Date: 20240307

Docket: IMM-10708-22

Citation: 2024 FC 388

[ENGLISH TRANSLATION]

Vancouver, British Columbia, March 7, 2024

PRESENT: Mr. Justice Gascon

BETWEEN:

MAURICIO ANDRES CARDENAS MEDINA
YOHANA PAOLA GUTIERREZ RUIZ
DAVID CARDENAS GUTIERREZ
SARA CARDENAS GUTIERREZ

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Mauricio Andres Cardenas Medina, his wife, Yohana Paola Gutierrez Ruiz, and their two minor children are Colombian nationals. They are seeking judicial review of a decision [Decision] of the Refugee Appeal Division [RAD], dated October 5, 2022, which

denied their claim for refugee protection and determined that they were neither Convention refugees nor persons in need of protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The applicants allege a risk of persecution in Colombia by people (including politicians) who allegedly profit from corruption in the healthcare system, as a result of Ms. Gutierrez Ruiz's appearance on a news program that denounced those people. Like the Refugee Protection Division [RPD] before it, the RAD determined that the applicants had not rebutted the presumption that they could avail themselves of the protection of the Colombian state.

[3] The applicants identified no less than eight errors in the Decision and argued that the finding that they had not rebutted the presumption of state protection in Colombia was unreasonable. They are asking the Court to set aside the Decision and refer the matter back to the RAD for redetermination.

[4] For the reasons that follow, the application for judicial review will be allowed. Although many of the arguments raised by the applicants are not sufficient to justify the Court's intervention, I agree that, on at least some elements, the RAD's decision is not intelligible and fails to respond to the evidence and arguments that the applicants had put forward in support of their claim for refugee protection.

II. Background

A. *The facts*

[5] The applicants claim to fear certain politicians who profit from corruption in the Colombian healthcare system. Ms. Gutierrez Ruiz helped expose them through an investigative news program produced by her brother-in-law. At the hearing before the RPD, the applicants added that they feared the paramilitary group Autodefensa Unidas de Colombia [AUC].

[6] Ms. Gutierrez Ruiz testified that in November 2017 she helped three journalists by providing them with information so that they could investigate corruption in Colombia, although she did not personally do any research or publish reports or articles on the topic.

[7] Starting in January 2019, Ms. Gutierrez Ruiz began receiving death threats by phone, email and mail. The threats came from individuals identifying themselves as being [TRANSLATION] “close to influential politicians who were fed up” with the reporting on corruption. On March 10, 2019, a death threat letter was left at the applicants’ home in Cali. The following day, the applicants moved to Buga to stay with a family member, and a week later, to the Bogotá area, to the municipality of Madrid in the department of Cundinamarca [Madrid].

[8] On May 5, 2019, the applicants’ former neighbours contacted them to notify them of a car that would often drove past their former home in Cali. On June 15, 2019, Ms. Gutierrez Ruiz received another threat, this time via WhatsApp. That same day, she called the Colombian authorities’ protection services to ask if they would protect her, and they told her they would not.

[9] On August 30, 2019, Ms. Gutierrez Ruiz and her husband noticed people looking at them in an unusual way. They took a cab to the local police station. The Madrid police refused to consider the complaint, as nothing had happened to the applicants and they did not know the identity of the individuals in question. Following this interaction with the police, the applicants understood that they would not receive protection from the Colombian state.

[10] The applicants arrived in Canada on September 24, 2019, and claimed refugee protection.

B. *RPD’s decision*

[11] The RPD ruled that the applicants were neither Convention refugees nor persons in need of protection, as they had not presented clear and convincing evidence that they had made efforts to obtain protection from the Colombian state, that the state was unwilling to protect them, or that state protection in Colombia was insufficient.

[12] Specifically, the RPD was not satisfied with the evidence provided by the applicants that a formal complaint had been made to the Madrid police. The RPD found that the applicants had not gone to the local police station on August 30, 2019, to file a complaint and, therefore, had not established that the officers had refused to act on it. Moreover, the RPD determined that, even if it had believed the applicants, they could have made additional efforts, by going to another police station or by contacting the Office of the Attorney General or the Office of the Ombudsman. Finally, the RPD also found that Ms. Gutierrez Ruiz had not demonstrated that she had a profile that would lead to the entire Colombian state’s refusing to help her.

