Federal Court  Cour fédérale

Date: 20130125

Docket: IMM-3984-12

Citation: 2013 FC 81

Ottawa, Ontario, January 25, 2013

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

ANGELA MARIA ARIAS ULTIMA ET AL.

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] of a decision of the Refugee Protection Division of the Immigration and Refugee Board [the Board], dated April 4, 2012, where the Board determined that the applicants are not Convention refugees or persons in need of protection.

I. Background

[2] Ms. Angela Maria Arias Ultima [the principal applicant, or PA] is a 46-year-old citizen of Columbia. She is the mother of the other two applicants, Mr. Gabriel Alejandro Restrepo Arias and Mr. Nicolas Restrepo Arias, ages 24 and 15 respectively.

[3] The applicants allege the following facts.

[4] On May 4, 2003, while living in Manizales, the PA found an envelope under her door that was addressed to her son Gabriel, the older male applicant. It contained a threatening request to join the Revolutionary Armed Forces of Columbia [the FARC]. On May 6, 2003, the PA attempted to report the letter to the police. The PA found a second threatening recruitment letter from the FARC on May 30, 2003. On June 10, 2003, the older male applicant was struck by a taxi while riding his bicycle, and the PA believes this was a deliberate act by the FARC. The PA decided her family needed to flee Columbia because they were not safe.

[5] The PA was unsuccessful at obtaining U.S. visas for herself and her sons, so she obtained Mexican visas and in September 2003 they left Columbia. The PA and her sons, who were then ages 15 and 6, flew to Mexico. The family then travelled by bus, foot, and car to the U.S., which they entered illegally.

[6] The applicants lived in the U.S. for seven years without legal status. In 2010 the PA learned that her family could claim refugee protection in Canada, and they did so at the Fort Erie, Ontario port of entry on December 16, 2010.

[7] With respect to the PA's credibility, the Board found that the PA provided some credible evidence and some evidence that brought the genuineness of her subjective fear into question. The Board noted that the PA gave evasive answers when she was asked why, after she had decided to flee Columbia with her children, she twice travelled the eight hours to Bogota to attempt to obtain visas, yet after each visit she had returned to her town of Manizales. The Board found she was not able to adequately explain why she took this self-endangering measure twice. The Board drew a negative inference from the PA's evidence in this area and found that she did not adequately address this conduct that adversely reflected on a genuine subjective fear.

[8] The Board found that the older male applicant was credible and noted that the injury he suffered when hit by the taxi was corroborated with a medical report.

[9] The Board noted two determinative issues in the claim: whether there is a risk of harm to the applicants if they were to return to Colombia and whether they have an internal flight alternative (IFA). The Board found the PA's fear that her sons would be forcibly recruited to the FARC upon return to Colombia was not consistent with documentary evidence stating that the FARC rarely forcibly recruited anyone. The Board also found that the PA had not provided persuasive evidence that the taxi incident and the FARC recruitment letters were connected. The Board found that more importantly, however, was that in the nine years since the letters were received, there was no evidence of anyone from the FARC showing any continued interest in pursuing the applicants and the FARC's strength and reach had diminished during the applicants' absence from Columbia.

[10] In any case, the Board was satisfied both prongs of the test for an IFA were met. The Board found there was no serious possibility of the applicants being persecuted in Bogota given the declining power of FARC, the limited profile of all the applicants, and the passage of nine years of time since the family left Columbia. Nor did the Board find Bogota an unreasonable IFA, in all the circumstances, given that the PA speaks the language, was born and raised in Columbia, has been to Bogota, has family members there, and has revealed versatility in being able to find employment outside her country of nationality.

II. Issues

[11] There are two issues in the present application:

A. Did the Board err in concluding that the applicants do not have a well-founded fear?

B. Did the Board err in finding that there was an internal flight alternative and was that finding with respect to the minor child unreasonable?

III. Standard of review

[12] The Board's conclusion that the applicants did not have a well-founded fear is reviewable on the reasonableness standard (*Nogheghase v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1409 at para 9).

[13] The Board's internal flight alternative [IFA] determination is also reviewable on the reasonableness standard (*Singh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 158 at para 17).

