Federal Court  Cour fédérale

Date: 20220204

Docket: IMM-5887-20

Citation: 2022 FC 108

[ENGLISH TRANSLATION]

Ottawa, Ontario, February 4, 2022

PRESENT: Mr. Justice Gascon

BETWEEN:

CELIA ESMERALDA PAREDES QUELE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Ms. Celia Esmeralda Paredes Quele, is seeking judicial review of a decision of the Refugee Appeal Division [RAD] made in September 2020 [Decision]. This Decision dismissed Ms. Quele's appeal against a decision of the Refugee Protection Division [RPD], which had rejected her refugee protection claim on the grounds that she could not be

considered a refugee or a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. Both the RAD and the RPD identified Ms. Quele's lack of credibility as the main reason for rejecting her refugee protection claim.

[2] Ms. Quele is asking the Court to set aside the Decision and refer the matter back to the RAD for redetermination by a differently constituted panel. She faults the RAD for having unreasonably exercised its role as reviewing tribunal by endorsing the RPD's incorrect reasoning with respect to the analysis of her credibility and ignoring the presumption of truthfulness of her allegations. Ms. Quele also claims that the RAD erred in failing to apply, in the appeal before it, two Immigration and Refugee Board of Canada [IRB] Chairperson's guidelines, namely, Guideline 4, *Women Refugee Claimants Fearing Gender-Related Persecution*, and Guideline 8, *Procedures with Respect to Vulnerable Persons Appearing Before the IRB* [Guidelines].

[3] The only issue raised by Ms. Quele's application is whether the RAD Decision is reasonable.

[4] For the following reasons, Ms. Quele's application for judicial review will be allowed. Having considered the reasons for the Decision and the applicable law, I find that, in the circumstances, the RAD's treatment of the IRB Guidelines did not meet the standard of reasonableness. In my view, the RAD's reasons do not allow me to understand whether and how the Guidelines were considered in the RAD's analysis. This is sufficient to justify the Court's intervention. I must therefore send the matter back for redetermination. Given this conclusion, I

do not have to deal with Ms. Quele's other arguments challenging the reasonableness of the Decision.

II. Background

A. *Facts*

[5] Ms. Quele, a citizen of El Salvador, alleges that she left her country out of fear that her former spouse would harass and abuse her. Ms. Quele and her former partner went through a bitter divorce in 2011. Ms. Quele alleges that the marital situation became intolerable after she confronted her former spouse about his possible unfaithfulness. Following the divorce, the former spouse harassed Ms. Quele, who then tried to escape him by moving several times. Ms. Quele alleges that she was found and beaten by her former partner in August 2012, although uncertainty remains as to when this assault occurred.

[6] In December 2012, Ms. Quele left El Salvador for the United States. Ms. Quele lived there for over four years, married again, and gave birth to a child there. However, Ms. Quele did not seek asylum in the United States. In May 2017, Ms. Quele and her family left the United States for Canada. She and her spouse applied for refugee protection in Canada through separate claims.

[7] The RPD heard Ms. Quele's application in June 2018 and made its decision on July 4, 2018. In its decision, the RPD stated that it had considered the Guidelines. However, the RPD concluded that Ms. Quele could not be granted the status of refugee or person in need of

protection because her claim was flawed by a significant lack of credibility. In fact, the RPD noted several inconsistencies in Ms. Quele's testimony and in the evidence submitted in support of her refugee protection claim. According to the RPD, Ms. Quele made several errors regarding the chronology of the alleged events, undermining her credibility. For example, the RPD noted that Ms. Quele initially alleged that she had been beaten by her former spouse in 2011, but the medical report submitted in evidence was originally dated August 6, 2013, before being corrected to August 6, 2012.

[8] The RPD also noted that the fact that Ms. Quele did not seek asylum in the United States, instead preferring to live there illegally for almost four and a half years, is inconsistent with her alleged subjective fear of her former partner in El Salvador. The RPD concluded that Ms. Quele was not credible and that her allegations of spousal abuse and harassment against her former spouse could not justify granting refugee protection in Canada.

[9] Ms. Quele appealed the RPD decision.

B. *RAD Decision*

[10] In September 2020, the RAD dismissed Ms. Quele's appeal.

