Federal Court  Cour fédérale

Date: 20110609

Docket: IMM-6066-10

Citation: 2011 FC 657

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, June 9, 2011

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

JAVIER FERNANDO MONZON ORTEGA
DIANA MARCELA BARRIGA PEREZ
DANIEL FERNANDO MONZON BARRIGA
DIANA ALEJANDRA MONZON BARRIGA
ADRES MONZON BARRIGA

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Court is asked to determine the validity of a decision of the Immigration and Refugee Board of Canada's Refugee Protection Division (RPD). In that decision, dated September 8, 2010, the RPD denied the principal applicant and her family the status of refugees

and persons in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] The principal applicant and her husband are from Colombia. While her husband was working in the United States, the principal applicant allegedly received two telephone calls from a unit of the Revolutionary Armed Forces of Colombia (FARC), a paramilitary group previously very active in Colombia. Afterwards, the principal applicant was allegedly visited and threatened by three men. The principal applicant was operating a database company, which allegedly had in its possession information on company directors. The FARC allegedly wanted to have access to these data and had threatened the principal applicant and her family to obtain them.

[3] The RPD found that despite the threats, the FARC's influence at the time of the hearing had substantially decreased and that state protection was available should the family seek it, which they had not done before their departure. This finding relied on the immigration law principle that foreign nationals must first exhaust their internal recourses before seeking protection from another state. Moreover, the RPD found that none of the Convention grounds or section 96 of the IRPA applied in this case.

[4] In support of their application for judicial review, the applicants submit that the RPD should have relied on a persuasive decision of the RPD, which was applicable when the events in question occurred, but which has since been discarded as being persuasive. According to the applicants, that decision accurately reflected the state of Columbia's fight against the FARC. In addition, the applicants argued that the RPD ignored the documentation establishing that the

FARC did indeed have considerable influence and that it was reasonable not to approach the authorities for protection. According to the applicants, the RPD's findings were therefore not supported by the documentary evidence and were therefore invalid.

Issue and standard of review

[5] The issue concerns the RPD's evaluation of the documentary evidence and its assessment of state protection in Columbia. It is a question of mixed fact and law which is reviewable on a standard of reasonableness (*Dunsmuir v New-Brunswick*, 2008 SCC 9; *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171; *Guevara c Canada (Citizenship and Immigration)*, 2011 FC 242). The Court's intervention is thus more limited: it has to determine whether the decision falls within a range of outcomes which are defensible in respect of the facts and law, whether it is intelligible, and whether it is based on an adequate foundation, without, however, being perfect.

Analysis

[6] The RPD's decision is reasonable regarding the availability of state protection in the state of Columbia.

[7] First, the RPD was not bound by the persuasive decision, even though it was in effect at the time of the alleged events. Indeed, it is trite law that the nature of a risk assessment is prospective, not retrospective (*Pour-Shariati v Canada (Minister of Employment and Immigration)*, [1995] 1 FC 767; *Katwaru v Canada (Citizenship and Immigration)*, 2010 FC 196; *Llorens Farfan v Canada (Citizenship and Immigration)*, 2011 FC 123). The RPD therefore

did not err in analyzing the *current* status of state protection in Columbia, rather than relying on the decision previously deemed to be persuasive and on the status of the FARC at the time of the events. In any event, decision makers are not obliged to rely on a persuasive decision when that decision is in effect. Judge Gibson properly clarified this at paragraph 22 of *Caro Rios v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1437:

> It is to state the obvious that "Policy Note[s]" are not law. They are not binding on members of the RPD. As indicated in the foregoing quotations Members are encouraged to rely upon "Persuasive Decisions" in the interests of consistency and collegiality, nothing more. If there is a sanction to flow from failure to acknowledge them, it is to be internal to the RPD; it is not for this Court to sanction such failure.

[8] *A fortiori*, this is true for a decision whose persuasive status had been revoked at the time the RPD assessed the file.

[9] What remains is the assessment of the documentary evidence on the availability of sufficient, albeit imperfect, state protection in Columbia against FARC threats. The applicants have the burden of establishing the inadequacy or absence of state protection (*Canada (Attorney General) v. Ward*, [1993] 2 SCR 689). The past not being an indication of the future, it is not necessary for the state to have always been effective in protecting its citizens for the protection to be deemed adequate (*Gomez Espinoza v Canada (Citizenship and Immigration)*, 2009 FC 806). Moreover, it remains trite law that the RPD is presumed to have reviewed the totality of the evidence and is qualified to select among the evidence those elements that support an otherwise reasonable position (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration))*, (1998) 157 FTR 35 (FC); *Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331).

[10] In that regard, the RPD did not fail to recognize that the evidence was contradictory; however, the RPD determined and found that the following factual findings were required:

i. The measures implemented resulted in a considerable reduction in the actions of illegal groups between 2002 and 2008, without, however, eradicating these groups.

ii. People are increasingly reporting crimes, and crime is dropping.

iii. The FARC is experiencing serious communications and supply problems, and its sphere of influence has been substantially reduced.

iv. Even though protection is not perfect, the state of Columbia has taken significant steps to ensure public safety.

[11] These findings were properly based on the documentary evidence and are reasonable according to the applicable standard of review. Aside from that, without this being determinative, this decision is consistent with a recent decision of this Court on the availability of state protection in Columbia against FARC threats, namely *Guevera*, above.

[12] The RPD's decision is therefore reasonable, and the application for judicial review is dismissed. No question for certification was proposed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed.

"Simon Noël"

Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6066-10
STYLE OF CAUSE:	JAVIER FERNANDI MONZON ORTEGA ET AL v MCI
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	May 31, 2011
REASONS FOR JUDGMENT:	THE HONOURABLE SIMON NOËL
DATED:	June 9, 2011

APPEARANCES:

Idil Abdi	FOR THE APPLICANT
Yaël Lévy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

CAZA, GAGNON, AVOCAT Montréal, Quebec	FOR THE APPLICANT
Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT