Federal Court  Cour fédérale

Date: 20110627

Docket: IMM-1736-10

Citation: 2011 FC 777

Ottawa, Ontario, June 27, 2011

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

IRINA BUITRAGO SALAZAR &
SERGIO NOLBERTO RUIZ ESCOBAR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated March 23, 2010, wherein the applicants were determined not to be Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

[2] The applicant, Irina Buitrago Salazar (the female applicant) requests that the decision of the Board be set aside and the claim remitted for redetermination by a different member of the Board. It is only the female applicant's decision that is being challenged in this judicial review.

Background

[3] Irina Buitrago Salazar was born on November 23, 1969 and is a citizen of Colombia.

[4] The female applicant married Mauricio Emerson Buitrago Aleman in the United States on February 12, 2002. In July 2002, they traveled to the department of Caquetá, Colombia to visit relatives. On the way, their car was intercepted by members of Fuerzas Armadas Revolucionarias de Colombia (FARC). The female applicant was raped in front of her husband. The female applicant went to the hospital and police after the incident. The marriage did not survive this violence and the couple divorced one year later.

[5] Sergio Nolberto Ruiz Escobar (the male applicant) owned a business in Colombia. In 2000, he was approached by two men claiming to be FARC militia who demanded money from him. He refused to pay these men and told them his brother was in FARC and he would have them beaten up if they returned. The male applicant was taken from near his home in January 2001 and demanded money from these same men and another FARC member. The male applicant explained that he was a FARC sympathizer and he wanted to support the cause. He was told to pay three million pesos by March 2001 and then 500,000 pesos every month from then on. The male applicant did not go to the police but rather left Colombia for the United States on a tourist visa.

[6] The female and male applicants married in January 2007.

[7] The applicants arrived in Canada on October 21, 2007 and claimed refugee protection.

Board's Decision

[8] The Board found both of the applicants credible and trustworthy.

[9] Concerning the female applicant, the Board stated that being part of a particular social group does not in itself establish a well founded fear of persecution. The Board found that the attack on the female applicant was random not targeted. There was insufficient evidence to suggest that the attackers knew the female applicant or could discover her identity and no evidence that they continued to pursue her, thus there was no serious possibility of persecution in Colombia today.

[10] The Board also found that a viable internal flight alternative (IFA) exists for the female applicant. She was assaulted in the department of Caquetá, Colombia, where FARC continues to have a stronghold. However, FARC no longer has a presence in Cundinamarca or Boyaca where she could live safely. There is evidence that FARC does not have the capacity to track the female applicant to this location because of government successes against FARC in the past few years. FARC has lost internal communication, the number of soldiers has decreased the centralized command had deteriorated. There was no evidence that these locations are unreasonable places to relocate.

[11] Finally, the Board determined that subsection 108(4) of the Act did not apply in this case. It found that the "compelling reasons" exception only applies where the Board has determined that a person would have been a Convention refugee or person in need of protection, but that the conditions that led to such a finding no longer exist. The Board stated that this was not the case because it was not satisfied that the female applicant was a Convention refugee or person in need of protection at time she left Colombia because an IFA would have been available, the low level of threat she faced and because there were no change in circumstances.

Issues

[12] The issues are as follows:

1. What is the appropriate standard of review?
2. Did the Board err by not applying the compelling reasons test of subsection 108(4) of the Act?
3. Did the Board apply the correct test for a current IFA?

Female Applicant's Written Submissions

[13] The female applicant submits that the Board erred by incorrectly applying the "compelling reasons" test of subsection 108(4) of the Act. The Board should have determined whether the female applicant was a refugee at the time of the persecution, whether there have been changes since that time and whether a compelling reasons assessment was warranted.

[14] The Board's conclusion about why the compelling reasons exception was not triggered did not follow from its analysis. The Board stated that an IFA was available for the female applicant at the time she left Colombia, the applicant was a low-level threat and there had been no change in circumstances. However, the Board never assessed whether an IFA existed at the time of persecution. Rather, it assessed only that a valid IFA existed at the time of the hearing. Neither did the Board assess the level of threat at the time of persecution. The Board accepted that at the time of the attack by FARC, the evidence was that FARC would have been able to seek out the female applicant and find her. Finally, by the Board's own analysis, there had been changes in the circumstances since the time of persecution.

[15] The Board was required to assess state protection in 2002. The Board erred in finding that the female applicant did not have a well founded fear of persecution without assessing whether the Colombian state was able to protect her.

[16] The female applicant further submits that the Board erred in finding that a viable IFA exists today for the female applicant. The Board was required to assess the Immigration and Refugee Board's *Chairperson's Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (Gender Guidelines) in conjunction with its findings of an IFA, failing to do so was an error.

Respondent's Written Submissions

[17] The respondent submits that in order to invoke section 108 of the Act, the Board must first make an explicit finding that an applicant has suffered persecution and would be found to be a refugee or person in need of protection except that the reasons for the persecution have ceased. The Board made no such finding in this case.

[18] The respondent submits that the Board found that there was no nexus to a Convention ground for either applicant as both claims were based on criminality.

