

Federal Court



Cour fédérale

Date: 20211006

Docket: IMM-705-20

Citation: 2021 FC 1033

Ottawa, Ontario, October 6, 2021

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

**MARTHA INES SARMIENTO FLOREZ
HECTOR ANTONIO TIBADUIZA POVEDA
LAURA CATALINA TIBADUIZA
SARMIENTO**

Applicants

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are a family from Columbia consisting of Martha Ines Sarmiento Flores, Hector Antonio Tibaduiza Poveda, and their daughter, Laura Catalina Tibaduiza Sarmiento. The Applicants seek judicial review of a decision dated January 8, 2020 [Decision], by the Refugee

Appeal Division [RAD] of the Immigration and Refugee Board dismissing the Applicants' appeal of a decision rendered by the Refugee Protection Division [RPD], which held that the Applicants were neither Convention refugees under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], nor persons in need of protection under section 97 of the IRPA.

[2] For the reasons set out below, the application for judicial review is dismissed.

II. Background Facts

[3] The Applicants' claim for refugee protection is based on the following facts.

[4] On June 29, 2017, Laura was approached by a woman in the washroom of the university where she studied and was asked personal questions. Laura did not reply.

[5] On July 6, 2017, as Laura was walking to her classroom, she was confronted by a man with a knife who told her that he knew where she lived, who her parents were and where they worked. He took Laura to a secluded part of the campus where the woman who previously approached her was waiting. The woman told Laura that they needed people to join a group named Los Encapuchados [LE], and mentioned that this group had a "revolutionary way" to see life. The woman told Laura that if she refused to join the group she would suffer the consequences, and if she mentioned anything about this encounter, they would kill her. Laura was able to push the man away and escape. She did not tell her parents what happened for fear of scaring them.

[6] A week later, Laura was attacked by several people as she was leaving class in the evening. The attackers threw her to the ground, kicked her, and told her she had to join them. They once again warned her that if she told anyone about them, they would kill her as well as her parents.

[7] After Laura told her parents what happened, they insisted that she should call the police and attend a hospital but she refused for fear of retaliation.

[8] In late July 2017, Hector received phone calls from individuals stating that since Laura had refused to join LE, he would have to support them financially.

[9] As a result, the family decided to leave Columbia. As they did not have the finances to leave together, Hector was the first to leave for the United States of America on August 9, 2017, followed by Laura and Martha on December 27, 2017.

[10] On January 4, 2018, the Applicants arrived in Canada and made a claim for refugee protection.

[11] The Applicants testified before the RPD that it was only after they arrived in Canada that they conducted research and discovered that LE was engaged in forcible recruitment and was operating for the Revolutionary Armed Forces of Colombia – People’s Army [FARC] or the National Liberation Army [ELN]. They later amended their account and stated at the hearing that LE was an ELN cell.

[12] By decision dated April 23, 2019, the RPD rejected the Applicants' asylum claims as it found them not to be credible and because they failed to provide clear and convincing evidence that state protection would not be available to them.

III. Decision under Review

[13] The Applicants appealed the RPD's decision to the RAD on the grounds that the RPD made significant errors in assessing their credibility, ignored evidence before it, and erred in law.

[14] The RAD concluded that the determinative issue related to state protection and the sufficiency of credible evidence pertaining to it.

[15] It concluded that given the credibility issues identified by the RPD, the profile of the principal claimant, Hector, and the objective evidence that does not support the allegations of forcible recruitment in universities, the Applicants' allegations were not credible as a whole with respect to the alleged risks in Colombia.

[16] The RAD found no error in the RPD's failure to consider documentary evidence of the ELN and other militant bodies that used forced recruitment in other parts of Columbia, as the RPD correctly found that the Applicants did not establish that LE is affiliated with the ELN or any other militant bodies mentioned in the documentary evidence. There was also no evidence suggesting that LE is a militant body since the individuals approaching Laura never mentioned that they are affiliated with the ELN or any other group.

[17] The RAD also noted that it was the Applicants' responsibility to rebut the presumption of state protection by means of clear and convincing evidence. While the RAD agreed with the Applicants that the RPD erred by failing to provide any analysis of the adequacy of the operational efforts made by the state, the RAD found that there is insufficient clear and convincing evidence of the absence of state protection.

IV. Analysis

[18] The Applicants submit that the RAD ignored evidence on a central issue, that is whether LE was a political/revolutionary group, and went on to do its state protection analysis based on the premise that it was not, thereby rendering its decision unreasonable. I disagree.

[19] There is no dispute between the parties that the nature of the alleged agent of persecution – whether political, militant, a sub-cell, guerilla, or revolutionary – is relevant to the state protection analysis because it could affect the presumption of state protection and the linkage with the ELN or other militant group. In the present case, the RAD provided detailed reasons for concluding that there was no evidence that LE was a militant body, or that it was linked to any militant group.

