Federal Court

Cour fédérale

Date: 20230131

Docket: IMM-6955-21

Citation: 2023 FC 142

Ottawa, Ontario, January 31, 2023

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

JESICA ANDREA VIRVIESCAS ROJAS
ANA LUZ ROJAS SAPUY
FRANCISCO JOSE RODRIGUEZ MONTANO
GINA PAOLA VIRVIESCAS ROJAS
VICTORIA MARTIN VIRVIESCAS
JUAN PABLO SANDOVAL VIRVIESCAS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Refugee Protection Division (RPD) made on September 17, 2021 determining that the Applicants are not Convention refugees

or persons in need of protection pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27 [*IRPA*].

[2] For the reasons below, the application is granted.

II. **Background**

A. *Facts*

[3] The Applicants are Jesica Andrea Virviescas Rojas [the Principal Applicant], her two children Victoria Martin Virviescas and Juan Pablo Sandoval Virviescas [the Minor Applicants], her mother Ana Luz Rojas Sapuy [the Principal Applicant's Mother], her step-father Francisco Jose Rodriguez Montano [the Principal Applicant's Step-father] and her sister Gina Paola Virviescas Rojas [the Principal Applicant's Sister]. They are all citizens of Colombia. The Applicants claim to fear harm in Colombia from the Fuerzas Armadas Revolucionarias de Colombia [FARC] or FARC dissidents, because of their failure to pay extortion demands by those groups.

[4] The Principal Applicant's Mother and Stepfather operated a store in Florencia, Colombia and the Principal Applicant's Sister would help in the store. In January 2019, they were subjected to death threats by a FARC dissident group asking them to make a financial contribution to their cause. Another local businessman who refused to pay had been killed. As a result, the couple decided to give up their business and fled to Bogota with the Principal Applicant's Sister.

[5] While in Bogota, there was a bomb attack perpetrated by the ELN, another illegal armed group, which convinced the couple and the Principal Applicant's Sister to flee the country. They obtained visas for the United States and traveled there. Because they had a cousin who had obtained refugee status in Canada, they then decided to claim refugee status here. They arrived in Canada in June 2019.

[6] The Principal Applicant and the Minor Applicants lived in Bogota where she and her husband ran a business. In late August 2019, the Principal Applicant and one of the Minor Applicants, her son, were kidnapped after leaving a medical clinic by people who identified themselves as members of the FARC. The Principal Applicant and her son were grabbed off the street and shoved into a vehicle. They were let go upon payment of one third of the extortion demand the same day, with the remainder due within twenty days, or the children would be harmed.

[7] The Principal Applicant sought protection from the police but as it was not forthcoming before the payment deadline, she and her husband sold the business and fled the country with the Minor Applicants. The couple and the Minor Applicants traveled to the USA and subsequently arrived in Canada in September 2019, where they sought refugee protection. The husband's claim was subsequently severed from those of the Principal Applicant and the Minor Applicants due to unrelated proceedings against him.

B. *Decision under review*

[8] At the outset of its reasons, the RPD panel affirmed that the *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* were considered and applied.

[9] Following the hearing on August 4, 2021, an Affidavit by the Principal Applicant's uncle was accepted into evidence on the basis that it was relevant and probative, and based on first-hand knowledge of events occurring in Columbia since the claimants' departure. However, the RPD rejected a country condition report published by Insight Crime on March 16, 2021 entitled "Ex-FARC expand into Northern Columbia" on the ground that it provided no new evidence with respect to the viability of a proposed Internal Flight Alternative (IFA). The panel considered that the subject matter was significantly covered in the National Documentation Package for Colombia [the NDP] and the report was issued months prior to the hearing.

[10] For the RPD, the determinative issue was the availability of Cartagena as an IFA. The RPD made no negative credibility findings against the Applicants.

[11] To assess whether an IFA existed in Cartagena for the Applicants, the RPD applied the two-pronged test set out in *Rasaratnam v. Canada (Minister of Employment and Immigration) (C.A.),* 1991 CanLII 13517 (FCA), [1992] 1 FC 706 [*Rasaratnam*].

[12] The RPD noted that a peace agreement was reached in 2016 between the Colombian government and the FARC. Since the Applicants testified to being threatened after this peace

agreement, the RPD concluded the threats must have come from dissident individuals or groups. The RPD acknowledged that the FARC dissidents have "significant abilities to operate and track targets throughout the country" and that "the objective evidence establishes […] that the FARC dissidents would be able to track and locate the claimants throughout Colombia, if they were motivated to do so".

