Federal Court  Cour fédérale

Date: 20120926

Docket: IMM-9671-11

Citation: 2012 FC 1134

Ottawa, Ontario, September 26, 2012

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

DIANA PATRICIA ZULUAGA ROBLES
MARIANA MARTINEZ ZULUAGA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of a pre-removal risk assessment (PRRA) officer (the officer), dated November 8, 2011, rejecting the applicants' PRRA application. The officer's decision was based on the finding that the applicants would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to their country of residence.

[2] The applicants request that the officer's decision be set aside and the matter be remitted back for redetermination by a differently constituted panel.

Background

[3] The principal applicant, Diana Patricia Zuluaga Robles, is a citizen of Colombia. Her daughter, Mariana Martinez Zuluaga, is the other applicant and is a citizen of the United States.

[4] The principal applicant was born in Colombia. On June 19, 1998, her father, who owned two cattle farms, was abducted by the Ejército de Liberación Nacional (ELN). The principal applicant helped to secure his release in December 1998. The ELN commander that she dealt with tried to recruit her to work for the ELN. The principal applicant refused. When she reported this to her father, he advised her to leave their home town of Bucaramanga. Thus, she moved to Bogota on January 6, 1999 and began working as a teacher there. On her father's advice, she also applied for a U.S. visitor's visa should the situation with the ELN worsen.

[5] On August 5, 1999, ELN members abducted the principal applicant in Bogota. Her abductees called her father and threatened that if he did not pay an increased monthly extortion fee, they would kill his daughter. Later that same day, the principal applicant was released. Her abductees threatened to kill her should she report them to the authorities. The ELN also warned her that should her father quit paying them or die, she would then become responsible for paying the extortion fees.

[6] After her abduction, the principal applicant's father told her to leave Colombia. He purchased her an airplane ticket on the earliest available date. On August 31, 1999, the principal applicant left Colombia and entered the U.S. on a six month visitor's visa.

[7] In September 1999, the principal applicant met Eduardo Martinez Gomez, also a Colombian citizen living in the U.S. They began dating and moved in together in January 2000. On October 31, 2000, their daughter (the other applicant in this application) was born. The couple married in January 2007.

[8] In May 2002, the family allegedly paid an immigration consultant to file an immigration claim for them in the U.S. The immigration consultant turned out to be fraudulent and the paperwork was never filed with U.S. immigration.

[9] On December 1, 2008, the family arrived in Canada and filed refugee claims on December 3, 2008, based on their fear of persecution by guerrilla movements in Colombia, specifically ELN and Fuerzas Armadas Revolucionarias de Colombia (FARC). Their refugee hearings were held on March 19 and 23, 2010. In a decision dated April 16, 2010, the Refugee Protection Division (the Board) denied the family's refugee claims based on its determination that the adult claimants' actions in the U.S. were inconsistent with what would be reasonable for persons who feared murder if returned to Colombia. In addition, the Board found that the situation in Bogota had changed such that the claimants would have adequate protection from either ELN or FARC. The Board was also satisfied that the minor applicant would be provided adequate protection in the U.S. where she is a citizen. Application for leave to challenge the Board's decision was denied on September 7, 2010.

[10] The principal applicant and her husband are now separated. The principal applicant's ex-husband returned to Colombia on November 13, 2010.

[11] On November 23, 2010, the principal applicant and her daughter filed PRRA applications. The principal applicant explained that she fears persecution by Colombia guerrillas on the basis of her membership in her father's family (a particular social group) and as a youth leader in religious and social issues who refused to work for the ELN guerrillas (perceived political opinion).

[12] The principal applicant's father has recently fallen ill. Due to his poor health, he has been late in paying the ELN and FARC. As a result, ELN members have visited his farms and stolen cattle and sheep.

Officer's Decision

[13] The officer issued the decision on November 8, 2011. The reasons are provided in the accompanying notes to file that form part of the decision.

