

Federal Court



Cour fédérale

Date: 20221019

Docket: IMM-6024-21

Citation: 2022 FC 1423

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 19, 2022

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

RONNY ASael MIRANDA MIRANDA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant, Ronny Asael Miranda Miranda, a citizen of Honduras, alleges a risk to his life related to a street gang in Honduras. In finding that the applicant was not credible because of several inconsistencies between his testimony and his account, the Refugee Protection Division

[RPD] determined that the applicant was not a Convention refugee or a person in need of protection. In a decision dated August 10, 2021, the Refugee Appeal Division [RAD] dismissed the applicant's appeal.

[2] The applicant is now seeking judicial review of the RAD's decision under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. After a careful review of the record and both parties' representations, I find that this application must be dismissed. For the reasons set out below, I am satisfied that the RAD's decision is reasonable.

II. Background

[3] The applicant alleges that, in September 2010, when he was working at a shoe factory, at least 18 people were killed by gunfire. In his Basis of Claim (BOC) Form, he wrote that he escaped through the factory's bathroom window after noticing that several armed men had arrived in a white truck. The police told him that the massacre was the result of a street gang war, and he later learned that the MS street gang was responsible.

[4] He moved to a neighbourhood under the control of a rival street gang, and he stated that there were rumours that MS was searching for survivors of the massacre. In 2013, his cousin told him that MS knew that he was in hiding and that his life was in danger. He moved again. In 2014, the shoe factory owner was murdered. The applicant and his spouse decided to move once again. In October 2016, when he was in front of his house with his spouse and baby, he saw a white van heading towards them at high speed. They all went into the house to hide. Once inside, the applicant heard gunshots fired at the house.

[5] He did not file a complaint with the police because MS had infiltrated the police. On his cousin's advice, he moved his family to his brother-in-law's house.

[6] In 2017, he was hired as a temporary foreign worker in the agricultural sector in Canada. At the end of his contract, he filed a refugee protection claim on March 6, 2018, believing that he would still be in danger if he returned to Honduras.

III. Decision under judicial review

[7] The issues before the RAD were the same as those raised by the applicant in this application. Among other things, the applicant alleged an apprehension of bias on the part of the RPD and errors in the assessment of state protection, prospective risk, contradictions between his BOC Form and testimony, including a lack of proof of employment at the shoe factory, and negative findings with respect to the applicant's credibility.

[8] After listening to the recording of the hearing before the RPD, the RAD rejected the argument that the RPD mocked the applicant and that it had a preconceived idea before hearing his representative's submissions. The RAD found that the RPD used a consistent, respectful tone, and it rejected the suggestion that taking a break of over 30 minutes before hearing the applicant's representative's submissions showed that the member had already made up his mind before hearing the oral arguments.

[9] The RAD concluded that the presumption of adequate state protection was not rebutted because the applicant did not file a complaint with the police at any point after the 2010

massacre or the 2016 incident. Given the applicant's explanation regarding his decision not to file a complaint because protection is non-existent due to the police being corrupt, the RAD accepted that the objective evidence in the National Documentation Package (NDP) shows impunity in certain circumstances. The RAD admitted that corruption and distrust exist in Honduras, but the applicant had no personal experience to substantiate that adequate state protection was not available. The RAD noted that his spouse filed a complaint in another matter and concluded that the applicant's failure to seek state protection undermined his credibility.

[10] The RAD also considered the contradictions between the applicant's BOC Form and his testimony regarding the events on the day of the massacre. Before the RPD, the applicant alleged that he had recognized two individuals and warned his colleagues, but in the BOC Form he escaped through a bathroom window without mentioning these warnings. According to the RAD, that contradiction adds to discrediting the applicant.

[11] Considering the prospective risk, the RAD found that the applicant had failed to establish a link between the assassination of the factory owner, the van that was speeding towards his family and the 2010 massacre. In addition, the RAD concluded that the attack against the owner in 2014 did not result in injuries or an attack on the workers in the factory at that time. Accordingly, the applicant does not appear to be a person of interest.