C. *RAD's decision*

[13] In its decision, the RAD expressed certain reservations about the RPD's findings. The RAD determined that the RPD had erred on the issue of credibility. In this respect, the RAD found that the RPD had not shown legitimate grounds for doubting the applicants' credibility as a result of their inability to produce a document corroborating the filing of their complaint with the Madrid police. According to the RAD, the objective documentary evidence showed that it was entirely possible that the applicants had gone to the Madrid police station and that their complaint had been deemed unfounded and refused, on the grounds that the applicants did not know the identity of the people who had been watching them and that nothing had happened to them.

[14] After analyzing the question of the applicants' credibility, the plausibility of their story and their subjective fear of persecution, the RAD turned to the objective fear, namely the availability of state protection in Colombia.

[15] The RAD began by analyzing Ms. Gutierrez Ruiz's profile to determine whether it would justify the Colombian state's refusal to assist her. The RAD came to the same conclusion as the RPD on this issue, for the following reasons: (1) Ms. Gutierrez Ruiz had played a secondary role, as a source (2) she did not personally do any research or publish reports or articles denouncing corruption; (3) she did not present any evidence of how her collaboration with journalists and what she had reported/denounced had impacted/affected corruption in Colombia; and (4) the main profiles targeted in Colombia and likely to be denied state protection are rather social or community leaders who denounce the presence of armed groups or participate in politics, which is not the case of Ms. Gutierrez Ruiz.

[16] In its decision, the RAD also examined the objective documentary evidence describing Colombian democracy and the measures taken by the Colombian state to ensure the security of its citizens, including the enactment of the *Victims and Land Restitution Law* in 2011 [2011 Law] and the creation of the National Protection Unit [UNP] in the same year. Although the measures taken by the state in Colombia have shortcomings and issues with effectiveness, the evidence on the record did not allow the RAD to conclude, on a balance of probabilities, that there was an absence of state protection.

D. *Standard of review*

[17] The parties contend that the standard of review applicable to questions of state protection is reasonableness. I agree (*Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at para 38 [*Hinzman*]; *Bishop v Canada (Citizenship and Immigration)*, 2022 FC 569 at para 13 [*Bishop*]; *Guerrero Jimenez v Canada (Citizenship and Immigration)*, 2021 FC 175 at para 10; *Durojaye v Canada (Citizenship and Immigration)*, 2020 FC 700 at para 6).

[18] Moreover, the framework for judicial review of the merits of an administrative decision is now the framework established by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], and (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 7 [*Mason*]). This framework is based on the presumption that the applicable standard of review in all cases is now that of reasonableness.

[19] When the applicable standard of review is that of reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision maker and determine whether the decision is based on "an internally coherent and rational chain of analysis" and is

"justified in relation to the facts and law that constrain the decision maker" (*Mason* at para 64; *Vavilov* at para 85). To make this determination, the reviewing court asks "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility" (*Vavilov* at para 99, citing, among other cases, *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 74).

[20] It is not enough for the outcome of a decision to be justifiable. Where reasons for a decision are required, the decision "must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies" [italics in original] (*Vavilov* at para 86). Thus, a review on a standard of reasonableness is concerned as much with the outcome of the decision as with the reasoning followed (*Vavilov* at para 87). Such a review must include a rigorous evaluation of administrative decisions. However, in analyzing the reasonableness of a decision, a reviewing court must therefore take a "reasons first" approach, examine the reasons provided with "respectful attention" and seek to understand the reasoning process followed by the decision maker to arrive at its conclusion (*Mason* at paras 58, 60; *Vavilov* at para 84). The reviewing court must adopt an attitude of restraint and intervene "only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13). The reasonableness standard always finds its starting point in the principle of judicial restraint and deference, and requires reviewing courts to show respect for the distinct role that Parliament has chosen to confer on administrative decision makers rather than on the courts (*Mason* at para 57; *Vavilov* at paras 13, 46, 75).

[21] The burden is on the party challenging the decision to show that it is unreasonable. To set aside an administrative decision, the reviewing court must be satisfied that there are sufficiently

serious shortcomings in the decision such that it cannot be considered reasonable (*Vavilov* at para 100).

III. Analysis

A. *Legal framework*

[22] Before delving into the analysis of the reasonableness of the RAD's decision, it is worth reiterating a few key principles that govern the matter of state protection.

[23] In *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*], the Supreme Court of Canada noted that international refugee law was formulated to serve as a back-up to the protection refugee claimants expect from the state of which they are nationals (*Ward* at p 709). This means there is a presumption that states are capable of protecting their citizens, with the exception of countries where there has been a complete breakdown of state apparatus (*Ward* at p 725).

