Federal Court  Cour fédérale

Date: 20101216

Docket: IMM-624-10

Citation: 2010 FC 1292

Ottawa, Ontario, December 16, 2010

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

ANA MARIA ANGEL GONZALEZ
OLGA MARGARITA GONZALEZ JARAMILLO
HECTOR ALFONSO ANGEL GONZALEZ

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA"), of a negative decision by the Immigration and Refugee Board (the "IRB") dated December 23, 2009. The IRB refused the refugee claim and found that the applicants were not Convention refugees or "persons in need of protection" as defined in sections 96 and 97 of IRPA. Leave for judicial review was granted by Justice Heneghan on September 9, 2010.

[2] In its decision, the IRB refused the applicants' claim as they were not found to be Convention refugees or persons in need of protection, based on a lack of credibility and plausibility of their story. Alternatively, they were found to have an Internal Flight Alternative ("IFA") in Colombia. The claims were not found to have sufficient nexus to a Convention ground.

The Facts

[3] The applicants' claim rests on the alleged persecution suffered at the hands of the Revolutionary Armed Forces of Colombia ("FARC"), a paramilitary organization. They are members of the same family: Ana Maria and Hector Alfonso are siblings and Olga Margarita is their mother. They also have a brother, Carlos Alberto, whose refugee claim in Canada was accepted in September of 2005. His refugee claim was based on persecution by the same paramilitary organization.

[4] Since Carlos Alberto's departure, the principal applicant, Ana Maria, was tasked with managing the family's three (3) farms, situated a few hours from their city of residence, Medellin. From August 2007 on, the principal applicant alleges having received several threatening phone calls from people claiming to be from the FARC. Threats were allegedly uttered, as the principal applicant refused to pay the FARC's extortion tax. These calls continued until the winter of 2008, when the principal applicant and her mother left for the United States on valid visas and made their way to Canada, after two weeks in that country. The brother, Hector Alfonso, allegedly received phone calls after their departure, asking the whereabouts of the principal applicant and reiterating the demands for the payment. The brother then fled, spending a week in the United States, before making his way to Canada.

The IRB's Decision

[5] Having analyzed the evidence and tested it during the hearing, the IRB was of the opinion that the applicants were not, on the balance of probabilities, targets of the FARC. Alternatively, they were found to have an Internal Flight Alternative ("IFA") in the capital of Bogota.

[6] More particularly, the applicants' story was not deemed credible for the following reasons:

- The fact that the three (3) farms the family owned continued to operate under the management of their long-time employee, is not seen to be credible as the IRB found it surprising that it kept functioning without FARC interference or problem;

- The IRB found that in light of the refusal to pay, the FARC could reasonably be expected to extract the money from the farm manager, take the produce and livestock and sell them or take the title to the farm and sell it. The fact that FARC did not, makes the IRB hesitant to believe the applicants' story;

- The fact that there was no personal confrontation or attack was deemed surprising, as the "passive style of getting their target to comply with their demand seems to be uncharacteristic of the FARC, who are well known to take swift and violent reprisal on those who did not comply";

- Despite the threats, the principal applicant still traveled by plane and car to go to the farm, and even stayed there two (2) days, without interference or contact with the FARC. The IRB

found it “strange” that she would “venture, as it were, into the lion’s mouth” without confrontation from the FARC.

[7] The IRB found that, on the balance of probabilities, the applicants were not targets of the FARC. Furthermore, the IRB made a negative credibility finding from the fact that the applicants had not applied for refugee protection while in the United States. Also, the IRB found that the applicants had an IFA in Bogota, and that the FARC’s current capacities were not such that they could track the applicants in the capital. The IRB also concluded that there was sufficient state protection in Colombia, and that the applicants had not shown that the efforts to avail themselves of that protection would be sufficient.

