Federal Court Cour fédérale

Date: 20220106

Docket: IMM-5666-19

Citation: 2022 FC 7

Toronto, Ontario, January 6, 2022

PRESENT: Madam Justice Go

BETWEEN:

FRANK LOZANO GUTIERREZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Frank Lozano Gutierrez [Applicant] came to Canada from Columbia seeking protection from an armed group called Los Rastrojos, who had targeted the Applicant to use his position as a rugby coach to convince underprivileged youth to join the criminal organization.

[2] The Applicant's refugee claim was rejected in a decision [Decision] by the Refugee Protection Division [RPD], which found that he was not a protected person under section 96 or section 97 of the *Immigration and Refugee Protection Act* [*IRPA*].

[3] The Applicant has applied for judicial review of this decision. For the reasons set out below, I will dismiss the application as I find the RPD decision reasonable.

II. **Background**

A. *Factual Context*

[4] The Applicant is a citizen of Colombia. He worked as a rugby coach in Cali, and he lived with his grandmother in Jamundi, 15 minutes outside of Cali. In November 2017, he started his own rugby team for youth, in what he describes as a poor neighbourhood in Buenaventura.

[5] On December 19, 2017, while he was in Buenaventura for a rugby practice, a group of men came up to him after practice to tell him that they wanted him to convince his team members to join their organization, Los Rastrojos. They told him that if he did not cooperate, they would "picar", which means kidnap him, tie him up, and dismember his body. They also looked through his identification documents.

[6] After this incident, the Applicant was so afraid that he stopped coaching in Buenaventura and concentrated on his work in Cali. However, on February 10, 2018, he received a phone call

from Los Rastrojos threatening to “pursue” him or “do something stronger” if he did not do what they had asked.

[7] Three days later, he went to the national prosecutor for help and was given a protection order to take to the police. The protection order applied to his home in Jamundi but not to his work in Cali, and the protection it offered was for police to drive by his home to check on him, but he never saw this happen.

[8] Also in February 2018, after refereeing a rugby game in Cali, the Applicant was stopped by two men with a gun, who told him that he should take Los Rastrojos seriously and that they had not forgotten their demands. One of the men hit him on the side of the head with a gun, drawing blood.

[9] The Applicant did not return to work again after this incident, and he did not tell his teammates why he had left. He left Colombia on March 7, 2018. About two weeks later, he learned that his grandmother had received a phone call from someone who was looking for him, who said they were waiting for him in Buenaventura. His grandmother continued to receive calls from Los Rastrojos, and she filed a report with the authorities on April 23, 2019.

[10] Meanwhile, the Applicant travelled through the United States and reached Canada on March 13, 2018, at a land port of entry. The RPD refused his refugee claim on August 27, 2019 and the Applicant was barred from appealing to the Refugee Appeal Division. This application for judicial review was filed on September 20, 2019, but it was held in abeyance pending the

final outcome of the challenge to the appeal bar in *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223. As the Federal Court of Appeal upheld the appeal bar and the Supreme Court denied leave, this judicial review was recommenced.

B. *Decision under Review*

[11] The RPD accepted that the Applicant's testimony was credible and that he had been the target of Los Rastrojos. However, the RPD found there is no nexus to section 96 of the *IRPA*. The RPD then considered whether the Applicant is a person in need of protection under section 97, and found that there is a viable internal flight alternative [IFA] in the city of Tunja, Boyaca, Columbia. The RPD concluded that the Applicant does not face a danger of torture, a risk to his life, or a risk of cruel and unusual treatment or punishment, should he relocate to Tunja.

III. **Issues**

[12] This application raises two issues:

(1) *Was it unreasonable for the RPD to find that the Applicant did not have a nexus to a ground of persecution under section 96 of IRPA?*

(2) *Did the RPD unreasonably assess IFA by ignoring or misconstruing evidence and/or failing to duly consider risk?*

[13] While in general a viable IFA is determinative of a claim under both section 96 and 97, the Applicant submits that the RPD's failure to find a section 96 nexus impacted its assessment of risk in the proposed IFA, citing Justice Norris' decision in *Sadiq v Canada (Citizenship and*

Immigration), 2021 FC 430. While I do not find *Sadiq* applicable to this case, I will however address both the RDP's finding on section 96 and the IFA in my decision.