[14] The officer first provided a summary of the applicants' refugee claims and the Board decision. The officer then noted that the applicants had provided several documents including internet news articles and documents on country conditions in Colombia. With regards to these documents, the officer stated that:

> Having carefully read the principal applicant's submissions, I note that she has provided documents from the internet in Spanish. Any documents provided in Spanish without a translation and/or a

> statement from an accredited interpreter attesting to the accuracy of the translations has not been considered.
>
> The principal applicant provided internet documents that pre-date the rejection of her refugee claim. She has not provided an explanation as to why they were not reasonably available for presentation to the RPD. Consequently, they are not new evidence.
>
> I acknowledge that I have been presented with documents that post-date the rejection of the applicant's claim; nonetheless, I find that they constitute updates on information that was before and considered by the RPD.

[15] Relying on *Kaba v Canada (Minister of Citizenship and Immigration)*, 2007 FC 647, [2007] FCJ No 874, the officer found that the applicants had provided insufficient evidence of a personalized risk distinguishable from that of the general population in Colombia. In addition, the evidence did not persuade the officer to come to a different conclusion than that of the Board, nor did it rebut any of the issues raised by the Board.

[16] The officer concluded that:

> After a careful review of all the evidence before me, taking into account the personal circumstances of the applicants, I find that, with respect to the principal applicant, she has not provided new evidence or evidence of new risk developments since the RPD rejected her claim to demonstrate that she is now at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if returned to Colombia.
>
> Similarly, with respect to the minor applicant, Mariana, I have not been presented with new evidence or evidence of new risk developments since the RPD rejected her claim to demonstrate that she is now at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if returned to the United States.

[17] For these reasons, the officer denied the applicants' PRRA application.

[18] On December 22, 2011, the applicants filed an application for leave and for judicial review challenging the officer's decision. In an order dated February 28, 2012, Mr. Justice Donald Rennie of this Court ordered that the applicants' removal, scheduled for March 1, 2012, be stayed until a decision was rendered in this judicial review of the PRRA decision.

Issues

[19] The applicants submit the following point at issue:

Did the officer err in law in that she misinterpreted the definition of Convention refugee, alternatively failed to have regard for relevant evidence before her?

[20] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the officer err in the assessment of the new evidence filed in the applicants' PRRA application?

Applicants' Written Submissions

[21] The applicants note that the new evidence filed in their PRRA application did not solely consist of documentary evidence. It also included letters from: the mayor of the principal applicant's municipality, her parish priest and the Caldas police department.

[22] The applicants submit that the officer's reasons are devoid of any analysis of the current documentary evidence that they submitted or that was otherwise publicly available. The applicants

submit that this absence and the officer's reliance on *Kaba* above, indicates that the officer wrongly believed that in no circumstances can documentary evidence of country conditions alone lead to a positive risk assessment.

[23] The applicants submit that *Kaba* above, does not stand for that proposition. Rather, the applicants submit that *Kaba* requires that there be a link between the applicants' situation and the documentary evidence such that the decision maker may find that there is more than a mere possibility of future persecution. That link may be alleged by the applicant or may appear from the documentary evidence.

[24] The applicants further submit that the Federal Court of Appeal's decision in *Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 250, [1990] FCJ No 454 (FCA) teaches that a situation of generalized oppression may result in a link to the persecution of an individual claimant. Thus, the applicants submit that the officer erred by not analyzing the country documentation and by not determining whether it could lead to a different state protection finding than the Board's finding on that issue.

[25] The applicants cite documentary evidence that post-dates the Board's decision and addresses the guerrillas' capacity to harm individuals in Bogota and the state's inability to protect those individuals. As a specifically targeted daughter of an ELN kidnap victim, the applicants submit that the principal applicant falls within the targeted group of family members reported in the documentary evidence. In addition, due to her prior role as a youth leader involved in religious and social activities, the principal applicant could be identified as falling within the category of civil

society and human rights activities described in the documentary evidence as at risk of being targeted by guerrillas.

[26] The applicants also note that the documentary evidence addresses the capacity of guerrillas to target individuals in major Colombian cities and refutes the notion that Bogota is a safe place.

[27] In summary, the applicants submit that the officer failed to mention or address any of this documentation that post-dated the Board's decision. Thus, the officer ignored evidence central to the PRRA decision, which constitutes a reviewable error.

