

Federal Court



Cour fédérale

Date: 20140623

Docket: IMM-2613-13

Citation: 2014 FC 598

Ottawa, Ontario, June 23, 2014

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

**MYRIAM ROCHA CORTES, GABRIELA
PATRICIA FERNANDEZ ROCHA, MARIA
DEL TRANSITO CORTES JIMENEZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated March 11, 2013, in which it concluded that they were not Convention refugees nor persons in need of protection pursuant to sections 96 or 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

Background

[2] The Principal Applicant, Myriam Rocha Cortes, her daughter Gabriela Patricia Fernandez Rocha, and her mother Maria del Transito Cortes Jimenez are citizens of Columbia. They claim to fear persecution by the Fuerzas Armadas Revolucionarias de Colombia (FARC) guerrillas.

[3] The Applicants claim that the Principal Applicant was the owner of a real estate company in Santa Marta. In May 2010, a man came to the office and applied to lease a house located directly behind the police station. A few days later, he returned and identified himself as a member of the FARC and indicated that the FARC required that the house be leased to it. The Principal Applicant reported this to the police on the same day. The police stated that this was not the first time that this had occurred as the FARC always sought to be close to the police. Further, that a denunciation was not necessary but that she should be careful and call if anything else happened. On May 21, 2010, the FARC called the Principal Applicant and demanded that the house be leased to them by May 30, 2010 and to remember that squealers died. Following this, she began to work from home.

[4] She was threatened again at a later date and was told that as she had not provided the house, she had to pay a war tax of 45 million pesos. If she complied, the FARC would guarantee her safety and that of her mother whose farm had previously been occupied by the FARC, but who had not provided them with the documentary rights to it. The Principal Applicant did not report these events to the police because the FARC warned her not to do so.

[5] The Principal Applicant moved in with a friend and closed her office on May 31, 2010. She provided a power of attorney to another person to address matters arising, but not to operate the business. On June 20, 2010, she moved with her mother to her daughter's home in Bogota. She sold her business on July 10, 2010.

[6] On August 19, 2010, there was an attempt to abduct her daughter which was reported to the police. On August 21, 2010, the Principal Applicant received a call from the FARC and was told that the Applicants could not escape, acknowledging the failed abduction attempt, stating that if she did not pay the war tax in fifteen days the Applicants would pay with their lives, and, to remember that squealers died. The Principal Applicant again did not report this to the police. On August 23, 2010, the Principal Applicant's daughter resigned from her job. They fled to Canada on September 3, 2010 and sought refugee protection upon arrival. Subsequently, the Principal Applicant learned that the FARC visited her old office on two occasions asking about her and her mother and claiming that they owed a debt to the FARC.

Decision Under Review

[7] The RPD stated that the determinative issue was state protection and analyzed this and credibility together. Essentially, the RPD did not believe that the Applicants were approached by the FARC or that they approached the police for protection.

[8] The RPD stated that, given the historical relationship between the police and the FARC, it could not understand the nonchalant police response as described by the Principal Applicant when she sought to report the FARC's interest in leasing the house. Based on the documentary

evidence, which the RPD found to demonstrate that the police take the FARC much more seriously than portrayed by the Principal Applicant, it concluded that she concocted the story of being approached by the FARC to bolster her claim for refugee status. Further, that she did not present corroborative evidence, such as a police report, to support her allegations that she had problems with the FARC in Columbia.

[9] The RPD noted that the Principal Applicant had not reported the threats received following the first encounter with the FARC. It found her testimony, that the police had stated that what occurred was not a crime, was contrary to the documentary evidence which revealed that extortion, threats and kidnapping are crimes that are investigated. It did not believe that she had any problems with the FARC or that she asked for protection. However, if she had encountered the problems as she alleged, the police would have protected her. The RPD also found that the Principal Applicant omitted from her Personal Information Form (PIF) narrative that she requested protection and that her explanation, that she reported an "August 18th" incident, did not answer why it was omitted, was evasive, undermined her credibility and was unreasonable. The RPD noted that she was represented by experienced counsel, amendments had been made to the PIF, and, that information omitted went to the heart of her claim, being state protection.

[10] The RPD acknowledged that the Principal Applicant's daughter had reported the attempted abduction to the police, but found that there was nothing in the daughter's PIF that stated that the police told her that they would not provide protection. As to the Principal Applicant's explanation that the police told her daughter that attempted kidnapping is not a crime

and that they would not protect her, the RPD found that this did not explain why her daughter did not include the information. It found that on a balance of probabilities, the daughter did not report the incident to the police and she did not do so because there was no attempt to kidnap her. Again, this was an effort to bolster the refugee claims. Further, the daughter stated she made a report on August 20, 2010, but she fled on September 23, 2010. Therefore, it was unreasonable to expect immediate prosecution or conviction. The RPD concluded that the Applicants had not provided clear and convincing evidence that state protection in Columbia is inadequate because they had not taken all reasonable steps to seek protection. The presumption of state protection had not been rebutted.

