Federal Court  Cour fédérale

Date: 20210615

Docket: IMM-1437-20

Citation: 2021 FC 608

Ottawa, Ontario, June 15, 2021

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

JESUS DAVID CASTELLANOS PENARANDA
YENNI MILENA LEAL GARCIA
JUAN MIGUEL CASTELLANOS LEAL
JUAN FERNANDO CASTELLANOS LEAL

Applicants

and

THE MINISTRY OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are citizens of Colombia. Jesus David Castellanos Penaranda, and co-applicants, Yenni Milena Leal Garcia, his spouse, and their two minor children Juan Miguel

Castellanos Leal and Juan Fernando Castellanos Leal, fled Colombia because of threats against Mr. Castellanos Penaranda's life by the Ejército de Liberación Nacional guerrilla group [ELN].

[2] Mr. Castellanos Penaranda is an industrial engineer who worked with the NABORS Company in the drilling and exploration of oil wells. Because of violent protests in the area where he worked in 2016 supporting cessation of activities of the oil workers, he asked his bosses in December that year to move him to another region. Thus, he was transferred to the Rubiales area in January 2017; however, protests in that region occurred later that year. In addition, the ELN specifically declared Mr. Castellanos Penaranda a "military objective" in a pamphlet delivered in a sealed envelope to his office. The police subsequently captured an "infiltrator," although not the ringleaders or other participants.

[3] Fearing for their safety and lives, the Applicants sought refuge in Canada pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The determinative issues before the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada [IRB] were state protection and internal flight alternative. After a break toward the end of the RPD hearing, the presiding member returned and delivered their decision and reasons orally.

[4] On appeal to the Refugee Appeal Division [RAD] of the IRB, the determinative issues were breach of natural justice and state protection. The RAD confirmed the RPD's determination that the Applicants are neither Convention refugees nor persons in need of protection, and dismissed the appeal.

[5] The Applicants seek judicial review of the RAD's decision. They allege the RAD erred in three respects: (i) its unreasonable determination that the RPD did not breach the principle of natural justice and did not show bias by rendering an oral decision at the close of the Applicants' hearing; (ii) its unfair failure to observe Rule 21(3)(b) of the *RAD Rules* because Mr. Castellanos Penaranda's Basis of Claim [BOC] Narrative was missing from the records of the RPD and the RAD; (iii) its unreasonable determination that state protection was available.

[6] Based on my review of the record and consideration of the parties' submissions, I agree with the Applicants that the RAD's decision is unintelligible regarding its determination of whether the RPD breached natural justice. Coupled with the absence of Mr. Castellanos Penaranda's BOC Narrative, I find that judicial interference is warranted in the circumstances. For the reasons that follow, the RAD's decision will be set aside and the matter sent back for redetermination by a different panel.

II. Applicable Standard of Review

[7] While the RAD's role was to review the RPD's decision through a correctness lens, the parties agree, as do I, that the Court's role in this judicial review is to consider the reasonableness of the RAD's decision in respect of issues (i) and (iii): *Canada (Immigration and Citizenship) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10; *Ahmad v. Canada (Citizenship and Immigration)*, 2021 FC 214 at para 13. To avoid judicial interference, an administrative decision maker's reasons, where given, must be justified, intelligible and transparent, taking into account not only the outcome but also the reasoning process: *Vavilov*, at paras 86-87, 99.

[8] The breach of procedural fairness issue, however, involves a reviewing exercise best reflected in the correctness standard, while recognizing that the duty of procedural fairness is context-specific, flexible and variable: *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Vavilov*, at para 77. The focus of the reviewing court is whether the process was fair in the circumstances: *Chaudhry v Canada (Citizenship and Immigration)*, 2019 FC 520 at para 24.

III. Analysis

(i) *RAD's Determination Regarding No Breach of Natural Justice*

[9] I find the RAD's determination that the RPD did not breach natural justice and did not show bias in rendering an oral decision unreasonable because of the unintelligible conclusion reached in this case. The RAD closed its review of the RPD's decision and reasons with the observations that the Applicants (or appellants before the RAD) did not indicate how long a break the RPD took before rendering its decision or how long a break they would have wanted the RPD to take. The RAD panellist then concluded: "In my opinion, and considering all of the above, a fifty-minute break would have been sufficient in this case for the RPD to render an oral decision." In light of the evidence the Applicants submitted in their judicial review, discussed below, I find the Applicants easily could have addressed the shortcomings identified by the RAD, in their RAD submissions. That said, in my view the RAD's concluding statement is unintelligible based on a review of the RPD hearing transcript, which includes the RPD's oral decision rendered after a break at the end of the hearing.

[10] The Applicants allege that the RPD's decision exhibits bias, and hence, a breach of natural justice, in the sense of the presiding member having prepared their decision, including reasons, in advance of the hearing. There is no direct evidence that the presiding member "pre-prepared" their decision, as alleged. As noted by the RAD, "the allegation of bias on the RPD's part is a serious allegation that cannot rest on mere suspicion, insinuations or even impressions of a party or its counsel," with reference in the applicable endnote to this Court's decision in *Pajarillo v Canada (Citizenship and Immigration)*, 2019 FC 1654 [*Pajarillo*] at para 37 and following.

[11] I agree with the Respondent that the RPD's decision refers to the Applicants' testimony (their credibility was not in issue), closing submissions of the Applicants' counsel, and the documentary evidence submitted at the hearing (including country conditions disclosed by the documentation). In fact, the RAD refers in its reasons to these aspects of the RPD's decision. Further, the RAD found the documentary evidence submitted at the beginning of the hearing was duplicative of that contained in the National Documentation Package [NDP] and available to the RPD before the hearing. All these factors could have facilitated the oral decision in this case, but the RAD did not state this.

[12] In addition, the presiding member's oral decision was not lengthy, comprising only 6½ pages at the end of the transcript. This is to be contrasted with the situation in *Sternberg*, on which the Applicants rely, where the administrative decision maker deliberated for 8 minutes following the hearing and then produced a 15-page typewritten decision: *Sternberg v Ontario Racing Commission*, 92 OR (3d) 257, 2008 CanLII 50514 (ON SCDC) [*Sternberg*] at para 13.

[13] As well, subrule 10(8) of the *RPD Rules* provides that the RPD member must render an oral decision and reasons for the decision at the hearing unless it is not practicable to do so. Presumably, this would not be a difficult task for an experienced RPD member regarding a matter that does not seem complex. The RAD did not mention, however, either the expertise of the RPD member or the complexity of the matter.

[14] The transcript of the RPD hearing discloses that there were three breaks, all of which the presiding member could have used to prepare and finalize their decision. The RAD also made no mention of this. Further, it is clear on the face of the RPD record that the there were only about 26 minutes from the end of the second break (about 10 minutes to 3:00) until the end of the third break (3:16), after which the presiding member rendered their decision. If one estimates about 15 minutes for the Applicants' counsel to make the closing submissions that were recorded in the transcript, this leaves approximately 10 minutes for the third and final break, give or take a few minutes for either component (closing submissions plus break) of these 26 minutes.

[15] The Applicants' Record contains two affidavits of the same legal assistant. In one of affidavits, the assistant attests to having examined the digital audio recording of the RPD hearing and provides information from which the approximate length of the breaks can be gleaned, including that the third break was approximately 10-11 minutes. The Applicants' Record also contains the affidavit of each of Mr. Castellanos Penaranda and his former counsel. These affidavits confirm as well such approximate length of the final break in the hearing. I find this evidence admissible under the "general background in circumstances" exception recognized in *Access Copyright* regarding the admissibility of evidence on judicial review that was not before

the administrative decision maker: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at para 20. That said, I find paragraphs 5 and 6 of the former counsel's affidavit inadmissible because they contain speculation about the ability of the presiding member to render their oral decision at the conclusion of the hearing and about the presiding member's alleged frame of mind. As well, the former counsel's recollection of what the presiding member may, or may not, have said after the close of the hearing is imprecise and irrelevant. As noted by the RAD, allegations of bias cannot rest on the impressions of a party's counsel.

[16] In any event, in all the circumstances of this matter, 10 or so minutes for the third break may well have been sufficient time for the presiding member to finalize their reasons and render them orally. Again, however, this is not what the RAD stated. Instead, the RAD held that "in this case" a fifty-minute break would have been sufficient for the RPD to render an oral decision. The basis on which the RAD arrived at this conclusion is not evident. While I might surmise it is based on the 50-minute break mentioned in *Pajarillo*, it is not for this Court to "back fill" gaps in the decision maker's decision. Further, it is clear on the face of the record, and having regard to the affidavit evidence in the Applicants' Record, that the third break was not a 50-minute break but in fact was considerably shorter.

[17] Although I believe that outcome of the RAD's decision in the case before me could have been reasonable under different circumstances, "it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome": *Vavilov*, at para 96. Further, a reasonable decision is one that "must be justified, intelligible and transparent,

not in the abstract, but to the individuals subject to it" [emphasis added]: *Vavilov*, at para 95. In the matter before me, the reference to a 50-minute break, without more, simply does not "add up": *Vavilov*, at para 104. I therefore find the RAD's determination on this issue unintelligible and its decision unreasonable.

