Federal Court  Cour fédérale

Date: 20210512

Docket: IMM-4271-20

Citation: 2021 FC 438

[ENGLISH TRANSLATION]

Montréal, Quebec, May 12, 2021

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

ALBERT FABIAN SOSA TRUJILLO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision of the Refugee Appeal Division [RAD] dated August 21, 2020, which confirmed a decision of the Refugee Protection Division [RPD] dated November 26, 2018, rejecting the applicant's claim for refugee protection.

[2] For the reasons that follow, the RAD's decision is reasonable and the reasons it provided do not raise a reasonable apprehension of bias. There is therefore no need to intervene in this case.

I. Factual background

[3] The applicant is a citizen of Columbia. He alleges that he has been persecuted since 2016 by the National Liberation Army [ELN], and since 2017 by Autodefensas Gaitanistas de Colombia [AGC], because of his work as a volunteer topographer for a not-for-profit organization [NGO] that helps the population obtain restitution of their land. He moved to six different cities, but the agents of persecution found him. On July 10, 2017, he left Colombia for the United States and illegally crossed the Canadian border the next day. Shortly afterwards, he filed a claim for refugee protection.

II. Rejection of the refugee protection claim and subsequent appeal

[4] In short, the RPD found that the applicant is not credible and that his story was fabricated. His testimony regarding the number of death threats and the circumstances surrounding them was shifting, confusing and contradictory. While his claim for refugee protection is based on his role as a volunteer topographer, the applicant could not identify even one of the 40 families whose land he allegedly helped reclaim and he presented no evidence that the NGO existed or to confirm what his functions were. The RPD also pointed out the complete confusion in the description of the places where he allegedly left the 9 million pesos demanded

by the terrorists. The applicant could not describe the route to the supermarket or indicate the name of the supermarket or the type of parking lot where he allegedly left the money.

[5] The applicant appealed this decision. He presented to the RAD various grounds for setting aside the decision in a memorandum filed in December 2018 [the initial memorandum]. Following the RAD's June 15, 2020, correspondence to counsel for the assigned appeals, the applicant submitted a supplementary memorandum in July 2020 [supplementary memorandum]. At the same time, he asked the RAD to hold a hearing and to admit the new evidence submitted with the supplementary memorandum.

[6] The matter was referred to the RAD in March 2020 and its final decision dismissing the appeal was rendered on August 21, 2020. In this case, the RAD declared the new evidence submitted by the applicant inadmissible (paras 12 to 27). Indeed, although it post-dated the RPD's decision, it did not meet the test of relevance. Therefore, as no new evidence was admitted, the RAD concluded that there was no need for a hearing (paras 28 and 29). On the merits of the appeal, the RAD divided its analysis into two distinct sections. The first section (paras 35 to 68) dealt with the errors raised in the initial memorandum, the second section (paras 69 to 106) dealt with the supplementary memorandum.

[7] First, in dealing with the arguments raised in the initial memorandum, the RAD ruled that the RPD did not breach the principles of procedural fairness and that its finding of non-credibility was based on the evidence. The RPD member was courteous and professional, ensured that the applicant understood the questions, repeated questions when the applicant's

statements were inconsistent, allowed his counsel to intervene several times during her own questioning, and moreover, his counsel raised no issues with procedural fairness during her oral submissions (paras 41-42). The RAD also concluded that the RPD did not err in its findings regarding the applicant's credibility. Indeed, the contradictions and omissions in the applicant's testimony were significant and concerned central elements of his claim for refugee protection (para 61). As his testimony was evasive, confused and included several omissions and contradictions, the RPD could find that the applicant's behaviour demonstrated a lack of subjective fear or was inconsistent with that of a person who genuinely fears for his life.

[8] Second, in dealing with the additional arguments raised in the supplementary memorandum, the RAD ruled that the RPD did not misunderstand the basis of the applicant's claim (paras 72 to 77) and that the RPD did not err in finding that he is not a refugee (paras 78 to 83). The RAD also rejected the applicant's argument that his confusion was attributable to the RPD's constant interventions, which prevented the conclusion of an answer and the applicant's attempts to answer questions before the translation was done (para 84). The RAD noted that the RPD repeatedly asked the applicant to listen to the questions before responding (para 87). He is therefore solely to blame for his own confusion (para 88). Finally, notwithstanding the lack of credibility, the RAD rejected the applicant's argument that the RPD erred in failing to assess the persecution and risk to which the applicant may be personally exposed should he return to Colombia (paras 96 et seq.). The RAD noted that the case law emphasizes the need to assess the facts objectively and determine whether the applicant faces a well-founded fear of persecution. Indeed, according to the documentary evidence, topographers are targeted by terrorists not because they are topographers, but rather for their involvement in land restitution (para 101). In

this case, the SAR and the RPD did not believe the applicant's story, in particular, that he worked as a topographer for an NGO, and that he was involved in the land restitution process. There is therefore no reason to believe that the applicant's removal to Colombia would subject him personally to a danger of torture or a risk to his life, or a risk of cruel and unusual treatment or punishment. Hence, this application for judicial review.

