

Federal Court



Cour fédérale

Date: 20210120

Docket: IMM-1739-20

Citation: 2021 FC 67

Vancouver, British Columbia, January 20, 2021

PRESENT: Mr. Justice Alan Diner

BETWEEN:

**EDINSON VALVERDE PEREZ
MARGARITA VALVERDE GARCIA
JEAN SEBASTIAN VALVERDE GARCIA
MARLING GARCIA IBARGUEN
MARIA CAMILA VALVERDE GARCIA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicants challenge an appeal overturning a positive first-instance refugee decision. After review, I find the appeal decision to be unreasonable, and will return the matter for redetermination.

I. Background

[2] Both tribunals of the Immigration and Refugee Board of Canada – the Refugee Protection Division (“RPD”) at first instance and subsequently the Refugee Appeal Division (“RAD”) – accepted the Applicants’ credibility and did not question the factual underpinnings of their claim. The Applicants (the Principal Applicant, his spouse, two adult children and a grandchild) are citizens of Colombia. The Principal Applicant, a Christian, coached youth soccer in his home town of Buenaventura, beginning training sessions to groups of up to 60 with talks about the word of God, and about the dangers of violent criminal gangs, which often recruit young people in Colombia. Given his community work, the Principal Applicant became recognizable in Buenaventura.

[3] On January 1, 2014, two men attempted to kidnap the Principal Applicant. His son intervened, and sustained injuries to his face that required stitches. Neighbours called the police and the two men fled.

[4] The Applicants reported the incident to the police when the police arrived, who told them to file a complaint with the prosecutor’s office. The Principal Applicant feared seeking further assistance due to his fears of ties to organized crime amongst the police, and instead fled that same day with his family to live in Cali with relatives. There, he continued his community activism, coaching and counselling youth, speaking out against gangs, and also started a successful business and studied theology.

[5] Homesick and wanting to see his mother, the Principal Applicant returned to Buenaventura, leaving his family in Cali. Several months after his return, he received an extortion request for a significant sum of money. The callers referenced his home ownership. He filed one complaint at the prosecutor's office and a second at a governmental agency for victim assistance. A journalist came to interview him about the threats made against him, falsely promising not to identify him. The journalist then wrote about the earlier kidnapping attempt, stating (in the translated version of the newspaper article):

The new case of extortion was registered in the centre in Las Tijeras street of Buenaventura where the Edinson Valverde Perez family was forced to leave their home for being intimidated by an armed group.

The first threat that the victim received was 2 years ago, when he had to flee because armed men came to his house and threatened [him] with ending his life. [...]

“I knew that those men were not playing games because they had come to my house looking for me once two years ago. At that time I [sic] they didn't kill me but what if they kill me now”, he expressed.

Since last May 10 when these incidents happened, the Valverde family has not had a minute of peace. And in spite of making a denunciation, they do not feel safe. These situations take place almost every day in the port. However, only few dare to denounce for fear and they prefer to pay the high amounts that the criminal gangs, like La Empresa and El Clan del Golfo, demand through extortion.

[Emphasis added.]

[6] Fearing the consequences of the extortion request and the published article, the Principal Applicant returned to Cali, and continued to coach and speak out to his players against organized crime. There, in another incident, two men on a motorcycle shot at him. The Principal Applicant sought refuge in a neighbourhood home. Police ultimately accompanied him back to his

relative's house. Once again citing police connections with organized crime, he went into hiding, before fleeing Colombia.

[7] The RPD found that the Principal Applicant had “been threatened and harmed in Buenaventura and Cali”, that he had “fled Buenaventura twice because his life was at risk and the lives of the claimants were at risk”, and that the “whole family fled Cali after the principal claimant had been harmed”. The RPD also noted that:

The principal claimant testified in a straightforward manner and corroborated the claim with extensive documentation.... The evidence includes corroboration that the claimant worked as a political activist and teaching the important values to children and adolescents in both Cali and Buenaventura....

[8] The RPD found that the attempted kidnapping, extortion, and shooting were all related to the Principal Applicant's actions as a social and political activist who defied gangs and delivered a strong message about Christianity. Based on these facts, the RPD found an inability of the state to protect the Applicants and no internal flight alternative.

[9] The RAD disagreed with this assessment and overturned the RPD decision, noting that its review was to be done on a correctness standard. It noted, at the outset of its decision, that “[t]he determinative issue is credibility”, although it said nothing further about credibility for the remainder of the decision – at least explicitly. Rather, it cited three reasons why it felt that the Applicants were neither convention refugees nor persons in need of protection.

[10] First, the RAD found a failure to demonstrate that the three incidents were part of a concerted effort by any criminal organization to silence the Principal Applicant. Instead, the

RAD Member characterized the incidents as isolated criminal acts. Second, the RAD rejected any nexus between the incidents and the Principal Applicant's religious and political opinions. The RAD noted that, with the Principal Applicant living in a predominantly Catholic country, the evidence did not indicate that criminal organizations were aware of his religiously motivated attempts to discourage youth from joining gangs. Finally, the RAD noted that while the Principal Applicant engaged state authorities by asking for and receiving protection in some instances, he showed a reticence to engage their protection at other times. The RAD found that this did not indicate the state's unwillingness or inability to provide protection to the Applicants.

II. Issues and Standard of Review

[11] The Applicants argue that the RAD overlooked evidence in coming to its findings regarding a lack of demonstrating the existence of (i) agents of persecution, (ii) nexus to political opinion, and (iii) a lack of available state protection. The Applicants argue before this Court that each of the three RAD findings are unreasonable.

[12] Reasonableness serves as the presumptive starting point for judicial review, subject to certain exceptions (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at para 16). No exceptions to that standard arise here. Under a reasonableness review, the Court must be satisfied that the administrative "decision is based on an internally coherent chain of reasoning, and is justified in light of the relevant legal and factual constraints" (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 2). The decision must bear the hallmarks of reasonableness – justification, transparency, and intelligibility – and it must be justified in relation to the relevant factual and legal constraints (*Vavilov* at para 99).

III. Analysis

[13] On the first issue, the RAD attributed the threats and violent incidents to “isolated criminal actions”, finding that, while organized criminality in Colombia is well documented, to infer that the criminal actions were carried out in a concerted effort in this case “is rational though inconclusive”. It found the incidents to be “isolated criminal action” without any serious repercussions in either Buenaventura or Cali to the Applicants. The RAD also found that “failing to identify criminals as belonging to a gang has an incidence on determining the serious possibility of persecution or, on a balance of probability, the likelihood of risk to life or of cruel and unusual treatment or punishment” for the Applicants in Colombia.

[14] The Principal Applicant was known in the community for his anti-gang activism. This was confirmed by supporting letters and the newspaper article cited above. The Principal Applicant’s immediate family was also attacked.

[15] The RAD’s findings do not reconcile the evidence personal to the Applicants’ situation in light of the significant objective evidence on the danger of gangs in the area where they lived in Colombia. This Court has previously held that a decision-maker’s failure to engage with an applicant’s evidence was sufficient to render the officer’s decision unreasonable (*Li v Canada (Citizenship and Immigration)*, 2020 FC 279 at para 13; see also *Gomes v Canada (Citizenship and Immigration)*, 2020 FC 506 [*Gomes*]). Reasons must address the key issues, including the evidence, that are relevant to the decision (*Gomes* at para 45). As the Supreme Court of Canada stated in *Vavilov*:

... 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. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning.

[16] The RAD's faulting the Applicants for "failure to identify the agents of persecution as gang members" was also unreasonable, along with the finding that these were isolated criminal acts. The Applicant reported the attacks to the police and prosecutors. He also made references linking the attacks to the media, as emphasized in the paragraph above.

[17] Clearly, the Principal Applicant linked these attacks both in his statements to the journalist in Colombia, and in his claim before the Board (both in his Basis of Claim ("BOC"), and in his oral testimony at his hearing), which was seemingly found to be credible (subject to my comments in paragraphs 21-22 below). He also clearly attributed the attacks to gangs once he came to Canada, both in his BOC (referred to as "criminal groups" and organized crime) and then in testimony before the RPD, evident in both documents and indeed throughout the objective evidence he provided.

[18] Once again, in finding no evidence of concerted efforts or of any gang involvement, the RAD overlooked evidence the Principal Applicant provided linking the attacks against him to his activities, including the news report about the Principal Applicant personally referring to the incidents coming from gangs, and various places from the country documentation relating to criminal gangs that operate with impunity including in Buenaventura and Cali.

[19] It is notable that RAD highlighted – including in a subtitle in its decision – the Principal Applicant’s “[f]ailure to identify the agents of persecution as gang members”. If the tribunal was referring to the evidence, this subtitle and the analysis that follows overlook multiple references by the Principal Applicant to gangs and criminal groups in his written and oral evidence.

[20] If, on the other hand, the RAD was referring the Principal Applicant’s failure to name names or specify the gang involved, that too would be unreasonable. Firstly, the Applicant was consistent that members of organized crime attacked him due to his anti-gang activism, including in both his written and oral testimony, as well the objective (country condition) evidence he pointed to. Secondly, in situations where the gang and/or its members have not been identified by the applicant who claims persecution, the tribunal must assess whether the evidence as a whole points to agents of persecution reacting to the particular grounds argued by that applicant, including due to opposition to their group (see, for instance *Sanchez Molano v Canada (Citizenship and Immigration)*, 2011 FC 1253 at paras 65-73). Clearly, in many cases, assailants would not announce their or their groups’ names during an attack.

[21] Whatever the precise meaning behind the RAD’s finding in this case of the Applicants’ “failure to identify the agents of persecution as gang member”, the RAD did not consider the surrounding circumstances in light of consistent evidence provided both orally and in writing regarding the attacks in different locations, and the links made between them to his activism.

[22] Regarding the state protection findings, the RAD also failed to engage with evidence that the RPD discussed, including the low level of police effectiveness to protect similarly situated

persons. Quite apart from overlooking evidence regarding city and country conditions, the fact was that the Principal Applicant reported each of his three incidents to the police in both cities and provided documentary evidence of the same. He also provided evidence that he continued to be attacked and threatened after these reports, and was forced to move from his home city on two different occasions before being attacked in Cali and finally fleeing the country.

[23] When a claimant presents evidence that state protection is inadequate, the decision-maker must either find fault with the evidence or find that it is outweighed by other evidence: *Barragan Gonzalez v Canada (Citizenship and Immigration)*, 2015 FC 502 at para 39 [*Barragan Gonzalez*]. The RAD failed to do so in its decision.

[24] Finally, I go back to the first point made in the RAD decision, namely its statement that the determinative issue was credibility. As conceded by the Respondent, the RAD never made a single explicit finding regarding credibility in its subsequent analysis. For instance, it cited no implausibility, inconsistencies, inferences, or other indicia of credibility weaknesses. In short, it made no determination on its self-declared “determinative issue”. Particularly in light of the fact that the RPD reached the opposite conclusion after it had questioned and heard oral evidence directly, the RAD owed the Applicants an explanation of how and why it came to this conclusion.

[25] The RAD’s statement about credibility being determinative, in and of itself, lacks justification. I recognize that the statement might have been a mistake, errantly left in perhaps from previous boilerplate or in an earlier draft of the decision. It nevertheless obscures the RAD’s chain of analysis. While I recognize that reasons need not be perfect, this error did not

occur in isolation; it was amplified by other reviewable errors. When viewed as a whole, the decision fails to withstand judicial review, because it is not one based on an internally coherent and rational chain of analysis (*Vavilov* at paras 85, 91).

IV. Conclusion

[26] The RAD erred by overlooking central evidence in relation to several of its key findings. It also deemed credibility to be its determinative issue without then making any determination to that effect or providing any explanation. For those reasons, the decision lacked justification, transparency, and intelligibility. I will thus allow this Application, and send it back to the RAD for redetermination by another tribunal member.

JUDGMENT in IMM-1739-20

THIS COURT'S JUDGMENT is that:

1. The application is granted and the matter is to be sent back to the RAD for redetermination by a different decision-maker.
2. No questions for certification were raised and I agree none arise.
3. There is no award as to costs.

“Alan S. Diner”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1739-20

STYLE OF CAUSE: EDINSON VALVERDE PEREZ, MARGARITA
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GARCIA V THE MINISTER OF CITIZENSHIP
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**HEARING HELD BY VIDEOCONFERENCE ON JANUARY 13, 2021 FROM
TORONTO, ONTARIO (COURT) AND VANCOUVER, BRITISH COLUMBIA
(PARTIES)**

JUDGMENT AND REASONS: DINER J.

DATED: JANUARY 20, 2021

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