

CANADA / JUDGMENT

TB8-03062

COURT

Refugee Protection Division

DECIDED

4 February 2019

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IMMIGRATION AND REFUGEE BOARD

- REFUGEE PROTECTION DIVISION -

Reasons for the decision in a Hearing under the

Immigration and Refugee Protection Act, concerning

XXXX XXXX XXXX XXXX XXXXXXXXXX XXXX XXXX XXXX

HELD AT: Toronto, Ontario

DATE: February 4, 2019

BEFORE: E. Metz - Member

APPEARANCES:

XXXX XXXX XXXX XXXX, et al. - Claimant

Abdalla E Abosharia - Counsel

N/A - Minister's Counsel

G. Escalante - Interpreter

DECISION

MEMBER: This is a bench decision in the matter of TB8-03062 in the claims of XXXX XXXX XXXX XXXX that are joined pursuant to the rules, Rule 55, with that of his spouse XXXX XXXX XXXX. They are citizens from Colombia and they are claiming protection in Canada.

I have considered the testimony of today's hearing as well as on the prior hearing date of November 1st, 2018. In the event that written reasons are issued, the Board reserves the right to make references to case law or documents and make any adjustments for syntax, spelling and/or grammar.

Okay, so I am going to explain to you why I came to my decision. I am not going to accept the claims for refugee protection and I am going to tell you why.

The counsel made an application to do written submissions, which was denied by the panel. I note pursuant to Rule 10(7), representation must be made orally at the end of the hearing unless the Division orders otherwise. In this case, this was a resumption matter.

There was ample time to do oral submissions, and further following the denial of counsel's application for written submissions, the panel offered the counsel a break before he engaged in his oral submissions.

As I have indicated, I have come to a negative determination with respect to your claims. While I do find you both to be very industrious individuals, that is not the test for refugee protection.

The claimants' allegations are set out in their Basis of Claim Form, Exhibit 2 to 3 as well as expanded upon during their testimonies before the panel. They allege that they are being persecuted by the paramilitary, specifically the Gulf clan, which is also known by a number of other names including the Urabenos.

With respect to the issue of the identity, I indicated to counsel prior to his submission that the panel finds on a balance of probability that the claimants' identities and nationalities as Colombian citizens have been established.

I made that determination based on the claimants' identity documents including certified copies of their Colombian passport as well as other ID documents, including documents for the husband indicating that he had no military service as well as their testimonies. Those documents were located at Exhibit 1.

In assessing credibility, I took into consideration the various factors that could affect the claimants' testimonies including any cultural differences and hearing room anxieties. The basic law on credibility in this hearing is that the claimant bears the onus to present evidence that is credible on a balance of probabilities to support the allegations which form the basis of their claims.

There was some deviation, in particular between the wife's testimony and what was contained in her Basis of Claim Form, and that relates primarily around her interaction with State officials. For instance, regarding the XXXX XXXX denunciation filed, when she was questioned by the panel as to what the State officials did, she indicated that they were not going to do anything.

However, I noted that in her Basis of Claim Form that's not what was said. They actually indicated that they were taking her denunciation or accepting the report, and further they were going to commence an investigation on the matter.

Overall, that did not detract from her credibility because the test as we know is on a balance of probabilities, and I found based on that standard, the claimants were threatened by the paramilitary, notwithstanding some deviation within the Basis of Claim Form, in particular the wife's testimony.

I also looked at the issue of subjective fear. The husband was in the States for over 2.5 months, yet made no refugee protection claim there, and while he did have legal means to make a claim in Canada via the Third Safe Country, he did not do so until many months later after living in the States. That puts the claimants', particularly the husband's, subjective fear issue problematic but not fatal, as we know failure to claim elsewhere is not determinative in refugee protection claims.

Where I did find where matters were determinative, it was respect to the matters that I did not find that these claimants overcame the issue of State protection or the presumption of adequate State protection.

Further, I also found that they had a viable internal flight alternative in their own country, and this stands whether it is on to Section 96 or Section 97 assessment. I do accept that the husband's profile, at least based on what he has testified to in regards to his XXXX work, that he does have a profile in Ibague as someone who engages in the community offering certain services from their XXXX.