[14] The standard of reasonableness is concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47 and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

IV. Analysis

A. *Did the Board err in concluding that the applicants do not have a well-founded fear?*

[15] The applicants submit the Board ignored important and relevant evidence and selectively considered the evidence on whether FARC forcibly recruits minors. In reviewing third party documentary evidence, applicants' counsel thoroughly canvassed the most recent commentary on FARC's activities in Columbia including excepts from the November 2010 Canadian Council for Refugees paper entitled "The Future of Columbian Refugees in Canada: Are We Being Equitable?" at page 12 (page 404 of the Tribunal Record):

> […] the FARC guerrillas (and also the paramilitaries), can easily hit any person or entity they wish, without needing to move many persons or resources to do so.

Applicants' counsel also pointed to excerpts in the Economist article "The FARC is not finished yet", July 7, 2011 at page 1 (page 508 of the Tribunal Record):

> Now there are some worrying signs that the FARC is bouncing back. Those who remain in the outfit are the radicalised hard-core, …

and from the Columbia Reports, March 26, 2010, the article "Army: FARC plans 'wave of urban attacks'" (page 519 of the Tribunal Record):

> Columbia's army said Friday the FARC might be planning a wave of terrorist attacks in the country's major cities, following the alleged arrival of two guerrilla bomb experts in the capital Bogota and the seizure of explosives in Cali.

[16] The respondent submits the Board's assessment of the evidence was reasonable and that the Board did not err in finding that the evidence did not support the applicants' fear that the FARC would attempt to forcibly recruit the PA's sons. The documentary evidence, as a whole, did not support any personalized risk to the applicants, and given the passage of time since the applicants left Columbia in 2003, there is no evidence to suggest any such personalized risk today or prospectively.

[17] In *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35, [1998] FCJ 1425 at paras 15-17 [*Cepeda-Gutierrez*], Justice John Evans established that a decision-maker's obligation to mention and analyze evidence increases with the relevance of the evidence in question to the disputed facts.

> 15 The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency. Just as a court will only defer to an agency's interpretation of its constituent statute if it provides reasons for its conclusion, so a court will be reluctant to defer to an agency's factual determinations in the absence of express findings, and an analysis of the evidence that shows how the agency reached its result.
>
> 16 On the other hand, the reasons given by administrative agencies are not to be read hypercritically by a court (Medina v. Canada (Minister of Employment and Immigration) (1990), 12 Imm. L.R.

> (2d) 33 (F.C.A.)), nor are agencies required to refer to every piece of evidence that they received that is contrary to their finding, and to explain how they dealt with it (see, for example, Hassan v. Canada (Minister of Employment and Immigration) (1992), 147 N.R. 317 (F.C.A.). That would be far too onerous a burden to impose upon administrative decision-makers who may be struggling with a heavy case-load and inadequate resources. A statement by the agency in its reasons for decision that, in making its findings, it considered all the evidence before it, will often suffice to assure the parties, and a reviewing court, that the agency directed itself to the totality of the evidence when making its findings of fact.
>
> 17 However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": Bains v. Canada (Minister of Employment and Immigration) (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.
>
> [Emphasis added]

[18] In my view, the Board unreasonably analyzed whether the applicants' fear was well-founded. First, it was unreasonable for the Board to draw a negative inference from the PA's evidence for why, after she had decided to flee Columbia with her children, she twice travelled the eight hours to Bogota to attempt to obtain visas, yet after each visit she had returned to her town of Manizales. The Board drew this negative inference despite the explanation provided by the older male applicant in his own testimony before the Board (see pages 569-570 of the Tribunal Record):

> MEMBER: […]Okay and was there something else that you wanted to clarify?

> CLAIMANT #2: Yes, you mentioned that why isn't [*sic*] that we stayed in Bogota whenever we went to the American embassy…
>
> MEMBER: Okay.
>
> CLAIMANT #2: …alright, first of all as you see, well our relationship with the [*sic*] her family and my dad's family is not the best, her dad he has his own family, my grampa [*sic*], he has a new wife, anything, they do not like my mother, they do not like us at all and we did not want to carry a conflict within their family; that is why we did not stay in Bogota for. [*sic*]
>
> Her older brother, my uncle, oh our family is very poor […] they basically have enough money and enough room for each other, like he lives in a (inaudible) in a little room by himself, there is no space for us down there and we did not have any money to provide him for anything or for the accommodations that he was going to give us. We had to go back to Manizales because she had to get me out of school […] She had to go back to my school and say that [she had to] retire me from the school, I guess that is the way you say it […]
>
> We had to sell everything that we could in order to come up with money for the expenses of going back and forth from Manizales to Bogota and then in the [case that] we get the visa to go to Mexico, that will have to cover some of the cost of the trip.

