Federal Court  Cour fédérale

Date: 20150925

Docket: IMM-1172-15

Citation: 2015 FC 1114

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, September 25, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ALBA ARGENIS ARANGO CHIRIVI
EDWARD ALIRIO CORTES FUQUENE
VALERIA YESICA CUELLAR ARANGO
FERNANDO DIEGO CUELLAR ARANGO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) for judicial review of a decision by a senior immigration

officer with Citizenship and Immigration Canada (PRRA officer), dated January 28, 2015, rejecting a pre-removal risk assessment (PRRA) application on the grounds that the principal applicant and her family would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if they were removed to Colombia.

II. Facts

[2] The principal applicant, Alba Argenis Arango Chirivi, her two children, Valeria Yesica Cuellar Arango and Fernando Diego Cuellar Arango, and her spouse, Edward Alirio Cortes Fuquene (together "the applicants"), are citizens of Colombia. They arrived in Canada on April 24, 2013, via the United States, with visitors' visas and they made a claim for refugee protection shortly after they arrived.

[3] The applicants' refugee protection claim was rejected on July 30, 2013, by the Refugee Protection Division (RPD) of the Immigration and Refugee Board. That decision was brought before the Refugee Appeal Division, which dismissed the appeal for lack of jurisdiction on August 26, 2013. An application for leave and judicial review was filed with this Court. On December 11, 2013, the application for leave was dismissed by the Court. Therefore, in July 2014, the applicants filed a PRRA application, which was rejected on January 28, 2015. This is the judicial review of that decision.

[4] In support of their PRRA application, the applicants alleged the following facts.

[5] The principal applicant's family is originally from the municipality of El Paujil, Colombia. The principal applicant alleges in her memorandum that her mother, Graciela Chirivi, was an influential member of the Colombian Liberal Party (Liberal Party). The Revolutionary Armed Forces of Colombia (FARC) consider the Liberal Party an enemy and the FARC put pressure on the principal applicant's mother to resign—which she apparently refused to do. After that refusal, members of the FARC killed the principal applicant's maternal uncle in December 1999 and the principal applicant's cousin in January 2000. Then, the principal applicant's mother was killed by members of the FARC in March 2000 in front of the principal applicant and the principal applicant's sister. The principal applicant's sister fled to Canada and obtained refugee protection in 2002.

[6] In August 2002, one of the principle applicant's other cousins was killed. It was also during that time that the principal applicant separated from her children's biological father. The biological father obtained custody of their son and the two of them lived in the municipality of El Paujil. The female applicant obtained custody of their daughter and left the municipality of El Paujil for Bogota.

[7] After a period of relative calm, two other members of the Chirivi family were killed in February 2009.

[8] Then, in 2011, the principal applicant participated in an identification session in connection with the investigation into her mother's murder and recognized one of the men who

was involved in the murder. After that identification session, the applicant apparently received threats to her safety and that of her family from FARC members.

[9] The authorities offered the applicants protection under the witness protection program, but the principal applicant refused that offer.

[10] Fearing for his son's safety, the biological father granted custody of their son to the principal applicant in the beginning of 2013. In early April, the principal applicant's son joined her in Bogota. Then, on April 23, 2013, the applicants left Colombia to finally arrive in Canada, via the United States, on April 24 with visitors' visas. They filed a refugee protection claim after arriving on Canadian soil.

III. Impugned decision

[11] In her decision dated January 28, 2015, the PRRA officer rejected the applicants' PRRA application, finding that they do not face the risks set out in sections 96 and 97 of the IRPA should they return to Colombia.

[12] In support of their PRRA application, the applicants submitted new facts and new evidence.

[13] Regarding the new facts, the applicants alleged that the political situation in Colombia has evolved since the RPD decision and that on August 21, 2013, one of the uncles of the principal applicant's children was killed.

