and motivated efforts being made by the Government to bring the situation under control. The Member weighed the evidence and concluded that the "preponderance of the objective evidence regarding current country conditions suggests that, although not perfect, there is adequate state protection in Columbia for victims of crime". I cannot conclude that the Member ignored

evidence in "stark contrast" to her conclusions, nor that there was insufficient evidence to support her conclusions.

2. Requirement for Separate Analysis for Each Claimant

[33] The applicants also contend that that the Member should have conducted an independent analysis of the availability of state protection in regards to the applicant's common-law partner and children. They argue that there is a duty to consider state protection for other individuals (*Tufino v Canada*, 2005 FC 1690) and to assess a child claimant's claim and evidence of state protection separately (*SRH v Canada*, 2012 FC 1271).

[34] In *Gilbert v Canada (Citizenship and Immigration)*, 2010 FC 1186, Justice O'Keefe addressed a very similar argument in relation to a principal applicant and her minor son. The applicant alleged that the Board in that case had breached its duty of fairness with respect to the minor applicant by not rendering a separate decision in his regard. Furthermore, as in the case at hand, the applicants' claims were joined and based on the same alleged fear, though they argued that the claims needed to be considered differently because while the principal applicant's claim for protection was based on being an abused woman, her son's claim was based on child abuse. Justice O'Keefe rejected that argument on the basis that at no time during the proceeding had the principal applicant or her counsel made the submission that her son's claim should be treated as being substantially different on that ground.

[35] Justice O'Keefe went on to state at paragraph 26 that:

> The joined claims of the applicants were rejected on the basis that state protection was available for them. It was not an error for the Board to consider implicitly that the minor applicant would and could avail himself of that same protection from the agent of persecution.

[36] Furthermore, Justice Near concurred with Justice O'Keefe's holding on that matter in *Castanon Garcia v Canada (Citizenship and Immigration)*, 2011 FC 1080 at paragraphs 22-23, where he stated the following:

> […] it was reasonable for the Board not to conduct an independent analysis of the minor Applicants' claims. All claims were based on sufficiently similar facts, the fear of continued threats and violence perpetrated by Pedro if returned to Mexico. Issues specific to the children were discussed by the Principal Applicant, who did not express a desire for them to be addressed separately.

[37] The same reasoning applies to the case at hand. The applicants' claims were joined, with Mr. Estevez named as the principal applicant, and at no juncture do the applicants appear to have requested that the claims be considered separately. Furthermore, there were no allegations that the alleged fear varied between the claimants. I have already indicated that it is reasonable to conclude that state protection would be provided for a whistleblower's family in these circumstances where a community member intervenes to ensure the integrity of policing. As a result, it was not an error for the Member to draw the conclusion that the applicant's common-law partner and children also should have availed themselves of the available state protection mechanisms before making refugee claims.

VII. Conclusion

[38] I conclude that the decision fell within a range of reasonable acceptable decisions based on the facts and law and was sufficiently justified, intelligible and transparent as to deny any grounds for the Court's intervention. Accordingly, the application is dismissed. There was no question requiring certification.

VIII. Judgment

For the reasons provided this Court's judgment is that:

1. The application is dismissed; and
2. No question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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