Federal Court  Cour fédérale

Date: 20211029

Docket: IMM-7498-19

Citation: 2021 FC 1158

Toronto, Ontario, October 29, 2021

PRESENT: Mr. Justice Diner

BETWEEN:

MANUEL MAZIETA MUNZEMBO
ANASTASIA DE FATIMA GABRIEL
FRANCISCO CULUMBO GABRIEL MAZIETA
ISAAC DIZOLELE GABRIEL MAZIETA
FLORENCA MAYIMONA GABRIEL MAZIETA
TERESA GABRIEL MAZIETA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This judicial review challenges the refusal of a refugee claim, which was unreasonably decided and as a result will be returned. The case concerns an application for judicial review,

made pursuant to s 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of a decision of the Refugee Protection Division (RPD) rendered orally on November 6, 2019, and issued on November 19, 2019. In the decision, the RPD member (the Member) rejected the Applicants' claim for refugee protection on the basis that they had failed to satisfy the evidentiary requirements to meet the definition of Convention refugees consistent with s 96 of *IRPA*.

[2] For the reasons that follow, I would grant the application.

II. Factual Context

[3] The Applicants are citizens of Angola. They fled Angola and arrived in Canada in August 2018, claiming a fear of persecution by state agents in Cabinda. The key points of the narrative that Mr. Munzembo (the Principal Applicant) provided are summarized below.

[4] The Principal Applicant had been raised in the province of Cabinda before moving to Luanda when he was 27, where he lived with his family for the next 13 years until his 2018 departure from Angola. He was employed as a health and safety inspector for an oil and gas company. Since 2016, he also owned a small trucking business, employing one driver and two helpers, for the transportation of passengers and their goods in Cabinda.

[5] On the night of December 18, 2017, the Principal Applicant received an anonymous call from someone who accused him of supporting the Separatist Front for the Liberation of the Enclave of Cabinda (FLEC). The caller told him he had been located and would be arrested for

his involvement. The caller hung up before the Principal Applicant could ascertain the caller's identity or whether the call was made to a wrong number.

[6] The following evening, on December 19, 2017, the Principal Applicant received a call from his driver's wife, telling him that the evening before her husband and the two helpers were detained and tortured by a group of police who suspected the truck was being used to support the FLEC in the region. When the police threatened to kill him, the driver turned over the truck's papers, which identified the Principal Applicant as the owner of the business. The driver also provided the police with the Principal Applicant's residential address in Luanda, as well as his phone number.

[7] On May 4, 2018, the Principal Applicant returned from work whereupon he was met by a gathering of his neighbours who informed him that a police jeep had left his house not long before, and that the police had been looking for him but had instead arrested his nephew, who had been living with him. Fearing for his and his family's safety, the Principal Applicant drove straight to an uncle's home an hour away. He called his wife and told her not to go home and to come with the children to his uncle's home.

[8] The Principal Applicant learned on June 6, 2018, that his nephew had died while in prison. Twelve days later, on June 18, he learned from his driver's wife that he too had died while in detention. The family fled to Canada shortly after.

III. Decision Under Review

[9] The Member rendered his decision orally. In it, he summarized the facts and acknowledged that the Applicants' claims were based on a fear of the authorities responsible for detaining the driver and nephew. The Member also specified that the determinative issues were (i) the credibility of the forward-looking risk – as opposed to the credibility of the Principal Applicant's narrative and other testimony about the past events described above – and (ii) whether the presumption of adequate state protection had been rebutted.

[10] The Member found that intermittent attacks took place in Cabinda and that the government could be heavy handed in its treatment of residents, including human rights abuses, arbitrary deprivation of life, and life threatening prison conditions. The Member also found that conflict was non-violent and low intensity, rather than civil war. The Member further noted the state's efforts to address corruption and human rights abuses.

[11] The Member found that the evidence did not support that the authorities perceived the Principal Applicant as a member of a particular social group who collaborated with enemies of the state. He noted that other than the driver's wife's interpretation of what had happened, there was no evidence of whether the state's allegations against and detention of the driver were well founded, particularly since the Principal Applicant had not taken steps to determine whether the charges were valid. The Member made the same observation of the Principal Applicant's nephew and the insufficient efforts to determine whether his detention had been legitimate, since it was

only the neighbours who had said the police were looking for the Principal Applicant at the time of the nephew's arrest.

[12] The Member acknowledged that the Principal Applicant was afraid of the corruption of the police, but noted that country condition documents did not indicate that police corruption was significant enough to make Angola a failed state. He found the Applicants should have consulted a lawyer to intercede and look into the charges, and that their fear of the police was based on speculation rather than credible evidence of persecution. The Member found that if there were a legitimate police investigation, then it was legitimate that the police would continue looking for the Principal Applicant.