With respect to State protection, I find that on a balance of probability that they did not overcome that presumption. There is a presumption that countries are capable of protecting their own citizens, and this underscores the principle of international protection, and that being that international protection comes into play only when a refugee claimant has no other recourse available.

To qualify for a refugee status, a claimant must satisfy the panel that he or she sought, but was unable to obtain protection from their home State or alternatively that their home State on an objective basis could not be expected to provide protection. I note that no government is expected to guarantee perfect protection to all of its citizens at all times.

Colombia is still a constitutional multi-party republic. The law provides for an independent judiciary and the government generally respects the judicial independence. While the country does have a high crime rate and various paramilitary forces operating, it is not in a state of complete breakdown.

When I look at State protection and to the application of the case in hand, I note that there was an incident in 2014 with respect to the husband, that matter was not reported to the relevant authorities.

In 2017, the husband reported an incident that occurred and protection was offered by the State, and that was given in the form of police escort. The incident occurred in Cali, <inaudible> employer accommodated, the husband would not work in Cali anymore.

Then, on XXXX XXXX, 2017, the husband filed an online complaint. Then, on XXXX XXXX, 2017, he further filed a complaint with the Ombudsperson's office. Thereafter, he decided to leave the country on XXXX XXXX, 2017, and went to the USA.

As it relates to the wife, there was an incident with respect to XXXX XXXX, 2017, that of text messages. No denunciation was filed, but the matter was reported to the Ombudsperson's office on XXXX XXXX, 2017. The wife indicated nothing was done and that the Ombudsperson's office indicated they would not be able to provide any form of protection.

I note based on the National Documentation Package, which is what the panel relies on for evidence pertaining to the conditions as well as procedures in Colombia, I note that the Ombudsperson's office doesn't actually provide protection, but can assist complainants with getting protection or advocating with complainants for them to receive protection from State authorities.

The claimant's wife indicated that she did not follow up beyond XXXX XXXX, 2017, that being the same date that she filed her notice with the Ombudsperson's office. Thereafter, she moved to Medellin and stayed with her mother-in-law.

There was a further incident on XXXX XXXX, 2018, that incident involved a threat with a gun, that matter was reported to the House of Justice and it was received by an officer who advised that given the nature or the scope of that incident, that the wife needed to take her complaint and file it with the Attorney General's office.

The wife did go to the Attorney General's office on the XXXX of the pertinent month, but they were out of time as per her Basis of Claim Form. In today's testimony, she indicated that actually all the tickets that were being given out for denunciation, that they were already done, and that they had to return the next day, that being on XXXX XXXX, 2018. She did do so, they returned on XXXX XXXX.

The wife testified that she made a denunciation with the federal Attorney General's office, but she was told that they could not provide her with protection and it was best for her to move out. In her Basis of Claim Form, it said something different. It indicated that the office actually took her complaint and indicated that they were going to start an investigation.

I did put this inconsistency to her, and she did actually admit that they did indeed say that they were going to start an investigation and took her complaint, but she also said that she could not wait around to get killed by the paramilitary.

On XXXX XXXX, 2018, there was an email sent by letter to the UNP. I am not sure, based on the wife's testimony here today and based on my understanding of National Documentation Package and what you need to do to apply to the programme, that she actually properly applied to this programme.

With respect to the UNP programme, the Ministry of Interior had developed an agency called the National Protection Unit or the Unidad Nacional de Protección. It is responsible for providing protection to individuals or group of persons or communities, given their positions or activities may be subjected to extraordinary or extreme risks.

The programme indicates that it grants protection measures based on the risk that a person faces or based on their position.

I questioned the wife if she did any followup with the UNP programme. Notwithstanding, it appears that the way she applied was not in proper form. She indicated that she did not follow up with the programme and shortly after, she departed her country.

There was a further incident on XXXX XXXX, 2018, and she made a denunciation, that is, the wife made a denunciation to the authorities, and immediately departed her country on XXXX XXXX, 2018.

The claimants must give the State an opportunity to protect them. The husband filed with the Ombudsperson's office, not the entity, for giving protection, and then shortly thereafter departed his country.

His wife also reported the text messages to the Ombudsperson's office; then she immediately relocated to another part of the country and never reconnected back with the Ombudsperson's office. She also indicated they could not offer protection - Correct, as that is not their mandate based on what I have read in the NDP, but they do offer assistance to help victims advocate for protection from State officials.

