

Federal Court



Cour fédérale

Date: 20230823

Docket: IMM-1816-22

Citation: 2023 FC 1131

Ottawa, Ontario, August 23, 2023

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

**OSCAR ALEXANDER MOLINA
QUIMBAYO**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, a citizen of Colombia, claims that he is at risk from the National Liberation Army [ELN]. He seeks judicial review of a decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board dated February 3, 2022, in which the RPD held that the Applicant was not a Convention refugee or a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicant asserts that the RPD's decision is unreasonable as: (a) the RPD erred in its assessment of the Applicant's medical condition by discounting it as a reasonable explanation for the deficiencies in his evidence; and (b) the RPD made an improper implausibility finding when it concluded that it was unlikely the ELN would have attacked the Applicant for failing to follow their instructions when they never called him to provide the instructions.

[3] For the reasons that follow, I am not satisfied that the Applicant has demonstrated that the RPD's decision is unreasonable and accordingly, the application for judicial review shall be dismissed.

I. Background

[4] The Applicant asserted in his Basis of Claim [BOC] that on September 30, 2018, two ELN members approached him while he was working as a truck driver and ordered him to transport weapons for the group. They threatened him and told him that if he did not comply, they would kill him and his family. They also told him he would receive a call at 4:00 a.m. the next day (October 1, 2018) with instructions for where to pick up the weapons. However, the Applicant did not receive a call with further instructions.

[5] On October 2, 2018, the Applicant informed his boss that he was approached by the ELN. The Applicant requested to be transferred to a different route to avoid the ELN and managed to work for eight days on this new route, without any incidents.

[6] On October 10, 2018, the Applicant states that he was attacked by the ELN. They threatened him with a gun and insulted him because he did not comply with their instructions. The Applicant explained to them that he could not transport the weapons for them because his boss had changed his route. The Applicant states that the men hit him on the head and the chin and kicked him. They told the Applicant to await instructions by telephone and threatened to hurt him and his family if he did not comply. Following the attack, the Applicant states that one of his colleagues took him to the hospital to get stitches on his head.

[7] On October 11, 2018, the Applicant explained the situation to his boss and resigned from his job as a truck driver. On the same day, the Applicant states that he reported the October 10, 2018 attack to the police. The police made a report, but the Applicant states that he did not believe they would investigate the matter due to corruption and infiltration by the ELN.

[8] On October 12, 2018, the Applicant, his wife and their daughter went into hiding at his father-in-law's house in Tibana, Boyaca. On that same date, the Applicant states that he received multiple calls on his cellphone, which he did not answer because he knew they were from the ELN and did not want them to locate him and his family.

[9] On October 15, 2018, the Applicant made the decision to leave Colombia. On October 31, 2018, the Applicant applied for a visa at the United States Embassy in Bogota, which he received in January of 2019. During this time, the Applicant states that he received multiple cellphone messages from the ELN threatening him and his family because they knew he had filed a police report against them.

[10] The Applicant made arrangements with his aunt, who lives in Toronto, to travel to Canada through the United States, and ultimately made a refugee claim in Canada.

II. The Decision of the RPD

[11] The Applicant's hearing before the RPD was originally scheduled for August 11, 2021. However, it was postponed as the Applicant had contracted COVID-19. The hearing was rescheduled to January 31, 2022 and when the Applicant attended the hearing, he used an oxygen tank. He advised the RPD that he was still receiving treatment for COVID-19 and that it would likely take another one to one-and-a-half years for his lungs to fully recover. The Applicant advised the RPD that COVID-19 impacts his memory and that sometimes he will say something and then immediately forget what he said. However, no medical evidence was provided by the Applicant to show that COVID-19 had any impact on his ability to testify and in particular, that it impaired his cognitive functioning.

[12] By decision dated February 3, 2022, the RPD determined that the Applicant is not a Convention refugee nor a person in need of protection. The RPD found that there was no nexus between the Applicant's claim and a Convention ground and thus assessed his claim under subsection 97(1) of the *IRPA*. The determinative issue was his credibility.

[13] The RPD acknowledged that the Applicant is recovering from long-haul COVID-19 and addressed his claim that his illness may have impacted his testimony at the hearing. The RPD found that the main credibility issues it identified that led to the rejection of the Applicant's claim were the result of internal inconsistencies in the original materials submitted by the Applicant,

which taken together, undermine the foundation of the Applicant's allegations, and cannot be explained by any confusion the Applicant may have experienced at the hearing due to COVID-19. Moreover, the RPD noted that steps could have been taken to obtain an assessment of the Applicant's ability to testify if there was a concern that there was any medical impairment that would impact his ability to testify and request that the hearing be rescheduled, none of which was done. The RPD therefore concluded that the Applicant had not established that the issues identified with his claim were attributable to his medical condition.

