Federal Court  Cour fédérale

Date: 20220202

Docket: IMM-321-21

Citation: 2022 FC 121

Toronto, Ontario, February 2, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

HUGO EDWIN SOTO CUBIAS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Hugo Edwin Soto Cubias, seeks judicial review of a December 21, 2020, decision of the Refugee Appeal Division [RAD], dismissing the Applicant's appeal of a decision of the Refugee Protection Division [RPD] refusing his claim for refugee protection under sections 96 and 97 of the Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA].

[2] Having considered the parties' submissions, I am not persuaded that the RAD committed an error warranting this Court's intervention. For the reasons that follow, this judicial review is dismissed.

I. Background

[3] The Applicant is a citizen of El Salvador. He alleges that he is at risk of persecution by the general manager of a mining company [General Manager] where he was employed for slightly under two years and the Mara Salvatrucha gang.

[4] From 2009 to 2011, the Applicant was in a relationship with a woman, who later became the General Manager. During the relationship, the woman was working for a mining company and the Applicant attested that he helped with various aspects of the company. In 2014, the woman contacted the Applicant to seek to bring him onboard in relation to a potential mining project. From July 2014 until March 2015, the Applicant provided various motivational training to employees of the company. In April 2015, the General Manager requested that he consider joining the company full-time. As a result, the Applicant was hired in June 2015.

[5] During his employment, the Applicant alleges that he became aware that the company had connections to the Mara Salvatrucha gang, for example, when the gang was used to help distribute flyers in support of a mining project in the local community. The Applicant also alleges that he witnessed the General Manager forging signatures on a petition that was to be submitted to the government in order to advocate for approval of a mining project. In March 2017, the Applicant alleges that he made it clear to the General Manager and a number of his

superiors that he opposed the forging of the signatures on the petition and the company's connection to the Mara Salvatrucha gang.

[6] In April 2017, after returning from a week vacation, the General Manager convened a meeting with the Applicant during which he was accused of being against the mining project and was fired from his job. The Applicant was asked to sign a non-disclosure agreement as part of his termination, but the Applicant refused to sign.

[7] The Applicant fears that the General Manager hired the Mara Salvatrucha gang to kill or harm him due to a concern that the Applicant may publicly disclose the General Manager's actions in forging the signatures on the petition in support of the mining project in 2017.

[8] The Applicant travelled to the United States to stay with a friend between August and October 2017. He returned to El Salvador and in November 2017, he travelled to Canada to visit his daughter. He returned to El Salvador again in January 2018 for three weeks before returning to Canada in February 2018, where he made a claim for refugee protection.

[9] On December 18, 2019, the RPD rejected the Applicant's refugee claim. The RPD found that the Applicant was not a credible witness, lacked subjective fear, had submitted insufficient evidence, and had failed to establish a nexus to a Convention ground.

[10] The Applicant appealed the RPD's decision and on December 21, 2020, the RAD rejected the appeal. The RAD found that the RPD had erred in finding that the re-availment and

delay in claiming refugee protection was sufficient to rebut the presumption of truthfulness that applied to the Applicant's testimony. The determinative issues for the RAD, however, were (i) the lack of nexus to a Convention ground, namely Section 96 of IRPA, and (ii) the insufficiency of evidence to establish, on a balance of probabilities, that if the Applicant were to be returned to El Salvador, he would personally be subject to a risk to life or serious harm from the General Manager or the Mara Salvatrucha gang.

II. Issues

[11] This application for judicial review raises the following issues:

A. Was there a breach of procedural fairness?

B. Is the Decision reasonable? In particular, whether it was reasonable for the RAD to find that the Applicant had failed to (i) establish a nexus to a Convention ground, and (ii) provide sufficient evidence to establish that he is at risk of serious harm?

III. Analysis

A. *Procedural Fairness*

[12] The Federal Court of Appeal has confirmed that, on judicial review, questions of procedural fairness are reviewed on the correctness standard (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[13] The Applicant submits that the RAD refused to admit new evidence in the form of a screenshot showing that the General Manager had viewed the Applicant's LinkedIn profile in August 2018, and then breached procedural fairness by relying on the rejected evidence.

[14] The RAD found the screenshot to be inadmissible as new evidence on the basis that it predated the RPD's decision and the Applicant had failed to provide a satisfactory explanation for failing to submit the evidence to the RPD. The Applicant had the obligation to put his best foot forward before the RPD.

[15] The Respondent submits that the RAD did not breach procedural fairness. Rather, the Applicant referenced the LinkedIn search both in his Basis of Claim form and in his testimony before the RPD. Consequently, it was open to the RAD to consider this evidence and the Applicant's allegation as to why he still feared the General Manager.

