Federal Court  Cour fédérale

Date: 20220909

Docket: IMM-6386-20

Citation: 2022 FC 1275

Ottawa, Ontario, September 9, 2022

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

JOSE FRANCISCO AGUIRRE MEZA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision [Decision] by the Refugee Protection Division [RPD], dated November 19, 2020, dismissing the Applicant's request to reopen a refugee claim as per section 62(6) of the *Refugee Protection Division Rules*, SOR/2012-256. To succeed the Applicant must establish a failure to observe a principle of natural justice.

The RPD considered the facts of this case and determined there was no such failure. With respect, the Decision is reasonable. Therefore judicial review is dismissed.

II. Facts

[2] The Applicant is a 34-year-old citizen of Mexico. His wife and two minor daughters remain in his home country. The Applicant speaks Spanish only.

[3] The Applicant claims to have fled Mexico due to a fear of extortion, namely criminal groups linked to a famous politician. The Applicant was publicly involved in politics as the son of a politician.

[4] On May 7, 2019, the Applicant arrived at Pearson International Airport. He claimed visitor status, but was rejected on the basis of ineligibility. He requested information on refugee process. He told CBSA he was the victim of extortion in Mexico and wanted to enter Canada to work, and to bring his family. While he said his life was not in danger, he made it clear he was the victim of extortion.

[5] He was in an emotional state. On this basis, the CBSA officer initiated a refugee claim, and allowed him to enter Canada for approximately two weeks for the purpose of further examination. At one point he indicated a desire to withdraw his claim, though no official withdrawal took place.

[6] With the benefit of an interpreter, the CBSA officer told the Applicant he had to attend a CBSA office for that further examination. The Applicant was also given various documentation, including contact info for the Red Cross should he have required any assistance with his refugee application. One of the other documents was a form that confirmed the Applicant was required to report in person for further examination.

[7] A Spanish language interpreter translated the form to the Applicant which the Applicant signed and declared he understood.

[8] The Applicant provided only an email where he could be reached. His counsel confirmed the email address given worked, which the Applicant had indicated in giving reasons why he did not respond to CBSA emails, as discussed later. The Applicant failed to provide CBSA with either an address or telephone number by way of updating his contact information.

[9] As noted, the CBSA officer told the Applicant he had to attend a CBSA office for the further examination. However, the Applicant did not appear for further examination. The CBSA office emailed the Applicant in both English and Spanish instructing him to contact them and reschedule his examination. The Applicant did not respond to this email correspondence. His evidence was that while he received emails from CBSA, he was hoping the situation in Mexico would improve and feared deportation. On June 25, 2019, the CBSA tried to contact the Applicant a second time. Again, the Applicant choose not to respond for the reasons noted.

[10] No response was received from the Applicant. The CBSA, having taken a refugee claim from the Applicant, then referred the matter to the RPD.

[11] Because he did not show up for the further examination or respond to the two emails, the Applicant was unaware his claim was referred to the RPD. Consequently, the Applicant did not provide the RPD with his required Basis of Claim [BOC] form. Nor did the Applicant attend a special RPD hearing on June 13, 2019, to provide any reason why his claim should not be declared abandoned. The claim was subsequently ruled abandoned.

[12] Due to his failure to note additional contact information on file, the RPD's Notice of Decision was not initially sent to the Applicant.

[13] The Applicant retained counsel in October 2019 but did nothing for five months after his initial contact with CBSA. He later learned the RPD had declared his claim abandoned.

[14] In October 2019, the Applicant sent refugee claim forms to CBSA. The Applicant reported every two weeks as required by CBSA. The Applicant asked that his claim be referred to the RPD, but was not successful. In 2020, the Applicant first learned of his abandoned claim. That same day, the Applicant applied to reopen his claim.

III. Decision under review

[15] On November 19, 2020, the RPD denied the Applicant's application to reopen his claim. The RPD found no failure on the part of the CBSA or RPD officials to observe a principle of

natural justice. In the RPD's view, the Applicant's refugee claim being denied was the result "of a chains of events which the claimant himself set in motion."

