Federal Court  Cour fédérale

Date: 20240229

Docket: IMM-4230-23

Citation: 2024 FC 339

[ENGLISH TRANSLATION]

Montréal, Quebec, February 29, 2024

PRESENT: Mr. Justice Gascon

BETWEEN:

FRANCISCO EDUARDO ESPITIA AMADOR
LIANA ZAYURI ALGARIN ESCORCIA
PAULA ANDREA ESPITIA ALGARIN

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Liana Zayuri Algarin Escorcia, her husband, Francisco Eduardo Espitia Amador, and their minor daughter, Paula Andrea Espitia Algarin [together, the Algarin Escorcia family], are citizens of Colombia. They are seeking judicial review of a decision by the Refugee

Protection Division [RPD] of the Immigration and Refugee Board of Canada dated February 16, 2023 [Decision], determining that they were not Convention refugees or persons in need of protection pursuant to section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The RPD rejected their claim for lack of credibility and the absence of an objective basis for their fear of persecution.

[2] The Algarin Escorcia family submits that the RPD breached its duty of procedural fairness by rejecting several explanations they had given and by failing to mention the documentary evidence on the record. They also allege that the RPD erred in law because of a lack of transparency and intelligibility in the reasons for its decision. The Algarin Escorcia family also submits that the RPD conducted an unreasonable analysis of its credibility because of prejudices it had against the family. Lastly, they submit that with regard to some new evidence, the RPD did not respect section 22 of the *Refugee Protection Division Rules*, SOR/2012-256 [Rules] by neglecting to give them prior notice of its intent to use information or an opinion that is within its specialized knowledge.

[3] For the reasons that follow, the Algarin Escorcia family's application for judicial review will be dismissed. After having reviewed the RPD's reasons and findings, the evidence before it, and the applicable legislation, I find no basis for overturning the Decision. Moreover, there was no breach of procedural fairness in the way the RPD processed the Algarin Escorcia family's file.

II. Background

A. *Basis of claim*

[4] The Algarin Escorcia family states that it fears being persecuted by the Revolutionary Armed Forces of Columbia [FARC] that threatened the family because of volunteer work Ms. Algarin Escorcia did with an organization that helped deserters.

[5] On October 15, 2021, Ms. Algarin Escorcia allegedly participated in a mission led by the Red Cross in an area controlled by the FARC in order to raise awareness among young guerilla fighters. During this mission, two FARC members allegedly advised her to stop speaking with the young members, took her identity card and cell phone, and made threats against her and her daughter.

[6] Following that mission, the Algarin Escorcia family was allegedly targeted by FARC members and received threatening calls, verbal threats and even threats at gunpoint. They subsequently filed a complaint and sought protection from the authorities several times, but the authorities did not intervene. Despite the threats, Ms. Algarin Escorcia continued to participate in volunteer activities with young deserters.

[7] Because of their fear of the FARC, the Algarin Escorcia family left Colombia for New York on November 26, 2021. They arrived in Canada on November 29, 2021, at a land border, and filed a claim for refugee protection.

B. *RPD decision*

[8] In February 2023, the RPD dismissed their claim for refugee protection on the basis of a lack of credibility and the absence of an objective basis for their fear of persecution.

[9] In the Decision, the RPD considered that the Algarin Escorcia family's testimony about the allegations that were central to its claim was not credible. For example, the RPD noted two behaviours that were inconsistent with that of a person who fears for their safety or their life that were not explained in a satisfactory manner. Particularly, Ms. Algarin Escorcia did not mention the altercation she had with the FARC to the Red Cross staff.

[10] The RPD also drew a negative inference from the absence of some evidence, rejecting the family's explanations in this regard. Lastly, the RPD noted certain credibility problems in the evidence. In particular, the RPD noted that volunteer involvement with underprivileged populations is insufficient in itself to establish a serious possibility of persecution. In fact, although the objective evidence indicated that social leaders in Colombia were persecuted, that evidence did not indicate that the persecution was systematic or that the situation was such that it supported a serious possibility of persecution for anyone who is involved in volunteer work with underprivileged populations, more specifically, with deserters.

