Federal Court  Cour fédérale

Date: 20210727

Docket: IMM-4622-20

Citation: 2021 FC 791

Ottawa, Ontario, July 27, 2021

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

ELVIS ROGELIO BENAVIDES QUISPE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Benavides', claim for refugee protection was denied by the Refugee Protection Division [RPD]. He appealed this decision to the Refugee Appeal Division [RAD] and tried to file new documents as part of his appeal. The RAD did not consider this new evidence and affirmed the RPD's determination that Mr. Benavides was not a Convention

Refugee or a person in need of protection on the grounds that he could safely relocate to two cities it had identified as Internal Flight Alternatives [IFAs] in Peru.

[2] Mr. Benavides challenges the August 16, 2020 decision of the RAD principally on the basis that the RAD improperly refused to consider his new evidence. He also argues that the RAD erred in its determination that the nature of his work did not make him a high-profile target that would be sought out by the agent of persecution in the IFAs identified.

[3] I do not agree that the RAD's decision contains these errors. The RAD properly considered and applied the requirements flowing from statute and case law for admitting new evidence. Further, Mr. Benavides has not identified how any of these new documents could have had any effect on the outcome of the RAD's decision on the viability of an IFA in Peru. Mr. Benavides' other argument with respect to the RAD's findings about the high profile nature of his work, only raised by his counsel orally at the hearing, repeats the argument made on this point before the RAD, but fails to address the RAD's reasons or identify any error made by the RAD.

[4] For the reasons set out below, I am dismissing this judicial review application.

II. Factual context

[5] Mr. Benavides is a citizen of Peru. He fled Peru with his wife and minor child because of threats and violence he and his family faced from members of a group called Sendero Luminoso [SL] or "Shining Path." Mr. Benavides was approached by the SL due to his work at a power

generation plant; the SL believed that Mr. Benavides could assist them with their plans to disrupt the electricity grid and/or cause an explosion. When Mr. Benavides refused to assist them, he faced numerous threats and violence, causing him and his family to flee.

[6] The RPD rejected Mr. Benavides' and his family's claims on the basis of the availability of IFAs in Peru, Mr. Benavides's country of citizenship, as well as in Colombia, a country where the RPD held that Mr. Benavides had access to citizenship through his marriage to a Colombian citizen.

[7] Mr. Benavides appealed this decision to the RAD. Mr. Benavides' wife and minor child were included in the appeal, but they withdrew their appeal prior to the RAD deciding their claims.

[8] The RAD found that the RPD wrongly determined that Mr. Benavides had access to citizenship in Colombia but upheld the RPD's determination on the availability of IFAs in Peru.

[9] The sole basis for the RAD's refusal of Mr. Benavides's appeal was its finding that there are two viable IFAs in Peru. The RAD's determination that the two cities identified as IFAs were safe for the Applicant was based on a number of factors, including: the two cities were the second and third largest cities in Peru; Mr. Benavides no longer worked at the oil and gas company and had not done so for three years; the SL is primarily involved in drug trafficking activities in the Valley of the Apurímac, Ene and Martaro Rivers [VRAEM] area, which is a significant distance from the IFAs; Mr. Benavides, as an ex-employee of the oil and gas

industry, does not have the profile of someone the SL would target; the SL's power has dramatically weakened with it being reported, by several sources in the country condition evidence, as only operating in the VRAEM region; and in recent years the government has been successful in its efforts to combat the violence of groups like the SL.

[10] Mr. Benavides now seeks judicial review of the RAD's refusal of his appeal.

III. Issues and Standard of Review

[11] The Applicant raises two issues in this judicial review:

A. Did the RAD err in not admitting new evidence?

B. Was the RAD's determination on the availability of IFAs in Peru otherwise unreasonable?

[12] In reviewing the RAD's reasons, I will be applying a reasonableness standard of review. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 [*Vavilov*] confirmed that reasonableness is the presumptive standard of review when reviewing administrative decisions on their merits. None of the exceptions to the presumption of a reasonableness standard of review apply in this case.