Respondent's Written Submissions

[28] The respondent submits that the standard of review of PRRA decisions is reasonableness, except as regards to pure questions of law.

[29] The respondent submits that the officer's PRRA decision was reasonable. The respondent notes that the applicants bear the onus of presenting new evidence to the officer. As the duty to consider current country conditions does not shift this onus to the officer, the officer had no obligation to consider the documentary evidence that the applicants included to bolster the evidentiary record.

[30] The respondent submits that the officer clearly considered all the evidence, including country condition documentation that post-dated the Board's decision. However, the officer found

that this evidence constituted updates on the information that was considered by the Board. The respondent submits that the officer properly found that there was insufficient evidence of a personalized risk. Thus, the officer was unable to come to a different conclusion than the Board on the section 96 and 97 analysis.

[31] The respondent submits that the decision is consistent with jurisprudence that explicitly declares that a PRRA officer has no duty to rule on each and every document and that documentary evidence is insufficient alone to warrant a positive risk assessment where the risk is not individualized.

[32] In addition, PRRA officers are presumed to have considered all the evidence presented to them.

[33] In this case, the respondent submits that the applicants have not rebutted this presumption with evidence that is specific and personal to them. Rather, the respondent submits that the general documentary evidence that was submitted was not connected to the applicants' personal circumstances. Thus, the respondent submits that the officer's decision was reasonable given the applicants' failure to submit new evidence that illustrates a personalized risk to them on return to their country of residence.

Applicants' Reply

[34] In reply, the applicants submit that the officer erred by not considering any of the documents that showed a change of country conditions in Colombia on the availability of state protection in Bogota, the very point on which the Board decided against the applicants. In addition, a mere statement that the officer had considered all the evidence was insufficient in the absence of any analysis on the crucial issue of whether the current documentary evidence should lead to a different conclusion on the availability of state protection against guerrillas, particularly in Bogota.

[35] The applicants also submit that the officer erred in dismissing their evidence merely because it was an update on the evidence before the Board. The updated evidence showed that country conditions had changed such that state protection was now unlikely to be available to individuals targeted by the guerrillas, particularly in Bogota. The officer erred in failing to consider this evidence.

Analysis and Decision

[36] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the Court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[37] It is trite law that the standard of review of PRRA decisions is reasonableness (see *Wang v Canada (Minister of Citizenship and Immigration)*, 2010 FC 799, [2010] FCJ No 980 at paragraph 11; and *Aleziri v Canada (Minister of Citizenship and Immigration)*, 2009 FC 38, [2009] FCJ No 52 at paragraph 11).

[38] In reviewing the officer's decision on this standard, the Court should not intervene unless the officer came to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 59). It is not up to a reviewing Court to substitute its own view of a preferable outcome, nor is it the function of the reviewing Court to reweigh the evidence (see *Khosa* above, at paragraphs 59 and 61).

[39] **Issue 2**

Did the officer err in the assessment of the new evidence filed in the applicants' PRRA application?

In the introductory paragraph of *Kaba* above, Mr. Justice Michel Shore outlined the law on a PRRA officer's review of documentary evidence. This succinct summary bears repeating at the outset here (see *Kaba* above, at paragraph 1):

> The pre-removal risk assessment (PRRA) officer has no duty to rule on each and every document in question.
>
> Contrary to what was alleged by the applicant, documentary evidence on a country is insufficient to warrant a positive risk assessment since the risk must be personal:

> [28] That said, the assessment of the applicant's potential risk of being persecuted if he were sent back to his country must be individualized. The fact that the documentary evidence shows that the human rights situation in a country is problematic does not necessarily mean there is a risk to a given individual (*Ahmad v. M.C.I.*, [2004] F.C.J. No. 995 (F.C.); *Gonulcan v. M.C.I.*, [2004] F.C.J. No. 486 (F.C.); *Rahim v. M.C.I.*, [2005] F.C.J. No. 56, 2005 F.C. 18 (F.C.)).