The Board made no mention of this explanation despite finding that the older male applicant was credible. In my view, this explanation was consistent with the explanation her PA had given regarding why she returned to Manizales after attempting to obtain visas in Bogota and entirely relevant to the Board's analysis of whether to draw a negative inference from the PA's evidence in this area. The Board's credibility finding related to the PA was therefore unreasonable.

[19] In my view, it was also unreasonable for the Board to find that it would be speculative to argue that the taxi incident and the FARC recruitment letters were connected. The older male applicant provided detailed testimony on the incident (see page 570 of the Tribunal Record):

> CLAIMANT #2: […] I saw the taxi, it was parked […] As soon as they saw me they just step [*sic*] on the gas and went straight ahead, like, towards me, then…
>
> MEMBER: So were you...were you riding your bike against traffic?
>
> CLAIMANT #2: It is a double way…so they went straight on the right line [coming] from the front.
>
> MEMBER: So you were riding into traffic?
>
> COUNSEL: Should he draw a picture?
>
> CLAIMANT #2: […] I was on my side of the street…
>
> MEMBER: But you said they were parked and they…
>
> CLAIMANT #2: …on the side of the street…
>
> MEMBER: …pulled out into…
>
> CLAIMANT #2: yeah on the left side of the street.
>
> MEMBER: …so they crossed into oncoming traffic…
>
> CLAIMANT #2: Yes, exactly […] and went straight for me. Okay, so I flew I guess of…some feet away from the taxi, I saw three men that got off [*sic*] the taxi. I…I landed like right in front of a beauty salon and a lot of people started coming out…as soon as they saw the people came [*sic*] out, they got back in the taxi and just sped off. […]

[20] This incident occurred on June 10, 2003, only ten days after the FARC sent a second threatening recruitment letter to the older male applicant, and the Board noted that this evidence was corroborated with a medical report. The Board stated that it found the older male provided credible evidence at the hearing. I fail to understand how based on this evidence before the Board, the Board

found it would be "speculation" to find a connection between the incident and the FARC recruitment efforts. The Board stated it would be speculative because "Gabriel did not see who was in the car, or recognize them, and it is not consistent with the objective evidence before the Board." However, the older male applicant did see three men get out of the taxi and then get back in as soon as they saw people coming out to help him.

[21] Moreover, the Board's assessment of the objective evidence relating to the applicants' fear was flawed. The Board only cited one document to support its conclusion that "[t]he country documents state that the FARC rarely forcibly recruited anyone": "The recruitment methods of the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, FARC) and government measures to help FARC members reintegrate into civilian society (2005 - February 2008)." This document was written by the Immigration and Refugee Board research directorate. Based on only this one document, the Board stated the following (at paragraphs 20 and 21 of its decision):

> I find that the PC's [principal claimant's] testimony in regards to her fears for her sons of being recruited forcibly on return is not consistent with the objective evidence. The country documents state that the FARC rarely forcibly recruited anyone...
>
> [The Board cited excerpts from the document on FARC's forcible recruitment]
> …
>
> The objective evidence confirms that the FARC does actively recruit in certain areas in schools and universities, but it appears that it is more of an effort to entice through promises, than it is a forcible recruitment. They appear to target those seen as more susceptible, according to the reports. The PC herself acknowledged that there were many rumors that many neighbours received the FARC letters.

