Federal Court  Cour fédérale

Date: 20230828

Docket: IMM-3701-22

Citation: 2023 FC 1161

Ottawa, Ontario, August 28, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

FRANCISCA OBREGON CAICEDO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Francisca Obregon Caiceda, seeks judicial review of a decision by the Refugee Appeal Division ("RAD") dated March 29, 2022, confirming the decision by the Refugee Protection Division ("RPD") that the Applicant is neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee*

Protection Act, SC 2001, c 27 ("*IRPA*"). The RAD found the determinative issue to be the availability of an internal flight alternative ("IFA") in Barranquilla, Colombia.

[2] The Applicant submits that the RAD erred in refusing to admit the new evidence proffered on appeal and in its IFA assessment, rendering the decision unreasonable.

[3] For the reasons that follow, I find that the RAD's decision is reasonable. This application for judicial review is dismissed.

II. Facts

A. *The Applicant*

[4] The Applicant is a 65-year-old citizen of Colombia. She resided in Buenaventura, Valle, where she operated a daycare business out of her home.

[5] The Applicant claims that in 2016, four men visited her home, identified themselves as members of the National Liberation Army ("ELN"), and demanded 30 million pesos as payment for continuing her business. When the Applicant told the four men she could not afford this payment, they allegedly threatened to kill her if she failed to pay and warned her against reporting the incident to the police.

[6] The Applicant claims that she immediately left her daycare business in the care of one of her employees and left Buenaventura for Popayan to stay with her daughter. She stayed in

Popayan until December 2016, when she returned to Buenaventura. She learned that none of the teachers at her daycare business were approached by the ELN during her absence, leading her to believe that the situation had calmed.

[7] The Applicant alleges that on September 15, 2018, four ELN members visited her home again, while her daycare was open. With children and employees present, the ELN members allegedly demanded that the Applicant pay them 30 million pesos to continue running her business. The Applicant claims that the men had weapons and again threatened to kill her if she did not comply with their demand. She did not pay the extortion money because she could not afford it. She did not report this incident to the police out of fear of retaliation from the ELN and because the police are allegedly ineffective against the ELN.

[8] The Applicant claims that the ELN members returned again in October 2018. They continued to threaten the Applicant with death if she did not pay the 30 million pesos.

[9] On November 15, 2018, after agreeing to give her more time to gather the money, ELN members allegedly called the Applicant and told her that her time was up and they were going to kill her. The Applicant claims that they also told her not to relocate because they would find her anywhere.

[10] The Applicant allegedly travelled to Cali to stay with a friend. She claims that in December 2018, she ordered the daycare to shut down and the children to move to Popayan for their safety. She then left Colombia for Canada, where she made a claim for refugee protection.

[11] The Applicant claims that on March 12, 2020, the ELN killed her brother as punishment for her failure to make the demanded payment. He was getting out of a car in the driveway of his home when he was shot. His grandchild was nearby and was also shot but survived. The Applicant was informed that there were two shooters, with other people waiting in a getaway car. She claims that her son called to inform her of the death and that he had received a phone call to let him know that the death was because of the Applicant's failure to comply with the ELN's demand for payment.

B. *RPD Decision*

[12] In a decision dated October 18, 2021, the RPD refused the Applicant's claim and found that she is neither a Convention refugee nor a person in need of protection.

[13] The RPD found the determinative issue to be the availability of an IFA in Barranquilla and credibility as it relates to the IFA. The test to determine a viable IFA requires that: (1) there is no serious possibility of persecution or risk of harm in the IFA, and (2) it is reasonable in the Applicant's circumstances to relocate to the IFA (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706). The second prong of the test places a high evidentiary burden on the Applicant to demonstrate that relocation to the IFA would be unreasonable (*Ranganathan v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1367) ("*Ranganathan*").

[14] At the first prong, the RPD considered the ELN's means to locate the Applicant in the proposed IFA. It noted that the ELN is a large guerilla group that operates in at least half of the

departments in Colombia, but that the National Documentation Package ("NDP") evidence does not indicate that it has a strong presence in Barranquilla. The RPD stated that while the ELN can track individuals through countrywide networks, the NDP shows that the ELN is most likely to track those with a high profile. The RPD found that the Applicant is not someone with a high profile.