(*Jarada v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 409, [2005] F.C.J. No. 506 (QL); see also *Rizkallah v. Canada (Minister of Employment and Immigration)* (1992), 156 N.R. 1 (F.C.A.), [2002] F.C.J. No. 412 (QL); *Moussaoui v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 133, [2004] F.C.J. No. 146 (QL); *Sanusi v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 987, [2004] F.C.J. No. 1215 (QL); *Zilenko v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 846, [2003] F.C.J. 1086 (QL); *Sivagnanam v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1216, [2003] F.C.J. No. 1542 (QL).)

Accordingly, in the case at bar, the general documentary evidence on the economic and political situation in Guinea cannot of itself establish that the protection application is valid when the connection between that evidence and the applicant himself has not been made, under both sections 96 and 97 of the IRPA.

> [5] In my opinion, the applicant's claim is entirely unfounded. It is settled law that an applicant must demonstrate an objective and subjective fear of persecution. In this case, it was not sufficient simply to file documentary evidence. It was necessary at the very least to establish that the applicant himself had a real fear of persecution. In the absence of such evidence, the Board members were entitled to conclude as they did.

(*Sinora v. Canada (Minister of Employment and Immigration)* (1993), 66 F.T.R. 113, [1993] F.C.J. No. 725 (QL), at pp. 114 et 115 (per Marc Noël J.); see also *Alexibich v. Canada (Minister of Citizenship and Immigration)*, 2002 FCTD 53, [2002] F.C.J. No. 57; *Ithibu v. Canada (Minister of Citizenship and Immigration)*, 2001 FCTD 288, [2001] F.C.J. No. 499 (per Pierre Blais J.).)

> The applicant must necessarily establish a connection between the present situation in his country and his personal situation. The PRRA officer was not satisfied that the applicant had made such a connection. [emphasis added]

[40] In this case, the applicants submit that the officer erred in analyzing the documentary evidence that post-dated the Board decision and that concerned available state protection in Colombia, particularly in Bogota. In the Board decision, the Board denied the refugee claims in part on its finding that state protection would be available in urban centres such as Bogota. In rendering this finding, the Board relied on documentary evidence that it found indicated that guerrilla activity was largely limited to areas without strong government presence and that were not heavily populated.

[41] In rendering its finding, the Board also noted that "[t]here is no indicaiton [sic] that any of the main political parties plan to change the approach of the government" (paragraph 52 of the Board decision). Notably, the documents filed with the PRRA application indicate that Juan Manuel Santos was inaugurated as the new Colombian President on August 7, 2010, after the Board's decision was issued. The applicants filed a public statement from Amnesty International, dated September 22, 2010, calling on the new government to protect human right defenders campaigning for the return of stolen lands. However, in line with the Board's projection, there was no evidence that the new president had changed the prior government's approach.

[42] On review of the applicants' PRRA submissions, I note that the officer correctly observed that a number of the newspaper articles were submitted in Spanish without English translations. In addition, some of the documents pre-dated the Board's decision and as they are publicly available, it

is reasonable to expect that the applicants could have previously filed them with their refugee claims. These would therefore not constitute admissible new evidence under subsection 113(a) of the Act.

[43] The country evidence that post-dated the Board decision does illustrate a strongly disconcerting situation in Colombia, a country that has been embroiled in more than forty years of armed conflict between guerrilla groups. The Amnesty International reports emphasize the targeting of victims of human rights violations and their families, as well as human rights defenders and other activists. These reports also indicate that increasing urban violence is generally limited to armed conflict, drug-related crime and acts of social cleansing while in rural areas, the main victims continue to be Indigenous peoples, members of Afro-descendant and peasant farmer communities and their leaders.

[44] Some of the evidence indicated that although the strength of armed guerrilla groups has diminished, they nonetheless continue to represent a serious threat to civilians. One Amnesty International report dated September 9, 2010 concluded:

> Amnesty International is of the view that while there have been some military advances against paramilitary and guerrilla groups in Colombia, these advances do not translate into state protection for those who have been targeted by the FARC, ELN or former AUC.

