Federal Court Cour fédérale

Date: 20220331

Docket: IMM-1843-20

Citation: 2022 FC 441

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 31, 2022

PRESENT: Mr. Justice McHaffie

BETWEEN:

LUIS FERNANDO MARQUEZ OBANDO
MARIA CECILIA PEREZ PELAEZ
JUAN CAMILO MARQUEZ PEREZ
LUIS MATEO MARQUEZ PEREZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Luis Fernando Marquez Obando and his family, are seeking judicial review of their refugee protection claim. The Refugee Appeal Division (RAD) found that

Mr. Marquez's account that he was threatened in Colombia by members of the guerrilla group Ejército de Liberación Nacional (ELN) lacked credibility. In doing so, it rejected two new items of evidence submitted by the applicants as lacking in credibility.

[2] For the following reasons, I find that the RAD decision is reasonable and fair. The RAD reasonably found that the new evidence submitted by the applicants was not credible. Contrary to the applicants' arguments, the RAD was not required to convene a hearing before making that finding. Its determination that some of the unfavourable credibility findings made by the Refugee Protection Division (RPD) were correct is also reasonable. The Court must show deference to such determinations and, despite the applicants' arguments, I am not satisfied that they have demonstrated the unreasonableness of the decision.

[3] The application for judicial review is therefore dismissed.

II. Issues and standard of review

[4] The applicants raise the following issues:

A. Did the RAD err in refusing to admit the new evidence presented by the applicants on credibility grounds?

B. Did the RAD breach the principles of procedural fairness by rejecting the applicants' refugee protection claim and the new evidence without holding a hearing?

C. Is the RAD's decision rejecting the refugee protection claim reasonable?

[5] The reasonableness standard applies to the first and third of these questions: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25; *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at paras 23–29; *Arana Del Angel v Canada (Citizenship and Immigration)*, 2020 FC 253 at paras 11 and 18; *Limones Munoz v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 1051 at paras 23–24. A reasonable decision is a decision that is based on coherent reasoning and that is justified in light of the legal and factual constraints that bear on the decision: *Vavilov* at paras 99, 101–07. When it reviews a decision on the reasonableness standard, the Court does not conduct its own analysis of the evidence to draw its own findings of fact and credibility: *Vavilov* at para 125. It can interfere with the tribunal's findings of fact only in exceptional circumstances in which the tribunal has not considered the evidence submitted or has fundamentally misapprehended the evidence: *Vavilov* at paras 125–26.

[6] The second question raises a procedural fairness issue. The parties agree that this question must be reviewed on the correctness standard or, rather, by determining whether a fair and just process was followed given the entire circumstances: *Canadian Pacific Railway Company v Canada (Attorney General),* 2018 FCA 69 at para 54; *Mission Institution v Khela*, 2014 SCC 24 at para 79. I agree, for the reasons I set out in *Idugboe v Canada (Citizenship and Immigration),* 2020 FC 334 at paras 34–40.

III. <u>Analysis</u>

A. *The RAD did not err in rejecting the new documents on the basis of credibility*

(1) Factual background

[7] The applicants are citizens of Colombia. Their refugee protection claim is based on a fear of being persecuted by the ELN, a military guerrilla force, because of political opinions expressed by Mr. Marquez. Mr. Marquez stated that he attended political rallies and several meetings of the local community. At these meetings, he promoted the importance of not joining violent and subversive groups and of reporting these groups to the authorities to prevent them from harming others through their actions.

[8] Mr. Marquez explained that in August 2016, he received a call on his landline at his workplace from a man who identified himself as a member of the ELN. This man told him that Mr. Marquez and his family were [TRANSLATION] "undesirables". Mr. Marquez believed that the call was a bad joke, but 15 days later, he received another threatening call. After this second call, Mr. Marquez disconnected his landline and strictly used his mobile telephone.

[9] On November 2, 2016, two men on a motorcycle drove past Mr. Marquez's workshop while making a throat-slitting gesture. On the same day, Mr. Marquez filed a complaint with the Office of the Attorney General. Then, he requested police protection, but to no avail. On November 29, 2016, he received a threatening letter from the ELN in which the group gave him 15 days to leave the municipality. On December 4, 2016, the family left Colombia for the United States with visas they had had with them since October 16, 2016. They came to Canada in January 2017 to seek refugee status.

