Federal Court  Cour fédérale

Date: 20220323

Docket: IMM-3750-21

Citation: 2022 FC 386

Ottawa, Ontario, March 23, 2022

PRESENT: Mr. Justice Gascon

BETWEEN:

EDISON GONZALEZ VALENCIA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Mr. Edison Gonzalez Valencia, is a citizen of Colombia. He is seeking judicial review of a decision rendered on May 19, 2021 [Decision] by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada. The RPD dismissed Mr. Valencia's claim for protection, finding that he was not a Convention refugee nor a person in

need of protection pursuant to section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] since a viable internal flight alternative [IFA] existed for him in Barranquilla, Colombia.

[2] Mr. Valencia asks this Court to quash the Decision and to return it to the RPD for redetermination by a differently constituted panel. Mr. Valencia claims that the RPD ignored critical objective evidence before it and erred in its analysis and application of the first prong of the viable IFA test.

[3] The only issue to be determined is whether the RPD's Decision is reasonable. For the following reasons, I will grant Mr. Valencia's application for judicial review. I am not persuaded that the RPD's reasons for concluding that Mr. Valencia faces no serious possibility of being persecuted in Barranquilla have the qualities that make its reasoning logical and consistent in relation to the relevant legal and factual constraints. More specifically, the RPD's conclusion about the absence of current country condition evidence on the presence or influence of the Ejército de Liberación Nacional [ELN] in the proposed IFA finds no support in the evidence. In the circumstances, this is sufficient to warrant the Court's intervention.

II. Background

A. *The factual context*

[4] Mr. Valencia was born on May 12, 1972 in Cali, Colombia. He worked as a taxi and private driver in different Colombian cities throughout his life.

[5] Mr. Valencia alleges that he fears members of the ELN, the last remaining Marxist insurgent paramilitary group operating in Colombia. The group is involved in numerous illegal activities, such as narcotics trafficking, terrorism, extortion and kidnapping. Mr. Valencia says he is particularly fearful of a man known under the alias of "El Gordo," a former member of the now-demobilized Revolutionary Armed Forces of Colombia [FARC] who has since joined the ELN.

[6] On November 23, 2006, Mr. Valencia's taxi car was stolen at gunpoint by five alleged FARC members. El Gordo called Mr. Valencia 30 minutes after the event to explain that the theft was a retaliation for an outstanding debt he owed to the paramilitary group. Mr. Valencia filed a complaint to the police the following day. In mid-December 2006, he received a phone call from El Gordo, who told him that one FARC member was arrested as a result of the complaint, and that he would face consequences if he did not have it withdrawn.

[7] Ten months after these events, in September 2007, Mr. Valencia was once again contacted by El Gordo and ordered to repay a debt owed to the FARC. Mr. Valencia says he ignored the demand, changed his mobile phone number, and moved from Bogotá to Cali. Mr. Valencia eventually move back to Bogotá in July 2014.

[8] On July 17, 2014, Mr. Valencia directly witnessed the murder of his employer, Fernando Alberto Garcia Peña, an engineer who had hired Mr. Valencia as a private driver. Mr. Valencia was interrogated by the police regarding this event, and he told the victim's sisters as well as two

colleagues that he believed the ELN was behind the assassination. The investigation stayed dormant for three years. In July 2015, Mr. Valencia relocated to the town of Jamundí, Colombia.

[9] On July 27, 2017, the police informed Mr. Valencia they had a renewed interest in the murder of Mr. Peña, and informed him he would need to make a new statement. On August 1, 2017, Mr. Valencia was contacted and threatened by El Gordo, who warned him not to make a witness statement against any member of the ELN. Mr. Valencia filed a complaint to the police following this event.

[10] In March 2018, ELN members unsuccessfully tried to gain access to Mr. Valencia's residence. ELN members subsequently started to send him threatening text messages and phone calls.

[11] Fearing for his life, Mr. Valencia temporally relocated to Cali at a friend's house before departing Colombia for the United States in June 2018. On September 19, 2018, Mr. Valencia subsequently crossed the land border into Canada at the Fort Erie port of entry, and filed a claim for refugee protection on the same day. Mr. Valencia alleges that his family in Colombia has received numerous threats since he departed the country.