[16] Having considered the record, including the Applicant's testimony before the RPD and his Basis of Claim form, I am satisfied that there was no denial of procedural fairness. The RAD stated that the General Manager "checked Mr. Soto Cubias' LinkedIn profile in September 2018". The Applicant's Basis of Claim form states, "In September 2018 [the General Manager] checked my profile in Linkelink (sic)". During his testimony, the Applicant noted that in September 2018, the General Manager's profile picture appeared on his account as someone who had "made a search for me". I therefore agree with the Respondent that, given the record, it was open to the RAD to consider the evidence of the LinkedIn search in the context of assessing

whether there was sufficient evidence to establish a likelihood of serious harm should the Applicant return to El Salvador.

[17] During the hearing, the Applicant pleaded that the screenshot further supported the evidence in the Basis of Claim form and the testimony, and as such should have been allowed if the RAD was going to rely on this information.

[18] I disagree. Nothing turns on whether the screenshot was admitted into evidence because the RAD assumed the Applicant's LinkedIn profile had in fact been checked by the General Manager. The RAD noted that the General Manager checked the LinkedIn profile in 2018, and found that, even when considering the other circumstantial evidence, this "does not establish that she is more likely than not seeking to kill him, or have him killed or seriously harmed if he returns to El Salvador."

B. *Was the Decision Reasonable?*

[19] Save for the issue of procedural fairness above, it is common ground between the parties that the standard of review is reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[20] The Applicant bears the burden of demonstrating that the Decision is unreasonable (*Vavilov* at para 100). For the reviewing court to intervene, the challenging party must satisfy the court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", and that such

alleged shortcomings or flaws “must be more than merely superficial or peripheral to the merits of the decision” (*Vavilov* at para 100).

[21] A reviewing court should also refrain from reweighing or reassessing the evidence considered by the decision maker and must not, absent exceptional circumstances, interfere with factual findings (*Vavilov* at para 125). Moreover, the Court must be careful, on judicial review of an administrative decision maker’s decision, not to engage in “a line-by-line treasure hunt for error” (*Vavilov* at para 102). Nevertheless, *Vavilov* instructs that a decision maker “must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them” (at para 126).

(i) Nexus to a Convention Ground

[22] The Applicant relies on *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 [*Ward*], and submits that the RAD erred in finding that the Applicant’s claim had no connection to a Convention ground and instead was related to feared criminal activity. The Applicant argues that by rejecting the mining company’s illegal activities and association with the gang, he demonstrated an implied political opinion against the gang. The Applicant submits that his opposition to the forged signatures on the petition and the distribution of pamphlets by the gang, constituted opposition to the mining project which required a government permit, thus making his opposition a matter of state affairs.

[23] The Respondent also relies upon *Ward*, submitting that the Supreme Court cautioned that “[n]ot just any dissent to any organization will unlock the gates to Canadian asylum; the

disagreement has to be rooted in a political conviction" (*Ward* at para 86). The Respondent relies on jurisprudence from this Court, notably *Tobias Gomez v Canada (Citizenship and Immigration)*, 2011 FC 1093 [*Gomez*] and *Casteneda v Canada (Citizenship and Immigration)*, 2011 FC 1012, for the proposition that opposition to criminal activity by gangs is not a political opinion.

[24] In *Ward*, the Supreme Court defined a political opinion as "any opinion on any matter in which the machinery of state, government, and policy may be engaged" (at para 81). The Supreme Court also instructs that the assessment of whether an applicant holds a political opinion, or whether one can be attributed to them, should be "approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution" (*Ward* at para 83). The existence of a political opinion and nexus to a Convention ground must be determined on a case-by-case basis (*Neri v Canada (Citizenship and Immigration)*, 2013 FC 1087 at para 20).

[25] In the matter at hand, the Applicant bore the burden of establishing a nexus to a political opinion. In other words, the Applicant bore the burden of presenting evidence demonstrating that his opposition to the General Manager, the company's activities and/or its use of the Mara Salvatrucha gang, amounted to a political conviction or that it would be construed as such by the General Manager or the Mara Salvatrucha gang (*Gomez* at para 25).

[26] Having reviewed the record, I am not persuaded that the RAD's decision was unreasonable. The Applicant relies on country condition documentation concerning gang

violence and the danger posed to those who defy gangs in El Salvador. The evidence, however, does not establish that the El Salvadorian government or the machinery of the state was engaged.