IV. **Standard of Review**

[14] The parties agree that the standard of review is reasonableness. The Federal Court has previously used reasonableness to assess decisions of the RPD concerning IFA (e.g. *Anaya Moreno v Canada (Citizenship and Immigration)*, 2020 FC 396), and I see no issues in this case that would warrant a departure from the presumption of reasonableness set out in *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[15] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker": *Vavilov*, at para 85. The onus is on the Applicant to demonstrate that the RPD decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency": *Vavilov*, at para 100.

V. **Analysis**

Issue 1: Did the RPD err in finding there is no nexus to Section 96?

[16] The RPD found that the Applicant failed to establish a nexus to a ground of persecution under section 96 of *IRPA*, as "the claimant's activities as a rugby coach and referee do not establish a profile that the claimant is [a] social or humanitarian leader that somehow establishes

a perceived political opinion." It added that victims of crime, corruption or vendettas generally fail to establish a link between their fear of persecution and a section 96 ground, according to the Federal Court in *Barrantes v Canada (Citizenship and Immigration)*, 2005 FC 518, which states at para 2, that "fear of persecution as a victim of organized crime and a fear of personal vengeance does not constitute a fear of persecution for purposes of the United Nations Convention."

[17] The Applicant argues that the RPD failed to genuinely consider whether he had established a perceived political opinion or membership in a particular social group under section 96. According to the Applicant, he is a social leader who volunteered with underprivileged youth with the goal of providing the youth with an alternative to gangs, and he provided evidence that youth leaders are targeted by gangs. The Applicant relies on the United Nations High Commissioner for Refugees guidelines listing youth leaders who oppose recruitment or drug use as one of the targets of armed groups. The same report also states that those in professions susceptible to extortion may be in need of refugee protection on the basis of political opinion or membership in a particular social group.

[18] The Respondent submits the Applicant is seeking to challenge a factual, evidentiary-based decision of the RPD, which is the heartland of its jurisdiction and discretion, based on its consideration and weighing of the evidence, including documentary evidence. The Applicant, argues the Respondent, essentially disagrees with the weight the RPD puts on the evidence. Applying *Vavilov*, the Decision meets the standard of justification, transparency and intelligibility: at para 99.

[19] The Respondent also cites *Daza Molina v Canada (Citizenship and Immigration)*, 2021 FC 137 [*Molina*] to support their argument that the RPD's fact driven nexus determination was based on the evidence and was reasonably open to it to make. In *Molina*, the RPD found that the principal applicant's refusal to cooperate with the National Liberation Army [ELN] while in Bogota was not rooted in political opinion. Rather, it found that the applicants were victims of crime. The RPD in that case recognized that the principal applicant's opposition might constitute a perceived political opinion if the ELN had influence in the Capital District, however, after looking at the National Documentation Package [NDP], it found that the ELN was not entwined with the state in this area, therefore the principal applicant would not be seen as challenging the state apparatus. In finding the RPD decision reasonable, Justice Favel noted as follows:

> [24] The onus is on an applicant to support his or her claim (*Kahumba v Canada (Citizenship and Immigration)*, 2018 FC 551 at para 49). The Applicants in the current matter have not provided such clear evidence of persecution for actual or perceived political opinion to support their claim. It was reasonable for the RPD, based on the record, to have determined that the Applicants were victims of crime and, accordingly, to find that the Applicants did not qualify for protection under section 96. I find the RPD's analysis that there is no nexus to a Convention ground to be reasonable.

[20] I believe the above passage can be aptly applied to this case.

[21] While I agree with the Applicant that a failure to collude and political opinion are not mutually exclusive, I disagree that the RPD made a generalization without considering the particular facts of his claim when it found that "the threats were based on the claimant's failure to collude with the gang and not based on a political opinion."

[22] I also reject the Applicant's argument that the RPD has focused on the "political opinion" without considering the Applicant's membership in a particular social group. It is clear from the reasons that the RPD simply did not find the Applicant fit the profile of a "social or humanitarian leader."

