

Federal Court



Cour fédérale

Date: 20240927

Docket: IMM-9803-23

Citation: 2024 FC 1528

Ottawa, Ontario, September 27, 2024

PRESENT: The Honourable Madam Justice Turley

BETWEEN:

ERIKA LIZETH NEITA MURILLO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS FOR JUDGMENT

I. Overview

[1] The Applicant seeks judicial review of a decision by the Refugee Appeal Division [RAD] refusing her claim for refugee protection under subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons that follow, I am dismissing this application. The Applicant has failed to establish that the RAD's findings regarding the inadmissibility of new evidence, credibility, and an internal flight alternative [IFA] are unreasonable. Finally, there is no merit to the Applicant's argument that the RAD failed to conduct its own independent analysis of her refugee claim.

II. Background

A. The Applicant's refugee claim

[3] The Applicant, a citizen of Colombia, entered Canada in July 2019. She claimed asylum in March 2021, based on her fear of the armed group Ejército de Liberación Nacional [ELN].

[4] Between July 2017 and May 2018, as part of her post-secondary studies, the Applicant completed an internship with the Centro de Atención Penal Integral a Víctimas [CAPIV], where she provided psychological support to women and children who are victims of armed groups. According to the Applicant, the majority of these individuals were victimized by the ELN.

[5] In October 2018, the Applicant received a call from an unknown number. The caller identified themselves as a member of the ELN, and sought the Applicant's help in recruiting women and minors. The Applicant discussed the call with a friend and changed her phone number.

[6] The Applicant received a second call in January 2019. This time the ELN member threatened that there would be consequences if the Applicant did not assist in recruitment. This caused the Applicant to relocate to her father's home in another area of Bogotá.

[7] In February 2019, the Applicant's stepfather was shot and wounded. She suspected that the ELN was responsible, and consequently began arranging to flee the country.

[8] In May 2019, the car of the Applicant's father was vandalized. She relocated to her grandmother's house until leaving for Canada in July 2019.

[9] The Applicant remained in Canada on a study permit when in January 2021, her father reported that he had been called by the ELN who made threats against her. He told her to stay out of the country, and he subsequently passed away in February. The Applicant then claimed asylum in March 2021.

B. *The RPD decision*

[10] By decision dated October 5, 2022, the Refugee Protection Division [RPD] dismissed the Applicant's refugee claim. The RPD found that the Applicant did not have a nexus to a Convention ground under section 96 of the *IRPA*, and so it only evaluated her claim under subsection 97(1).

[11] The determinative factor for the RPD was credibility and the viability of an IFA. While the RPD accepted that the Applicant had received two phone calls from the ELN, it had credibility concerns with the subsequent events. As such, the RPD found that the ELN did not have a continuing interest in the Applicant. It also found that the Applicant had a viable IFA in Cartagena.

C. *The RAD decision*

[12] The Applicant did not dispute the RPD's determination that the persecution she feared lacked a nexus with any Convention ground. As a result, the RAD only assessed the Applicant's claim under subsection 97(1) of the *IRPA* as a person in need of protection.

[13] The Applicant sought to adduce the following new evidence before the RAD: a letter from her brother; a letter from her mother; and her own affidavit. The RAD determined that none of these documents were admissible under subsection 110(4) of the *IRPA*. Given the RAD's determination, it did not convene an oral hearing.

[14] The RAD ultimately dismissed the Applicant's appeal, finding that aspects of her claim were not credible and that she had a viable IFA in Cartagena.

III. Issues and Standard of Review

[15] The Applicant challenges four aspects of the RAD's decision: (i) the inadmissibility of new evidence; (ii) the credibility assessment; (iii) the assessment under the first prong of the IFA test; and (iv) the lack of an independent analysis.

[16] There is no dispute that reasonableness is the applicable standard of review for the second and third issues.

