Federal Court  Cour fédérale

Date: 20230207

Docket: IMM-6-22

Citation: 2023 FC 180

Ottawa, Ontario, February 7, 2023

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

DIANA MARIA SALGADO PENA &
YULI ALEJANDRA ROBAYO SALGADO

Applicants

and

THE 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 by the Refugee Protection Division [RPD], dated December 16, 2021, which found the Applicants had not established that there is a serious risk of persecution or that they would be personally subjected to a danger of torture or

face a risk to life or that of cruel and unusual treatment or punishment upon a return to Colombia. They were found to be neither Convention refugees nor persons in need of protection.

II. Facts

[2] The Principal Applicant [PA] is a 45-year-old citizen of Colombia whose claim is also joined to that of her 19-year-old daughter. Their narrative is as follows.

[3] A relative of the PA lived in the PA's family home with other relatives after serving a prison sentence for kidnapping and criminal conspiracy before moving out in 2014. At that time, they promised to change their ways. However, in December 2016, police raided the PA's home and arrested the relative. They were released after a judge determined the raid was illegal.

[4] The relative was arrested again in 2017 and transferred to a jail and has been incarcerated ever since. In the legal proceedings that followed, the PA learned that the relative had been the head of a hit man squad with ties to two guerrilla groups. The Attorney General offered a reduced sentence and protection if they were to cooperate and identify the groups' leaders. No trial was held and the relative entered into a pretrial agreement, and provided substantial incriminating evidence for a reduced sentence.

[5] The PA's family was subsequently targeted by unknown agents as apparent retaliation for the relative's "snitching". These threats and actions included breaking into their family home, monitoring the family, threatening phone calls, strange men standing near their home and sending a threatening letter. The relative also reported they had received direct threats against

their family members for cooperating with authorities. The PA and family made reports to the police, but nothing substantially came of any of the complaints. Eventually, the PA and family avoided taking their concerns to authorities due to previous inaction.

[6] Following threats in January 2019, the PA, her daughter and parents applied for U.S. visas and plans were made to leave the country due to all the uncertainty. The Applicants' U.S. visas were approved. They then purchased their airline tickets to travel to the U.S. Due to COVID restrictions, the Applicants did not leave for the U.S. until later in 2020. Soon after, they made their way to the Canadian border. The PA's parents remained in Colombia. The PA's mother noted that she has not received a threatening call in two years, but sometimes strangers call her. The PA previously speculated that the reason she and her family were never harmed was that they were more useful alive than dead.

III. Decision under review

[7] The Applicants' claim in front of the tribunal was that they did not receive adequate protection in Colombia. The RPD panel concluded the Applicants had not rebutted the presumption that the Colombian state is capable of protecting its own citizens. In the panel's view, they had not provided clear and convincing evidence of the state's inability to do so.

[8] The panel rejected the Applicants' concerns regarding the ineffective actions taken by local authorities when complaints were made. The RPD found the Applicants failed to follow-up and critically show the authorities tangible proof of the alleged plot against the family. The panel also rejected the Applicants' reasoning that they had "given up" on the Colombian justice

system, noting they had failed to provide any further evidence of ongoing harassment to state authorities for 22 months prior to their departure.

[9] Considering all of the circumstances, the panel found the claimants had not rebutted the presumption of the adequacy and effectiveness of state protection with clear and convincing evidence of the state's ability to do so. Moreover, the panel noted that the Colombia state has shown a willingness to combat guerrilla and criminal violence by sentencing the relative to a term of incarceration.

[10] The panel also found the Applicants' evidence unclear and contradictory about what further information the relative would give to authorities since the sentence was already reduced due to cooperation. Equally unclear and contradictory in the panels' view was the evidence presented by the PA about who exactly was threatening the family.

[11] Moreover, the panel found the Applicants' claim regarding strangers standing or parking in front of the house inconsistent because, in the panel's view, it was odd these individuals never approached the PA or their family. Similar findings were made in regards to the threatening phone calls.

[12] Overall, the panel determined that the evidence provided by the Applicants was vague, inconsistent and contradictory.

IV. Issues

[13] The only issue in this application is whether the RPD's decision was reasonable.

V. Standard of Review

[14] The parties agree, as do I, that the applicable standard of review is that of reasonableness. 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 *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 S.C.R. 653 [*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]

[15] Importantly in this case, *Vavilov* also requires the reviewing court to assess whether the decision subject to judicial review meaningfully grapples with the key issues:

> [128] Reviewing courts cannot expect administrative decision makers to "respond to every argument or line of possible analysis" (*Newfoundland Nurses*, at para. 25), or to "make an explicit finding on each constituent element, however subordinate, leading to its final conclusion" (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, 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. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.
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> [Emphasis added]

VI. Analysis

[16] This case turns on state protection. In this connection there are two matters that concern this Court such that it will grant judicial review. The first is that no mention is made of the correct legal test for state protection. The second is the failure of the RPD to meaningfully grapple with the country condition evidence showing inadequacies with state protection.

