Federal Court  Cour fédérale

Date: 20211008

Docket: IMM-4411-20

Citation: 2021 FC 1058

Ottawa, Ontario, October 8, 2021

PRESENT: The Honourable Mr. Justice Henry S. Brown

BETWEEN:

DANIEL ALAN BAHENA OCAMPO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[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 Applicant is neither a Convention refugee nor a person in need of protection pursuant to section 96 and section 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*] [Decision].

II. Facts

[2] The Applicant is a 27-year old citizen of Mexico. The Applicant fears persecution in Mexico from a cartel gang.

[3] On July 5, 2017, the Applicant was travelling with a co-worker when they were accosted at gunpoint by members of the cartel. Upon learning where he worked, the Applicant was taken into a vehicle where they demanded he provide a list of personal information about coworkers and others where he worked.

[4] When he arrived at work, he approached one of the coordinators and told him about the incident. It was decided he should leave the job. The Applicant did not seek police protection because he believed they were involved with the cartels.

[5] After the incident, the Applicant went into hiding. When a co-worker contacted the Applicant to warn that they were being looked for, the Applicant fled to the United States of America [USA] with the assistance of a relative. The Applicant says gang members continued to look for him after his departure.

[6] The Applicant did not seek asylum in the USA because of the immigration climate but stayed there to help care for a relative. He arrived in Canada in 2018. He signed his initial Basis of Claim [BOC] and later made amendments in 2019. His refugee hearing took place in 2019 and the RPD made an oral decision to reject the Applicant's claim on the same day.

III. Decision under review

[7] The RAD dismissed the appeal. The RAD upheld the RPD's decision to deny the Applicant's claim for refugee protection because the Applicant has a viable IFA elsewhere in Mexico.

A. *New Evidence*

[8] The Applicant submitted two documents as new evidence: a letter from a co-worker and a letter from his spouse. However, the RAD rejected the evidence because the contents of both letters did not pertain to new information that arose after the Applicant's RPD hearing. Moreover, there was no explanation provided as to why the Applicant could not have given such letters to the RPD.

B. *Test for IFA*

[9] The two-prong test for assessing an IFA is set out in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 [Mahoney JA] at para 13:

> 13 In my opinion, in finding the IFA, the Board was required to be satisfied, on a balance of probabilities, that there was no serious possibility of the appellant being persecuted in Colombo and that, in all the circumstances including circumstances particular to him, conditions in Colombo were such that it would not be unreasonable for the appellant to seek refuge there. Serious possibility of persecution or risk of harm in Mexico

[10] First Prong: The RAD found the Applicant has a viable IFA, where he does not face a serious possibility of persecution or a risk of harm. The evidence did not demonstrate the agents

of harm have motivation or means to search for and locate the Applicant throughout Mexico, and more specifically, in the IFA.

[11] The RAD considered the evidence available regarding the identity of the agents of harm and found it was insufficient to establish these agents belong to or are affiliated with the relevant cartel members. The fact he was stopped and threatened does not establish the agents of harm are members of the cartel.

[12] When the RPD asked the Applicant how he knew the identity of the agents of persecution, he said the men told him what they were. However, the letter from the co-worker stated, “during our return we were stopped by an armed group that did not identify itself.” Moreover, a letter from another co-worker said a man came to the workplace to inquire about the Applicant but “did not identify himself”. There were other letters before the RPD but none mentioned the cartels referred to by the Applicant. Thus, the RAD found the identity of the agents of harm was not established.

[13] In considering the motivation and resources of the agents of harm to track down the Applicant in the proposed IFA, the Applicant testified he was uncertain as to whether he would continue to be sought if returned. The RAD further noted the Applicant’s parents live in the same city where the incidents occurred yet there is no evidence they were contacted.

[14] The RAD reviewed country condition evidence and found no evidence to establish the cartel has a strong presence in the IFA area. Moreover, the evidence revealed the state concerned was relatively non-violent.

[15] Second Prong: The RAD agreed the RPD was correct in finding the Applicant had not discharged the onus of proving the IFA is not objectively reasonable. Based on the evidence, the RAD found the Applicant possesses work and life skills to assist him in finding employment and residency in the IFA; circumstances distinguishable from the average person.

[16] The RAD acknowledged the Applicant is afraid to relocate to a place where he does not know anyone; however, the RAD found the absence of friends or family in a proposed IFA not enough to establish it is unreasonable. The burden was on the Applicant to demonstrate the proposed IFA is unreasonable or unduly harsh in their particular case; however, the Applicant failed to provide submissions that the proposed IFA would be unreasonable in terms of other factors including language, accommodation, and medical care.

IV. Issues

[17] The only issue in this application is whether the RAD's IFA finding is reasonable.

V. Standard of Review

[18] In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, majority reasons by Justice Rowe [*Canada Post*], which was issued at the same time as the Supreme Court of Canada's decision in *Vavilov*, the majority explains what is required for a reasonable

decision, and importantly for present purposes, 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*).
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> [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).
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> [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).
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> [Emphasis added]

[19] In the words of the Supreme Court of Canada in *Vavilov*, a 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".
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> [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.
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> [Emphasis added]

[20] 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," and provides guidance that the reviewing court decide based on the record before them:

> [126] That being said, a reasonable decision is one that is justified in light of the facts: *Dunsmuir*, para. 47. The decision maker must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them: see *Southam*, at para. 56. The reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it. In *Baker*, for example, the decision maker had relied on irrelevant stereotypes and failed to consider relevant evidence, which led to a conclusion that there was a reasonable apprehension of bias: para. 48. Moreover, the decision maker's approach would *also* have supported a finding that the decision was unreasonable on the basis that the decision maker showed that his conclusions were not based on the evidence that was actually before him: para. 48.
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> [Emphasis added]

[21] Furthermore, *Vavilov* makes it clear that the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances":

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
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> [Emphasis added]

VI. Analysis

[22] In *Lawal v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 301, I reviewed recent jurisprudence regarding the test for an IFA:

> [8] First, it is settled law that the two-prong test to be applied in determining whether there is an IFA was established in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589. The test was recently outlined by Justice Pamel in *Feboke v Canada (Citizenship and Immigration)*, 2020 FC 155 at para 15:
>
> > [15] The decisions in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589, have established a two-prong test to be applied in determining whether there is an IFA: (i) there must be no serious possibility of the individual being persecuted in the IFA area (on the balance of probabilities); and (ii) conditions in the proposed IFA must be such that it would not be unreasonable

> in all the circumstances for an individual to seek refuge there (*Reci v Canada (Citizenship and Immigration)*, 2016 FC 833 at para 19; *Titcombe v Canada (Citizenship and Immigration)*, 2019 FC 1346 at para 15). Both prongs must be satisfied in order to make a finding that the claimant has an IFA. This two-prong test ensures that Canada complies with international norms regarding IFAs (UNHCR Guidelines at paras 7, 24-30).

[23] The onus is on the Applicants to negative one or the other of the two prongs. See *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 [Létourneau JA] at paragraph 13.

[24] In *Nimako v Canada (Minister of Citizenship and Immigration)*, 2013 FC 540 [Campbell J] at para 7, this Court held that an analysis of whether there is a serious possibility of an applicant being persecuted includes whether an agent of persecution has probable means and motivation to search for the Applicant in the suggested IFA.

[25] The Applicant submits the RAD ignored and or misconstrued corroborating evidence, notably country condition documents, to support a finding the agents of persecution have the means and motivation to search for the Applicant in the IFA. The Applicant points to country condition excerpts; however, the excerpts cited make no mention of the IFA nor does it demonstrate whether the cartel has the means and motivation to search for the Applicant in the IFA.

[26] However, in the absence of persuasive evidence that an agent of persecution intends to target a claimant, country condition evidence is of limited relevance: *Abdullah v Canada (Citizenship and Immigration),* 2021 FC 76 [Walker J] at para 17:

> […] The fact that the Applicants' agents of persecution may be able to locate them in other cities in Bangladesh does not negate the RAD's finding that they would not have the motivation to do so (*Essel v Canada (Citizenship and Immigration)* 2020 FC 1025 at para 13). The RAD comprehensively and logically explained the reasons for its adverse motivation finding and I find no reviewable error in the panel's conclusion.

[27] In the case at bar, the Applicant was unable to give a clear answer as to why or how he may be targeted in the future. A letter from his co-worker said the workplace was targeted, however, the Applicant no longer works there, he no longer has access to information about others there, and after he left Mexico the group recruited someone else. Therefore, the Applicant did not establish the agent of persecution has sufficient motivation to continue pursuing him.

[28] I also note the cartel group has not contacted the Applicant's parents, which further reinforced the RAD's finding that the Applicant does not face a serious possibility of persecution in the IFA. See *Rodriguez Llanes v Canada (Citizenship and Immigration),* 2013 FC 492 [MacTavish J as she then was] at para 10.

[29] Regarding the identity of the agent of persecution, the Applicant submits the RAD was unreasonable to reject the agents of persecution's profile based in part, on the credibility of the Applicant and lack of evidence. The Applicant submits the RAD was unreasonable in noting his evidence did not mention the agents of persecution by name, and in noting the agents of

persecution did not target his parents who remain where they were. The Applicant submits these findings amount to “credibility inferences”.

[30] The Respondent submits, and I agree, the Applicant’s belief, however sincere, was not a replacement for sufficient reliable evidence as to the identity of the agents of persecution. See, *Potes Mina v Canada (Citizenship and Immigration),* [Russell J] 2016 FC 834 at paras 41, 43, 47.

[31] The difficulty for the Applicant is also that his evidence regarding the group he encountered was not consistent with that of his co-workers.

[32] In these circumstances, I conclude the RAD reasonably considered the totality of the evidence but was “simply unpersuaded”. Without disbelieving his version of events, it was reasonably open for the RAD to conclude the Applicant had not met his burden of proof. See, *Ferguson v Canada (Citizenship and Immigration),* 2008 FC 1067 [Zinn J] at para 20.

VII. Conclusion

[33] In my respectful view, the Applicant has not shown the decision of the RAD was unreasonable. The onus was on the Applicant to demonstrate a serious possibility of being persecuted in the IFA, or that it is unreasonable for him to seek refuge in the IFA in all the circumstances. In my view, the Decision is transparent, intelligible and justified based on the facts and law.

VIII. Certified Question

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

JUDGMENT in IMM-4411-20

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed, no question is certified, and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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