Federal Court  Cour fédérale

**Date: 20200130**

**Docket: IMM-1168-19**

**Citation: 2020 FC 173**

**Ottawa, Ontario, January 30, 2020**

**PRESENT: Mr. Justice Norris**

**BETWEEN:**

**JOHN ALEXANDER GUECHA RINCON**
**ANA YIVE POSSO ALBARRACIN**
**LUISA FERNANDA GUECHA POSSO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] The principal applicant, John Alexander Guecha Rincon, arrived in Canada on October 31, 2017 with his wife, Ana Yive Posso Albarracin, and their minor daughter. All three are citizens of Colombia. They sought refugee protection in Canada on the basis of their fear of persecution in Colombia at the hands of the Revolutionary Armed Forces of Colombia (commonly known by its Spanish acronym FARC).

[2] On October 11, 2018, the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] rejected their claims, finding that the applicants were neither refugees nor persons in need of protection within the meaning of sections 96 and 97, respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The RPD rejected the claims primarily on credibility grounds but also, in the alternative, because of recent changes in the country conditions and on the basis that the applicants had an Internal Flight Alternative.

[3] The applicants appealed this decision to the Refugee Appeal Division [RAD] of the IRB. For reasons dated January 22, 2019, the RAD dismissed the appeal and confirmed the RPD's determination that the applicants are neither refugees nor persons in need of protection. The RAD based its decision on the determination that the applicants' failure to seek asylum in the United States (where they had lived for approximately two and a half years before coming to Canada) was "indicative of a lack of subjective fear."

[4] The applicants now apply for judicial review of the RAD's decision under section 72(1) of the *IRPA*. They contend that the RAD's assessment of the significance of their failure to seek asylum in the United States and its assessment of current conditions in Colombia are unreasonable.

[5] For the reasons set out below, I agree that the RAD's determination with respect to the significance of the applicants' failure to seek asylum in the United States is unreasonable. This

is sufficient to dispose of this application. The application for judicial review will therefore be allowed and the matter will be remitted for redetermination by a differently constituted panel.

[6] The background can be summarized briefly.

[7] In 2014, the principal applicant was working as a server manager with a Spanish technological resources management company called INDRA. He was responsible for managing the proper functioning of the company's computer servers. Among the companies that used INDRA's services was ECOPETROL, a Colombian petroleum company.

[8] The principal applicant alleged that on February 25, 2014, he was approached by two men as he was leaving work and forced into a pickup truck. The two men sat with the principal applicant in the back while a third man was in the driver's seat. The men identified themselves as members of an armed FARC faction called First Front. They demanded that the principal applicant reveal certain confidential information about ECOPETROL. The principal applicant explained that he was unable to retrieve the information because of audit mechanisms. The men eventually released the principal applicant but threatened to kill his whole family if he did not provide the information they were demanding.

[9] The next day the principal applicant reported the incident to the Public Prosecutor's Office. A short time later, he decided to quit his job with INDRA and leave Bogota. On March 28, 2014, the applicants moved to Villavicencio, Colombia. About five months later, on August 10, 2014, the principal applicant received a call from a First Front member. The caller

told him that First Front knew where he lived, and threatened to kill him if he did not provide the information about ECOPETROL.

[10] A few days later, the principal applicant and his family moved to Ibague, Colombia. While in Ibague, the applicants obtained visitor visas for the United States. The visas were valid from March 13, 2015, until September 12, 2015. The applicants left Colombia for the United States, arriving in Chicago via Miami on March 13, 2015.

[11] While in the United States, the principal applicant inquired about seeking asylum there but two lawyers advised him that he could not claim asylum because his fear was not based on his political opinions. The applicants overstayed their visitor visas. The principal applicant's employer offered to help legalize the family's status in the United States but never followed through with this. After the US election in 2016, the principal applicant became even more pessimistic that he and his family would be able to secure status in the United States. Fearing deportation, they travelled to the New York/Quebec border and made a claim for refugee protection in Canada on October 31, 2017.

[12] The RPD member disbelieved the principal applicant's account of the incident on February 25, 2014, because he had described the vehicle at different times as a car and a truck. On appeal, the principal applicant provided evidence that he had consistently used the same Spanish word – *camioneta* – to refer to a passenger truck as opposed to a commercial transport truck and that this usage was an accepted meaning of the term. The RAD member accepted the new evidence and determined that there was no inconsistency in the principal applicant's account

of the February 25, 2014, incident. The RAD member found as a fact that the incident had occurred as the principal applicant described.

[13] However, the RAD member proceeded to uphold the RPD's rejection of the claims solely on the basis that the applicants' failure to seek asylum in the United States was indicative of a lack of subjective fear.

[14] It is well-established that the RAD's determinations of factual issues and issues of mixed fact and law are reviewed on a reasonableness standard (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, at para 35).

[15] That this is the appropriate standard has recently been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], where the majority of the Court set out a revised framework for determining the standard of review with respect to the merits of an administrative decision (at para 10). Applying *Vavilov*, there is no basis for derogating from the presumption that reasonableness is the applicable standard of review of the RAD's decision.

[16] The majority in *Vavilov* also sought to clarify the proper application of the reasonableness standard (at para 143). The principles the majority emphasizes were drawn in large measure from prior jurisprudence, particularly *Dunsmuir v New Brunswick*, [2008] 1 SCR 190, 2008 SCC 9 [*Dunsmuir*]. Although the present application was argued prior to the release of *Vavilov*, the footing upon which the parties advanced their respective positions concerning the reasonableness of the RAD's decision is consistent with the *Vavilov* framework. I have applied

that framework in coming to the conclusion that the RAD's decision is unreasonable; however, the result would have been the same under the *Dunsmuir* framework.

[17] As discussed in *Vavilov*, the exercise of public power "must be justified, intelligible and transparent, not in the abstract but to the individuals subject to it" (*Vavilov* at para 95). For this reason, an administrative decision maker has a responsibility "to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96). 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). An assessment of the reasonableness of a decision must be sensitive and respectful yet robust (*Vavilov* at paras 12-13). Here, the onus is on the applicant to demonstrate that the RAD's decision is unreasonable. Before the decision can be set aside on this basis, I must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100).

[18] The applicants submit that the RAD's decision is fatally flawed because the member failed to explain why he rejected their explanation for not seeking asylum in the United States before drawing the conclusion that this failure was indicative of a lack of subjective fear. I agree.

[19] I summarized the governing principles concerning the significance of delay in seeking refugee protection in *Chen v Canada (Citizenship and Immigration)*, 2019 FC 334 at para 24. To reiterate:

a) Delay in seeking refugee protection is not determinative of the claim; rather, it is a factor the decision maker may take into account in assessing the claim's credibility (*Calderon Garcia v Canada (Citizenship and Immigration)*, 2012 FC 412 at paras 19-20).

b) In particular, delay can indicate a lack of fear of persecution in the country of reference on the part of the claimant (*Huerta v Canada (Minister of Employment & Immigration)*, [1993] FCJ No 271 (FCA), 157 NR 225). Put another way, delay can be probative of the credibility of the claimant's assertion that he or she fears persecution in the country of reference (*Kostrzewa v Canada (Citizenship and Immigration)*, 2012 FC 1449 at para 27).

c) Whether there has been delay and, if so, its length must be determined with regard to the time of inception of the claimant's fear as determined from the claimant's personal narrative.

d) The governing question is: Did the claimant act in a way that is consistent with the fear of persecution he or she claims to have?

e) Delay in seeking protection can be inconsistent with subjective fear because generally one expects a genuinely fearful claimant to seek protection at the first opportunity (*Osorio Mejia v Canada (Citizenship and Immigration)*, 2011 FC 851 at paras 14-15).

f) When a claimant has not sought protection at the first opportunity, the decision maker must consider why not when assessing the significance of this fact. A satisfactory alternative explanation for why the claimant waited to seek refugee protection can support the conclusion that the delay is not inconsistent with the fear of persecution alleged by the claimant. Absent a satisfactory alternative explanation, it may be open to a decision maker to conclude that, despite what the claimant now says, he or she does not actually fear persecution and that this is why protection was not sought sooner (*Espinosa v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1324 at para 17; *Dion John v Canada (Citizenship and Immigration)*, 2010 FC 1283 at para 23 [*Dion John*]; *Velez v Canada (Citizenship and Immigration)*, 2010 FC 923 at para 28).

g) Whether an alternative explanation is satisfactory or not depends on the facts of the specific case, including the claimant's personal attributes and circumstances and his or her understanding of the immigration and refugee process (*Gurung v Canada (Citizenship and Immigration)*, 2010 FC 1097 at paras 21-23; *Licao v Canada (Citizenship and Immigration)*, 2014 FC 89 at paras 57-60; *Dion John*, at paras 21-29).

[20] This issue was addressed by the RPD in the following way in oral reasons delivered on the day of the hearing:

> I note that they were in the States for two and a half years and they did not claim refugee protection and they put forward explanations here today that they sought assistance of counsel and were told they could not claim refugee protection or reasons why it would not be to their benefit to claim refugee protection.
>
> While some may argue that United States is currently politically empowered for potential immigrants and refugee claimants, the panel would reasonable expect the claimant to make a claim for

> asylum at the first opportunity especial in the country that is signature to the Convention, but I do take into consideration what the fellow court has held the Board is required to assess why asylum was not sought at the first instance by claimant [*sic* throughout].

However, having said this, the RPD member was prepared to set this issue aside because the claim could be disposed of on other grounds.

[21] In dismissing the applicants' appeal, the RAD member stated the following:

> The RPD also concluded that the Appellants failed to file an asylum claim while living for two and half years in the United States. They were asked by the RPD why they had not filed a claim in the United States and the Principal Appellant replied that they had been advised that it would not be beneficial for them to make such an application. The RPD rejected this explanation. I agree with the RPD in rejecting this explanation.

[22] In my view, this conclusory statement falls well short of the degree of justification, transparency and intelligibility required in the circumstances.

[23] Looking first at the RPD's finding which the RAD member purports to adopt, it is highly problematic. Even allowing for the fact that the RPD member delivered oral reasons for the decision and that there are some obvious infelicities in the transcription (e.g. "fellow court" should presumably be "Federal Court"), there are parts of the RPD's reasons that are simply unintelligible as transcribed (e.g. "some may argue that United States is currently politically empowered for potential immigrants and refugee claimants"). Moreover, contrary to what the RAD member thought, the RPD does not actually reject the applicants' explanation for not seeking asylum in the United States. At best, the RPD equivocates on the issue: on the one hand

one would reasonably expect the applicants to have claimed asylum at the first opportunity to do so but on the other hand the jurisprudence requires the Board to consider why this did not happen. The RPD does not resolve this issue one way or the other before moving on. As a result, it is unreasonable for the RAD simply to agree with the RPD in rejecting the applicants' explanation without any further discussion. Contrary to what the RAD member evidently thought, the RPD member did not actually reject the applicants' explanation. Even if it may be open to the RAD member to reject the applicants' explanation for not seeking asylum, at least some explanation for this conclusion is required.

[24] The RAD member may have thought that no explanation was required because he believed the applicants had not challenged "this particular finding of the RPD." In the view of the RAD member, it was "reasonable to expect that they would have provided submissions to indicate whether the RPD had erred with respect to this particular conclusion." I have already explained why the RAD member is mistaken in thinking that the RPD actually reached a "particular finding" or a "particular conclusion" on this point. The RAD member is also mistaken that the applicants did not challenge the RPD's assessment of their failure to claim asylum in the United States. In fact, they did challenge the RPD's treatment of this issue in their written submissions in support of their appeal. While not the main focus of their appeal, this was doubtless because this issue did not figure in the RPD's ultimate determination.

[25] The RAD member treated the failure to seek asylum in the United States as determinative of the appeal. It was incumbent upon him to explain why he rejected the applicants' explanation for not seeking asylum in the United States before drawing the conclusion that this was

indicative of a lack of subjective fear. The complete lack of explanation is a serious shortcoming which leaves the RAD member's reasoning on the determinative issue utterly opaque.

[26] For these reasons, the RAD's decision must be set aside and the matter must be reconsidered by the differently constituted panel.

[27] The parties did not suggest any serious questions of general importance for certification under section 74(d) of the *IRPA*. I agree that none arise.

[28] Finally, the original style of cause names the respondent as the Minister of Immigration, Refugees and Citizenship. Although that is how the respondent is now commonly known, its name under statute remains the Minister of Citizenship and Immigration: *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, section 5(2) and *IRPA*, section 4(1). Accordingly, as part of this judgment, the style of cause is amended to name the respondent as the Minister of Citizenship and Immigration.

**JUDGMENT IN IMM-1168-19**

**THIS COURT'S JUDGMENT is that**

1. The style of cause is amended to reflect the Minister of Citizenship and Immigration as the correct respondent.
2. The application for judicial review is allowed.
3. The decision of the Refugee Appeal Division dated January 22, 2019, is set aside and the matter is remitted for redetermination by a differently constituted panel.
4. No question of general importance is stated.

"John Norris"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-1168-19 |
| **STYLE OF CAUSE:** | JOHN ALEXANDER GUECHA RINCON ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | OCTOBER 2, 2019 |
| **JUDGMENT AND REASONS:** | NORRIS J. |
| **DATED:** | JANUARY 30, 2020 |

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| Leanne Briscoe | FOR THE RESPONDENT |

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