A. *Notice of the Hearing*

[16] The RPD first points out that once a claim is referred to the tribunal, a completed BOC must be received within legislated timelines. The RPD acknowledged the Applicant's not understanding regarding the submission of this BOC and need to attend his special hearing given he did not know the status of his application., However, in the RPD's view, "the claimant's ignorance in this respect is a result of his own actions." The RPD notes claimants have the right to be notified of their hearing date and to be present at the hearing, but similarly share the responsibility of providing authorities with the information necessary to receive notice. In the RPD's view, the Applicant is the one who "unavoidably prevents the tribunal from providing notice to the claimant."

B. *Fear of Deportation*

[17] The RPD found that the Applicant's decision not to attend his further examination despite agreeing in writing to do so weighs against allowing the reopening of his examination. The Applicant claimed he did not attend out of a fear of deportation. In the RPD's view, his asserted fear is "inconsistent with this failure to appear for further examination." The RPD suggested that not appearing for his examination, knowingly violating the immigration conditions he signed and remaining in Canada without any valid status, could have increased the likelihood of his deportation. This factor in combination with the Applicant's lack of significant action to follow-

up on his claim or contact the CBSA or Red Cross, weighed against allowing the reopening of the application.

C. *Applicant's intention to proceed*

[18] The RPD notes that after being refused entry as a visitor and making a refugee claim, the Applicant indicated a desire to visit his family in Mexico. The RPD said the Applicant later stated he "was not in danger" back home and wanted to withdraw his claim. I note the record shows he said his "*life* was not in danger", but that he feared extortion. The Applicant's failure to attend further examination followed. The Applicant then chose to "remain essentially 'underground' in Canada for several months while having no valid immigration status." In the RPD's view, taking these factors together, the Applicant's actions are not consistent with an intention to proceed with his refugee claim.

[19] The RPD found that reopening the claim would effectively allow individuals to bypass elements of normal immigration processing, remain in Canada for an indeterminate period of their own choosing, and then undo any abandoned processes they had previously initiated. In the RPD's view, this concern "would be inconsistent with maintaining the integrity of the Canadian refugee protection system." As will be seen, I agree with this assessment.

IV. Issues

[20] The only issue is whether the Decision is reasonable.

V. Standard of Review

[21] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Vavilov*, the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] 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). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must 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*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).
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> [Emphasis added]

[22] Furthermore, *Vavilov* makes it abundantly clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
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> [Emphasis added]

[23] Furthermore, in this Court's decision of *Martinez Giron v. Canada (Citizenship and Immigration)*, 2013 FC 7, Justice Kane enunciated the deference owed to RPD decision makers:

> [14] With respect to the Board's analysis of credibility and plausibility, given its role as trier of fact, the Board's findings warrant significant deference: *Lin v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1052, [2008] FCJ No 1329 at para 13; *Fatih v Canada (Minister of Citizenship and Immigration)*, 2012 FC 857, [2012] FCJ No 924 at para 65.
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> [15] This does not mean, however, that the Board's decisions are immune from review where intervention is warranted. In *Njeri v Canada (Minister of Citizenship and Immigration)*, 2009 FC 291, [2009] FCJ No 350 Justice Phelan stated:
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> > [11] On credibility findings, I have noted the reluctance that this Court has, and should have, to overturn such findings except in the clearest case of error *(Revolorio v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1404). The deference owed acknowledges both the contextual circumstances and legislative intent, as well as the

> unique position that a trier of fact has to assess testimonial evidence. That deference is influenced by the basis upon which credibility is found. The standard is reasonableness subject to a significant measure of deference to the Immigration and Refugee Board.
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> [12] However, deference is not a blank cheque. There must be reasoned reasons leading to a justifiable finding. With considerable reluctance, I have concluded that this decision does not meet this standard of review.