[11] This led the RPD to conclude that the Algarin Escorcia family did not establish that it had been targeted and persecuted on the basis of its membership in the social leaders group and that it did not establish a serious possibility that it would be persecuted in Colombia because of Ms. Algarin Escorcia's volunteer activities.

C. *Standard of review*

[12] There is no doubt that in this case the reasonableness standard applies to the RPD's findings on credibility and the lack of sufficient evidence to establish the basis of the claim (*Regala v Canada (Citizenship and Immigration)*, 2020 FC 192 at para 5; *Janvier v Canada (Citizenship and Immigration)*, 2020 FC 142 at para 17; *Yuan v Canada (Citizenship and Immigration)*, 2018 FC 755 at para 13; *Warsame v Canada (Citizenship and Immigration)*, 2016 FC 596 at para 25).

[13] Moreover, the analytical framework for judicial review of the merits of an administrative decision is now that established by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 7 [*Mason*]). This analytical framework is based on the presumption that the standard of reasonableness is now the applicable standard in all cases.

[14] When the applicable standard is reasonableness, the role of a reviewing court is to examine the reasons provided by the administrative decision maker and determine whether the 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" (*Mason* at para 64; *Vavilov* at para 85). The reviewing court must therefore ask "whether the decision bears the hallmarks of reasonableness—justification, transparency and intelligibility" (*Vavilov* at para 99, citing, in particular, *Dunsmuir v New-Brunswick*, 2008 SCC 9 at paras 47, 74).

[15] It is not enough for the decision to be justifiable. Where reasons are required, the administrative decision "must also be *justified*, by way of those reasons, by the decision maker to

those to whom the decision applies" [emphasis in original] (*Vavilov* at para 86). Thus, a review under the reasonableness standard involves both the outcome of the decision and the reasoning process that led to that outcome (*Vavilov* at para 87). Reasonableness review must include a rigorous evaluation of administrative decisions. However, in its analysis of the reasonableness of a decision, the reviewing court must take a "reasons first" approach, examine the reasons provided with "respectful attention" and seek to understand the reasoning process followed by the decision maker to arrive at its conclusion (*Mason* at paras 58, 60; *Vavilov* at para 84). The reviewing court must adopt a posture of restraint and intervene "only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13). Reasonableness review, I will note, finds its starting point in the principle of judicial restraint and requires the reviewing court to demonstrate respect for the distinct role the legislature conferred on administrative decision makers rather than on courts of justice (*Mason* at para 57; *Vavilov* at paras 13, 46, 75).

[16] The burden is on the party challenging a decision to show that it is unreasonable. To set aside an administrative decision, the reviewing court must be satisfied that there are sufficiently serious shortcomings to render the decision unreasonable (*Vavilov* at para 100).

[17] However, with regard to procedural fairness issues, the Federal Court of Appeal has found on many occasions that the usual standards of review do not apply (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24–25; *Perez v Hull*, 2019 FCA 238 at para 18; *Canadian Pacific*

Railway Company v Canada (Attorney General), 2018 FCA 69 at para 54 [*CPR*]). Procedural fairness is instead a legal issue that should be assessed on the basis of the circumstances in order to determine whether the decision maker's procedure met the standards of fairness and natural justice (*CPR* at para 56; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 51–54). The reviewing court need not show deference to administrative decision makers on procedural fairness issues.

III. Analysis

[18] The Algarin Escorcia family presents four arguments against the Decision: (i) breach of the rules of procedural fairness; (ii) lack of transparency and intelligibility of the reasons for the Decision; (iii) unreasonable analysis of its credibility because of the RPD's prejudice; and (iv) failure to respect section 22 of the Rules, requiring notice prior to using information or an opinion that is within the RPD's specialized knowledge.

[19] None of these arguments has persuaded me. As noted by the respondent, the Minister of Citizenship and Immigration [Minister], the rules of procedural fairness were not bent in this case. Instead, the Algarin Escorcia family is trying to challenge the unfavourable credibility findings regarding it with a disguised allegation of breach of procedural fairness. Moreover, the RPD findings about the credibility of the Algarin Escorcia family and the absence of an objective basis for their fear of persecution are reasonable and based on the evidence that was before the RPD.