[11] The RAD first found that the RPD correctly determined that Ms. Quele's contradictions with respect to the chronology of the reported events and the significant errors in the dates in her account considerably undermined her credibility. The RAD conceded that a claimant might sometimes mix up the dates of past events. However, in the case at hand, the RAD noted that

Ms. Quele is wrong by more than a year about the date of the assault she allegedly suffered, given that a series of other events are temporally related to this assault.

[12] The RAD then identified inconsistencies in Ms. Quele's testimony with respect to the reason for her divorce. In fact, according to the RAD, Ms. Quele suggests that her former spouse did not want a divorce and that it was this disagreement that apparently led to the episodes of spousal abuse and harassment. However, the evidence shows that it was actually her former spouse who applied for the divorce. The divorce was reportedly obtained by joint petition in 2011.

[13] The RAD finally concluded that the RPD correctly determined that Ms. Quele demonstrated behaviour inconsistent with the fear she alleged as the basis for her refugee protection claim. Although Ms. Quele moved several times to flee her former spouse, she still kept her job at the Burger King in the city of Colon, a place known to her former spouse. As the RAD stated, "to continue working at the same job, at the same location and on a regular schedule would make it very easy for Mr. Quele to meet with her. . . . There is reason to agree with the RPD's correct conclusions." In addition, the RAD agreed with the RPD that Ms. Quele's failure to seek asylum in the United States is a significant fact that calls into question her subjective fear of returning to El Salvador.

[14] The RAD therefore confirmed the RPD's decision that Ms. Quele is neither a refugee nor a person in need of protection.

C. *Standard of review*

[15] It is well established that the Court must apply the reasonableness standard when it reviews the RAD's findings (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35). The judgment of the Supreme Court of Canada [SCC] in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] strengthens this principle by establishing that the revised framework for determining the standard of review is now based on a presumption that the standard of reasonableness applies in all cases where the Court is called upon to review the merits of administrative decisions (*Vavilov* at para 16). This presumption can only be rebutted in two types of situations. The first is where Parliament has prescribed the applicable standard of review or provided for a statutory appeal mechanism from an administrative decision to a court; the second is where the question under review falls within one of the categories of questions for which the rule of law requires review on a standard of correctness (*Vavilov* at paras 10 and 17; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post Corp*] at para 27). None of the situations that would justify departing from the presumption of reasonableness review applies in this case. The RAD decision is therefore reviewable on a standard of reasonableness. The parties do not dispute this.

[16] Where the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and determine whether the decision is based on "an internally consistent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85; *Canada Post Corp* at paras 2 and 31). The reviewing court must consider "the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (*Vavilov* at para 15). The reviewing court must therefore

ask “whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility—and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paras 47 and 74 and *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 13).

[17] It is not enough for the decision to be justifiable. Where reasons are required, the “decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies” [emphasis in original] (*Vavilov* at para 86). Thus, review under the reasonableness standard is concerned with both the outcome of the decision and the reasoning process that led to that outcome (*Vavilov* at para 87). This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with both outcome and process (*Dunsmuir* at paras 27, 47–49).

III. Analysis

[18] Among the reasons Ms. Quele raised in her application for judicial review, she identified the RAD’s failure to apply the Guidelines in its analysis. Ms. Quele submits that these two Guidelines create a positive obligation for the administrative decision maker. According to Ms. Quele, the RAD cannot simply point out that the Guidelines were considered by the RPD to fulfill its obligation, but it must explain in particular [TRANSLATION] “why and how” the Guidelines were applied by the RPD in its own decision. Ms. Quele feels that the RAD should have intervened, but that it merely mentioned that the RPD had indeed [TRANSLATION]

"considered" the Guidelines. Ms. Quele adds that in applying the Guidelines in a reasonable manner, the RAD would not have concluded that her testimony was not credible.

[19] I share Ms. Quele's view that the RAD failed to deal reasonably with the Guidelines in its Decision.

[20] In her grounds of appeal before the RAD, Ms. Quele acknowledged that the RPD had indeed taken the Guidelines into consideration, but she faulted the RPD for not demonstrating understanding and openness in its analysis, as required by the Guidelines. Contrary to the arguments put forward by the Minister, I am satisfied that Ms. Quele did in fact raise, before the RAD, the problem of the RPD's flawed application of the Guidelines, suggesting that this failure of the RPD constituted a breach of the principles of natural justice and procedural fairness. However, in the Decision, the RAD merely stated, at paragraph 9 of its reasons, that the RPD concluded that Ms. Quele lacked credibility, "taking . . . into consideration" the Guidelines. Nowhere in the Decision does the RAD state that it itself, in exercising its role as reviewing tribunal, took into consideration and applied the Guidelines in question.