B. *The RPD Decision*

[12] The RPD began the Decision by mentioning that the determinative issue in Mr. Valencia's case was whether a viable IFA existed in Colombia, and proceeded with the application of the well-accepted two-pronged test developed in *Rasaratnam v Canada (Minister*

of Employment and Immigration), [1992] 1 FC 706 (FCA) [*Rasaratnam*]. The first prong consists of ensuring that there is no serious possibility, on a balance of probabilities, of the claimant being persecuted in the proposed IFA. The second prong requires that the conditions in the proposed IFA be such that it would not be unreasonable, upon consideration of all the circumstances, including the claimant's personal circumstances, for the claimant to seek refuge there. In this case, the RPD said that a valid IFA existed for Mr. Valencia in the city of Barranquilla, located in Colombia's Atlántico Department, some 1,000 kilometres from both Bogotá and Cali.

[13] In its analysis of the first prong of the test, the RPD reviewed the profile of Mr. Valencia as a claimant, the profile of the ELN as an organized criminal group operating in Colombia, as well as the profile of the city of Barranquilla. The RPD also considered the episodes of threat and harassment alleged by Mr. Valencia. The RPD noted that El Gordo had no contact with Mr. Valencia during a prolonged period, and that this could be indicative of a lack of motivation, resources or ability to persecute Mr. Valencia. Additionally, the RPD determined that if ELN members were indeed able to locate Mr. Valencia in March 2018, this constituted an isolated event when taking into account the number of years that had elapsed without incident. The RPD pointed out that Mr. Valencia himself indicated that his address was discovered only after a denunciation was filed to the authorities following El Gordo's phone threat.

[14] With respect to the profile of ELN, the RPD considered two post-hearing articles filed by Mr. Valencia as well as the country condition documents contained in the National Documentation Package for Colombia [NDP]. The RPD noted that both articles referred to

events that occurred three years ago and that they were inconclusive on the link with the ELN. The RPD further observed that the more recent NDP evidence on the record did not support Mr. Valencia's testimony that members of the ELN had established a network in the city of Barranquilla or in the Atlántico Department. The RPD recognized that some country condition documents mentioned past ELN activity in Barranquilla, but found that no evidence supported the submission that the ELN currently had a presence or influence in the proposed IFA.

[15] The RPD also looked at the location of the proposed IFA, noting that Barranquilla was geographically located in Colombia's northeast on the Atlantic coast, some 940 kilometres from Bogotá and more than 1,100 kilometres from the city of Cali. Moreover, the RPD found insufficient the evidence regarding the reach and willingness of the ELN to target Mr. Valencia in Barranquilla.

[16] Based on these considerations, the RPD concluded that there was no serious possibility that Mr. Valencia would face persecution in the proposed IFA.

[17] In its analysis of the second prong of the test – namely, the reasonableness of the proposed IFA –, the RPD noted that Barranquilla is one of Colombia's largest cities, that it has a widely varied economy, and that Mr. Valencia's level of education would allow him to find employment in the proposed IFA. After noting that Mr. Valencia speaks Spanish, that he identifies as being a Colombian of Catholic faith, and that he has not established that he faces serious social, economic or other barriers in the city of Barranquilla, the RPD concluded that it would be reasonable for Mr. Valencia to relocate to the proposed IFA.

[18] The RPD determined that both prongs of the test were satisfied on a balance of probabilities, and that Mr. Valencia could thus not be considered as a Convention refugee or a person in need of protection pursuant to section 96 or 97 of the IRPA.

C. *The standard of review*

[19] The parties agree that the presumptive standard of reasonableness applies to the review of the merits of this case and to the RPD's findings regarding the existence of a viable IFA (*Adeleye v Canada (Citizenship and Immigration)*, 2022 FC 81 at para 14; *Ambroise v Canada (Citizenship and Immigration*), 2021 FC 62 [*Ambroise*] at para 6; *Singh v Canada (Citizenship and Immigration)*, 2020 FC 350 [*Singh*] at para 17; *Kaisar v Canada (Citizenship and Immigration)*, 2017 FC 789 at para 11). This is confirmed by the Supreme Court of Canada's landmark decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], where the court established a presumption that the standard of reasonableness is the applicable standard in all judicial reviews of the merits of administrative decisions. None of the situations allowing a reviewing court to depart from that presumption apply in this case (*Vavilov* at para 17).

[20] 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 to determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). The reviewing court must therefore ask whether the "decision bears the hallmarks of reasonableness—justification, transparency and intelligibility" (*Vavilov* at para 99). Both the

outcome of the decision and its reasoning process must be considered in assessing whether these hallmarks are borne (*Vavilov* at paras 15, 95, 136).

[21] Such a review must include a rigorous evaluation of administrative decisions. However, as part of its analysis of the reasonableness of a decision, the reviewing court must begin its inquiry by examining the reasons provided with "respectful attention," and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion (*Vavilov* at para 84). The reviewing court must adopt an attitude of restraint and intervene "only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13). Before setting aside a decision on the basis that it is unreasonable, 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).

III. Analysis

[22] Mr. Valencia claims that the RPD ignored critical evidence in its analysis of the first prong of the *Rasaratnam* test. He submits that the RPD made an unreasonable factual conclusion in finding that the ELN did not operate in Barranquilla, and contends that the proposed IFA was in fact inadequate. He maintains that this RPD's finding amounts to a lack of transparency and intelligibility, which are the necessary characteristics of reasonable decisions under the *Vavilov* framework (*Vavilov* at para 99). Mr. Valencia argues that the objective country evidence submitted in support of his claim for protection (most particularly, the Documents 4.4 and 7.23 contained in the NDP) clearly establishes that the ELN operates in the proposed IFA and that the

different factions of the ELN are in constant dialogue with one another, meaning they are capable of monitoring targets across Colombia. The Minister responds that the RPD reasonably determined there was insufficient evidence showing that the ELN would have the ability and/or willingness to target Mr. Valencia in Barranquilla.

[23] With respect, I am not convinced by the Minister's arguments. I instead find that the RPD's conclusion about the absence of current country condition evidence on the presence or influence of the ELN in the proposed IFA has no support in the evidence. This is sufficient to render unreasonable its finding on the absence of a serious possibility that Mr. Valencia would face persecution should he relocate in Barranquilla, and its general conclusion on the existence of a viable IFA.

[24] In his submissions, the Minister correctly noted that the concept of a viable IFA is inherent to a claim under section 96 or 97 of the IRPA, in the sense that a claimant must, when possible, seek safety in a region of their country of origin before seeking protection in Canada. International protection is a measure of last resort and can only be offered to refugee protection claimants in cases where the country of origin is unable to provide adequate protection everywhere within their territory (*Singh* at para 26). In Canadian immigration and refugee law, a claimant must flee from a country, not from some subdivision or region of that country (*Thirunavukkarasu v Canada (Minister of Employment and Immigration*), [1994] 1 FC 589 (FCA) [*Thirunavukkarasu*] at pp 592–593; *Ambroise* at paras 11–12). Once an administrative decision maker proposes an IFA, the onus lies on the claimant to establish that the proposition is inadequate (*Thirunavukkarasu* at p 595; *Salaudeen v Canada (Citizenship and Immigration),*

2022 FC 39 at para 26; *Manzoor-Ul-Haq v Canada (Citizenship and Immigration)*, 2020 FC 1077 at para 24).

[25] It is also a well-settled principle that administrative decision makers are presumed to have weighed and considered all the evidence before them unless proven otherwise (*Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at para 36; *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA) at para 1). In the same vein, a failure to mention a particular piece of evidence does not mean that it was ignored (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16), and a failure to analyze evidence that runs contrary to the tribunal's decision does not necessarily make it unreasonable (*Aghaalikhani v Canada (Citizenship and Immigration)*, 2019 FC 1080 at para 24; *Khir v Canada (Citizenship and Immigration)*, 2021 FC 160 [*Khir*] at para 48).

[26] However, when an administrative decision maker does not properly deal with evidence squarely contradicting its findings of fact, the Court may intervene and infer that the decision maker overlooked the contradictory evidence when reaching its conclusion (*Ozdemir v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 331 at paras 9–10; *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 (QL) at para 17). The failure to consider specific evidence must be viewed in context and may sometimes be sufficient to overturn a decision, but it is only the case when the evidence is critical and contradicts the decision maker's conclusion, and where the reviewing court determines that its omission means

that the tribunal disregarded the material before it (*Khir* at para 48; *Torrance v Canada (Attorney General)*, 2020 FC 634 at para 58).

[27] The case law indeed recognizes that a finding for which there is no evidence before the decision maker will be set aside on judicial review because such a finding is made without regard to the material before it (*Canadian Union of Postal Workers v Healy*, 2003 FCA 380 at para 25). Such findings for which there is no evidence before the tribunal run afoul of paragraph 18.1(4)(d) of the *Federal Courts Act*, RSC 1985, c F-7 (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at paras 34–40). This is the situation here.

[28] In its Decision, the RPD referred specifically to NDP Documents 4.4 and 7.23 singled out by Mr. Valencia in his argument before this Court. There is therefore no doubt that the RPD effectively reviewed and considered this piece of evidence in its analysis. Moreover, the RPD mentioned it had considered "the totality of the evidence," including older and more recent country condition evidence submitted by Mr. Valencia in support of his claim. The NDP Documents 4.4 and 7.23, which are respectively dated from July 2019 and April 2018, expressly establish that the ELN operates and has a presence through a cell in Barranquilla, and that the ELN are most concentrated in northeastern Colombia, where the proposed IFA is located. While the RPD indicates in its reasons that "no current country condition evidence supports a conclusion that the [ELN], commanders, members or allies have presence or influence in Atlántico Department, or in the city of Barranquilla specifically" (Decision at para 30), it does not refer to any evidence in that respect. A review of the record confirms that no such evidence was before the RPD.

