Federal Court

Cour fédérale

Date: 20130208

Docket: IMM-4333-12

Citation: 2013 FC 138

Ottawa, Ontario, February 8, 2013

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

RICARDO CRUZ VERGARA
ELSA LUZ DIAZ GUIZA
JUANITA ALEJANDRA CRUZ DIAZ
(A.K.A. JUANITA ALEJAND CRUZ DIAZ)

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants, Ricardo Cruz Vergara, his wife Elsa Luz Diaz Guiza, and their daughter Juanita Alejandra Cruz Diaz, citizens of Columbia, seek judicial review of a decision made by the Refugee Protection Division of the Immigration and Refugee Board that they are neither Convention refugees nor persons in need of protection.

[2] The decision was made on April 11, 2012. This application is brought under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. For the reasons that follow, the application is dismissed.

BACKGROUND:

[3] The principal applicant is a lawyer by training. He practiced in the city of Armenia from 1994 to 2009. In June of 2009, two men approached him and identified themselves as being from the Fuerzas Armadas Revolucionarias de Colombia (FARC). In his initial personal information form (PIF) Mr. Cruz stated that they told him that he had 20 days to "leave" or face the consequences. He speculates that this was in retaliation for his successful defence of a lawsuit from which the FARC stood to gain. At the hearing of his claim, he amended the word" leave" to "disappear from the country".

[4] After the threat, Mr. Cruz and his wife took steps to safeguard themselves and their children and proceeded to sell their assets. Following another threat in August, 2009 Mr. Cruz made a declaration to City Hall that he was being displaced from the city for reasons beyond his control and the family fled to Bogotá. There Mr. Cruz presented a declaration to the “Personaria” (translated at the hearing as Ombudsman’s office) explaining what had happened and seeking assistance to leave the country. The Ombudsman forwarded it to the Office of Social Action. On August 26, 2009 the family moved to Vélez where they had many relatives and retained counsel to press their case. On September 25, 2009 counsel advised Mr. Cruz that the Office of Social Action had refused to

register him and his family as displaced persons because it had no information about FARC activities in Armenia, which was considered to be a secure, government controlled city.

[5] An appeal of that decision was submitted on October 2, 2009. On October 13, 2009 Mr. Cruz, his wife, and his minor daughter fled Colombia arriving in Canada on October 27, 2009 via Buffalo, New York. Mr. Cruz has a sister, a Canadian citizen, living in Essex, Ontario. An adult daughter was left in Vélez as she did not have a US visa. Mr. Cruz's two other children from a prior marriage, several siblings and his parents also remain in Colombia along with his wife's family.

[6] In his updated PIF, submitted in January 2012, Mr. Cruz states that in September 2011, two years after their departure, his wife’s sister Esperanza wrote to tell him that three people she believed to be FARC informants had been inquiring for him and his wife in Vélez, saying that they had an account to settle with the family. He also states that his lawyer informed him that his appeal was successful nine months after they left and that the family had been recognized by the Colombian government as internally displaced persons.

DECISION UNDER REVIEW:

[7] The Panel Member found that the issues were whether the claimant’s fear was objectively reasonable (including whether there was adequate state protection in Colombia, whether the claimant had taken all reasonable steps to avail himself of it, and whether he had provided clear and convincing evidence of a failure to protect) and whether there was a viable internal flight alternative (IFA) in the city of Cartagena, Colombia.

[8] The Member noted that the armed conflict in Colombia had lasted over four decades and despite a decrease in violence, the number of Colombians being displaced both internally and externally remained high. He stated that the UNHCR considered various groups to be at particular risk of persecution, including judges and other persons involved in the administration of justice, and that the FARC and other groups had committed many human rights abuses, including intimidation of judges, prosecutors, and witnesses.

