

Federal Court



Cour fédérale

Date: 20120315

Docket: IMM-5762-11

Citation: 2012 FC 309

Ottawa, Ontario, March 15, 2012

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**MAURICIO ZAMBRANO CASTRO
MARTHA MARGARETH GALINDO SALAMANCA
(A.K.A. MARTHA MARGARET GALINDO SALAMANCA)
MARIA ANGELICA ZAMBRANO GALINDO
ANDRES MAURICIO ZAMBRANO GALINDO**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] At the conclusion of the hearing, I informed the parties that I would be granting the applicants' application for judicial review of a negative decision of the Refugee Protection Division of the Immigration and Refugee Board finding them to be neither Convention refugees nor persons in need of protection.

[2] In my view, the Board improperly and unreasonably rejected their claims pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 without a proper analysis of their risk.

[3] The principal applicant, Mauricio Zambrano Castro, and his family, are Colombian citizens. They came to Canada in April 2009. Mr. Zambrano Castro was a career officer in the Colombian Armed Forces. In 2000, he became a captain of a unit in Cali and was responsible for fighting the United Self-Defence Forces of Colombia (AUC), the country's main paramilitary group. While carrying out this role, Mr. Zambrano Castro was twice discharged, first in 2001, although he was soon reinstated, and again in 2003. He believes his discharge was a result of his actions arresting AUC leaders and members. In 2003, he filed a lawsuit challenging his last discharge. It was pending at the time of the Board hearing.

[4] Mr. Zambrano Castro alleges that in 2004 he was twice threatened in phone calls telling him he would pay for what he had done in opposing the AUC. In December 2005, Mr. Zambrano Castro took his family to the United States and shortly thereafter applied for asylum. In order to secure documents, he returned to Colombia in June 2006 and stayed there for some three months. During his time in Colombia Mr. Zambrano Castro claims he received two more threatening phone calls, and was shot at.

[5] The applicants' US claim was rejected because, although Mr. Zambrano Castro was found credible, it was found that he and his family were no longer at risk as the paramilitary had

been officially disbanded in 2006. Their appeal to the Board of Immigration Appeals was rejected in April 2009. Because the applicants believed their lives remained in danger from the AUC, they came to Canada and claimed protection.

[6] The Board rejected the applicants' claims for refugee protection under both sections 96 and 97 of the Act based on its finding that parts of the evidence of Mr. Zambrano Castro was not credible.

[7] The applicants raised a number of issues, relating to the Board's credibility findings, the Board's examination of the evidence and record, and the profile of Mr. Zambrano Castro.

[8] In my view, the one issue raised by the applicants that has merit is its allegation that the Board erred in failing to examine Mr. Zambrano Castro's risk based on his profile. This issue is to be assessed on the reasonableness standard, and the decision of the Board is to be given deference: *Dunsmuir v New Brunswick*, 2008 SCC 9; *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 21-22.

[9] If an applicant's personal account of some events is not found credible but there is substantial documentary evidence attesting to the risk he or she may face based on his or her identity, then the Board is obliged to assess the claim. As the applicants submit, "refugee law does not require past persecution in order to establish future risk."

[10] The Board, in a very brief decision, found only limited aspects of the testimony of Mr. Zambrano Castro not to be credible; specifically, the threatening phone calls and him being shot. It appears to have accepted, and in fact there was abundant documentary evidence to support that he was a member of the Colombian Armed Forces and was actively involved in fighting the AUC. The Board, however, gave no analysis of whether, having that profile, Mr. Zambrano Castro would be at risk if he returned to Colombia. Rather, the Board dismissed the applications under both sections 96 and 97 of the Act on the basis of credibility:

When I consider the actions of the claimant to remain in Colombia for more than 2 years after his army discharge, his return to Colombia after being safely in the USA, his failure to spontaneously give evidence of the 2004 phone calls where he was threatened and his inconsistent evidence concerning the September 2006 shooting, I am satisfied on a balance of probabilities the claimant was not a credible witness. Hence, his claim fails pursuant to both sections 96 and 97 of the IRPA.

[11] The identity of Mr. Zambrano Castro as a former army officer who worked against the AUC was not disputed and there was evidence before the Board that such persons are at risk in Colombia. As a result, and notwithstanding the negative credibility findings of the Board, Mr. Zambrano Castro's political or imputed political identity triggered a requirement for a proper risk analysis under section 97 based on the evidence before it.

[12] Quite simply, the finding of a lack of credibility regarding some aspects of the evidence of Mr. Zambrano Castro did not provide a foundation to simply dispense with the claim under section 97 of the Act.

[13] Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed, the applicants' claim for protection is referred to a differently constituted Board for determination, and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5762-11

STYLE OF CAUSE: MAURICIO ZAMBRANO CASTRO ET AL v. THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: February 28, 2012

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

DATED: March 15, 2012

APPEARANCES:

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