[15] The RPD also considered the ELN's motivation to pursue the Applicant in the IFA, noting that the ELN did not pursue the Applicant during the brief time that she spent in Popayan in 2016, after allegedly receiving the first extortion demand, and despite Popayan being located in a region with a strong ELN presence. The RPD found no evidence that the Applicant nor her children, who she sent to Popayan for their safety, were pursued by the ELN while residing there, which undermines any motivation that the ELN may have to pursue her in the IFA. The RPD further found that the ELN's motivation is further undermined by the fact that its alleged demands for payment were in return for the Applicant being able to continue running her business, but her business was shut down in December 2018. The RPD found that the ELN's motivation behind the extortion demand no longer exists.

[16] The RPD acknowledged the Applicant's testimony that the ELN killed her brother in March 2020. The Applicant testified that her son informed her of the shooting, that he had received a phone call from an ELN member to inform him that the Applicant was to blame for her brother's death, and that her extended family also blames her for her brother's death. The Applicant provided news articles about the killing to substantiate her testimony. However, the RPD also alerted the Applicant to her son's letter, which was submitted in support of her claim

and which does mention the alleged shooting or a phone call from the ELN. The RPD did not draw any credibility findings or inferences from the letter because of what it does not include, but found that it does not establish that the Applicant's brother was indeed killed by the ELN, nor that the Applicant's son received a phone call from the ELN. The RPD also considered the report about the killing from the Attorney General's Office in Colombia, which the Applicant submitted in support of her claim, and found that it made no mention of the ELN. For these reasons, the RPD concluded that the Applicant provided insufficient evidence to establish that the ELN was responsible for or involved in the killing of her brother.

[17] At the second prong of the IFA test, the RPD noted the Applicant's testimony that the only obstacle to her relocation would be the lack of safety from the ELN. Nonetheless, the RPD considered other potential barriers to relocation, including language, religion, housing, friends, and family. The RPD ultimately found that while the Applicant may encounter some general hardship in resettling, this hardship does not rise to meet the high threshold at the second prong of the IFA test.

[18] Considering both elements of the test, the RPD concluded that Barranquilla is a viable IFA, in light of the evidence and circumstances. The RPD therefore refused the Applicant's claim and found that she is neither a Convention refugee nor a person in need of protection.

C. *Decision under Review*

[19] In a decision dated March 29, 2022, the RAD dismissed the Applicant's appeal and confirmed the RPD's finding that the Applicant is neither a Convention refugee nor a person in need of protection, on the basis that she has a viable IFA in Barranquilla.

[20] The Applicant proffered new evidence before the RAD on appeal. Subsection 110(3) of *IRPA* outlines the general rule that the RAD "must proceed without a hearing, on the basis of the record of the proceedings of the [RPD]." Subsection 110(4) enumerates the exceptions to this general rule, in which a claimant may present evidence to the RAD that was not before the RPD if it "arose after the rejection of the claim or that was not reasonably available, or that the person could not reasonably have been expected to have presented, at the time of the rejection." Once the RAD finds that new evidence meets the statutory criteria under subsection 110(4), it must then consider whether that evidence is credible, relevant, and material (*Singh v Canada (Citizenship and Immigration)*, 2016 FCA 96 at paras 38-49, citing *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 ("*Raza*") at paras 13-15). These latter admission criteria are known as the "*Raza* factors."

[21] The new evidence submitted by the Applicant on appeal was a report that offers an opinion on the viability of an IFA in the face of a prospective risk of harm from the ELN. The Applicant submitted that she could not have adduced this evidence before the RPD because it responds to errors in the RPD's analysis of the viability of the IFA and the ELN's ability to pursue the Applicant upon relocation. The RAD rejected this submission and found that the

Applicant failed to satisfy the admissibility criteria set out in subsection 110(4) of *IRPA*. It found that although the report is dated after the RPD decision, it references circumstances and sources that predate the RPD decision and therefore belies the finding that such a report was not available to the Applicant prior to the RPD decision.

[22] The RAD noted that the Applicant was notified that the viability of the IFA was a live issue in her claim, she had the opportunity to present evidence about this issue before the RPD, and the purpose of adducing new evidence on appeal is not to provide an opportunity for claimants to supplement a deficient record before the RPD (*Abdullahi v Canada (Citizenship and Immigration)*, 2016 FC 260 at para 14). The RAD therefore rejected the new evidence.