VI. Applicable Sections of Law

[24] Section 62(6) of the *Refugee Protection Division Rules* reads:

Reopening A Claim or Application	**Réouverture d'une demande**
Factor	**Élément à considérer**
62(6) The Division must not allow the application unless it is established that there was a failure to observe a principle of natural justice.	**62(6)** La Section ne peut accueillir la demande que si un manquement à un principe de justice naturelle est établi.

VII. Analysis

A. *Notice of Hearing*

[25] The Applicant submits that the RPD erred by not telling the Applicant about the referral of his claim to the RPD, thus breaching the principles of natural justice. The Applicant submits that the failure to attend a scheduled CBSA interview or provide his address in a timely fashion should have been excused by the Applicant's personal circumstances, namely his emotional state

and the barriers posed by language and culture. The Applicant acknowledges that the CBSA communicated to the Applicant via email, but notes it never informed the Applicant of his claim referral.

[26] The Respondent submits that there is no breach of procedural fairness where the opportunity to be heard was lost due to a failure to properly advise the RPD of contact details. In this regard, the Respondent points to this Court's decision in *Mendoza Garcia v Canada (Citizenship and Immigration)*, 2011 FC 924, which states:

> [8] On January 22, 2009, the IRB sent a new notice to appear to Mr. Mendoza Garcia, notifying him that his hearing was scheduled for February 6, 2009. Again, the IRB sent the notice to Sherbrooke Street West, with a copy to Mr. Brodeur. The applicant did not attend the hearing.
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> […]
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> [14] While it is true that natural justice requires that every person is given the opportunity to make his or her case, especially when a person fears for his or her life, it is nonetheless important for applicants to pay particular attention to their personal affairs. It was entirely reasonable for the member to determine that the applicant had not informed the IRB of his change of address: this conclusion is further reinforced by the fact that the applicant's counsel at the time asked to be removed from the applicant's file because he was unable to reach or contact his client, Mr. Mendoza Garcia. *Matondo v Canada (Minister of Citizenship and Immigration), 2005 FC 416*, provides a good example of the steps applicants must take to keep abreast of the progress of their applications.
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> [15] It is important to keep in mind that Mr. Mendoza Garcia is the author of his own misfortune, and that despite the outcome of this application for judicial review, he is still entitled to a pre-removal risk assessment.

[27] The Respondent further cites to *Gurgus v Canada (Citizenship and Immigration)*, 2014 FC 9 at paras 7–11, 23–26, and *Perez v. Canada (Citizenship and Immigration)*, 2020 FC 1171 at para 23, for this proposition. The Respondent submits that relief should be granted with particular regard to the specific facts of each case, but "at some point a claimant will be considered the author of his own misfortune." The Respondent notes Justice McHaffie's decision in *Perez*:

> [26] What is clear from the foregoing cases is that a failure to comply with procedural obligations does not automatically disqualify a claimant from relief on fairness grounds, but at some point a claimant will be considered the author of their own misfortune. The line between these two, and thus the assessment of procedural fairness, will be heavily dependent on the overall factual matrix and the conduct of the claimant.

[28] The Respondent submits that the Applicant's case does not merit relief given that he acknowledged staying "underground" since his arrival and his claim was already considered abandoned once he retained counsel.

[29] In my respectful view, the Applicant's submissions have no merit. His submissions fail to acknowledge he had both written and verbal notice of the further examination before CBSA. He is unable to rely on language issues because his instructions to attend were given both in writing and verbally through the translator. His submissions fail to align with the facts in this respect. He provided written and verbal confirmation that he understood the need to attend before the CBSA at the time and place stated. In my respectful view, the decision not to attend was both deliberate and intentional – his evidence was that he knew of the meeting but chose not to attend because he hoped the situation in Mexico would improve and feared deportation. As noted, he knew of the emails sent to him by CBSA but chose to ignore them for the same reasons.

[30] With respect, I am unable to see any reasonable case for finding a breach of procedural unfairness in these circumstances. As the RPD reasonably concluded, there was no failure to observe a principle of natural justice. In my view on this record and given constraining law, it was open to the RPD to find that the Applicant "was essentially the author of his own misfortune." The Applicant had ample opportunity to receive notice of the hearing: he simply did not take the steps required to do so. The Applicant was also allowed the opportunity to speak to a Spanish interpreter before signing and declaring his understanding of the Entry for Further Examination or Admissibility Hearing form. Given this, I would not consider language or misunderstanding to be a significant barrier to the Applicant's effective participation in the refugee determination process.

