

Federal Court



Cour fédérale

**Date: 20220118**

**Docket: IMM-1118-21**

**Citation: 2022 FC 58**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, January 18, 2022**

**PRESENT: The Honourable Madam Justice Roussel**

**BETWEEN:**

**MIGUEL ANGEL FRAGOSO VELAZQUEZ**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Background

[1] The applicant, Miguel Angel Fragoso Velazquez, is seeking judicial review of a decision of the Refugee Appeal Division [RAD] dated January 26, 2021, confirming the rejection of his refugee protection claim by the Refugee Protection Division [RPD].

[2] The applicant is a citizen of Mexico. He alleges that on February 2, 2018, as he was on his way home, he was attacked by five individuals who claimed to have been watching him for a long time to find out where he lived and studied, and to find out his parents' names. On April 26, 2018, he was abducted in a car by two individuals, one of whom was present at the February 2, 2018 incident. The applicant's assailants threatened to kill him; then they handed him a bag full of drugs bearing the logo of a Mexican cartel. He was told that he had to sell the bag's contents and recruit other people, otherwise he and his family would suffer the consequences. Once alone, he got rid of the bag, refusing to be involved in such activities. The next day, a shooting took place in his town. His parents decided to send him to live with his uncles in another municipality on May 10, 2018. On June 5, 2018, he returned to live with his parents, and on June 13, 2018, a hooded individual showed up at his home. This person demanded money in exchange for his protection. On June 24, 2018, the applicant left Mexico for Canada and filed a refugee protection claim.

[3] On November 14, 2019, the RPD rejected his refugee protection claim. It found the applicant lacked credibility because of significant contradictions between his Basis of Claim [BOC] form, his testimony at the hearing, and the documentary evidence. In addition, it considered that the applicant's behaviour in the months prior to his departure from Mexico was inconsistent with the risk alleged in his refugee protection claim. Finally, it did not give any probative value to the documentary evidence submitted by the applicant.

[4] On appeal before the RAD, the applicant argued that there were breaches of procedural fairness in how the hearing was conducted. He further argued that the RPD relied on secondary aspects in the overall analysis of his credibility.

[5] The RAD dismissed the appeal and upheld the RPD's decision. First, it considered that there had been no breaches of procedural fairness. It then found that while the RPD had erred in some respects, its overall analysis of the applicant's credibility remained accurate.

[6] The applicant submits before this Court that the RAD improperly assessed the alleged breaches of procedural fairness. He also submits that the analysis of his credibility and evidence is unreasonable.

## II. Analysis

[7] The reasonableness standard applies to the RAD's conclusion that there was no breach of procedural fairness before the RPD. The issue in this case is not whether the RAD breached procedural fairness but whether there was a breach before the RPD (*Chaudhry v Canada (Citizenship and Immigration)*, 2019 FC 520 at para 24; *Brown v Canada (Citizenship and Immigration)*, 2018 FC 1103 at para 25; *Abuzeid v Canada (Citizenship and Immigration)*, 2018 FC 34 at para 12). The same standard also applies to RAD decisions on credibility and the assessment of evidence (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 143 [Vavilov]; *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35; *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCA No 732 at para 4 (FCA) (QL)).

[8] When the reasonableness standard applies, the Court is interested in “the decision actually made by the decision maker, including both the decision maker’s reasoning process and the outcome” (*Vavilov* at para 83). It must ask itself “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). In addition, “the burden is on the party challenging the decision to show that it is unreasonable” (*Vavilov* at para 100). They must satisfy the Court that the decision has serious shortcomings that are “sufficiently central or significant to render the decision unreasonable” (*Vavilov* at para 100).

A. *Procedural fairness*

[9] Before the RAD, the applicant submitted that the RPD had attempted, throughout the hearing, to influence him and his counsel. For example, he alleged that (1) the RPD corrected his counsel by telling him that it was incorrect to speak of agents [TRANSLATION] “of persecution” when they were agents [TRANSLATION] “of harm”; (2) the RPD suggested that his counsel was testifying in his place, while he was providing clarification; (3) the RPD intervened several times during his counsel’s examination, cutting him off and preventing him from asking questions; and (4) the RPD’s numerous interventions during counsel’s submissions interrupted the rhythm of his arguments. The applicant argued that the RPD had breached procedural fairness by doing so.

