Federal Court  Cour fédérale

Date: 20220113

Docket: IMM-5108-20

Citation: 2022 FC 35

Ottawa, Ontario, January 13, 2022

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

CARLOS JULIAN HENAO RAMIREZ
YENY ALEJANDRA RODRIGUEZ HIGUITA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Carlos Julian Henao Ramirez and Yeny Alejandra Rodriguez Higuita, seek judicial review of a decision of the Refugee Appeal Division (RAD) which held that they are neither Convention refugees nor persons in need of protection.

[2] The Applicants are citizens of Colombia. Mr. Ramirez was a basketball trainer and teacher at the Technological University of Pereira (University) in Colombia. He is married to Ms. Higuita, who is an industrial technologist. Mr. Ramirez claims what in June 2014, while en

route to a basketball game with his team, the team bus was stopped by armed men who identified themselves as part of the Ejército de Liberación Nacional or National Liberation Army (ELN) militia. He says the men distributed pamphlets to the team members, encouraging them to join the militia, and ordered him to help convince the students to join the ELN. A few weeks later, the ELN contacted him to ask about his progress in recruiting students.

[3] Mr. Ramirez states that in August 2014, he was abducted by the ELN, who told him that he was a "military objective". He reported this to the University, who advised him not to report it to the authorities. Fearing for his safety, Mr. Ramirez did not renew his contract with the University and began to work independently. He says that in July 2015, the ELN attacked him again. They told him that if he did not assist them they would kill him, and that they would kill his spouse if he went to the authorities. Mr. Ramirez then fled to Australia, but the couple did not have sufficient funds to obtain a visa for Ms. Higuita, so she stayed in Colombia. Mr. Ramirez later went to Chile where the couple reunited. They did not claim refugee status there, because the ELN had influence in that country. They decided to return to Colombia in July 2016, because they could not obtain Australian visas from Chile. The couple then left for Australia in October 2016 and July 2017, respectively. They subsequently received Canadian visas and travelled to Canada on December 18, 2017. They claimed refugee protection on January 11, 2018.

[4] The Refugee Protection Division (RPD) dismissed their claim, finding their narrative to be not plausible and also drawing a negative credibility inference from their return to Colombia in 2016. The RPD found that the Applicants would have an internal flight alternative (IFA) in Bogota, Colombia.

[5] The Applicants appealed this decision to the RAD, arguing that the RPD was biased in considering the evidence about the ELN and the conduct of the hearing demonstrated the member had a closed mind. They also challenged the IFA finding. The RAD rejected the bias claim, and held that there was not sufficient evidence to establish that the ELN had the means and motivation to locate the Applicants in Bogota, despite acknowledging some evidence to the contrary. Based on this, the RAD dismissed the appeal.

[6] The Applicants seek judicial review of the RAD decision, arguing that the RAD did not correctly deal with the claim of bias, and that it unreasonably found that an IFA existed for them in Bogota, Colombia because the panel failed to consider the objective country evidence regarding the reach of the ELN.

[7] The Applicants' bias claim stems from the following exchange between the RPD member and Mr. Ramirez during the hearing. The RPD member was asking questions about why the Applicants thought the ELN would be interested in them and would have the capacity to harm them. In one of his answers, Mr. Ramirez said "And now they are stronger than ever." The member then stated:

> Well, they are not actually stronger than ever. Ten of their leaders actually fled to Cuba. And Colombia is trying to have them sent back from Cuba. In other words, I disagree with you saying that they are stronger than ever…. So what do you have to tell me, comment on it? Because you say that they are now stronger than ever.
>
> …
>
> On a balance of probabilities, it doesn't seem logical to me or reasonable to me, that in almost 2020, almost five or six years after the incident that they asked you to recruit for them. Especially, that instead of getting stronger, they've gotten weaker… So what do

> you have to tell me, comment on it? Because you say they are now stronger than ever.

[8] The Applicants submitted to the RAD that these comments indicated that the RPD member had already made up her mind before the hearing, and that this constituted bias. The RAD rejected this argument, finding that the RPD member was not antagonistic to the Applicants and that she gave them the opportunity to respond to the objective evidence about the strength of the ELN. The RAD stated "[h]er requirement as an adjudicator is to come to the hearing with an open mind, not an empty or uninformed mind" (RAD Decision, para 8).

[9] The Applicants submit that the RAD finding is incorrect, because the RPD member's comments concerned a crucial issue in the hearing, and her statements during the hearing left little room for discussion but rather indicated that she had come to a conclusion on the matter before she had heard all of the evidence. The fact that the RPD member asked Mr. Ramirez to comment on her statement about the ELN does not eliminate the bias, because her earlier statement made it very clear that she had decided on a balance of probabilities that there was no objective basis for his fear.

[10] I am not persuaded. The long-accepted test for reasonable apprehension of bias was set out by the Supreme Court of Canada in *Committee for Justice and Liberty et al. v National Energy Board*, [1978] 1 SCR 369, [1976] SCJ No 118 at para 40:

> … the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information... [The] test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more likely than not

> that [the decision-maker], whether consciously or unconsciously, would not decide fairly.

