Federal Court  Cour fédérale

Date: 20220311

Docket: IMM-1835-21

Citation: 2022 FC 215

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 11, 2022

PRESENT: The Honourable Justice Roy

BNTWEEN:

LUIS FRANCISCO ASCENCIO PEREZ
LILIANA DEL PILAR LOPEZ LOPEZ
SALOMON ASCENCIO LOPEZ
EMILY ASCENCIO VIDES
JACOB ASCENCIO LOPEZ

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review in respect of a decision of the Refugee Appeal Division (RAD) confirming the rejection of a refugee protection claim by the Refugee Protection

Division (RPD). The application for judicial review was made pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA or the Act].

[2] The applicants are citizens of Colombia. They are a family. The principal applicant, Luis Francisco Ascencio Perez, works in real estate, and his work is described as regularizing property titles, among other things. The central allegation is that his work in assisting with the regularization of property titles led to actions against him that caused him to claim refugee protection in Canada for himself and his family. The Canadian administrative decision-makers believed that the principal applicant and his wife had received the threatening calls they alleged having received. However, there were other incidents reported by principal applicant that were unrelated to the threats, according to the administrative tribunals. There was therefore an issue with respect to credibility. In addition, the applicants reportedly had an internal flight alternative (IFA) available to them. For the reasons that follow, the application for judicial review cannot succeed.

I. Facts

[3] The principal applicant received the mandate of participating the regularization of property titles of the [TRANSLATION] "president of the 'Cano Rico' community action board". As part of his mandate, he reportedly held a few meetings in early 2018 with people from Cano Rico. He alleged that he had received threatening calls during the first half of 2018, beginning on February 17, 2018. He changed telephone numbers, which stopped the calls, but went back to his old number because his work contacts used it. On May 28, he allegedly received a threatening call.

[4] The principal applicant's wife received a threatening call on June 4, 2018. The applicant stated that as of June 14, he received [TRANSLATION] "a protection measure in the Sogamoso region" from police (Basis of Claim Form (BOC Form), para 12).

[5] On July 8, 2018, at dusk, two individuals on a motorcycle came up from behind them and shot at the principal applicant. The principal applicant was not hit and stated that one of the two individuals had told the other that it was not him before leaving the scene.

[6] The principal applicant complained to the authorities and requested "a protective measure" for Bogota, where he was travelling with his family. The protection measure offered was a telephone to contact them if necessary. It was then that he started to make arrangements to leave Colombia.

[7] The applicants arrived in the United States on August 8, 2018, with U.S. visas; they crossed the Canadian border at a place other than a port of entry on August 10. They made a claim for refugee protection on August 13, 2018. The dates in the BOC Form and an update in the file did not align with what was stated therein. The BOC Form was dated September 25. An update in the BOC Form was ostensibly dated August 23, but referred to an event that had occurred in December 2018. The principal applicant added two paragraphs. In the first paragraph, he claimed that his daughter's mother was attacked by two men who wanted to find out his whereabouts. In the second paragraph, the principal applicant alleged that a woman, whom he identified, was reportedly killed on December 27, 2018, because, in his words, she

refused to provide the perpetrators of the attack with “information regarding [my] whereabouts”. The differing dates did not lead to confusion, and I will not be exploring this issue.

II. Decision for which judicial review is sought

[8] Both the RPD and the RAD expressed doubts about what was recounted by the principal applicant (the other applicants went along with the principal applicant’s narrative). It is evidently the RAD’s decision that can be the subject of judicial review. As for the RPD, it accepted the allegations that telephone threats had been made. However, it did not believe the other incidents relied on. In addition, the RPD found that there was an internal flight alternative (IFA) in Colombia available to the applicants.

[9] The RAD, like the RPD after all, did not see any link between the motorcyclists’ attack on the principal applicant and the threats received. Indeed, the link was nothing more than an inference made by the principal applicant. At the hearing before the RPD, he made a link between the incident and the threats because he had not received any other type of threat. In addition, the principal applicant himself confirmed what was stated in his BOC Form about the assailants stating, “it’s not him”; which made this deduction “hypothetical and difficult to accept” (RAD decision, para 39). The RAD concluded that there was no link between the telephone threats and the incident described.

[10] At the RPD hearing, the principal applicant mentioned for the first time another incident that reportedly occurred on August 4, 2018. While walking against the direction of traffic, the principal applicant saw a motorcycle coming towards him; the motorcycle braked suddenly, and

its occupants fell. Not only was the principal applicant unable to explain the omission from his BOC Form, but he also stated that “it may well be something real but it may also be the product of my paranoia, depending on the mental state I was in” (RAD decision, para 44). The RAD was of the opinion that his answers were evasive and inconsistent, and his explanations were unsatisfactory. The incident was therefore disregarded.

[11] According to the RPD, the principal applicant sought to embellish his story by including incidents experienced by his extended family. The incidents involved the mother-in-law of the principal appellant’s brother who was killed on December 27, 2018, a woman named Maria, the principal applicant’s ex-spouse, and one of the principal applicant’s daughters. The RAD supported the RPD’s observations about them.

[12] Thus, with respect to the killing, it is mere speculation from the principal applicant’s brother in his quest to explain the deadly attack. It was not established that there was any connection with the threats received by the principal applicant: it was just a theory.

[13] As for his ex-spouse, Maria, the incidents reportedly occurred between October 17, 2018, November 14, 2018, and August 8, 2020. On August 8, 2020, a man reportedly approached her on her way to work to find out where the principal applicant was. The RPD considered that the principal applicant’s testimony, which merely recounted an incident he had not witnessed, [TRANSLATION] “was far from spontaneous and he was visibly searching for answers to the panel’s questions for several minutes” (RPD decision, para 20). As for the other two incidents, the allegation was that there was a threatening call, followed, a few days later, by two men who

allegedly struck Maria. A complaint was filed, but there was no mention of an assault. What was mentioned was a second threatening call. The RPD did not believe that an assault had occurred. The RAD agreed.

[14] The RPD and the RAD also concluded that an internal flight alternative in Colombia was available. The RAD stated that it was satisfied that there was no serious possibility of the applicants being persecuted in two parts of the country.

[15] The applicants submitted that the agent of harm was willing and able to pursue them anywhere in Colombia. The RAD concluded that there was nothing to demonstrate any interest, motivation or ability to track the applicants down. The evidence was deficient in that it did not demonstrate a serious possibility of persecution. Since the incidents relied upon were not believed to be true, only the threatening calls remain to be considered.

[16] Moreover, the location of the IFA must not be such that it would be unreasonable for the applicants to seek refugee there. The second prong of the test was no more successful. The onus is on the individuals claiming refugee protection to demonstrate that it would be unreasonable for them to be required to seek refuge in the places designated as potential internal flight alternatives. In the RAD's opinion, this was never demonstrated. Rather, the RAD noted that the RPD had been consistent with respect to matters related to the IFA. Indeed, the RPD's finding on the second prong was not disputed.

III. Standard of review

[17] The standard of review applicable in a given case is important because the burden of proof for a person seeking judicial review differs depending on whether the standard is reasonableness or correctness.

[18] The applicants barely scratched the surface of the issue, but they did not claim a standard of correctness either. They were correct. Since *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, there is no longer any doubt that reasonableness is the preferred standard of review; it is also the presumptive standard (para 25). The presumption applies both to questions of fact and the administrative decision maker's interpretation of the enabling statute.

[19] The choice of standard of review has its consequences. The burden is on the party challenging the decision to show that it is unreasonable (para 100), whereas the reviewing court must exercise judicial restraint (para 13) and adopt an attitude of respect towards an administrative decision maker (para 14). A reasonableness decision bears the hallmarks of justification, transparency and intelligibility and it is justified in relation to the relevant factual and legal constraints (para 99). Thus, a decision must have serious shortcomings, demonstrated by those who bear the burden, for an appeal to succeed. Two types of serious shortcomings are those involving a failure of rationality internal to the reasoning process, where the reasoning is internally incoherent, and those where the justifications are in some respect untenable.

[20] Judicial review based on unreasonableness is not one in which the reviewing court seeks to reweigh the evidence, to substitute its assessment of the merits for that of the administrative tribunal. As noted by the Supreme Court in *Vavilov*, "[i]t 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" (para 125). For a decision to be found to have been unreasonable, the administrative decision maker has to have "fundamentally misapprehended or failed to account for the evidence before it" (para 126).

[21] The Federal Court of Appeal cautioned against a review on the reasonableness standard that becomes a decision reviewed on the correctness standard of review. In *Canada (Citizenship and Immigration) v Mason*, 2021 FCA 156, it is stated as follows:

> [36] In order to interfere, a reviewing court needs to find a "fundamental gap" in express or implied reasoning, a "fail[ure] to reveal a rational chain of analysis", a "flawed basis", a finding that the "decision is based on an unreasonable chain of analysis" or "an irrational chain of analysis", unintelligibility in the sense that "the reasons read in conjunction with the record do not make it possible to understand the decision maker's reasoning on a critical point" or "clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise": *Vavilov* at paras. 96 and 103-104. These problems must be on a key point, "sufficiently central" or "significant" such that they point to "sufficiently serious shortcomings in the decision": *Vavilov* at para. 100. They must be "more than merely superficial or peripheral to the merits of the decision": *Vavilov* at para. 100.
>
> [37] In *Vavilov*, the Supreme Court tells us that we should not be too hasty to find these sorts of flaws. *Vavilov*'s requirement of a reasoned explanation cannot be applied in a way that transforms reasonableness review into correctness review. If reviewing courts are too fussy and adopt the attitude of a literary critic all too willing to find shortcomings, they will be conducting correctness review, not reasonableness review. That would return us to the bad old days in the 1960's and 1970's when reviewing courts would come up with any old excuse to strike down decisions they disliked—and often did: see *Canadian Copyright Licensing*

Agency (Access Copyright) v. Canada, 2018 FCA 58, 422 D.L.R. (4th) 112 at paras. 61-65.

IV. Arguments and analysis

[22] The RAD reviewed this case under paragraph 97(1)(b). I reproduce it below:

Person in need of protection	**Personne à protéger**
97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	**97 (1)** A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :
…	[…]
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	**b)** soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins

provide adequate health or medical care.	médicaux ou de santé adéquats.

It appears that the applicants would have preferred that the analysis begin with section 96, which was referred to as a [TRANSLATION] "*prima facie* analysis".

[23] The applicants failed to address the argument at the hearing of the judicial review application to the point where it was considered abandoned. Suffice it to say that the RAD concluded that the threatening calls were from criminals against land restitution. For section 96 to apply, there needs to be persecution based on race, religion, nationality, membership in a particular social group and political opinion. That was not the case. The applicants did not demonstrate in any way how the RAD had erred. Furthermore, they did not demonstrate how considering the claim under paragraph 97(1)(b) put them at a disadvantage. It should be noted that the determinative issues were the credibility of the majority of incidents presented in support of the alleged persecution and the internal flight alternative in Colombia.

[24] As for the credibility of the incidents described by the principal applicant, aside from the threatening calls received, the other incidents did not meet the balance of probabilities threshold. The principal applicant argued that if it was believed that the threats were true, it should have been believed that the other incidents described were true as well. One wonders why that is.

[25] I would like to reiterate that the essential role of the administrative decision maker is to assess and evaluate the evidence before it. Absent exceptional circumstances, a reviewing court will not interfere with its factual findings (*Vavilov*, para 125). It would have been necessary for

the applicants to demonstrate that the RAD fundamentally misapprehended the evidence. That was not done. It was necessary for there to be a link between the principal applicant's work and the shots that he said were fired at him. However, he himself testified that his assailants stated at the scene of the attack that it was the wrong person. This is a far cry from a fundamental misapprehension.

[26] A second incident mentioned at the RPD hearing was said to have occurred on August 4, 2018, although it was not presented in the BOC Form. In any case, it again involved a motorcycle with two occupants who, before drawing up to the principal applicant who was on foot, braked suddenly, causing the motorcyclists to fall. The principal applicant stated that he believed they had been pursuing him. However, at the RPD hearing, the principal applicant testified that the incident was only mentioned at the hearing "because it may well be something real but it may also be the product of my paranoia, depending on the mental state I was in". The fact that this incident was completely dismissed by the RAD was in no way shown to have been unreasonable by the applicants.