[22] In my view, the Board misconstrued the evidence it cited. I read the document the Board cites, and I see no evidence to support the finding that when FARC recruits in schools and universities, it does so through promises rather than force. Nor do I see evidence to support the finding that they target those seen as more susceptible. Here are the excerpts from the document the Board cites that relate to FARC's forcible recruitment and its recruitment in schools and universities:

> […] In its statement to the 7th session of the United Nations (UN) Human Rights Council, Amnesty International (AI) reported that it had received testimony about the forced recruitment of children by guerrilla groups (21 Feb. 2008; see also AI 2007). […] The Office also reports that FARC members frequently visit schools in Cauca department to recruit children (ibid.).
>
> According to the Xinhua News Agency, Colombia's education minister (Ministra de Educación) stated that the intelligence service had found that armed groups were present at both public and private universities (12 Dec. 2007). Colombia's vice-president has also stated that recruitment is being done at universities (*El Universal* 10 May 2007). […] The Minister of Education also indicated that the government would monitor students susceptible to recruitment by FARC (Xinhua 12 Dec. 2007)…

[23] Accordingly, the Board erred by making findings on FARC's recruitment strategies that were unsupported by the evidence.

[24] For these reasons, the Board unreasonably assessed whether the applicants' fear was well-founded.

B. *Did the Board err in concluding that the applicants have an internal flight alternative?*

[25] Regarding the first prong of the test for an IFA, the applicants argue that the Board selectively considered evidence relating to whether the power of the FARC has diminished since the

applicants left Columbia and that the Board erred in determining that Bogota, with a population of eight million people, provides the applicants with anonymity and distance from their problems which dated back to 2003.

[26] As for the second prong of the test, the applicants submit that their documentary evidence and testimony shows that the IFA found to exist in Bogota was clearly not reasonable in the applicants' circumstances, due to the following reasons:

- The minor claimant was only 6 years old when he fled Colombia and has been exclusively educated in the U.S. and Canada;
- The three applicants have been absent from Colombia for nine years and have no support network there;
- The PA would suffer severe psychological trauma and constant anxiety if forced to live anywhere in Colombia due to fear that her sons would be recruited by the FARC; and
- The documentary evidence demonstrates that Internally Displaced People (IDPs) suffer extreme hardship and marginalization in Colombia.

[27] The respondent submits it was reasonable for the Board to conclude, after reviewing the documentary evidence, that the applicants did not face a serious possibility of being persecuted in Bogota, given that the applicants' evidence did not show that they fit the profile of a high-value target for the FARC. As for the second prong of the test for an IFA, the respondent asserts that the applicants have not established that their lives or safety would be at risk in Bogota or that the specific circumstances of the minor applicant or the PA's anxiety about being in Colombia met the high threshold for showing that returning to Bogota would be objectively unreasonable.

[28] As agreed by the parties, the test for a viable IFA is two-pronged. First, the Board must be satisfied that there is no serious possibility of the claimant being persecuted in the IFA found to exist. Second, it must be objectively reasonable to expect a claimant to seek safety in the part of the country considered to be an IFA (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (FCA) at para 10). The burden is on the applicant to show that an IFA is not viable (see *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1993] FCJ 1172 (FCA) at paras 5-6).

[29] The Board concluded the following with regard to the first prong of the test for an IFA:

> The Board does not find persuasive the evidence that the PC or her sons have established a well founded fear of persecution, or would face a serious possibility of being persecuted in Bogota, given the declining power of FARC, the limited profile of all the claimants, and the passage of nine years of time.

[30] The Board's analysis regarding the first prong of the test was reasonable. The Board reviewed several pieces of documentary evidence concerning the reach and influence of the FARC in the proposed IFA and acknowledged that it was mixed. The Board reasonably found that the applicant had not established that she fit any of the profiles that would render her a high-value target of the FARC if she were to relocate to Bogota.

[31] The Board's analysis on the second prong was limited to the following (at paragraph 39 of the decision):

> The Board does not find Bogota an unreasonable IFA, in all the circumstances, given that the PC speaks the language, was born and raised in Colombia, has been to Bogota, has family members there;

> and given that the PC has been able to find employment outside of her country of nationality, revealing her versatility.

[32] The applicants refer to two cases to support their argument that the Board erred by not specifically analyzing under the second prong of the IFA test the impact relocating to Bogota would have on the minor claimant, who left Columbia at the age of 6 and is now 15 years old. In the first case, *Sooriyakumaran v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ 1402 the Court found that the Board ought to have considered the fact that the applicant's two children were in Canada when deciding the second branch of the IFA test. I fail to see how this is relevant to the applicants' submission in the present case, as the minor claimant would be returning to Bogota with his mother and brother.

