Federal Court  Cour fédérale

Date: 20180313

Docket: IMM-3964-17

Citation: 2018 FC 290

Ottawa, Ontario, March 13, 2018

PRESENT: The Honourable Mr. Justice Brown

BETWEEN:

DANIEL AUGUSTO ARISTIZABAL VELEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of Proceeding

[1] This is an application for judicial review by the Applicant pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], of a decision made by the Refugee Protection Division of the Immigration and Refugee Board [the RPD], dated August 24, 2017, determining that the Applicant is neither a Convention refugee nor a person in need of protection for the purposes of sections 96 and 97(1) of *IRPA* [the Decision].

[2] At issue is whether the RPD's decision is defensible on the facts and law in connection with the doctrine of "compelling reasons" in a refugee protection case. I have concluded it is not. Therefore judicial review is granted for the following reasons.

[3] The 30-year old Applicant is a citizen of Colombia who entered Canada, from the United States [US] on August 8, 2012. The Applicant's family owns farm land in rural Colombia. According to the Applicant, whose credibility in this respect was not at issue, in May 2001, when he was 14 years old, he and his father were attacked by Revolutionary Armed Forces of Colombia [FARC] terrorists, who were active around their family's farm land.

[4] Specifically, the Applicant and his father found the lifeless body of their farm manager on the farm. He had been killed by FARC. When they attempted to drive away, they were forced off the road by FARC guerillas. The Applicant and his father were thrown from the car and injured.

[5] FARC soldiers checked to ensure they were dead, then left, apparently satisfied that they were. The Applicant's father suffered fatal injuries. He died in the Applicant's arms. The Applicant was 14 at the time.

[6] Later in 2001, the Applicant encountered his mother being extorted by two FARC guerillas. Then, in February 2002, an unknown person believed to be FARC combatant attempted to run over the Applicant's mother with a car.

[7] The RPD found FARC's actions against the Applicant constituted "persecution". I would not disturb this finding because it is defensible on the facts and law in that regard. The RPD found as a fact that the Applicant, his mother and sister were able to avoid further "persecution" by going to a small town within Colombia three hours away.

[8] For the next fourteen months, the Applicant and his family did not encounter FARC; they had found a place that offered some refuge from FARC guerillas.

[9] The family then moved to the US in 2003. At some point while in the US, the Applicant was convicted of possession of less than 20 grams of marijuana. In 2012, according to a US attorney, this disentitled him to US refugee protection. The US attorney advised him to go to Canada to seek refugee protection; the Applicant came to Canada and made this claim for refugee protection.

[10] The refugee protection hearing took place in 2017. By then, the situation in Colombia had changed significantly: the previous combatants reached a settlement of the well-known, long-running and vicious guerilla warfare that had been waged between the Government of Colombia and FARC for decades. There is no dispute that the situation in Colombia, while perhaps not perfect, had changed significantly, such that it was open to the RPD to find as it did that there was no longer more than a mere risk of persecution for the Applicant.

[11] The RPD made no finding on the issue of "compelling reasons", as it could (and in these circumstances should) have under subsection 108(4) of *IRPA*:

Cessation of Refugee Protection **Rejection**	**Perte de l'asile** **Rejet**
108 (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances: …	**108 (1)** Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants : …
Exception	**Exception**
(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.	**(4)** L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

II. Issue

[12] The determinative issue of this application is whether the RPD dealt appropriately with the issue of compelling reasons pursuant to subsection 108(4) of *IRPA*. I find it did not.

III. Standard of Review

[13] In *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 57and 62 [*Dunsmuir*], the Supreme Court of Canada held that a standard of review analysis is not necessary where "the

jurisprudence has already determined in a satisfactory manner the degree of deference to be accorded with regard to a particular category of question." This Court determined that the appropriate standard of review in connection with the question of whether or not subsection 108(4) ought to have been considered is reasonableness, see *Alfaka v Alharazim v Canada (Citizenship and Immigration)*, 2010 FC 1044 [*Alharazim*] at para 25 and *Jairo v Canada (Citizenship and Immigration)*, 2014 FC 622 [*Jairo*] at para 18. Therefore, reasonableness is the standard of review.

[14] In *Dunsmuir* at para 47, the Supreme Court of Canada explained what is required of a court reviewing on the reasonableness standard of review:

> A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[15] The Supreme Court of Canada also instructs that judicial review is not a line-by-line treasure hunt for errors; the decision should be approached as an organic whole: *Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper, Ltd*, 2013 SCC 34. Further, a reviewing court must determine whether the decision, viewed as a whole in the context of the record, is reasonable: *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65; see also *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

IV. Analysis

[16] The "compelling reasons" exception is, in effect, a carve-out from the general rule that refugee protection may not be available if it is safe for a claimant to return to his or her country of nationality. As Justice Crampton, as he then was, explained in *Villegas Echeverri v Canada (Citizenship and Immigration)*, 2011 FC 390 [*Echeverri*] at paras 31 - 35:

> [31] A long line of jurisprudence establishes that the Board is entitled to proceed directly to a forward-looking assessment of whether an applicant for refugee protection has a well-founded fear of future persecution, without first making a determination of whether the applicant has suffered past persecution and, if so, whether subsection 108(4) applies. (*Hassan v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 946 (C.A.); *Yusuf v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 35, at para. 2 (C.A.); *Brown v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 988, at para. 7 (T.D.); *Yamba v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 457, at para. 6; *Corrales v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1283, at paras. 6-7 (T.D.); *Kudar v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 648, at para. 10; *Brovina v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 635, at paras. 6-9; *Decka v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 822, at paras. 15-16; *Thiaw v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 965, at para. 24; *Cardenas v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 537, at para. 37; and *Kamara v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 785, at para. 40).
>
> [32] However, there may be some situations in which the nature of the alleged past persecution is so severe that it would be contrary to the underlying spirit of subsection 108(4), and a reviewable error, for anyone reviewing the application for refugee protection to fail to consider the potential applicability of that provision (*Alharazim*, above, at paras. 44-53). For the reasons discussed in *Alharazim*, above, those situations are limited to where there is *prima facie* evidence of past persecution that is so exceptional in its severity as to rise to the level of "appalling" or "atrocious."

[33] As recognized in *Canada (Minister of Employment and Immigration) v. Obstoj*, [1992] 2 F.C. 739, at 747-748 (C.A.), the inspiration for what is now subsection 108(4) is found in Article 1 C (5) of the 1951 *United Nations Convention Relating to the Status of Refugees* (the "Refugee Convention"). Article 1 C (5) states:

> C. This Convention shall cease to apply to any person falling under the terms of section A if:
>
> …
>
> (5) He can no longer, because of the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
>
> Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.

[34] With respect to the second paragraph of Article 1 C (5), the UN Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees (the "Handbook") states:

> 136. The second paragraph of this clause contains an exception to the cessation provision contained in the first paragraph. It deals with the special situation where a person may have been subjected to very serious persecution in the past and will not therefore cease to be a refugee, even if fundamental changes have occurred in his country of origin. The reference to Article 1 A (1) indicates that the exception applies to "statutory refugees". At the time when the 1951 convention was elaborated, these formed the majority of refugees. The exception, however, reflects a more general humanitarian principle, which could also be applied to refugees other than statutory refugees. It is frequently recognized that a person who – or whose family – has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of

> regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee. (Emphasis added.)
>
> [35] The underscored words of the passage quoted immediately above make it clear that the past persecution contemplated by the second paragraph of Article 1 C (5) was intended to extend to past persecution of family members of the refugee claimant. This was recognized by my colleague Justice Martineau in *Suleiman v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1125, at paras. 13 and 22. In my view, this is particularly the case with respect to past persecution of a refugee claimant's immediate family members, namely, siblings, children and parents.

[17] The Federal Court of Appeal set out the criteria for determining if the compelling reasons exception applies in *Yamba v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 458 (FCA) [*Yamba*]:

> [6] In summary, in every case in which the Refugee Division concludes that a claimant has suffered past persecution, but this has been a change of country conditions under paragraph 2(2)(e), the Refugee Division is obligated under subsection 2(3) to consider whether the evidence presented establishes that there are "compelling reasons" as contemplated by that subsection. This obligation arises whether or not the claimant expressly invokes subsection 2(3). That being said the evidentiary burden remains on the claimant to adduce the evidence necessary to establish that he or she is entitled to the benefit of that subsection.

[18] In the Applicant's view, the RPD found the two critical facts necessary to give rise to the exception: (1) that the Applicant suffered past persecution, and (2) that there has been a change in country conditions. As such, the Applicant says the RPD should have considered the application of subsection 108(4) of *IRPA*. I agree. There was a finding of past persecution, and there was finding of a change of circumstances in Colombia.

[19] In response, the Respondent argues that the persecution branch of the two-part test for triggering the compelling reasons exception was not met because there was an Internal Flight Alternative [IFA] for the Applicant in 2002, namely the village to which he and his remaining family resorted after the murder of his father, the attacks on his mother, FARC's attempt on the life of the Applicant himself as a 14-year-old boy, and the murder of their farm manager. The Respondent, in effect says that the finding that the village offered refuge equates to a finding that in fact and law it was an IFA for the purposes of the IRPA and the Convention.

[20] I accept the Respondent's submission that a claimant who has an IFA at the time of his or her persecution is, by definition, excluded from consideration for refugee protection, and therefore excluded from the application of subsection 108(4) of *IRPA*. This was established by the Federal Court of Appeal in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FCR 589 [FCA] at paras 2-3:

> **The Law**
>
> 2. Despite the decision of this court in *Rasaratnam v. Canada (Minister of Employment & Immigration)* (1991), [1992] 1 F.C. 706, there remains some confusion about the nature of "the internal flight alternative" in Convention refugee claims. It should first be emphasized that the notion of an internal flight alternative (IFA) is not a legal defence. Neither is it a legal doctrine. It merely is a convenient, short-hand way of describing a fact situation in which a person may be in danger of persecution in one part of a country but not in another. The idea of an internal flight alternative is "inherent" in the definition of a Convention refugee (see Mahoney J.A. in *Rasaratnam*, supra, at p. 710); it is not something separate at all. That definition requires that the claimants have a well-founded fear of persecution which renders them unable or unwilling to return to their home country. <u>If claimants are able to seek safe refuge within their own country, there is no basis for finding that they are unable or unwilling to avail themselves of the protection of that country.</u> As Mahoney J.A. stated in *Rasaratnam*, supra [p. 710]:

> [T]he Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists.

Mr. Justice Mahoney continued:

> [S]ince by definition a Convention refugee must be a refugee from a country, not from some subdivision or region of a country, a claimant cannot be a Convention refugee if there is an IFA. It follows that the determination of whether or not there is an IFA is integral to the determination whether or not a claimant is a Convention refugee. I see no justification for departing from the norms established by the legislation and jurisprudence and treating an IFA question as though it were a cessation of or exclusion from Convention refugee status.

3. This view was also expressed earlier by Mr. Justice Décary in *Zalzali c. Canada (Ministre de l'emploi et de l'immigration)*, [1991] 3 F.C. 605 (C.A.) where he stated [at pp. 614-615]:

> I know that in principle persecution in a given region will not be persecution within the meaning of the Convention if the government of the country is capable of providing the necessary protection elsewhere in its territory.

[Emphasis added.]

[21] In the case before me, the RPD did not conduct an IFA assessment, of make an IFA determination. The RPD stated:

> The fact that the [Applicant] and his family were effectively able to avoid further persecution by relocating three hours away, despite the claimant returning to his home for a few weeks; and that he has not established that other family member who remained in Colombia were targeted by the FARC, despite the fact that ownership of the farm remained within the family, suggests that there is a very low likelihood of the FARC pursuing the [Applicant] to [proposed IFA], a city that is even further away, over 15 years later.

[22] Central to this aspect of the Respondent's argument is his explicit request that this Court find the village to which the Applicant and his family fled after the murderous attacks constituted outlined above, constituted in fact and law, an IFA. I am asked to draw this conclusion from the finding accepted by the RPD that they were there for 14 months before they managed to escape the country entirely.

[23] With respect, I decline to do so, and for several reasons.

[24] First, the determination of whether or not a viable IFA exists is a question of fact, and in some cases a question of fact and law. Such determinations are one of the central functions and duties of the RPD. Deference is afforded to such determinations by the RPD in part because of the RPD's presumed expertise in such determinations.

[25] Second, this Court on judicial review generally should not engage in a *de novo* review; the Federal Court is to determine if the tribunal acted reasonably, which of course entails an assessment of whether the decision is defensible on the law per *Dunsmuir*.

[26] Further, I acknowledge that the Court is generally obliged to attempt to support the reasons of a tribunal from the record, that is, the Court must connect the dots where the lines may readily be drawn. However, the Federal Court of Appeal has established that there is no such obligation where there are no dots on the page, per *Lloyd v Canada (Attorney General)* (and see *2251723 Ontario Inc. (VMedia) v Rogers Media Inc.* 2017 FCA 186 per Near JA, Webb JA concurring, Gleason JA dissenting):

> [24] In light of the adjudicator's findings, even on a generous application of the principles in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708, the basis upon which the 40-day suspension was justified cannot be discerned without engaging in speculation and rationalization. As I noted in *Komalafe v. Canada (Citizenship and Immigration)*, 2013 FC 431, at para. 11:
>
> > *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn. Here, there were no dots on the page.

[27] As in *Komolave*, in this case there are no dots on the page to connect, because nothing is said by the RPD about an IFA.

[28] Therefore I decline to make an IFA determination; that will be the done by the RPD at the redetermination.

[29] As noted, the compelling reasons exception must be undertaken once each of the two criteria set out in *Yamba* are satisfied. The Applicant is not required to raise the exception himself; the RPD must explicitly consider compelling reasons whether that issue is raised by the refugee claimant or not. The RPD may not avoid the issue of compelling reasons by not making

an explicit finding about past persecution. As Justice de Montigny, as he then was, stated in *Jairo* at para 27:

> [27] I agree with counsel for the Applicants that where compelling reasons arising out of previous persecution are relevant to the determination of a refugee protection claim, the compelling reasons proviso must be explicitly considered, whether raised by the refugee protection claimant or not. The Board cannot avoid the issue of compelling reasons by not making an explicit finding about past persecution: *BTB v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1181; *Yamba v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 457; *Nagaratnam v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1208; *Rose v Canada (Minister of Citizenship and Immigration)*, 2004 FC 537.
>
> [Emphasis added.]

[30] See also *Yamba* where the Federal Court of Appeal came to the same conclusion:

> [6] In summary, in every case in which the Refugee Division concludes that a claimant has suffered past persecution, but this has been a change of country conditions under paragraph 2(2)(e), the Refugee Division is obligated under subsection 2(3) to consider whether the evidence presented establishes that there are "compelling reasons" as contemplated by that subsection. This obligation arises whether or not the claimant expressly invokes subsection 2(3). That being said the evidentiary burden remains on the claimant to adduce the evidence necessary to establish that he or she is entitled to the benefit of that subsection.
>
> [Emphasis added.]

[31] As I have already found, the two criteria set out in *Yamba* were met: there was a finding of persecution, and there was a finding of a change of country conditions. Thus, there was a legal duty on the RPD to explicitly consider compelling reasons. This it failed to do.

[32] Another important consideration with respect to the compelling reasons exception is whether returning a claimant would be “atrocious” or “appalling”. This assessment, logically, must be undertaken if the two part test in *Yamba* is satisfied. Because judicial review is discretionary I am also considering this aspect of this case; if there is nothing to support such a claim there may be no point in ordering judicial review.

[33] The requirement that a claimant’s return be “atrocious” or “appalling” is explained by Justice Crampton, as he was then, in *Echeverri* at para 49:

> [49] In short, had the Board accepted the overall credibility of Ms. Villegas’ claims, there would have been credible evidence that: (i) she herself, or the social group consisting of her family, had been subjected to past persecution; and (ii) two of her brothers had been subjected to persecution that, prima facie, rose to the level of being “appalling” or “atrocious”, by virtue of the fact that they were murdered by the FARC. In these circumstances, the Board was obliged to explicitly determine, and to address in its reasons, whether Ms. Villegas or her family, as a social group, had in fact been subjected to past persecution and whether there were compelling humanitarian grounds, as contemplated by subsection 108(4), for not requiring her to avail herself of the adequate state protection that the Board found now exists in Bogota.

[34] In my view on this record the “atrocious” or “appalling” criteria may be met. The Applicant’s father died in his arms after the two of them were attacked by FARC terrorists. The Applicant and his father found the farm manager murdered by FARC. FARC attempted to murder the Applicant himself as a 14-year-old boy. FARC attempted to extort, and it appears that FARC subsequently attacked his mother with potentially deadly consequences.

[35] There is no merit to the Respondent's suggestdion that only the Applicant's parents, rather than the Applicant himself, were targeted by FARC: he shelters under FARC's attacks on both his father and mother.

[36] In my respectful view, the Decision is not reasonable because it is not defensible on the facts and law, as required by *Dunsmuir*; the RPD failed to consider the compelling reasons exception pursuant to subsection 108(4) of *IRPA*. Therefore, judicial review must be granted. Since there will be a new hearing, the Applicant may file new evidence at the redetermination.

[37] Neither party proposed questions of general importance to certify, and none arises.

[38] On a procedural note, counsel for the Respondent requested that the style of cause be amended to show the Minister of Citizenship and Immigration as Respondent; there being no objection, the style of cause is so amended effective immediately.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to show the Minister of Citizenship and Immigration as Respondent.
2. The application for judicial review is granted.
3. The decision of the RPD is set aside.
4. The matter is remanded for redetermination by a differently constituted panel.
5. The redetermination shall be conducted in accordance with these reasons.
6. The Applicant may file new evidence at the redetermination.
7. No question is certified.
8. There is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3964-17
STYLE OF CAUSE:	DANIEL AUGUSTO ARISTIZABAL VELEZ v THE MINISTER OF IMMIGRATION AND CITIZENSHIP
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	MARCH 7, 2018
JUDGMENT AND REASONS:	BROWN J.
DATED:	MARCH 13, 2018

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