[17] In respect of the first issue, the Applicant alleges that the RAD misinterpreted subsection 110(4) of the *IRPA* in refusing to admit her new evidence. She asserts that the question is one of procedural fairness reviewable on the correctness standard. I disagree. The jurisprudence is clear that the RAD's interpretation and application of subsection 110(4) of the *IRPA* is reviewable on the standard of reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25 [*Vavilov*]; *Singh v Canada (Citizenship and Immigration)*, 2016 FCA 96 at paras 23, 29, 74 [*Singh*]; *Homauoni v Canada (Citizenship and Immigration)*, 2021 FC 1403 at para 16; *Mohamed v Canada (Citizenship and Immigration)*, 2020 FC 1145 at para 7; *Khan v Canada (Citizenship and Immigration)*, 2020 FC 438 at para 28 [*Khan*].

[18] A reasonable decision is “one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker”: *Vavilov* at para 85; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 8 [*Mason*]. A decision should only be set aside if there are “sufficiently serious shortcomings” such that it does not exhibit the requisite attributes of “justification, intelligibility and transparency”: *Vavilov* at para 100; *Mason* at paras 59-61. Furthermore, the reviewing court “must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable”: *Vavilov* at para 100.

IV. Analysis

A. *The RAD's refusal to admit new evidence is reasonable*

[19] According to subsection 110(4) of the *IRPA*, new evidence must satisfy one of the following requirements to be admissible before the RAD: (i) it arose after the rejection of the refugee claim; (ii) it was not reasonably available at the time of the rejection; or (iii) it was reasonably available, but the person could not have reasonably been expected in the circumstances to have presented it at the time of the rejection: *Singh* at para 34.

[20] If the evidence meets one of these requirements, then the RAD must consider whether the evidence meets the criteria set out in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*] and *Singh*, including newness, relevance, and credibility: *Singh* at paras 34-38, 49; *Raza* at para 13.

[21] On judicial review, the role of the Court is not to revisit whether the new evidence should have been accepted, but rather whether the RAD's admissibility determination is reasonable: *Khan* at para 28. In that vein, deference is owed to the RAD's determination: *Frank v Canada (Citizenship and Immigration)*, 2023 FC 696 at para 25; *Asim v Canada (Citizenship and Immigration)*, 2022 FC 517 at para 23; *Khan* at para 32.

[22] As set out below, I find that the RAD's refusal to admit the new evidence is reasonable. The RAD comprehensively explains why the evidence does not meet the relevant admissibility criteria. As such, I find the reasons are intelligible, transparent, and justified.

(1) The brother's letter

[23] In support of her refugee claim, the Applicant submitted a letter from her brother that mentioned a January 2021 phone call the Applicant's father had received from the ELN. However, the RPD found that this letter lacked detail and did not explain how the brother had personal knowledge of the incident. The RPD thus assigned the brother's letter "low weight": Refugee Protection Division Reasons and Decision dated October 5, 2022 at para 38 [RPD Decision].

[24] The Applicant sought to adduce a second letter from her brother before the RAD. This letter contains more details about the call's subject matter, and explains that the brother listened to the call contemporaneously with the father on speakerphone. The RAD rejected the admissibility of the letter because it relates to events pre-dating the RPD's decision.

[25] The Applicant argues that although the events recounted in this letter are not new, the letter itself is. She asserts that the need for additional details arose because of the RPD's scepticism about the brother's evidence, and thus she could not have reasonably been expected to submit this additional information prior to the hearing.

[26] I do not agree with the Applicant. As the RAD stated, "refugee claimants are required to put their best foot forward at the RPD stage": Refugee Appeal Division Reasons and Decision dated July 7, 2023 at para 15 [RAD Decision]. This Court has consistently held that a RAD appeal is not a second chance to submit evidence in an effort to respond to weaknesses identified by the RPD: *Adjassode v Canada (Citizenship and Immigration)*, 2022 FC 1724 at para 17; *Kumar v*

Canada (Citizenship and Immigration), 2022 FC 1440 at para 16; *Eshetie v Canada (Citizenship and Immigration)*, 2019 FC 1036 at para 33; *Abdullahi v Canada (Citizenship and Immigration)*, 2016 FC 260 at para 15.

[27] The jurisprudence is also clear that the relevant date for evaluating newness is not the date the document was created, but when the event in question took place: *Raza* at para 16.

[28] The RAD reasonably found that the brother's letter, and the corresponding portions of the Applicant's affidavit, did not meet any of the requirements of subsection 110(4) of the *IRPA*.