[17] In terms of the test, this Court has repeatedly found that the test for assessing the adequacy of state protection is at the operational level which requires an assessment of not only the efforts made by the state but the actual results: *Asllani v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 645 per Crampton CJ at para 25:

> [24] With respect to both Italy and Kosovo, Mr. Asllani submits that the RAD erred by failing to state the correct test. In this regard, he states that the correct test is whether state protection is adequate at the "operational level" (*Durdevic v Canada (Citizenship and Immigration)*, 2018 FC 427 at para 33) and that it was incumbent upon the RAD to explicitly articulate that test at the outset of its assessment of the state protection issue.
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> [25] I disagree. I am not aware of any such onus on the RAD or the RPD. What counts is whether the adequacy of state protection is actually assessed at the operational level. This assessment is made in the course of assessing evidence led by the refugee claimant to overcome the presumption of state protection that exists in the absence of a demonstration of a complete breakdown in the state's apparatus: *Ward*, above, at 692.
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> [26] It bears underscoring that the burden of overcoming this presumption and demonstrating that adequate state protection does not exist at the operational level lies upon the refugee claimant. However, in his submissions to the RAD, Mr. Asllani did not endeavour to discharge this burden with respect to Italy by referring to evidence in support of his bald assertion that the RPD had failed to examine the availability of state protection at the operational level.
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> [Emphasis added]

[18] This Court has enunciated and applied this test on a great number of occasions over the years. That the adequacy of state protection must be assessed at the operational level is confirmed in: *Bito v Canada (Citizenship and Immigration)*, 2022 FC 1370 per Brown J; *Zapata v Canada (Citizenship and Immigration)*, 2022 FC 1277 per Favel J at paras 15, 25; *Mejia v Canada (Citizenship and Immigration)*, 2022 FC 1032 per McVeigh at paras 25-26, 28; *Rstic v*

Canada (Citizenship and Immigration), 2022 FC 249 per Favel J at paras 18, 30-31; *Kotai v Canada (Citizenship and Immigration)*, 2020 FC 233 per Elliott at paras 34, 42; *Asllani v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 645 per Crampton CJ at para 25; *Newland v Canada (Citizenship and Immigration)*, 2019 FC 1418 per McHaffie at paras 23-25; *Dawidowicz v Canada (Citizenship and Immigration)*, 2019 FC 258 per Brown J at para 10; *Gjoka v Canada (Citizenship and Immigration)*, 2018 FC 292 per Strickland J at para 30; *Moya v Canada (Citizenship and Immigration)*, 2016 FC 315 [*Moya*] per Kane J at para 68; *Hasa v Canada (Citizenship and Immigration)*, 2018 FC 270 per Strickland J at para 7; *Eros v Canada (Citizenship and Immigration)*, 2017 FC 1094 per Manson J at para 45; *Benko v Canada (Citizenship and Immigration)*, 2017 FC 1032 per Gascon J at para 18; *Koky v Canada (Citizenship and Immigration)*, 2017 FC 1035 per Gascon J at para 14; *Mata v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1007 per McDonald J at paras 13-15; *Poczkodi v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 956 per Kane J at para 37; *Paul v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 687 per Boswell J at para 17; and *John v Canada (Citizenship and Immigration)*, 2016 FC 915 at para 14. However, see *Mudrak v. Canada (Citizenship and Immigration)*, 2015 FC 188 per Annis J at paras 50, 81.

[19] For example, in *Moya*, Justice Kane states at paras 73-76:

> [73] To be adequate, perfection is not the standard, but state protection must be effective to a certain degree and the state must be both willing and able to protect (*Bledy v Canada (Minister of Citizenship and Immigration)*, 2011 FC 210 at para 47, [2011] FCJ No 358 (QL)). State protection must be adequate at the operational level *(Henguva v Canada (Minister of Citizenship and Immigration)*, 2013 FC 483 at para 18, [2013] FCJ No 510 (QL); *Meza Varela v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364 at para 16, [2011] FCJ No 1663 (QL)).

> [74] As noted by the applicant, democracy alone does not ensure effective state protection; the quality of the institutions providing protection must be considered (*Sow v Canada (Minister of Citizenship and Immigration)*, 2011 FC 646 at para 11, [2011] FCJ No 824 (QL) [*Sow*]).
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> [75] The onus on an applicant to seek state protection varies with the nature of the democracy and is commensurate with the state's ability and willingness to provide protection (Sow at para 10; *Kadenko v Canada (Minister of Citizenship and Immigration)*, 1996 CanLII 3981 (FCA), [1996] FCJ No 1376 (QL) at para 5, 143 DLR (4th) 532 (FCA)). However, an applicant cannot simply rely on their own belief that state protection will not be forthcoming (*Ruszo v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1004 at para 33, [2013] FCJ No 1099 (QL)).

[20] In my respectful view, it is not possible to conduct a reasonable assessment of state protection without first correctly setting out constraining law, as per the above, as to what the term state protection means. State protection entails state protection at the operational level. However, nowhere in its reasons does the RPD define state protection in terms of this constraining law.

[21] Therefore and with respect the Decision is not reasonable and will be set aside.

