

Federal Court



Cour fédérale

Date: 20180111

Docket: IMM-2992-17

Citation: 2018 FC 23

Ottawa, Ontario, January 11, 2018

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

**MIRNA JOSEFINA PALACIOS DE MARTINEZ
ERICK DANIEL PALACIOS MIRANDA
CARLOS ENRIQUE MARTINEZ CALDERON
MARIA FERNANDA MARTINEZ PALACIOS
ANDRES ENRIQUE MARTINEZ PALACIOS**

Applicants

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

JUDGMENT AND REASONS

[1] The Applicants are a family from El Salvador who claim refugee protection in Canada for fear of the MS-13 gang. The Refugee Protection Division [RPD] denied their claims under ss. 96 and 97 of the *Immigration and Refugee Protection Act* [IRPA] on the grounds of credibility and availability of state protection.

For the reasons that follow, this judicial review is allowed as the RPD erred in its state protection analysis.

I. Background

[2] The Father Applicant [FA] has been a member of the Salvadoran military since 2000.

[3] In February 2014, the Applicants received a phone threat from MS-13 threatening them and telling them to leave their home. In response, the FA wrote a letter to a Colonel in the army, who advised him to leave the home immediately.

[4] The Applicants relocated to the home of a family member for seven months, and returned to their home in September 2014.

[5] In August 2016, the FA states that he was working security at the home of the daughter of the President of El Salvador when a shooting occurred. The FA states that he reported the attack to the person in charge of security for the President, but the incident was not recorded.

[6] In September 2016, the Applicants state that they started receiving more threatening telephone calls. The FA alleges that he reported these calls to the police and to his immediate superior.

[7] In December 2016, the son of the FA alleges that he was the victim of an attack by three masked men, on the way home from work. The FA states that he reported this incident and the

threatening calls to the police and to the Office of the Prosecutor General for the Republic of El Salvador. However, the FA states that no investigation was ever conducted into these alleged incidents.

[8] On January 26, 2017, the Applicants left El Salvador. The FA did not resign his position in the military. He alleges he is wanted because he is a deserter. The Applicants first went to the United States and then claimed refugee status in Canada on February 10, 2017.

II. Decision Under review

[9] The RPD concluded that the Applicants were not Convention Refugees because they did not have a nexus to a Convention ground. The FA argued that his status as a member of the security forces in El Salvador made him a member of a “social group” for the purposes of s.96 of the IRPA. However, the RPD concluded, based upon Federal Court authority, that the grounds in s.96 of the IRPA, including the social group category, refer to who someone is rather than what they do for employment. The other Applicants’ claims failed because they were derivative of the FA’s claim.

[10] With respect to their claim under s. 97, the RPD concluded that the Applicants are not subject to any risk of personal targeting in El Salvador because they were not credible in their allegations about having been threatened before in El Salvador. The RPD based this conclusion on four contradictions in the testimony and evidentiary documents of the Applicants.

[11] The RPD also concluded that the FA and his family could receive effective state protection in El Salvador because of his military status.

III. Issues

[12] Although the Applicants raise a number of issues, whether the RPD properly analyzed state protection is dispositive of this application.

IV. Standard of Review

[13] The application of the correct state protection test is reviewable on the standard of correctness (*Mata v Canada (Immigration, Refugees, and Citizenship)*, 2017 FC 1007 at para 10).

V. Analysis

[14] The Applicants argue that the RPD's focus on "effective state protection" is an error. The proper test is "adequate state protection" (*Kovacs v Canada (Citizenship and Immigration)*, 2015 FC 337 at para 67).

[15] The test for state protection is focused on whether the state can provide adequate protection in an operational sense (*Vidak v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 976 at para 8). As noted in *The Minister of Citizenship and Immigration v Flores Carrillo*, 2008 FCA 94, effectiveness *per se* is not the test for state protection. However, to be

adequate, protection must have a certain degree of effectiveness (*Bledy v Canada (Citizenship and Immigration)*, 2011 FC 210 at paras 46-49).

[16] Here the RPD addresses the *effectiveness* of Salvadorian state protection throughout the reasons. The RPD concludes that for most Salvadorians, “the state does not provide effective protection.” However, the RPD also concluded that the FA “was in a position to get effective assistance” and “personified ‘effective state protection’” because of his role in the military.

[17] Aside from the fact that the RPD’s reasoning is not the correct test for state protection, there is no evidence in the record to suggest that state protection would be forthcoming to the FA simply because he was a former member of the state apparatus. In fact, the evidence is to the contrary. As noted by the RPD, state protection is not generally forthcoming in El Salvador, as there are reports of widespread corruption of the police by gang members. Moreover, there is no reason to presume that state protection would be operationally adequate as regards the FA or his whole family, including his children.

[18] The RPD failed to properly apprehend the evidence on state protection leading it to conclude that it was “implausible” that the FA could not obtain state protection, due to his military position. While the RPD is entitled to make credibility findings based on logic and rationality, implausibility findings must only be made in the clearest of cases (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7). Here, the implausibility finding was clearly contradicted by the objective evidence, and it cannot be supported.

[19] In the circumstances, the RPD both failed to apply the correct test for state protection and failed to objectively assess the evidence. The judicial review is therefore granted.

JUDGMENT in IMM-2992-17

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted. The decision of the RPD is set aside and the matter is remitted for redetermination; and
2. No question of general importance is proposed by the parties and none arises.

"Ann Marie McDonald"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-2992-17

STYLE OF CAUSE: MIRNA JOSEFINA PALACIOS DE MARTINEZ, ERICK DANIEL PALACIOS MIRANDA, CARLOS ENRIQUE MARTINEZ CALDERON, MARIA FERNANDA MARTINEZ PALACIOS, ANDRES ENRIQUE MARTINEZ PALACIOS v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 6, 2017

JUDGMENT AND REASONS: MCDONALD J.

DATED: JANUARY 11, 2018

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