[10] The RPD found that Mr. Marquez lacked credibility regarding his behaviour with respect to the incidents described above and the applicants' delay in leaving Colombia. The RPD found that this behaviour was inconsistent with that of a person fearing persecution. The RPD also

determined that there was an internal flight alternative (IFA) in the city of Barranquilla. It therefore refused the applicants' claims for protection.

[11] The applicants appealed the RPD's decision to the RAD. They filed two new documents before the RAD: (i) a letter said to be from the ELN that Mr. Marquez's brother received following the RPD hearing; and (ii) a complaint based on the receipt of said letter, filed by the brother with the police.

(2) Legal background

[12] In the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], Parliament requires that an appeal to the RAD proceed, in general, without holding a hearing and on the merits of the RPD record: IRPA, s. 110(3). There are some exceptions to this general rule. In particular, sections 110(3) and (4) together stipulate that an appellant may present new evidence if it meets certain criteria:

Procedure	**Fonctionnement**
110 (3) Subject to subsections (3.1), (4) and (6), the Refugee Appeal Division <u>must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division</u>, and may accept <u>documentary evidence and written submissions from the Minister and the person who is the subject of the appeal</u> … .	**110 (3)** Sous réserve des paragraphes (3.1), (4) et (6), la section <u>procède sans tenir d'audience en se fondant sur le dossier de la Section de la protection des réfugiés</u>, mais peut recevoir <u>des éléments de preuve documentaire et des observations écrites du ministre et de la personne en cause</u> … .

Evidence that may be presented	**Éléments de preuve admissibles**
(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	**(4)** Dans le cadre de l’appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n’étaient alors pas normalement accessibles ou, s’ils l’étaient, qu’elle n’aurait pas normalement présentés, dans les circonstances, au moment du rejet.
[Emphasis added.]	[Je souligne.]

[13] As the Federal Court of Appeal has confirmed, subsection 110(4) states that new documents are admissible only if (i) they arose after the rejection of the refugee protection claim, (ii) they were not reasonably available or (iii) the person could not reasonably have been expected in the circumstances to have presented them at the time of the rejection: *Singh* at paras 32–34.

[14] These three categories constitute the explicit criteria prescribed by the Act. However, the Federal Court of Appeal also confirmed that other criteria stem implicitly from subsection 110(4), particularly the credibility and relevance of new evidence: Singh at paras 38–47, citing *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paras 13–15. The Court of Appeal noted that the RAD is not required to accept new items of evidence that lack credibility or relevance filed by an appellant simply because they have arisen since the rejection of his or her claim: *Singh* at paras 43–45.

(3) RAD decision

[15] The RAD determined that the letter from the ELN lacked credibility for several reasons. Regarding the issue of form, the letter is undated, and the RAD noted a reversal of the logos in its heading compared to a letter on file that Mr. Marquez says he received from the ELN. As to the contents, the document refers to an assault Mr. Marquez's brother apparently survived in the 1990s. The RAD noted that Mr. Marquez had never mentioned before that his brother had had serious problems with the ELN at that time. In addition, the letter identifies Mr. Marquez as a former police officer, a position he had not held for more than 23 years, although his refugee protection claim specifies that his difficulties with the ELN began long afterward, in 2016, because of his involvement in politics.

[16] The RAD therefore concluded that the letter from the ELN lacked credibility and did not admit it. Since that letter lacked credibility, the RAD also rejected the complaint Mr. Marquez's brother filed with the police on credibility grounds because it is based on the letter already found to lack credibility.

(4) The decision is reasonable

[17] The applicants note that the RAD did not question the fact that the documents arose since the rejection of their claim by the RPD. They also contend that the documents are relevant because they are "capable of proving or disproving a fact that is relevant to the claim for protection": *Dugarte de Lopez v. Canada (Citizenship and Immigration)*, 2020 FC 707 at para 21, citing *Raza* at para 13. I agree. However, the fact that a document is new and relevant

does not mean that it is credible. The RAD rejected the applicants' documents on credibility grounds. The newness and relevance of the documents do not affect this finding.

