Federal Court  Cour fédérale

Date: 20160708

Docket: IMM-17-16

Citation: 2016 FC 782

Ottawa, Ontario, July 8, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

BARRIOS GARCIA, TABATA YAJAIRA
ALVAREZ HERNANDEZ, LUIS FELIPE
BARRIOS GARCIA, YARUTHZA
MATEUS TREJOS, FABIO ANDRESS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The principal applicant, Tabata Yajaira Barrios Garcia, her sister, Yaruthza Barrios Garcia, and their respective spouses (collectively, the applicants) have brought an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] The applicants seek the judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (RPD). It was determined that the applicants are not Convention refugees or persons in need of protection pursuant to sections 96 and 97 of the IRPA.

I. Facts

[3] The applicants are all citizens of Colombia. The two sisters are members of the Liberal Party of Colombia, the party currently in power in that country. They allege fear of persecution at the hands of the national liberation army (referred to as the ELN). That organization continues to be active in Colombia although the documentation acknowledges that it is not as powerful as the FARC (Revolutionary Armed Forces of Colombia). The crux of the decision under review revolves around the question of state protection.

[4] It seems that the applicants have been aware of the possible actions of the ELN going back to the late 1980's. According to the principal applicant, her mother would have been threatened with death in 1987, after refusing to make uniforms for the group. It also appears a member of the ELN would have been killed after the applicants' mother reported him to the police. There are also indications that the applicants' mother was subjected to an attempt on her life in 2006.

[5] The events giving rise to this matter before the Court start on June 4, 2015. On that date, the principal applicant would have been kidnapped by the ELN, apparently in an effort to

persuade her and her sister to join the group and recruit other young, professional women to the cause.

[6] There was a denunciation by the principal applicant to the prosecutors that same day, after she was quickly released. It is clear, and there is no debate between the parties, that the police gave the principal applicant safety advice and offered in-person monitoring at her home. That offer was declined, the applicants opting for monitoring by phone instead. Oddly, on that same day, the principal applicant followed up her denunciation by writing to international organizations like the United Nations High Commission and the International Red Cross.

[7] The applicants testify that they received threatening phone calls during July and August 2015.

[8] In an interview with the judicial police that took place on September 14, 2015, at 8:30 a.m., the principal applicant was incapable of providing any details about the telephone calls, "because I didn't record the calls." Furthermore, according to the translation of the report, the principal applicant was asked, "[w]hy have none of you asked for asylum or refuge?" The answer was, "it's very complicated because of the money, that's what we've been thinking about, but we've never tried to." Given that the principal applicant was obviously seeking protection, she was asked about where they were currently living. The report notes:

> Q. In your particular case, you are living at a farm, you have not given an address, please explain how to go about providing you with said protection.
>
> A. I will send the address of the farm in writing to this office.

[9] The report explains that "the complainant is given the number of the NC Fiscalia, and address so that she can write them advising them of the address of the farm, which she does not remember at this moment."

[10] During that same interview, the principal applicant answered the question about her plans for the future. Her answer was, "we don't want to leave Colombia, but as a last resort we plan to ask for asylum somewhere, which is the easiest." This is rather surprising because in spite of saying that she would send to the police, in writing, the address of the farm where the applicants were residing, and that there was no plan to leave Colombia, the applicants left Colombia the following day for Canada (via the United States). Furthermore, they had an appointment to meet with the Office of the Prosecutor General for the Nation on September 16, 2015. Thus, the applicants not only refused the monitoring that was offered to them earlier in the summer of 2015, but it appears that the principal applicant was less than forthcoming when she was interviewed by the police the day before she left Colombia. Actually, she left Colombia the day before she was to be seen by the Office of the Prosecutor General for the Nation.

II. Decision under review

[11] As indicated earlier, the reason for the decision of the RPD is fundamentally that the applicants have not discharged their burden that Colombia is not capable of protecting these citizens. The presumption that a state protects its nationals may certainly be rebutted, but it may be rebutted on the balance of probabilities by clear and convincing evidence.

[12] The RPD indicated, rightly, that "[s]imply asserting a subjective belief of a lack of state protection is not sufficient. State protection need not be perfect. In assessing the state protection available to any individual among the factors to be considered are the profile of the alleged agent of persecution, the efforts the claimant took to seek protection from authorities and the response of the authorities along with the available documentary evidence" (decision of the RPD at para 8).

[13] Here, the applicants are said to have failed to discharge their burden. As put by the RPD, the assertion of the state protection claim is based on two pillars. First, there was a failure, during the period of three months after the alleged kidnapping of June 2015, to receive state protection; second, the ELN would be so powerful that they could reach the claimants anywhere in Colombia, because of the so-called high value of the female claimants to the ELN due to their profile. The Board concluded that the applicants might well believe that the ELN has the capacity to find them anywhere in Colombia, but it also found that the evidence on record did not provide a reasonable basis for such a belief.

