Federal Court  Cour fédérale

Date: 20111124

Docket: IMM-2118-11

Citation: 2011 FC 1357

Ottawa, Ontario, November 24, 2011

PRESENT: The Honourable Mr. Justice Barnes

BETWEEN:

GLORIA INES NINO YEPES
LUIS HECTOR CUERVO CHAVES
(A.K.A. LUIS HECTOR CUERVO CHAVEZ)
HECTOR DAVID CUERVO NINO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The Applicants are three members of a Colombian family whose claim to refugee protection was denied by the Refugee Protection Division of the Immigration Refugee Board (Board) on February 24, 2011. Their claim to protection was based on a story of threats and persecution primarily directed at Luis Cuervo by the National Liberation Army (ELN) between 1988 and 1994. Mr. Cuervo alleged that he was targeted by the ELN because of his employment in the Second Criminal Court in Bogota.

[2] According to the Applicants, the situation was so dangerous that in 1994 they fled to the United States. In 1996 their claims to asylum in the United States were denied and in 2009 they sought protection in Canada on the strength of the same risk allegations.

[3] The Board rejected the Applicants' claims on the basis that they had failed to rebut the presumption of state protection. Despite summarizing the evidence, the Board made no findings concerning the Applicants' credibility or the truthfulness of their factual allegations. This is surprising because the Board also concluded without any evidentiary analysis that there was no nexus to any of the statutory grounds for protection. The absence of a justification for this finding is, by itself, a basis for setting the Board's decision aside. However, for the reasons that follow, the Board's state protection finding is also insufficient and is a further basis for setting the decision aside.

[4] In the absence of any factual or credibility findings, I am obliged to carry out my review of the Board's state protection finding on the basis that the Applicants' allegations of past persecution by the ELN were accepted. Notwithstanding that history, the Board concluded, on the strength of country-condition evidence, that past victims of persecution at the hands of the ELN could now be adequately protected in Columbia and are no longer at risk.

[5] Where the Board fails to address the evidence of personal risk in a meaningful way or, as in this case, fails to address it at all, the application of country-condition evidence can be profoundly more difficult. This is because the Board lacks an evidentiary framework for its state protection

analysis. Any lingering but unstated reservations about credibility or plausibility may cause the Board to apply the state protection evidence in a way that is unjustified or insensitive to the asserted risks. In this case that failure appears to have caused the Board to overlook material evidence that contradicted its conclusion that adequate state protection was available to the Applicants. If the Board had reminded itself that it had an obligation to consider the country-condition evidence in the context of a family that had been repeatedly targeted by the ELN, it undoubtedly would not have overlooked the evidence from several sources which indicated that, as targeted victims of the ELN, they could not be protected by the Colombian authorities. This evidence included the following:

> The state has clearly shown an inability to sustain or protect Colombians from targeted threats, violence, or attack.
>
> …
>
> The Colombian state has actively under-represented information related to the civil war so as to prevent a negative image of those in power from getting out to the domestic and foreign public.
>
> James J. Brittain, "Continued Insecurity: Documenting the Performance of the FARC-EP Within the Context of Colombia's Civil War" (2009) 21, 25; Certified Tribunal Record at pp 935, 939.
>
> The findings of this report indicates that Colombian authorities are still attempting to paint a positive picture, despite the increasing reports of forced internal displacement, attacks against social and human rights activists and killings by security forces. Our report, further debunks statements repeated by the Colombian government, such as paramilitary groups no longer operate, human rights abusers are held to account and the work of social activists and trade unionists is being fully respected.
>
> …
>
> Amnesty International is of the view that while there have been some military advances against paramilitary and guerrilla groups in Colombia, these advances do not translate into state protection for those who have been targeted by the FARC, ELN or former AUC.
>
> [Footnotes omitted and emphasis added]