[18] In this regard, I cannot accept the applicants' argument that the RAD was required to analyze the explicit criteria of the IRPA before analyzing the implicit conditions of *Raza* and *Singh*. If the RAD finds that the evidence lacks credibility, the relevance and newness of this evidence is not important. The RAD can reasonably concentrate its analysis on the issue of credibility if it is determinative.

[19] The applicants also submit that *Singh* and *Raza* indicate that the RAD can reject new evidence only if it lacks credibility "considering its source and the circumstances in which it came into existence": *Singh* at para 38; *Raza* at para 13. The applicants claim that the RAD rejected the new documents for reasons that go far beyond an assessment of their source and the circumstances in which they came into existence. I cannot accept this argument.

[20] By my interpretation, *Raza* and *Singh* do not limit the scope of the credibility analysis that the RAD can undertake regarding a new document submitted by an appellant. *Raza* indicates that the RAD can consider questions related to a document's source and the circumstances in which it came into existence. It does not indicate that the RAD cannot consider other questions relevant to credibility. In addition, it should be noted that the Court of Appeal in *Singh* acknowledged a link between the credibility criterion set out in subsection 110(4) and the criteria of paragraph 171(a.3) of the IRPA: *Singh* at para 44. It provides that the RAD "may receive and base a decision on evidence that is adduced in the proceedings and considered credible or

trustworthy in the circumstances” [emphasis added]. This credibility analysis, which is implicit in subsection 110(4), is not limited to specific reasons such as the “source” or “circumstances in which [the evidence] came into existence”.

[21] In any event, the RAD’s reasons in the case at hand are in fact based on the source and circumstances of the new documents. The RAD essentially found that the source of the letter said to be from the ELN was in question because of its form and contents. This finding is reasonable. Despite the applicants’ arguments, the fact that there may be other explanations why the events in the 1990s were not raised earlier, such as Mr. Marquez’s unfamiliarity with these events, does not make the RAD decision unreasonable. It should be noted that the applicants had the opportunity to provide such explanations to the RAD when they filed the documents and did not do so: *Refugee Appeal Division Rules* (SOR/2012-257), s 3(3)(g)(iii) [*RAD Rules*].

[22] I therefore find that the rejection of new evidence is substantively reasonable.

B. *The RAD was not required to hold a hearing*

(1) Legal background

[23] As indicated earlier, an appeal to the RAD generally proceeds without holding a hearing: IRPA, s 110(3). Subsection 110(6) of the IRPA provides that the RAD can hold a hearing in limited cases:

Procedure	**Fonctionnement**
110 (6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)	**110 (6)** La section peut tenir une audience si elle estime qu’il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :
(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;	**a)** soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause;
(b) that is central to the decision with respect to the refugee protection claim; and	**b)** sont essentiels pour la prise de la décision relative à la demande d’asile;
(c) that, if accepted, would justify allowing or rejecting the refugee protection claim	**c)** à supposer qu’ils soient admis, justifieraient que la demande d’asile soit accordée ou refusée, selon le cas.
[Emphasis added.]	[Je souligne.]

[24] It follows from subsections 110(3), (4), and (6) that the RAD can hold a hearing only if there is new evidence that meets the criteria set out in subsection 110(4): *Singh* at para 48.

(2) There was no breach of procedural fairness

[25] The applicants claim that the RAD should have granted them a hearing before rejecting their new documents and their refugee protection claim. They argue that the fact that the RAD did not do so amounts to a breach of procedural fairness.

[26] I reject this argument. Regarding the rejection of documents, according to subsections 110(3), (4), and (6) of the IRPA, the RAD can hold a hearing only if it has already

determined that the new documents filed meet the criteria of subsection 110(4), including the credibility criterion. This Court has repeated found that the RAD is not required to hold a hearing to determine whether a document presented as new evidence is credible: *AB v Canada (Citizenship and Immigration)*, 2020 FC 61 at para 17; *Mohamed v Canada (Citizenship and Immigration)*, 2020 FC 1145 at paras 19–21; *Sunday v Canada (Citizenship and Immigration)*, 2021 FC 266 at paras 42–44.

