Federal Court  Cour fédérale

Date: 20230619

Docket: IMM-2798-22

Citation: 2023 FC 860

Ottawa, Ontario, June 19, 2023

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

JULIO CESAR HERNANDEZ GOMEZ
ANA MARIA BUITRAGO HERNANDEZ
MARTHA ISABEL BUITRAGO MARTINEZ
SANDRA JUDITH HERNANDEZ GOMEZ
ISABELLA MARIN HERNANDEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, Julio Cesar Hernandez Gomez, his common-law partner Martha, their daughter Ana, his sister Sandra, and her daughter Isabella, are citizens of Colombia. They allege that they fear the *Aguilas Negras* or Black Eagles, a criminal organization, due to Mr. Hernandez

Gomez's [Principal Applicant] political activities with the Conservative Party and work with the coffee plantation owners. The Principal Applicant's sister and niece allege they were also threatened by the Black Eagles on the basis that they knew the whereabouts of the Principal Applicant.

[2] The Applicants seek judicial review of a decision by the Refugee Protection Division [RPD] dated February 23, 2022, rejecting their claim for refugee protection and finding that the Applicants are neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The determinative issue for the RPD was the availability of state protection and credibility as it related to state protection. In considering the profile of the Applicants and the threats they faced, the RPD found that they did not take all reasonable steps to avail themselves of state protection nor did they demonstrate that the Colombian state is unable or unwilling to protect them.

[3] The Applicants submit that the RPD's conclusions on state protection are unreasonable and that the RPD erred with respect to its credibility findings for both the Principal Applicant and his sister.

[4] The Respondent submits that on the facts the Applicants simply failed to take advantage of state protection when it was offered to them and that the RPD reasonably engaged with the country condition evidence.

[5] Having considered the record before the Court, including the parties' written and oral submissions, as well as the applicable law, the Applicants have failed to persuade me that the RPD's decision is unreasonable. For the reasons that follow, this application for judicial review is dismissed.

II. Standard of Review

[6] The parties agree that the applicable standard of review is that of reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). A reasonable decision is one that is justified in relation to the facts and the law that constrain the decision maker (*Vavilov* at para 85). Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). As such, the approach is one of deference, especially with respect to findings of fact and the weighing of evidence. A reviewing court should not interfere with factual findings, absent exceptional circumstances, and it is not the function of this Court on an application for judicial review to reweigh or reassess the evidence considered by the decision maker (*Vavilov* at para 125).

III. Analysis

[7] As noted above, the central issue in the present judicial review is state protection. The starting point of the analysis of state protection is the presumption that states are capable of protecting their own citizens. The RPD rightly references the Supreme Court of *Canada in Canada (Attorney General) v Ward*, 1993 CanLII 105 (SCC), [1993] 2 SCR 689 [*Ward*], where it was confirmed that "[a]bsent a situation of complete breakdown of state apparatus…it should

be assumed that the state is capable of protecting a claimant" and "clear and convincing confirmation of a state's inability to protect must be provided" (*Ward* at 724-725). The RPD equally referenced *Nadeem v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1263 for the proposition that the onus on the Applicants to show the inability or unwillingness of the state to protect is a heavy one (at para 10).

[8] Refugee claimants must show that they have made all reasonable efforts to obtain protection in their home state, or that it would have been objectively unreasonable for them to do so (*Nugzarishvili v Canada (Citizenship and Immigration)*, 2020 FC 459 at para 34).

[9] As noted by the Applicants, one must look to the adequacy of state protection at the operational level. Indeed, for state protection to be adequate, it must be effective to a certain degree and thus the state must be both willing and able to protect (*Moya v Canada (Citizenship and Immigration)*, 2016 FC 315 at para 73; *Pena v Canada (Citizenship and Immigration)*, 2023 FC 180 at para 19). In the course of assessing the evidence led by the refugee claimant to overcome the presumption of state protection, the board is to assess the adequacy of state protection at the operational level (*Asllani v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 645 at para 25 [*Asllani*]). The Chief Justice Paul S. Crampton has recently underscored that the burden of overcoming the presumption and demonstrating that adequate state protection does not exist at the operational level lies with the refugee claimant (*Asllani* at para 26).

[10] The Applicants plead that the RPD did not consider operational effectiveness as part of its analysis on state protection. I disagree. The RPD considered the steps actually taken by the

Applicants, the steps that they failed to take, and the explanations as to why they did not take the steps that the RPD would have reasonably expected them to take. The RPD noted that the Principal Applicant testified that he was in fact offered protection, which he assumed was a bodyguard, but that he never followed up with the authorities. The RPD considered the foregoing alongside the country condition documentation, which establishes that protection is offered to victims, including bodyguards in certain instances. The RPD then concluded, among other things, that the Applicants "have not presented clear and convincing evidence that the state's protection, if forthcoming, would have been operationally inadequate, either systemically or in their specific circumstances" (emphasis added). It is clear to me that the RPD considered operational effectiveness as part of its analysis on state protection.

[11] The Applicants plead that the RPD ignored and failed to engage with country condition evidence that demonstrates that the Colombian government is unable and ineffective in protecting individuals such as the Applicants.