[10] In its reasons, the RAD stated that it had listened to the recording of the hearing before the RPD. It noted that the RPD had a great deal of control over its hearing room and that the facts alleged by the applicant all took place. However, it added that although the RPD reminded

the applicant's counsel that it had already asked the same questions, it nevertheless allowed him to continue his questioning. With respect to the RPD's interruptions during counsel's submissions, the RAD believed that these were made to understand each one of counsel's words, as counsel himself acknowledged during his submissions that he had a heavy accent when he spoke French.

[11] Relying on *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, the RAD acknowledged that the RPD had intervened a great deal during the hearing. However, it considered that the recording showed that the RPD had allowed the applicant and his counsel to present their allegations and submissions. The RAD added that the RPD's interventions were intended to clarify the applicant's account and to inform him of its concerns about the identified contradictions and omissions. Although it did not encourage the attitude shown by the RPD during the hearing, the RAD concluded that the applicant had had the opportunity to present the allegations in support of his refugee protection claim and that there were therefore no breaches of procedural fairness.

[12] Before this Court, the applicant is essentially reiterating the same arguments he raised on appeal. However, he submitted a supplementary affidavit with some excerpts from the recording of the hearing. In particular, he faults the RAD for concluding that there were no breaches of procedural fairness, even as he acknowledges the veracity of the facts alleged in his memorandum of appeal. In addition, he submits that it was wrong for the RAD to indicate that the RPD had allowed his counsel to continue with his questions. In fact, his counsel had to withdraw one of his questions, thus depriving the applicant of the opportunity to clarify his

remarks. Finally, the applicant takes issue with the reference to his counsel's [TRANSLATION] "heavy accent" to explain certain communication problems.

[13] After listening to the recording of the RPD hearing, the Court cannot agree with the applicant's arguments. The RPD first questioned the applicant about his allegations for nearly two hours. Throughout the applicant's testimony, the RPD asked him open questions and sought to clarify his testimony and his account. It informed him of its concerns about the identified contradictions and omissions and allowed him to provide explanations. Questioning a refugee protection claimant to clarify his or her evidence or to test his or her credibility does not constitute a breach of procedural fairness (*Thelusma v Canada (Citizenship and Immigration)*, 2018 FC 612 at para 26; *Moualek v Canada (Citizenship and Immigration)*, 2009 FC 539 at paras 54 and 55).

[14] It is true that the RPD made it clear to the applicant's counsel, during his submissions, that the case involved the issue of establishing an agent of harm rather than an agent of persecution. However, the context in which this intervention took place must be considered. His counsel had just stated that the refugee protection claim was based solely on section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. The Court does not consider that this exchange raises a procedural fairness issue.

[15] With respect to the RPD's other interventions during the counsel's submissions, the recording shows that the RPD sought to take note of all the applicant's arguments. When counsel

went too fast or it did not understand a word, the RPD asked him to repeat. The Court finds that the RPD's interventions were reasonable.

[16] Finally, the recording in fact shows that the applicant's counsel withdrew one of his questions while questioning the applicant. The applicant's counsel asked him to tell him [TRANSLATION] "word for word" what his assailants had told him on April 26, 2018. The RPD then intervened to point out to him that he had already asked the applicant this question on several occasions and in various ways. Counsel indicated that he was trying to clarify a contradiction, to which the RPD replied that questions should not be asked again, and that the applicant should not be asked to repeat his testimony. Counsel then indicated that, for the purposes of the recording, he was not having the testimony repeated but that he would nevertheless withdraw his question. The RPD then replied that it was not interfering with his questions, but that if the applicant had already had an opportunity to testify on this point, it was inappropriate to ask the same questions again. After reiterating that it was more about clarifying a contradiction, counsel repeated that he was withdrawing his question.