[22] Secondly, I am not satisfied the RPD meaningfully grappled with the country condition evidence regarding state protection at the operational level which was relied on by the Applicant as required by *Vavilov* at para 128 set out above. In this respect the Applicant submits the following with which I substantially agree:

> 27. As a result, the Board ignored highly probative evidence with respect to the inadequacy of state protection measures for victims of organized crime; this included Item 7.37 of the August 31, 2021 version of the NDP, a report authored by the IRB dated August 13,

2021. Counsel offered extensive oral submissions with respect to Item 7.37.

28. Item 7.37 states as follows with respect to the Colombian state's efforts to provide protection to victims of armed non-state actors:

> […]Amnesty International reports that the UNP "only" provides protection "on a highly individual basis," and "generally within urban areas" (Amnesty International 8 Oct. 2020). According to the Senior Analyst, it is "really hard" for those targeted by criminal groups to access state protection due to a "very high threshold" for eligibility; a "certain" amount of "public exposure" is required, such as for "known leaders" (Senior Analyst 8 July 2021). The HRW report states that "many community leaders" do not receive threats or do not report them to prosecutors, which is a "require[ment]" to receive protection (HRW 10 Feb. 2021).
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> An article by Infobae, a Spanish-language news website from Argentina (The Washington Post 8 June 2016), citing a report issued by the national government, states that [translation] "[d]espite an increase in the number of murders of social leaders and human rights defenders in Colombia, the [UNP] only admitted 16% of the requests" (Infobae 1 Oct. 2020). The same source further states that from 1 January to 16 August 2020, 6,756 applications for protection were submitted by social leaders and 3,053 by human rights defenders to the UNP, of which 1,093 and 474 were admitted, respectively (Infobae 1 Oct. 2020). According to the Senior Analyst, "some" have applied for protection and waited 6 to 8 months for a response, by which point the danger has either "materialized" or "passed" (Senior Analyst 8 July 2021). The same source adds that, measures such as bulletproof vests and armoured cars may make it "easier" for them to be targeted by criminal groups (Senior Analyst 8 July 2021).
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> According to the Office of the Ombudsman, the SATs are an [translation] "instrument" used by the Office of the Ombudsman to "collect, verif[y], and analyze, in a technical manner, information related

to situations of vulnerability and risk of the civilian population, as a consequence of the armed conflict," and is used to warn the "authorities concerned" so they are able to "coordinate and provide timely and comprehensive attention to the affected communities" (Colombia n.d.).

However, HRW reports that the authorities responsible for acting on its early warnings "have repeatedly failed to do so or have reacted in a pro-forma and unsubstantial way, leading to scant impact on the ground" (HRW 10 Feb. 2021). Amnesty International similarly states that the SAT is of "little effect" as there are "no consequences for state bodies that fail to comply with its measures" (Amnesty International 8 Oct. 2020).

According to the Professor, although the UNP and SAT have grown "more effective," "significant flaws" remain, including "a lack of proper intelligence" on criminal groups, "pushback" from "local political elites," and "infiltrators" in government agencies and other organizations (Professor 12 July 2021). The Collective Protection Route (Ruta de Protección Colectiva), a "set of actions adopted by the Colombian authorities to prevent risk, counteract threats and minimize the vulnerabilities of groups and communities" is also not "effectively implemented" (Amnesty International 8 Oct. 2020).

[…]

Sources indicate that the government is experiencing "significant" financial "constraints" (InSight Crime 11 Nov. 2019; HRW 10 Feb. 2021). The February 2021 HRW report states the "large number" of measures for protection "diffuses" resources and results in "wastefu[l]" redundancies (HRW 10 Feb. 2021). According to Amnesty International, the array of mechanisms for protection is "so extensive and so complex" that "many" are unsure how to access them; also, "many" defenders report that the measures do not meet their communities' needs (Amnesty International 8 Oct. 2020). International Crisis Group similarly reports that "almost all" community

> leaders seeking protection "express their frustration" at the government's "impenetrable maze of bureaucracy" (International Crisis Group 6 Oct. 2020, i). The Freedom House report indicates that "trust" in government-provided protection "varies widely" (Freedom House 3 Mar. 2021). According to International Crisis Group, "[c]ertain social leaders who file reports after receiving death threats fear that officials who should be protecting them are in league with criminals" (International Crisis Group 6 Oct. 2020, i). Freedom House indicates that COVID-19 has made "effective protection" more difficult (Freedom House 3 Mar. 2021).
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> [Emphasis added]

[23] While the RPD faults the Applicants personally for not doing enough, that is not the only criteria. Country condition evidence showing the experience of others is also relevant. As noted the foregoing was not mentioned nor even cited as considered by the RPD. Of course the RPD need not consider every submission or piece of evidence relied on, but here I am persuaded it did not meaningfully grapple with the country condition evidence which in this case it was obligated to do.

[24] I need not consider the other issues raised.

VII. Conclusion

[25] This Application for judicial review is granted.

VIII. Certified Question

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

JUDGMENT in IMM-6-22

THIS COURT'S JUDGMENT is that judicial review is granted, the Decision is set aside, the matter is remanded for reconsideration by a differently constituted decision-maker, 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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