

Federal Court



Cour fédérale

Date: 20120328

Docket: IMM-5497-11

Citation: 2012 FC 366

Ottawa, Ontario, March 28, 2012

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

**LINA JINETH OSORIO GARCIA
JUAN SEBASTIAN JIMENEZ OSORIO
ESTABAN JIMENEZ OSORIO
LAURA DANIELA JIMENEZ OSORIO**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review by Lina Jineth Osorio Garcia and her family challenging a decision by the Refugee Protection Division of the Immigration and Refugee Board (Board) by which their claims to refugee protection were denied.

[2] The Board's negative decision was based on findings that state protection was available to the Applicants and that there was a viable internal flight alternative (IFA) in either Bogota or Cartagena, Colombia.

Background

[3] The Board found the claimants to be credible witnesses and it is implicit from the reasons that their risk allegations were accepted as truthful. The principal claimant, Lina Osorio, testified that she had been the target of politically motivated death threats connected to her support for socially progressive political organizations in Colombia. This risk was heightened by the high-profile involvement of two of Ms. Osorio's uncles in the trade union movement and in left-wing political causes. Ms. Osorio worked for her uncles during a 1997 election campaign. In that capacity, they had all received death threats from a paramilitary group (AUC) that supported, and was tacitly supported by, the governing regime. Ms. Osorio also came to understand that she and her uncles had been targeted for execution.

[4] During the 1997 election, Ms. Osorio claimed that 35 candidates were executed, 200 kidnapped and more than 1200 forced to withdraw from the campaign. In ten municipalities, the election was cancelled. There is no doubt from the record before the Board that persons with political views of the sort held by Ms. Osorio and her uncles were, at that time, profoundly at risk in Colombia with little, if any, available state protection.

[5] In 1998, threats were again made to Ms. Osorio, to her uncles and to other political and trade union leaders. Ms. Osorio was fearful for her safety and, in 1999, she fled with her family to the United States.

[6] The family was hopeful that the political climate would improve in Colombia so that they could return. According to Ms. Osorio, the situation in Colombia did not allow for their return and in 2010 the family came to Canada and made refugee claims. Ms. Osorio's explanation for the delay in seeking protection was accepted by the Board and it formed no basis for the Board's negative decision.

Issue

[7] Did the Board err in its assessment of the current risk environment faced by the Applicants with particular reference to the availability of state protection?

Analysis

[8] The Board was required to assess a forward looking risk. After 13 years away from Colombia, the Board reasonably concluded that the persecutory risk that had caused the Applicants to flee was no longer extant. The political party that Ms. Osorio had been associated with in 1997 and 1998 had been disbanded and the AUC that had threatened her life had been substantially dismantled. Accordingly, there was evidentiary support for the Board's finding "that the former AUC members who had targeted the now defunct [Movimiento Alternativo Regional] in the late 1990's would have no interest or reason to pursue [Ms. Osorio] today". The Board also doubted

that the AUC would be capable of finding the claimants even if it had a continuing interest in their whereabouts.

[9] The issue of concern, however, is with the Board's assessment of the evidence of a new risk to Ms. Osorio if she returned to Colombia and resumed, as she said she would, her political and socially progressive activities. The Board appears to have accepted her evidence on this point but it carried out no meaningful analysis of the evidence bearing on her current risk profile.

[10] In its IFA assessment the Board simply repeats its state protection finding that the risk that prevailed in 1997 and 1998 was no longer relevant. The Board's only other assessment of current risk conditions was limited to the observation that the evidence on point was "mixed" as reflected in a few passages from country-condition reports. What is notably absent from the Board's reasons is any attempt to reconcile the country-condition evidence and to connect that evidence to Ms. Osorio's situation if she returned to Colombia and again took up political causes in opposition to the governing regime or contrary to the interests of the AUC or its paramilitary successors.

