

Federal Court



Cour fédérale

Date: 20101013

Docket: IMM-6246-09

Citation: 2010 FC 1010

Ottawa, Ontario, October 13, 2010

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

**ROBINSON ANDRES RODRIGUEZ GUTIERREZ
VICKY MILLEY MIRA OSORIO
ALEXIS MATEO RODRIGUEZ MIRA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants apply for judicial review of the November 12, 2009 decision of the Refugee Protection Division (RPD) refusing their application for refugee status. The principal Applicant (the Applicant) is a former police officer from Columbia. The other two applicants are his wife and son. They are citizens of Columbia.

[2] I have concluded that the judicial review should be granted for the reasons that follow.

Background

[3] The Applicant was a highway patrol police officer. The Applicant claims that while he was stationed in Magdalena Medio, he received information from an informant about a cocaine drug shipment by the Revolutionary Armed Forces of Columbia (FARC). He passed on that information to the intelligence section of the highway police which resulted in the July 20, 2006 interception of 1,850 kilograms of cocaine. He participated in the seizure of this substantial cocaine drug shipment as a field investigator.

[4] The Applicant says he then began to receive anonymous phone calls on his cell phone, at his home in Puerto Berrio, and at the police department, asking for information about him. In August 2006, the Applicant received a letter from the FARC stating the Applicant would be killed if he did not reveal the name of the informant. On September 15, 2006 the body of the informer was discovered. The Puerto Berrio Police Station Commander reported the deceased was apparently assassinated by the FARC.

[5] On October 25, 2006 the Applicant says he received a second letter from the FARC stating he and his family were military targets who were to be executed. On December 2006, after men came twice looking for him, the Applicant moved to Medellin, a city of approximately one million people. Nevertheless he received a phone call and was threatened. The Applicant retired from the highway patrol and enrolled in university in Medellin. In January 2007, a vehicle blocked his vehicle while he was driving in San Jose de Nus and shots were fired at him but the

Applicant managed to escape. The Commander of the Police Station reported the attack as an assassination attempt.

[6] In February 2007, the Applicant received a third letter at his home stating that the FARC had him in their sights and that no matter where he fled he would be killed for being a snitch. The Applicant moved his family to another apartment in Medellin. On May 21, 2007 shots were fired at the family's third floor apartment. The Chief of the Judiciary Police in Bello believed the FARC was responsible because of the modus operandi involved.

[7] The Applicant was advised by the superintendent of the apartment building that men had come looking for him. The Applicant fled to the United States with his family. He made an asylum claim which was rejected. Upon receiving legal advice that an appeal of the U.S. asylum decision "would not help" the Applicants came to Canada and made a refugee claim.

Decision Under Review

[8] The RPD rejected the Applicants claim on the basis of credibility, a lack of subjective fear of persecution, existence of an internal flight alternative and generalized risk.

[9] The RPD did not believe the Applicant was targeted by the FARC. It made much of the Applicant's response when asked if he had proof that the cocaine was seized from the FARC. The Applicant said the FARC was identified on a police intelligence report on the seizure which he did not have. When asked if the FARC was specifically identified in the police seizure report

which he had provided, he said no. The RPD took that exchange as a deliberate attempt to mislead. The RPD also noted the telephone callers did not identify themselves as the FARC. It rejected the threatening notes as being easily fabricated. The RPD chose to find it highly likely that, on the Applicant's admission that drug cartels operated in the area, a drug cartel was targeting the Applicant.

[10] The RPD found the Applicant could settle in Bogota, a metropolis of eight million people. The RPD found that country documentation provided evidence that the FARC had retreated to the rural areas. The RPD also found that if the Applicant was targeted by a drug cartel, this was a risk faced by those in the justice system, which was an excluded risk since it was a generalized and prevalent risk faced by this subgroup of the population at large.

Legislation

Immigration and Refugee Protection Act, 2001, c.27 (IRPA)

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,
 (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or
 (b) not having a country of nationality, is outside the

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
 a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
 b) soit, si elle n'a pas de

country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country...

nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

Standard of Review

[11] The standard of review with respect to questions of fact and mixed fact and law are assessed on the standard of reasonableness: *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190. In addition, the Supreme Court has held that where a standard of review has been previously determined then a review analysis need not be conducted anew.

[12] The standard of review for whether there exists a well-founded fear of persecution is reasonableness: *Mendoza v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 387. The standard of review for an internal flight alternative is also reasonableness: *Esquivel v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 468.

Issue

[13] In my view the substantive issues in this proceeding are credibility and internal flight arrangement (IFA).

Analysis

[14] The Applicant submits that the RPD erred in determining he was not credible in alleging he was targeted by the FARC. Further, the Applicant says that the RPD erred in determining the Applicants had an internal flight alternative as it did not take into account the Applicant's personal circumstances.

Credibility

[15] The RPD is due deference in receiving and assessing oral testimony since the member is able to observe the witness's demeanour. However, that deference is not due where the RPD differs in its summation from the Applicant's testimony without further reference to contradictions or evasive demeanour. The RPD made much of what it decided was the Applicant's attempt to lie. It stated:

During his oral testimony, the principal applicant was asked if he had a copy of a news report, police report or other persuasive evidence indicating that the cocaine had been seized from the FARC. He said that the FARC was identified in a police report on the seizure but did not have a copy of the report included into evidence. However, when pressed if the FARC was specifically identified in the police report as the owner of the illegal shipment, he said, “no,” basically admitting to the attempted lie.

[16] A close review of the hearing transcript concerning the “admitted lie” discloses that the RPD conflated the police intelligence report allegedly identifying the FARC as the drug owners with the seizure report that does not identify the FARC. At worst, the Applicant’s response was not clear but quickly clarified. There is no attempted deception here. Jurisprudence establishes that the RPD should not be overzealous in finding instances of insignificant contradiction in an applicant’s testimony: *Attakora v. Canada (Minister of Employment and Immigration)*, (1989) 99 N.R. 168 (F.C.A.).

[17] Further, there is a presumption that the RPD need not explicitly refer to every piece of evidence before it: *Cepeda-Gutierrez v. Canada (Minister of Citizenship of Immigration)*, [1998] 157 F.T.R. 35. However, where relevant evidence bears on the issue before it, failure to refer to such evidence supports an inference that the RPD did not consider it.

[18] The RPD dismissed the threatening notes the Applicant says are from the FARC on the basis that they could be easily fabricated. However, the Applicant also presented police reports identifying likely FARC involvement in the death of the drug informant and in the attacks on the

Applicant and his family. The RPD makes no mention of these reports and its failure to evaluate the police reports is an error.

[19] I conclude the RPD erred in how it conducted its assessment of the Applicant's credibility.

Internal Flight Arrangement

[20] The Applicant submits the FARC was motivated to pursue the Applicant because of his central role in the interception of the large cocaine shipment. Further the Applicant submits the documentary evidence demonstrates a difference between the FARC's ability to pursue covert attacks in urban centres, including Bogota, and its conventional armed confrontations now pulled back into rural areas.

[21] The test for determining whether the Applicants have an IFA involves two steps. First, there must be no serious possibility that an individual would be persecuted or subjected to persecution, or to a danger of torture or to risk of life or of cruel and unusual treatment or punishment in the proposed IFA; and second, it would not be unreasonable for the individual to seek refuge in the proposed IFA area: *Rasaratnam v. Canada (Minister of Citizenship and Immigration)*, [1992] 1 F.C. 706 (F.C.A.). The onus is on a claimant to prove actual and concrete evidence of conditions which would jeopardize his or her life: *Morales v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 216.

[22] Notwithstanding the RPD's finding that the Applicant was not a FARC target, the RPD did proceed with its IFA analysis on the basis that he was being targeted by the FARC. The RPD decided that:

In summary, the panel is satisfied that the FARC has moved away from its bases from urban areas to rural areas with headquarters in the mountains or jungles and no longer has the ability to track an individual from one area to another, due to surveillance by security forces and their ability to interrupt communications.

[23] The RPD concedes that the Applicant may be the target of a drug cartel. Yet, the RPD does not have regard to the documentary evidence that identifies the FARC as the largest dealer of illegal drugs. FARC would be highly motivated to seek out those responsible for the loss of its large illegal cocaine shipment.

[24] The National Documentation Packages suggest the FARC is adapting and capable of conducting urban terrorist activities including targeting police and others. As an example, one report by the International Crisis Group: Policy Briefing: Colombia: Making Military Progress Pay Off states:

“There is reason to believe that the FARC is still capable to a degree of adapting and resisting, at least in the short to medium term....Unable to carry out large strikes, units have specialized in the use of landmines and explosives, attacks by snipers and selective killings (plan pistola) against specific police and military targets. The FARC is also undertaking more intelligence operations, managing to infiltrate armed force commands to obtain classified information.... (emphasis added)

[25] The RPD did not explain why it chose to disregard this evidence which speaks directly to the Applicant's situation contradicting its conclusion.

[26] Finally, notwithstanding the RPD's analysis that the Applicant has an internal flight alternative in the megalopolis of Bogota, the personal history of the Applicant suggests otherwise. The Applicant's narrative involves three different towns and cities where the FARC was involved in his life: Puerto Berrio, where he lived with his family and received death threats by phone, Medellin, where he moved to but continued to receive death threats, and San Jose de Nus, where he had been driving and forced off the road. These are three different areas in Colombia, one of which is Medellin, which has a population of over a million people. The Applicant's personal history would suggest that the FARC may be able to track him wherever in Colombia.

[27] I conclude the RPD failed to have regard for the Applicant's personal circumstances and documentary evidence relevant to the availability of an IFA.

Conclusion

[28] The application for judicial review is granted.

[29] The Parties have not proposed a general question of importance for certification and I do not certify any question.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is granted.
2. I do not certify any question of general importance.

“Leonard S. Mandamin”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6246-09

STYLE OF CAUSE: ROBINSON ANDRES RODRIGUEZ GUTIERREZ, ET
AL. and THE MINISTER OF CITIZENSHIP AND
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**REASONS FOR JUDGMENT
AND JUDGMENT:** MANDAMIN, J.

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