[14] The RPD was particularly concerned about the lack of details about any description of persons who would have kidnapped the principal applicant or of the taxi cab in which she travelled. In that same vein, the police report of September 15, 2015, to which I have referred earlier, is completely lacking as to the details of the threatening phone calls alleged to have been received after the kidnapping. As the RPD noted, "[t]he claimants have not provided even the minimum necessary information" (decision of the RPD at para 14).

[15] The RPD appears to have been impressed with the response that the applicants received from several state agencies in Colombia. Indeed, the offer of closer monitoring was even declined by the applicants.

[16] The RPD also noted that the strength of the ELN is reduced in Colombia, operating as a significantly weaker organization than in the past. If it is true that the ELN would show an interest in women with high profiles, that is not the kind of profile displayed by these applicants. The best that was offered was two letters from the Liberal Party which the Board qualified of pro forma letters and "boiler-plate" which offer very limited information about the activities of the applicants.

[17] The RPD actually explored the issue at the hearing of this case and concluded that "[t]he lack of detail in both the testimony and membership letter leads the panel to the finding that the claimants' role with the party was likely minor. The evidence does not support the claimants' allegation of a high profile resulting in a higher risk" (decision of the RPD at para 18).

[18] The RPD goes on to state:

> 19. Documentary evidence referred to in counsel's submissions does point to several profiles of individuals in Colombia who are at greater risk, politicians, government officials, human rights defenders and "women with certain profiles or specific circumstances" being examples which were presented as relevant to this claim. The female claimant's membership in the Liberal Party and low level activities related to that membership does not raise their profile to the level set out in the documents. The panel acknowledges that the test for determining whether the claimants are at risk is a forward looking test. Counsel submitted that future activities the claimants may undertake may raise their profile and thereby raise the level of risk to them. The panel finds this

> submission to be speculative in the consideration of the claims for protection before it today.

III. Position of the parties

[19] The applicants disagree that state protection exists in Colombia, based on what the applicants argue is a wealth of evidence. In their view, the evidence that they claim was presented ought to have been examined carefully and distinguished. Receiving a response from a state agency does not confirm the state's ability to provide effective adequate protection. In effect, they attempted to obtain assistance but in the end did not receive any.

[20] They seem to claim that it is not their responsibility to provide the authorities with the information that will allow them to investigate the matter, but rather they argue that the burden is elsewhere to ask the right questions.

[21] The respondent takes the view that the presumption of the availability of state protection is well established and that these applicants did not discharge their burden. More importantly, this case presents evidence of state agencies making immediate efforts to provide state protection, only to see the applicants decline same and leave the country without following up with interviews and basic information that would have been of assistance to the authorities.

[22] In the view of the respondent, the findings of the RPD were reasonable in the circumstances of this case, recognizing that the assessment must be made on a case-by-case basis.

IV. Standard of review

[23] The standard of review in this case is obviously reasonableness. On the specific issue of state protection, the jurisprudence of this Court and of the Federal Court of Appeal is settled: the proper standard is reasonableness (*Omorogie v Canada (Citizenship and Immigration)*, 2015 FC 1255 at para 47; *Canada (Citizenship and Immigration) v Flores Carrillo*, 2008 FCA 94 at para 36 [*Flores Carrillo*]).

V. Analysis

[24] The applicants frame their case by suggesting that the RPD erred in the assessment of state protection by predicting the actions of agents of persecution and by drawing conclusions about the claimants' motivations despite having no evidence to support those conclusions. In judicial review applications, the burden that an applicant has is not to show that the administrative tribunal has erred on this or that, but rather the applicants must satisfy the reviewing court that the outcome is unreasonable. The task faced by an applicant is described at para 47 of *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190:

> 47 Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision

> falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[25] In this case, the Court has concluded that the decision made on the facts of this case is reasonable. It is not because applicants hail from Colombia that state protection will be ruled to be inefficient. Columbia has not been shown to be a failed state. As indicated earlier, the facts must be examined on a case-by-case basis in order to ascertain if it is reasonably open to find that an applicant has not established that the presumption has been rebutted (*Osorio v Canada (Citizenship and Immigration)*, 2005 FC 20, at paras 14-15). I note, in passing, that most decisions recently have been with respect to the threat posed by the FARC, yet these decisions, where refugee status or PRRA was denied, were upheld (*Vargas v. Canada (Minister of Citizenship and Immigration)*, 2014 FC 484, *Osorio*, above, *Rujana v. Canada (Minister of Citizenship and Immigration)*, 2015 FC 197, *Hurtado v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 768. The Eligibility Guidelines for Assessing the International Protection Needs of Asylum-seekers from Colombia of the United Nations High Commissioner for Refugees of September 2015 show quite clearly in my view that the FARC continues to be the more potent of the armed groups that continue to operate in Colombia, although at reduced capacity.