[12] The Respondent submits that the flaw in the Applicants' position is that both the Principal Applicant and his sister failed to take advantage of the protection when it was in fact offered to them. The Respondent pleads that this is fatal to their claim, especially since the Principal Applicant's testimony concerning the offer of protection aligned with the objective evidence in the country condition documentation.

[13] I am not persuaded that the RPD committed a reviewable error in its treatment of the country condition evidence. Rather, the Applicants' request is ultimately an impermissible request to reweigh the evidence considered by the RPD (*Vavilov* at para 125).

[14] The RPD noted that the Principal Applicant reported the Black Eagles' 2017 threat to the Ombudsman's office, who said they would investigate, and he reported the 2018 threat to the Fiscalia, who informed him he would be provided with protection. The Principal Applicant never followed up with either of the authorities and instead fled Colombia. The RPD found that the Principal Applicant's testimony as to his distrust of the authorities was insufficient to discharge his burden of establishing that the Colombian state is unable or unwilling to protect him, given that he was offered protection from the authorities. The RPD engaged with the country condition documentation, noting that it aligned with the Principal Applicant's testimony as to an offer of protection because the Fiscalia offers protection to victims and bodyguards can be provided. The documents referenced by the RPD indicate there are thousands of people receiving protection, including 2,500 with bodyguards. Country condition documentation referenced by the RPD further indicates that protective measures had been put in place for a number of individuals in relation to threats from the Black Eagles.

[15] I find that the RPD's analysis, and in particular its consideration of the country condition documentation and its application to the particular circumstances of the Applicants, meets the criteria of *Vavilov*, in that it is justified in relation to the facts and the law (*Vavilov* at para 85). While the Applicants highlight a number of passages from the country condition documentation to the effect that some members of government security forces have collaborated with or tolerate

armed groups such as the Black Eagles, I am not persuaded that this is sufficient to demonstrate that the RPD erred in its analysis of state protection in the Applicants' particular circumstances, nor is it sufficient to evidence an error on the part of the RPD in assessing the Principal Applicant's reasons for not following up with the authorities.

[16] The Applicants submit that in Item 7.10 of the country condition documentation, an Associate Professor had indicated that where a person receiving a threat holds a position of power or is a public servant in the judicial system, then they may receive protection from the authorities. Based on this indication, the Applicants argue that the country condition documentation does not state that the Applicants could have received protection.

[17] The Respondent highlights that the Applicants' evidence is that the Principal Applicant was in a leadership position. Specifically, he was the President of the Conservative Party at the municipal level and the President of the Committee governing water management in the town of Vereda de Argentina. He worked at the mayor's office in the town of Villagomez and worked closely with the coffee plantation owners. The Respondent submits that as the Principal Applicant holds a position of power, he would have been protected in line with the offer of protection from the authorities.

[18] The Applicants respond that it is not for the Respondent to presume that the Principal Applicant's position was high enough and that in any event the RPD did not undertake that analysis.

[19] The burden is on the Applicants to show the inability or unwillingness of the state to protect them. If it is the Applicants' position that the Principal Applicant's status was such that he would not actually receive protection, then it was for the Applicants to demonstrate this. Moreover, this runs counter to the evidence provided by the Principal Applicant that he was in fact offered protection. Again, it is not for this Court to reweigh the evidence before the RPD, nor is it for this Court to make assumptions based on country condition documentation that the Applicants have not tied to their particular circumstances.

[20] Finally, the Applicants have objected to the RPD's credibility findings for both the Principal Applicant and his sister. Credibility determinations are part of the fact-finding process, and are afforded significant deference upon review (*Fageir v Canada (Citizenship and Immigration)*, 2021 FC 966 at para 29 [*Fageir*]; *Tran v Canada (Citizenship and Immigration)*, 2021 FC 721 at para 35 [*Tran*]; *Azenabor v Canada (Citizenship and Immigration)*, 2020 FC 1160 at para 6). Such determinations by the RPD and the RAD demand a high level of judicial deference and should only be overturned "in the clearest of cases" (*Liang v Canada (Citizenship and Immigration)*, 2020 FC 720 at para 12). Credibility determinations have been described as lying within "the heartland of the discretion of triers of fact […] and cannot be overturned unless they are perverse, capricious or made without regard to the evidence" (*Fageir* at para 29; *Tran* at para 35; *Edmond v Canada (Citizenship and Immigration)*, 2017 FC 644 at para 22, citing *Gong v Canada (Citizenship and Immigration)*, 2017 FC 165 at para 9).

[21] Having considered the arguments raised by the Applicants, I am not persuaded that the RPD erred. While the Applicants disagree with the negative inferences drawn from the

testimonies of the Principal Applicant and his sister, those inferences were open to the RPD to make based on the record before it, and its resulting analysis is not unreasonable.

[22] For the foregoing reasons, I conclude that the RPD's reasons meet the standard of reasonableness set out in *Vavilov*.This application for judicial review is therefore dismissed. No serious question of general importance for certification was proposed by the parties, and I agree that no such question arises.

JUDGMENT in IMM-2798-22

THIS COURT'S JUDGMENT is that:

1. The Applicants' application for judicial review is dismissed; and

2. There is no question for certification.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2798-22
STYLE OF CAUSE:	JULIO CESAR HERNANDEZ GOMEZ ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 1, 2023
JUDGMENT AND REASONS:	ROCHESTER J.
DATED:	JUNE 19, 2023

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