A. *New evidence*

[20] In their written submissions before the Court, the Algarin Escorcia family submitted some evidence that was not presented to the RPD. The Minister objected to the Court's considering it in its analysis. I agree with the Minister.

[21] On judicial review, the Court cannot normally review evidence that was not before the administrative decision maker (*Tsleil-Waututh Nation v Canada (Attorney General)*, 2017 FCA 128 at paras 97–98 [*Tsleil-Waututh*]; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19 [*Access Copyright*]; *Fortier v Canada (Attorney General)*, 2022 FC 374 at para 17). Indeed, "[t]he essential purpose of judicial review is the review of decisions, not the determination, by trial de novo, of questions that were not adequately canvassed in evidence at the tribunal or trial court" (*Access Copyright* at para 19).

[22] However, there are some exceptions to this principle (*Gittens v Canada (Attorney General)*, 2019 FCA 256 at para 14; *Access Copyright* at paras 19–20). Those limited exceptions extend to materials that (1) provide general background assisting the reviewing court in understanding the issues; (2) demonstrate procedural defects or a breach of procedural fairness in the administrative process; or (3) highlight the complete absence of evidence before the decision maker (*Labrosse v Canada (Attorney General)*, 2022 FC 1792 at para 31, citing *Tsleil-Waututh* at para 98; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263 at paras 23–25; *Access Copyright* at paras 19–20; *Nshogoza v Canada (Citizenship and Immigration)*, 2015 FC 1211 at paras 16–18).

[23] In this case, none of the exceptions apply to the evidence in question. The Algarin Escorcia family submits that its new documents aim to show a complete absence of evidence. I do not share this opinion. Submitting new evidence on the standards for drafting documents in Colombia and some examples of government irregularities does not serve the purpose of showing a lack of evidence before the RPD; instead, it is an attempt to strengthen the Algarin Escorcia family's position and suggest a different interpretation of the evidence the RPD had considered on the issue.

B. *The RPD's specialized knowledge*

[24] In regard to the new evidence, the Algarin Escorcia family also submits that the RPD did not respect section 22 of the Rules by neglecting to provide notice of its intention to use information or an opinion within its specialized knowledge. In the Decision, the RPD noted irregularities with regard to the use of the word "C*iudad*" in the letterhead of certain documents, which was not the case with other documents the Algarin Escorcia family submitted.

[25] Under section 22 of the Rules, the RPD must notify refugee claimants before it uses any information or opinion within its specialized knowledge in its analysis. However, as the Minister noted, section 22 of the Rules does not provide any time frame for doing so. Thus, in *Munir v Canada (Citizenship and Immigration)*, 2012 FC 645 [*Munir*], Justice de Montigny noted that it "therefore does not appear essential for a party to be informed, prior to the hearing, that the panel will rely on information within its specialized knowledge. What is important is that a party can adequately assert his or her point of view on that information" (*Munir* at para 17). In this case, it is clear from the reasons for the Decision that the RPD questioned Ms. Algarin Escorcia about the irregularities noted with regard to the use of the word *"Ciudad"* in the various documents

submitted. Ms. Algarin Escorcia cannot now allege that she did not have the opportunity to present her arguments with regard to the observations the RPD made. On the contrary, she had ample opportunity to respond to the RPD's concerns during the hearing.

[26] Additionally, in my opinion, this is not a situation where the use of the RPD's specialized knowledge is at issue. The irregularities in the use of the word *"Ciudad"* do not raise a specialized knowledge issue but rather an issue of probative value and of weight to be granted to the documents in relation to Ms. Algarin Escorcia's credibility.