[26] The RPD was right to conclude that the presumption of state protection applies with respect to a country such as Colombia. In *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, the Supreme Court established what is required in order to rebut the presumption. On can read at pages 724-725:

> The issue that arises, then, is how, in a practical sense, a claimant makes proof of a state's inability to protect its nationals as well as

> the reasonable nature of the claimant's refusal actually to seek out this protection. On the facts of this case, proof on this point is unnecessary, as representatives of the state authorities conceded their inability to protect Ward. Where such an admission is not available, however, clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of state apparatus, such as that recognized in Lebanon in *Zalzali*, it should be assumed that the state is capable of protecting a claimant.

[27] There is no serious evidence that Colombia is a state where there is a complete breakdown of state apparatus. As already noted, our Court had already found that state protection is available in Colombia.

[28] That takes the analysis to determining whether the presumption has been rebutted in this case. The question is whether adequate protection in view of the risk is available. The quality of evidence is important in matters of this nature. In *Flores Carrillo*, above, the Federal Court of Appeal held that it was not sufficient for evidence used to rebut the presumption of state protection to be reliable:

> [30] In my respectful view, it is not sufficient that the evidence adduced be reliable. It must have probative value. For example, irrelevant evidence may be reliable, but it would be without probative value. The evidence must not only be reliable and probative, it must also have sufficient probative value to meet the applicable standard of proof. The evidence will have sufficient probative value if it convinces the trier of fact that the state protection is inadequate. In other words, a claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate.

[29] In this case, it boils down to this. The principal applicant claims that she was kidnapped for what appears to be a short period of time in June 2015. She then went to the Colombian authorities, but also to international organizations, for the purposes of bringing the matter to the attention of the authorities. However, she did not give details about the kidnapping, including any kind of description of the people involved; she declined offers of protection being satisfied with telephone monitoring. She did not have any details to offer on the calls that she claims she received in July and August 2015, attended a police interview on September 14, 2015, stating that she was not interested in leaving Colombia and indicating that she would provide the police with the address where she was residing, only to leave Colombia for Canada the day after, together with her sister and their respective spouses. Actually, there was an appointment with the Prosecutor scheduled for September 16, 2015 which, obviously, was missed. The departure from Colombia seems to have been planned and deliberate.

[30] Furthermore, the lack of details about the activities of the principal applicants with the Liberal Party is somewhat troubling. It is difficult to disagree with the conclusion of the RPD that neither of them exhibits the kind of profile discussed in the documentation concerning persons who would be of interest for organizations such as ELN.

[31] The conclusion reached by my colleague Justice Strickland on facts somewhat similar is comforting. She wrote in *Vargas*, above:

> [23] In my view, based on the record before it, including the Principal Applicant's PIF and the testimony of the other Applicants, the RPD reasonably found that the Applicants failed to rebut the presumption of state protection. The RPD made a number of findings which are reasonable based on the record including that: the Applicants did not report the alleged incident of

> December 2005 to the police (until 2006); there was no persuasive evidence that the police did not respond properly when advised of the threats against the Principal Applicant's mother; the police did investigate the incidents on the farm; and, that the Applicants did not file a police report until the Principal Applicant fled the country and her husband left the day after making the report.
>
> [24] On the latter point, it was open for the RPD to find that the filing of a denunciation and subsequent departure from Columbia while that process was continuing did not constitute clear and convincing proof of Columbia's inability to protect the Principal Applicant. A similar finding was made in *Montemayor Romero v Canada (Citizenship and Immigration)*, 2008 FC 977 at para 24 and *Romero Davila v Canada (Citizenship and Immigration)*, 2012 FC 1116 at para 39.

[32] This is, in my view, the same kind of situation faced by the RPD in this case. There was a lack of details about the alleged incidents, and in spite of that, the authorities in Colombia were addressing the denunciation with dispatch. The applicants did not appear to be forthcoming and, in fact, indicated being willing to give information that they already knew they were evidently not interested in supplying because they were leaving Colombia the day after the last police interview. The protection that was offered while in Columbia was not accepted and, in the end, the applicants left Colombia without seeking to get the protection a state is capable of offering.

[33] The presumption that state protection will be afforded was not rebutted in this case and that is enough to dispose of the matter. The decision of the RPD was not unreasonable. Indeed, in my view, it was reasonable.

[34] Accordingly, the application for judicial review is dismissed. There is not a serious question of general importance in this case.

JUDGMENT

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

There is not a serious question of general importance in this case.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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