

Federal Court



Cour fédérale

Date: 20210723

Docket: IMM-4233-20

Citation: 2021 FC 785

Ottawa, Ontario, July 23, 2021

PRESENT: The Honourable Mr. Justice Gleeson

BETWEEN:

ZORIMAR CARELYS OSORIO MALAVE

Applicant

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Ms. Zorimar Carelys Osorio Malave, is a citizen of Venezuela. Her father is a prominent Venezuelan politician in the Maduro regime. She reports that due to her father's connection to that regime, she and other family members have suffered assaults, including murder attempts, threats, and harassment from pro-opposition forces within the Venezuelan police services and the broader community.

[2] The Refugee Protection Division [RPD] refused the claim, finding the Applicant had failed to rebut the presumption of state protection - she was neither a refugee nor a person in need of protection. On August 14, 2020, the Refugee Appeal Division [RAD] upheld the RPD's denial, also finding that the presumption of state protection was not rebutted and that this was determinative of the appeal.

[3] The Applicant now seeks judicial review of the RAD's decision under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. She argues that the RAD's decision should be set aside and the matter returned for redetermination for three reasons:

- A. The RAD breached her procedural fairness rights by making novel adverse credibility findings;
- B. The RAD's state protection analysis was unreasonable; and
- C. The RAD's analysis of the credibility of reported ongoing threats to the Applicant's mother was unreasonable.

[4] I need only address issues A and B. I am of the opinion that the RAD did not breach the Applicant's procedural fairness rights. The state protection issue is determinative of the Application. I am satisfied that the RAD's analysis and conclusion are reasonable. My reasons follow.

II. Standard of Review

[5] Procedural fairness issues are reviewed by asking whether a fair and just process was followed, having regard to all of the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*CPR*]). This review is “best reflected in the correctness standard,” although no standard of review is actually being applied (*CPR* at para 54).

[6] On judicial review, a reviewing court presumptively applies the reasonableness standard of review (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]). None of the reasons identified in *Vavilov* that might warrant a departure from the presumptive standard in relation to the RAD’s state protection analysis arise (paras 33, 53). The decision will be reviewed on a reasonableness standard (*Burai v Canada (Minister of Citizenship and Immigration)*, 2020 FC 966 at para 17).

[7] A party challenging a decision subject to a reasonableness review has the burden of showing the decision is unreasonable. To discharge that burden, it must be demonstrated that the shortcomings are more than superficial or peripheral to the merits of the decision. The shortcomings must be such that they undermine the required degree of justification, intelligibility, and transparency in relation to the decision maker’s reasoning and the ultimate outcome, having regard to the facts and the applicable law (*Vavilov* at paras 100, 102, 105).

III. Analysis

A. *The RAD did not breach the Applicant's procedural fairness rights*

[8] In considering the Applicant's appeal and reported fear of persecution by pro-opposition forces within the Venezuelan police and broader community, the RAD considered the Applicant's evidence as it related to the experiences of her family members. The RAD made a number of findings in regard to the evidence, including:

- A. an incident that involved shooting at a car in which the Applicant's brother was an occupant did not occur with the intent of harming her brother because of his connection to the Applicant's father. In reaching this conclusion, the RAD relies on investigation documentation related to the incident that refers to an attempted theft of the car;
- B. a kidnapping of her brother was not attributable to the actions of pro-opposition police officers as alleged, the RAD noting evidence that the Applicant's father had been advised the kidnapping had been carried out as a form of extortion; and
- C. the evidence failed to credibly establish that the ongoing threats to the Applicant's mother were a result of her previous relationship with the Applicant's father.

[9] I take no issue with the Applicant's view of the law as it relates to novel credibility findings on appeal. It is well established that the RAD cannot make a novel adverse credibility finding on a new issue without first giving an appellant notice and an opportunity to respond *Husian v Canada (Minister of Citizenship and Immigration)*, 2015 FC 684 at para 10; *Daodu v Canada (Minister of Citizenship and Immigration)*, 2021 FC 316 at para 18; *Laag v Canada*

(Minister of Citizenship and Immigration), 2019 FC 890 at para 23; *He v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1316 at paras 65-68; *Kwakwa v Canada (Minister of Citizenship and Immigration)*, 2016 FC 600 at para 23; *Mohamed v Canada (Minister of Citizenship and Immigration)*, 2020 FC 1145 at para 72; *Dalirani v Canada (Minister of Citizenship and Immigration)*, 2020 FC 258 at para 28; *Palliyaralalage v Canada (Minister of Citizenship and Immigration)*, 2019 FC 596 at para 9).