[23] With respect to the first prong of the IFA test, the Applicant submitted that the RPD erred in assessing the objective evidence demonstrating that the ELN has a presence in the Atlántico region, where the IFA is located. She submitted that the fact that the ELN did not pursue her in Popayan in 2016 does not establish that they are unmotivated to locate her for the debt she owes them. However, the RAD agreed with the RPD's assessment of the objective evidence and found that it does not establish that the Applicant faces a risk of harm at the hands of the ELN in the proposed IFA.

[24] The RAD found that even if the ELN has a presence in Barranquilla and the Applicant may be a potential target, despite not fitting the profile of those who are targeted by such groups, the ELN's behaviour does not suggest that they are motivated to pursue the Applicant in connection with their past extortion attempt. Furthermore, the subject of their past motivation—

the Applicant's daycare business—no longer exists. The RAD noted that the Applicant does not dispute the RPD's finding that there is insufficient evidence that her brother's killing can be attributed to the ELN. The RAD agreed with this finding. It ultimately confirmed the RPD's finding that the first prong of the IFA test is not made out.

[25] The RAD noted that the Applicant did not dispute the RPD's assessment of the second prong of the IFA test. The RAD ultimately agreed with the RPD's reasons and found that the Applicant provided insufficient evidence to establish that relocation to the proposed IFA would be unreasonable in her circumstances. For these reasons, the RAD agreed with the RPD's determination that the Applicant has a viable IFA in Barranquilla and therefore, the Applicant is neither a Convention refugee nor a person in need of protection.

III. Issue and Standard of Review

[26] The sole issue in this application is whether the RAD's decision is reasonable.

[27] The standard of review is not disputed. The parties agree that the applicable standard of review is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 23–25) ("*Vavilov*"). I agree.

[28] Reasonableness is a deferential, but robust, standard of review (*Vavilov* at paras 12-13). The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified (*Vavilov* at para 15). 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). Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences (*Vavilov* at paras 88-90, 94, 133-135).

IV. Analysis

[29] The Applicant submits that the RAD erred in refusing to admit the report she adduced as new evidence on appeal and in assessing the viability of the IFA. In my view, the RAD's decision is reasonable in both respects.

A. *New Evidence*

[30] The Applicant submits that the RAD erroneously refused to admit the report she proffered as new evidence on appeal. She submits that the report addressed the Applicant's specific case, included evidence that related to the issue of the ELN's means to pursue the Applicant in the IFA, and included new information about the ELN that spoke to the viability of the IFA in the Applicant's circumstances. The Applicant submits that on this basis, the report meets the criteria of newness set out by the *Raza* factors.

[31] The Applicant further submits that the new evidence is material to the determinative issue in the RAD's consideration of the IFA because it directly counters both the RPD's and the RAD's determination that the Applicant does not face a serious possibility of harm in the proposed IFA. The Applicant specifically challenges the RAD's reasoning for rejecting the new

evidence, namely that the report's contents predated the RPD hearing, despite being published after the hearing. The Applicant submits that if this were a reasonable basis upon which to deny the newness of a newly adduced document, the additional admissibility criteria stipulated under subsection 110(4) of the *IRPA* would serve no purpose. The Applicant submits that the RAD's reasoning for refusing to admit the report as new evidence is unjustified and therefore unreasonable.

[32] The Respondent maintains that the RAD's decision is reasonable. Firstly, the Respondent submits that the RAD reasonably found the Applicant's new evidence to be inadmissible on appeal, on the basis that she could have reasonably been expected to produce such evidence before the RPD. The Respondent noted that on appeal, the Applicant submitted that she was represented by different counsel before the RPD and she was unaware of the witness who authored the report or whether this witness could provide evidence about the IFA issue. The Respondent submits that it was open to the RAD to reject the explanation in which the Applicant blames former counsel for the failure to adduce this evidence before the RPD, given that she did not raise this allegation of negligent counsel as per necessary procedure, nor did she explain how the former counsel was incompetent.

[33] The Respondent submits that the RAD also reasonably rejected the Applicant's submission that the report was admissible because it contradicted findings by the RPD that the Applicant did not anticipate. The Respondent cites the decision in *Marin v Canada (Citizenship and Immigration)*, 2016 FC 847 ("*Marin*"), wherein this Court found that a refugee claimant "is not entitled to submit new evidence 'every time he or she is surprised by the RPD's decision'"

(at para 27, citing *Canada (Citizenship and Immigration) v Desalegn*, 2016 FC 12 at para 23). The Respondent further submits that even if the RAD had erroneously rejected the new evidence, the Applicant failed to demonstrate how this was a determinative error.