[11] Under a separate section entitled state protection, the RPD referred to various country condition reports. It recognized that there are inconsistencies in the documentary evidence, but found that the preponderance of the evidence suggests, that, although not perfect, there is adequate state protection for victims of crime and that Columbia is making serious efforts to address criminality. The RPD also reviewed the evidence concerning guerrilla and paramilitary activities and noted that the United Nations High Commission for Refugees has identified certain groups who face a particular risk of persecution or serious harm in Columbia. The Board recognized that the FARC commit human rights abuses and that the documentary evidence concerning its reach and influence is mixed. It therefore had to rely on the personal circumstances of claimants in relation to the documentary evidence to consider whether the FARC would choose to continue pursuing a relocated individual. The documentary evidence suggested that this would depend on their value to the FARC. Members of the political elite,

business class, academic or professional class targeted for extortion or coercion to cooperate would render them a high value target.

Standard of Review

[12] Credibility findings are essentially pure findings of fact that are reviewable on a reasonableness standard (*Zhou v Canada (Citizenship and Immigration)*, 2013 FC 619 at para 26 [Zhou]; *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (CA)). Similarly, the weighing of evidence and the interpretation and assessment of evidence is also reviewed on a reasonableness standard (*Zhou*, above, at para 26). That standard also applies to determinations of state protection (*Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at para 38; *Orellana Ortega v Canada (Minister of Citizenship and Immigration)*, 2012 FC 611 at para 7).

[13] Reasonableness is concerned with the justification, transparency and intelligibility of the decision-making process, but also with whether the decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 [*Dunsmuir*]).

Positions of the Parties

Applicants' Position

[14] The Applicants submit that the RPD's determinations as to credibility and state protection were unreasonable. The RPD doubted their testimony without any reason to do so (*Maldonado v*

Canada (Minister of Employment and Immigration), [1980] 2 FC 302 (CA)). It found it implausible that the police, when advised by the Principal Applicant that the FARC had approached her seeking to lease a property located near the police station, did not take a report. This was speculation unsupported by the evidence and is inappropriate for Colombian conditions. Plausibility findings should be made only in the clearest of cases and the RPD should not apply Canadian paradigms uncritically to different countries and cultures (*Divsalar v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 653 at para 24; *Yada v Canada (Minister of Employment and Immigration)* (1998), 140 FTR 264; *Bains v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 497 (TD)). Therefore, its credibility finding which is based on such reasoning is unreasonable. Further, that the RPD made a number of other reviewable errors in its credibility analysis, including requiring corroborating evidence when they submitted evidence which was ignored.

Respondent's Position

[15] The Respondent submits that the Board exercised its jurisdiction and expertise, citing well-accepted principles and bases for disbelieving the Applicants (*Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paras 7-8; *Grewal v Canada (Minister of Employment and Immigration)*, [1983] FCJ No 129 (CA)). The Board reasonably found several material parts of the Applicants' story to be implausible. It looked at the relationship between the FARC and the police and noted the Applicants' own documentary evidence concerning brutal attacks against police stations, and found their lack of response was unreasonable. There were also significant omissions from the Principal Applicant's PIF that supported its decision, and any minor errors did not detract from its overall conclusion.

Analysis

[16] In reviewing the RPD's decision in this matter, it is important to note that while the RPD identifies state protection as the determinative issue, it analyzes state protection and credibility together. As a result, and because the RPD essentially disbelieved the Applicants' entire claim, credibility was also determinative in effect. In my view, the errors in the credibility analysis impacted the state protection finding.

[17] The presumption that an applicant's sworn testimony is true can be rebutted if there is reason to doubt his or her truthfulness (*Adu v Canada (Minister of Employment and Immigration)*, [1995] FCJ No 114 (CA) at para 1; *Maldonado*, above). However, in this case, it appears that the Applicants' testimony and evidence were disregarded mainly because of the RPD's plausibility findings or inferences.

[18] The RPD's principal concern pertained to the Principal Applicant's evidence that she reported the FARC's interest in the leased house to the police. It stated that it could not understand how the police would react nonchalantly to this given the historical relationship between the police and the FARC and the documentary evidence in that regard. Based on this, the RPD found that the police would have taken the report far more seriously, as dictated by self-interest, which would be more consistent with common sense and rationality.

[19] Where the RPD finds a lack of credibility based on inferences, including inferences concerning the plausibility of the evidence, there must be a basis in the evidence supporting the

inferences (*Abdul v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 260, [2003] FCJ No 352 at para 15 (TD)). Plausibility findings should only be made in the clearest of cases i.e. if the facts presented are outside the realm of what could reasonably be expected or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at paras 7, 17), and with a clear explanation for those findings (*Saeedi v Canada (Minister of Citizenship and Immigration)*, 2013 FC 146 at para 30).