[14] Regarding the new evidence, in her assessment, the PRRA officer only considered documentation subsequent to the RPD decision, noting [TRANSLATION] "that the sole purpose of a PRRA application is to assess the risks based on the new evidence". In doing so, articles and documentation on the situation in Colombia, as well as on the FARC, were not taken into consideration, because the officer was of the opinion that the applicants had not justified why those documents, dated before the RPD decision, had not been submitted to the RPD.

[15] The PRRA officer considered the following documents:

- Statement from the murdered uncle's daughter, Nayibe Alcira Sanchez Polo, dated July 14, 2014;
- Statement from the former mayor of El Paujil, who had worked with the principal applicant's mother, dated July 9, 2014;
- Statements from Halinson Valbuena Valencia and Ricardo Elin Roa Calderon, dated July 8, 2014;
- Letter from the Chairperson of El Paujil's Municipal Council, dated June 6, 2014;
- Copy of an excerpt from the civil registry on the death of Charry Jose Mielar Sanchez, the uncle of the principal applicant's children, dated August 21, 2013;
- Copy of the death certificate for Neifer Sanchez Correa, the cousin of the principal applicant's children, dated February 1, 2013, as well as photos of the crime scene;
- Statements by Yudy Prada Perdono and Jorge Eduardo Henao Ciruentes, dated June 16, 2014;
- Statement from the children's biological father, dated July 14, 2014.

[16] The PRRA officer rejected the applicants' PRRA application for several reasons.

[17] First, the PRRA officer recognized that even though the situation in Colombia is not perfect, the applicants had not discharged their burden of proving that they face the risks stated in sections 96 and 97 of the IRPA.

[18] Regarding the above-mentioned new evidence, the PRRA officer rejected all of it, finding that it lacked probative value, was not credible, was not supported by the objective evidence or was imprecise.

[19] With respect to the statement from Nayibe Alcira Sanchez Polo, the officer drew a negative inference from the fact that neither the original nor a certified copy was submitted and, among other things, that the statements in the letter lack precision and are not supported by the objective evidence.

[20] With respect to the statement from the former mayor of El Paujil, Huber Bustos Hurtado, the officer drew a negative inference from the fact that that neither the original nor a certified copy was submitted and, among other things, that the statements in the letter are vague with respect to the threats referred to. He did not demonstrate that he witnessed the events directly. Also, the officer found that the applicants did not explain why they were unable to obtain that statement before the RPD decision.

[21] With respect to the out-of-court statements by Halinson Valbuena Valencia and Ricardo Elin Roa Calderon, the officer drew a negative inference from the fact that the two statements bear the same number and are practically identical, that neither the originals nor certified copies were submitted and, among other things, that the signatories do not explain their connection to the principal applicant and her family. They do not explain how they were informed of the threats to the applicants. Also, the officer found that the applicants did not explain why they were unable to obtain those statements before the RPD decision.

[22] With respect to the letter from the Chairperson of El Paujil's Municipal Council, the officer drew a negative inference from the fact that neither the original nor a certified copy was submitted and, among other things, that the author of the letter wrote that there is a threat to the principal applicant and her family but did not, however, specify the source of that information. Furthermore, the officer found that the applicants did not explain why they were unable to obtain that letter before the RPD decision.

[23] With respect to the copy of the excerpt from the civil registry on the death of the children's uncle, Charry Jose Mielar Sanchez, the officer drew a negative inference from the fact that the cause of death is not specified and, among other things, that that document does not support the allegations of the risks the applicants face because the circumstances of the death are not specified in the content of the document. Furthermore, the officer found that the applicants did not explain why they could not submit the original excerpt.

[24] With respect to the copy of the death certificate for the children's cousin, Neifer Sanchez Correa, and the photos of the crime scene, the officer drew a negative inference from the fact that the deceased was not identified on the photos. It is therefore difficult to connect the death certificate and the photos. Furthermore, even though the certificate establishes that the victim suffered a violent death, it does not specify, in particular, whether the crime was committed for ideological or political reasons.