[23] The onus is on the Applicant to support his claim with evidence to establish that he had a political profile that put him at risk: *Neri v Canada (Minister of Citizenship and Immigration),* 2013 FC 1087. Further, to support a claim of risk of persecution on account of imputed membership in a particular group, such a claim must be grounded in evidence: *Khan v Canada (Citizenship and Immigration)*, 2021 FC 1233, at para 9. Without referencing any specific case law or evidence on record, the Applicant submits that he "matches the definition of a community or social leader."

[24] The Applicant should be commended for coaching disadvantaged youth rugby, and his work was acknowledged by the RPD in the Decision. However, as the Applicant submits, "the Court's task is simply to assess whether errors were made by the Board in failing to duly consider political-based persecution as required." I find no errors in the RPD's analysis. The Applicant concedes that the RPD Member is "saying the right thing", but submits that there are "limitations and gaps" if the Decision is reviewed more closely. With respect, the Applicant is asking the Court to reweigh the evidence and engage in a microscopic analysis of the Decision, which is not the role of the Court in a judicial review application.

[25] The Applicant cited *Monroy Beltran v Canada (Citizenship and Immigration)*, 2012 FC 275, at para 15, in which Justice Zinn stated that there is no jurisprudence holding that section 96 protection is not available to forcible recruitment of children by armed groups in Colombia. I do not see the Decision denying the Applicant's claim on that basis. Rather, the Applicant's claim was rejected due to insufficient evidence.

[26] Additionally, the Applicant argues that the RPD failed to see the persecution from the perspective of the persecutor, citing a Federal Court statement that "the crucial test …should not be whether the Board considers that the Applicant engaged in political activities, but whether the ruling government of the country from which he claims to be a refugee considers his conduct to have been styled as political activity": *Orellana v Canada (Minister of Employment and Immigration)*, [1979] FCJ No 607, at para 16; see also *Oyarzo v Canada (Minister of Employment & Immigration)* [1982] 2 F.C. 779. The Applicant also cites the Supreme Court's decision in *Canada (Attorney General) v Ward*, 1993 CanLII 105 (SCC) [*Ward*], which explains that a political opinion is "any opinion on any matter in which the machinery of state, government, and policy may be engaged", meaning that "it is possible that a claimant may be seen as a threat by a group unrelated, and perhaps even opposed, to the government because of his or her political viewpoint, perceived or real."

[27] The problem with this argument, as the Respondent submits, is that there was insufficient evidence before the RPD that the "machinery of state, government and policy" was engaged, as per *Ward*.

[28] The Applicant also argues that the RPD has ignored evidence regarding the ties between armed groups and the government of Columbia and as such, it failed to properly grapple with the element of vengeance in this case, while unreasonably dismissing it as speculative and of a general nature. However, as the Respondent notes, the RPD did consider the issue of vengeance, albeit not in a fulsome manner.

[29] Despite the able submissions of counsel for the Applicant, I must agree with the Respondent that, based on the evidence before it, the RPD reasonably concluded that the Applicant has failed to failed to establish a political profile that would put him at risk.

[30] Based on the above, I find the RDP's finding that there is no nexus to section 96 is reasonable.

Issue 2: Internal Flight Alternative

[31] The RPD proposed the city of Tunja as an IFA, meaning that the Applicant had an onus to establish that the IFA was not viable (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, 1993 CanLII 3011 (FCA), [1994] 1 FC 589; see also *Khan v Canada (Citizenship and Immigration)*, 2020 FC 1101, at paras 9-10 [*Khan*]).

[32] The well-established test for IFA has recently been articulated by Justice McHaffie in *Khan* at paragraph 10, as follows:

> In assessing whether there is a viable IFA, the decision maker must be satisfied, on a balance of probabilities, that (1) the claimant will not be subject to persecution (on a "serious possibility" standard),

> or a danger or risk described in section 97 (on a "more likely than not" standard) in the proposed IFA; and (2) in all the circumstances, including circumstances particular to the claimant, conditions in the IFA are such that it would not be unreasonable for the claimant to seek refuge there.

[33] The RPD found that both prongs of the test were satisfied. While the Applicant testified that anywhere in Colombia would be unsafe for him, the RPD found that the objective evidence outweighed his testimony, with respect to both the means and the motivation of Los Rastrojos to find him.

[34] The Applicant argues that the RPD failed to consider his particular circumstances, citing *Ratnam v Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 516 for the well-established principle that an IFA analysis must consider the claimant's particular circumstances and not only general country conditions.