[10] However, the Respondent argues, and I agree, that the Applicant has mischaracterized the nature of the RAD's findings.

[11] Credibility findings generally involve a decision-maker pointing to contradictions and inconsistencies in the evidence and often involve a questioning, expressed or implied, of the sincerity of a statement or belief. Where a finding does not rest on contradictions and inconsistencies, but instead a failure of the evidence, even if believed, to establish the conclusion for which it has been tendered, the finding relates to the evidence's sufficiency, not credibility (*Ansar v Canada (Minister of Citizenship and Immigration)*, 2019 FC 197 at para 24; *Adeleye v Canada (Minister of Citizenship and Immigration)*, 2020 FC 640 at para 10 citing *Azzam v Canada (Minister of Citizenship and Immigration)*, 2019 FC 549 at para 33).

[12] I am satisfied that the RAD's findings, reached after considering the evidence, are insufficiency findings. The RAD's analysis begins with the following statement:

[27] The Appellant bears the evidentiary burden of adducing evidence, in the form of clear and convincing proof to the effect that state protection is, on a balance of probabilities, inadequate or

non-existent. For the following reasons, I do not find she has discharged of [*sic*] that burden.

[13] The RAD engaged with the Applicant's evidence tendered in support of the claim, and in doing so identified concerns with the adequacy of the evidence. The RAD addressed why the evidence is insufficient to meet the Applicant's burden of demonstrating the claimed risk from pro-opposition forces due to the Applicant's father's role in the Maduro regime.

[14] The Applicant submits that the RAD's references to the absence of "credible evidence" in addressing the circumstances around the kidnapping of her brother and in relation to her experiences in the community demonstrate that these findings were in fact negative credibility findings. I disagree. The reference to credible evidence does not equate to a negative credibility finding. The RAD's reference to "credible evidence" must be considered within the context of the whole of the decision. Doing so demonstrates the RAD did not take issue with the sincerity of the Applicant's subjective beliefs; credibility was not the issue.

[15] Similarly, the RAD did not question the Applicant's mother's subjective belief. Instead, after a consideration of the totality of the evidence relating to the extortion and threats reported, the RAD found the evidence to be insufficient to support the conclusion that the mother and the Applicant invited the RAD to draw - the extortion and threats were the result of the mother's relationship with the Applicant's father.

[16] The RAD has not made novel and negative credibility findings; there was no breach of fairness.

B. *The RAD's state protection analysis and conclusions are reasonable*

[17] The Applicant submits that the RAD erred in its state protection analysis by focusing on state protection efforts as opposed to the operational adequacy of that protection. She further submits, relying on *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC), that the RAD ignored documentary evidence describing “serious shortcomings in Venezuela’s ability to provide operationally adequate state protection.” Finally, the Applicant argues the RAD erred in its consideration of her mother’s evidence demonstrating that operationally adequate protection was not available to the Applicant.

(1) The RAD considered the operational adequacy of state protection

[18] It is not enough in conducting a state protection analysis to consider state efforts to provide protection. A decision-maker must also consider what protection is practically available to an applicant. The question to be asked is whether the protection provided by the state is operationally adequate - is protection from persecution actually available (*Orgona v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1438 at para 11; *Hercegi v Canada (Minister of Citizenship and Immigration)*, 2012 FC 250 at para 5).

[19] Contrary to the Applicant’s submissions, the RAD’s analysis does go beyond a consideration of state efforts. The RAD directly addresses evidence of the operational adequacy of state protection, having considered the Applicant’s prior experiences and the experiences of those in similar circumstances.