[12] According to the RAD, isolated elements that undermined the applicant's credibility were not sufficient to find that there was a lack of credibility. However, the new facts in the testimony

regarding the 2010 events, the generalizations with respect to the lack of state protection and the lack of problems for his family in Honduras, taken together, undermine his credibility.

IV. Issue and standard of review

[13] The applicant identified several issues that call the reasonableness of the RAD's decision into question. The applicant also raises a breach of the principles of natural justice and procedural fairness.

[14] Counsel for the applicant specified, during oral arguments, that the allegation of a breach of the principles of natural justice and procedural fairness is based on an apprehension of bias on the part of the RPD. The issue raised in this application is therefore not that of the RAD's bias, but rather whether the RAD's conclusion regarding the RPD's bias is reasonable.

[15] The application raises a single issue: whether the RAD's decision is reasonable. The reasonableness standard of review applies (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10 [*Vavilov*]).

[16] A reasonable decision bears several hallmarks, such as justification, transparency and intelligibility (*Vavilov*, above, at para 99). Moreover, a reasonable decision is "based on an internally coherent and rational chain of analysis and ... is justified in relation to the facts and law that constrain the decision maker" (*Vavilov*, above, at para 85). A court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker. Instead, the reviewing court must consider only whether the

decision made by the administrative decision maker—including both the rationale for the decision and the outcome to which it led—was unreasonable (*Vavilov*, above, at para 83).

V. Analysis

[17] The burden is on the applicant to show that any shortcomings or flaws relied on are sufficiently central or significant to render the decision unreasonable, such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency. Any alleged flaws or shortcomings must be more than merely superficial or peripheral to the merits of the decision to warrant the Court's intervention (*Vavilov*, above, at para 100).

[18] The applicant clearly demonstrated his disagreement with the RAD's treatment of the issues raised on appeal, but I am not satisfied that the decision is unreasonable.

A. *Apprehension of bias*

[19] Before the RAD, the applicant alleged that the RPD mocked his answers and that this influenced his testimony. In addition, the break taken before the member heard the applicant's oral arguments and the RPD's conduct suggested that the RPD did not keep an open mind and that it had already made its decision well before the hearing had ended. Thus, according to the applicant, his arguments were made only for procedural purposes.

[20] After listening to the recording of the RPD hearing, the RAD found that the RPD used a consistent tone, the questions were well-founded and the confrontations over contradictions and

omissions were done in an equal, measured and respectful tone. The RAD could draw that conclusion; it is reasonable.

[21] In making this finding, I am not rejecting the applicant's subjective perception regarding the RPD's tone. After hearing the parts of the recording cited by the applicant in his oral arguments, I find that the RPD was abrupt and indifferent, which suggests, at worst, that the RPD was not welcoming or sensitive to the applicant while he was talking about difficult experiences. However, the applicant could not identify how his answers or his conduct were affected by this behaviour on the part of the RPD. In addition, the recording shows that the RPD gave him the chance to answer questions without interrupting. This showcases how important it is for a decision maker to be aware of his or her tone and reactions when hearing the evidence.

[22] In addition, it was not unreasonable for the RAD to conclude that the timing of the breaks, the length of the breaks and the fact that the RPD was ready to render a decision at the end of oral arguments were not grounds for bias. I note that, according to subsection 10(8) of the *Refugee Protection Division Rules*, SOR/2012-256, "[a] Division member must render an oral decision and reasons for the decision at the hearing unless it is not practicable to do so."

B. *State protection*

[23] The applicant submits that the presumption of state protection is rebutted by the objective evidence and that the subjective criterion is unnecessary (*Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at para 37; *Garcia v Canada (Minister of Citizenship and Immigration)*, 2007 FC 79 at para 18). He also submits that the objective evidence in the NDP

shows that state protection is illusory since the police is corrupt and impunity is certain. The applicant alleges that the RPD and the RAD raised the standard of proof threshold, expecting the applicant to prove that all police officers were corrupt.

[24] Only where there is clear and convincing evidence that protection is unavailable or ineffective such that state conduct amounts to persecution will Canada be able to extend its refugee protections to the claimants (*Hinzman*, above, at para 54).