Position of the Parties

[8] The applicants argue that the IRB erred in its appreciation of the evidence. It is argued that the IRB made several unreasonable findings, such as the fact that the FARC could sell the farms and the cattle and the detrimental conclusion to the applicants’ transit through the United States. The applicants submit that the IRB ignored evidence before it, such as the security measures taken by the applicants in order to avoid the FARC. The IRB failed to recognize the presumption of truth of refugee claims and ignored the documentary evidence before it.

[9] The Respondent argues that, in light of the reasonableness standard of review, the IRB’s decision falls within the range of reasonableness. It is argued that the IRB sufficiently motivated its decision and took into consideration the evidence before it. Also, the respondent alleges that it was justified for the IRB to make an adverse credibility finding based on the applicants’ failure to make in the first safe haven they found, while recognizing that this cannot be the sole factor on which the

IRB bases its decision. The respondent submits that the Court must not reweigh the evidence and substitute its own conclusions if the IRB's decision falls within the acceptable outcomes justifiable in fact and in law.

The Applicable Standard of Review

[10] The IRB's determination of the validity of a claim for protection made pursuant to sections 96 and 97 of IRPA is a mixed question of fact and law, and thus attracts review on a reasonableness standard (*Gutierrez v. Canada (Citizenship and Immigration)*, 2009 FC 487; *Gonzalez v. Canada (Citizenship and Immigration)*, 2009 FC 163). As such, the Court must not substitute its own judgment to that of the IRB. So long as the decision falls within the realm of reasonable and justifiable outcomes, the Court may not intervene (*Dunsmuir c. Nouveau-Brunswick*, 2008 CSC 9).

[11] It is not the Court's role, in reviewing the IRB's findings, to reweigh the evidence that was before the IRB. Rather, the Court must review the decision in keeping with the principles of judicial review (*Sanchez v. Canada (Citizenship and Immigration)*, 2008 FC 971).

Analysis

[12] While the IRB is not required to refer to each and every piece of evidence before it, there is a presumption that it weighed and considered all the evidence (*Hassan v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 946 (F.C.A.); *Sanchez v. Canada (Citizenship and Immigration)*, 2008 FC 134; *Suvorova v. Canada (Citizenship and Immigration)*, 2009 FC 373). When the IRB draws inferences and conclusions that on the record are reasonable, the Court should not interfere, whether or not it agrees with the inferences drawn: *Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (F.C.A.); *Chen v. Canada*

(Citizenship and Immigration), [1999] F.C.J. No. 551 (F.C.A.). However, as it will be seen below, the IRB's decision, on the whole, is unreasonable and does not fall within the range of acceptable outcomes. On several grounds, the IRB's decision failed to relate evidence before it, and made unreasonable conclusions.

Passage through the United States

[13] In its decision, the IRB made a negative inference from the fact that the applicants had transited through the United States and had stayed there for a certain amount of time. The IRB concluded that "the panel finds this troubling in that, if they were truly in fear of being returned to Colombia, they would have taken steps and actions that reflect the urgency of their situation, that is, to apply for refugee protection at the first opportunity in a safe country". While it holds true that a certain inference can be made from not claiming refugee status in the first country, this cannot be the sole factor on which the IRB bases its decision (*Hue v. Canada (Minster of Employment and Immigration)*, [1998] F.C.J. No. 283 (F.C.A.)). The IRB must assess why there was delay in the application and why asylum was not sought at the first occasion (*Mendez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 75; *Mesidor c. Canada (Citoyenneté et Immigration)*, 2009 CF 1245; *Gavryushenko v. Canada (Minister of Citizenship and Immigration)*, [2000] 194 F.T.R. 16).

[14] In this case, an explanation was given by the applicants: they did not seek refuge in the United States because their brother/son had filed a successful claim in Canada based on similar underlying facts. The IRB did not address this in its reasons and made an adverse finding, despite the evidence before it. While not determinative in itself, this element is indicative of the unreasonableness of the IRB's decision.