[20] For example, the RAD notes that the Applicant previously had a personal bodyguard but had dismissed the bodyguard to allow for more personal independence. The RAD addresses the effectiveness of a personal bodyguard, citing evidence that the kidnapping of the Applicant's brother was resolved when a bodyguard located and returned the brother. The RAD also cites the Applicant's evidence to the effect that her brother benefitted from enhanced protection by living with the Applicant's father in "a well-protected military area." Finally, the RAD also noted that the perpetrators of the murder of one of her father's associates had been arrested and prosecuted by state authorities.

- (2) The RAD did not err by failing to address evidence contradicting its central finding

[21] The Applicant argues that the RAD erred in failing to address; (1) a 2018 report by the United States Department of State Overseas Security Advisory Council [OSAC] discussing the prevalence of crime and unsafe conditions in Venezuela; (2) a 2019 United States Department of State Human Rights report which details the deficient human rights conditions in Venezuela; and (3) a 2019 OSAC report that states Venezuelan police are ineffective at deterring violent crime and are slow to respond to calls.

[22] The Applicant argues the above noted documentary evidence is directly contradictory of the RAD's conclusions. I disagree. First, I note that the general themes addressed in the documentary evidence cited by the Applicant are addressed by the RAD. The RAD acknowledges police corruption, lack of police training and funding, the excessive use of force

and human rights abuses. The RAD was under no obligation to cite specific documents that detail similar evidence.

[23] Second, none of the evidence the Applicant identifies directly contradicts the RAD's findings. The RAD's findings must be considered in light of the Applicant's profile, the daughter of a senior Maduro regime insider. The RAD acknowledged the Applicant's submissions relating to "serious shortcomings in Venezuela's protection regime" but also noted the absence of any independent documentary evidence suggesting an inability to provide adequate protection to state functionaries and their families.

[24] The RAD's treatment of the documentary evidence as it related to the adequacy of state protection for someone with the Applicant's profile was reasonable.

(3) The RAD reasonably considered the evidence of the Applicant's mother

[25] The Applicant argues that, in light of the ongoing extortion experienced by her mother and her experience in making complaints to the police, it was unreasonable for the RAD to find state protection was available to the Applicant. Again, I disagree.

[26] The Applicant's parents had separated when she was young; the record indicates her parents did not live together when she was growing up. The RAD accepted the evidence that the Applicant's mother had been subjected to threats and extortion and had been robbed outside her home but concluded the evidence did not establish that the extortion or robbery was because of

her connection with the Appellant's father. Instead, the RAD finds that the mother, as the owner of a business, was the "victim of a generalized risk of organized crime."

[27] In support of this conclusion the RAD notes (1) the mother's letter stating she was considering leaving Venezuela "due to insecurity, crime, the unstable economy and above all due to the threats and demands for money that I have to pay."; (2) that none of the employees' affidavits establish that the mother was being threatened because of her relation to the Applicant's father; (3) the ongoing operation of the business in the face of the extortion and a robbery; and (4) the failure of the Applicant's mother to specify in her letter that those who committed the robbery were the same men extorting her at her business.

[28] With respect to the RAD's reliance on the mother's failure to state in her letter that those who robbed her were the same men extorting her, the Applicant argues the RAD's finding is microscopic and reflects a misapprehension of the evidence. I agree.

[29] The RAD correctly notes that the letter does not expressly state that those involved in the robbery outside her home were the same individuals who were extorting her. However, the mother's letter does state that those involved in the robbery were aware of the fact that she was being extorted at her business and a report had been made to police.

[30] Although the RAD erred in assessing the potential link between the extortion activity and the robbery, that error does not undermine the RAD's conclusion that the evidence established solely, that the mother was the victim of a generalized risk of organized crime.

[31] The RAD's consideration of the Applicant's mother's evidence was reasonable.

IV. Conclusion

[32] The RAD's decision is reasonable. The Application is dismissed.

[33] The parties have not identified a question of general importance for consideration, and none arises.

JUDGMENT IN IMM-4233-20

THIS COURT'S JUDGMENT is that:

1. The Application is dismissed;
2. No question is certified.

“Patrick Gleeson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4233-20

STYLE OF CAUSE: ZORIMAR CARELYS OSORIO MALAVE v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: BY VIDEOCONFERENCE

DATE OF HEARING: JUNE 14, 2021

JUDGMENT AND REASONS: GLEESON J.

DATED: JULY 23, 2021

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