(a) *Means: Los Rastrojos' ability to locate the Applicant in Tunja*

[35] The Applicant argues that the RPD failed to consider his unique profile as a rugby coach, which would make him easy to identify as there are few rugby players in Columbia and tournament schedules are posted online. While the RPD noted these factors, it concluded that his answers to questions on whether he could relocate "failed to directly reference Tunja and were more of a general nature and therefore speculative in the face of the objective documentation."

[36] On the issue of IFA, I find the RPD had regard both to the Applicant's circumstances as well as the NDP documents with regard to Los Rastrojos. With respect to the Applicant's circumstances, the RPD noted as follows:

> I asked the claimant if he thought he would be safe from LR in Tunja, to which he responded he didn't know, but that he thinks it would be possible for them to find him there. The claimant testified that it would be very easy for the LR to go to rugby tournaments and find him as a coach or a referee, because rugby is not that popular in Columbia and that schedules and events are often posted online or through social media. When asked if he thought that they were searching for him throughout the country, the claimant testified that they would be looking for him in his own city, but doesn't know if they would be looking for him across the country…

[37] The RPD then turned to the objective documentation, which lists Cali, Jamundi, and Buenaventura as areas of Los Rastrojos influence, but not Tunja. The RPD also relied on NDP evidence that Los Rastrojos was "less significant than in previous years" and they "continue on a track to disappear."

[38] The Applicant argues that the RPD ignored other contradicting evidence, which states that Los Rastrojos has the ability to interfere with authorities on a national level. The NDP also describes Los Rastrojos as having "an unmatched ability to adapt, expand and contract, which makes it easier for them to resurface in other parts of the country." The fact that the RPD made no effort to reference or reconcile the contradictory evidence about Los Rastrojos' capacity found within the same NDP documents, the Applicant argues, rendered the Decision unreasonable: *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC).

[39] Reading the Decision as a whole, I disagree with the Applicant's submission that the RPD did not make any effort to reconcile the contradictory evidence. The RPD specifically referred to the "strategic alliance" that Los Rastrojos had formed with another armed group, ELN, which has influence in Boyaca department (where Tunja is located). However, as this alliance was only for the purposes of transporting drugs, the RPD concluded that Los Rastrojos has no influence in Tunja.

[40] I reject the Applicant's submission that the fact that there is one purpose for the strategic alliance (i.e. transporting drugs) does not mean there are no other lines of alliances that may give Los Rastrojos the capacity to operate in Tunja. While that may well be the case, the RPD cannot be faulted for not considering the "full aspect" of these alliances without the evidentiary foundation to do so. Similarly, while it may be true that the situation is changing in Columbia, and that there may be "shifting details" of the country that would impact on the Applicant's risks, once again, I am limited to reviewing the Decision based on the record before the RPD and, in so doing, I cannot find any basis to disturb its finding on a reasonableness standard. I find the RPD's conclusion is justified in light of the law and the facts of the case.

(b) *Motivation: Los Rastrojos' desire to pursue the Applicant in Tunja*

[41] The RPD found that while the Applicant would be useful to Los Rastrojos, the group could instead approach his players directly, meaning that he was unnecessary to their recruitment efforts and they would not be motivated to find him in Tunja. The Applicant submits that this ignores the fact that Los Rastrojos could have also approached players directly when the Applicant first refused to help them, instead of continuing to pursue him and contacting his

grandmother. Further, the Applicant submits that the RPD ignored his fear that Los Rastrojos would be motivated to pursue him because he had denounced the group to the police. He submits that there was ample evidence on record to show that those who denounce armed groups to the police often face reprisals.

[42] While the RDP did not address these facts directly, I agree with the Respondent that the RPD's decision was nonetheless reasonable because it did review the objective evidence to find that Los Rastrojos did not have a presence in Tunja.

[43] The Applicant did not challenge the RDP's finding with respect to the second prong of the IFA test. Given my conclusions above, I do not find it necessary to address this issue.

VI. **Certification**

[44] Counsel for both parties were asked if there were questions requiring certification. They each stated that there were no questions arising for certification and I concur.

VII. **Conclusion**

[45] The application for judicial review is dismissed.

JUDGMENT in IMM-5666-19

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question to certify.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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