> Letter from Gloria Nafziger (9 September 2010), Amnesty International (2, 11); Applicants' Record at pp 283, 292.
>
> The protection of victims and their organizations continues to be a challenge, which must be faced by competent authorities with decisive and effective action.
>
> UN Human Rights Council, *Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and of the Secretary-General*, UNHRC, 10th Sess, A/HCR/10/032 (9 March 2009), 18; Applicants' Record at p 408.
>
> What is clear is that the Colombian state is unable to protect those who have been targeted, be they communities facing forced internal displacement, or individuals threatened with kidnapping, extortion or extra-judicial assassination. Almost all human rights violations in Colombia occur with impunity.
>
> …
>
> The successful military operations against the FARC that occurred in 2008 have weakened the FARC but this has not translated into a reduced risk to individuals who have been directly targeted by the FARC.
>
> …
>
> The State Department report underscores the problem with widespread impunity in the country. Despite the Uribe Administration's stated hard-line policies towards terrorism, the Colombian government is unable to protect a targeted individual.
>
> [Emphasis added.]
>
> Marc Chernick, "Country Conditions in Colombia Relating to Asylum Claims in Canada" (2009) 3, 15-16; Certified Tribunal Record at pp 1224, 1236-37.

[6] Counsel for the Minister relies on the decisions of this Court in *Ortega v Canada (MCI)*, 2011 FC 657, [2011] FCJ no 856 (QL);*Pena v Canada (MCI)*, 2011 FC 746, [2011] FCJ no 964

(QL);and *Guevara v Canada (MCI)*, 2011 FC 242, [2011] FCJ no 447 (QL) all of which, she says, support her position that a valid state protection finding can be made in isolation from the evidence of personal risk. Each of these cases did involve refugee claimants from Colombia who claimed to be at risk from the Revolutionary Armed Forces of Colombia (FARC) and each claim failed on the basis of a finding of adequate state protection. Nevertheless, these decisions are distinguishable from this application.

[7] In *Guevara*, above, the Court noted that "a complete lack of analysis of an applicant's personal circumstances may render a decision unreasonable". It is also clear from the Court's reasons that the Board carefully weighed evidence from Dr. Marc Chernick and discounted it for reasons that were found to be reasonable. In this case, the Board made no mention whatsoever of Dr. Chernick's evidence or the similar evidence submitted from Amnesty International, the U.N. Human Rights Council and Dr. Brittain.

[8] The decision in *Pena*, above, indicates that the Board did examine the evidence of personal risk and rejected it on credibility grounds albeit for reasons that the Court later rejected as unreasonable. In commenting on the Board's state protection analysis, the Court held that the evidence said to have been overlooked was "not of such relevance that the failure to specifically address it results in a decision made without regard to the evidence". In this case, the evidence that the Board failed to mention starkly and directly contradicted its finding that adequate state protection was available for victims personally targeted by the FARC and the ELN.

[9] The decision in *Ortega*, above, indicates that the Board was influenced in part by the applicants' failure to pursue any state protection options before leaving Colombia. In upholding the Board's state protection finding, the Court also made no mention of any material evidence being overlooked and it described the Board's evidentiary analysis as principled and balanced. That is not a finding that is available on the record before me.

[10] Even if the Board's failure to make factual or credibility findings did not in this case give rise to a reviewable error, its failure to refer at all to the evidence of Drs. Brittain and Chernick is a further basis for sending this matter back for a redetermination: see *Villicana v Canada (MCI)*, 2009 FC 1205, 357 FTR 139.

[11] On the basis of the foregoing, this application is allowed with the matter to be redetermined on the merits by a different decision-maker.

[12] Neither party proposed a certified question and no issue of general importance arises on this record.

JUDGMENT

THIS COURT'S JUDGMENT is that this application for judicial review is allowed with the matter to be redetermined on the merit by a different decision-maker.

"R.L. Barnes"

Judge

Federal Court  Cour fédérale

FEDERAL COURT

SOLICITORS OF RECORD

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