[17] It was reasonable for the RPD to find that, in asking the applicant to repeat word for word what his assailants had told him, counsel was asking the same questions, and that he was trying to make the applicant repeat his testimony. However, this Court has recognized that it is entirely justified for a decision maker to limit repetitive testimony (*Almoqaiad v Canada (Citizenship and Immigration)*, 2020 FC 160 at para 18 [*Almoqaiad*]; *Svecz v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 3 at para 43; *Chelaru v Canada (Citizenship and*

*Immigration*), 2012 FC 1535 at para 29). Merely interrupting a refugee protection claimant when appropriate is not a reviewable error (*Almoqaiad* at para 18).

[18] Having listened to this exchange, the Court considers that counsel could have rephrased his question to make it more precise. In addition, the Court notes that the applicant did not elaborate, either before the RAD or this Court, on exactly what his counsel was trying to clarify, the response he would have given or how it might have affected the decision. The Court assumes that the clarification the applicant's counsel wanted to make regarded the fact that the applicant had failed to mention in his testimony the threats made to his family on April 26, 2018. However, if this was the case, the RAD proved the applicant was right by establishing that that the RPD had been overzealous on this issue and had not reached a correct conclusion. The Court finds that this argument could not be accepted, given that the RAD found in the applicant's favour on this point.

[19] The issue to be decided by the RAD was whether the applicant had been offered the opportunity to present his position fully and fairly. It found that to be the case. The applicant has not persuaded the Court that this finding is unreasonable.

B. *Credibility analysis and assessment of evidence*

[20] The applicant first submits that the RAD erred, on the one hand, in acknowledging that the RPD had drawn a negative inference from the fact that he had failed to clarify through his testimony the threats made to his family and, on the other hand, in failing to find that this error was sufficient to reverse the decision made. He also criticizes the RAD for acknowledging that



the contradictions between his testimony and his girlfriend's letter did not relate to a central element of the refugee protection claim but nonetheless conducting a [TRANSLATION] "microscopic" analysis of her responses to justify the outcome remaining the same.

[21] The Court cannot accept these arguments.

[22] The RAD clearly explained why it found that the RPD's error was not determinative. It indicated that it was instead concerned about the applicant's behaviour following the April 26, 2018 incident and the absence of retaliation from the individuals who threatened him. In this regard, it explained that at the beginning of the hearing the applicant testified that he was aware of the extent of the cartel's criminal activities and its level of dangerousness owing to their desire for revenge. The RAD also noted that the applicant alleged that he had disposed of a bag full of drugs belonging to the cartel. Despite possible retaliation, the applicant stated that he had stayed home because he wanted to be close to his parents, with whom he felt safe. He acknowledged that he did not take any specific security measures during this period and that he continued to see his friends. He testified that the cartel had given him about a month to sell the drugs. However, the applicant stated that the cartel had never come to collect the money. The RAD is of the view that the fact that the applicant returned to live in the same neighborhood only because he wanted to spend time with his parents and felt safer, even though his assailants had warned him that he had been watched for a long time and that they knew where he was studying and living, is inconsistent with the behaviour of someone who fears for his life. The Court finds this conclusion to be reasonable considering the applicant's testimony.

[23] With respect to the letter from the applicant's girlfriend, the RAD did not acknowledge that the RPD had made an error. It instead agreed that this was not a fact central to the refugee protection claim. However, it acknowledged that there was in fact a contradiction between the applicant's testimony and the letter. In addition, it noted that when the applicant was confronted with this contradiction, he adjusted his testimony. The applicant's argument fails to show why the RAD's finding is unreasonable. Although this is a secondary element, the fact remains that there was a contradiction and that it could reasonably undermine the applicant's credibility.

[24] The applicant then criticizes the RAD's finding regarding the contradiction between what he alleged in his testimony and what he stated in his BOC form, in which he stated that he could not see his assailants on February 2, 2018. In his testimony, the applicant stated that he saw their faces and added that they all had black hair, that one of them had a beard, and that another one had a moustache. Like the RPD, the RAD found the applicant's explanation to be unsatisfactory because he claimed that, because of his fear, he did not recall what had happened and that with time, he had been able to relax. The RAD was of the view that the contradiction touched on a central point of the applicant's account—namely, the incident during which his problems allegedly began—and that it was therefore reasonable to expect that the applicant could clearly testify as to whether he had seen his assailants. It concluded that this contradiction greatly undermined the applicant's credibility.