The FARC's Responses and Behaviour

[15] The IRB was of the opinion that the applicants' allegations of the FARC's threats and behaviour were incompatible with its reputation of violent reprisal. Furthermore, the IRB did not find credible that the FARC would simply give a pamphlet to the farm manager. The IRB stated that "it would have been reasonable to believe that the FARC would extract the money they demanded directly from the farm manager, take the farm produce and livestock and even take title to the farm and sell these themselves".

[16] As the applicants noted in their pleadings, such a conclusion is unwarranted and unreasonable. It goes beyond a plausible inference of fact and delves into speculation that is not materially supported. That the FARC are usually violent is not contested; however, this does not imply that the FARC would sell the farm's livestock, or even the farm itself, which is an unreasonable inference of fact. Surely, the Court cannot find such a conclusion to be "within the realm of justifiable outcomes", as per *Dunsmuir*, *supra*.

[17] This is further compounded by the fact that the IRB ignored the applicants' attempt to modify their routes and behaviour in order to avoid the FARC. The IRB concluded that the FARC typically has violent methods, which is not contested. However, the IRB could not reasonably conclude that if the FARC did not physically confront the applicants without duly considering the evidence, that the applicants had taken precautionary security measures in order to protect themselves from the FARC. Again, this element is not determinative, but is indicative of the unreasonableness of the IRB's findings.

The IFA finding

[18] The IFA finding makes up a sizeable portion of the IRB's decision. It addresses a good portion of the documentary evidence and attempts to evaluate the FARC's current capacities in the capital of Bogota. However, in its reasoning on the IFA issue, the IRB drew unreasonable conclusions from the documentary evidence.

[19] One example of this is the finding in regards to the United Nations High Commission for Refugees' (UNHCR) report. The IRB concludes that this report "no longer supports" and is "silent" on the FARC's capacity to track down citizens in the capital or in large cities. The IRB took this as a finding that the FARC had limited operational capacities in the cities. In fact, as the applicants noted, the more recent version of the UNHCR report does not have the same specific paragraph, but contains certain relevant elements. The Court's role in this instance is not to determine whether the FARC can track down people in large cities. Rather, the Court can state that the documentary evidence was not reasonably considered, as was the case here.

[20] The IRB's decision also omitted an important element of fact in its IFA determination. It made no mention of the fact that the source of the applicants' woes was farms on which they did not reside and were situated several hours away. The applicants lived in the large city of Medellin, and were allegedly tracked down by the FARC, even though they had moved within this city after the first threats were received. It is unreasonable for the IRB not to have considered the applicants' move within the city and the fact that the alleged persecution was not directly linked to their place of residence.

Adequacy of State Protection

[21] While the IRB's decision does attest to a serious analysis of Colombia's capacity to protect its citizens from the FARC, especially in major cities, the decision does not relate how this protection relates to the applicants. The IRB failed to address in its decision the principal applicant's previous dealings with police forces. Also, it failed to consider the police's response to the brother's complaints about the alleged threats. Without addressing the sufficiency of such elements in regards to an IFA finding, the Court finds it unreasonable for the IRB to ignore this evidence.

Conclusion

[22] In light of the discussed elements of the IRB's decision, it appears that the IRB's determination of the applicants' refugee claims was made in an unreasonable fashion, without due consideration of the evidence before it and drawing unreasonable conclusions from the evidence it did consider. The application for judicial review of the IRB's decision, dated December 23, 2009, is granted and sent for redetermination in front of a newly constituted panel.

[23] No question of general importance for certification was proposed by the parties.

JUDGMENT

THIS COURT'S JUDGMENT is:

- the judicial review application is granted and the matter is to be sent for determination by a newly constituted panel of the Immigration and Refugee Board. No question is certified.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-624-10
STYLE OF CAUSE:	ANA MARIA ANGEL GONZALEZ , OLGA MARGARITA GONZALEZ JARAMILLO HECTOR ALFONSO ANGEL GONZALEZ AND MINISTER OF CITIZENSHIP AND IMMIGRATION
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