[9] Next the Panel Member analyzed the viability of an IFA. Citing relevant jurisprudence he explained that an IFA must be realistic, attainable, and accessible, but that as long as it was objectively reasonable for a claimant to live there without fear of persecution, the attractiveness and convenience of this alternative to the claimant was not a factor. The question was whether one should be required to make do in that location before traveling abroad to seek safe haven in another country. He set out the two-pronged test and noted that the claimant always bore the burden of proof.

[10] The claimant had testified at the hearing that he could not move to Cartagena for safe haven because the FARC was present throughout the country and, as a lawyer, wherever he moved he would have to register and advertise and this could draw FARC attention. The Panel considered that this was not likely. The FARC had not issued any further threats after the claimant fled Armenia and it had not carried out the initial threat when he did not flee within 20 days. The claimant had not directly answered a question as to why this was so. Counsel had submitted that the state could not protect people from the FARC and that the FARC had a presence in Cartagena; this might be true,

the Member recognized, but the claimant had not demonstrated that he was an ongoing target of the FARC.

[11] The Member also considered that the applicant had not offered a reasonable explanation for changing "leave" to "disappear off the map" in his narrative, changing the interpretation of the threat. His assertion that the FARC used its own jargon and that he had thought that a literal translation would lead to confusion was thought to be an embellishment.

[12] The letter from Mr. Cruz's sister-in-law alleging that suspicious people were looking for the family in September 2011 was given very little weight. It did not seem likely, on a balance of probabilities, to the Member that the FARC would try to track down the claimant two years after he had left Armenia, the letter contained no information that could be corroborated, and the FARC as an organization had decreasing resources and was unlikely to spend them on targeting the claimant in another community a great distance away from the city where the original threats were made.

[13] The Panel discussed at length the reach and influence of the FARC based on mixed documentary evidence. It concluded that with significant funding and assistance from the U.S., Colombia had been able to take control of previously ungoverned areas of the country and provide security to a far larger portion of its citizens.

[14] The claimant had testified that the FARC had infiltrated government agencies everywhere and that it was very risky to go to the police. The Panel considered that this was not consistent with the documentary evidence. As well, the claimant had not gone to the police at all. Instead he had

filed an application with the "Personaria" or Ombudsman to be recognized as an internally displaced person and appealed the initial refusal of this application. Since his appeal had been granted, although nine months after he had fled the country, this was evidence that state protection was adequate. The claimant's testimony demonstrated that he had not sought protection so as to remain in Colombia; rather, his intent was to flee Colombia to seek refugee protection in Canada. Rather than stay in Colombia to benefit from government programs for displaced persons, he had fled before learning the outcome of his appeal. His object in requesting support from the state was to facilitate his flight to seek international protection.

[15] The Panel Member acknowledged counsel's submission of evidence indicating corruption and human rights abuses concerns with the Colombian police, but held that although it was not perfect, state protection in Colombia was adequate, that Colombia was making serious efforts to address the problem of criminality, and that the police were both willing and able to protect victims.

[16] The Panel concluded that the claimant had not rebutted the presumption of state protection, had not demonstrated that he would face persecution, and had not cited objectively reasonable impediments to living in Cartagena.

ISSUES:

[17] The issues raised by the written materials submitted by the parties are as follows:

a. Was the Panel's IFA determination unreasonable?

b. Did the Panel unreasonably disregard or reject material evidence demonstrating an objective basis for the claimant's continuing fear of persecution?

c. Was the Panel's determination on state protection unreasonable because it disregarded or rejected material evidence submitted by the applicant?

[18] These are all issues which attract the reasonableness standard of review: *Lopez v Canada (MCI)*, 2012 FC 1022 at paras 21, 24-25; *Jackson v Canada (MCI)*, 2012 FC 1098 at para 26; *Andrade v Canada (MCI)*, 2012 FC 1490 at paras 6-10.

[19] At the outset of the hearing of this application, counsel for the respondent acknowledged that the Member in summing up his thoughts on the claim had stated that he had credibility concerns only about the sister's letter. In rendering his decision, following written submissions, he expressed his concerns about the explanation for the last-minute PIF amendment undermining the credibility of the claim. In failing to mention that at the close of the hearing, the applicants were deprived of an opportunity to address the Member's concerns in their post-hearing written submissions, the respondent conceded.