[27] The applicants' argument that the incidents involving third parties should have been believed to be true because the administrative decision makers accepted that threats were made was as bizarre in respect of the third parties as it was with respect to the two incidents involving the principal applicant. It was not demonstrated that the killing of the mother-in-law of the principal applicant's brother was in any way connected to the principal applicant or to his property title regularization work. It was nothing more than mere speculation on the part of the principal applicant's brother. The principal applicant speculated, at best, that the killing had been

carried out because the victim refused to provide information on principal applicant's whereabouts. Because the victim was a woman without issues, it was speculated that the killing had to have been in connection with the principal applicant. Again, the fact that the administrative decision makers dismissed the incident was hardly an indication of any unreasonableness on their part.

[28] As for the principal applicant's ex-spouse and his daughter, the principal applicant's allegation was that they had received telephone calls in which the callers were seeking information on the principal applicant's whereabouts. The principal applicant's testimony was seen as being far from spontaneous, hesitant, looking for answers for several minutes. Details as to any connection with the principal applicant's work were not present.

[29] Ultimately, the RAD was in complete agreement with the RPD that threatening calls had been made, but the other evidence presented was not believed to be true. In my view, the applicants failed to discharge their burden of showing that the RAD arrived at unreasonable conclusions. The RAD's reasons justified its decision, which was transparent and intelligible.

[30] The applicants argued that the RAD was simply wrong to conclude that there was an internal flight alternative in this case. If I understand the argument, the applicants submit as follows:

- The principal applicant was targeted and the RAD accepted this;
- The principal applicant's testimony was credible and trustworthy;
- The threatening calls were received in several cities;

- The fact that the calls stopped when the [TRANSLATION] “phone card” was replaced, only to start again when the principal applicant put the old one back in, shows that he was targeted.

[31] The Court first notes that the applicants did not claim the second prong of the IFA analysis. Indeed, the applicants could have attempted to demonstrate that the two internal flight alternatives available to them were unreasonable within the meaning of the Federal Court Appeal’s decisions in *Thirunavukkarasu v Canada (Minister of Employment and Immigration) (CA)*, [1994] 1 FC 589 and *Ranganathan v Canada (Minister of Citizenship and Immigration) (CA)*, [2001] 2 FC 164. They failed to do so.

[32] As for the first prong, it was necessary that the RAD be satisfied that there was no serious possibility of the applicants being persecuted where an internal flight alternative might have existed in Colombia. The burden was on the applicants. The arguments presented by the applicants were not sufficient for them to discharge their burden. The fact that the principal applicant was credible with respect to the threatening calls he had received did not mean that the agents of harm would have been able or motivated to track the applicants down anywhere in the country. There was no such evidence. It is certainly not the fact that calls were received on a cellular telephone in different regions that would improve the applicants’ position. This does not in any way establish that the agents of persecution were following them across the country. Moreover, once the principal applicant changed his number, he was left alone.

[33] Nevertheless, as troubling as it may be, only the harassing phone calls were considered, and those calls stopped once the telephone number associated with the principal applicant’s cell phone was changed. This does not demonstrate a motivation or ability to track the applicants

down at the locations designated as internal flight alternatives. The RAD concluded that the evidence submitted, and accepted, did not demonstrate a serious possibility of persecution for the applicants if they were to relocate to one of the proposed internal flight alternatives in Colombia. There is nothing wrong with the RAD's decision.

V. Conclusion

[34] The complaints made with regard to the RAD decision are without merit and the decision was reasonable. In light of the lack of credibility with respect to incidents that could have given rise to a remedy under paragraph 97(1)(b) of the Act and the existence of an internal flight alternative available to the applicants, the application for judicial review is therefore dismissed.

[35] The parties did not propose a question for certification, and none will be certified.

JUDGMENT in IMM-1835-21

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. No serious question of general importance is certified.

"Yvan Roy"
Judge

Certified true translation
Sebastian Desbarats

FEDERAL COURT

SOLICITORS OF RECORD

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