[20] The Applicants relied on an article from *El Tiempo*, obtained after they left Columbia, to establish that LE is a primary cell of the ELN. The RAD noted however that the Applicants were unable to point out any specific paragraph showing a link between the LE and the ELN. In particular, the article:

- Failed to mention LE by name;

- Specifically referred instead to the Bolivarian Student Movement;
- Specifically mentioned that the “hooded” protesters of the Bolivarian Student Movement have ties to the FARC rather than the ELN;
- Described the targeted recruitment of individuals who have a very different profile than that of Laura;
- Described a totally different method of recruitment than that used by LE on Laura;
- In no way indicated that LE is a “primary cell” of the ELN as alleged by the Applicants.

[21] The only other evidence upon which the Applicants relied to establish a link between LE and a militant group was a statement made by the woman who approached Laura, saying that they have a “revolutionary way” to see life.

[22] However, given the ambiguous nature of the statement, I see no error in the RAD’s conclusion that there was nothing in the testimonial evidence that suggests that the LE is a “militant body”, as further explained by the RAD at page 8 of its Decision.

According to the evidence, the people who threatened the Appellants, wanted their address, wanted Laura to join them, wanted extortion money and nothing more. The individuals never mentioned that Laura should join them in any political or “militant” action. The assailants never mentioned that they are affiliated with the ELN or any other group. The evidence is not sufficient to qualify the LE as one of the “militant bodies” described in the evidence.

[23] I note that for the purposes of the state protection analysis, the RAD accepted the facts as alleged regarding the Applicants' interactions with LE. The RAD found it unnecessary to examine submissions made by the Applicants that the RPD erred in the assessment of their credibility with issues that do not pertain to state protection. In conducting the analysis, the RAD properly considered whether there was clear and convincing evidence to rebut the presumption of state protection.

[24] The Applicants submit that by stripping the Applicants' claim of the political context, the RAD rendered an unreasonable decision when dealing with the issue of state protection. I disagree. Having found that the Applicants had failed to establish that LE was associated with the ELN or any other militant group, the RAD properly concluded that there was no error by the RPD in not addressing the documentary evidence that armed and "narcoparamilitary" groups, such as the ELN, had infiltrated state institutions, including the police and the attorney-general's office.

[25] The Applicants did not dispute, and in fact acknowledged, that they did not seek state protection in Bogota or elsewhere in Colombia. The RAD recorded the Applicants' testimony on this subject as follows at para 31:

[31] The Appellants did not file a complaint with the authorities. Hector testified that he wanted to file a complaint but that his daughter insisted that he should not, despite the fact that that time, they did not yet believe that the people that they fear have any links to the ELN.

[26] This admission proved fatal to the Applicants' claim.

[27] Finally, I wish to address an issue of procedural fairness raised by the Applicants which, in my view, simply has no merit.

[28] Prior to the RAD hearing, the Applicants were given written notice that the member analyzing the file would be using the updated version of the National Documentation Package [NDP] for Colombia dated May 31, 2019 generally “and specifically tab 7.8 : République de Colombie: Situation sécuritaire. COI Focus. (June 7, 2019)”. The Applicants were invited to provide written submissions about the specific document.

[29] The Applicants submit that the purpose of the notice was not clear and the RAD should have been more specific in order to be fair. However, I note that counsel for the Applicants provided written submissions on Item 7.8, commenting generally that while violence in Bogota is receding, it is still a problem, and that the ELN continues with its forced recruitment and extortion. No complaint was raised at the time that the notice or its purpose were unclear.

[30] If the Applicants wished the RAD to consider the NDP report further, it was incumbent upon them to highlight portions of the document that supported their position that the presumption of adequate state protection could be rebutted. Ultimately, both the RAD and the Applicants agreed that violence in Bogota was receding, based on the report.

[31] In the circumstances, I am satisfied that there was no denial of procedural fairness. The Applicants had the opportunity to present their case, fully and fairly, and have it determined in a fair, impartial, and open process.

V. Conclusion

[32] For the above reasons, I am satisfied that the RAD's Decision bears all the hallmarks of a reasonable decision – justification, transparency and intelligibility – and does not warrant any intervention by this Court.

[33] The application for judicial review is accordingly dismissed.

[34] There are no questions for certification.

JUDGMENT IN IMM-705-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There are no questions for certification.

“Roger R. Lafrenière”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-705-20

STYLE OF CAUSE: MARTHA INES SARMIENTO FLOREZ, HECTOR ANTONIO TIBADUIZA POVEDA, LAURA CATALINA TIBADUIZA SARMIENTO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: BY VIDEOCONFERENCE

DATE OF HEARING: SEPTEMBER 1, 2021

JUDGMENT AND REASONS: LAFRENIÈRE J.

DATED: OCTOBER 6, 2021

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