III. Analysis

[9] At the hearing before this Court, counsel for the applicant focused on demonstrating that: (1) the RAD acted unreasonably by declaring the new evidence submitted with his supplementary memorandum inadmissible; and (2) in the alternative, the structure of the reasons and the unjustified or inappropriate criticisms found in the RAD's decision were such as to raise a reasonable apprehension of bias and undermines the validity of the decision dismissing the appeal. For her part, counsel for the respondent reiterated the same arguments for dismissal as those found in the respondent's memorandum, while pointing out at the hearing that although the RAD's decision was not perfect, on the whole it was reasonable and there was no reasonable apprehension of bias, even if some of the comments might have been inappropriate or unjustified.

Is the refusal to admit new evidence reasonable?

[10] Subsection 110(4) of the IRPA provides that only evidence that arose after the rejection of the claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection, is admissible.

The Federal Court of Appeal in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*], held that the implied conditions of admissibility identified in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paragraphs 13 and 14 [*Raza*]—credibility, relevance, newness and materiality—must also be assessed by the RAD.

[11] Furthermore, these being relevant factors, paragraph 29(4)(a) of the *Refugee Appeal Division Rules*, SOR/2012-257, expressly states that in deciding whether to allow an application, the RAD must consider any relevant factors, in particular "the document's relevance and probative value", and with respect to relevance, the Federal Court of Appeal has defined the "relevance" of new evidence as that which is "capable of proving or disproving a fact that is relevant to the claim for protection" (*Raza* at para 13). In particular, the Federal Court of Appeal notes that relevance is a "basic condition" for the admissibility of any piece of evidence (*Singh* at para 45).

[12] In this case, the applicant challenges the application of the test for relevance to the new evidence he sought to admit before the RAD. He argues that the facts questioned by the RPD relate specifically to his status as a topographer and his work in the land restitution process. These facts were central to his claim. The new evidence before the RAD consists of the following: two newspaper articles dealing with the murder of topographers (Exhibits A-1 and A-2); a legal report on the importance of topography work (Exhibit A-3); and a topographical report on the importance of topography work (Exhibit A-4). This new evidence demonstrates that topography work is central to the land restitution process and corroborates the applicant's testimony in this regard, and is therefore relevant in the applicant's view.

[13] In accordance with the presumption set by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the reasonableness standard applies when determining whether new evidence is admissible. When reviewing a decision on the standard of reasonableness, the Court must first consider the reasons given with respectful attention and seek to understand the reasoning process followed by the decision maker to arrive at its conclusion. What the decision maker must do to justify its decision depends on the context in which the decision is rendered. 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. In short, it is the decision maker's responsibility to assess and evaluate the evidence before it. Absent exceptional circumstances, a reviewing court will not interfere with its factual findings (*Vavilov* at para 125). That said, "[t]he reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov* at para 126).

[14] I agree with the respondent that the RAD acted reasonably in assessing the admissibility of the new evidence. Although the new evidence met the explicit criteria of s. 110(4) of the IRPA, it was not relevant because it was not capable of proving the determinative facts the RPD questioned and that were relevant to the claim for protection, namely the existence of the NGO for which the applicant alleges he worked as a volunteer, his involvement in the land restitution process, and his resignation in 2016.

[15] One must read all the reasons provided in paragraphs 22 to 27 of the impugned decision. While the four documents (A-1 to A-4) attest to a serious and dangerous reality for topographers

involved in the land restitution process, as set out in the National Documentation Package for Colombia, their contents do not establish any direct or indirect connection or link to the applicant's alleged volunteer activity.

[16] Also, after the applicant testified that a friend of his uncle brought him documents from Colombia to Canada, the RPD asked him why this friend did not also bring him a document from the human rights organization. His response was evasive, confusing and unsatisfactory. Here is the exchange he had with the RPD on this matter:

> [TRANSLATION]
>
> The RPD: . . .Did you bring these documents with you or did you ask for them?
>
> The appellant: A friend of my uncle brought them.
>
> The RPD: Why didn't you think to ask for a document from the human rights organization?
>
> The appellant: Because I was very scared, I didn't know what to do. I was running away.
>
> The RPD: You asked one of your uncle's friends to bring you the documents, why not the other?
>
> The appellant: Because I had this evidence to show them that my life is in danger.

[17] Finally, as noted by the RAD, subsection 110(4) of the IRPA does not give the RAD discretion to accept new evidence, nor does it provide the opportunity to complete a deficient record submitted before the RPD. Rather, it allows for errors of fact, errors in law or mixed errors of fact and law to be corrected. In this case, it was reasonable for the RAD to conclude that the four documents were produced in response to the RPD's finding that the applicant

provided limited arguments or information to corroborate his alleged involvement in activities with a humanitarian organization to assist displaced persons to reclaim their land. The submission of the new evidence was therefore merely an attempt by the applicant to complete a deficient record (*Casilimas Murcias v Canada (Citizenship and Immigration)*, 2019 FC 1182 at para 50 citing *Ilias v Canada (Citizenship and Immigration)*, 2018 FC 661 at para 34).

