Federal Court  Cour fédérale

Date: 20170215

Docket: IMM-3646-16

Citation: 2017 FC 192

Vancouver, British Columbia, February 15, 2017

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

RAFAEL CUERO CHAMORRO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

(Delivered orally from the Bench on February 15, 2017)

I. Overview

[1] In the case at bar, credibility was not an issue; neither the Refugee Protection Division [RPD] nor the Refugee Appeal Division [RAD] questioned the veracity of the Applicant's testimony or of the evidence provided.

[2] The Court finds that the RAD's findings on of state protection were made in a perverse or capricious manner, and were at odds with the evidence on file (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 35). The RAD found that the state was acting in a reasonable manner to protect the Applicant, stating that authorities were "actively working on his complaints" and gave him "various security advices to assist him in his personal safety measures" (RAD Decision at para 16). A careful look at the evidence on file and at the RPD's reasons show the contrary; there was merely a mouth-service follow-up of the Applicant's complaints and he was told that the police did not have the resources to protect him.

[3] In assessing the state protection, the RAD held:

> [18] It could be successfully argued that with the FARC situation as it was a few years ago, the state was not in effective control of its territory, however, the recent military successes have placed the urban and suburban territories where the Respondent lived back under the control of the state. [Emphasis added.]

[4] The RAD's statement amounts to mere speculation and contradicts the objective country condition documents provided and the Applicant's testimony, the credibility of which was not challenged. The RAD member's findings are contrary to the evidence. The Court notes that the Applicant, despite the improvements made with respect to territory control by the Colombian state, still received threats, had to flee several cities, and go into hiding. The Court also highlights that the Applicant's many complaints with respect to the FARC were not addressed by the state for two years.

[5] The RAD further writes:

> [21] … None of this will happen overnight and there will be some bumps in the road to total peace, however, on a balance of probabilities, the FARC will not be interested in pursuing [the Applicant] over a piece of land that it will likely no longer want. [Emphasis added.]

[6] In the Court's view, the Applicant's constant fear for his life and his forced underground since 2012 cannot be likened to "bumps in the road". Such a comparison is far from reasonable; it is fundamentally flawed. It is trite law that state protection must not be perfect or always effective (*Canada (Minister of Employment and Immigration) v Villafranca*, [1992] FCJ No 1189, 99 DLR (4th) 334 (FCA) at para 7 [*Villafranca*]; *Kovacs v Canada (Citizenship and Immigration)*, 2015 FC 337 at para 72 [*Kovacs*]); however, the Applicant's repeated efforts to obtain state protection over the years was indicative of inadequate state protection.

II. Nature of the Matter

[7] 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 RAD dated July 27, 2016, which allowed the Minister's appeal from a decision of the RPD granting the Applicant's claim for refugee protection.

III. Facts

[8] The Applicant, aged 48, is a citizen of Colombia of Afro-Colombian descent. He was born in Buenaventura and moved to Cali in 1984. His wife, mother and siblings remained in Cali.

[9] The Applicant left Colombia for Mexico and the United States on March 26, 2015, entered Canada on September 14, 2015, and applied for refugee protection on September 17, 2015. He joined a sister who lives in Canada. The Applicant fears persecution by the Revolutionary Armed Forces of Colombia [FARC].

[10] The Applicant's family owned land which was later sought after by the FARC. When the Applicant's father refused to sell his land to the FARC, he was abducted; it is believed that he was killed in 1990. The FARC thereafter threatened the family and warned them not to go to the authorities. The Applicant's brother kept looking for their father and was killed in 1991.

[11] In September 2012, after they became aware of a governmental process aimed to recover the lost land, the Applicant and his family sought a certificate acknowledging his father's disappearance and death. Threats by the FARC ensued on a regular basis.

[12] The Applicant was targeted and threatened by phone. Fearing for his life, he fled to Bucaramanga in March 2013, and changed his phone number, but was eventually tracked down by the FARC. He thereafter reported the incidents to the authorities, but to no avail; they refused to give him a copy of the report and told him to be vigilant, as they did not have the resources to protect him. The Applicant moved to Bogota and filed a new complaint with the Public Prosecutor (*fiscalía*) in June 2013. In Bogota, the Applicant faced racism and could not find work; he once again had to move, this time to Villavicencio, where he was traced once more by the FARC.

[13] In November 2013, the Applicant was asked by the Cali authorities to return in order to make a formal complaint. Upon returning to Cali, he remained in hiding and was given a document confirming his status as a displaced person. On two occasions, men purporting to be police officers visited his mother, looking for him. The Applicant believes they were not police officers since the prosecutor had not sent these men and no investigation had commenced. The Applicant never heard back from the prosecutor and decided to file another complaint by a different *fiscalía* in Cali.

[14] After waiting in hiding for the authorities to investigate the threats he was receiving, the Applicant decided to flee Colombia on March 26, 2015, transiting through Mexico. He entered the United States and was detained during three months until payment of a large bond for his release. He entered Canada in September 2015.

