Federal Court Cour fédérale

Date: 20240711

Docket: IMM-3075-23

Citation: 2024 FC 1092

Ottawa, Ontario, July 11, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ANGELA MARIA ROCHA BADILLO
ANGELLY QUINTERO ROCHA
CAMILO ANDRES GUTIERREZ ORTIZ

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants seek judicial review of a decision of the Refugee Protection Division ("RPD") finding that the Applicants are neither Convention refugees nor persons in need of protection, pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC

2001, c 27 ("*IRPA*"). The RPD refused their claim on the basis that the Applicants have a viable internal flight alternative ("IFA") in Medellin, Baranquilla, and/or Sincelejo in Colombia.

[2] The Applicants submit that the RPD's decision is unreasonable for ignoring central aspects of the Applicants' claim and failing to properly consider their risk.

[3] For the following reasons, I find that the RPD's decision is unreasonable. This application for judicial review is granted.

II. **Analysis**

A. *Background*

[4] Angela Maria Rochar Badillo (the "Principal Applicant"), Camilo Andres Gutierrez Ortiz (the "Associate Applicant") and the Principal Applicant's daughter (the "Minor Applicant") (collectively, the "Applicants") are citizens of Colombia.

[5] According to the Principal Applicant's Basis of Claim narrative ("BOC narrative"), the Applicants' fear of persecution at the hands of individuals opposed to the Principal Applicant's mother owing to her work as government lawyer in Colombia prosecuting cases dealing with corruption.

[6] In late 2020, the Principal Applicant began receiving threatening telephone messages and a text message referring to her mother's work. The Applicants believe that these threats may

have come from corrupt government officials affiliated with a powerful Colombian political party. In December 2020, the Applicants went into hiding at the Associate Applicant's mother's home.

[7] In January 2021, the Applicants entered Canada and made a refugee claim.

[8] In a decision dated February 17, 2023, the RPD refused the Applicants' claim on the basis that they have a viable IFA in Medellin, Baranquilla, and/or Sincelejo.

[9] 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).

[10] On the first prong of the IFA test, the RPD found that there was insufficient evidence to establish that the agents of persecution had the means to locate the Applicants in the proposed IFA locations. The RPD found that there was insufficient evidence regarding the government officials and that a major Colombian political party supported these officials such that the Applicants would be at risk, and insufficient evidence regarding the individuals that the Principal Applicant's mother was prosecuting. The RPD further found that there was insufficient evidence that the agents of persecution had the motivation to locate the Applicants, given that it was

unclear whether these agents ever truly knew where the Applicants lived, as well as the fact the Principal Applicant's mother was no longer involved in prosecution of the cases that gave rise to the claimed risks. Additionally, the RPD found that there was little evidence regarding the death of the Minor Applicant's father and that the Applicants did not have a profile that would put them at risk in the proposed IFAs.

[11] On the second prong of the IFA test, the RPD found that the evidence established that the Applicants' language, religious practice, the Principal and Associate Applicants' previous education and ability to support themselves by finding employment, housing, and travel to the IFA locations all favoured the Applicants. The RPD acknowledged the Principal Applicant's testimony that she did not know anyone in the proposed IFAs, as well as the Minor Applicant's ailing mental health in the wake of her father's death, and found there would be "some general hardship" by relocating to the proposed IFAs. Nonetheless, the RPD concluded that it would be reasonable for the Applicants to relocate, which is the threshold of the second prong of the IFA test.

[12] For these reasons, the RPD concluded that the Applicants were neither Convention refugees nor persons in need of protection and dismissed their claim.

B. *Parties' positions*

[13] The Applicants submit that the RPD made several erroneous findings of fact, including failing to consider the extent of government corruption in Colombia and how this affected the IFA analysis, as well as ignoring evidence regarding the agents of persecution's means to find

the Applicants, the Applicants' risk profile, the Applicants' status as internally displaced persons ("IDP"), and the death of the Minor Applicant's father. The Applicants further submit that the RPD conducted an unprincipled analysis under section 97(1)(b)(ii) of the *IRPA* by failing to consider the Applicants' individualized risk and erred at both prongs of the IFA analysis with regard to the objective evidence and the Applicants' circumstances.

[14] The Respondent maintains it was reasonable for the RPD to find that there was insufficient evidence to establish that the alleged agents of persecution had neither the motivation nor the means to find the Applicants, and that the Applicants' reliance upon objective country condition evidence is simply a request for this Court to reweigh evidence, as are the Applicants' submissions on the second prong of the IFA test.