[31] As noted above, this Court is not entitled to reweigh or reassess the factual findings made by the RPD except in exceptional circumstances, none of which were referred to or established before this Court.

[32] As noted above, the Applicant also argued the RPD's decision was unreasonable because the tribunal misapprehended the Port of Entry [POE] notes indicating that the Applicant was "not in danger back home." Rather, the Applicant points out, it was indicated that his "life" was not in danger. [Emphasis added] It is possible, in the Applicant's view, to be in danger while still alive. Extortion then remained a potentially valid ground for a refugee claim.

[33] The Applicant further submits that the Applicant's attempt to withdraw his refugee application should not be indicative of a lack of subjective fear given his familial obligations in

Mexico and his "consumed state of mind." In this regard, the Applicant cites this Court's decision in *Ribeiro v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1363, which states:

> [11] I have considered the submissions of counsel for the Minister that, in substance, the Board found that Mr. Ribeiro had no subjective fear because he continued to put himself at risk by returning to help his mother. There are, I believe, three answers to the submission. First, the Board made no finding that Mr. Ribeiro's testimony was not credible with respect to the matters set out above. As the Federal Court of Appeal noted in *Shanmugarajah v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 583, at paragraph 3 "it is almost always foolhardy for a Board in a refugee case, where there is no general issue is to credibility, to make the assertion that the claimants had no subjective element in their fear". Second, bounds of family loyalty may lead a person to engage in dangerous conduct that otherwise could be viewed as conduct inconsistent with a lack of subjective fear. See, for example, *Mohammadi v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1028 at paragraphs 14 and 15. Third, on the basis of the evidence the RPD accepted, for Mr. Ribeiro to have no well-founded fear of persecution in Brazil he would have to avoid travelling out of Sao Paulo or Rio de Janeiro in order to avoid conflict with his father while assisting his mother. Just as the Convention does not require a claimant to return to his country of origin and avoid political activity that might attract a risk of persecution (see, for example, *Islam v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 135 (T.D.)), I do not accept that the Convention or the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 would require a son to avoid protecting his mother in order to keep himself safe.

[34] It is clear, in the Applicant's view, that the Applicant was emotional at his POE encounter and was greatly concerned about seeing his family. Given this, the Applicant suggests age, experience, language, culture and lack of legal knowledge be taken into account in considering the POE notes.

[35] Similarly, the Applicant submits that this Court has required the RPD to be mindful of a claimant's first encounter with authority. The Applicant cites Justice Rennie's [as he then was] decision in *Cooper v. Canada (Citizenship and Immigration)*, 2012 FC 118, to aid in this proposition, which with respect I find inapplicable in this case:

> [4] Secondly, the Board's determination that the applicant lacked credibility was vague and imprecise. Prior to examining the decision in question, it is helpful to revisit some of the principles which govern the assessment of credibility:
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> […]
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> g. Similarly, in assessing statements made by refugees to immigration officials on first arrival to Canada, the trier of fact must consider that "most refugees have lived experiences in their country of origin which gives them good reason to distrust persons in authority": Professor J.C. Hathaway, The Law of Refugee Status (Toronto, Butterworths) (1991), pp 84-85, as cited by Justice Martineau in *Lubana*;

[36] I am unable to accept the Applicant's reliance on *Ribiero*. In that case the Court found "the bounds of family loyalty may lead a person to engage in dangerous conduct that could be viewed as conduct inconsistent with a lack of subjective fear (because the applicant in that case continued to put himself at risk by returning to help his mother.)" In this case, the Applicant explicitly noted that his life was not in danger and that he was coming to work and "bring his family." It seems to me this logic is inconsistent with his failure to appear for further examination given that it may actually increase his chances of deportation.