[25] With respect to the statements by Yudy Prada Perdono and Jorge Eduardo Henao Ciruentes, the officer drew a negative inference from the fact that the two statements are practically identical, that neither the originals nor certified copies were submitted and, among other things, that the signatories do not explain their connection to the principal applicant and her family. They do not explain how they were informed of the threats to the applicants. Furthermore, the officer found that the applicants did not explain why those statements could not be obtained before the RPD decision.

[26] With respect to the statement by the children's biological father, the officer drew a negative inference from the fact that the signatory is not a disinterested party and, among other things, from the fact that he does not explain how he was informed of the threats to the principal applicant and her family. Furthermore, the officer found that the female applicant did not explain why those statements could not be obtained before the RPD decision.

[27] Finally, the officer found that there have been no significant changes in Colombia since the RPD decision that would result in them facing a personalized risk if they were to return to Colombia.

IV. Issues

[28] The Court finds that the application raises the following issues:

(1) Did the officer err in her interpretation of section 113 of the IRPA by rejecting the new evidence?

(2) Does the applicants' deportation that follows the rejection of the PRRA application violate sections 7 and 12 of the *Canadian Charter of Rights and Freedoms* and Canada's international law obligations?

V. Statutory provisions

[29] The following statutory provisions of the IRPA apply:

Consideration of application	**Examen de la demande**
113. Consideration of an application for protection shall be as follows:	**113**. Il est disposé de la demande comme il suit :
(*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;	*a*) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;

(*d*) in the case of an applicant described in subsection 112(3) — other than one described in subparagraph (*e*)(i) or (ii) — consideration shall be on the basis of the factors set out in section 97 and

d) s'agissant du demandeur visé au paragraphe 112(3) — sauf celui visé au sous-alinéa *e*)(i) ou (ii) —, sur la base des éléments mentionnés à l'article 97 et, d'autre part :

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada; and

(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada;

(*e*) in the case of the following applicants, consideration shall be on the basis of sections 96 to 98 and subparagraph (*d*)(i) or (ii), as the case may be:

e) s'agissant des demandeurs ci-après, sur la base des articles 96 à 98 et, selon le cas, du sous-alinéa *d*)(i) ou (ii) :

(i) an applicant who is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punishable by a maximum term of imprisonment of at

(i) celui qui est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada pour une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au

least 10 years for which a term of imprisonment of less than two years — or no term of imprisonment — was imposed, and	moins dix ans et pour laquelle soit un emprisonnement de moins de deux ans a été infligé, soit aucune peine d'emprisonnement n'a été imposée,
(ii) an applicant who is determined to be inadmissible on grounds of serious criminality with respect to a conviction of an offence outside Canada that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years, unless they are found to be a person referred to in section F of Article 1 of the Refugee Convention.	(ii) celui qui est interdit de territoire pour grande criminalité pour déclaration de culpabilité à l'extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d'un emprisonnement maximal d'au moins dix ans, sauf s'il a été conclu qu'il est visé à la section F de l'article premier de la Convention sur les réfugiés.

VI. Position of the parties

[30] Regarding the first issue, the applicants argue that the PRRA officer erred in her assessment of the new evidence submitted at the hearing, namely concerning the assessment of the danger to the applicants. The PRRA officer cannot exclude material evidence on the risk to the applicants' lives without substantial legal grounds for doing so. The applicants argue that paragraph 113(*a*) of the IRPA must be interpreted in a systemic and logical manner, given, in particular: the principles and objectives of the IRPA as stated in section 3 of the IRPA, the case law and Canada's duty to respect its international obligations (*Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 (*Raza*)). In doing so, the new evidence should not have been excluded for such minimal reasons by the PRRA officer. The applicants refer to *L.O.M.T. v Canada (Minister of Citizenship and Immigration)*, 2013 FC 957 at paras 26-27, in

which Justice Catherine M. Kane stated that the RPD's refusal to accept a letter by the applicant's family member because that member was apparently self-serving is not reasonable. The new evidence also should not be rejected for purely technical reasons (*Elezi v Canada (Minister of Citizenship and Immigration)*, [2008] 1 FCR 365, 2007 FC 240 at para 45). Furthermore, the applicants argue that their removal from Canada while they face a risk of torture in Colombia would be a violation of sections 7 and 12 of the Charter, the *Geneva Convention*, the *Convention Against Torture* and the *International Covenant on Civil and Political Rights* (*Suresh v Canada (Minister of Citizenship and Immigration)*, [2002] 1 SCR 3, 2002 SCC 1). Finally, the Court should draw on recent decisions of the European Court of Human Rights and the Inter-American Court of Human Rights.