[27] This does not mean that the RAD cannot request written representations from an appellant if it has questions about new documents. It always has this discretion, even if the appellant already has the obligation to present "full and detailed submissions" on how the new documents meet the requirements of subsection 110(4): *RAD Rules*, s 3(3)(g)(iii). However, I find that the RAD was not required to provide written notice to the applicants that the credibility of the new documents was in question in order to comply with the principles of procedural fairness. Without wanting to define situations in which the RAD could have such an obligation, if any, in the case at hand, the RAD based its credibility findings directly on the form and contents of the letter filed by the applicants themselves, in a case where Mr. Marquez's credibility was already in question. Procedural fairness did not require the RAD to provide the applicants with another opportunity, in addition to the one already provided for by *RAD Rules*, to respond to questions about credibility.

[28] Having rejected the new documents, the RAD was required under the IRPA to determine the appeal on the merits without holding a hearing: IRPA, s. 110(3). Even if the RAD made findings on the credibility of Mr. Marquez's account, it is not a breach of procedural fairness for

the RAD to follow the procedures set out in the Act: *Singh* at paras 51–52; *Mohamed* at para 22; *Malambu v Canada (Citizenship and Immigration)*, 2015 FC 763 at paras 29–36.

[29] I therefore find that there was no breach of the principles of procedural fairness when the RAD did not hold a hearing before rejecting the applicants' new documents or before rejecting their appeal.

C. *The RAD decision is reasonable*

(1) The RAD's credibility findings

[30] The RPD made negative findings on Mr. Marquez's credibility because of four aspects of his account: (1) his actions after receiving calls said to be from the ELN; (ii) the absence of documents related to his complaint filed with the police and his testimony in this respect; (iii) the lack of a follow-up with the police after the initial complaint and after the receipt of a written threat from the ELN; and (iv) the delay between the threats and the family's departure from Colombia.

[31] The RAD did not agree with the RPD with respect to two of its findings, namely, those I numbered as (ii) and (iii) above. However, the RAD found that the RPD was right to draw negative inferences regarding Mr. Marquez's credibility based on his actions following the threatening calls and the delay before leaving Colombia. With regard to the last point in particular, the RAD found that Mr. Marquez's explanation that the family delayed their escape because of the children's school term is behaviour inconsistent with that of a person who,

according to his allegations, was facing serious death threats. Considering these findings, the RAD upheld the RPD's decision that the appellants were neither Convention refugees nor persons in need of protection.

[32] The applicants fault the RAD for these two findings, but they have not presented a clear or convincing argument explaining why or how these findings are unreasonable. The Court's role in conducting a judicial review is not to reconsider the evidence or to make its own credibility findings: *Vavilov* at para 125. Given the deference owed to the RAD's credibility findings, I cannot find that its determinations were unreasonable.

[33] The applicants also argue that these two findings are not, in themselves, enough to justify a general finding of lack of credibility and that it is unreasonable on the RAD's part to reject their refugee protection claim on this basis. Again, it is not the role of this Court to re-weigh and reassess the credibility findings on the merits of the refugee protection claim if the RAD has done so reasonably. The RAD adequately justified its findings in light of the evidence before it. The applicants have not satisfied me that it was unreasonable for the RAD to base its rejection of the claim on the two credibility findings identified.

[34] Finally, the applicants claim that the RAD erred in determining their appeal without deciding the issue of an IFA. The RPD found that there is an IFA available in Barranquilla, and the applicants raised on appeal that the RPD erred in this determination. I cannot accept the applicants' argument. The RAD did not have to decide an issue that was that was not determinative of the case: *Doherty v Canada (Citizenship and Immigration)*, 2017 FC 661 at

para 13. If a refugee protection claim lacks credibility, the presence or absence of an IFA is not relevant. The RAD did not err in not addressing the issue of the availability of an IFA.

IV. Conclusion

[35] For these reasons, the application for judicial review is dismissed. The parties did not identify a question for certification. I agree that there are none in the case at hand.

JUDGMENT in IMM-1843-20

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

"Nicholas McHaffie"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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