[29] At the hearing before this Court, counsel for the Minister identified some more recent NDP documents dealing notably with the human rights situation in Colombia, and mentioned that these documents did not include clear information about the presence of the ELN in Barranquilla. The Minister submits that the absence of a specific mention about the ELN's presence in the proposed IFA in these more recent NDP documents supports the RPD's conclusion, and the limited risk now faced by Mr. Valencia in Barranquilla. I am not convinced by this argument. The fact that some more recent country condition documents – whose purpose was not to deal directly with political activities or organizations or with criminality – may have been silent on the ELN cannot serve to set aside the specific evidence contained in NDP documents 4.4 and 7.23, which directly contradicted the RPD's conclusions about the ELN's activities. The most recent country condition documents expressly dealing with the presence and influence of the ELN in Barranquilla were precisely those two documents identified by Mr. Valencia, and it was unreasonable for the RPD to disregard them in the circumstances, without any explanation or analysis.

[30] In *Vavilov*, the Supreme Court of Canada reminded the reviewing courts that a reasoned explanation by an administrative decision maker has two related components: adequacy, as well as logic, coherence and rationality (*Vavilov* at paras 96, 103–104). A decision maker's failure "to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it" (*Vavilov* at para 128). As the Federal Court of Appeal stated in *Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 [*Alexion*], the "critical point[s]" of a decision are shaped, in part, by "the central issues and concerns raised by the parties" (*Alexion* at para 13,

citing *Vavilov* at paras 127–128): "[i]n making its decision, the [decision maker] must ensure that a reasoned explanation is discernable on the key issues—the issues on which the case will turn and the issues of prime importance raised in the parties' submissions" [Emphasis added.] (*Alexion* at para 70). In this case, Mr. Valencia had expressly flagged the NDP Document 7.23 in his submissions to the RPD, and the question of the presence or influence of the ELN in the proposed IFA was, without a doubt, a key issue in the Decision. The RPD's failure to expressly deal with it and to explain why the explicit evidence identified by Mr. Valencia should be discarded is a serious shortcoming and a fundamental gap in its reasoning which, in this case, warrants intervention by this Court (*Vavilov* at paras 102–103, 127–128).

[31] Even if I read the Decision "holistically and contextually" and bear in mind that reviewing courts should strive to "to understand the reasoning process followed by the decision maker" in arriving at its conclusions (*Vavilov* at paras 84, 97), I am not satisfied that the RPD could reasonably find that the objective evidence before it did not demonstrate that the ELN had a presence or influence in the proposed IFA.

[32] It is true that the RPD's conclusions on the existence of an IFA are essentially factual and go to the very heart of its expertise in matters of immigration and refugee protection. It is well established that the RPD takes advantage of the specialized knowledge of its members to assess evidence relating to facts that fall within its area of expertise. In such situations, the standard of reasonableness requires the Court to show great deference to the RPD's findings. It is not the task of a reviewing court to reweigh the evidence on the record, or to reassess the RPD's findings of fact and substitute its own (*Canada (Canadian Human Rights Commission) v Canada*

(Attorney General), 2018 SCC 31 at para 55). Rather, the Court must consider the reasons as a whole, together with the record (*Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 53), and limit itself to determining whether the conclusions are irrational or arbitrary. However, in the case of Mr. Valencia, I cannot conclude that the RPD's conclusion on the proposed IFA has the attributes of a reasonable analysis, as I can find no evidence able to support its factual conclusion about the lack of ELN's presence or influence in Barranquilla.

IV. Conclusion

[33] For the reasons detailed above, Mr. Valencia's application for judicial review is allowed.

[34] There are no questions of general importance to be certified.

JUDGMENT in IMM-3750-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is allowed, without costs.

2. The decision of the Refugee Protection Division dated May 19, 2021, rejecting the applicant's refugee protection claim, is set aside and the matter is referred back to a differently constituted panel for reconsideration based on these reasons.

3. No question of general importance is certified.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3750-21
STYLE OF CAUSE:	EDISON GONZALEZ VALENCIA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 16, 2022
JUDGMENT AND REASONS:	GASCON J.
DATED:	MARCH 23, 2022

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