[11] The threshold to establish a reasonable apprehension of bias is a high one, and the burden on the party seeking to establish a reasonable apprehension is correspondingly high (*Yukon Francophone School Board, Education Area # 23 v Yukon (Attorney General)*, 2015 SCC [*Yukon Francophone School Board*] at paras 25-26; *Oleynik v Canada (Attorney General)*, 2020 FCA 5 at para 57). It is also relevant that the RPD's role is an inquisitorial one, and this sometimes requires that Members have to ask questions of applicants that would perhaps be inappropriate for a judge to ask: *Bai v. Canada (Citizenship and Immigration)*, 2021 FC 1406 at para 17, citing *Bozsolik v Canada (Citizenship and Immigration)*, 2012 FC 432 at para 16; *Benitez v Canada (Citizenship and Immigration)*, 2007 FCA 199 at para 18; and *Aloulou v Canada (Citizenship and Immigration)*, 2014 FC 1236 at para 28.

[12] In this case, the RAD reviewed the argument and the evidence carefully, and applied the test, paraphrasing from a recent, leading authority of the Supreme Court of Canada on the question. In *Yukon Francophone School* at para 33, Justice Abella stated there is "a crucial difference between an open mind and an empty one." This is the approach that guided the RAD in assessing the allegation of bias.

[13] At its highest, the questioning by the RPD indicated that the member had formed a tentative view of the evidence, and asked for Mr. Ramirez's comments on that. This is not an indication of a reasonable apprehension of bias: *Eshetie v Canada (Citizenship and Immigration)*, 2019 FC 1036 at para 30. Furthermore, the specific evidence referred to in the

question is not mentioned in the RPD's decision. Instead, the member noted that the ELN and FARC had joined forces; this indicates that the member remained open-minded during the hearing and incorporated Mr. Ramirez's testimony into her analysis.

[14] The RAD applied the proper legal test to the facts, and explained its reasoning on this issue. That is all that was required of it. There is no basis to overturn the decision on this ground.

[15] Turning to the IFA issue, there are two prongs of the IFA test: is there a serious possibility of persecution in the proposed IFA location, and is it reasonable for the Applicants to relocate there? (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, [1991] FCJ No 1256 at para 13). In their appeal before the RAD, the Applicants challenged the RPD's decision on the second prong of the test, claiming that the member had failed to consider the issue of whether they could obtain housing, healthcare, education or employment in Bogota. The RAD dealt with both elements of the IFA test, and found that the Applicants had failed to meet their onus of proof on both prongs.

[16] The RAD found that there was insufficient evidence that the ELN had the means and motivation to find the Applicants in Bogota, because the Applicants provided very little detail about how the ELN would find them or why it would still be interested in them more than six years after Mr. Ramirez's first contact with them. In addition, the RAD noted that Ms. Higuita testified that she had no problems during the time she was in Colombia. The RAD also noted the objective evidence that violence by the ELN was focused in areas where it had expanded its illegal drug activities, not Bogota.

[17] Before this Court, the Applicants concede that the RAD's decision on the second prong of the test was reasonable; the focus of their arguments was on the first prong of the test. They claim that the RAD failed to consider relevant objective country condition evidence with regard to the capacity of the ELN to find them in Bogota. The Applicants argue that this evidence contradicted the RAD's conclusions on the current strength of the ELN, and the RAD's failure to consider this makes its decision unreasonable.

[18] The problem for the Applicants is that they did not raise this argument or refer to this specific evidence before the RAD. There is ample case-law supporting the conclusion that new issues cannot be raised to challenge a RAD decision on judicial review, if these were not dealt with in the appeal to the RAD (*Canada (Citizenship and Immigration) v. R. K.*, 2016 FCA 272 at para 6; *Dahal v Canada (Citizenship and Immigration)*, 2017 FC 1102 at para 35).

[19] Although the IFA question in general is not a new issue, in the sense that it was raised as a basis of appeal before the RAD, the Applicants' challenge to the decision cannot succeed because it is based on the first prong of the test, whereas their appeal to the RAD focused on the second element. In essence, the Applicants argue that it was unreasonable for the RAD to fail to address objective country condition evidence relating to the means and motivation of the ELN, but they did not ask the RAD to address that evidence.

[20] In addition, the RAD specifically deal with the means and motivation of the ELN in its decision, and the Applicants' argument amounts to asking this Court to re-weigh the evidence. That is not the role of the Court on judicial review (*Canada (Minister of Citizenship and Immigration v Vavilov*, 2019 SCC 65, at para 125).

[21] For these reasons, the application for judicial review is dismissed.

[22] There is no question of general importance for certification.

JUDGMENT in IMM-5108-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5108-20
STYLE OF CAUSE:	CARLOS JULIAN HENAO REMIREZ, YENY ALEJANDRA RODRIGUEZ HIGUITA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	OCTOBER 25, 2021
JUDGMENT AND REASONS:	PENTNEY J.
DATED:	JANUARY 13, 2022

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