[18] The Respondent submits that the Applicants' allegation of bias should have been raised without delay, that is at the RPD hearing: *Aloulou v Canada (Citizenship and Immigration)*, 2014 FC 1236 at paras 32-33. Given the nature of the Applicants' complaint in the case before me, however, I find that I cannot agree with the Respondent. In the circumstances, it is unreasonable in my view to expect that the Applicants would have raised the issue of bias at the conclusion of the hearing while the presiding member rendered their oral decision and the Applicants' attention was focussed on the decision. In light of the appeal mechanism available to them, I find it reasonable that the Applicants first raised the issue on appeal.

[19] In sum, I find this issue determinative and, therefore, I decline to consider the reasonableness of the RAD's state protection finding. Because the matter will be sent back for redetermination, however, I will add a few words about Mr. Castellanos Penaranda's missing BOC Narrative, which I find to be a breach of procedural fairness for the reasons below.

(ii) *Missing BOC Narrative*

[20] There is no question that the BOC Narrative was part of the constellation of documents considered by the RPD. The RPD transcript captures the conversation between the presiding member and the Applicants' counsel regarding the missing BOC Narrative. When the member

returned after the first break at 1:34, the member stated: “I did not have a copy of the narrative in my file, it wasn’t attached to the Basis of Claim form, **so counsel gave me his copy and I read it** and we can resume the hearing now.” [Emphasis added.] In addition, I note from the certified tribunal record sent to this Court that while Mr. Castellanos Penaranda’s BOC Form itself states at 2(h), “PLEASE READ DOCUMENT ATTACHED……,” there is no attachment.

[21] *RAD Rule* 21(3)(b) provides that the RPD record must contain the BOC Form, as defined in the *RPD Rules* and any changes or additions to it. A refugee claimant’s BOC Form, including the written narrative, is the most important document in the RPD’s file. It provides the claimant with an opportunity to inform the decision maker about their case, and it can have a bearing on the hearing, including the examination of the claimant, depending on the comprehensiveness and credibility of claimant’s story as disclosed in the BOC Form.

[22] The legal assistant’s affidavit describing their review of the digital audio recording of the RPD hearing, also describes the absence of the BOC Narrative from a copy of the RPD file obtained by Applicants’ counsel’s office in advance of the hearing before this Court, as well as from a copy they obtained of the RPD record transmitted to the RAD. They obtained the latter copy from Immigration, Refugees and Citizenship Canada pursuant to an Access to Information request. I find this evidence admissible as well, but pursuant to the “procedural defects” exception articulated in *Access Copyright*, at para 20. Further, the Respondent did not deny that the BOC Narrative was not before the RAD. Based on the Applicants’ evidence in this judicial review, I thus am prepared to infer that it was not contained in the RPD record transmitted to the RAD.

[23] Because the RAD's role is to review the RPD's decision through a correctness lens, I find the BOC Narrative is essential to the RAD's review, notwithstanding that in this case the Applicants' credibility was not in issue. I find this situation akin to the third scenario described by (former) Justice Boswell in *Togtokh v Canada (Citizenship and Immigration)*, 2018 FC 581 at para 16. In other words, the BOC Narrative is known to have been before the presiding member at the RPD hearing but was not before the RAD and thus could not be reviewed. Further, a BOC Narrative generally tends to be central to a refugee claimant's claim. In the circumstances of the matter before me, I find the BOC Narrative's absence from the record before the RAD to be a significant breach of procedural fairness.

IV. Conclusion

[24] For the above reasons, I grant the Applicants' judicial review application. The RAD's decision is unintelligible, and hence, unreasonable, regarding its determination about whether the RPD breached natural justice. In addition, the absence of Mr. Castellanos Penaranda's BOC Narrative from the RPD record transmitted to the RAD itself is a breach of procedural fairness in this case. The RAD's decision, therefore, will be set aside and the matter remitted to a different panel for redetermination. The record reviewed by the RAD on redetermination must include a copy of Mr. Castellanos Penaranda's BOC Narrative.

[25] Neither party proposed a serious question of general importance for certification and I find that none arises in the circumstances of this judicial review.

JUDGMENT in IMM-1437-20

THIS COURT'S JUDGMENT is that:

1. The Applicants' judicial review application is granted.
2. The RAD's January 23, 2020 decision is set aside.
3. The matter will be sent back for redetermination by a different panel.
4. The record reviewed by the new RAD panel must include a copy of Mr. Castellanos Penaranda's BOC Narrative.
5. There is no question for certification.

"Janet M. Fuhrer"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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