(2) The mother's letter

[29] The letter from the Applicant's mother recounts a new incident. She alleges that the ELN abducted her and warned that if the Applicant did not return, she would pay the consequences. The mother claims reporting this to the prosecutor's office, and relocating twice as a result.

[30] The RAD rejected this evidence on two grounds: (i) a lack of credibility; and (ii) a lack of corroborative evidence.

[31] The RAD found the mother's evidence lacked credibility because the timing of the alleged abduction was "too fortuitous" given it had been three years since the ELN's last contact with the family:

[17] I reject this evidence due to its lack of credibility. It strains credulity that just days before the RPD rendered its decision, events occurred in Colombia that simply happened to directly undermine

the basis for the decision that the RPD would render two days later. The RPD did not accept that the Appellant's father received a phone call from the ELN in January 2021, nor did the RPD accept that the shooting of her stepfather and the vandalism of her father's car were related to her troubles with the ELN. These findings were crucial to the RPD's determination on the availability of an IFA, as the RPD found that the ELN was likely not motivated to pursue the Appellant to other parts of the country, such as Cartagena. Apart from the phone call in January 2021 phone call [*sic*] (which the RPD correctly found did not occur), the Appellant's family members were not contacted by the ELN after the Appellant's departure from Colombia in July 2019. I find it too fortuitous that after years of inaction from the ELN, the Appellant's mother simply happened to be violently abducted by people identifying themselves as ELN members in circumstances that conveniently contradicted the RPD's principal findings on the claim, just two days before a decision was rendered. As discussed further below, the Appellant has a low-level profile that is unlikely to attract such a degree of interest in her. She merely completed a student internship at CAPIV, had no professional experience as a psychologist, and did nothing to interfere with the ELN's affairs. It is likely that these allegations were fabricated after the Appellant's receipt of the RPD's decision, in order to bolster the appeal.

[Emphasis added]

[32] The jurisprudence is clear that evidence can reasonably be regarded as dubious based on the suspicious timing of events: *Jiang v Canada (Citizenship and Immigration)*, 2021 FC 572 at para 44; *Idugboe v Canada (Citizenship and Immigration)*, 2020 FC 334 at paras 21-25; *Elmi v Canada (Citizenship and Immigration)*, 2020 FC 296 at paras 32-36; *Meng v Canada (Citizenship and Immigration)*, 2015 FC 365 at para 22.

[33] Furthermore, the RAD based its adverse credibility finding on a lack of corroborative evidence because the mother failed to provide a copy of her police complaint despite saying that she would. The RAD reasoned that this was "consistent with a troubling pattern" whereby the Applicant makes a claim, but does not provide corroborative evidence that ought reasonably to be

available: RAD Decision at para 18. The RAD's approach is consistent with the law on corroborative evidence: *Senadheerage v Canada (Citizenship and Immigration)*, 2020 FC 968 at para 36 [*Senadheerage*]; *Luo v Canada (Citizenship and Immigration)*, 2019 FC 823 at para 21; *Guyen v Canada (Citizenship and Immigration)*, 2018 FC 38 at para 38; *Amarapala v Canada (Minister of Citizenship and Immigration)*, 2004 FC 12 at para 10.

[34] Based on these two findings, the RAD reasonably refused to admit the mother's letter and the corresponding portions of the Applicant's affidavit.

B. *The RAD's credibility findings are reasonable*

[35] The RAD agreed with the RPD that the October 2018 and January 2019 phone calls to the Applicant occurred. However, like the RPD, the RAD found numerous credibility issues with the evidence concerning the shooting of the Applicant's stepfather in February 2019, the damage to her father's car in May 2019, and the phone call to the Applicant's father in January 2021. Given that the Applicant only takes issue with the RAD's credibility conclusions regarding the shooting and the phone call, I have not addressed the finding concerning the car.

[36] Significant deference is owed to the RAD with respect to the assessment of credibility: *Aldaher v Canada (Citizenship and Immigration)*, 2021 FC 1375 at para 23; *Sary v Canada (Citizenship and Immigration)*, 2016 FC 178 at para 23; *Lawal v Canada (Citizenship and Immigration)*, 2010 FC 558 at para 11.