[27] Lastly, I note that the issue of the use of the word *"Ciudad"* is not determinative in this case. As Justice de Montigny noted in Munir, "[e]ven if one were to assume that the panel erred by relying on the advertising document, that factor was not a determining one in the panel's decision. A breach of Rule 18 of the Rules, alone, is not sufficient to set aside the panel's decision if the other grounds raised to conclude that the applicant's account was implausible and non credible stand on their own" (*Munir* at para 19, citing *Kabedi v Canada (Minister of Citizenship and Immigration)*, 2004 FC 442 at para 14). As was the case in *Munir*, in this case, an alleged breach of section 22 of the Rules alone is not sufficient to set aside the RPD's decision since the other grounds the RPD raised to conclude that Ms. Algarin Escorcia lacked credibility stand on their own.

C. *There was no breach of procedural fairness*

[28] The Algarin Escorcia family also submits that there was a breach of procedural fairness because the RPD rejected several of its explanations and remained silent with regard to the documentary evidence on the record.

[29] I do not agree.

[30] As noted by the Minister, the rules of procedural fairness require administrative decision makers to give the parties the opportunity to present their statement of facts and their evidence and to be heard. It should be reiterated that issues of procedural fairness and the duty to act fairly do not involve the validity or content of a decision rendered, but instead involve the process followed. Procedural fairness includes two components: the right to be heard and the opportunity to respond to evidence that a party must rebut and the right to a fair and impartial hearing before an independent tribunal (*Therrien (Re)*, 2001 SCC 35 at para 82). Here, I do not detect any breach of the obligation to allow the Algarin Escorcia family to present their evidence.

[31] In this case, credibility was the main issue raised before the RPD, and it is clear that it brought to Ms. Algarin Escorcia's attention the significant problem in her file regarding the letters submitted that included the words *"Ciudad"* and *"ville"*. It was obvious that the RPD had some concerns about these documents and it clearly mentioned this during the hearing. The RPD then provided Ms. Algarin Escorcia with several opportunities to respond to them. However, the responses provided were not found to be reasonable explanations for the contradiction. By way of an allegation of a breach of procedural fairness, the Algarin Escorcia family is attempting to contest the negative credibility finding.

[32] Moreover, it is well established that an administrative decision maker is presumed to have weighed and considered all the evidence presented to it unless the contrary is shown (*Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at para 36; *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (QL) (FCA) at para 1). Similarly, failure to mention a particular piece of evidence does not mean that it was ignored

(*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at para 16), and failure to analyze evidence that runs contrary to the tribunal's decision does not necessarily render a decision unreasonable (*Aghaalikhani v Canada (Citizenship and Immigration)*, 2019 FC 1080 at para 24; *Khir v Canada (Citizenship and Immigration)*, 2021 FC 160 at para 48).

[33] Here, the RPD explicitly refers to the evidence on the record. At paragraph 20 of the Decision, the RPD notes the "substantial amount of evidence" submitted by the Algarin Escorcia family. Despite this large amount of evidence, the RPD notes that some evidence it considered relevant was missing, such as photos taken when Ms. Algarin Escorcia was volunteering on the days she was allegedly threatened or evidence from the Red Cross about Ms. Algarin Escorcia's participation in the mission. The RPD also found irregularities in a few pieces of evidence. Lastly, at paragraph 44 of the Decision, the RPD notes that it considered the objective evidence addressing the persecution of social leaders in Colombia, but concluded that that evidence does not indicate that the persecution is systematic or that the situation is such that it would be possible to establish a serious possibility of persecution for anyone who volunteers with disadvantaged populations.

[34] Thus, the RPD did consider all of the evidence on the record. In its analysis, the RPD weighed the evidence before it, and after a careful review of the evidence on the record and Ms. Algarin Escorcia's testimony, it was certainly open to the RPD to conclude that the claim should be dismissed. There was no breach of procedural fairness here.

[35] Lastly, I note that it is well established that issues of procedural fairness must be raised with the RPD as soon as they come to light (*Mohammadian v Canada (Minister of Citizenship*

and Immigration), 2001 FCA 191 at paras 13–19; *Yassine v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 949 (QL) at para 7). In other words, it is generally not possible to raise breach of procedural fairness issues for the first time on judicial review "if they could reasonably have been the subject of timely objection in the first-instance forum" (*Hennessey v Canada*, 2016 FCA 180 at para 20). Such procedural fairness concerns must be raised at the first opportunity and, if the refugee claimants fail to do so, they cannot then do it on judicial review. This is the Algarin Escorcia family's situation, and it is another element that justifies rejecting their argument that there was a breach of procedural fairness.