[19] The respondent submits that the burden is on the female applicant to show that there is no IFA. The test for proving that the Board's finding of an IFA is wrong, is a strict one. In this case, the Board analyzed the extensive documentary evidence on the situation between the government and the FARC. The Board also reasonably concluded that there was no evidence that the IFA locations were objectively unreasonable.

[20] The respondent submits that the psychological report made conclusions about immigration issues and therefore was not relevant. Despite this, the report was considered by the Board.

[21] The Board further considered the Gender Guidelines. The female applicant did not claim that she was or would be ostracized for reporting her attack to the police. There was also no evidence that she would move to an IFA without her husband so the restrictions on movement by single women referred to in the Gender Guidelines were not applicable.

[22] Finally, the respondent notes that oral decisions may form adequate reasons. The main factors relevant to the decision were set our and discussed by the Board. It clearly stated why the female applicant's claim failed and what factors were important to the decision. This decision was reasonable.

Analysis and Decision

[23] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[24] In this case, the issue concerning the application of subsection 108(4) is whether the Board erred in finding that the applicants were not refugees or persons in need of protection at the time of persecution. This is a question of mixed fact and law, not a pure error of law, and is therefore reviewable on the standard of reasonableness (see *Adel v Canada (Minister of Citizenship and Immigration)*, 2010 FC 344 at paragraph 22).

[25] Whether or not the Board applied the correct test for assessing the current IFA is reviewable on the standard of correctness (see *Meneses Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 691 at paragraph 7).

[26] **Issue 2**

Did the Board err by not applying the compelling reasons test of subsection 108(4) of the Act?

The Board found that the compelling reasons exception of subsection 108(4) did not apply in this case because it had not made a determination that the female applicant was a Convention refugee or a person in need of protection at the time they left Columbia.

[27] The problem lies in the Board's reasons for this finding. The Board stated that the female applicant was not a refugee or person in need of protection at the time she left Colombia because:

> …an Internal Flight Alternative would have been available and because of the low level of threat [she] faced, and there has been no change in circumstances….

[28] First, the Board spent approximately two pages of its decision reviewing the changes to the political and military strength of the FARC and government in Colombia and the loss of control and power by FARC over the past several years. This is in direct contradiction to its statement that section 108 did not apply because "there has been no change in circumstances."

[29] Second, the Board's IFA analysis was intricately linked to its discussion on the change of circumstances. Although asserting that it did, the Board did not find a viable IFA existed at the time of persecution. Rather, it stated precisely, that today "there is evidence that the FARC 'no longer operated in the departments of Cundinamarca or Boyaca'". The Board's IFA analysis found that with the passage of time and the deterioration of FARC over the past decade, the female applicant could now live safely in areas where FARC is no longer a threat.

[30] Finally, the Board did not assess the level of threat that the female applicant posed at the time of her attack.

[31] The jurisprudence on subsection 108(4) is clear that the Board must first find a refugee claimant to be a Convention refugee or person in need of protection at the time of persecution before the compelling reasons exception applies. In *Nadjat v Canada (Minister of Citizenship and Immigration),* 2006 FC 302, Mr. Justice James Russell held at paragraph 50 that there must be ". . . a finding that the claimant has at some point qualified as a refugee, but the reasons for the claim have ceased to exist".

[32] As I held in *John v Canada (Minister of Public Safety and Emergency Preparedness*), 2010 FC 1088 at paragraph 41:

> This requires a clear statement conferring the prior existence of refugee status on the claimant, together with an acknowledgement that the person is no longer a refugee because circumstances have changed.

[33] There was no such conference on the female applicant in this case. However, given the errors in the Board's analysis, I cannot know whether it would have found the female applicant to be a refugee or person in need of protection at the time of the persecution, absent these errors.

[34] For this reason, the judicial review is allowed.

[35] Because of my finding, I need not deal with the remaining issue.

[36] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[37] **IT IS ORDERED that** the application for judicial review is allowed and the matter is referred to a different panel of the Board for redetermination.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

Immigration and Refugee Protection Act, SC 2001, c 27

72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
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,	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) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	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) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.	b) soit, si elle n'a pas de 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 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	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) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	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) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

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

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

(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,

(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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

108.(1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances: . . .

108.(1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants : . . .

(e) the reasons for which the person sought refugee protection have ceased to exist.

e) les raisons qui lui ont fait demander l'asile n'existent plus.

. . .

. . .

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

(4) L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1736-10
STYLE OF CAUSE:	IRINA BUITRAGO SALAZAR & SERGIO NOLBERTO RUIZ ESCOBAR - and - THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Calgary, Alberta
DATE OF HEARING:	January 19, 2011
REASONS FOR JUDGMENT AND JUDGMENT OF:	O'KEEFE J.
DATED:	June 27, 2011

APPEARANCES:

D. Jean Munn	FOR THE APPLICANTS
Rick Garvin	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Caron & Partners LLP Calgary, Alberta	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada Edmonton, Alberta	FOR THE RESPONDENT