[33] I do, however, find that the facts of the second case cited by the applicants, *Elmi v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ 336 [*Elmi*] are analogous to the present case. In *Elmi*, above, the Court set aside the Board's refusal to grant the applicant refugee status because the Board had failed to take into account in its IFA assessment the fact that the applicant was a child and had failed to address the issues arising from his young age, such as whether the applicant had ever been to the IFA or whether he had the support of an adult there (see *Elmi* at paras 14-15). A major distinction with *Elmi*, however, is that in *Elmi* the minor applicant was applying for refugee status alone, but in the present case the minor applicant's claim was intertwined with his brother's and his mother's and the IFA analysis was based on the premise that the family would relocate together to Bogota. On *Elmi* alone, therefore, I am not persuaded the Board in the present case erred by failing to specifically analyze the circumstances of the minor applicant when assessing the second prong of the IFA test.

[34] As for the applicants' argument that they have been absent from Colombia for nine years and have no support network there, they have not adequately explained how the Board erred in finding that the applicants have family in Bogota, nor have they asserted that this finding was irrelevant. Nor have the applicants provided any support for their assertion that the Board erred by not considering that the PA would suffer severe psychological trauma and constant anxiety if forced to live anywhere in Colombia. The Board considered several relevant factors in assessing whether it was objectively reasonable to expect the applicants to relocate to Bogota, including the fact that the PA speaks the language, was born and raised in Colombia, and that she has shown versatility in being able to find employment outside her country of nationality. None of these findings have been challenged by the applicants.

[35] However, in its analysis of the second prong of the IFA test, the Board did not acknowledge the applicants' argument that they would become IDPs if forced to return to Colombia and that the documentary evidence demonstrated that IDPs in Colombia lead a very fragile and vulnerable existence. See for instance the following excerpts of the document entitled "The Future of Colombian Refugees in Canada: Are we Being Equitable?", a report for the Canadian Council for Refugees dated November 2010, found at pages 407-413 of the Tribunal Record:.

> Moving within the country has been one of the most common measures adopted by civiliants seeking to avoid threats in Colombia. As a consequence, Colombia now has approximately four million internally displaced persons (IDPs), the largest number in the western hemisphere. This represents between 7% to 10% of the Colombian population, the second highest proportion of IDPs in the world, just behind Sudan.
> […]
> When a Colombian citizen who has left the country is forced to return, this person is seen by the Colombian system and civil society

> as an internally displace[d] person. If IDPs can be tracked anywhere in the country, international returnees obviously face the same realities. The vulnerability of these people facilitates their localization by the armed actor: they need to access services and this forces them to show their location.
> […]
> **Bogota as a "safe place"**
> [...]
> Another indication of the danger for IDPs is the statistic quoted above by the representative of the UNHCR in Colombia of more than 7,500 IDPs killed in the last ten years, of whom 40% were killed in Bogota.
>
> Bogota is indeed safer than it was a decade ago but for many Colombians who are being persecuted there is no safety in Colombia, not even in Bogota. At the meeting with the Ombudsman's representatives, the delegation was told that "the only way you could survive would be if you could manage it without any help". Internally displaced persons are registered by the government institutions. International returnees and visitors, as well as any Colombian civilians, are regularly finger-scanned, photographed and required to provide identification by security at the entrance of every public building. Any person, anywhere is tracked through a system of Colombian private security companies. The use of the information collected at public buildings is not fully regulated in Colombia.
> […]
> [Footnotes omitted]

At the hearing before the Board, applicants' counsel brought this document to the Board's attention and submitted that it established that the applicants would not be safe in Bogota because, as internally displaced returnees living at the lower strata of society, they would not be safe (pages 577-578 of the Tribunal Record). In my view, the Board erred by ignoring this evidence in its analysis of whether the applicants have a viable IFA. This evidence was directly relevant to the question of whether it was objectively reasonable to expect the applicants to seek safety in the part of the country considered to be an IFA and pointed to a different conclusion on the second prong of the test for an IFA than the conclusion made by the Board. Accordingly, the Board erred by not mentioning or analyzing this evidence (see *Cepeda-Gutierrez*, above, at paras 15 to 17).

[36] For these reasons, the application will be allowed.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1.) The applicants' application for leave and judicial review is allowed, the Board's decision set aside, and the matter remitted to a differently constituted panel for redetermination.

2.) No questions are certified.

"Michael D. Manson"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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