Federal Court  Cour fédérale

Date: 20111220

Docket: IMM-4068-11

Citation: 2011 FC 1504

Toronto, Ontario, December 20, 2011

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

KATTERINE NAYIBE MARTINEZ GONZALEZ
GERMAN DARIO ACOSTA FERNANDEZ
DAVID ACOSTA MARTINEZ
PAULA ANDREA ACOSTA MARTINEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] German Dario Acosta Fernandez and his family seek judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board which determined that the family were not Convention Refugees or persons in need of protection. The determinative issue for the Board was the availability of state protection in Colombia for victims of extortion at the hands of the Revolutionary Armed Forces of Colombia [FARC].

[2] For the reasons that follow, I have concluded that the Board's decision was reasonable. As a consequence, the application for judicial review will be dismissed.

Background

[3] Mr. Acosta's experience with the FARC began in 1993 when he was targeted for extortion while operating his own trucking company. As a result of these threats, Mr. Acosta abandoned his trucking business in order to pursue other work.

[4] In 2003, when the situation in Colombia had become more stable, Mr. Acosta decided to re-establish his trucking business, this time in the city of Santamarta. On December 2, 2009, while driving through the town of Buenaventura, four FARC members approached Mr. Acosta's truck and threatened Mr. Acosta and his associate at gunpoint. The bandits stole 200,000 pesos from Mr. Acosta, and demanded that he pay an additional 1.5 million pesos per month in return for permission to conduct business in the area.

[5] Upon his return to Bogotá, Mr. Acosta reported the incident to the Office of the Attorney General [OAG]. The OAG referred him to the Unified Action Group for Personal Freedom [GAULA]. GAULA evidently did not have monetary jurisdiction over extortion of lesser amounts such as that involved in Mr. Acosta's case. Consequently, it referred him back to the OAG which then advised Mr. Acosta to report the incident to the police in Buenaventura. Mr. Acosta did not take this advice.

[6] On January 22, 2010, two FARC members approached Mr. Acosta, this time in his garage in Santamarta. They threatened him and demanded that he pay them 20 million pesos.

[7] Mr. Acosta made no attempt to report this second extortion attempt to the police. After consulting with his wife and brother-in-law, he decided to flee Colombia with his family and come to Canada.

Analysis

[8] While the applicants raise a number of arguments, ultimately the issue to be determined is the reasonableness of the Board's finding that they had failed to rebut the presumption that the state of Colombia would be able to protect them.

[9] The applicants submit that Colombia is not a *developed* democracy like the United States. As a consequence, the statement at paragraph 46 of *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, 282 D.L.R. (4th) 413 [*Hinzman*] that an applicant must exhaust all of the possible avenues of protection available to him before seeking refugee protection should not apply in this case.

[10] Clearly, not all democracies are created equal, and the maturity of the democratic system in a given country will inevitably lie somewhere along a spectrum: *Capitaine v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 98, 166 A.C.W.S. (3d) 150.

[11] However, it has long been a principle of Canadian refugee law that the burden of proof on a claimant to rebut the presumption of state protection is "directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her": *Canada (Minister of Citizenship and Immigration v. Kadenko* (1996), 143 D.L.R. (4th) 532, [1996] F.C.J. No. 1376 (Q.L.) (F.C.A.) at para. 5.

[12] The Federal Court of Appeal's decision in *Hinzman* does not change this. Indeed, it reiterates that a claimant coming from a democratic country "will have a heavy burden when attempting to show that he should not have been required to exhaust all of the recourses available to him domestically before claiming refugee status": at para, 57. To rebut the presumption that the state is capable of protecting its citizens, a claimant must provide "clear and convincing confirmation of a state's inability to protect": *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, [1993] S.C.J. No. 74 (Q.L.) at para. 50 [*Ward*].

[13] Moreover, a refugee claimant's failure to approach his own state for protection may defeat his claim where "it is objectively unreasonable for the claimant not to have sought the protection of his home authorities": *Ward*, above at para. 49.

[14] In this case, the Board clearly understood that the burden on a refugee claimant was tied to the level of democracy in the country in question. The Board discussed the extent of the democracy in Colombia at some length, and further examined the nature and reach of its law enforcement institutions. No error on the part of the Board has been shown in this regard.

[15] The applicants further submit that the law does not require a refugee claimant to put his or her life in danger in order to access state protection, and that it was unreasonable to expect Mr. Acosta to have to risk his life by returning to Buenaventura to file a police report with respect to the first attempted extortion. The Board erred, the applicants say, by failing to consider whether requiring the victim of an attempted extortion to return to the scene of the crime was reasonable in the circumstances.

[16] A claimant will generally be required to seek protection in the appropriate jurisdiction: *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 491, [2011] F.C.J. No. 610 (Q.L.); *Martinez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1050, 141 A.C.W.S. (3d) 116.

[17] It is clear that the Board was aware that the onus was on Mr. Acosta to take "all *reasonable* measures" to access state protection: Reasons at para. 23, [emphasis added]. The Board was not satisfied that he had done so. Moreover, it is evident from the transcript that the primary explanation offered by Mr. Acosta for his failure to seek protection in Buenaventura was that he had become frustrated with the run-around that he had received from Colombian authorities. In the circumstances, the Board's conclusion that Mr. Acosta had not made reasonable efforts to seek state protection in Buenaventura was itself reasonable.

[18] I am also not persuaded that the Board erred in relying on Mr. Acosta's failure to seek state protection with respect to the second extortion attempt. As the Board noted, Mr. Acosta did not go to the local police in Santamarta. He also failed to inquire as to whether he could report the matter to

the GAULA, given that the monetary demands in the second incident were significantly larger than in the first.

[19] The Board considered, and reasonably rejected, Mr. Acosta's explanation for his failure to seek state protection in relation to the second extortion attempt. In so doing, it examined the evidence as to the availability of state protection in Colombia, and whether Mr. Acosta could reasonably have expected such protection to have been forthcoming. The Board acknowledged that the evidence in this regard was mixed, and had clearly considered the contrary evidence relied upon by the applicants.

[20] Finally, while I accept that the two references to Mexico in one paragraph of the Board's decision are unfortunate, I am nevertheless satisfied that this is nothing more than a typographical error. After reviewing the reasons as a whole, including the lengthy discussions on country conditions, there can be no question that the Board understood that the country in issue in this claim was Colombia.

Conclusion

[21] For these reasons, the application for judicial review is dismissed.

Certification

[22] Neither party has suggested a question for certification, and none arises here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is dismissed; and

2. No serious question of general importance is certified.

"Anne Mactavish"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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