[25] The RAD agreed that the NDP showed that there is corruption in the police, that the public mistrusts the police and that complaints against police officers have a low rate of success. However, nothing in the objective evidence indicated that the police do not respond to the public's fears, which would have been relevant to the applicant's circumstances. The RAD determined that, in the absence of an effort on the applicant's part to access protection, generalized evidence was insufficient to rebut the presumption of state protection. Subjective mistrust was not sufficient. The RAD's analysis explains the basis for the conclusions drawn and reflects the applicable case law.

C. *Contradictions between the applicant's BOC Form and his testimony*

[26] Once again, I am not satisfied that the RAD erred in drawing a negative inference with respect to credibility because of inconsistencies between the applicant's BOC Form and his testimony.

[27] The applicant submits that it was unreasonable to draw a negative conclusion on the basis of a lack of evidence corroborating a job at the shoe factory in 2010. The applicant's position misstates the RAD's conclusion.

[28] First, the RAD specifically noted that the lack of evidence with respect to the job was insufficient to draw a negative credibility inference and that the RPD's analysis was incomplete. The RAD drew a negative inference after considering the inconsistency between the applicant's BOC Form and his testimony concerning his actions at the time of the massacre in 2010.

[29] In his testimony, the applicant stated that he had recognized two individuals and then warned his colleagues before hiding. This information was not included in the BOC Form. The RAD noted the explanation for the inconsistency/omission, but found the contradiction difficult to reconcile. In his written submissions, the respondent noted that the affidavit filed in support of the applicant's application for judicial review follows the account in his BOC Form and mentions nothing about recognizing two individuals or warning his colleagues.

D. *Prospective risk*

[30] The RAD took into account the circumstances alleged by the applicant to show that MS was actively searching for him: the applicant's cousin informed him of MS's continued interest; the factory owner was assassinated four years after the 2010 massacre, and the 2016 incident involved a van of the same colour and make as that involved in the 2010 incident. In concluding that these factors were insufficient to establish that the applicant was of interest to the agent of persecution, the RAD was of the opinion that the basis for linking the 2010, 2014 and 2016

incidents was speculative and found that those incidents did not establish a continued interest or a prospective risk. The RAD also noted that the applicant's family continued to live in the same area, that his spouse was still working and that his children went to school without any issues. In addition, it is not in dispute that the applicant did not receive any direct threats from the agent of persecution.

[31] The applicant is relying on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC 53 to argue that the RAD erred in not basing its decision on the cartel's "guidelines", which show, according to the applicant, that it is not the agent of persecution's reflex to harm family members and which explain the lack of difficulties faced by the family. I do not find this argument persuasive. The evidence in question does not completely contradict the RAD's conclusion. Rather, the argument reflects a reinterpretation of the evidence. *Cepeda-Gutierrez* is of no assistance to the applicant.

[32] In addition, the applicant's reliance on *Ortega Arenas v Canada (Citizenship and Immigration)*, 2013 FC 344 is of little help. The RAD's analysis reflects the first step set out in *Ortega*: is there an ongoing future risk? The RAD answered that question in the negative.

[33] The RAD did not err in its assessment of a prospective risk of persecution.

E. *Credibility finding*

[34] I have nothing new to say regarding the RAD's conclusions that the negative inferences drawn with respect to credibility, considered cumulatively, undermine the claim's credibility.

[35] The principles applicable to analyzing credibility were considered by Justice Denis Gascon in *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924, where he stated the following:

[22] Second, even though they may be insufficient when taken individually or in isolation, the accumulation of contradictions, inconsistencies and omissions regarding crucial elements of a refugee claim can support a negative conclusion about an applicant's credibility... . I pause to underscore the well-accepted statement that the RPD is best positioned to assess an applicant's credibility, as it has the benefit of hearing his or her testimony... .

VI. Conclusion

[36] The application for judicial review is dismissed. There is no question of general importance to be certified.

JUDGMENT in IMM-6024-21

THE COURT'S JUDGMENT is as follows:

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

“Patrick Gleeson”

Judge

Certified true translation
Margarita Gorbounova

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6024-21

STYLE OF CAUSE: RONNY ASAEL MIRANDA MIRANDA v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

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