C. *Standard of Review*

[15] Reasonableness review, which all parties agree governs this judicial review, demands that a decision is responsive. This includes responsiveness to the parties' submissions, reflecting that a decision maker "actually <u>listened</u> to the parties" (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 ("*Mason*") at para 74 [emphasis in original], citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at ("*Vavilov*") at para 127). This also includes responsiveness to the key facts of the case (*Gomes v Canada (Citizenship and Immigration)*, 2020 FC 506 ("*Gomes*") at para 63 [citations omitted]). My colleague Justice Pamel has recently held that "the failure of a decision-maker to engage with the central aspects raised by a party is generally sufficient to set the decision aside" (*Canada (Minister of*

Citizenship and Immigration) v Xu, 2024 FC 267 ("*Xu*") at para 21, citing *Mason* at paras 58, 60, 74).

[16] A responsive decision is also one that is responsive to the consequences that a decision has upon an individual through reflection of the legislature's intention (*Mason* at para 76, citing *Vavilov* at para 133). The decision maker's reasons must show that the consequences of a decision have been considered and are "justified in light of the facts and law" (*Vavilov* at para 135, cited in *Mason* at para 76). Decisions that fail to "grapple with particularly severe or harsh consequences for the affected individual" may be found to be unreasonable (*Mason* at para 76, citing *Vavilov* at para 134).

[17] The principle of responsive justification has been confirmed in this Court for refugee proceedings (see *e.g.*, *Simelane v Canada (Immigration, Refugees and Citizenship)*, 2022 FC 1374 at para 64, citing *Vavilov* at para 133). And albeit in the context of discussing a decision maker's interpretation of the *IRPA* and that interpretation's reasonableness, the Supreme Court of Canada has recognized that the principle of *non-refoulement* (*i.e.*, not allowing refugees to be expelled to a country where they face persecution) "must be considered in construing and applying the *IRPA*" (*Mason* at para 117 [emphasis in original]).

D. *The decision is unreasonable*

[18] With this understanding of reasonableness review in mind, I now turn to the RPD's decision.

[19] The Principal Applicant's BOC narrative makes numerous specific claims regarding the alleged risk of persecution against her and her family.

[20] The first is that in October 2020, she received a call from an unknown number saying: "Your mom is messing with people in the Amazon she shouldn't be; she's getting into things she shouldn't care about; she forgets she has children; tell your mom to stand aside because if she is a *sapa* ("toad", meaning snitch) you know what will happen."

[21] The second was a text message from an unknown number that the Principal Applicant received on October 21, 2020, stating: "Hey, let's be clear - disobedience costs and costs dearly, your little mama is going where she shouldn't and with whom she shouldn't, she's warned."

[22] The third, and perhaps most important, was that on November 5, 2020, the Principal Applicant received a call from an unknown number stating: "It wasn't hard to know that you live in Bogota with your daughter" and "[y]our mom keeps getting into what she shouldn't care about."

[23] Lastly, the Principal Applicant received two unknown phone calls in November 2020, where she was told: "Tell your [SOB] mom that we're not playing - she doesn't want to understand the right way, then we play the hard way - I will send her your head as a Christmas present."

[24] The RPD acknowledged that the Principal Applicant "received phone calls in October and November 2020 warning her that she would pay the consequences for her mother's action", and that the Principal Applicant "received several phone calls and a text message that involved threats beginning in October 2020... in these threatening calls the [Principal Applicant] was told she would face consequences for the actions of her mother, who was involving herself in things that were not her business and was labelled as a snitch."

[25] However, the RPD concluded that in reference to the first call in October 2020, the Principal Applicant's sister had not received any threats, despite the agents of harm knowing that the Principal Applicant's mother had "children." Moreover, the RPD concluded that while the November 5, 2020, phone call indicated that the agents of harm knew where the Principal Applicant lived, they did "not repeat her address to her," the RPD thus finding it unclear as to whether the agents of harm knew the Principal Applicant's address or were using the call as a scare tactic.

[26] The RPD's reasons omit that the agents of harm knew of the Principal Applicant <u>and her daughter</u>. The reasons do not account for the fact that the Principal Applicant reported these threats to the police after the November 5, 2020, phone call. The BOC narrative clearly demonstrates that the agents of persecution knew that the Principal Applicant had a daughter, and that the Principal Applicant was living in Bogota with her daughter. The BOC narrative also clearly demonstrates that the Principal Applicant feared for both her and her daughter's safety.

[27] In my view, the RPD's failure to address the risk regarding the Principal Applicant's daughter represents a failure in responsive reasoning, this threat being a key feature of the Applicants' risk profile as provided in the Principal Applicant's BOC narrative. This alone is sufficient to render the decision unreasonable (*Xu* at para 21). However, I further find that the RPD's reasons were insensitive to the consequences the Principal Applicant's daughter would face upon rejection of her and her family's refugee claim. This failure to engage with the threat the Minor Applicant encountered in Colombia demonstrates that the consequences of the RPD's decision were neither considered nor justified in light of the facts presented in the Principal Applicant's BOC narrative (*Vavilov* at para 135, cited in *Mason* at para 76).

[28] Thus, the decision is unreasonable. The RPD's analysis of the threats posed to the Principal Applicant is insufficiently responsive to the Applicants' submissions regarding the risk faced in Colombia, the threat against the Minor Applicant, and the consequences of a negative decision (*Mason* at paras 74, 76; *Gomes* at para 63).

E. *The proper remedy*

[29] The question remains as to the proper remedy in this matter.

[30] On January 15, 2024, the Applicants filed and served an affidavit from the Principal Applicant. She stated that on May 18, 2023, the Applicants were directed to report for removal to Colombia. On July 5, 2023, the Applicants were removed from Canada.

[31] The Applicants submit that the proper remedy in this matter is to set aside the RPD's decision and refer the matter to another panel for redetermination. The Applicants further submit the Respondent ought to facilitate the Applicants' return to Canada pending the redetermination of their claim. Additionally, the Applicants submit that the Court should order the RPD to re-determine the Applicants' case on an expedited basis and order the Respondent to issue the Applicants travel documents in the event their claims are successful.

[32] The Respondent challenges the ability of the Court to provide the remedies the Applicants seek. At the hearing, the Respondent submitted that in the Applicants' application for leave and judicial review, counsel did not, as a ground for the application, request the remedies sought. The Respondent further submitted that the Court cannot order that individuals be returned to Canada.

[33] The Respondent's first argument is largely formal. Section 301(d) of the *Federal Courts Rules*, SOR/98-106 provides that a notice of application shall contain "a precise statement of the relief sought." Here, such relief included an order setting aside the RPD's decision and having the matter remitted for redetermination by a different panel "in accordance with the direction of the Court." As will be seen below, I am issuing such directions.

[34] Furthermore, counsel for the Respondent maintained at the hearing that the Applicants left Canada voluntarily. I disagree. I adopt this Court's ruling, in the context of refugee claimants applying to the Federal Court for judicial review of their unsuccessful refugee claim, that "departing Canada after the CBSA advised that they had to leave the country and that they

faced warrants for their arrest can hardly be considered a voluntary decision. They departed under legal compulsion by operation of the *IRPA*, backed by the power of the state" (*Jawad v Canada (Citizenship and Immigration)*, 2021 FC 1262 ("*Jawad*") at para 22). The fact that the Applicants did not apply for a stay of their removal is also not determinative (*Jawad* at para 26 [citation omitted]).

[35] With regard to the substantive remedies, I grant this application for judicial review, set aside the decision of the RPD, and order that a different decision maker re-determine the matter in accordance with these reasons.

[36] I further find that it is appropriate in these circumstances to refer the matter back to the RPD with directions that this Court deems appropriate. Before issuing these directions, I am mindful that they ought not to unduly tread into responsibilities given to decision makers by Parliament under the *IRPA* (*Canada (Citizenship and Immigration) v Yansane*, 2017 FCA 48 at para 18; *Vavilov* at para 140). Section 52(1) of the *IRPA* provides that "[i]f a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances."

[37] The Court has ordered the government to make best efforts to return an individual to Canada, were it necessary for the refugee claim or should the individual have been found to be a Convention refugee while abroad (*Freitas v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 20463 (FC), [1999] 2 FC 432 (TD) at para 44). But there has also been jurisprudence from this Court holding that the Court cannot order the government, in the context

of judicial review, to have individuals returned to Canada, although the Court did not express "a definite opinion on this matter" (*Figurado v Canada (Solicitor General) (FC)*, 2005 FC 347 ("*Figurado*") at para 27). In these circumstances, I do not grant the Applicants' request in this application for judicial review to order their return to Canada or be issued travel documents.

[38] With that in mind, I am prepared to provide directions that are appropriate in these circumstances:

a) The Applicants will have the opportunity to provide updated evidence and submissions to the RPD, and will do so no later than 30 days from the date of this decision; and

b) The redetermination of this matter will be completed and a decision issued to the Applicants no later than 60 days from the date of this decision.

III. **Conclusion**

[39] This application for judicial review is granted. The RPD's decision is unreasonable. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-3075-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.

2. The RPD's decision is set aside.

3. The matter will be remitted to a different panel for redetermination in accordance with the reasons for this decision and the following directions:

   a) The Applicants will have the opportunity to provide updated evidence and submissions to the RPD, and will do so no later than 30 days from the date of this decision; and

   b) The redetermination of this matter will be completed and a decision issued to the Applicants no later than 60 days from the date of this decision.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3075-23
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