[37] I am unable to find that the RAD made any reviewable errors in its credibility assessment.

(1) The shooting of the Applicant's stepfather

[38] The RAD based its adverse credibility finding concerning the shooting of the Applicant's stepfather on two inconsistencies in the evidence.

[39] First, the RAD found discrepancies between the Applicant's Basis of Claim [BOC] narrative and her stepfather's letter regarding the identity of the shooters. The Applicant stated that she suspected the ELN committed the attack. Her stepfather said, however, that his attackers explicitly identified themselves as ELN members and that the shooting was the consequence of the Applicant's non-cooperation

[40] I do not accept the Applicant's argument that this discrepancy is minor. As the RAD pointed out, the shooting was the alleged precipitating incident that drove the Applicant to flee Colombia: RAD Decision at para 33. The identity of the attackers goes to the heart of her claim.

[41] Second, the RAD found that the Applicant and her stepfather's descriptions of the location of the gunshot wound were inconsistent with the medical report. The medical report referred to a gun shot wound and surgery "at the thoraco-abdominal level", whereas both the Applicant and her stepfather stated that the gunshot wound was to his right shoulder: RAD Decision at para 30. Again, this is not a minor detail or discrepancy, as alleged by the Applicant.

[42] The RAD also found that the absence of a police report undermined the Applicant's credibility. The RAD noted that while there is no general requirement for corroborative evidence,

the RPD had good reason to require corroboration given the credibility issues about this incident: RAD Decision at para 37. This conclusion is wholly consistent with this Court’s jurisprudence: *Suen v Canada (Citizenship and Immigration)*, 2023 FC 1641 at para 15; *Nadarajah v Canada (Citizenship and Immigration)*, 2022 FC 171 at para 13; *Senadheerage* at para 36; *Magyar v Canada (Citizenship and Immigration)*, 2015 FC 750 at para 36.

[43] The RAD further noted that the objective evidence in the National Documentation Package for Colombia states that a person who reports a crime can obtain a police report, even from outside the country: RAD Decision at para 38. This reliance on country condition evidence rebuts the Applicant’s argument that the RAD unreasonably applied a “Western lens” in not accepting her explanation as to why she was unable to obtain a copy of the police report: Applicant’s Memorandum of Argument at para 55.

(2) The threatening phone call to the Applicant’s father

[44] The RAD did not accept the Applicant’s testimony that her father received a threatening call in January 2021 because her evidence was vague. While the RAD considered the report from the Applicant’s psychotherapist detailing her anxiety, depression, and sleep disturbances, the RAD concluded that “these do not adequately explain the lack of detail in the [Applicant’s] evidence”: RAD Decision at para 49.

[45] In addition, the RAD determined that the Applicant had the opportunity to explain what occurred in her BOC, her oral testimony, and through other sources such as family members. However, this evidence was also lacking in detail. The RAD thus concluded that there was

insufficient credible and probative evidence to support that her father had received a threatening call from the ELN in January 2021.

[46] Based on the foregoing, I disagree with the Applicant's submission that the RAD failed to engage with her evidence and provide coherent reasons for its findings. Sitting in judicial review, it is not for this Court to reweigh the evidence before the RAD: *Vavilov* at para 125.

C. *The RAD's assessment of the first prong of the IFA test is reasonable*

[47] It is well established that a refugee claim should be dismissed where the claimant has a viable IFA in their country of nationality: *Sadiq v Canada (Citizenship and Immigration)*, 2021 FC 430 at paras 38-39; *Olusola v Canada (Citizenship and Immigration)*, 2020 FC 799 at para 7.

[48] A two-pronged test is applicable to determining the viability of an IFA. In this case, the Applicant only takes issue with the RAD's assessment of the first prong of the test.

[49] The first prong considers whether a claimant would be subject to a risk of harm under subsection 97(1) of the *IRPA* in the proposed IFA. The agent of persecution's "means" and "motivation" to locate the claimant in the proposed IFA are considered: *Singh v Canada (Citizenship and Immigration)*, 2023 FC 996 at para 8; *Adeleye v Canada (Citizenship and Immigration)*, 2022 FC 81 at para 21.