Is there a reasonable apprehension of bias?

[18] The allegation of a reasonable apprehension of bias—which involves respecting the principle of procedural fairness—must be reviewed by the Court under the standard of review for correctness. As this Court stated in *Zhou v Canada (Citizenship and Immigration)*, 2020 FC 633 at para 39, the burden is on the party alleging a reasonable apprehension of bias (actual or perceived) to show that a reasonable and informed person, viewing the matter realistically and practically, and having thought the matter through, would conclude that it is more likely than not that the decision maker, whether consciously or unconsciously, would not decide the matter fairly. In the absence of such evidence, members of administrative tribunals, like judges, are presumed to have acted fairly and impartially. The threshold for a finding of bias is therefore high and mere suspicion is insufficient to meet that threshold.

[19] In this case, the applicant considers that by analyzing the initial memorandum and the supplementary memorandum in two stages, a reasonable and informed person could conclude that there is a reasonable apprehension of bias. The applicant alleges that the RAD had decided to dismiss the appeal at the time of the filing of the initial memorandum, which is apparent from paragraph 53 of the RAD decision. According to the applicant, RAD's bias is also inferred from

the inappropriate or unjustified accusations the RAD made in various places in the reasons, particularly at paragraphs 33, 49, 51, 53 and 71.

[20] The applicant's criticisms are unjustified or not determinative in this case. They do not raise any reasonable apprehension of bias. Although the Member, who had been seized of the file since March 2020, had already analyzed the file and was able to conclude that the grounds of appeal raised in the December 2018 memorandum were not well-founded (para 53 of the reasons), he nonetheless fully considered and ruled on the merits of the applicant's new arguments submitted in his second memorandum of July 2020, resulting in a fair and equitable decision.

[21] The Court is satisfied that the RAD conducted an exhaustive, rigorous and detailed analysis of the evidence and the applicant's arguments as a whole (both the original submissions of December 2018 and the supplementary submissions of July 2020). Furthermore, the Member took the time to explain the structure of his analysis at the beginning of his reasons, given the voluminous nature of the submissions, including the exhibits, and confirmed that he was considering them:

> [TRANSLATION]
>
> [33] In this case, the initial memorandum was 21 pages long and the supplementary memorandum was 23 pages long for a total of 44 pages, 14 pages longer than permitted by Rule 3(4) of the RAD Rules.
>
> [34] The RAD's analysis will be separated into two distinct sections, each relating to either memorandum:
>
> > SECTION 1: SUBMISSIONS IN THE APPELLANT'S INITIAL MEMORANDUM

> (A) Whether the RPD breached the principles of natural justice and procedural fairness.
>
> (B) Whether the RPD erred in making a general negative credibility finding.
>
> SECTION II: SUBMISSIONS IN THE APPELLANT'S SUPPLEMENTARY MEMORANDUM (appellant's new memorandum) (AR, pp 16 and 19; RAD's Reasons, pp 7 and 12, paras 33 and 34).

[22] As apparent from the RAD's reasons, the subheadings of its analysis are derived from those in the applicant's submissions and the Member specifically refers to the paragraphs and exhibits in the applicant's two memoranda (December 2018 and July 2020) in his footnotes. Although the RAD indicated that there are several additional pages, there is no indication that they have not been considered and there is no breach of the rules of natural justice. In the context of the applicant's failure to indicate that the supplementary memorandum would have superseded the initial memorandum, the RAD Member had an obligation to consider both memoranda, and the process he followed demonstrates that he did consider all of the applicant's arguments. His reasons attest to this fact.

[23] Moreover, I agree with the respondent that the applicant's allegations of bias are based on impressions and assumptions (*Arthur v Canada (Attorney General)*, 2001 FCA 223):

> An allegation of bias, especially actual and not simply apprehended bias, against a tribunal is a serious allegation. It challenges the integrity of the tribunal and of its members who participated in the impugned decision. It cannot be done lightly. It cannot rest on mere suspicion, pure conjecture, insinuations or mere impressions of an applicant or his counsel. It must be supported by material evidence demonstrating conduct that derogates from the standard. It is often useful, and even necessary, in doing so, to resort to evidence extrinsic to the case.

[24] Finally, with respect to the unjustified or inappropriate criticisms found in certain places in the reasons, they are not determinative in this case. I do not believe they show a level of hostility that would warrant referring the matter to another member. In *Trasvina Ramirez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 809 at paragraphs 22 and 23, the Court noted that while the Member allowed her frustration to show, this did not amount to bias on her part (see also *Keita v Canada (Citizenship and Immigration)*, 2015 FC 1115 at para 32).

IV. Conclusion

[25] The application for judicial review is dismissed. No serious question of general importance has been raised by counsel and none arises in this case.

JUDGMENT in IMM-4271-20

THE COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed. No question is certified.

"Luc Martineau"
Judge

Certified true translation
This 10th day of June 2021.

Elizabeth Tan, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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