IV. Analysis

A. *New Evidence*

[13] The Applicant's principal argument centres on the failure of the RAD to accept ten documents [New Evidence] into evidence. The Applicant took issue with a comment from the RAD that he had failed to provide submissions on why the new evidence should be accepted in relation to the factors set out in the legislation. The Applicant argued that the RAD's comment on the lack of submissions was improper and led to a misapplication of the statutory provision relating to new evidence at the RAD.

[14] There are two problems with the Applicant's argument. First, despite commenting on the lack of submissions, the RAD still assessed whether the New Evidence should be part of the record on appeal. Second, given the nature of the New Evidence, it is not apparent to me, nor has it been specifically argued, how any of the documents that the Applicant sought to submit could have impacted the sole basis for the RAD's refusal decision, i.e. that there are viable IFAs in Peru.

[15] The legal test for the admission of new evidence at the RAD is set out in subsection 110(4) of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [*IRPA*]:

110(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in	**110(4)** Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas

the circumstances to have presented, at the time of the rejection.	normalement présentés, dans les circonstances, au moment du rejet.

[16] The RAD correctly noted this statutory requirement and explained that in addition to these constraints, the RAD also had to consider whether the documents were new, relevant and credible as set out by the Federal Court of Appeal in *Canada (Minister of Citizenship and Immigration) v Singh,* 2016 FCA 96 at paragraphs 38-49.

[17] The RAD noted that "it is up to the Appellant to provide submissions as to how the new evidence they wish to submit to the RAD meets the criteria." The RAD determined that Mr. Benavides' submissions on this point were limited to a statement that he "will be relying on new evidence referred to in subsection 110(4)" and a statement in his affidavit "that I present new evidence in form of publications indicating and showing that Internal Flight Alternative (IFA) suggested by the Panel is not safe for me and my family, and this evidence was not reasonably expected at the time of the rejection of my claim."

[18] The RAD did not stop there, however. The RAD noted that it conducted an independent review and determined that the New Evidence submitted was either "before the RPD… or was reasonably available for the Appellant to give to the RPD." Further, the RAD noted that "several pieces of the new evidence are from sources of unknown origin or have no date so I am unable to assess their credibility."

[19] I agree with the Applicant that regardless of whether submissions are made by the parties, the RAD remains obligated to consider whether new evidence tendered meets the requirements

for admission under subsection 110(4) of *IRPA*. However, in this case, the RAD Member did exactly that. After commenting on the failure of the Applicant to provide any direct submissions on how the new evidence meets the requirements for admission, the RAD Member went on to look at the evidence and assessed whether it met the requirements under the statute and the further constraints at common law of the newness, relevance and credibility of documents.

[20] The second problem in the Applicant's argument is that Mr. Benavides has not argued how the particular pieces of the New Evidence that were sought to be admitted could possibly make any difference to the outcome of the RAD's analysis.

[21] The Applicant sought to enter the following ten country condition documents as new evidence at the RAD:

1. A report on citizenship law in Peru, dated June 2015;
2. A response to Information request, dated July 9, 2014;
3. A news article on the ELN in Barranquilla, Colombia, dated January 18, 2019;
4. A news article related to the ELN bomb attack in Colombia, dated February 10, 2018;
5. An article relating to Venezuela's neighbors accuse Maduro of protecting "terrorist groups in Colombia", unknown source and date
6. An article about human rights attacks in Colombia, the source and date is not evident;
7. A news article on the Shining Path's attack in Peru, dated March 20, 2017;
8. An article (source unknown) about the attacks of hit men in Trujillo, Peru that left three dead, dated July 9, 2018;

9. An article (source unknown) relating to Peru's attempt to fight crime in Trujillo, dated September 8, 2016; and
10. An article on an attack on Peru's military base in Junin, unknown source and date.

[22] The first two documents were in the National Documentation Package [NDP] for Peru and were therefore already part of the record and before the RAD Member. The next four items, items 3, 4, 5, and 6, were related to Colombia, which was no longer relevant at the RAD, given its finding that the Applicant could not obtain citizenship there. The remaining four articles that dealt with Peru, items 7, 8, 9 and 10, were either about the general violence in one of the IFA locations, or the general violence of the SL group, the agent of persecution. Two of the unsourced articles about the SL group support the RAD's finding that the SL generally operates in the VRAEM region, an area that was found to be a significant distance from the identified IFAs.

[23] In oral submissions, the Applicant raised a new argument on the new evidence issue, arguing that the RAD Member erred in commenting that there had been no submissions, since, in fact, there had been submissions made by the Applicant on the RAD appeal. This argument does not have any merit. The RAD Member's reasons clearly indicate that the concern was not with respect to a failure to provide *any* submissions on appeal, but rather the lack of submissions on why the new evidence should be admitted. In any case, as stated above, I have already determined that the RAD considered the new evidence and whether it met the requirements under subsection 110(4) of *IRPA* despite the lack of submissions on this point.

B. *Other issues raised with respect to the IFA determination*

[24] As noted above, Mr. Benavides' principal argument on this judicial review centred on the RAD's decision to not admit the new evidence. In written submissions, the only other point advanced by Mr. Benavides' counsel, in the two concluding paragraphs of the Applicant's Memorandum of Fact and Law, consisted of an assertion that "from the documentary evidence and the totality of the evidence presented, the Applicant had established that he had good grounds within the enumerated grounds for fearing persecution if asked to return to Peru." I do not find that this is a basis for review as it is a general statement without an articulation of a specific basis for review.

[25] In oral submissions, Mr. Benavides' counsel raised a further new issue, arguing that the RAD erred in not finding that Mr. Benavides' work made him a high-profile target for the SL. The RAD's comments on this point were in response to the arguments of Mr. Benavides' counsel that the RPD erred in its determination that Mr. Benavides was not of a sufficiently "higher profile" to attract the attention of the ELN, an affiliated group in Colombia. As noted by the RAD in their reasons, this finding of the RPD related to the IFAs identified for Colombia – not Peru; the RAD had determined that the RPD was incorrect in identifying IFAs in Colombia as Mr. Benavides was not entitled to citizenship there.

[26] In any event, the RAD proceeded to find that there was insufficient evidence before it "to establish that the Appellant's profile is one in which the SL would maintain an interest in forward looking harm." The RAD then explained that it took this position because Mr. Benavides was employed as an emergency technician, not a high-level management position,

that he was no longer employed by the company, and had been out of Peru for the last three years.

[27] The Supreme Court of Canada in *Vavilov* explained that the "burden is on the party challenging the decision to show that it is unreasonable" and that a decision can only be set aside where the reviewing court is "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,* para 100).

[28] Mr. Benavides has not explained how the RAD erred in its findings on this issue and has not directly engaged with the RAD's reasons on this point: specifically, that Mr. Benavides' job certificate was for an emergency technician and not a high-level management position, and that Mr. Benavides had resigned from his position three years before the RAD rendered its decision. Much of Mr. Benavides' counsel's submissions at the hearing repeated the arguments made to the RAD by focusing on the RPD's determination on this point instead of addressing the RAD's reasons on appeal.

[29] The starting point for a review on a reasonableness standard is a decision-maker's reasons (*Vavilov*, para 13). In this case, the RAD was responsive to Mr. Benavides' arguments. Mr. Benavides' arguments do not address the RAD's reasons or articulate a basis for finding them unreasonable.

[30] Accordingly, the application for judicial review is dismissed.

[31] The parties have not suggested any questions of general importance for certification under subsection 74(d) of *IRPA*. I agree that none arises.

JUDGMENT IN IMM-4622-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed;

2. No question is certified for appeal.

"Lobat Sadrehashemi"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4622-20
STYLE OF CAUSE:	ELVIS ROGELIO BENAVIDES QUISPE v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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