[11] It is not a sufficient justification in cases like this one to draw bare conclusions about the adequacy of state protection in the face of apparently reliable and contrary evidence like the following:

During the year the Prosecutor General's Human Rights Unit issued 518 arrest orders for armed forces personnel involved in extrajudicial killings, the majority of which took place prior to 2009. However, claims of impunity continued to be widespread, due in some cases to obstruction of justice, a lack of resources for investigations and protection for witnesses and investigators, and inadequate coordination among government entities. Many human rights groups criticized the Prosecutor General's Office for indicting low-ranking

military personnel only while avoiding investigations of high-ranking intellectual authors.

...

Prominent human rights NGOs complained that the government arbitrarily detained hundreds of persons, particularly social leaders, labor activists, and human rights defenders. CINEP reported that security forces arbitrarily detained 113 persons during the first six months of the year, compared with 224 in the same period of 2008. Many of these detentions took place in high-conflict areas (notably in the departments of Santander, Antioquia, Arauca, and Narino), where the military was involved in active hostilities against insurgents.

...

The government stated that it did not hold political prisoners. Some human rights advocacy groups characterized as political detainees some detainees held on charges of rebellion or terrorism in what the groups reported were harassment tactics by the government against human rights advocates (see section 5). According to INPEC, there were 3,698 detainees accused of rebellion or aiding and abetting insurgency in the year. The government provided the ICRC access to these prisoners.

...

New illegal groups and paramilitary members who refused to demobilize killed journalists, local politicians, human rights activists, indigenous leaders, labor leaders, and others who threatened to interfere with their criminal activities, showed leftist sympathies, or were suspected of collaboration with the FARC. They also reportedly committed massacres or "social cleansing" killings of prostitutes, gay men and lesbians, drug users, vagrants, and gang members in city neighborhoods they controlled. New illegal groups and paramilitary members who refused to demobilize, according to CINEP, were responsible for the deaths of 279 civilians from January through June, an 89 percent increase from the 148 deaths reported during the same period in 2008. On February 26, an illegal armed group allegedly killed a transgender sex worker in Dabeiba (Antioquia). Members of the group were reported to have bragged that they killed a gay drug user.

...

New illegal groups, paramilitary members who refused to demobilize, and the FARC threatened and killed government officials (see section 1.g.). According to the Presidential Program for Human Rights, eight municipal council members were killed through November, compared with 12 in the same period 2008.

...

Despite advances in the JPL process, the application of the law continued to face many challenges, including zero convictions of paramilitary leaders since 2005, thousands of former paramilitary members who remained in legal limbo, and no land or money reparations of properties confiscated from paramilitary leaders. NGOs and victims criticized the slow pace of determining the truth, while the Prosecutor General's Office said pressure to reveal all truths behind paramilitary crimes delayed prosecutions.

U.S. Department of State, *2009 Country Reports on Human Rights Practices: Colombia* (11 March 2010), online: <<http://www.state.gov/j/drl/rls/hrrpt/2009/index.htm>>.

The coordinator of specialized prosecutors investigating the successor groups also pointed to alleged links between the groups and state agents as a problem in Urabá: “There are links with the public security forces, prosecutors, police, and DAS. They move like fish in the water. Whenever there’s an operation, they’re alerted and they leave. That makes it difficult to arrest them. They have a complex network of informants, going from the woman in the store to the guy driving the motorcycle taxi. With one phone call, that’s it. They’re very strong.” The same problem, she said, presented itself in Meta, where “there are links with the public security forces, which block the arrests of Cuchillo and [notorious drug lord] El Loco Barrera.... The problem of links is difficult because if it’s not one institution it’s another. In all the institutions there are good and very bad people. And at any level, the information can be very useful for them.”

[Footnotes omitted]

Human Rights Watch, *Paramilitaries' Heirs: The New Face of Violence in Colombia* (February 2010), online: <http://www.hrw.org/sites/default/files/reports/colombia0210webcover_0.pdf>.