[20] Where an issue of procedural fairness arises, the Court must determine whether the process followed by the decision-maker satisfied the level of fairness required in all of the circumstances: see *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339 at para 43.

[21] I will address the fairness issue in discussing the IFA finding.

ANALYSIS:

a. *Was the Panel's IFA determination unreasonable?*

[22] The applicants submit that the IFA finding was based on little other than the RPD's speculation about what the FARC was likely to do. The panel accepted everything in the PIF except the information that the FARC was still looking for the applicant two years after his departure. There was no evidence confirming that the FARC was aware that the applicant had left the country, so the panel should not have made a plausibility finding as to whether it would still be searching for him. The Panel erred in impugning Mr. Cruz' credibility based on the PIF changes, the applicants submit; the Board rules specifically allow for PIF changes and a plausible explanation was offered.

[23] The applicants submit further that according to the information in the Board's National Documentation Package, an IFA is generally not available in Colombia by reason of FARC's country-wide reach. However, the UNHCR document of May 2010 upon which this assertion is based links that conclusion to persecution carried out by state agents or condoned by state authorities, including through corruption.

[24] The Member did not doubt the veracity of the story of persecution in Armenia, although he did question why the FARC did not fulfil the initial threat when the applicant did not flee immediately. The Member analyzed at length the reach and influence of the FARC, which he would not have done if he had rejected the assertion that they had targeted the applicant at the start.

[25] The change from "leave" to "disappear off the map" made at the beginning of the hearing was not what was found to be the embellishment: it was the applicant's explanation during oral testimony that the latter wording was FARC jargon for telling someone to leave Colombia altogether which was questioned. This clarification was not made when the PIF narrative was amended in January 2012 but at the outset of the hearing. When asked for an explanation, Mr. Cruz stated:

> I didn't want to be so explicit or…or to use the same words in the written form because maybe they couldn't be interpreted or translated in an appropriate manner because those are expressions that…which don't have transl…literal translations.

[26] The Member made it clear at that point in the hearing that he did not understand this explanation, and considered that the meaning of the revised words went to a central element of the claim. In his view, it should have been included in either the original narrative or the amended version submitted two months prior to the hearing. He gave Mr. Cruz another opportunity to explain why he had not done so which elicited this response:

> Locations in…when circumstances like the ones that we…that had happened to us, we...we lost the…the…sense of reaching certain things, and in order to…to try to be more clear you act in the opposite way, and that's what happened in this case. A lot of the language that these people from FARC, these guerrillas, they use that jargon language, or those expressions that they used, it's… are used exclusively by them.
>
> … And those literal translations may lead to confusions.

[27] Mr. Cruz is an educated man and while he was testifying with the assistance of a Spanish language interpreter, his answers in the transcript are generally clear and responsive to the questions put to him. In my view, it was open to the Member to find that the explanation provided for the

change in the narrative was neither. I am also satisfied that the applicants had a full opportunity to present their claim and explain why the proposed IFA was not suitable. They were represented by experienced counsel. The Member's error in signaling at the close of the hearing that he was concerned only with the credibility of the sister's letter had no material effect on the outcome.

[28] It was to be expected that the Panel would consider the availability of an IFA elsewhere in Colombia. Mr Cruz did not present clear and convincing evidence that the FARC had a presence in Cartagena and that he would be targeted in that city. His claim that the FARC had infiltrated government agencies everywhere was not consistent with the country documentation. On the record before me, the Panel's IFA finding was reasonable. While this finding is sufficient to dispose of the application, I will briefly set out my conclusions on the other issues.

b. *Did the Panel unreasonably disregard or reject material evidence demonstrating an objective basis for the claimant's continuing fear of persecution?*

[29] Having accepted that the first threat occurred, the applicants submit that it was unreasonable for the Panel not to give greater weight to the objective documentary evidence which confirmed that the FARC routinely persecutes people involved in the administration of justice. Further, they submit, the Panel made a reviewable error when it assigned little weight to the sister-in-law's declaration about FARC operatives seeking the applicant in September 2011.