[14] The RPD then found that the Applicant had not established that the ELN had targeted him and then attacked him on October 10, 2018. The RPD reasoned that the Applicant claimed the ELN attacked him because he refused to cooperate with their instructions. However, the Applicant's written materials and testimony at the hearing was that he never received further instructions from the ELN because they did not call him on October 1, 2018 at 4:00 a.m. While he later testified that someone had called him before 4:00 a.m. on October 1, 2018 but he did not pick up, he recanted that statement and confirmed his original statement in his written materials that no one called him that morning. The RPD ultimately concluded that the ELN could not have been motivated to seek and attack the Applicant on October 10, 2018 because he failed to follow their instructions, since he was never given instructions in the first place.

[15] The RPD further found that the Applicant's supporting documents were inconsistent with his BOC and testimony and therefore undermined his credibility. Specifically:

- A. The Applicant produced a letter from his employer, yet it contained no mention of the Applicant's allegations with regard to the ELN, even though the Applicant's evidence was that he told his boss about the encounter and the attack and the boss changed his route as a result thereof. The letter also indicated that the Applicant started working for the truck driving company in March 2010, when his Schedule A indicated that he started working for the company in July 2015. The RPD gave no weight to this letter and found that it did not add credibility to the Applicant's allegations or remedy any of the Applicant's credibility issues.
- B. The Applicant indicated in his BOC and testified at the hearing that he sustained jaw and head injuries from the attack by the ELN that required stitches. However, the medical report submitted by the Applicant states he received a diagnosis of "lower left limb wound by short stabbing weapon" and "short stab wounds upper right limb at man's height". The Applicant failed to offer an explanation as to why the medical report indicated stab wounds and he confirmed that he was not stabbed during the ELN attack. The RPD gave no weight to the medical report and found that it further undermined the Applicant's credibility.
- C. The Applicant produced to the RPD a report from the Fiscalia. However, there was no mention by the Applicant in his written materials that he had contacted the Fiscalia, but rather only the police. The RPD noted that the Applicant testified that he went to file a report with the Fiscalia on October 13, 2018 in Bogota, but in his BOC, he had indicated that he went into hiding in Boyaca – several hours away from Bogota – on

October 12, 2018 with his wife and daughter. The RPD also noted that the report states that it was filed in Villavicencio and not Bogota. The RPD was also concerned with the fact that the report was given an 8-digit number when National Documentation Package information indicates that Fiscalia reports are given 21-digit numbers. The RPD raised substantive issues with the report as the report is addressed to “Respected Doctor” and contained two instances where the Applicant appears to address an authority outside of Colombia, and not the Fiscalia. The RPD concluded the report is most likely fabricated due to the aforementioned issues. The RPD gave the report no weight and found that it further undermined the Applicant’s credibility.

- D. The Applicant produced letters from colleagues and his father, which purported to corroborate his claims regarding the ELN. However, the RPD assigned them little weight as they only offered brief and general statements and held that they were insufficient to overcome the numerous credibility concerns with the Applicant’s own evidence and other documentary evidence.

[16] The RPD concluded that the Applicant had not established that the ELN targeted and attacked him. Accordingly, the RPD found that he does not face a risk to his life or a risk of torture or cruel or unusual treatment or punishment from the ELN in Colombia.

III. Issues and Standard of Review

[17] While the Applicant has raised two issues on this application, they both relate to the reasonableness of the RPD's decision. Accordingly, the issues raised by the Applicant are reviewable on a reasonableness standard [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 25].

[18] When reviewing for reasonableness, the Court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified. 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 [see *Vavilov, supra* at paras 15, 85]. The Court will intervene only if it is satisfied there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency [see *Adenijj-Adele v Canada (Minister of Citizenship and Immigration)*, 2020 FC 418 at para 11].

IV. Analysis

A. *The RPD reasonably assessed the Applicant's medical condition*

[19] The Applicant relies on *Yasun v Canada (Citizenship and Immigration)*, 2019 FC 342 [Yasun] to argue that this Court has recognized that evidence of a claimant's psychological or mental state must be properly considered when assessing the credibility of their testimony. The Applicant submits that he complained of confusion approximately eight times during the hearing

and that the RPD recognized that he was having difficulties testifying due to his medical condition since the RPD stated at the hearing: “I know that given your medical situation that today’s testimony was-was difficult so I want to thank you for-for being able to go through with it.” The Applicant submits that in light of the frequency of his complaints and the RPD’s statement recognizing his difficulties, it was inconsistent for the RPD to then find that the Applicant’s confusion was confined to issues related to the written materials. The Applicant asserts that had the RPD shown in its reasons the same understanding that it showed for the Applicant at the hearing, it might well have concluded that the Applicant’s oral testimony was credible and could form the basis for a positive determination of the claim, without needing to resort to an analysis of the corroborating documents.

[20] I reject this assertion. The circumstances of this case are unlike *Yasun*, where the Court held that the RPD seemed unreceptive to the challenges faced by Ms. Yasun, since it had failed to mention in the decision that Ms. Yasun felt unwell and had to postpone the hearing and made light of a situation where Ms. Yasun’s counsel testified that she had collapsed in the counsel’s office and required CPR. In contrast, in this case, the RPD acknowledged the seriousness of the Applicant’s condition, by both indicating that the original hearing date had been postponed and by stating at paragraph 12 of its decision “I wish to reiterate a point I made at the hearing, which is that this finding is not intended to minimize Mr. Molina’s experience with Covid-19.”

[21] Moreover, in *Yasun*, the RPD drew an adverse inference on Ms. Yasun’s credibility based on her testimony that was “difficult to follow”, which was expected given her psychological and medical condition. However, in this case, the issue was the Applicant’s inability to provide any

explanations for the inconsistencies in his submitted materials and the Applicant remained able to testify and to recall minute details associated with his claim.

[22] I find that the RPD reasonably concluded that the credibility issues that arose from the Applicant's claim could not be explained by the fact that he had contracted and suffered from long-haul COVID-19, since the credibility issues arose largely from internal inconsistencies in his original materials, which were submitted before he contracted COVID-19.

B. *The RPD did not make an unreasonable implausibility finding*

[23] The Applicant submits that the RPD faulted him because he could not explain why the ELN had targeted him on October 10, 2018 for failing to comply with their orders when, in the RPD's view, they had not given him any orders – as they indicated they would – by telephoning him at 4:00 a.m. on October 1, 2018. The Applicant contends the RPD made an implausibility finding when the supporting evidence demonstrates that the events, as described by the Applicant, could have happened. The Applicant submits an implausibility finding should only be made in the clearest of cases and the facts relied on by the RPD did not amount to “the clearest of cases” to justify its finding of implausibility. To the contrary, the Applicant asserts that he testified that he received several calls that night, which he did not answer because he believed they were from the ELN. The Applicant argues that it is possible that the ELN had called that night and that by ignoring their calls, the Applicant failed to comply with their demands, and that it would be reasonable to expect that they would have attacked him nine days later on October 10, 2018.

[24] I am not satisfied that the Applicant has demonstrated that the RPD made an implausibility finding, let alone an unreasonable implausibility finding. Rather, I find that the RPD's determination was based on insufficient credible evidence proffered by the Applicant to establish his allegations of risk. The RPD stated in its decision:

[23] Claimants cannot be expected to know the motives behind an agent of persecution. However, Mr. Molina's foundational allegation is that he was targeted and is at risk in Colombia because the ELN is after him for not cooperating with their demands for collaboration.

[24] His allegations do not support this. Mr. Molina testified he was possibly approached at random one day because he was a truck driver. The ELN warned him he would receive instructions on how to collaborate but never followed up even though he agreed to cooperate and provided his phone number. Therefore, the basis for which the ELN would have been incentivized to locate and attack Mr. Molina, in a completely different region from where they first found him, does not exist.

[25] The RPD's finding that the ELN had no incentive to pursue the Applicant is supported by the evidence in the record. The evidence is clear that the ELN never gave the Applicant any instructions after their first encounter. The Applicant's testimony that the ELN may have indeed called him on October 1, 2018 but that he did not answer is not only speculative, but later recanted by the Applicant and also contradicted by the Applicant's BOC narrative (which made no reference to an unanswered call on October 1, 2018). Moreover, there was no credible documentary evidence to corroborate the Applicant's allegations that the ELN were pursuing him because he refused to comply with their demands. To the contrary, the RPD reasonably found that portions of the documentary evidence undermined the credibility of the Applicant's allegation.

V. Conclusion

[26] As the Applicant has failed to meet his burden of demonstrating that the RPD's decision was unreasonable, the application for judicial review shall be dismissed.

[27] The parties propose no question for certification and I agree that none arises.

JUDGMENT in IMM-1816-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. The parties proposed no question for certification and none arises.

“Mandy Ayles”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1816-22

STYLE OF CAUSE: OSCAR ALEXANDER MOLINA QUIMBAYO v
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: VIDEOCONFERENCE

DATE OF HEARING: AUGUST 22, 2023

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DATED: AUGUST 23, 2023

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