[27] On the contrary, as pleaded by the Respondent, the Applicant's view was consistent with the view of the El Salvadorian government. The mining licence was ultimately not provided to the mining company, and the project did not go forward. The fact that the petition which contained the forged signatures was submitted to the government, does not render the Applicant's objection to the act of illegally forging signatures, which he expressed to the General Manager and his superiors at the company, a political act. Similarly, the evidence does not suggest that the Applicant's stated opposition to the forgery of signatures or the company's use of the gang to distribute flyers would be viewed as a political opinion by the Mara Salvatrucha gang.

C. *Insufficient Evidence to Establish a Likelihood of Serious Harm*

[28] The RAD stated that "in my view, the real issue in this case is whether there is sufficient evidence to establish that it is more likely than not, if he returns to El Salvador, Mr. Soto Cubias would be subjected personally to a risk to his life or to a risk of any of the kinds of serious harm that would make him a person in need to protection at the hands of [the General Manager] and/or the Maras to which she has connections."

[29] The RAD considered the circumstantial evidence, which included the Applicant's witnessing of forged signatures (including photos), having seen different vehicles parked near his house, being followed once while driving, a WhatsApp message indicating he had won a car, a

credit application from a financial institution, and the General Manager having checked his LinkedIn profile. The Applicant testified that he believed that the message concerning a prize and the letter from the financial institution were suspicious and sent by the Mara Salvatrucha gang.

[30] Having considered the circumstantial evidence, the RAD found that the Applicant had made a number of suppositions and interpreted events as reinforcing his belief that the General Manager intended to kill or seriously harm him. The RAD found that, while certain events must have been worrisome for the Applicant, it was “far from evident” and a “significant leap” to conclude that the Applicant’s interactions with the General Manager and his knowledge of forged signatures on a petition years ago for a project that was never approved were sufficient to conclude that the General Manager would kill or seriously harm him.

[31] The Applicant submits that the evidence corroborates that the General Manager terminated his employment and threatened him. The Applicant argues that the RAD misconstrued the evidence, and unreasonably focused on what the documents did not say. The Applicant submits that the RAD improperly speculated as to the motives of the agents of persecution by stating that it was far from evident that the Applicant’s knowledge of the forged signatures would be of such significance to the General Manager so as to want to kill him.

[32] The Respondent submits that the Applicant has failed to establish that the RAD misconstrued the evidence. Furthermore, the Respondent, relying on *Araya Atencio v Canada (Citizenship and Immigration)*, 2006 FC 571 [*Araya*], argues that even though the RAD found

the Applicant credible, the RAD was not required to accept the inferences drawn by the Applicant from his evidence.

[33] Having considered the RAD's reasoning and the evidentiary record before it, I find no basis upon which to intervene. The RAD provided a logical and internally coherent explanation for its findings, that was justified in relation to the evidence provided by the Applicant (*Vavilov* at para 85). The RAD was entitled to find that there was no evidence in the record to establish that the WhatsApp message, the letter from the financial institution, and the unknown vehicles, were connected with the General Manager or the Mara Salvatrucha gang. Absent exceptional circumstances, it is not the role of this Court to interfere with factual findings (*Vavilov* at para 125).

[34] As to the inferences made by the Applicant, I agree with the Respondent. The presumption of truth applies to the facts recounted by a claimant, but it does not extend to inferences drawn or deductions made from those facts (*Araya* at para 8). Similarly, "this presumption does not apply to inferences, conclusions a witness may draw from the facts, or speculation regarding future events" (S*ingh v Canada (Citizenship and Immigration)*, 2021 FC 1410 at para 16). The RAD accepted the Applicant's version of the events, but it was certainly not bound to accept the Applicant's interpretation of those events. Having accepted that the alleged events took place, it was open to the RAD to nevertheless find that there was insufficient evidence to establish that the Applicant would be personally subjected to a risk to his life or serious harm should he return to El Salvador.

IV. Conclusion

[35] For the foregoing reasons, this application for judicial review is dismissed. Neither party proposed that a question be certified for appeal.

JUDGMENT in IMM-321-21

THIS COURT'S JUDGMENT is that

1. The Applicant's application for judicial review is dismissed;

2. There is no question for certification arising.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-321-21
STYLE OF CAUSE:	HUGO EDWIN SOTO CUBIAS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO – BY ZOOM VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 26, 2022
JUDGMENT AND REASONS:	ROCHESTER J.
DATED:	FEBRUARY 2, 2022

APPEARANCES:

VIVIAN OWAH	FOR THE APPLICANT
NUR MUHAMMED-ALLY	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MICHAEL LOEBACH BARRISTER AND SOLICITOR TORONTO, ONTARIO	FOR THE APPLICANT
ATTORNEY GENERAL OF CANADA TORONTO, ONTARIO	FOR THE RESPONDENT