Federal Court  Cour fédérale

Date: 20230119

Docket: IMM-7880-21

Citation: 2023 FC 80

Toronto, Ontario, January 19, 2023

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

PAULA ANDREA RENDON OCAMPO
GIOVANNI ORTIZ MAFLA
VALENTINA CORRALES RENDON
SANTIAGO CORRALES RENDON,
DANIEL ORTIZ RENDON
(A MINOR BY HIS LITIGATION GUARDIAN PAULA ANDREA RENDON OCAMPO)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of an October 12, 2021 decision [Decision] of the Refugee Protection Division [RPD], which determined that the Applicants are neither

Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As set out further below, it is my view that the application should be dismissed. The RPD's finding that the Applicants have not rebutted the presumption of state protection was reasonable and the Applicants have not established that the RPD ignored or misapprehended evidence in reaching that conclusion. Further, the RPD did not err by failing to consider the sexual orientation of the Applicant, Valentina Corrales Rendon [VCR], as a ground of persecution.

I. Background

[3] The Applicants are a family of five who are Colombian nationals.

[4] They allege that in December 2010 VCR, who was then 12, was sexually assaulted by the Applicants' neighbour [BQP], by touching and kissing her in a sexual manner. BQP fled and evaded arrest for several years, but was finally arrested and sentenced in September 2017 after being convicted of aggravated sexual harassment on a plea agreement. He served four and a half years in prison and paid reparations to his victim. The Applicants allege that BQP should have served 13 years in prison and that he used his influence to obtain a lighter sentence.

[5] The Applicants claim they received threatening phone calls before and after BQP's sentencing and were being watched and followed during BQP's imprisonment. They allege that

in December 2017, a man attempted to pick their son up from school and in February 2018, VCR and her girlfriend were robbed and assaulted by a group of men.

[6] In March 2018, VCR, her mother, and one of her brothers travelled to Canada via the United States and claimed asylum. The remaining Applicants came to Canada in April 2018. They sought refugee protection on the basis of an alleged fear that BQP would seek revenge on their family and that VCR would face gender-related persecution arising from the incident with BQP and the subsequent incident in 2018.

[7] On October 21, 2021, the RPD refused the Applicants' claim. The RPD accepted that VCR was the victim of a crime, but found that the dispositive issue was the credibility of the Applicants' allegation that state protection was not available in Colombia. The RPD found there to be insufficient evidence that BQP used his influence to obtain a lighter sentence. The RPD was also unpersuaded that the later incidents experienced by the Applicants supported a finding of a forward-looking risk because of inadequate state protection.

II. Issues and Standard of Review

[8] The Applicants raise the following issues:

A. Did the RPD err in its assessment of state protection?

B. Did the RPD err in failing to consider VCR's sexual orientation as a ground of protection?

[9] The standard of review is reasonableness. None of the situations that would rebut the presumption that all administrative decisions are reviewable on a standard of reasonableness are

present in this case: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 16-17.

[10] A reasonable decision is "based on an internally coherent and rational chain of analysis" that is "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at paras 85-86; *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at paras 2, 31. A decision will be reasonable if when read as a whole and taking into account the administrative setting, it bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 91-95, 99-100.

III. Analysis

A. *Did the RPD err in its assessment of state protection?*

[11] The Applicants assert that the RPD erred in its determination of state protection by ignoring evidence from the National Documentation Package [NDP], which they assert confirms that there is no available state protection for victims of crime. They assert that Colombia suffers from widespread corruption, including of its criminal justice system. They further argue that formal assistance programs for victims of criminal proceedings are ineffective and unavailable.

[12] The Applicants contend that the RPD misapprehended evidence they submitted from a Colombian lawyer and from the Ombudsman of the Prosecutor's office with respect to the sentence received by BQP. They say this evidence establishes corruption in the judicial system and that the pre-trial agreement that was reached to reduce BQP's sentence was entered into illegally and without proper consent.

[13] In reaching its conclusion that the Applicants had not rebutted the presumption of state protection, the RPD considered the country condition evidence relating to the role of the police and security apparatus in Colombia and the ability of civilian authorities to maintain effective control over security forces. It found that this evidence did not establish that state protection was not available; rather, the evidence supported a view that Colombia was in effective control of its territory and had a functioning security force in place to uphold the laws and constitution of its country.