[34] I agree with the Respondent. I do not find that the RAD committed a reviewable error in refusing to accept the Applicant's new evidence on appeal. As set out by this Court in *Galamb v Canada (Citizenship and Immigration)*, 2016 FC 1230 at paragraphs 19 and 20, citing *Raza*, assessing a document's newness is not judged exclusively by the date it was created, but when the event sought to be proven by the evidence occurred and, specifically, whether this event or circumstance occurred after the RPD's decision. The RAD reasonably considered the substance of the report proffered on appeal and justified its conclusion that although the report is dated after the RPD decision, the circumstances and sources in the report predate the decision. It is reasonable to find that the Applicant failed to establish that such a report was not available to her at the time of the RPD hearing.

[35] I further agree with the Respondent's submission that the opportunity to adduce new evidence before the RAD does not arise every time a claimant is surprised by a particular consideration or finding in the RPD's assessment (*Marin* at para 27). The Applicant was notified that the IFA was a live issue in her claim and therefore, she had the opportunity to adduce any evidence to support her position that she would face a serious possibility of harm by the ELN in the proposed IFA. The RAD reasonably found that the new evidence was inadmissible on appeal, on the basis of a justified and intelligible review of the evidence (*Vavilov* at para 86).

B. *IFA*

[36] The Applicant submits that the RAD conducted an unreasonable assessment of the IFA in light of the objective evidence. The Applicant concedes the second prong of the test, but submits that the RAD erroneously found that the ELN does not have the means or motivation to pursue the Applicant in Barranquilla, at the first prong of the test. The Applicant submits that the RAD's inferences about the ELN's motivation were based on erroneous assumptions about how the agent of persecution *ought* to have demonstrated an ongoing interest in the Applicant. The Applicant contends that each of the RAD's findings regarding the ELN's motivation—that they did not harm her in Popayan, that they did not harm her children in Popayan, and that the subject of motivation no longer exists—are irrational or fail to accord with the evidence.

[37] The Respondent submits that the RAD's assessment of the ELN's means and motivation to pursue the Applicant in the IFA is reasonable. The Respondent notes that the Applicant did not dispute that she does not fit the profile of someone who the ELN would typically pursue, nor did she dispute the RAD's finding that there is insufficient evidence demonstrating that the ELN was responsible for her brother's death. The Respondent submits that this leaves the ELN's past threats as the sole piece of evidence of their motivation to pursue the Applicant in the proposed IFA. The Respondent submits that on this basis, the RAD reasonably found that this evidence is insufficient to establish the ELN's continued interest in the Applicant, given the additional facts that her children live in an ELN stronghold and are undisturbed by the ELN, and that the business upon which the extortion demands were based no longer exists.

[38] I agree with the Respondent. While I find merit in the Applicant's submission that the RAD may not make unfounded assumptions about how an agent of persecution ought to have demonstrated its interest or how it will act in the future, I do not find that the RAD's reasons reveal this error (*Aboutaleb v Canada (Citizenship and Immigration)*, 2022 FC 810 at paras 17-18). As found by my colleague Justice Diner in *Soos v Canada (Citizenship and Immigration)*, 2019 FC 455, "the Board is entitled to make inferences based on the evidence before it," given that logical and reasoned inferences are "based on clear and non-speculative evidence" (at paras 13-14, citing *Ifeanyi v Canada (Citizenship and Immigration)*, 2018 FC 419 at para 32).

[39] In the Applicant's case, the RAD conducted a thorough and reasoned assessment based on the only evidence available regarding the ELN's motivation to pursue the Applicant: its previous behaviour. The RAD did not make inferences about the ELN because it overlooked evidence demonstrating the group's motivation to pursue the Applicant but, rather, because the Applicant failed to provide sufficient evidence to demonstrate this motivation. The RAD substantiated its inferences about the ELN's lack of motivation using clear and non-speculative evidence. The RAD reasonably found that the ELN does not have a continued interest in the Applicant and, in turn, that the group would not pose a serious risk of persecution to the Applicant in the IFA. For these reasons, I find that the RAD's assessment of the first prong of the IFA test is reasonable.

V. Conclusion

[40] This application for judicial review is dismissed. The RAD's reasons with respect to the admissibility of the Applicant's new evidence and the viability of the proposed IFA are justified,

transparent and intelligible (*Vavilov* at para 86). No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-3701-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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