[45] Another relevant report that the applicants included in the PRRA submissions was the Canadian Council for Refugees (CCR), *The Future of Colombian Refugees in Canada: Are we being equitable?*, dated March 2011. In this study, the authors tested themes that had emerged in board decisions refusing refugee claims from Colombia. These included increased availability of

state protection for civilians in Colombia and the possibility for increased safety in Bogota for those under threat, themes that were also present in the applicants' Board's decision. The following findings were included in CCR's report:

1. The urban security has improved dramatically in the last eight years;

2. The worst of the conflict has been pushed to the external regions of the country where there is a strong impact on civilians;

3. The guerrillas do not need to have many personnel in the main cities of Colombia in order to attack civilians anywhere;

4. There is still a prevalence of paramilitary groups in Colombia despite state efforts to formally reduce their numbers and to create the perception that they are demobilized; and

5. Although they still extort, the main concern of Colombia's paramilitary groups now is to take care of the huge amount of land stolen through many years of terror and to assure control of that territory for legal and illegal business.

[46] Another document included in the applicants' PRRA submissions was the United Nations High Commissioner for Refugees (UNHCR) *Eligibility Guidelines for assessing the International Protection needs of Asylum-seekers from Colombia*, dated May 27, 2010. In this report, the UNHCR stated:

> UNHCR considers that an internal flight or relocation alternative (IFA/IRA) is generally not available in Colombia. Nevertheless, an IFA/IRA may be available in certain circumstances and in accordance with the framework of the relevance and reasonableness test and the guidance provided in these Guidelines.

[47] This report noted that refugee claims from Colombia should be considered on their individual merits. It then specified main groups at risk. In their submissions, the applicants alleged that the principal applicant was a member of the "civil society and human rights activists" category. In the UNHCR report, this category was described as including individuals who actively promote or defend human rights in any way and religious workers involved in human rights activities. In support of the principal applicant's membership in this group, the applicants submitted reference letters, with English translations, from individuals in her home town in Colombia.

[48] The Mayor indicated that the principal applicant "stood out in the town as a young leader, family honest, hardworking, good principles and manners", who had to move to seek protection due to the kidnapping of her father and threats made against her "physical integrity". Similar statements were made by the commander of the police station of Marquetalia Caldas. The parish priest of Marquetalia Caldas indicated that the principal applicant has "always participated in religious and social activities at a young age" and had been a youth leader of the municipality. The priest also indicated that "[h]er return to the country at this time would be even riskier for her life and her daughter's life".

[49] The officer here stated that the decision was based on a careful review of all the evidence. However, without explicitly referring to any of the evidence that post-dated the Board decision, including the above-mentioned reports and reference letters from individuals in her home town, the officer concluded that this evidence merely constituted updates on information that was before and considered by the Board and did not constitute new evidence or evidence of new risk developments since the Board decision.

[50] As mentioned above, the officer was not required to rule on every document in question (see *Kaba* above, at paragraph 1). In addition, as the applicants were required to demonstrate both an objective and a subjective fear of persecution, documentary evidence of country conditions alone was insufficient to establish their PRRA submissions (see *Kaba* above, at paragraph 1). However, Mr. Justice John Evans' well-cited statement in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35, [1998] FCJ No 1425 is also instructive (at paragraph 17):

> However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. […] [emphasis added]

[51] On my review of the evidence, I do find it relatively sparse with respect to the principal applicant's personal risk. However, it does still lend some support to the principal applicant's claim that she fell within recognized groups at risk in Colombia, namely, family members of human rights abuse victims and civil society and human rights activists. Although this Court owes significant deference to the officer's decision on this issue, I find that the officer unreasonably failed to engage with this evidence and the connection between the principal applicant's personal situation and the risks reported in the documentary evidence. In addition, as the CCR report challenged some of the basic themes on which the Board based its decision, I find that the officer erred in not explicitly

engaging with it and by not explicitly considering in what way it differed from the evidence that was previously before the Board.

[52] In summary, it is not clear whether the officer considered the totality of the evidence in assessing the applicants' PRRA applications. The officer's decision lacks transparency and justification in that it fails to clearly address the evidence. The decision is therefore not reasonable and I would allow this application for judicial review.

[53] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter is referred to a different officer for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72. (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
113. Consideration of an application for protection shall be as follows:	113. Il est disposé de la demande comme il suit :
(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;	a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

FEDERAL COURT

SOLICITORS OF RECORD

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