[14] I agree with the Respondent that the argument made by the Applicants amounts to a disagreement with the RPD's weighing of the evidence, which is not sufficient to warrant judicial interference. While the Applicants characterize the documentary evidence as establishing that no state protection is available for "similarly situated persons" in Colombia, the excerpts relied upon do not support this characterization. Nor do I agree that the selected excerpts demonstrate that state protection is not available. As highlighted by the Respondent, the excerpts from the NDP referring to those targeted by armed and guerilla groups are not relevant to the Applicants. Further, the fact that the Applicants may not be eligible for certain state recognized protection programs does not mean that general state protection is not available.

[15] Regarding the lawyer's and Ombudsman's letters submitted by the Applicants, the Court has cautioned that expert opinion should not be given exalted status in administrative proceedings simply because it is prepared by a licensed professional: *Molefe v Canada (Citizenship and Immigration)*, 2015 FC 317 at para 31. The evidence must stand or fall on its own merits: *Moffat v Canada (Citizenship and Immigration)*, 2019 FC 896 at para 30.

[16] As noted by the RPD, both the letter from the Colombian lawyer and the letter from the Ombudsman mischaracterize the charge that was relevant to the plea agreement and in the letter from the Ombudsman, the approach to sentencing, and reasonably influenced the RPD's consideration of this evidence. Further, the court documents indicate that at the time of the plea agreement, the Public Ministry expressed their disagreement with the lowering of the offence; however, the prosecutor chose to proceed with the agreement, which included both a sentence and compensation to be payable to the victim.

[17] As noted by the RPD, BQP pled guilty to the charge of aggravated sexual harassment and received four and a half years, which was the maximum sentence for that charge. The record shows that certain requests made by the public defender (*i.e.*, substitution of house arrest in lieu of prison and for other sentence reductions) were not accepted. In my view, it was reasonable for the RPD to conclude that the sentence received did not support a finding of a failure of state protection.

[18] The Applicants contend that the RPD's state protection finding is a reviewable error because it is singularly focussed on the issue of BQP's sentence, instead of considering the forward-looking risk to the Applicants and whether the state could offer the Applicants ongoing protection. The Applicants argue that the RPD member did not engage in sufficient questioning to fully consider the Applicants' allegations.

[19] However, it is trite law that the Applicants have the onus to establish their claim for refugee protection. It is not the obligation of the RPD to elicit answers during questioning to substantiate the Applicants' allegations.

[20] VCR's mother reported the alleged threats she received while BQP was awaiting sentencing both to the police and through a complaint to the Ombudsman. In neither report did she refer to the threats as being from BQP. Rather instead, she characterized the threats as being from "unknown phone numbers" and stated that she did "not know where they may be coming from".

[21] When asked who the threats came from during questioning, VCR's mother stated "I do not know, what I can say is that they could come from any of the cases in process or it could also come from [BQP] who was convicted to 4 years 5 months in prison with no reduced time." In her statement, she explained that she had two cases in the Office of the Inspector General, one for workplace harassment and the other relating to a complaint with the head of disciplinary control who used to be her boss.

[22] In the Decision, the RPD described the allegations as vague and questioned why the threats were not reported to the prosecutor who was handling the charge against BQP instead of to the general police who were not involved in BQP's case. The RPD found that the failure of the Applicants to bring the threats to the attention of those directly involved in the case undermined the criticism of the state's inability to protect the Applicants. In my view, it was

open to the RPD to make this finding and as such, I do not consider this analysis to render the Decision unreasonable.

[23] Similarly, the RPD found the description of the February 2018 incident involving VCR and her girlfriend that was reported to police to be indicative of a common street robbery and not an attack directed and organized by BQP. It accordingly found that the police's failure to identify the persons involved in the attack insufficient to conclude that state protection was not available, particularly as the report was made shortly before VCR and her mother left for Canada. I do not find this analysis unreasonable, especially in view of the timing involved.

[24] In my view, the Applicants have not established that the RPD erred in this part of its analysis.

B. *Did the RPD err in failing to consider VCR's sexual orientation as a ground of protection?*

[25] The Applicants assert that the RPD erred in failing to consider VCR's sexual orientation as a basis for refugee protection under section 96 of the IRPA.