[13] The Member concluded by finding that, having failed to investigate the police conduct further instead of speculating as to their corruption, there was no evidence other than speculation as to why the police were pursuing the Principal Applicant. Therefore, the evidentiary burden of showing that he was perceived as having collaborated with enemies of the state was not met.

[14] The Member found that the Principal Applicant did not have a forward-looking risk, stating: "Regarding credibility, I agree with Counsel that you were credible in the events that you narrated, but I find that you are not credible regarding the forward-looking risk that you would face if you went back to Angola".

[15] Having found that the Applicants failed to establish the nexus to Convention grounds under s 96 of *IRPA*, their claims were denied.

IV. Standard of Review

[16] The parties agree that the applicable standard of review for the decision of the RPD is reasonableness. The Supreme Court of Canada's recent decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], which set out a revised framework to determine the standard of review, provides no reason to depart from the reasonableness standard followed in previous case law: *Gayrat v Canada (Citizenship and Immigration)*, 2021 FC 666 at paras 9-10; *Elve v Canada (Citizenship and Immigration)*, 2020 FC 454 at para 22.

[17] A court conducting reasonableness review scrutinizes the decision maker's decision in search of the hallmarks of reasonableness – justification, transparency, and intelligibility – to determine whether it is justified in relation to the relevant factual and legal constraints that brought the decision to bear (*Vavilov* at para 99). Both the outcome and the reasoning process must be reasonable (*Vavilov* at para 83).

V. Analysis

[18] The Applicants submit that the RPD's decision was unreasonable on two grounds. First, they submit the Member's finding that the Applicants would not face a forward-looking risk of harm in Angola was unreasonable. Second, they submit that the Member erred in his analysis with regard to state protection. The Respondent asserts that both findings were open to the Member given the evidence and were thus reasonable. I disagree, as explained below.

A. *Failing to address key evidence*

[19] Specifically, the Respondent argued that the Member reasonably found the Applicants failed to establish their s 96 burden. In asserting that the Applicants never reached the requisite evidentiary threshold to establish a credible fear of forward-looking persecution, the Respondent points to paragraph 4 of *Tapambwa v Canada (Citizenship and Immigration)*, 2019 FCA 34:

> In a section 96 risk assessment, sometimes called Convention grounds assessment, the appellants must establish that they "subjectively fear[] persecution and that this fear is objectively well-founded" (Sukhu v. Canada (Citizenship and Immigration), 2008 FC 427 at para. 25). The latter element requires that there is a "reasonable chance", a "reasonable possibility", or a "serious possibility" of persecution on Convention grounds (*Németh v. Canada (Justice)*, 2010 SCC 56 at para. 98, [2010] 3 S.C.R. 281 (*Németh*) citing *Adjei v. Canada (Minister of Employment & Immigration)*, 1989 CanLII 5184 (FCA), [1989] 2 F.C. 680 at 683, 57 D.L.R. (4th) 153 (F.C.A.)). While they must establish their case on a balance of probabilities, they do not have to establish that persecution would be more likely than not (*Li* at para. 11). If they convince the PRRA officer that they face a section 96 risk, refugee protection is conferred (IRPA, s. 114(1)(*a*)).

[20] The Respondent also points to *Gray v Canada (Citizenship and Immigration)*, 2020 FC 240 [*Gray*], arguing that it paints a similar portrait of a claimant failing to establish the baseline evidentiary threshold of s 96 persecutory risk. The backdrop to *Gray*, however, was markedly different. In *Gray*, although the RPD had similarly found the applicant to be credible in his narrative; that narrative depicted fear based on general crime, corruption, or vendettas without pointing to any Convention nexus. Thus, Mr. Gray never sought – nor, more notably, had any reason to seek – state protection. There, based on the record and the applicant's credible narrative, the Court the found the RPD's assessment of only a speculative fear of persecution was reasonable.

[21] The Respondent relates the outcome in *Gray* to this case, stating that here too, the evidence was insufficient to find the events involving the driver and the nephew were linked to each other or linked to targeting the Principal Applicant. As such, the Respondent alleges, it was reasonable, just as in *Gray*, to conclude that the fear of future reprisal was entirely speculative. I cannot agree with the Respondent's assessment, either of the factual similarities to *Gray* or of the reasonableness of the Member's finding, that the fear of persecution was speculative. Having accepted the Principal Applicant's narrative as credible, without impugning any part of the past narrative, the Member thereby accepted four key points put into evidence by the Principal Applicant as part of his narrative, namely that he was:

(i) told by his driver's wife that his trucking company was suspected of supporting of the FLEC by the police, who now had his identifying information, and that her late husband had been detained, was tortured, and then died while in detention;

(ii) contacted directly by phone the night of the arrest by an anonymous caller informing him that he was suspected of assisting the FLEC and would be arrested;

(iii) told by his neighbours of the arrest of his nephew (who also died in detention) and that the police had actually been looking for him that day; and

(iv) being pursued by police after his departure from Angola, according to a sworn statement from his uncle, whom the police suspected of sheltering him and had threatened with arrest for providing him with support.