IV. Decision

[15] On January 14, 2016, the RPD determined that the Applicant was a Convention refugee. The RPD found that the Applicant was credible, that he had a well-founded fear of persecution based on race and perceived political opinion, that the state was unable or unwilling to protect him, and that there was no Internal Flight Alternative [IFA] for him in Colombia. The RPD member rendered his decision orally at the January 14, 2016 hearing, and in writing on January 27, 2016.

[16] On February 11, 2016, the Respondent appealed the RPD decision on the grounds that the RPD had erred: (a) in law and fact, failing to conduct a sufficient analysis to justify its findings

of a nexus to a Convention ground; i.e. to political opinion and to race; (b) in its analysis of state protection; and, (c) in its assessment of an IFA.

[17] On July 27, 2016, the RAD, pursuant to paragraph 111(1)(b) of the IRPA, set aside the RPD decision and determined that the Applicant was not a Convention refugee.

[18] First, the RAD found that there was no race nexus because the Applicant had failed to provide sufficient evidence that he was targeted by the FARC or by the state for racial reasons. Although the RAD found that the RPD had failed to conduct a clear analysis with respect to the perceived political opinion nexus, the RAD found that the RPD did not err in this regard after conducting its own independent analysis.

[19] Next, the RAD found that the RPD analysis lacked justification and that the Applicant had failed to present clear and convincing evidence to rebut the presumption of state protection (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*]; *The Minister of Citizenship and Immigration v Flores Carrillo*, [2008] 4 FCR 636, 2008 FCA 94 [*Flores Carrillo*]).

[20] Finally, since the RAD determined that state protection had not been negated, IFA became a moot point for which analysis by the RAD was not required.

V. Issues

[21] The Applicant's sole argument is that the RAD erred in its assessment of state protection. The parties agree that the reasonableness standard of review applies.

VI. Submissions of the Parties

A. *Applicant's Submissions*

[22] The Applicant states that credibility was not an issue in the case at bar since the RPD accepted his testimony and the RAD did not challenge it.

[23] The Applicant claims that the RAD's state protection analysis ignored and misconstrued relevant evidence, relying on "common knowledge" rather than on objective documentary evidence and on subjective evidence submitted by the Applicant. The Applicant further contends that the RAD rendered a decision based on unreasonable findings of adequate state protection. The RAD erred in:

(1) finding that the peace agreements between the FARC and Colombia would translate in the FARC's loss of interest in the land belonging to the Applicant's family;

(2) ignoring the evidence relating to the discrimination faced by Afro-Colombians in seeking state protection;

(3) misconstruing the evidence with respect to the authorities' action or lack thereof when addressing the Applicant's complaints; and

(4) finding that the Applicant should have no problem to live in Cali because his family was able to live there.

B. *Respondent's Submissions*

[24] The Respondent asserts that the RAD decision was reasonable for the following reasons:

(1) The RAD reasonably analyzed the peace negotiations and agreements between the Colombian government and the FARC as factors pertinent to the Applicant's objective fear. The RAD determined based on the objective evidence that the Colombian state had effective control of the urban and suburban territories where the Applicant lived *(Villafranca*, above, at para 7).

(2) The RAD did not ignore evidence of state discrimination; rather no such evidence was provided by the Applicant. Aside for mere assumptions that state authorities would not help him (*Shala v Canada (Citizenship and Immigration)*, 2016 FC 573 at para 17), the Applicant did not provide any evidence – subjective or objective – demonstrating state discrimination.

(3) The RAD did not misconstrue the state authorities' response to the Applicant; it simply came to its own conclusion by reviewing the record before the RPD, rightly concluding that the Colombian authorities were in fact actively working on his complaint and recalling the test for state protection is not that of effectiveness, but whether or not it is adequate (*Konya v Canada (Citizenship and Immigration)*, 2013 FC 975 at para 34).

(4) The RAD reasonably considered the welfare of the Applicant's family. It was open to the RAD to conclude that the entire family was affected, given that the Applicant's alleged persecution was based on the FARC's interest in the land claimed by the Applicant and his family.

VII. Analysis

[25] After carefully reviewing the evidence on file, the Court finds that the RAD decision, with respect to state protection, lacks justification, transparency and intelligibility and is therefore unreasonable.

A. *Applicable jurisprudence*

[26] Much has been written by Canadian courts on state protection.

[27] The Supreme Court has instructed that asylum seekers must provide clear and convincing evidence in order to rebut the presumption that state protection is available in their country of origin:

> 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. … Where such an admission is not available, however, clear and convincing confirmation of a state's inability to protect must be provided. … 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. [Emphasis added.]
>
> (*Ward*, above, at 724-725)

[28] Similarly, as the Federal Court of Appeal has held, state protection must be presumed available in the refugee claimant’s country of origin and the claimant has the burden of rebutting this presumption:

> [18] Indeed, in order to rebut the presumption of state protection, she must first introduce evidence of inadequate state protection (for the sake of convenience, I will use "inadequate state protection" as including lack of such protection). This is the evidentiary burden.
>
> [19] In addition, she must convince the trier of fact that the evidence adduced establishes that the state protection is inadequate. This is the legal burden of persuasion.
>
> (*Flores Carrillo*, above, at paras 18-19)

