Federal Court  Cour fédérale

Date: 20220412

Docket: IMM-4262-21

Citation: 2022 FC 524

Ottawa, Ontario, April 12, 2022

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

NICOLAY ECHEVERRY MARTINEZ and IRIDIANA VARGAS ZARATE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, citizens of Colombia, seek judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board, dated June 7, 2021, in which the RAD confirmed the decision of the Refugee Protection Division [RPD] that Nicolay Echeverry Martinez [the Principal Applicant] and Iridiana Vargas Zarate [the Associate Applicant] are not *Convention* refugees or persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The Applicants alleged that they were personally targeted and had their lives threatened by a criminal organization called “Clan del Golfo” [agent of persecution] due to the Principal Applicant’s refusal to engage in illegal activities for the agent of persecution at his job at an airport in Cartagena. Following the threats, the Principal Applicant stopped going to work, the Applicants left their home to stay with relatives and within weeks of the threats being made, the Applicants left Colombia and came to Canada, via the United States.

[3] The RPD found the Applicants to be credible witnesses and that the events described by the Applicants in their basis of claim form and accompanying narrative occurred as alleged. However, the RPD denied their claim on the basis of a viable internal flight alternative [IFA] in Tunja.

[4] In considering whether the agent of persecution would be interested in finding and hurting the Applicants in Tunja, the RPD found that the reason that the agent of persecution wanted the Principal Applicant to collude with them was to use his security clearance and knowledge of the airport to help the agent of persecution smuggle narcotics. The RPD concluded:

> In conjunction with the [Applicants] relatively low profile, the 15+ people that the Gulf Clan could approach at the airport instead of the [Principal Applicant] and that the [Applicants] didn’t report the incidents to the police, I find that the [Applicants] are not of such a profile that the Gulf Clanwould expend resources to try and find the [Applicants] throughout Columbia.
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> Further bolstering these findings, is the [Applicants]’ testimony that none of their family members had been approached by the Gulf Clam (or anyone) seeking their whereabouts in the one year and five months (at the time of the hearing) since they left the country. There are also several support letters from the [Principal Applicants]’s cousin (who the [Applicants] stayed within in Cali for two weeks or so), father, neighbours and the [Associate Applicant]’s cousin which make no reference to having been approached by anyone about the

> [Applicants]' whereabouts. As noted, at their hearing, the [Applicants] confirmed that no one had approached family members about their whereabouts. As such, I find on a balance of probabilities that the Gulf Clanhas not expended resources to approach the most obvious individuals (family members) who might know where the claimants had gone. As a result, I find, on a balance of probabilities, that the Gulf Clan has not shown an ongoing interest in tracking down the [Applicants].

[5] The balance of the RPD's determinations in relation to the IFA are not at issue on this application.

[6] The Applicants appealed the RPD's decision to the RAD, arguing, among other things, that the RPD erred in its determination that the lack of contact with the Applicants' family was demonstrative of the agent of persecution's lack of interest in the Applicants.

[7] Before the RAD, the Applicants submitted new evidence, which included a letter from Adriaan Alsema, the Editor in Chief of Colombia Reports [Colombia Reports Letter]. Colombia Reports has generally been acknowledged by the IRB as a credible source of evidence, as the most recent national documentation package for Colombia contains five Colombia Reports publications.

[8] In the Colombia Reports Letter, Mr. Alsema provided information on the *modus operandi* and resources of the agent of persecution. In particular, he stated that the agent of prosecution is not embedded in the local community and has neither the means nor the motivation to pursue extended family members of a victim. Rather, the agent of persecution relies on government databases (like Colombia's National Registry database) to locate their victims. By relying on such databases, the agent of persecution has no information on the identity or whereabouts of family

members and does not need such information, as the databases provide sufficient information to locate the victim.

[9] The RAD accepted the Colombia Reports Letter into evidence and found that this new evidence regarding the *modus operandi* and use of the National Registry database was credible and relevant to the future risk faced by the Applicants. While the RAD found that Mr. Alsema's expertise did not extend to Canadian refugee law and thus disregarded part of his letter, the RAD relied on other portions of his letter, citing it repeatedly in its analysis of whether the agent of persecution would have the means to locate the Applicants in Tunja.

[10] The RAD upheld the decision of the RPD, finding that while the agent of persecution had the means to locate the Applicants in Tunja, the agent of persecution would not be motivated to do so. The RAD concluded that, having considered the totality of the evidence, the Applicants had not discharged their burden of proof to establish, on a balance of probabilities, that there is a serious possibility of being persecuted in Tunja or that they would be personally subject to a risk to life or cruel and unusual punishment or treatment or danger of torture in Tunja.

Analysis

[11] The determination of the RAD regarding an IFA analysis is reviewable on the standard of reasonableness [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65; *Iyere v Canada (Minister of Citizenship and Immigration)*, 2018 FC 67 at para 16].

[12] When the reasonableness standard applies, the burden is on the party challenging the decision to show that it is unreasonable. A court conducting a reasonableness review scrutinizes the decision-maker's decision in search of the hallmarks of reasonableness – justification, transparency, and intelligibility – to determine whether it is justified in relation to the relevant factual and legal constraints. Both the outcome and the reasoning process must be reasonable [see *Vavilov, supra* at paras 83, 99, 100].

[13] The two-prong IFA test was described by Justice McHaffie in *Olusola v Canada (Citizenship and Immigration)*, 2020 FC 799 at paras 8-9 as follows:

> [8] To determine if a viable IFA exists, the RAD 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 section 97 danger or risk (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: *Thirunavukkarasu* at pp 595–597; *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at paras 10–12.
>
> [9] Both of these "prongs" of the test must be satisfied to conclude that a refugee claimant has a viable IFA. The threshold on the second prong of the IFA test is a high one. There must be "actual and concrete evidence" of conditions that would jeopardize the applicants' lives and safety in travelling or temporarily relocating to a safe area: *Ranganathan v. Canada (Minister of Citizenship & Immigration)*, [2001] 2 F.C. 164 (Fed. C.A.) at para 15.

[14] The sole issue raised on this application relates to the first prong of the IFA test and specifically, whether the RAD's determination that the agent of persecution was not motivated to locate the Applicants in Tunja was reasonable.

[15] The RAD held that the fact that there has been no contact with the Applicants' friends and family is indicative of the agent of persecution's interest in the Applicants and thus the Applicants' prospective risk. The RAD noted that the Federal Court has consistently found that it is reasonable to conclude that a claimant's family would be contacted by an agent of persecution if the claimant was not able to be located. While not determinative on its own, the RAD held that the lack of contact with family and friends was an indication of a lack of motivation from the agent of persecution. The RAD noted that this was "particularly the case when the cartel had the resources to find the name and occupation of [the Associate Applicant] when they were attempting to recruit [the Principal Applicant]." The RAD made no reference to the Colombia Reports Letter in making this determination.

[16] The RAD agreed with the RPD's finding that the risk to the Applicants was tied to the Principal Applicant's former job and that, as he had left that job, had not reported the incidents to the police and there were more than 15 other people who could assist the agent of persecution at the airport, the future risk to the Applicants was seriously reduced.

[17] The RAD concluded by stating "In summary, I find that, while the [agent of persecution] may have the means to find the [Applicants], they will not be motivated to do so given their lack of interest in the past two years and that their original interest in [the Principal Applicant] was tied to his former employment".

[18] The Applicants asserts that the RAD failed to engage with the Colombia Reports Letter, which clearly contradicted the RAD's inference that the lack of contact with family and friends was an indication of a lack of motivation from the agent of persecution.

[19] The Respondent asserts that the RAD did not ignore or otherwise fail to engage with the Colombia Report Letter as it was repeatedly referenced in the RAD's reasons. Moreover, the Respondent asserts that the RAD simply preferred the specific evidence before it as to how the agent of persecution worked – namely, by locating the Associate Applicant to target the Principal Applicant – as opposed to the general evidence of Mr. Alsema.

[20] I reject the Respondent's assertion, as I do not find that the Respondent's interpretation of the RAD's reasons for decision is reasonable. The RAD's reasons are silent as to its consideration of the Colombia Reports Letter, such that it cannot reasonably be inferred that it preferred one piece of evidence over another. Moreover, the Colombia Reports Letter clearly pointed to a different conclusion from that reached by the RAD regarding any inference to be drawn from the agent of persecution's failure to contact the Applicants' friends and family over the last two years. As that evidence was squarely before the RAD and expressly relied upon by the Applicants, the RAD was obligated to engage with that evidence and determine what impact (if any) it had on the RAD's decision, which the RAD failed do so [see *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC 53 at paras 16-17].

[21] The Applicants assert that the RAD's failure to engage specifically with the Columbia Reports Letter leaves a gap in the RAD's rational chain of analysis, which the Court is not

permitted to remedy post-*Vavilov*. As such, the Applicants assert that the Court must remit this matter for redetermination.

[22] The Respondent asserts that notwithstanding the RAD's error, it is evident that the lack of contact with friends and family was attributed less weight as between the two reasons underpinning the RAD's lack of motivation conclusion, given the RAD's comments that the lack of contact was "not determinative on its own". As such, the Respondent asserts that the RAD's error was immaterial to the outcome, as the lack of motivation findings can stand based on the second reason alone – namely, that the Principal Applicant no longer works at the airport.

[23] I disagree with the Respondent. The RAD based its conclusion that there was a lack of motivation to locate the Applicants based on two reasons and unlike the RPD's reasons, I find that the RAD's reasons do not provide insight as to the weight that it attributed to each reason. It is not open to the Court on judicial review to make that attribution in order to save the RAD's decision.

[24] Accordingly, I find that the RAD's decision does not contain a rational chain of analysis given its failure to engage with the Colombia Reports Letter on the issue of the agent of persecution's motivation to locate the Applicants. The application for judicial review shall therefore be granted and the matter shall be remitted to a differently-constituted panel of the RAD for redetermination.

[25] Neither party proposed a question for certification and I agree that none arises.

JUDGMENT in IMM-4262-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed, the decision of the Refugee Appeal Division dated June 7, 2021 is set aside and the matter is remitted to a differently-constituted panel of the Refugee Appeal Division for redetermination.

2. The parties proposed no question for certification and none arises.

"Mandy Aylen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4262-21
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