[37] In my view it was reasonable on the evidence for the RPD to have found the Applicant's subjective fear of deportation inconsistent with his intentions to remain in Canada and pursue a refugee claim.

[38] There is no evidence the Applicant had any issue understanding the conditions of his release from the airport.

B. *Applicant's intention to proceed*

[39] The Applicant submits the rejection of his claim on the basis of a lack of intention to pursue to the refugee claim is unreasonable. He says his conduct demonstrates every intention of pursuing a refugee claim, pointing specifically to his retention of counsel in October 2020 (five months after he was released at the airport), bi-weekly interviews with the CBSA thereafter, and this request to re-open once he had learned that his claim was referred and abandoned. The Applicant further submits that his unfamiliarity with the refugee process and fear of deportation, leading to his not contacting the CBSA, does not rise to the level of intending to abandon his claim. For this proposition, the Applicant cites to this Court's decision in *Huseen v. Canada (Citizenship and Immigration)*, 2015 FC 845, which states:

> [16] In my view, the door should not slam shut on all those who fail to meet ordinary procedural requirements. Such a restrictive reading would undermine Canada's commitment to its refugee system and underlying international obligations (section 3(2) of the Act). Indeed, one of the purposes of the Refugee Convention, to which Canada is a signatory, is to allow refugees the widest possible exercise of fundamental rights and freedoms (*Febles v Canada (Citizenship and Immigration)*, 2014 SCC 68, at para 27).
>
> [17] The opportunity to free a family from the scourge of persecution, the actors of which presumably caused the death of their husband and father, should not rest on an overly rigid application of procedural requirements. This is particularly where, as I shall explain, the Rules themselves allow for the flexibility to safeguard fairness.

[40] In my view there is no merit in these submissions. As the Respondent submits, the RPD reasonably found dilatoriness on the part of the Applicant, specifically noting his arrival in Canada first as a visitor, making a refugee claim and thereafter expressing a desire to return to his country and visit his family. The Respondent further notes the Applicant later indicated "he was not in danger back home and wanted to withdraw his refugee claim" and then remained "underground" for five months without status. Whether the reference was to his life was not in danger or just that generally he was not in danger (which would include a danger to life) is not material in my view.

[41] It seems to me that when taken together the Applicant's actions and inactions are not consistent with an intention to proceed with his claim. To reasonably find otherwise would require one to ignore all the formalities and discussions at the airport, which he chose to ignore, and to overlook entirely the emails he received and also chose to ignore. His answers to his failings simply establish his decisions were intentional and considered. Findings as requested by the Applicant would reasonably be seen to fall well beyond the constraining facts of this case, that is, his submissions do not reasonably accord with the constraining record.

[42] I also note Federal Court of Appeal jurisprudence which applies to this case that "maintenance of the integrity of the Canadian refugee protection system is a valid purpose to consider, and one which the system requires as a duty to be taken seriously by all concerned." See: *Azizi v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 406; allowing this claim would negatively impact the integrity of the refugee protection system in my view:

> [27] Mr. Azizi says paragraph 117(9)(d) is ultra vires because it is inconsistent with the purpose of the IRPA. I agree that a purpose of

> the IRPA is family reunification and that the best interests of children are to be considered when relevant. But the legislation has other purposes as well. Another purpose is the maintenance of the integrity of the Canadian refugee protection system. The integrity of that system is undermined by a complacent approach to misrepresentations made by applicants for admission to Canada.

[43] In my view, the RPD was reasonable in its assessment of the Applicant's intentions.

[44] The Court was advised at the hearing, without objection that the Applicant is entitled to a Pre-Removal Risk Assessment before any removal.

VIII. Conclusion

[45] In my respectful view, the Applicant has not shown that the Decision of the RPD is unreasonable. To the contrary the Decision is justified, transparent and intelligible based on the evidence and law presented before the decision maker and this Court. Therefore, judicial review must be dismissed.

IX. Certified Question

[46] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-6386-20

THIS COURT'S JUDGMENT is that the application is dismissed, no question of general importance is certified, and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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