[50] Here, the RAD reasonably determined that the ELN would not be motivated to pursue the Applicant in Cartagena for three reasons. First, the RAD concluded that, as a previous student

intern with CAPIV, the Applicant does not fit the profile of someone that would warrant pursuit. Second, neither the Applicant nor her family had been contacted by the ELN since January 2019, more than four years before the RAD's decision. Third, Cartagena is outside the ELN's normal zones of operations.

[51] The Applicant fails to provide any persuasive arguments that the RAD's IFA assessment is unreasonable. I do not agree that the RAD's conclusions about the Applicant's profile amounts to speculation. To the contrary, the objective evidence before the RPD and the RAD supports that the Applicant did not fit the profile of someone the ELN would track:

... According to the evidence, "criminal groups are more likely to track individuals who have a "high profile" or "continue to advocate for their communities" after being "displaced" or leaders, people who are "more likely to express their opinions," or those who are "more capable" of "infring[ing]" on the group's interests, for example by "encroach[ing] on their territories" or "limiting their operations". This goes on to say that "[i]n general," criminal groups target those they see as an "annoyance" or "obstacle" to their economic goals in an area," and that they may or may not track an individual who does not present an annoyance or obstacle further.

RPD Decision at para 57 [Citations omitted]

[52] Further, in response to the RAD's finding that the ELN has not shown any continued interest in the Applicant, she simply argues that had the RAD admitted her new evidence, it would have found an ongoing motivation: Applicant's Memorandum of Argument at para 66. As set out above, I do not accept that the RAD erred in refusing to admit the new evidence.

D. *The RAD conducted an independent assessment*

[53] The Applicant argues that the RAD failed to conduct its own independent assessment of her refugee claim. I do not agree that this is a case of the RAD simply rubber-stamping the RPD's decision. Indeed, the RAD agreed with the Applicant that the RPD had failed to consider the relevance of the psychotherapist's report under the second prong of the IFA test: RAD Decision at para 64.

[54] Simply because the RAD agrees with the RPD does not mean it failed to undertake its own analysis: *Singh v Canada (Citizenship and Immigration)*, 2023 FC 332 at para 27; *Ademi v Canada (Citizenship and Immigration)*, 2021 FC 366 at para 28; *Kayitankore v Canada (Citizenship and Immigration)*, 2016 FC 1030 at para 23.

[55] The Applicant's reliance on *Gomes v Canada (Citizenship and Immigration)*, 2020 FC 506 [Gomes] and *Ajaj v Canada (Citizenship and Immigration)*, 2015 FC 928 [Ajaj] is misplaced. In *Gomes*, the RAD's reasons were three paragraphs long and simply stated that it did not find that the RPD erred. It did not give reasons why, nor state what its own conclusions were. In this case, the RAD's reasons were thorough and comprehensive and totalled 20 pages. In considering each issue, the RAD's reasons follow the same structured analysis: it first summarizes the RPD's finding, then the Applicant's position, before explaining why it does not accept the Applicant's arguments.

[56] In *Ajaj*, the Court found that the RAD had failed to conduct an independent assessment of the applicant's claim because the RAD's decision exhibited a high degree of deference using the language of reasonableness: *Ajaj* at para 42. In contrast, the RAD in this case clearly understood its role: "I have applied a correctness standard and arrived at independent findings": RAD Decision at para 8. Indeed, the RAD's reasons reflect that it did just that.

V. Conclusion

[57] Based on the foregoing, I find that the RAD's decision is reasonable with respect to the refusal to admit new evidence, the credibility findings, and the first prong of the IFA test. In addition, I am satisfied that the RAD conducted an independent assessment of the Applicant's claim. The application for judicial review is therefore dismissed.

[58] The parties did not raise a question for certification and none arises in this case.

JUDGMENT in IMM-9803-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. There is no question for certification.

“Anne M. Turley”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-9803-23

STYLE OF CAUSE: ERIKA LIZETH NEITA MURILLO v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD VIA VIDEOCONFERENCE

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**JUDGMENT AND REASONS
FOR JUDGMENT:** TURLEY J.

DATED: SEPTEMBER 27, 2024

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