

Federal Court



Cour fédérale

Date: 20111121

Docket: IMM-2036-11

Citation: 2011 FC 1339

Calgary, Alberta, November 21, 2011

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

WILLIAM FERNANDO ORTIZ RINCON

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] While the Refugee Protection Division of the Immigration and Refugee Board accepted that William Fernando Ortiz Rincon had been targeted by the Revolutionary Armed Forces of Colombia [FARC], it did not accept that FARC had located Mr. Ortiz after he moved to Bogotá. The Board was further satisfied that adequate state protection would be available to Mr. Ortiz in Colombia. As a result, his refugee claim was dismissed.

[2] For the reasons that follow, I have concluded that the Board's decision was unreasonable. As a consequence, the application for judicial review will be allowed.

The Finding that FARC did not follow Mr. Ortiz to Bogotá

[3] Mr. Ortiz was managing his wealthy family's cattle ranch in Caqueza when FARC began demanding that he provide it with protection money. After the second demand, Mr. Ortiz fled to Bogotá, where he began working in one of his family's supermarkets.

[4] The Board seemingly accepted that FARC had targeted Mr. Ortiz for extortion while he was in Caqueza, but did not accept that it had located him in Bogotá or that it continued its efforts to extort him in that city. There are two problems with this finding.

[5] Mr. Ortiz testified that when he was contacted by FARC after he relocated to Bogotá, he was so frightened that he had to seek medical assistance. This testimony was corroborated by a medical report that confirmed that Mr. Ortiz had suffered a panic attack and had required medication. While the physician's report could not identify the agents of persecution, it did provide contemporaneous corroboration that Mr. Ortiz was terrified during the time in question. The medical evidence is not addressed in the decision, and it was sufficiently material that I am prepared to infer that it was overlooked by the Board: see *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, (1998), 157 F.T.R. 35, [1998] F.C.J. No. 1425 at paras.14-17.

[6] The Board also based its finding that Mr. Ortiz was not targeted by FARC while he was living in Bogotá in part on its belief that other members of Mr. Ortiz' family had not been targeted.

In coming to this conclusion, the Board observed that an article dealing with the kidnapping of Mr. Ortiz' uncle did not specifically state that the kidnapping had been carried out by FARC, as Mr. Ortiz had claimed. However, Mr. Ortiz put evidence before the Board indicating that newspapers in Colombia regularly self-censor, and do not attribute crimes to FARC because of threats of violence. It was open to the Board to decide how much weight to attribute to this evidence, but it was not open to the Board to simply ignore it.

[7] In light of these errors, I am satisfied that the Board's negative credibility finding regarding FARC's pursuit of Mr. Ortiz to Bogotá was unreasonable.

The State Protection Analysis

[8] The Board was also satisfied that adequate state protection was available to Mr. Ortiz in Colombia. It based this finding in part on the reasonableness of the police response when Mr. Ortiz sought assistance after being threatened in Bogotá.

[9] I would start by observing that it is difficult to reconcile the Board's finding that the police in Bogotá took "reasonable steps" in response to the threats received by Mr. Ortiz with its finding that Mr. Ortiz was not threatened while he was living in that city.

[10] More problematic, however, is the Board's finding that the police in Bogotá had actively assisted Mr. Ortiz when he sought their protection. According to the Board, after Mr. Ortiz sought protection, the police responded by installing a surveillance camera outside the supermarket where

he worked. The Board further found that the police hooked up a recorder to the store's phone to record future threats, and that they provided Mr. Ortiz with a recording device to carry on him.

[11] The respondent acknowledges that these findings are contrary to the evidence before the Board. Mr. Ortiz testified that the only things that the police did for him were to give him a telephone number to call in the event that he was contacted again by FARC, and to make suggestions as to how he might protect himself. There was no evidence before the Board to support the finding that the police provided the security camera or the recording devices. Indeed, these safety measures were taken by Mr. Ortiz himself.

[12] It is difficult to assess the extent to which the Board's assessment of the country condition information was coloured by its misunderstanding of Mr. Ortiz' own experience in trying to access protection. Certainly, there was documentary evidence before the Board that supported Mr. Ortiz' story, particularly as it related to the limited ability of the police to protect Colombian citizens from FARC. In the circumstances, I am satisfied that the Board's factual error was material to its state protection analysis.

[13] There was also evidence before the Board that corroborated Mr. Ortiz's claim that FARC remains active and continues to commit human rights abuses, despite the loss of its leaders. This evidence, which ran contrary to the Board's finding that FARC had been largely marginalized, was not dealt with by the Board.

[14] The Board's review of the country condition information also appears to have been selective. It found that Colombia is a country in which human rights violators "are held accountable for their actions through the rule of law". However, there was significant evidence before the Board, including reports by Professors Brittain and Chernick, which discussed the persistence of impunity in Colombia, as well as the subornation and intimidation of judges, prosecutors and witnesses; corruption; and the infiltration of Colombia's state institutions by armed groups.

[15] The professors' evidence supported Mr. Ortiz's claim that adequate state protection was not available to him in Colombia. Indeed, Drs. Brittain and Chernick each described FARC's increased presence in urban areas, its ongoing use of extortion as a means of fundraising, its tendency to single out business and farm owners as targets, and its ability to track individuals within the country. Dr. Brittain's report also highlights the unreliability of Colombian government data, potentially calling into question some of the information relied upon by the Board.

[16] The Board did not explain why it discounted this evidence. The only acknowledgement of the conflicting evidence regarding current conditions in Colombia was the statement that "there are too many interest groups painting somewhat conflicting pictures of the FARC, its strength and capabilities", and its acknowledgment that "[a]rticles and reports submitted by counsel and/or the clamant indicate continuing FARC activity".

[17] In my view, these generic statements are not sufficient to meet the level of justification, transparency and intelligibility mandated by *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] S.C.J. No. 9, [2008] 1 S.C.R. 190 at paras. 47, 58 and 163.

[18] While there is a presumption that a decision-maker has considered all of the evidence, that presumption is rebutted where, as here, “the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact”: *Cepeda-Gutierrez*, above at para. 17.

[19] The reports of Drs. Brittain and Chernick discuss the availability of state protection for business owners targeted for extortion in urban areas. They provided relevant evidence that corroborated Mr. Ortiz’s allegations and which squarely contradicted the Board’s findings. In these circumstances, I am satisfied that the failure of the Board to come to grips with this evidence rendered its state protection analysis unreasonable.

[20] Before concluding, I would note that Justice Barnes recently came to a similar conclusion with respect to the failure of the Board to properly deal with the Brittain and Chernick reports in a similar case: see *Ortiz de Martheyn v. Canada (Minister of Citizenship and Immigration)* (3 October 2011), Ottawa IMM-1861-11 (FC).

Conclusion

[21] For these reasons, the application for judicial review is allowed.

Certification

[22] Neither party has suggested a question for certification, and none arises here.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. This application for judicial review is allowed; and
2. No serious question of general importance is certified.

“Anne Mactavish”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2036-11

STYLE OF CAUSE: WILLIAM FERNANDO ORTIZ RINCON v.
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: November 10, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** MACTAVISH J.

DATED: November 21, 2011

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