D. *The RPD decision is reasonable*

[36] Lastly, the Algarin Escorcia family submits that there was an error of law because of a lack of transparency and intelligibility in the RPD's reasons for the Decision. Additionally, they state that the RPD's analysis of their credibility was unreasonable.

[37] Again, I am not persuaded by the Algarin Escorcia family's arguments. The RPD has "complete jurisdiction to determine the plausibility of testimony…[and] is in a better position…to gauge the credibility of an account and draw the necessary inferences" (*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (QL) (FCA) at para 4 [*Aguebor*]). As such, "[a]s long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review" (*Aguebor* at para 4). Indeed, a reviewing court must consider the factual and legal constraints imposed on the decision maker (*Vavilov* at paras 90, 99), without "reassessing the evidence considered" by that decision maker (*Vavilov* at para 125). Moreover, the accumulation of contradictions, inconsistencies and omissions regarding crucial elements of a refugee claim can be sufficient to support a negative

conclusion about an applicant's credibility (*Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 22).

[38] In this case, the RPD found there was a lack of credibility, in particular, because of two behaviours that are inconsistent with that of a person who fears for their safety, specifically, the fact that Ms. Algarin Escorcia did not inform the Red Cross of the threats she allegedly received from the FARC, and the fact that she continued to participate in her volunteer activities after having received threats. Added to this are the credibility issues in the evidence and the absence of some evidence. As a result, the RPD found that there was no objective basis for the Algarin Escorcia family's fear in Colombia. Since it was of the opinion that Ms. Algarin Escorcia's version of the facts was not credible and that her fear had no objective basis, the RPD found that the members of the Algarin Escorcia family would not be persecuted by the FARC because of Ms. Algarin Escorcia's volunteer work should they return to Colombia.

[39] It is well established that findings of a lack of credibility require a high degree of deference and it is not for this Court to reweigh and reassess the evidence to reach a conclusion that the Algarin Escorcia family would prefer (*Acosta Rodriguez v Canada (Citizenship and Immigration)*, 2021 FC 1298 at para 12, citing *Vavilov* at para 125; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59).

[40] In my opinion, there is nothing in the Algarin Escorcia family's arguments that would make it possible to identify errors that would justify the Court's intervention. The RPD's findings that Ms. Algarin Escorcia lacked credibility result instead from transparent and intelligible reasons that indicate an internally coherent reasoning (*Vavilov* at paras 86, 99). A careful reading of the Decision reveals that the RPD adequately considered Ms. Algarin

Escorcia's testimony and the evidence on the record to support its decision. Here, it is the accumulation of contradictions together with the behaviour that is inconsistent with that of a person who fears for her safety that led the RPD to conclude that the Algarin Escorcia family was not credible and did not have an objective basis for its fear of persecution. In short, the RPD's inferences and conclusions are not so unreasonable as to warrant the intervention of the Court and the findings are therefore not open to judicial review (*Aguebor* at para 4).

IV. Conclusion

[41] For the above-noted reasons, the application for judicial review is dismissed. The Algarin Escorcia family was not able to show that there was a breach of procedural fairness or that the Decision was unreasonable.

[42] As noted by the Minister, the style of cause must be amended to reflect the proper legal name of the respondent before the Court, namely the "Minister of Citizenship and Immigration."

[43] There is no question of general importance to be certified.

JUDGMENT in IMM-4230-23

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed, without costs.

2. The style of cause is amended such that the respondent is identified as the "Minister of Citizenship and Immigration".

3. There is no question of general importance to be certified.

"Denis Gascon"
Judge

Certified true translation
Elizabeth Tan

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4230-23
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PLACE OF HEARING:	MONTRÉAL, QUEBEC
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