[25] The Court finds this conclusion to be reasonable. If the applicant did indeed remember later that he had seen his assailants' faces, he could have corrected his BOC form. He did so for the shooting on April 27, 2018. It was only when the RPD asked him to explain the contradiction

that he provided this explanation. It was entirely reasonable for the RAD to conclude that this was a significant contradiction on a key point of his account.

[26] The applicant faults the RAD for erring in pointing out that he had again indicated in his memorandum that he did not see his assailants. Even if this is the case, the Court does not consider this error to be determinative because of the contradiction on a key point between the BOC form and the applicant's testimony.

[27] The applicant also faults the RAD for failing to consider that he was 19 years old at the time of the incident and that he was dependent on his parents before concluding that his behaviour was inconsistent with the alleged risk. This criticism is unfounded. It is clear from the RAD's reasons that it did in fact take his profile into account, considering both his age and his relationship with his parents. However, the RAD could reasonably find that the applicant's age could not be used as a justification for his behaviour that was inconsistent with all his allegations.

[28] The final points raised by the applicant relate to the rejection of some of his evidence.

[29] With respect to the medical certificate, the applicant faults the RAD for failing to give it any probative value, although there was no element that could cast doubt on its authenticity. The applicant is of the opinion that the RAD erred in not accepting that the medical certificate corroborated that he had sustained injuries on the same day he was allegedly assaulted (February 2, 2018). He adds that a medical certificate will never disclose the cause of injuries.

[30] The RAD did not question the authenticity of the certificate. Rather, it explained why the medical certificate did not compensate for the applicant's lack of credibility. In addition to noting that the document did not indicate the cause of the injuries, it noted that the document did not specify the nature of the injuries and that the document only stated that the applicant must apply ice, take capsules, and apply cream. The RAD added that the fact that the applicant saw a physician on February 3 is not probative in establishing that he was the victim of an attack by a cartel on February 2, 2018.

[31] After reviewing the medical certificate, the Court considers that the RAD could have reasonably agreed with the RPD's decision not to give it any probative value, especially since the certificate is based on a negative finding of credibility, namely, the incident on February 2, 2018. However, it is well established that a negative credibility finding may be applicable to relevant evidence submitted by an applicant (*Gao v Canada (Citizenship and Immigration)*, 2021 FC 271 at para 22; *Alizadehvakili v Canada (Citizenship and Immigration)*, 2018 FC 165 at para 34; *Lawal v Canada (Citizenship and Immigration)*, 2010 FC 558 at para 22).

[32] In his further memorandum, the applicant also appears to suggest that the RAD found that his girlfriend's letter was not genuine. However, this was never suggested. As noted above, the RAD instead noted a contradiction because the letter claims that the applicant saw his girlfriend again after February 2018, when he testified to the contrary before the RPD.

[33] As for the neighbour's letter, it alludes to an element that is not central to the refugee protection claim, given that the applicant was not personally targeted by the incident on April 27, 2018.

[34] The Court considers that all these arguments are essentially an invitation by the applicant to reassess his evidence. However, it is well established that findings relating to the credibility of a refugee protection claimant and the assessment of the evidence require a high degree of deference on the part of this Court. In the case at hand, the RAD conducted its own analysis of the case and listened to the recording of the hearing. Its finding on the applicant's lack of credibility is based on the entire file. Although the applicant disagrees with the findings of the RAD and the RPD, it is not for this Court to reassess and re-weigh the evidence to reach a conclusion that would be favourable to the applicant (*Vavilov* at para 125; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

[35] In conclusion, the Court is of the opinion that, when the RAD's reasons are read holistically and contextually, they bear the hallmarks of reasonableness (*Vavilov* at paras 97 and 99).

[36] The application for judicial review is therefore dismissed. No question of general importance was submitted for certification, and the Court is of the opinion that this case does not raise any.

**JUDGMENT in IMM-1118-21**

**THIS COURT'S JUDGMENT is as follows:**

1. The application for judicial review is dismissed.
2. No question of general importance is certified.

“Sylvie E. Roussel”

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Judge

Certified true translation  
Michael Palles

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

**DOCKET:** IMM-1118-21

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MINISTER OF CITIZENSHIP AND IMMIGRATION

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