[20] Here, the RPD does refer to documentary evidence in finding that it was unlikely that the police would react nonchalantly to the prospect of a house next to the police being rented by the FARC. This was comprised of articles describing FARC attacks on various police stations. From this, it determined that the Applicants made up the story. However, the referenced documentary evidence does not address the police response to information provided at a front counter indicating that the FARC have taken an interest in the police. Rather, the RPD draws an inference that because of prior attacks on police stations, a report would have been prepared. That is, that the police officer at the police station that the Principal Applicant visited did not respond to her complaint in the manner that the RPD felt that it should. However, it must be recalled that she imparted information as to the FARC's interest in a leased house. Her evidence was that the police had previously leased that very house so they would certainly know its proximity to them. It also seems unlikely that mere interest by the FARC in leasing the house would amount to a crime. Further, the Principal Applicant had not been threatened at that stage.

[21] Given the above, it is not implausible that the police officer did not feel that a report was warranted at that time as the Principal Applicant asserts. Further, the officer's internal treatment of the information is unknown, but for the purposes of the police's self-interest, this too would not necessarily require a report from the Principal Applicant. Thus, the facts presented are not outside the realm of what could reasonably be expected in these circumstances nor does the documentary evidence demonstrate that the events could not have happened in the manner asserted by the Principal Applicant. In my view, this plausibility finding was not made in the clearest of cases.

[22] Further, the RPD states that the Principal Applicant's daughter was allegedly physically assaulted (the attempted kidnapping) which was reported to the police, but that there was nothing in the daughter's PIF indicating that the police declined to provide protection. The RPD reminded "...itself that the claimant is required to include in her PIF the result of any report she made to the authority in there country". It found the Principal Applicant's explanation that the police told her daughter that an attempted kidnapping is not a crime and that they would not protect her was evasive. Further, she did not explain why her daughter did not include the information. On this basis, the RPD found on a balance of probabilities that her daughter did not make any report to the police and that she did not do so because there was no attempt to kidnap her. The RPD found that the Applicants also concocted this aspect of their story to bolster their claim for refugee status.

[23] The RPD's reasons are inconsistent as it states both that the daughter did report the attempted kidnapping, and, that she did not make a report. The latter finding grounds its

determination that the report was not made because the attempted kidnapping did not take place. However, the daughter did in fact make a report to the police and that report was on the record before the RPD. It clearly states the particulars of the attempted abduction, the questions the police asked her and her responses. Further, the daughter's PIF clearly stated "PLEASE SEE STATEMENT OF MY MOTHER MYRIAM ROCHA CORTES". Therefore, the RPD also erred in finding that the daughter's PIF omitted the information concerning the police declining to offer protection as the daughter relied on her mother's PIF narrative. In the Principal Applicant's narrative, she states that her daughter went to the police to request protection and that the police stated that they were unable to protect her. The RPD explicitly based its negative credibility determination on these findings, which were in error.

[24] I would also note that while the RPD recognized that the Principal Applicant approached the police after the FARC visited her office on March 18, 2010, which it stated in error was on August 18, it found that "nowhere" in the Principal Applicant's "original or amended Personal Information Form (PIF) narratives does it say that she went to seek state protection". While it noted her explanation that she recited her PIF in general terms and that she included relevant information, it found her explanation to be unreasonable and, based on this, it drew an adverse inference as to her credibility. In my view, it was unreasonable to find that the Principal Applicant did not seek state protection simply because her PIF did not explicitly describe the visit to the police as such.

[25] Given these credibility findings and inconsistencies, viewed in whole, the decision is unreasonable (*Dunsmuir*, above).

[26] As to state protection, as indicated above, the RPD's credibility and state protection analysis was intertwined. While state protection is often dispositive of an application (*Herrera Andrade v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1490 at para 2), so too is credibility. In this case, the RPD's finding that the Applicants failed to provide clear and convincing evidence to rebut the presumption of state protection was influenced by its finding that they did not approach the state at all. Therefore, the two findings are inextricably linked. As the RPD's disbelief of the Applicants' story was based on its flawed credibility findings which permeated its state protection analysis, the state protection analysis is also rendered unreasonable in these circumstances (*Henriquez de Umaña v Canada (Minister of Citizenship and Immigration)*, 2012 FC 326 at para 29; *Feradov v Canada (Minister of Citizenship and Immigration)*, 2007 FC 101 at para 23).

[27] As the Board found that the Applicants were not at a risk from the FARC due to an erroneous credibility finding, it also did not properly assess their risk profile in connection with the FARC.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed, the decision is to be remitted to a different panel of the Immigration and Refugee Board for reconsideration; and
2. No question of general importance is certified.

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2613-13

STYLE OF CAUSE: MYRIAM ROCHA CORTES, GABRIELA PATRICIA
FERNANDEZ ROCHA, MARIA DEL TRANSITO
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CITIZENSHIP AND IMMIGRATION

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