[21] I agree with Ms. Quele that it is not sufficient for the RAD to simply mention that the Guidelines were considered by the RPD. The RAD did in fact have to elaborate on how the Guidelines were considered in its own analysis and how, in light of the principles developed in these Guidelines, it could confirm or set aside the RPD's findings (*Omoruan v Canada (Citizenship and Immigration)*, 2021 FC 153 at para 21; *Griffith v Canada (Minister of Citizenship and Immigration)*, [1999] FCA No 1142 (QL) [*Griffith*] at para 25). In the case at

hand, the RAD did not refer to the Guidelines in its own analysis of Ms. Quele's file. I acknowledge that the RAD is not required to explicitly mention the Guidelines in its decisions. However, the RAD had to, at least, demonstrate in its reasons that it was aware of their content, was sensitive to their content, and followed their teachings in its analysis of the spousal violence dynamic raised by Ms. Quele (*Keleta v Canada (Minister of Citizenship and Immigration)*, 2005 FC 56 at para 14).

[22] In my view, in the case at hand, the RAD analysis stumbles in two respects. Not only are the Guidelines not referred to in the RAD analysis, but the reasons for the Decision do not indicate the level of knowledge, understanding, and sensitivity required by the Guidelines, or a concern by the RAD to ensure their application. In other words, the reasons for the Decision do not allow me to conclude that the RAD did in fact fulfill its role in this regard *(Kandha v Canada (Citizenship and Immigration)*, 2016 FC 430 at para 20). However, consideration of the Guidelines was one of Ms. Quele's main grounds for her appeal against the RPD decision.

[23] Guideline 4 concerning gender-related persecution forms a framework for analysis in the context of gender-based persecution where, for example, allegations of sexual violence are made. The purpose of these Guidelines is to ensure "knowledgeable and sensitive consideration of the evidence of women claiming refugee status because of violence within a relationship" (*Griffith* at para 3). They prescribe that refugee protection claimants who have been subjected to sexual abuse may need to be shown an extremely understanding attitude. Thus, when an administrative decision maker lacks the "requisite sensitivity", it can be established that "the Gender Guidelines were not properly applied" *(Odia v Canada (Citizenship and Immigration)*, 2014 FC 663 [*Odia*]

at para 9). Clearly, Guideline 4 does not require a specific outcome. However, it does at the very least require a certain attitude on the part of the RPD and the RAD.

[24] I acknowledge that the Guidelines are not intended to compensate for all omissions or deficiencies in a refugee protection claim or its supporting evidence *(Mavangou v Canada (Citizenship and Immigration)*, 2019 FC 177 at para 48; *Ismail v Canada (Citizenship and Immigration)*, 2016 FC 446 at para 26). They also do not require that all documents and allegations be accepted at face value, but they are, rather, designed to ensure a fair hearing *(Odurukwe v Canada (Citizenship and Immigration)*, 2015 FC 613 at para 40). As Gagné A.C.J. stated in *Duversin v Canada (Citizenship and Immigration)*, 2018 FC 466 [*Duversin*], the Guidelines cannot improve or enhance any evidence of gender-related persecution in themselves. They merely dictate the attitude and open-mindedness that the administrative decision makers must demonstrate when dealing with such allegations of persecution (*Duversin* at para 30). For the RPD or the RAD to take the Guidelines into account in a meaningful way, it has to assess the refugee protection claimant's testimony while being alert and sensitive to her gender; to the social, cultural, economic, and religious norms of her community; and to the factors that may influence the testimony of women who have been the victims of persecution (*Odia* at para 9; see also *Mirzaee v Canada (Citizenship and Immigration)*, 2020 FC 972 at paras 52 and 53).

[25] The reasons for an administrative decision must therefore enable the reviewing court to conclude that the Guidelines have been applied satisfactorily (*Odia* at para 18). In the case at hand, the RAD's reasons do not show, in my view, the compassion and sensitivity prescribed by the Guidelines, or the acknowledgement of Ms. Quele's particular situation, her background, and

her education. It is true, as the Minister's counsel noted, that the RAD went through the evidence of Ms. Quele's date errors and took care to deal with them in detail. However, on reading the reasons, I cannot conclude that the RAD complied with the letter and spirit of the Guidelines in its analysis.

