

Federal Court



Cour fédérale

**Date: 20210429**

**Docket: IMM-7416-19**

**Citation: 2021 FC 374**

**Ottawa, Ontario, April 29, 2021**

**PRESENT: The Honourable Mr. Justice Brown**

**BETWEEN:**

**ESTER HERNANDEZ ALMEIDA  
SARA SOFIA ESTUPINAN HERNANDEZ  
CRISTHIAN ARBEY AVENDANO  
HERNANDEZ**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD] of the Immigration and Refugee Board, which upheld the decision of the Refugee Protection Division [RPD]. The RPD determined the Applicants are neither Convention refugees nor persons in need of protection pursuant to section 96 and section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [IRPA] [Decision].

I. Facts

[2] The Applicants, a mother [Principal Applicant] and her minor children are citizens of Colombia. In her Basis of Claim [BOC] she says she owned and operated a beauty business in Colombia. She says she started receiving phone calls from an armed group in Colombia [Group] who demanded money. The Principal Applicant initially ignored the calls. Later, she said men from the Group attended her business demanding security fees. They said they had already investigated her life and the daily activities of her and her children. Subsequently, her business was robbed by armed members of the Group who stole her money and gagged her employees. This incident was reported to the authorities. Five days later, she received a threatening call from them after they discovered she made a police complaint and they threatened to kill her and her children if she did not pay. She then began paying them a monthly security fee.

[3] In 2016, the Principal Applicant experienced difficulties paying. The Group said if she did not pay, they would kidnap her son, so she sent her son to a different place to live. By the next year, they stopped demanding the fee. She says she was in Canada with her minor children at the time and her adult daughter was in charge of the business in Colombia.

[4] In mid-2017, while the Principal Applicant and her minor children were in Canada, her adult daughter received threatening calls. Later that year she was approached by two armed members of the Group who told the Principal Applicant to appear or else she and her children would be killed. As a result, the Applicants made a refugee claim while in Canada later in 2017.

[5] The Principal Applicant also says family members and acquaintances in Colombia were threatened and approached by people inquiring about the Applicants. Then the adult daughter in Colombia received what she thought was a threatening letter [Letter] from the Group saying the Applicants are the subject of a military objective and would be executed. There were in fact two letters delivered at the same time bearing resemblances to each other.

[6] Before the RPD, the Principal Applicant filed a psychiatric report that said she experiences adjustment disorder, anxiety and depression.

[7] The RPD found the evidence lacked credibility due to numerous discrepancies in the Letter sent by the Group and denied her claim for refugee protection.

## II. Decision under review

[8] The Applicants appealed the RPD decision and the RAD dismissed the appeal. The RAD concluded the RPD was correct in finding the Applicants' evidence was not credible and said this was the determinative issue on appeal. The RAD said the heart of the Applicants' claim was their lives were threatened after being declared a military objective in the Letter. It found their credibility was undermined by the determination the Letter was not genuine, and their behaviour in returning to Colombia was not consistent with subjective fear of persecution or harm. It found the balance of the documentary evidence submitted was not enough to support a positive disposition of the claim.

[9] The RAD held the Letter was not genuine because two similar, but different, Letters were provided to the RPD even though the Principal Applicant stated there was only one. Before the RPD, the Principal Applicant initially stated there was only one Letter, but later stated, after speaking with her adult daughter, that her adult daughter received two Letters and did not realize they were different. The RAD found the RPD provided cogent and transparent reasons to reject the credibility of the Letters based on discrepancies between them, and the submissions of non-genuine Letters undermined the believability of the entire claim.

[10] The RAD also found the RPD did not err by failing to conduct a separate analysis pursuant to section 97 of *IRPA*. The RAD stated the Applicants had not provided any evidence to support a residual claim fitting their profile either through a nexus to a section 96 ground or through a personalized risk going beyond a general risk pursuant to section 97.

### III. Issues

[11] The only issue in this application is whether the Decision is reasonable.

### IV. Standard of Review

[12] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] Justice Rowe said that *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] set out a revised framework for determining the applicable standard of review for administrative decisions. The starting point is a presumption that a standard of reasonableness applies. This presumption can be rebutted in certain situations, none of which apply in this case. Therefore, the Decision is reviewable on a standard of reasonableness.

[13] In *Canada Post*, Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

[31] 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). Accordingly, when conducting reasonableness review “[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with ‘respectful attention’ and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion” (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand “the basis on which a decision was made” (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).

[32] A reviewing court should consider whether the decision as a whole is reasonable: “what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review” (*Vavilov*, at para. 90). The reviewing court must ask “whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).

[33] Under reasonableness review, “[t]he burden is on the party challenging the decision to show that it is unreasonable” (*Vavilov*, at para. 100). The challenging party must satisfy the court “that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable” (*Vavilov*, at para. 100).

[14] The Supreme Court of Canada in *Vavilov*, at para 86 states “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.” The reviewing court must be satisfied the decision maker’s reasoning “adds up”:

[104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

[105] In addition to the need for internally coherent reasoning, a decision, to be reasonable, must be justified in relation to the constellation of law and facts that are relevant to the decision: *Dunsmuir*, at para. 47; *Catalyst*, at para. 13; *Nor-Man Regional Health Authority*, at para. 6. Elements of the legal and factual contexts of a decision operate as constraints on the decision maker in the exercise of its delegated powers.

## V. Analysis

[15] The Applicants submit the RAD erred in finding the Principal Applicant was not credible, erred in its assessment of the Applicants delay in making their claim and erred in finding the RPD was not required to conduct a separate section 97 analysis.

### A. *Did the RAD err in finding the Principal Applicant was not credible?*

[16] The Applicants submit the RAD erred in its credibility findings and in its determination the RPD's credibility findings were reasonable. The central credibility findings were the Applicants had presented fabricated Letters because the Principal Applicant provided similar, but different, Letters after initially stating there was only one Letter.

[17] The Applicants submit there is nothing implausible in their conduct. They did not know there were two different Letters until confronted at the RPD hearing. They were then provided an opportunity to explain and the Principal Applicant relied on her adult daughter for the

information. The adult daughter said both Letters containing threats from the Group came in one envelope and she did not realize the Letters were different because she was extremely nervous when she received the envelope. She thought they were two copies of the same Letter.

[18] Both the RPD and RAD found the explanation was not reasonable and found the Letters must have been manufactured. They used this finding to reject the entire credibility of the Applicants.

[19] While a number of issues concerning the Letter(s) were canvassed, some in considerable detail, on review I have concluded the RAD erred in its credibility assessment concerning the Letter(s). At issue before the RAD was the credibility of the Principal Applicant. In my view, the RAD erred because instead of assessing the credibility of the Principal Applicant, it focussed in fact on the credibility of the adult daughter upon whom the Principal Applicant relied. The Principal Applicant knew nothing of the Letters except what was told to her by her adult daughter. Initially caught by surprise by there being two Letters, she had a chance to be updated by her adult daughter between the first and second day of the hearing. At the second day, she once again could and did only report the additional information she received from her adult daughter. To the extent what she said was not believed by the RAD, in my view she was simply repeating what her adult daughter in Colombia had reported to her. I am not prepared to accept a credibility finding against the Principal Applicant that is, as here, based on perceived faults of her adult daughter. The credibility assessment is not reasonable because it is not supported by the evidence in the circumstances of this case.

[20] The Applicants also submit the RAD, having found the Applicants were not credible, then essentially rejected numerous other documents submitted by third parties in support of her claim. In fact that is not what the RAD did, but it seems to me the RAD's analysis of the many other documents submitted was less than thorough. None of the documents were assessed as not genuine; I take them as genuine. A police report concerning a robbery in 2013 was rejected because it did not name the group who robbed the Principal Applicant. But, at that time she did not know who they were. In addition, this document should have been, but was not, considered under her residual claim per section 97 of the *IRPA*. In connection with section 97, I note *Bouaouni v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1211 [Blanchard J] at para 41 where it is stated that a section 97 claim must be evaluated:

[41] A claim under section 97 must be evaluated with respect to all the relevant considerations and with a view to the country's human rights record. While the Board must assess the applicant's claim objectively, the analysis must still be individualized. I am satisfied that this interpretation is not only consistent with the United Nations CAT decisions considered above, but is also supported by the wording of paragraph 97(1)(a) of the Act, which refers to persons, "...whose removal ... would subject them personally...". There may well be instances where a refugee claimant, whose identity is not disputed, is found to be not credible with respect to his subjective fear of persecution, but the country conditions are such that the claimant's particular circumstances, make him/her a person in need of protection. It follows that a negative credibility determination, which may be determinative of a refugee claim under s. 96 of the Act, is not necessarily determinative of a claim under subsection 97(1) of the Act. The elements required to establish a claim under section 97 differ from those required under section 96 of the Act where a well-founded fear of persecution to a convention ground must be established. Although the evidentiary basis may well be the same for both claims, it is essential that both claims be considered as separate. A claim under section 97 of the Act requires that the Board apply a different test, namely whether a claimant's removal would subject him personally to the dangers and risks stipulated in paragraphs 97 (1) (a) and (b) of the Act. Arguably, the Board may also be required to apply a different standard of proof, which is an issue that I will leave for another



day, since it was not argued on this application. Whether a Board properly considered both claims is a matter to be determined in the circumstances of each individual case bearing in mind the different elements required to establish each claim.

[21] Continuing with the documents supporting the claim, complaints by the daughter to the Attorney General of Colombia and to the General Persecution Office of Colombia were rejected because they were tied to the Letter, which was unreasonable in that I have found the Letter(s) was unreasonably assessed. The Letter should have been considered in support of the claim, and also under section 97, but were not. There were also two sworn statements from two neighbours which confirmed the threats. These were rejected because they did not name the group involved. That was unreasonable unless there was good cause to believe the neighbours actually knew the agents of persecution which was not established. Therefore these statements should have been assessed as supporting the claim but were not. They should also have been considered under the RAD's section 97 assessment but were not.

[22] There were other documents as well; I will not go through them all, but one was a report prepared by the official Colombian Government Victim's Unit. This official report identified the Applicants as having been subject to death threats and forced displacement and stated: "such event has breached simultaneously both civil and political rights as well the economic, social and cultural, amongst other the rights of freedom of movement and the unity of the family". This genuine official government assessment was not even assessed by the RAD in support of the claim as in my view it should have been, nor was it considered in its residual assessment under section 97.

B. *Other issues*

[23] The RPD and RAD criticized the Principal Applicant for her delay in claiming refugee status noting she travelled back and forth between Canada and Colombia for several years such that there was a question about her subjective fear of persecution. Given my findings on credibility and the assessment of the remaining documents, I need not review this issue because the others are determinative. The Principal Applicant also claimed her section 97 claim was not properly assessed, which I have dealt with above.

VI. Conclusion

[24] In my respectful view, the Applicants have shown the Decision of the RAD was unreasonable. The RAD conducted an unreasonable analysis of credibility, which in part led to an inadequate assessment of the considerable additional documentation, and failed to conduct a section 97 analysis as required in this case. Constraining law was not respected. Therefore, judicial review must be granted and the matter sent for redetermination.

VII. Certified Question

[25] Neither party proposed a question of general importance, and none arises.

**JUDGMENT in IMM-7416-19**

**THIS COURT'S JUDGMENT is that** judicial review is granted, the Decision below is set aside, the matter is remanded for redetermination by a different decision-maker, no question of general importance is certified and there is no order as to costs.

“Henry S. Brown”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-7416-19

**STYLE OF CAUSE:** ESTER HERNANDEZ ALMEIDA, SARA SOFIA  
ESTUPINAN HERNANDEZ, CRISTHIAN ARBEY  
AVENDANO HERNANDEZ v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**HEARING HELD BY VIDEOCONFERENCE ON APRIL 26, 2021 FROM OTTAWA,  
ONTARIO (COURT) AND TORONTO, ONTARIO (PARTIES)**

**JUDGMENT AND REASONS:** BROWN J.

**DATED:** APRIL 29, 2021

**APPEARANCES:**

Lorne Waldman FOR THE APPLICANTS

Melissa Mathieu FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Waldman & Associates FOR THE APPLICANTS  
Barrister and Solicitor  
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT  
Toronto, Ontario