Federal Court  Cour fédérale

Date: 20181010

Docket: IMM-4949-17

Citation: 2018 FC 1013

Ottawa, Ontario, October 10, 2018

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ANGIE CAROLINA TAMAYO VALENCIA
ALEXANDER VALDERRAMA MONTANO
LUIS FERNANDO VALDERRAMA TAMAYO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants are citizens of Colombia. They report that in 2009, Ms. Angie Carolina Tamayo Valencia's [Angie] sister testified against a member of the Revolutionary Armed Forces of Colombia [FARC]. The FARC member was allegedly involved in an attack on police in 2002, in which Angie's sister's husband was murdered. The sister's testimony then led to the arrest of a

FARC commander. As a result, Angie has received threats from members of the FARC and asserts that she, her husband, Mr. Alexander Valderrama Montano, and their son, Luis Fernando Valderrama Tamayo, are at risk. Angie's sister has been recognized as a Convention refugee and is residing in Canada.

[2] The Refugee Protection Division [RPD] determined that the applicants are neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The applicants seek judicial review of that determination pursuant to subsection 72(1) of the IRPA. They submit the RPD misapprehended the evidence; made inaccurate, vague, and confusing findings; applied an incorrect legal test; and failed to consider contradictory evidence.

[3] The respondent submits that the RPD's decision is reasonable.

[4] For reasons set out in greater detail below, I find that the RPD's characterization of the claim as one of "indirect persecution" is inconsistent with the evidence and the applicant's narrative. In addition, the RPD's failure to render clear and unambiguous credibility findings make it impossible to discern what evidence the RPD accepted and what it rejected. The application is granted.

II. Style of Cause

[5] The applicants have named the Minister of Immigration, Refugees and Citizenship Canada as the respondent in this matter. The correct respondent is the Minister of Citizenship

and Immigration (*Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, s 5 (2) and *Immigration and Refugee Protection Act*, SC 2001, c 27, s 4(1)). Accordingly, the respondent in the style of cause is amended to the Minister of Citizenship and Immigration.

III. Background

[6] The applicants assert that, subsequent to the 2009 arrest of a FARC commander named Omar, they received a threatening phone call. As a result of the threat, they changed their address and phone numbers and Mr. Montano quit his job. The police were also contacted. The police advised the applicants not to be concerned as the FARC commander, Omar, was in jail. Angie's sister left Colombia in August 2009, leaving Angie as the only sibling still in Colombia.

[7] In March 2011, the applicants were again contacted by the FARC: Angie received a sympathy card as well as a phone call advising that, as the only member of the family remaining in Colombia, she would be targeted by the FARC. As a result, the applicants moved to a different city. They did not report the threats to the police as they knew they would not be protected and feared the police had been infiltrated by the FARC.

[8] In March 2012, a neighbour informed the applicants that a man had been asking for them. The man had identified himself as a friend of Omar. The applicants immediately moved to a different city and applied for travel visas to the United States.

[9] The applicants received their visas in May 2012 and left Colombia in June. They arrived in Canada via the United States and made a refugee claim at the port of entry. Their claim was dismissed by the RPD on October 5, 2017.

IV. The Decision under Review

[10] The RPD's decision was rendered orally. The panel stated that Angie was generally credible and that her recollection of reported events and circumstances seemed accurate. However, the RPD also found that in some cases, evidence was embellished or exaggerated and there was no foundation for what was being said.

[11] The RPD then noted that the applicants' fear arose in the context of their status as family members of an individual who had testified against the FARC and was linked to their membership in a particular social group. The RPD expressed some concern in this regard, noting "nothing happened to you directly, not in the same way as your sister." The RPD referenced the decision of the Federal Court of Appeal in *Pour-Shariati v Canada (Minister of Employment and Immigration)* (1997), 131 FTR 80 (CA), and concluded that the applicants had experienced "indirect persecution." In reaching this conclusion, the RPD noted that "[f]or a claim to be successful there must be a personal nexus between the alleged persecution and a convention ground…[t]here is no actual nexus, nothing actually happened."

[12] The RPD then turned to the question of state protection, noting a complaint had been made to the police. The RPD found that the police complaint was insufficient to rebut the

presumption of state protection and that the documentary evidence indicated state protection was available.

[13] The RPD noted that an accord had been entered into between the government of Colombia and the FARC. The RPD accepted that the documentary evidence indicated dissident FARC groups continued to pose a threat, but it found these to be criminal groups, posing a general risk to be assessed under section 97 of the IRPA. The RPD further concluded the applicants had an internal flight alternative [IFA] in Bogota.

V. Issues

[14] The applicants challenge the reasonableness of all aspects of the RPD decision. As is explained below, the RPD's misapprehension of aspects of the evidence and the ambiguous credibility findings are determinative, and they are the only issues I need address.

VI. Standard of Review

[15] The parties agree that the issues raised are questions of mixed fact and law reviewable against a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 51 [*Dunsmuir*]).

[16] The applicants argue that the RPD applied an incorrect test in considering whether there was a nexus between the applicants' claim and one of the grounds identified in section 96 of the IRPA. They submit that this issue is to be reviewed against a standard of correctness. I disagree.