[29] The Federal Court of Appeal has also held that state protection must not be perfect or always effective, but rather adequate:

> [7] No government that makes any claim to democratic values or protection of human rights can guarantee the protection of all of its citizens at all times. Thus, it is not enough for a claimant merely to show that his government has not always been effective at protecting persons in his particular situation. … Where, however, the state is so weak, and its control over all or part of its territory so tenuous as to make it a government in name only, … a refugee may justly claim to be unable to avail himself of its protection. … On the other hand, where a state is in effective control of its territory, has military, police and civil authority in place, and makes serious efforts to protect its citizens from terrorist activities, the mere fact that it is not always successful at doing so will not be enough to justify a claim that the victims of terrorism are unable to avail themselves of such protection. [Emphasis added.]
>
> (*Villafranca*, above, at para 7)

[30] Likewise, the Federal Court wrote that state protection adequacy is to be assessed based on the specific circumstances of the asylum seeker and his or her country of origin:

> [72] In my view, this guidance elaborates on the indicators of adequate state protection but it does not elevate the standard. Adequacy remains the standard and what will be adequate will vary with the country and the circumstances of the applicants…
>
> (*Kovacs*, above, at para 72)

B. *Case at Bar*

[31] In the case at bar, credibility was not an issue; neither the RPD nor the RAD questioned the veracity of the Applicant's testimony or of the evidence provided.

[32] The Court finds that the RAD's findings on state protection were made in a perverse or capricious manner, and were at odds with the evidence on file (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 35). The RAD found that the state was acting in a reasonable manner to protect the Applicant, stating that authorities were "actively working on his complaints" and gave him "various security advices to assist him in his personal safety measures" (RAD Decision at para 16). A careful look at the evidence on file and at the RPD's reasons show the contrary; there was merely a mouth-service follow-up of the Applicant's complaints and he was told that the police did not have the resources to protect him.

[33] In assessing the state protection, the RAD held:

> [18] It could be successfully argued that with the FARC situation as it was a few years ago, the state was not in effective control of its territory, however, the recent military successes have placed the urban and suburban territories where the Respondent lived back under the control of the state. [Emphasis added.]

[34] The RAD's statement amounts to mere speculation and contradicts the objective country condition documents provided and the Applicant's testimony, the credibility of which was not challenged. The RAD member's findings are contrary to the evidence. The Court notes that the Applicant, despite the improvements made with respect to territory control by the Colombian state, still received threats, had to flee several cities, and go into hiding. The Court also

highlights that the Applicant's many complaints with respect to the FARC were not addressed by the state for two years.

[35] The RAD further writes:

> [21] … None of this will happen overnight and there will be some bumps in the road to total peace, however, on a balance of probabilities, the FARC will not be interested in pursuing [the Applicant] over a piece of land that it will likely no longer want. [Emphasis added.]

[36] In the Court's view, the Applicant's constant fear for his life and his forced underground since 2012 cannot be likened to "bumps in the road". Such a comparison is far from reasonable; it is fundamentally flawed. It is trite law that state protection must not be perfect or always effective (*Villafranca*, above, at para 7; *Kovacs*, above, at para 72); however, the Applicant's repeated efforts to obtain state protection over the years was indicative of inadequate state protection.

[37] Also, the RAD's speculation as to the FARC's ongoing desire for the land claimed by the Applicant and his family does not rest on any evidence whatsoever; rather, the repeated threats received by the Applicant, his constant flight and the numerous complaints made to the authorities show the opposite.

[38] Finally, the RAD's assumption that "if his immediate family can live in Cali safely, the [Applicant] should be able to live there as well" (RAD Decision at para 22) simply cannot stand. As stated by the Applicant, refugee claimants do not have to risk their lives to prove the inadequacy or complete lack of state protection (*Ward*, above, at 724; *Gonsalves v Canada*

(Citizenship and Immigration), 2008 FC 844 at para 16), nor should they be forced to remain in hiding (*Sabaratnam v Canada (Minister of Citizenship and Immigration)*, [1992] FCJ No 901 (FCA)).

[39] After considering the numerous errors made by the RAD, coupled with its unjustified findings, the Court finds the decision to be unreasonable.

VIII. Conclusion

[40] The application for judicial review is allowed and the matter is to be sent back to a newly constituted panel of the RAD for a reconsideration of the appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review be granted and the matter is to be sent back to a newly constituted panel of the RAD for a reconsideration of the appeal. There is no serious question of general importance to be certified.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3646-16
STYLE OF CAUSE:	RAFAEL CUERO CHAMORRO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF HEARING:	FEBRUARY 15, 2017
JUDGMENT AND REASONS:	SHORE J.
DATED:	FEBRUARY 15, 2017

APPEARANCES:

Lobat Sadrehashemi	FOR THE APPLICANT
Courtenay Landsiedel	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Embarkation Law Corporation Vancouver, British Columbia	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENT