Federal Court  Cour fédérale

Date: 20220613

Docket: IMM-519-21

Citation: 2022 FC 879

Ottawa, Ontario, June 13, 2022

PRESENT: The Honourable Madam Justice Rochester

BETWEEN:

GILBERTO ERNESTO GARCIA PUEBLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Gilberto Ernesto Garcia Puebla, is a Cuban citizen. He seeks judicial review of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada rendered on January 8, 2021 dismissing the Applicant's refugee claim and finding there was no credible basis to the Applicant's claim as per subsection 107(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicant did not have a right of appeal to the Refugee Appeal Division because he was admitted to Canada as an exception to the Safe Third Country Agreement between the United States and Canada (IRPA, ss 110(2)(d)(i), referring to 102(1) and 102(2)(d)).

[3] The Applicant submits that (i) the RPD unreasonably determined that there was "no credible basis" to his claim and (ii) the RPD's determination that the Applicant was not credible is unreasonable and not based on an internally coherent and rational chain of analysis. The Applicant also submits that, notwithstanding that he has come before the Court with "unclean hands", the Court should consider the merits of the present judicial review.

[4] The Respondent submits that the Court ought to decline to hear the Applicant's judicial review on the basis of his "unclean hands", and that in any event, the Applicant has failed to demonstrate a reviewable error.

[5] For the reasons that follow, this judicial review is dismissed.

II. Anonymization Order

[6] The Applicant was scheduled to be removed to Cuba on August 19, 2021, however, he failed to report for his pre-removal interview and Covid-19 test on August 17, 2021 and went underground. An arrest warrant was issued and, on December 10, 2021, the Applicant was apprehended and detained while seeking to illegally cross into the United States. The Applicant was removed to Cuba on December 16, 2021. Counsel for the Applicant had been unable to contact the Applicant regarding his failure to appear in August, and confirmed at the hearing of

this matter that she has not been successful in contacting the Applicant since his removal to Cuba.

[7] A few days prior to the hearing of this matter on January 25, 2022, counsel for the Applicant filed a notice of motion for an order anonymizing the style of cause. The grounds of the motion are that counsel for the Applicant is concerned that, given the Applicant's allegations against the Cuban authorities, a public decision may jeopardize his safety in Cuba.

[8] The Respondent submits that not only is there no cogent evidentiary basis in the record for the order, the Applicant himself has not requested a confidentiality order nor has he discussed it with his counsel.

[9] While I certainly understand counsel for the Applicant's wish to act out of an abundance of caution and concern for her client, the test for issuing a confidentiality order, as articulated by the Supreme Court of Canada in *Sierra Club of Canada v Canada (Minister of Finance)*, 2002 SCC 41 at para 53 [*Sierra Club*] and as recast in *Sherman Estate v Donovan*, 2021 SCC 25 at para 38 [*Sherman*], has not been met. There are three core prerequisites that are to be established by a person seeking an exception to the open courts principle (*Sherman* at para 38). A court may order discretionary limits on openness only where: (1) openness poses a serious risk to an important public interest; (2) the order sought is necessary to prevent that risk; and (3) the benefits of the order outweigh its negative effects (*Sherman* at para 38, citing *Sierra Club* at para 53). Given the circumstances in the present case, including the fact that the issue of

confidentiality was not raised by the Applicant himself, I find that the Applicant has not established that a confidentiality order is warranted.

III. Unclean Hands

[10] The Respondent highlights the fact that the Applicant has repeatedly flouted Canadian and American immigration laws, gone underground, not contacted his counsel, failed to present himself at his own motion for a stay of removal, sabotaged his removal in August 2021, and sought to cross into the United States illegally in December 2021. He has come to the Court with unclean hands, and thus the Respondent submits that the Court should exercise its discretion to not hear the merits of this judicial review.

[11] Counsel for the Applicant submits that while he has come to the Court with unclean hands, his misconduct does not undermine the proceedings in question which relate to whether his refugee claim reasonably had no credible basis (*Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2006 FCA 14 at para 10 [*Thanabalasingham*]). Counsel for the Applicant further submits that, having been removed from Canada, he is not being rewarded for his misconduct, rather, he is already paying the price for it.

[12] The Court of Appeal instructs that a Court is to "attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights" (*Thanabalasingham* at para 10). A non-exhaustive list of factors for the Court to consider in the exercise of its discretion includes "the seriousness

of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand" (*Thanabalasingham* at para 10).

[13] I am of the view that the Applicant's blatant disregard for a validly issued removal order and his resulting arrest while seeking to illegally cross the Canadian-United States' border represents serious misconduct that merits a strong message of deterrence to those who may wish to engage in similar conduct.

[14] That said, the Applicant has suffered the consequences, notably, his removal from Canada to the country where he alleges he fears persecution. The nature of the misconduct is indeed serious, however, it does not undermine or otherwise impair this Court's ability to determine this application for judicial review on its merits. In addition, and as stated by my colleague Justice John Norris, given that the "reviewing Court must engage with the merits of the underlying judicial review in any event to assess 'the apparent strength of the case,' a full assessment of those merits would come at little extra cost to the administration of justice" (*Alexander v Canada (Citizenship and Immigration)*, 2021 FC 762 at para 44). Consequently, I am not persuaded that the present circumstances warrant the exercise of the Court's discretion not to consider the merits of this application for judicial review.

IV. Standard of Review

[15] The parties agree that the applicable standard of review is one of reasonableness as set out in Canada (*Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). A reasonable decision is one that is justified in relation to the facts and the law that constrain the decision maker (*Vavilov* at para 85).

[16] It is the Applicant, the party challenging the decision, who bears the onus 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).

V. Analysis

[17] The determinative issue before the RPD was the Applicant's credibility. The Applicant's claim centred on his alleged fear of persecution from the Cuban authorities for aiding in a court case arising from a fireman's death in which the state was held negligent in 2009, and due to his profile as a former executive of a Canadian aeronautics company who had allegedly refused to spy on the Canadian company. The Applicant alleged that he had been offloaded from an airplane in 2016 because of the foregoing.

[18] The Applicant submits that the RPD conflated its findings on the Applicant's credibility with the finding of "no credible basis". The Applicant relies on *Rahaman v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89 at para 51 [*Rahaman*]:

> [51] Finally, while I have not been able to accept the position advanced by counsel for Mr. Rahaman in this appeal, I would agree that the Board should not routinely state that a claim has "no credible basis" whenever it concludes that the claimant is not a credible witness. As I have attempted to demonstrate, subsection 69.1(9.1) requires the Board to examine all the evidence and to conclude that the claim has no credible basis only when there is no trustworthy or credible evidence that could support a recognition of the claim.

[19] The Applicant's position is that a lack of credibility does not mean that there is no credible basis for his claim. He states that a "no credible basis" determination may not be made if there is any credible or trustworthy evidence that could support a positive determination from the RPD, even if such a determination has not been established on a balance of probabilities. The Applicant refers to his evidence, namely, (i) a letter from his employer confirming that he had been unable to obtain visas to travel to Canada for the last two years of his employment; (ii) an electronic airline ticket from 2016 indicating he was offloaded by immigration officials; and (iii) country condition evidence that Cuba suppresses dissent and restricts travel to those perceived to be government opponents.

[20] The Respondent submits that the RPD recognized that in order to support a finding of "no credible basis" there must be a lack of any probative evidence whatsoever to ground a claim, and explicitly acknowledged this on two occasions in its reasons. The Respondent argues that there was nothing in the letter or the airline ticket capable of establishing a claim based on persecution for imputed political opinion. The Respondent highlights that the visa issues were difficult to

characterize as persecution given the Applicant had freely travelled to the United States and Canada before and after the visa issues in 2016-2017. As to the country condition evidence, the Respondent submits that they are insufficient to support the claim because all the evidence of the Applicant's profile came from him and was found not to be credible.

[21] In *Rahaman,* the Federal Court of Appeal underscored that the presence of some evidence will not preclude a "no credible basis" finding if that evidence is insufficient in law to sustain a positive determination of the claim:

> [30] On the other hand, the existence of *some* credible or trustworthy evidence will not preclude a "no credible basis" finding if that evidence is insufficient in law to sustain a positive determination of the claim. Indeed, in the case at bar, Teitelbaum J. upheld the "no credible basis" finding, even though he concluded that, contrary to the Board's finding, the claimant's testimony concerning the intermittent availability of police protection was credible in light of the documentary evidence. However, the claimant's evidence on this issue was not central to the Board's rejection of his claim.
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> [Emphasis in original.]

[22] Considering the evidence before the RPD, I am not persuaded that its conclusion is unreasonable. I find that the RPD was alive to the distinction between the Applicant's credibility and a finding of "no credible basis", and reasonably found that there was no credible or trustworthy evidence upon which the RPD could have upheld the claim.

[23] As to the Applicant's second argument that the RPD's credibility determination was unreasonable, I also find that he has failed to discharge his burden of demonstrating that the

decision has sufficiently serious shortcomings such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency (*Vavilov* at para 100).

[24] The Applicant points to certain events mentioned in the Basis of Claim form [BOC], which form part of the Applicant's profile, that are not mentioned in the decision. It is, however, trite law that a decision maker is presumed to have weighed and considered all the evidence brought before it (*Burai v Canada (Citizenship and Immigration)*, 2020 FC 966 at para 38 [*Burai*]). Reviewing courts cannot expect administrative decision makers to respond to every argument or line of possible analysis (*Vavilov* at 91, 128). It is "only when an administrative decision maker is silent on evidence clearly pointing to an opposite conclusion that the Court may intervene and infer that the decision maker overlooked the contradictory evidence when making findings of fact" (*Burai* at 38). I do not find this to be the case here. The events cited in the BOC were peripheral to the story told by the Applicant and I am unwilling to find that the failure to mention them means that the RPD did not consider the material before it.

VI. Conclusion

[25] It was incumbent on the Applicant to demonstrate that the decision is unreasonable, which he has not done. The decision, when read as a whole, meets the standard of reasonableness set out in *Vavilov*.

[26] For the foregoing reasons, this judicial review is dismissed. No serious question of general importance for certification was proposed by the parties, and I agree that no such question arises.

JUDGMENT in IMM-519-21

THIS COURT'S JUDGMENT is that:

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

2. No question of general importance is certified.

"Vanessa Rochester"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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