The applicants' submissions on the question of nexus take issue with the RPD's characterization of their circumstances, not the underlying test itself. This is a question of mixed fact and law. All issues will be reviewed against a standard of reasonableness.

VII. Analysis

[17] The applicants submit that the RPD decision reflects a lack of familiarity with the evidence. They attribute this to the member's decision to deliver an oral decision shortly after completing the hearing. They submit that evidence related to important elements of the claim was inaccurately set out in the RPD decision. This evidence included a sympathy card received by the applicants, which was interpreted as a threat from the FARC, and the timing of the family's relocation in response to the FARC threats. They further submit that the RPD's credibility findings were inconsistent, leaving the applicants with no way of knowing what the panel disbelieved or how that disbelief was weighed. The respondent argues that the evidence allowed the RPD to reasonably reach the conclusions it did and that the applicants are merely asking the Court to re-weigh evidence.

[18] It is evident upon a review of the RPD decision that the RPD misapprehended evidence. The RPD makes reference to a 2009 letter, a letter that is not found in the record. Instead, the 2009 threat is reported to have been received by phone. The decision also evidences some confusion in relation to the applicants' evidence of threats; the timing of the threats; and the circumstances of the son, his age, and his attendance at school. The member also states:

> I had some discrepancies, it was hard to follow which sister left and why. For example, I cited a sister who left in 2011 and then there was another sister who left in 2009. I am not clear about

> some of the timeframes for the sisters leaving and where they went were still a little unclear to me.

[19] The jurisprudence recognizes that where a decision-maker misapprehends evidence that may have impacted the outcome of the decision-maker's analysis, a reviewable error has been committed (*Acosta Ramirez v Canada (Citizenship and Immigration)*, 2007 FC 721 at para 35). The evidence relating to the threats received and the timing of the applicants' moves within Colombia is evidence that would have been of particular relevance in assessing the applicants' subjective fear, the adequacy of state protection, and the availability of an IFA.

[20] On the question of credibility, the RPD states "[i]n terms of your credibility, in general I found you credible... I believe you about your sisters' reasons for leaving and coming to Canada…I am not going to say anything more about your credibility because most of your recollection seemed to be very accurate and you certainly made attempts to remember and I realize that you know you have been here for five years, so there is no problem there."

[21] Despite these findings, all of which suggest credibility is not in issue, the RPD proceeds to reach negative credibility findings, stating that the applicants had embellished or exaggerated evidence, that there was no foundation for what they said, and that the explanation for their delay in departing Colombia was not credible.

[22] Credibility findings must be clearly made, and a decision maker must clearly identify evidence it finds not to be credible. These requirements were recognized by Justice Russel Zinn

in *Mendoza v Canada (Minister of Citizenship and Immigration)*, 2015 FC 251, where he states at paragraph 22:

> Negative credibility findings must be made in clear and unmistakable terms (*Hilo v Canada (Minister of Employment & Immigration)* (1991), 130 NR 236, 26 ACWS (3d) 104 (FCA)), and it is an error not to specify what evidence the decision-maker does and does not find credible (*Rahman v Canada (Minister of Employment & Immigration)* (1989), 8 Imm LR (2d) 170, 16 ACWS (3d) 105 (FCA)). Here, there are numerous statements by the RPD that it finds Edwin not to be credible, but there is no specific reference to any particular evidence that it rejects on the basis of that credibility finding. Regrettably, this leaves an impression with the applicants and this court that the credibility findings impacted the RPD's assessment of the evidence that led to its state protection finding. [Emphasis added.]

[23] The RPD's credibility findings can be best described as inconsistent. The RPD makes what might reasonably be interpreted as a global and generalized finding that the applicants are credible. That finding is then qualified by a finding that some evidence—evidence that is not identified—has been at least discounted if not disbelieved on the basis that there has been embellishment or exaggeration.

[24] In reviewing the decision, I am uncertain as to which aspects of the applicants' narrative the RPD believed and which portions it disbelieved. For example, did the RPD disbelieve the applicants' claim that the FARC had found them after they moved in 2009 and again after they moved to a new city in 2011? Whether the RPD accepted this evidence or rejected it as an exaggeration or embellishment is of particular importance when assessing the reasonableness of the IFA finding and, to a lesser extent, the state protection finding.

[25] Having found that the RPD both misapprehended evidence relevant to its analysis and rendered inconsistent and non-specific credibility findings, I am unable to conclude that the decision falls within the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at para 47). The decision is unreasonable.

[26] I need not address the other issues raised in the application, but I do note that the RPD's finding of indirect discrimination may well be a finding that arises as a result of the RPD's flawed understanding of aspects of the applicants' evidence.

VIII. Conclusion

[27] The application is granted. The parties have not proposed a question of general importance and none arises.

JUDGMENT IN IMM-4949-17

THIS COURT'S JUDGMENT is that:

1. The application is granted;

2. The matter is returned for redetermination by a different decision-maker; and

3. No question is certified.

"Patrick Gleeson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4949-17
STYLE OF CAUSE:	ANGIE CAROLINA TAMAYO VALENCIA, ALEXANDER VALDERRAMA MONTANO, LUIS FERNANDO VALDERRAMA TAMAYO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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