The Colombian government still has much to do to end threats and attacks against trade unionists, human rights defenders, and

community leaders, which have continued and even escalated since the new government took office in August 2010. The Colombian National Labor School (ENS) reports that 42 trade unionists were killed in 2010 as of December 15th 2010. The National Indigenous Organization of Colombia (ONIC) reported that over 105 indigenous persons were killed in 2010. Paramilitary and emerging illegal armed groups, which still act in many areas with the collusion or tolerance of the Colombian armed forces, continue to control areas of the countryside. The Colombian think-tank INDEPAZ's recent report indicates that there are 6,000 armed men operating in 29 Colombian departments with between 7,400 and 12,000 persons supporting these structures. The implementation of even the best-intentioned land law will face major challenges due to the on-going internal armed conflict and dominance of illegal armed groups' operations in areas designated for returns. A number of leaders of displaced communities who have reclaimed their land rights were killed in recent months.

The new administration has so far failed to demonstrate significant advances in prosecuting cases of extrajudicial executions attributed to Colombian security forces. Cases involving some 3,000 civilians killed are stalled in the civilian justice system. Many are failing to advance or are advancing slowly, while many other cases are still improperly handled by the military justice system instead of being transferred to civilian courts.

[Emphasis omitted]

The Washington Office on Latin America, *The U.S. Must Wait for Colombia to Improve Human Rights Record before Considering Free Trade Agreement* (26 January 2011), online: <<http://www.wola.org>>.

The rise in killings of trade unionists coincided with the rise of right-wing paramilitary groups in the 1980s and 1990s, and these groups are considered responsible for over 60 percent of the murders. Another 30 percent are blamed on the country's leftist guerrillas, who assassinate union members as part of their struggles for ideological and economic domination. The remaining killings are perpetrated by a variety of culprits, including members of the security forces. The government has at times described many of the murders as the result of either common crime or guerrilla infiltration of unions. However, unions claim that a majority of murders and threats occur in the context of labor strife and note that many of those killed are union leaders, not rank-and-file members. Unions and human rights groups also assert that spurious legal charges and rhetorical attacks against

unionists by state officials have contributed to an environment that is conducive to violence.

In 2006, the government formed a special unit within the prosecutor's office to focus on union slayings. It had obtained 189 convictions by the end of 2009. Still, a backlog of over 1,300 cases remains to be prosecuted. In addition to murders, many union activists have faced death threats, displacement, kidnapping, and torture. Teachers were the unionized workers most likely to suffer violent attacks; 15 of the union members murdered during 2009 were teachers.

Freedom House, *The Global State of Workers' Rights – Colombia* (31 August 2010), online:
<<http://www.unhcr.org/refworld/docid/4d4fc803c.html>>.

[12] It is impossible to tell whether the Board considered this evidence to be unconvincing or simply ignored it. On its face, this evidence contradicted the Board's conclusion that adequate state protection was available to the Applicants if Ms. Osorio once again became active in socially progressive political or trade union causes. The decision cannot be justified in the absence of a meaningful consideration of Ms. Osorio's risk profile in the context of all of the relevant country condition reports.

[13] The Respondent's reliance on recent Federal Court jurisprudence dealing with the availability of state protection from the Revolutionary Armed Forces of Colombia (FARC) is not persuasive. Ms. Osorio's risk was based on her profile as a political opponent to the governing interests in Colombia. The record indicates very clearly that the historical links among state security forces, some government representatives and paramilitary groups have not disappeared in Colombia and that human rights advocates and trade union leaders remain at risk with questionable recourse to state protection.

[14] I am not satisfied that the Board's decision is justified by the reasons it gave. In the result, the application must be redetermined on the merits by a different decision-maker.

[15] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed with the matter to be redetermined on the merits by a different decision-maker.

"R.L. Barnes"

Judge

Federal Court



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FEDERAL COURT

SOLICITORS OF RECORD

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