[31] The respondent argues that the documents submitted by the applicants do not meet the criteria set out in the case law concerning paragraph 113(*a*) of the IRPA (see *Raza*, above at para 13). The respondent contends that the PRRA officer proceeded with an analysis of the documents submitted by the applicants and determined that they were to be given little weight. Thus, the respondent argues that the PRRA officer's finding with respect to the new evidence was reasonable. The respondent finds the decisions of the Inter-American Court of Human Rights and the *Chahal* decision, cited by the applicants, to be irrelevant in this case.

[32] Regarding the second issue, the applicants argue that the PRRA officer's decision was arbitrary and unfounded, thus violating their right to fundamental justice, guaranteed in section 7 of the Charter. Furthermore, the removal of the applicants to their country would be a violation of the guarantees set out in sections 7 and 12 of the Charter—that is, the right to life and security

of the person and the right not to be subjected to any cruel and unusual treatment or punishment (*Reference Re Public Service Employee Relations Act (Alta.)*, [1987] 1 SCR 313 at p 349; *Slaight Communications Inc v Davidson*, [1989] 1 SCR 1038 at pp 1056-1057). The applicants support those arguments with international law, noting that paragraph 3(3)(*f*) of the IRPA states that the IRPA must be construed in light of Canada's duty to comply with international human rights instruments to which Canada is signatory.

[33] The respondent argues that the Supreme Court of Canada has already determined in *Chieu v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3 (*Chieu*); *Al Sagban v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 4 (*Al Sagban*); *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 (*Suresh*), that removal after a PRRA does not contravene the guarantees in sections 7 and 12 of the Charter or Canada's international obligations.

VII. Standard of review

[34] The reasonableness standard of review applies to the PRRA officer's findings of fact and findings of fact and law (*Belaroui v Canada (Minister of Citizenship and Immigration)*, 2015 FC 863 at paras 9-10; *Kandel v Canada (Minister of Citizenship and Immigration)*, 2014 FC 659 at para 17; *Hamida v Canada (Minister of Citizenship and Immigration)*, 2014 FC 998 at para 36). Note that the analysis of the evidence in the record is within the expertise of the PRRA officer, thus deference is owed (*Aboud v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1019 at para 33; *Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067, [2008] FCJ 1308 at para 33).

VIII. Analysis

[35] It is important to note that a PRRA application is not an appeal or a reassessment of the RPD decision to reject a refugee claim (*Nebie v Canada (Minister of Citizenship and Immigration)*, 2015 FC 701 (*Nebie*); *Raza*, above at para 12). The purpose of a PRRA is to assess new risks developments between the RPD hearing date and the removal date, in order to ensure that Canada does not remove people to a country where they would face the risks set out in sections 96 and 97 (*Raza*, above at para 10; *Kulanayagam v Canada (Minister of Citizenship and Immigration)*, 2015 FC 101 at para 23). Thus, the RPD decision regarding sections 96 and 97 of the IRPA became *res judicata*, "subject only to the possibility that new evidence demonstrates that the applicant would be exposed to a new, different or additional risk that could not have been contemplated at the time of the RPD decision" (*Perez v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1379 at para 5).

[36] Because the RPD decision was *res judicata*, it was reasonable for the PRRA officer to rely on the RPD's findings with respect to the applicants' lack of credibility on several aspects of their testimony before the RPD.