[22] The Member made no mention of points (ii) and (iv) in his decision, making it impossible to know how the evidence, if he considered it, would have impacted the determination of the Applicants' nexus to Convention grounds. I venture to say that, if taken in its totality and taken

as fact, the fear of being targeted by police for suspected involvement with the FLEC rises above the level of speculation and would be more appropriately qualified as a reasonable logical inference based on multiple sources of information. That alone makes the Member's decision unreasonable, as the Principal Applicant's objective fear of arbitrary detention, torture, and death appears to be borne out by the evidence from several different sources and events. Furthermore, the country condition evidence accompanying his application provided objective support for the feared risk at the hands of the state.

[23] On this first point, having failed to weigh crucial evidence in his determination, the Member's decision was clearly not justified in light of the factual and legal constraints with respect to his findings on the s 96 and 97 determination and thus unreasonable.

B. *State Protection*

[24] Turning to the state protection analysis, the Respondent argues that the Principal Applicant offered no evidence of the state pursuing him and accordingly failed to rebut the presumption of state protection. Further, the Respondent found it was not unreasonable for the Member to inquire whether the Principal Applicant had, through an agent, made inquiries as to the legitimacy of the charges against his nephew, his driver, or himself. Absent these verifications, and in light of the Member's acknowledgement that the government of Angola was making efforts to address corruption and human rights abuses, the assumption that the Principal Applicant would not be provided with state protection was speculative.

[25] Once again, I must disagree. First, contrary to the Respondent's assertions, the Member accepted that the Principal Applicant was being pursued by the police, just not his explanation of why. It is trite law that an applicant is not required to risk their life by seeking ineffective state protection (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at pp 724-725, 103 DLR (4th) 1 [*Ward*]). In this case, the Primary Applicant's driver and nephew had, in separate incidents, been arrested, tortured, and had died while in detention. On this basis alone, the availability of state protection was clearly in doubt since the police themselves, who suspected the Principal Applicant of assisting rebels, were the agents of persecution and whom he feared would harm him.

[26] Second, the Applicants submitted voluminous clear and convincing country condition evidence, some of which was addressed by the Member, of the prevalence of police corruption, state killing, human rights abuses, and deadly prison conditions in Angola.

[27] It is well established that the adequacy of state protection is a question of operational effectiveness and that a focus on best efforts without an assessment of the effectiveness of those efforts, is a reviewable error (*Mata v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1007 at paras 12-13; *Hercegi v Canada (Citizenship and Immigration)*, 2012 FC 250 paras 4-6).

[28] The only two comments that seem to consider the operational effectiveness of state protection in the Member's decision in this case are (i) that police corruption is not so bad in Angola as to qualify as a failed state, and (ii) that the government monitors prison conditions, which are described as life threatening, overcrowded, violent, corrupt, and without medical care.

As such, the Member's focus on attempts taken by the government to address corruption, instead of assessing the actual operational effectiveness of state protection, were clearly misplaced, unjustified by the facts, and unreasonable.

[29] Finally, the presumption of state protection does not require an applicant to consult domestic legal counsel and conduct an independent investigation, scrutinizing the legitimacy of police conduct. Non-state actors cannot be expected to replace the protections that ought to be provided by police (*Aurelien v Canada (Citizenship and Immigration)*, 2013 FC 707 para 15-17; also *Corneau v Canada (Citizenship and Immigration)*, 2011 FC 722 para 10). Imposing an independent commission of inquiry on the Applicants in order to rebut the presumption of state protection was excessive, unreasonable, and unjustified, and of course runs counter to the basic tenets of state protection as enunciated in *Ward* and its ample progeny since.

VI. Conclusion

[30] The Member made fatal errors, first by impugning subjective fear without a rational basis to do so in light of overlooked key evidence, and second by placing a wholly unreasonable onus on the Applicants to investigate the same police force that they had good reason to fear based on actions taken against the Principal Applicant's driver and his nephew. I will thus grant the application for judicial review and remit the matter to for hearing by another panel. No questions for certification were raised and I agree that none arise.

JUDGMENT in IMM-7498-19

THIS COURT'S JUDGMENT is that:

1. The judicial review is granted and the matter is remitted for hearing by another panel.

2. There is no question for certification.

3. No costs will issue.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7498-19
STYLE OF CAUSE:	MANUEL MAZIETA MUNZEMBO ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 21, 2021
JUDGMENT AND REASONS:	DINER J.
DATED:	OCTOBER 29, 2021

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