

Federal Court



Cour fédérale

Date: 20110317

Docket: IMM-4738-10

Citation: 2011 FC 325

Toronto, Ontario, March 17, 2011

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

**JENNY PATRICIA MARTINEZ MUNOZ
ROBINSON BARBOSA CEBALLOS
LIZBETH VANESSA TOVAR MARTINEZ
JOCELIN BARBOSA MARTINEZ**

Applicants

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application concerns a Colombian family's claim for refugee protection from the FARC in Colombia. The essence of the claim is that, in April 2004, the Applicant father operated a wholesale avocado business in Cali and, on its demand, began to pay extortion money to FARC. By December 2004, because he was unable to make the payments, he was severely beaten

and the lives of his family were threatened. As a result, the family fled and ultimately claimed refugee protection in Canada on March 25, 2008.

[2] The Refugee Protection Division (RPD) denied the claim. It is important to note that no negative credibility finding was made with respect to the truth of the evidence offered in support of the claim. In denying the claim the RPD made the following findings:

I am satisfied that the claimants failed to establish that for them state protection would be inadequate in Cali where they have lived in the past, or in the alternative that Bogota does not meet both requirements of a viable internal Flight Alternative (IFA). Hence, I reject the claims.

Analysis:

In Cali, the claimants made no attempt to seek the assistance of the authorities when extortion was demanded. Even after being beaten, the claimant did not make a report to the authorities in late 2004.

The claimant testified that he did not make a report on the instruction of the FARC. He believed that if he went to the authorities, it would make the situation worse since the FARC would find out he had made a report.

I am not aware of reliable reports of businessmen who refused to pay extortion being harmed in Cali in late 2004 or past 2004.

The Immigration and Refugee Board (the "Board") has been unable to find evidence that persons have been harmed in large urban cities during this period.

Academics have reported their opinion that FARC has such a capacity but even if that is the case, there is no reliable evidence that FARC has used this capacity to harm persons such as the claimant or their family in urban areas such as Cali when demands were not met if the victims used the assistance of the authorities.

I note the facts of this case suggest the claimant's father has had his truck stolen by guerrillas in 2005. As of the date of the hearing, this is the only incident reported by a member of the claimant's family. The father still lives in Cali today.

The theft of the truck was reported, however there was no mention that the father believed it was related to his son's problems.

There is no evidence the guerrillas retaliated as a result of the police report concerning the stolen truck.

Since the claimant's father made a report and is still able to reside in Cali, I am satisfied that the claimant's fear of retaliation if he had taken similar action is not justified.

As a result, I am satisfied the claimants failed to establish that for them state protection would have been inadequate if they had requested it in 2004 before leaving Colombia.

In the alternative is Bogota a viable IFA due to the existence of adequate state protection today? I am satisfied this is the case.

(Decision, paras. 13 to 24)

[3] Thus, the Applicant father's reason for not seeking state protection is the fear that somehow the information would get from the police to FARC. The test with respect to the acceptance of this reason in the context of a claim for protection is stated in *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at paragraph 57:

Reading all these authorities together, a claimant coming from a democratic country will have a heavy burden when attempting to show that he should not have been required to exhaust all of the recourses available to him domestically before claiming refugee status. In view of the fact that the United States is a democracy that has adopted a comprehensive scheme to ensure those who object to military service are dealt with fairly, I conclude that the appellants have adduced insufficient support to satisfy this high threshold. Therefore, I find that it was objectively unreasonable for the appellants to have failed to take significant steps to attempt to obtain protection in the United States before claiming refugee status in Canada.

[Emphasis added]

[4] I find that the RPD failed to make the determination to which the Applicant was entitled. Rather than appropriately determine whether the claimant's fear of reporting was "objectively unreasonable", the RPD offered an opinion on the different question: whether businessmen who refused to pay were harmed by FARC in Cali, or other large urban cities, in 2004. The fact that the Applicant's father had no difficulty reporting the theft of the truck to the police is completely irrelevant: he was not reporting life-threatening extortion under fear of retaliation. It is clear from the reasons that the RPD was prepared to reject the claim for protection on the failure to report. I find that to have done so would be to decide the claim in reviewable error because the nature and quality of the Applicant's reason for not reporting was not evaluated according to law as expressed in *Hinzman*, and, therefore, is not defensible (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, para. 47). Indeed, apparently to guard against such a possible outcome upon judicial review, the RPD went on to make an Internal Flight Alternative finding "in the alternative".

[5] During the course of the hearing of the present Application, I identified the error to Counsel for the Applicant and Respondent, but nevertheless, requested argument on the alternative finding. Having thought the matter through, I have concluded that it was inappropriate to do so. In my opinion, if a central determination is reached in an RPD decision which has the potential of ending a claimant's hope for obtaining protection, and that determination is found to be erroneous, regardless of the argued merit of any alternative finding, I believe that it is only fair to set such a decision aside. I find that this is the just result in the present case.

ORDER

Accordingly, the decision under review is set aside and the matter is referred back for redetermination by a differently constituted panel.

There is no question to certify.

"Douglas R. Campbell"
Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4738-10

STYLE OF CAUSE: JENNY PATRICIA MARTINEZ MUNOZ; ROBINSON
BARBOSA CEBALLOS; LIZBETH VANESSA TOVAR
MARTINEZ; JOCELIN BARBOSA MARTINEZ
v. MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 16, 2011

**REASONS FOR ORDER
AND ORDER BY:** CAMPBELL J.

DATED: MARCH 17, 2011

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