A. *New evidence and the PRRA*

(1) The case law and the *Raza* test

[37] Paragraph 113(*a*) of the IRPA sets out the limits for the new evidence that can be presented for a PRRA. The reason is simple: because the PRRA is not an appeal of the RPD decision, Parliament wants to avoid the risk of wasteful and potentially abusive relitigation

(*Raza*, above at para 12; *Nebie*, above at para 36). Paragraph 113(*a*) of the IRPA "is based on the premise that a negative refugee determination by the RPD must be respected by the PRRA officer, unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD." [Emphasis added.] (*Raza*, above at para 13; *Nebie*, above at para 36). Thus, at paragraph 13 of *Raza*, the Federal Court of Appeal stated the questions that a PRRA officer must address to admit new evidence:

> 1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.
>
> 2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.
>
> 3. Newness: Is the evidence new in the sense that it is capable of:
>
> (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
>
> (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
>
> (c) contradicting a finding of fact by the RPD (including a credibility finding)?
>
> If not, the evidence need not be considered.
>
> 4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD? If not, the evidence need not be considered.
>
> 5. Express statutory conditions:
>
> (a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that he or she could not reasonably have been expected

> in the circumstances to have presented the evidence at the RPD hearing? If not, the evidence need not be considered.
>
> (b) If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).

[38] The PRRA officer must therefore consider all evidence that is presented, unless it is excluded on one of the grounds stated above (*Raza*, above at para 15; *Nebie*, above at para 36).

(2) The rejection of the new evidence and paragraph 113(*a*) of the IRPA

[39] The newness of a piece of evidence cannot be tested solely by the date on which the document was created. What is important is the event or circumstance sought to be proved by the documentary evidence (*Raza*, above at para 16). In her decision, the PRRA officer stated that she considered only the evidence that was dated subsequent to the RPD decision given that the applicants had not met the 5(a) criterion in *Raza* at paragraph 13—that is, that that evidence was not reasonably available for them for presentation at the RPD hearing, or that they could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing. Therefore, the officer was correct to refuse it.

[40] Regarding the evidence dated subsequent to the RPD decision, the officer provided reasons as to why she had attached little or no probative value to it. It is important to remember that unless the officer failed to consider relevant factors or considered irrelevant factors, the Court must show significant deference (*Mikhno v Canada (Minister of Citizenship and Immigration)*, 2010 FC 385 at para 27; *Nebie*, above at para 40).

[41] In this case, the PRRA officer analyzed the evidence in the record and found that if the applicants were sent back to Colombia, they would not be likely to face the risks set out in sections 96 and 97 of the IRPA. It appears that, in her assessment of the evidence, the PPRA officer should have considered the family's violent history to determine whether they would face the risks set out in sections 96 and 97 of the IRPA. Note that several members of the principal applicant's family died a violent death, including the principal applicant's mother. Her mother had an important job in a political organization, which apparently resulted in her murder. Also note that the principal applicant's sister obtained refugee status for events related to their mother's murder.

[42] In short, given the history of several violent deaths in the Chirivi family in the village of El Paujil, a more in-depth review of the evidence on record is necessary to determine whether there are indeed risks, as set out in sections 96 and 97 of the IRPA, for the applicants should they return to Colombia. In light of the potential risk to the family, it appears, nevertheless, in the view of the Court, as though a number of key issues were not considered and the evidence on record was not sufficiently assessed in relation to these significant unaddressed issues.

B. *The PRRA, the Charter and Canada's international obligations*

[43] The Court agrees with the respondent that the Supreme Court of Canada has already determined in *Chieu*, above; *Al Sagban*, above; and *Suresh*, above, that removal after a PRRA does not infringe on the guarantees set out in sections 7 and 12 of the Charter.

IX. Conclusion

[44] Given the circumstances of this case, the potential risks are so significant that without an in-depth analysis of the matter, risk assessment would not be adequately carried out. The result remains to be seen following reassessment by a PRRA officer.

[45] The Court finds that the PRRA officer's decision was unreasonable. Consequently, the application for judicial review is allowed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial reviewed is allowed and the matter is referred back to a different officer for a *de novo* analysis. There is no question of importance for certification.

"Michel M.J. Shore"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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