[26] The RAD was required to explain its Decision with respect to consideration of the Guidelines, and I am not satisfied that it did so. In short, the RAD's reasons do not allow me to be satisfied that the RAD specifically considered Ms. Quele's particular situation. When I read the reasons in relation to the record, it is impossible for me to understand the RAD's reasoning on one central point of the Decision, namely, the processing of Ms. Quele's appeal in regard to the principles set out in the Guidelines.

[27] That said, it is not up to me to determine whether the RAD's error regarding the application of the Guidelines contributed to discrediting Ms. Quele's testimony. This falls within the RAD's jurisdiction and expertise. I concede that the RAD's reasons suggest that it did indeed conduct its own analysis of Ms. Quele's circumstances to determine whether the RPD had made a correct decision. However, the Decision is completely silent on the Guidelines, which are central to the appeal made by Ms. Quele and the arguments raised against the RPD decision.

[28] In the wake of *Vavilov*, special attention must now be paid to the decision-making process and the justification for administrative decisions. One of the objectives advocated by the SCC in applying the reasonableness standard is to "develop and strengthen a culture of justification in administrative decision making" (*Vavilov* at paras 2 and 143). It is not enough for

a decision to be justifiable, it must also be "*justified*, by way of those reasons, by the decision maker to those to whom the decision applies" [emphasis in the original] (*Vavilov* at para 86). Ultimately, a reviewing court "must develop an understanding of the decision makers reasoning process" and determine "whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility" (*Vavilov* at para 99). In the wake of *Vavilov*, reasons provided by administrative decision makers are the primary mechanism by which administrative decision makers show that their decisions are reasonable—both to the affected parties and to the reviewing courts (*Vavilov* at para 81). They serve to state "how and why a decision was made", demonstrate that "the decision was made in a fair and lawful manner" and shield against "the perception of arbitrariness in the exercise of public power" (*Vavilov* at para 79). In short, it is the reasons that establish the justification for the decision.

[29] However, In Ms. Quele's case, I am of the view that, with respect to the Guidelines, the RAD's reasons do not justify the Decision in a transparent and intelligible manner. On the contrary, they suggest that the RAD seems to have disregarded these Guidelines and their terms; that it did not follow a rational, coherent, and logical line of reasoning in its analysis; and that the Decision does not conform to the relevant legal and factual constraints that bear on the outcome and the issue at hand (*Canada Post Corporation* at para 30; *Vavilov* at paras 105–07).

[30] I am well aware that, in a judicial review, the Court is not permitted to reweigh the evidence or substitute its own assessment of the facts for that of the administrative decision maker. Deference to administrative decision makers includes deferring to their findings and assessment of the evidence (*Canada Post Corporation* at para 61). In the same vein, I also accept

that the reasons for a decision do not have to be exhaustive. Indeed, the reasonableness standard of review is not concerned with the decision's degree of perfection but rather with its reasonableness (*Vavilov* at para 91). However, the reasons must be intelligible and justified. An administrative decision maker has a duty to articulate its rationale in its reasons *(Farrier v Canada (Attorney General)*, 2020 FCA 25 [*Farrier*] at para 32). Admittedly, the lack of detail given in a decision does not necessarily make it unreasonable, but the reasons must enable the Court to understand the basis of the contested decision and to determine whether the conclusion holds water.

[31] Here, I am particularly mindful of the "principle of responsive justification" set out in *Vavilov* for cases where the decision of the administrative decision maker may have harsh consequences "that threaten an individual's life, liberty, dignity or livelihood." This principle entrusts on administrative decision makers in such cases a "heightened responsibility . . . to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law" (*Vavilov* at paras 133 and 135). Ms. Quele's case is one of these cases, and I respectfully believe that the Decision falls short of this heightened standard.