[30] It is clear from the Member's reasons that the Panel considered all of the evidence submitted by the applicants including the country documents they relied upon. It explicitly acknowledged the

mixed reporting concerning the reach and influence of the FARC. However, it was the Panel's task to weigh the claims, submissions, and reports. The applicants' submissions on this issue amount to a plea for a reweighing of the evidence. That is not the Court's role on judicial review.

[31] I agree with the applicants that they could not be expected to explain why the FARC chose not to follow up with an attack on Mr. Cruz when he had not responded to their initial threat within the 20 day deadline. However, on all of the evidence including the sister's letter, it was open to the Panel to find that the FARC did not have a continuing interest in Mr. Cruz. While documents such as the sister's letter are to be assessed on the basis of what they say and not what they do not say, as the jurisprudence states, a Panel is not obliged to take them at face value when they are not consistent with the evidence as a whole. Here, the Panel carefully assessed all of the evidence and submissions received.

c. *Was the Panel's determination on state protection unreasonable because it disregarded or rejected material evidence submitted by the applicant?*

[32] On this issue, the applicants' position was that the Panel made a reviewable error when it relied heavily on evidence from the National Documentation Package and ignored country evidence presented by them. They submit that the Panel unreasonably concluded that since the applicant's appeal was recognized by the Colombian authorities, there was adequate state protection. To the contrary, they argue, the existence of a large displaced population indicates that Colombia does not have control of its territory.

[33] The applicants did not seek protection from the police or other law enforcement authorities in Colombia. Rather they went to the "Personaria" or Ombudsman to receive aid to facilitate their departure from the country. When that was not immediately forthcoming they left anyway, taking advantage of US visas to reach the Canadian border.

[34] Colombian government recognition that there are internally displaced persons was, the Panel found, an indicator of the State's acceptance of the need to provide social welfare to such persons. This was a finding reasonably open to the panel. In addition, as the respondent submits, the Panel considered the current state of the FARC and found that over the course of ten years, Colombia had been able to reverse a decline in state protection and bring security to a far larger portion of its citizens.

[35] Recent cases from this Court support the reasonableness of decisions finding there to be adequate state protection in Colombia for those who were in similar circumstances to those of the applicant and who were threatened by the FARC. A list of those cases is set out in *Andrade v Canada (MCI)*, 2012 FC 1490 at para 18. As noted at paragraph 20 of that decision, this Court has overturned RPD decisions on state protection in Colombia only where the RPD was shown to have failed to properly assess the background or "profile" of the claimant and the claimant fell into one of the groups that the documentary evidence indicates may be at risk in Colombia such as "judges and other individuals associated with the justice system".

[36] While the principal applicant falls into the category of individuals "associated with the justice system" in that he had practiced as a lawyer, he did not pose a risk to the FARC for that

reason. The threat against him was said to be based on FARC's disappointment at the outcome of a case they had hoped would go in favour of someone close to them. The Panel took that into consideration. Its finding that state protection would probably have been available within Colombia had the applicant sought it fell within the reasonable range.

[37] No questions for certification were proposed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed. No questions are certified.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4333-12
STYLE OF CAUSE:	RICARDO CRUZ VERGARA ELSA LUZ DIAZ GUIZA JUANITA ALEJANDRA CRUZ DIAZ (A.K.A. JUANITA ALEJAND CRUZ DIAZ) and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	January 30, 2013
REASONS FOR JUDGMENT AND JUDGMENT:	MOSLEY J.
DATED:	February 8, 2013

APPEARANCES:

Alla Kikinova	FOR THE APPLICANTS
Brad Bechard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

ALLA KIKINOVA Loeback Law Firm Toronto, Ontario	FOR THE APPLICANTS
WILLIAM F. PENTNEY Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT