Federal Court  Cour fédérale

Date: 20101223

Docket: IMM-2017-10

Citation: 2010 FC 1323

Ottawa, Ontario, December 23, 2010

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

ANA ELVIA HERNANDEZ HERNANDEZ AND WANDA PATRICIA ROJAS HERNANDEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a decision of the Refugee Protection Division (the Board), dated March 3, 2010, where Ana Elvia Hernandez Hernandez (the principal applicant or PA) and Wanda Patricia Rojas Hernandez (the second applicant) were found not to be a Convention refugee or a person in need of protection.

[2] This application for judicial review shall be allowed for the reasons below.

Facts

[3] Both applicants are citizens of Colombia. The principal applicant is the mother of the second applicant.

[4] The applicants fled Colombia in 2007 and claimed refugee protection in Canada based on a fear of the Colombian Revolutionary Armed Forces (FARC). The PA's other two daughters had both previously come to Canada in 2003 and were accepted as Convention refugees.

The Principal Applicant

[5] The principal applicant was formerly a lawyer and prosecutor in Colombia. Her husband, prior to his death in the 1980s was a judge. The family owned a cattle farm in an area that came to be dominated by the FARC. The family began receiving regular threats from the FARC in 1986 due to the prominence of their family in the country. In the year 2000, the FARC completely took over the farm and stole all of the cattle. In 2003 the applicants began receiving threats again.

[6] During this time, the PA was also experiencing difficulties with her boss. The PA alleges that her boss was sexually harassing her, and that after refusing his advances, he ordered her transferred to an area of the country known to be dangerous because of FARC activity. Given her personal history with the FARC, the PA objected to the transfer and complained that it was "retaliation".

[7] She alleges that in further retaliation for refusal, her boss also initiated a corruption investigation regarding her. He accused the PA of agreeing not to prosecute three police officers accused of extorting money from a criminal, in exchange for receiving money for herself. As a result of these accusations, the PA was arrested in 2003 and placed in jail pending trial. Her trial occurred in 2005 and she was convicted of abuse of authority and graft (the equivalent of bribery).

[8] The PA alleges that she did not commit the alleged crimes and that there were numerous irregularities in her prosecution. Also, the prosecutor in charge of her case had close ties with her former boss. She appealed her sentence and it was reduced.

[9] She was eventually released from prison in 2006 with conditions, one of them being that she was not to leave the country without permission. The PA alleges that as soon as she was released from prison in July 2006, she began to request permission to leave the country, as she believed that she was no longer protected from the FARC. She had formerly been given protection through her job until 2000.

[10] The second claimant stated that she contacted the Canadian Embassy in her efforts to leave Colombia, but she did not receive a response. The PA also stated that she applied to the Court of Execution of judgments for permission to leave the country. She also alleges that she also made a declaration to the Attorney General in regard to her fears of the FARC.

[11] On August 28, 2007, the PA's lawyer told her that the time of the judgment had been carried out and that she could leave the country. He came to that conclusion because he had gone to the Department of Administrative Security (DAS) to request a report in her name, and it showed that everything was clear. In the principal applicant's opinion, the Court of Execution of Judgements did not respond on a timely basis to her request to leave. The Court of Execution judgements then denied her departure from Colombia without any argument. She then appealed again and the same magistrate who had denied her appeal did not answer her second petition.

[12] Receiving no answer, the applicants went to the airport on September 4, 2007, where they met DAS officials whom the PA had known from having worked there in the past. At the airport, the authorities looked into their computer, found nothing, wished them a good trip then the applicants left Colombia for Canada. The principal applicant believed that there was no process against her in Colombia and that she had obtained a clear criminal record certificate.

The Second Applicant

[13] The second applicant assisted her mother while she was in prison with her legal matters. She also started attending university while waiting for her mother's trial. In December 2004, she was approached by the FARC and was given a message for her mother. After this incident, she moved although she continued to attend University.

[14] Almost five months later, the second applicant was blindfolded, gagged and placed in a vehicle by the FARC. They informed her that her mother owed them a substantial amount of money

and she would be harmed if it was not paid. After this incident, the second applicant stopped attending University, went into hiding, and frequently moved from house to house.

[15] After the PA's release from prison, the applicants relocated again and attempted to sell the farm to avoid any future problems with the FARC. The farm was sold in May 2007. Shortly after the sale, the applicants were found again by the FARC and told that they had eight days to turn over the proceeds from the sale of the farm, otherwise they would be killed. They were also told that they were now both military targets. The applicants immediately went into hiding at a friend's farm for three months. They then travelled to Bogota from where they flew to the United States and then crossed into Canada where they made their claims.

Impugned Decision

[16] The determinative issues in this case were the questions of exclusion, well-founded fear of persecution, failure to claim elsewhere, credibility, perceived political opinion, and risk to life or of cruel and unusual treatment or punishment and whether or not the applicants had rebutted the presumption of state protection.

Principal Applicant

[17] The Board found that the principal applicant was excluded under Article 1F(b) of the *United Nations Convention.* In making this finding, the Board noted that the government in Columbia has taken steps to remedy corruption, despite the fact that it is not perfect. The Board did not agree with the argument put forth by the applicant's counsel that the panel should make a finding that the crime that the principal applicant had been convicted of had not been committed. The Board did not feel

that it had the jurisdiction to make this type of determination. The Board also stated that the applicant had her opportunity to be heard in Court in Colombia and that it was not up to this Board to make findings on the Court's determination.

The Second Applicant

[18] The determinative issues for the second applicant were whether the harm feared by her would rise to the level of persecution or risk to life or risk of cruel and unusual treatment or punishment.

[19] The Board found that the female claimant did not establish that there was a serious possibility that she would face persecution or other incidents of serious harm if she returned to Colombia. The Board did not find that the second applicant would have a well-founded fear of persecution from the FARC, if she were to return to Bogota in Colombia. The Board noted that even though threats to be killed started back in 2000, and the second claimant was allegedly continually having to hide, the second claimant was able to reside in Bogota where she attended school from 1991 through 2006, having gone to the USA for school from August 2001 to May 2002, and returning to reside and go to school in Bogota, with nothing happening to her from any members of the FARC.

[20] The Board also drew a negative inference from the applicants not contacting the authorities in regard to the allegations of threats of death from the FARC. The Board stated that if the FARC had been so interested in harming or killing the female claimant, they would have found the second

claimant in the two-year period from May 2005 until she left Colombia and went to the USA in September 2007.

[21] The Board further stated that if the FARC gave the principal applicant eight days to pay the money from the sale of the farm and it was not paid, surely the FARC would have made sure that neither the principal applicant nor the second applicant escaped from Colombia without paying the money from the farm in the months from the time of the sale on May 9, 2007 until five months later when they left for the USA on September 4, 2007.

[22] The Board stated that the second applicant's allegations that she was in hiding for two years is not supported by the evidence. The Board found that her statements that she attended school during this time in her PIF were contradicted by her stating that she was in hiding.

Issues

[23] The issues are as follows:

a. Did the Board err when it found that it did not have the jurisdiction to "go behind a decision of the Courts in Colombia"?

b. When concluding that the principal applicant should be excluded under Article 1F(b), did the Board make unreasonable findings in light of the evidence before it?

c. Did the Board make an unreasonable finding when it stated that the FARC would have already found and harmed the second applicant if they were really interested in her?

Standard of Review

[24] This Court has found that the question of exclusion under Article 1F is a question of mixed law and fact and it should be reviewed on the standard of reasonableness (*Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FC 238, 324 FTR 62 (FC) at para 10).

[25] The other issues pertain to the Board's consideration of evidence which is a matter of fact, attracts a deferential standard (*Villicana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1205, 357 FTR 139 at paras 35 to 39). Accordingly, the Court will only intervene if the decision does not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

a. Did the Board err when it found that it did not have the jurisdiction to "go behind a decision of the Courts in Colombia"?

Applicants' Arguments

[26] The applicants argue that the Board refused to look in any detail at the circumstances surrounding the PA's conviction and the evidence before it because it believed that it did not have the jurisdiction to do so (paras 32-38 of the decision).

[27] The applicants further contend that it was a clear error of law for the Board to say that it did not have jurisdiction to go behind the conviction to look at the circumstances surrounding the alleged crime and conviction. The applicants submit that such an inquiry is very much appropriate in the context of an assessment under Article 1F(b) and arguably even required.

[28] The applicants state that the jurisprudence instructs that the Board is not entitled to take the mere existence of a conviction to be sufficient evidence of participation in a serious non-political crime. Factors such as the circumstances of the crime, the method of prosecution, and the sentence should be looked at by the Board before such a determination can be made (*Jayasekara v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 404, [2009] 4 FCR 164 at para 44 (*Jayasekara (FCA)*); *Rihan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 123, [2010] FCJ No 134 (QL)). The applicants submit that the Board has even more of a duty to engage in an analysis of the circumstances surrounding a conviction when the claimant specifically alleges that there are mitigating factors warranting the claimant not being excluded, such as corruption, and when there is ample evidence on the record to support the claimant's position.

[29] The applicants refer to *Rihan*, above at paras 54 and 55 where the Court stated the following:

> What emerges is Article 1F(b) leaves signatories to the convention a fair degree of latitude to exclude both criminal and possibly criminal applicants. The Article is not restricted to extraditable crimes, nor must there be proof of a conviction or even an allegation of a qualifying crime made by authorities in other countries.
>
> That being said, Canada's commitment to Convention refugees requires the RPD [Board] members properly scrutinize the evidence before them before applying the exclusionary articles of the convention.

Respondent's Arguments

[30] The respondent advances that it was reasonable to find that that the applicant committed a non-political crime.

[31] First, the respondent states that it was reasonable to find that the crime was serious, given that it noted that the Canadian equivalent of the alleged crime carries a sentence of up to 14 years in prison. The respondent notes that the Courts have affirmed that any offence for which Parliament has determined a maximum sentence of ten years or more may be imposed in Canada is reasonably considered "serious" (*Jayasekara (FCA)*, above at para 40).

[32] The respondent also refers to *Pineda v Canada (Minister of Citizenship and Immigration)*, 2010 FC 454, [2010] F.C.J. No. 538 (QL) at paras 27-30, *Xie v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 250, [2005] 1 FCR 304 where the Court has stated that the Board can rely on an arrest warrant to conclude that there are reasonable grounds to conclude that a claimant committed a serious crime outside of Canada. The respondent underscores that in this case, the evidence was not only an arrest warrant, the applicant was convicted and her conviction was maintained on appeal, and there were court documents detailing the criminal charges.

[33] The respondent contends that contrary to the applicant's argument, it is not the function of the Board to determine whether the applicant had in fact committed serious non-political crimes. Article 1F(b) requires only that there be serious reasons for considering that she had done so (*Deng v Canada (Minister of Citizenship and Immigration)*, 2007 FC 943, [2007] F.C.J. No. 1228 (QL) at para 11, quoting *Xie*, above at para 23).

[34] The respondent further states that the *Rihan* case raised by the applicant is distinguishable on its facts given that in that case the applicant had not made restitution, and that the only evidence

favouring exclusion was a warrant, and the Board did not address the applicant's evidence that the charges had been fabricated.

[35] The respondent further submits that in the case at bar, it was reasonable for the Board to reject the PA's claim that she had been unjustly convicted. The Board considered the following factors:

a. The PA had counsel and applied to the Supreme Court of Justice.
b. The letter from the applicant's former counsel in Colombia does not provide details as to why he believed the applicant was unjustly convicted in Colombia.
c. The evidence indicated that the applicant's boss was being investigated for corruption and that the Supreme Court had issued an inhibitory judgment for 15 days, as it did not find proof against him (para 36 of the reasons).
d. It found that the Supreme Court in Colombia also looked at the allegations against the principal applicant's boss and made their findings.
e. The evidence indicated that the Colombian government had taken steps to remedy corruption.

Analysis

[36] The Board found that there were serious reasons for considering that the principal claimant is a person described in Article 1F(b) of the *United Nations Convention*, and accordingly, that she is excluded from refugee protection in Canada. The Board stated that it had no jurisdiction over what happened to the applicant in Colombia (page 826, tribunal record).

[37] The Board made an error in stating that it did not have the jurisdiction. If the Board is to make decisions regarding the exclusion of an individual from refugee status, it must be convinced or satisfied that there are serious reasons that the individual committed a serious non-political crime outside of Canada. It depends on the particular circumstances in each case.

[38] Jurisprudence from this Court demonstrates that the Board is to scrutinize the evidence before it before applying the exclusionary articles (*Rihan*, above). In the case at bar, the Board did not even want to look at the evidence presented by the applicant to see if it could be satisfied that there were serious reasons that the principal applicant had committed a serious non-political crime outside of Canada.

[39] The Court in *Pineda* stated the following at paras 27 to 30:

> … Parliament has also given the RPD [Board] a lot of freedom to receive any evidence it considers credible and trustworthy [subsections 170(g) and (h) of the Act]. That said, the need for "serious grounds" is protection against arbitrary and capricious action especially in light of the dire consequences resulting from an exclusion pursuant to Article 1F(b) of the Convention. For this standard to be meaningful, it requires a proper and objective assessment of the context as well as all the evidence presented by the refugee claimant. Obviously, the RPD must be particularly cautious when charges led have been dismissed by a competent court in accordance with the rule of law.
>
> … the Federal Court of Appeal made it clear that the RPD [Board] can, in a proper context, rely upon an indictment and an arrest warrant to conclude that there are reasonable grounds to conclude that a claimant has committed serious crime outside of Canada.
>
> This is based on the premise that in a system where the rule of law prevails, the RPD [Board] can reasonably infer that there were reasonable and probable grounds for the police or the judicial investigative system to issue a warrant or lay a charge.

> Naturally, for such premise to apply, the RPD [Board] must first be satisfied that the issuing authority does respect the rule of law, that is, for example, that it is not dealing with a country known for the filing of false charges as a means of harassment or intimidation.

[40] In this case, as will be discussed below, there were serious questions about corruption in Colombia's legal system at the time of the arrest and conviction of the principal applicant. Therefore, in light of the fact that the applicant was alleging a wrongful conviction, she merited for her case to be further analyzed, especially considering that she comes from a country in which the respect for the rule of law was questionable.

b. When concluding that the principal applicant should be excluded under Article 1F(b), did the Board make unreasonable findings in light of the evidence before it?

[41] The applicant submits that the Board based its refusal to consider whether the PA's conviction was wrongful and facilitated by a corrupt judicial system, in part on "serious efforts" that the Colombian Government is reported of having taken since 2008. The applicant argues that regardless of whether "serious efforts" have actually resulted in a reduction in corruption on the ground in Colombia, these efforts that the Colombian government may or may not have taken to combat corruption in that country's judicial system since 2008 would have had absolutely no bearing on whether the PA's charges in 2003 and conviction in 2005 – five and three years earlier – were facilitated by corruption within the system.

[42] The applicants argue that it was unreasonable for the Board to dismiss the question of whether corruption played a role in the PA's conviction in part because of the evidence that the

Colombia government had undertaken “serious efforts” to combat corruption five and three years after the relevant time periods.

[43] The applicants add that quite contrary to the Board’s conclusions on this point, evidence of serious efforts undertaken in 2008 should support the need for an inquiry into whether corruption played a role in the PA’s conviction in 2005, rather than eliminate the need for such an assessment.

[44] The applicant further contends that had the Board properly engaged in an analysis of the circumstances surrounding the conviction, there was ample evidence before the Board, in addition to the acknowledgement that there is a history of corruption within the judicial system in Colombia, that specifically corroborated the events as disclosed by the principal applicant in her testimony and personal information form as she submitted at paras 49 a. to g. of her memorandum of fact and law (page 269 of the applicant’s record).

[45] For example, among several pieces of evidence, the PA has submitted sworn statements from two of the three police officers declaring that they did not give money to the PA and were not asked for money from her. She has also submitted a news report detailing that the PA’s former boss had sought the transfer of another of his female employees to a dangerous zone in Colombia after she refused his sexual advances. The applicants also refer to documentary evidence relating to the judicial system in 2005 which refers to corruption in the legal system.

Respondent's Arguments

[46] The respondent states that the applicants have failed to demonstrate that the evidence cited by the Board was irrelevant to the PA's claim. The respondent notes that the 2009 Department of State (DOS) document indicated that in 2006, Colombia had presidential elections that were considered generally free and fair. The respondent also refers to the 2008 UNHCR document which refers to developments in 2007 – the same year in which the applicant was seeking permission from the authorities to leave Colombia – and indicated that the Supreme Court of Justice was strong and independent.

Analysis

[47] I do not find the Board's conclusion that the government of Colombia had taken steps to remedy corruption to be sufficient reasons for rejecting the applicant's contention that she had been the victim of corruption in the legal system. The documents relied on by the Board pertain to efforts taken by the government in the years after the laying of charges and conviction of the principal applicant.

[48] The Board should have also referred to more relevant and timely evidence on the question of corruption (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35, [1998] FCJ No 1425 (FCTD) (QL)*)*. The Board makes mention of the PA's former boss and the fact that the Court did not find proof against him, however, it did not consider why he would have been fired for sexual harassment, and why several allegations would have been made against him by different women.

[49] I do not find that the Board's reasons on this question were reasonably justifiable (*Dunsmuir*, above at para 47).

c. Did the Board make an unreasonable finding when it stated that the FARC would have already found and harmed the second applicant if they were really interested in her?

[50] The applicants submit that the panel's inference that the second applicant is not at risk from the FARC because she was not already found and harmed by the FARC is untenable.

[51] The applicants submit that the conclusion by the panel that the FARC could not have been interested in the second applicant if it had not yet harmed her was essentially a plausibility finding. The applicants argue that adverse plausibility findings should only be made in the clearest of cases, where the facts are inherently implausible (*Dua v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1055, 75 Imm LR (3d) 20 at para 4, *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776, [2001] FCJ No 1131 (QL) at para 7).

[52] The applicants contend that it is not inherently implausible that the FARC would still be interested in harming the applicants despite not having located and harmed the applicants in the three months that they remained in hiding prior to feeling Colombia. The applicants add that the Board provides no basis for its conclusion on this point and does not refer to any specific evidence to support its conclusion, other than to merely assert that this was not what would be expected of the FARC if they were really interested in harming the applicants.

[53] The Board's conclusion rests solely on the panel's personal interpretation of what the FARC would be expected to do in the circumstances (*Keqaj v Canada (Minister of Citizenship and Immigration)*, 2008 FC 388, 71 Imm LR (3d) 269 at para 36, *Soto v Canada (Minister of Citizenship and Immigration)*, 2008 FC 354, 70 Imm LR (3d) 292 at paras 19 and 26). The applicant also refers to *Barrero v Canada (Minister of Citizenship and Immigration)*, 2010 FC 364, [2010] FCJ No 415 (QL) at paras 7 to 9, where the Court found that the Board's conclusion that there was no objective basis for the applicant's claim was unreasonable.

[54] The applicants also quote *Ilyas v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1270, 41 Imm LR (3d) 3, in which the Court stated at paras 58 and 59:

> I am highly cognizant of the respondent's warning that the Court should not merely re-weigh evidence and come to a different conclusion from the Board. This is particularly so in the case of a Decision based on credibility.
>
> What troubles me here is that so much of the decision rests upon negative plausibility findings and negative inferences: failure to make a claim in the U.S.; implausible target for the SSP; failure of the SSP to kill the applicant when they had the chance. None of these findings have much of a base to them. They are not based upon inconsistencies internal to the Applicant's evidence but upon the Board's own view of what someone in the position of the Applicant and his family should have done, or upon what the Board thought would have been a more likely outcome in the circumstances. When it comes to making decisions based upon these kind of criteria, the Board is no better placed than the Court. Also, inferences and conclusions are drawn by the Board without really addressing strong evidence that points the other way …

[55] The applicants further highlight that the Board's conclusions with regard to the second applicant also seem to be based on a factual error. The Board seems to base its conclusion that the FARC is not interested in the second applicant in part on the assumption that she resided in Bogota

between 2005 and 2007 (para 67 of the decision). The applicants submit that in reality, the applicant lived outside of the city for part of 2006 and only lived in Bogota for three months during 2007.

Respondent's Arguments

[56] The respondent submits that the Board is entitled to make reasonable findings based on implausibility, common sense and rationality, and may reject evidence if it is not consistent with the probabilities affecting the case as a whole (*Shahamati v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 415 (FCA) (QL), *Wu v Canada (Minister of Citizenship and Immigration*, 2009 FC 929, [2009] FCJ No 1143 (QL) at paras 15 and 17). The respondent states that the Board clearly explained the implausibility findings.

[57] The respondent also suggests that the Board's findings were based on the fact that the second applicant was able to remain in Colombia for so long without incident. Furthermore, the respondent adds that if the Board erred by stating that the second applicant lived in Bogota before coming to Canada, such an error is immaterial because the Board's conclusions were based on her remaining in Colombia without incident (paras 58-65 of the decision).

[58] The respondent also underscores that the finding that the second applicant was not in hiding for two years was reasonable given that the evidence indicated that she was in school at the time she claimed to be in hiding.

Analysis

[59] I am of the opinion that the Board's conclusion that the second applicant is not at risk from the FARC because she was not already found and harmed is not reasonable. It is not logical to require the second applicant to have been harmed by the FARC in order to receive refugee protection.

[60] I am also concerned with the factual error made by the Board where it assumed at para 67 that the second applicant resided in Bogota between 2005 and 2007. Although this is not the only factor upon which the Board relied upon to come to its conclusion, it nonetheless took it into consideration where it stated that "the second applicant continued to reside in Bogota for an additional two years, before coming to Canada, without any further incidents from the FARC". As such, I am concerned as to what bearing this mistake had on the Board's final determination.

[61] With regards to the Board's adverse inference regarding the applicant's inconsistency with respect to her schooling and her being in hiding (at para 66) of the decision, I find that it was reasonable for the Board to come to that conclusion. However, in light of the above considerations, I still find that the Court's intervention is warranted.

[62] No question for certification was proposed and none arise.

JUDGMENT

THIS COURT ORDERS that the application for judicial review be allowed. The matter is remitted back for reconsideration by a newly constituted Board. No question is certified.

"Michel Beaudry"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2017-10
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DATE OF HEARING:	December 9, 2010
REASONS FOR JUDGMENT:	BEAUDRY J.
DATED:	December 23, 2010

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