[32] I have one last observation. In *Vavilov*, the SCC did point out that a reviewing court has some discretion as to the remedy to be awarded when it sets aside an unreasonable decision, with the majority warning against the "endless merry-go-round of judicial reviews and subsequent reconsiderations" (*Vavilov* at paras 140–42). Thus, it may sometimes be appropriate to refuse to remit a case to an administrative decision maker "where it becomes evident to the court, in the

course of its review, that a particular outcome is inevitable and that remitting the case would therefore serve no useful purpose" (*Vavilov* at para 142; *Mobil Oil Canada Ltd v Canada–Newfoundland Offshore Petroleum Board*, [1994] 1 SCR 202 at 228–30; *Entertainment Software Assoc. v Society Composers*, 2020 FCA 100 [*Society Composers*] at paras 99–100). This can also be the case when correcting the error would not have changed the existing result and would have no practical significance, and where only one conclusion is actually possible *(MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2 at para 52; *Farrier* at para 31; *Robbins v Canada (Attorney General)*, 2017 FCA 24 at paras 16–22). This discretion to grant or not grant remedies exists in the contexts of both procedural errors and substantive defects (*Society Composers* at para 99).

[33] However, as the SCC clarified, this discretion in the matter of remedies must be exercised with restraint because the choice of remedy must in particular be "guided by the rationale for applying [the standard of reasonableness] to begin with, including the recognition by the reviewing court that the legislature has entrusted the matter to the administrative decision maker, and not to the court" (*Vavilov* at para 140). Thus, where a decision reviewed by applying the reasonableness standard cannot be upheld, it will most often be appropriate to remit the matter to the decision maker to have it reconsider the decision, this time with the benefit of the court's reasons (*Vavilov* at para 141; *Society Composers* at para 99; *Robbins* at para 17). In summary, the threshold for opting not to remit the matter to the administrative decision maker when its decision is deemed unreasonable is high *(D'Errico v Canada (Attorney General)*, 2014 FCA 95 at paras 14–17).

[34] Insofar as the standard of the reasonableness is marked by deference and respect for the legitimacy and competence of administrative decision makers in their area of expertise, the discretion of the reviewing courts to not remit an unreasonable decision to the administrative decision maker for reconsideration must therefore be exercised carefully, sparingly and with prudence, and be limited to the rare cases where the context can only inevitably lead to a single result and where the outcome leaves no doubt. These situations will more likely be exceptions. The brief remarks made by the SCC in *Vavilov* on the exercise of discretion in remedies do not constitute an opening for reviewing courts to substitute themselves for the administrative decision maker and interfere with the merits of the decision to be rendered, if it is conceivable that the decision maker could arrive at a decision that is both different and reasonable. It would be ironic, to say the least, if the discretionary remedy associated with the standard of reasonableness, a standard anchored in the recognition of and respect for the role of administrative decision makers, were to become the cause for transferring those decision makers' powers to the courts of justice responsible for their supervision (*Dugarte de Lopez v Canada (Citizenship and Immigration)*, 2020 FC 707 at paras 29–35).

[35] Admittedly, the RAD analyzed many factors in Ms. Dugarte de Lopez's refugee protection claim before upholding the RPD's decision. However, its error in considering and recognizing the Guidelines concerned a fundamental element of Ms. Quele's appeal. It may be that, even when informed of these reasons for the error made by the RAD and of the consideration that should have been given to the Guidelines, a differently constituted panel could nevertheless reasonably repeat the same decision. However, this differently constituted panel could also reach a different conclusion, more favourable to Ms. Quele. It is the RAD, not the

Court, that conducts this assessment. I cannot simply presume that considering the Guidelines would not have changed the situation before the RAD and usurp the decision-making authority that Parliament has entrusted to the administrative decision maker in this regard. In the case at hand, I cannot affirm that the record leans so heavily against allowing Ms. Quele's refugee protection claim that it would serve no useful purpose to remit the matter *(Lemus v Canada (Citizenship and Immigration)*, 2014 FCA 114 at para 38).

IV. Conclusion

[36] For the above reasons, Ms. Quele's application for judicial review is allowed. Neither party proposed any questions for certification. I agree that there is no basis for doing so in the case at hand.

JUDGMENT in IMM-5887-20

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed without costs.

2. The Refugee Appeal Division's decision dated September 16, 2020, dismissing Celia Esmeralda Paredes Quele's appeal, is set aside.

3. Celia Esmeralda Paredes Quele's case is remitted to the Refugee Appeal Division for reconsideration by a differently constituted panel, on the basis of these reasons.

4. No question of general importance is certified.

"Denis Gascon"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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