I do not find that you guys have overcome the presumption of adequate State protection. The Colombian State has reported that it has captured 41,450 or so members of criminal structures including those from the paramilitary you fear, and amongst those captures were first-level leaders, second-level leaders as well as a 108 third-level leaders.

I do concede that in spite of the Colombian government's effort that illegal armed groups have emerged after the demobilisation and some have continued to act under the protection of State agents.

However, when I look at your particular case and your circumstances and all the incidents, I find that either the State afforded you adequate protection as they did with respect to your husband when they escorted him or with respect to the other incidents that you did not give the State adequate time to properly investigate the matter or even offer you protection.

I also find that protection would be forthcoming should you seek it upon your return to Colombia. Protection does not need to be perfect. It does not necessarily need to be to the claimant's liking. It just needs to be adequate.

So, based on my analysis of your State protection efforts, I find that the claimants have not provided the requisite clear and convincing evidence that on a balance of probabilities, State protection in Colombia, at least as it relates to their particular circumstances, is inadequate.

Further, I also believe that you have an internal flight alternative in your own country, and that I believe that you could safely return to Tunja and live there.

The test to be applied to determine whether or not there is an internal flight alternative is a two-prong test, and both prongs must be satisfied for finding that the claimants have a viable internal flight alternative.

With respect to the first prong, there must be no serious possibility of persecution in the proposed location, and with respect to the second prong, the conditions in area of the location of the IFA proposed are such that it would not be unreasonable for the claimants to move there.

With respect to the first prong, while I concede based on a balance of probabilities that the paramilitary had a prior interest in you and your family or on both of the claimants before me, I do not see them as having an ongoing interest in you and your family. I do not find there is any serious possibility of persecution in the proposed area.

While there is a high degree of criminality in your country, and I do not dispute that based on the documentary evidence both in the NDP and as well as being presented to the panel by counsel included in Exhibit 8 and also I believe in Exhibit 6, I do not find that the specific group that you fear, the Gulf clan, has a presence in the city of Tunja, Boyaca.

Further, I do not find that they have an ongoing interest in both of you. I looked at the motivation to locate the husband or the wife in the proposed IFA and I note that refugee protection or refugee determination is forward looking, and I am not persuaded that the paramilitary is motivated to find both of you.

One, you both have families that remain in Colombia, in particular <inaudible> the husband's family is living in the very same home that he fled from, and none of them has received any further threats and they have maintained living there safely in Ibague. They have remained living safely there in their home.

Similarly, the wife also has relatives living in Colombia, and since she has departed Colombia, no one has been threatened and no one has come looking for them.

On second prong, I do not think it would be unreasonable for both of you to relocate to Tunja based on your particular profiles. The wife is well educated and skilled. Both she and her husband have transferrable skills. The husband has a XXXX background and also has transferrable skills in XXXX XXXX XXXX XXXX, XXXX, XXXX since they have been in Canada, and as I said earlier, I do admire their initiative, but that is not the test for refugee protection.

The wife has commenced XXXX XXXX XXXX and has also worked on and off as a XXXX, notwithstanding that she was XXXX XXXX back in her own country. The husband likewise has been working as an XXXX XXXX approximately for 6 months. Altogether, they have transferrable skills that they can fall back on when they return to Colombia and try to seek employment.

While resettlement may be difficult, you do have skill sets to do so, and you have already proven you can do so based on your integration into the Canadian society. I note that none of you have any ongoing medical issues that I had to consider with respect to reasonableness of relocating back to Colombia and specifically living in Tunja.

Having considered the totality of the evidence before the panel, I find that the claimants are not Convention refugees pursuant to Section 96 and further that they are not persons in need of protection pursuant to Section 97(1).

Madam interpreter, as usual I would like to thank you for your services here today.

INTERPRETER: Thank you madam member.

MEMBER: My apologies for going 10 minutes over. Counsel, thank you for your representation.

COUNSEL: Okay.

MEMBER: Best of luck. Thank you. I am off the record.

----- REASONS CONCLUDED -----

I HEREBY DECLARE THAT THIS IS A TRUE

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February 7, 2019

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