[26] The Applicants argue that the RPD was required to decide whether the Convention definition was met even if the ground was not raised during the hearing. They rely on paragraphs 66 and 67 of the United Nations High Commissioner for Refugees Handbook on Procedures and Criteria for Determining Refugee Status [UNHCR Handbook] which states that:

> 66. In order to be considered a refugee, a person must show well-founded fear of persecution for one of the reasons stated above. It is immaterial whether the persecution arises from any

> single one of these reasons or from a combination of two or more of them. Often the applicant himself may not be aware of the reasons for the persecution feared. It is not, however, his duty to analyze his case to such an extent as to identify the reasons in detail.
>
> 67. It is for the examiner, when investigating the facts of the case, to ascertain the reason or reasons for the persecution feared and to decide whether the definition in the 1951 Convention is met with in this respect. It is evident that the reasons for persecution under these various headings will frequently overlap. Usually there will be more than one clement combined in one person, e.g. a political opponent who belongs to a religious or national group, or both, and the combination of such reasons in his person may be relevant in evaluating his well-founded fear.
>
> (Emphasis Added)

[27] They further cite *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*] at pages 745 and 746, which followed paragraphs 66 and 67 of the UNHCR Handbook. In *Ward*, the Court determined that political opinion as a ground for fear of persecution should be dealt with, even though the ground was not raised before the decision-maker as the issue was critical to the case.

[28] However, *Ward* does not take away from the principle that the grounds of persecution must be determined based on the facts as asserted by the claimants: *Ortiz v Canada (Citizenship and Immigration)*, 2022 FC 1066 at paras 15-16. The onus is on the claimant to introduce into evidence all the material that may be essential to assessing their claim: *Mersini v Canada (Citizenship and Immigration)*, 2004 FC 1088 at paras 8-10; *Paramanathan v Canada (Citizenship and Immigration)*, 2012 FC 338 at para 19.

[29] In this case, as argued by the Respondent, the RPD was not required to engage with VCR's sexual orientation as a ground of persecution as fear of persecution on this basis was not apparent on the face of the record, nor was it apparent from the facts argued before the RPD.

[30] I note that at the beginning of the RPD hearing, the panel member spent considerable time with the Applicants' counsel defining the issues to be canvassed during the hearing. The Applicants agreed that the only issues for consideration were the issues of state protection and forward-looking risk based on the reported threats and attack. The RPD invited the Applicants to redefine the issues during testimony and argument if it was their view that the issues had evolved or were not characterized correctly. However, no further refinement was made. In this context, the RPD cannot now be faulted for failing to consider further issues: *Mariyadas v Canada (Citizenship and Immigration)*, 2015 FC 741 at paras 25, 32.

[31] Further, in my view, the circumstances of this case are distinguishable from the specific jurisprudence cited by the Applicants.

[32] In this case, unlike in *Vilmond v Canada (Citizenship and Immigration)*, 2008 FC 926 at paragraph 19, *Adan v Canada (Citizenship and Immigration)*, 2011 FC 655 at paragraph 30, and *Niyonkuru v Canada (Citizenship and Immigration)*, 2012 FC 732 at paragraphs 20-25, the Applicants did not allege, or even suggest, a fear of persecution on the basis of VCR's sexual orientation in the claim or otherwise. Further, unlike in *Viafara v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1526 at paragraphs 5-8 and *Nabizadeh v Canada (Citizenship and Immigration)*, 2012 FC 365 at paragraph 52, the alleged facts and evidentiary

record did not suggest that VCR would be targeted by BQP or any other agents of persecution because of her sexual orientation.

[33] While the Applicants argue that there are several documents confirming that VCR was in a same sex relationship, including a letter from her girlfriend and her psychological report, this evidence is inconsistent with answers given by VCR in her denunciation where she was asked whether she belonged to the LGBTQ community and she indicated that she did not. Moreover, the Applicants have not pointed to evidence establishing widespread persecution and regular targeting of lesbian women, nor does the evidence establish that VCR was ever targeted on this basis, or that it was a reason for the persecution the Applicants fear.

[34] In my view, the RPD did not err in failing to conduct an analysis under section 96 of the IRPA on the basis of sexual orientation.

IV. Conclusion

[35] For all of these reasons, the application is dismissed.

[36] None of the parties raised a question for certification and I agree that none arises in this case.

JUDGMENT IN IMM-7880-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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