[24] The onus rests on claimants to establish that their home state is unable to protect them (*Notar v Canada (Citizenship and Immigration)*, 2021 FC 1038 at para 26; *Glasgow v Canada (Citizenship and Immigration)*, 2014 FC 1229 [*Glasgow*] at para 35). In order to do so, claimants must provide clear and convincing evidence of the state's inability to protect them, which will usually require them to show "that they sought, but were unable to obtain, protection from their home state, or alternatively, that their home state, on an objective basis, could not be expected to provide protection" (*Hinzman* at para 37; *Glasgow* at para 35). It is also not disputed that the appropriate test in a state protection analysis commands an assessment of the adequacy of that protection at the operational level, not solely the efforts or intentions of the state (*Bishop* at

para 18; *Mata v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1007 at paras 13–14; *Vidak v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 976 at para 8). The evidence must be "relevant, reliable and convincing" and must satisfy the decision maker, on a balance of probabilities, that state protection is inadequate (*Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 30; *Rstic v Canada (Citizenship and Immigration)*, 2022 FC 249 at para 29).

[25] For democratic countries, refugee protection claimants will normally have to demonstrate that they sought state protection. The more democratic the institutions, the more claimants must have done to exhaust all courses of action open to them, except in the event that they can show that it would likely have been futile for them to approach the state for protection, as protection would have been ineffective (*Flores Carrillo* at para 32; *Vargas Bustos v Canada (Citizenship and Immigration)*, 2014 FC 114 at paras 31–32).

B. *The Decision was not reasonable in certain respects*

[26] As the Minister's counsel correctly argued in her submissions to the Court, many of the arguments advanced by the applicants are insufficient to demonstrate that the Decision was unreasonable. Indeed, the Decision shows that, in general, the RAD analyzed all of the evidence and provided detailed explanations for each of its conclusions.

[27] Thus, I am not of the opinion that the RAD erred in requiring Ms. Gutierrez Ruiz to provide evidence that corroborates that her actions actually caused harm to her agents of persecution. The RAD's assertion that it "is unlikely that the politicians the female appellant fears will use their influence with the police against her" stems from the fact that the applicants'

claim that the Colombian state is unwilling to protect them is largely based on conjecture. In fact, Ms. Gutierrez Ruiz has not provided clear and convincing evidence to show that her complaint was rejected by the police due to the influence exerted by her agents of persecution on the Madrid police. Ms. Gutierrez Ruiz simply stated that her complaint was not treated as a priority, as nothing had happened to the applicants and she did not know the identity of the individuals who were watching them.

[28] In the same vein, I am of the opinion that the RAD's conclusion in paragraph 49 of the Decision is intelligible and that the RAD did not make a veiled credibility finding by asserting that the main profiles targeted in Colombia are social leaders, implying that Ms. Gutierrez Ruiz would not be at risk because of her personal profile. There is nothing unreasonable about identifying the main profiles that are subject to inadequate protection by the state because of their degree of influence or notoriety. In its decision, the RAD did not conclude that only people with the profile of social or community leaders are at risk and do not benefit from the protection of the Colombian state, but simply noted that Ms. Gutierrez Ruiz's profile did not correspond to the profiles that are generally targeted.

[29] In addition, some of the errors cited by the applicants invite the Court to reweigh the evidence analyzed by the RAD. However, it is well established that this is not the role of the Court on judicial review. Moreover, the case law cited by the Minister shows that reference to general evidence about conditions prevailing in a country without establishing a connection between that evidence and the claimant's personal situation is generally not sufficient to warrant the RAD or RPD finding a lack of adequate state protection (*Ramirez Rueda v Canada*

(Citizenship and Immigration), 2009 FC 828 at para 43, citing *Morales Alba v Canada (Citizenship and Immigration)*, 2007 FC 1116 at paras 3-4).

[30] Lastly, I do not share the applicants' reading of the passages in the Decision dealing with the measures taken by the Colombian state to protect its citizens. According to the applicants, and contrary to the jurisprudence of this Court, the RAD erred in focusing on the government's efforts to combat crime, forced disappearances and kidnappings, without assessing whether those efforts were actually producing tangible results. Relying on *Csiklya v Canada (Citizenship and Immigration)*, 2019 FC 1276 at paragraph 28 [*Csiklya*], and *Pava v Canada (Citizenship and Immigration)*, 2019 FC 1239 at paragraph 48, the applicants argue that the humanitarian efforts and assistance referred to in paragraph 52 of the Decision are not sufficient to corroborate the availability of Colombian state protection at the operational level. I disagree.

[31] On the contrary, I am satisfied that the RAD, relying on the National Documentation Package [NDP], clearly assessed not only the efforts of the Colombian state, but also the results of those efforts. More specifically, in paragraph 51 of the Decision, the RAD asserts that "the Colombian government has deployed thousands of troops to combat armed groups, resulting in several losses for armed groups and weapons seizures" [Emphasis added]. In my opinion, the deployment of thousands of soldiers to fight armed groups does not represent a "mere presence of ameliorative efforts" in Colombia, to quote Justice Ahmed in *Csiklya*. In addition, the RAD noted that the rates of forced disappearances and kidnappings, as well as the number of people registered as victims in the Registry of Victims, have decreased over the years. The RAD also mentioned that, although there had been an increase in the rate of homicides against social leaders and aggressions against ex-combatants, those statistics do not apply to the applicant's

situation or profile. Thus, this is not a situation in which the RAD merely looked at the efforts of the Colombian state without taking stock of concrete results on the ground.

[32] Lastly, the Minister is right to assert that the applicants cannot blame the RAD for failing to analyze certain pieces of evidence when they have not discharged their burden of proving the merits of the claims underlying their claim for refugee protection, namely that the refusal of the Madrid police to consider the complaint demonstrated an absence of state protection.

[33] However, I am nevertheless of the opinion that, in the circumstances, some of the errors identified by the applicants are sufficient to shift the Decision outside the realm of reasonableness.

[34] The applicants' most compelling argument is the argument concerning the RAD's failure to address their primary submissions in connection with state protection, namely the two interactions with the Madrid local police that occurred in May and August 2019. The RAD mentioned this argument in its analysis of the applicants' credibility, but it did not explain why these refused attempts to seek protection were insufficient to rebut the presumption of state protection.

[35] It is clear from the record that this alleged error was central to the applicants' arguments before the RAD. Admittedly, the RAD did analyze the complaint rejected by the local police in Madrid and concluded that the complaint was rejected because it was unfounded. In the Decision, the RAD stated that this was a normal exercise of police discretion, but it did not mention state protection in its analysis and did not explicitly link the events of 2019 to the absence of state protection. More specifically, in its analysis of state protection, the RAD did not

directly discuss Ms. Gutierrez-Ruiz’s attempt to file a complaint with the Madrid police or her 2019 request for protection services from the Colombian authorities.

[36] Moreover, although the applicants cited several NDP tabs to demonstrate that protection could not reasonably have been provided for them, as it was inadequate, the RAD’s reasons did not address this evidence in its state protection analysis.

[37] I accept that the RAD did conduct a thorough review of the operational adequacy of the police’s action and unsuccessful attempts by Ms. Gutierrez Ruiz to obtain state protection in 2019. In particular, it ruled that the refusal to consider Ms. Gutierrez Ruiz’s complaint was a normal exercise of police discretion, and that the applicants had not provided any evidence to show that the Madrid police’s refusal to consider the complaint was motivated by corruption. However, the RAD did not clearly analyze the 2019 events in light of police corruption in Colombia and the extensive evidence in the NDP identified by the applicants.

[38] Moreover, I also agree with the applicants that the 2011 Law reviewed by the RAD had little relevance to addressing the issue of state protection, as the risk to which the applicants were exposed arises from the criminal activities of the politicians they fear. I would add that the RAD invoked this statute without analyzing its purpose, effectiveness or relevance. The mere existence of this statute, which has no protective or punitive purpose, is of questionable use in determining whether or not the applicants have rebutted the presumption of state protection.

[39] Lastly, the RAD’s comments regarding the protection provided by the UNP are unreasonable because the evidence on the record, particularly tabs 7.3 and 1.8 of the NDP, demonstrates that such protection is not effective. This evidence indicates that journalists do not

enjoy adequate protection, such that Ms. Gutierrez Ruiz, as a mere journalistic source, could not reasonably have expected to avail herself of such protection (*Torres v Canada (Citizenship and Immigration)*, 2021 FC 1333 [*Torres*]). In *Torres*, Justice Roussel held that, if a person would not qualify for protection by the UNP, or that protection would not be forthcoming in a reasonable delay, then the fact that the person never properly applied or followed up with the UNP could not reasonably be held against that person (*Torres* at para 8).

[40] According to the framework established in *Vavilov*, the reasons given by an administrative decision maker involve two related elements: adequacy on the one hand, and logic, coherence and rationality on the other (*Vavilov* at paras 96, 103–104). The logic, coherence and rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as when the decision-maker ignores the "central issues and concerns raised by the parties" (*Alexion Pharmaceuticals Inc v Canada (Attorney General)*, 2021 FCA 157 at para 13 [*Alexion*], citing *Vavilov* at paras 127–128). In short, a decision will be not be reasonable if the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point (*Rajput v Canada (Citizenship and Immigration)*, 2022 FC 65 at para 34).

[41] Here, the RAD does not appear to have considered the evidence specifically identified by the applicants (*Kavugho-Mission v Canada*, 2018 FC 597 at para 14). The RAD acknowledged that the various Colombian state protection programs and measures have suffered setbacks and are criticized for being ineffective, but it did not assess whether Ms. Gutierrez Ruiz would actually be able to access those programs, nor whether she would receive adequate state protection.

[42] As the applicants' counsel correctly pointed out at the hearing before this Court, 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" (*Vavilov* at para 128). As the Federal Court of Appeal stated in *Alexion*, the critical points of a decision are shaped, in part, by the central issues and concerns raised by the parties (*Alexion* at para 13, citing *Vavilov* at paras 127–128). In this case, the applicants had expressly pointed to certain documents in the NDP in their representations and submissions to the RAD, and the question of state protection was, without doubt, the key issue in their case. The fact that the RAD failed to clearly and intelligibly explain why the explicit evidence identified by the applicants should be rejected is a serious shortcoming and a fundamental flaw in its reasoning which, in this case, warrants intervention by this Court (*Vavilov* at paras 102–103, 127–128).

[43] Even if I read the Decision "holistically and contextually" and bear in mind that reviewing courts should seek "to understand the reasoning process followed by the decision maker" to arrive at its conclusion (*Vavilov* at paras 84, 97), I am not satisfied that the RAD's reasoning, as presented, is intelligible and adequately addresses the concerns raised by the applicants.

[44] Since *Vavilov*, special attention must now be paid to the decision-making process and the justification for administrative decisions. One of the objectives advocated by the Supreme Court of Canada in the application of the reasonableness standard is to "develop and strengthen a culture of justification in administrative decision making" (*Vavilov* at paras 2, 143). It is not enough for the outcome of a decision to be justifiable, the decision must also "be justified . . . by

the decision maker to those to whom the decision applies" [emphasis in original] (*Vavilov* at para 86). A reviewing court "must develop an understanding of the decision maker's reasoning process" and determine "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility" (*Vavilov* at para 99).

[45] However, in the applicants' case, I am not convinced that the RAD's decision is consistent with the relevant legal and factual constraints that bear on the outcome and the issue in dispute (*Vavilov* at paras 105–107). I acknowledge that the reasons for an administrative decision need not be exhaustive. Indeed, the reasonableness standard of review is not concerned with the decision's degree of perfection but rather with its reasonableness (*Vavilov* at para 91). However, the reasons must still be intelligible and justify the administrative decision. In this case, I am obliged to note that the RAD's decision was not based on a coherent and intelligible analysis of the facts relevant to the applicants' situation. On the contrary, the Decision is riddled with significant shortcomings that cause me to lose confidence in the RAD's conclusions.

[46] Thus, when the Decision is read holistically and contextually, I find that it is not sufficiently transparent or justified to meet the standard of reasonableness set forth in *Vavilov*. That said, it may well be that the RAD's conclusions with regard to state protection in Colombia are well-founded. Indeed, it may be that, even when informed of these reasons for the RAD's error and of the consideration that should have been given to the applicants' submissions, a differently constituted panel might nevertheless reasonably arrive at the same decision. However, this differently constituted panel may also reach a different conclusion, one that is more favourable to the applicants. It is the RAD, not the Court, that conducts this assessment.

IV. Conclusion

[47] For all the foregoing reasons, I conclude that the Decision was not intelligible on certain points and that some of the shortcomings identified by the applicants were sufficiently significant as to render the Decision unreasonable (*Vavilov* at para 100). The application for judicial review is therefore allowed, and the applicants' case is referred back to the RAD for redetermination by a differently constituted panel.

[48] Neither party has proposed any questions of general importance for certification, and I agree that there are none.

JUDGMENT in IMM-2062-23

THIS COURT'S JUDGMENT is as follows:

1. This application for judicial review is allowed, without costs.

2. The decision rendered by the Refugee Appeal Division on October 5, 2022, is set aside.

3. The matter is referred back to the RAD for redetermination by a differently constituted panel.

4. There are no questions of general importance to be certified.

"Denis Gascon"
Judge

Certified true translation
Sebastian Desbarats

FEDERAL COURT

SOLICITORS OF RECORD

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