[13] The RPD however concluded that the Applicants failed to establish that the FARC dissidents are motivated to find and harm them or that there is a serious possibility that they would be motivated to find them in the future elsewhere in the country.

[14] The RPD therefore found that the Applicants would not be at risk of persecution in Cartagena. The Applicants testified there is no other barriers that would prevent them from living in Cartagena. Additionally, the objective country condition evidence indicates that there is a moderate risk of crime in Cartagena and a moderate risk from terrorism.

[15] The RPD also considered the psychiatric assessment of one of the Minor Applicants stating that his history and symptoms were consistent with Post-Traumatic Stress Disorder (PTSD). The psychiatric report indicated that if the Principal Applicant's son was surrounded by cues of his trauma by returning to the place where the trauma happened, he would experience a relapse of his PTSD symptoms. However, considering that Cartagena is not the place where the trauma occurred, the RPD concluded the evidence did not establish that the child would suffer a relapse there.

[16] The RPD thus concluded that the Applicants had failed to satisfy the burden of establishing they face a serious possibility of persecution on a Convention ground and had failed to establish they would be subjected to a danger of torture, a risk to life or a risk of cruel and unusual treatment or punishment upon return to Colombia.

III. **Issues**

[17] The Applicants argue the RPD erred in three ways: (1) by failing to consider information in the documentary evidence that contradicted the panel's findings, (2) by failing to consider the jurisprudence with respect to IFA in Colombia and (3) by breaching natural justice by refusing to admit a relevant news article into evidence.

[18] In my view, the issues are whether: (1) whether the RPD erred by refusing to admit a relevant news report into evidence, and (2) whether the RPD was reasonable in finding the Applicants had an IFA in Cartagena.

IV. **Analysis**

(1) Did the RPD err by refusing to admit the news report into evidence?

[19] The RPD accepted that the March 2021 Insight Crime report had probative value yet refused to admit it on the basis that the "subject matter is significantly covered in item 1.7 of the [NDP] for Colombia", and that the Applicants and their counsel were aware that IFAs were a necessary part of the test for their refugee claim.

[20] Item 1.7 of the NDP is the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum Seekers from Columbia from September 2015. The Applicants submit that it indicates that there is no secure IFA for people like them who have been targeted for extortion. Having relied on that document, they could not reasonably have been expected to provide, at the hearing, specific evidence for every point on the map or for Cartagena in particular.

[21] The Applicants submit that they did not provide the Insight Crime report before the hearing because Cartagena was only disclosed as a viable IFA location during the hearing and they had no advance notice of Cartagena as a specific location. Once it was identified as an IFA, the Applicants contend that the RPD erred in refusing to admit evidence specific to the region. The fact that the FARC had announced a major campaign to reclaim the region should have been taken into account when considering the level of motivation. Refusal to admit the news report was also unfair, the Applicants contend, as the RPD relied on a 2019 report, written during the peace accord, to find that Cartagena has a lower risk of crime and terrorism. The 2019 document, a travel safety advisory, predated the news report of a new FARC offensive by two years.

[22] I agree with the Applicants that the RPD’s decision to exclude the Insight Crime report into evidence was unreasonable. It is unclear how an article concerning events in 2021 would “add no new evidence” and consists of “subject matter covered significantly” in the 2015 UNHCR document. The Insight Crime article specifically mentions a revival of the Caribbean bloc following its demobilization in the 2016 peace agreement, which took place after Item 1.7 was published.

[23] This is, in my opinion, a fatal flaw in the overarching logic in the decision maker's reasoning and renders the decision unreasonable: *Canada (Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65, at para 102 [*Vavilov*]. The reasoning does not "add up": *Vavilov* at para 104.

[24] I also agree with the Applicants that it was unreasonable of the RPD to expect the Applicants to have submitted prior to the hearing extensive evidence about every possible IFA in Columbia. Indeed, Rule 43 of the *Refugee Protection Division Rules* provides for the admission of such post-hearing evidence: for example, see *Bakare v. Canada (Citizenship and Immigration)*, 2021 FC 967 at para 17.

(2) Was the finding that the Applicants had an IFA in Cartagena reasonable?

[25] Overall, the Applicants submit that the RPD disregarded key information in the UNHCR's Guidelines and in an expert report (the "Columbia Reports") that directly contradicted its finding that the FARC would not be motivated to persecute the Applicants if they moved to Cartagena. In doing so, the Applicants contend, the RPD arbitrarily disregarded decisions by other RPD panels, the Refugee Appeal Division (RAD) and the Federal Court.

[26] Among other concerns, the Applicants contend that the UNHCR Guidelines state that non-cooperation with the FARC, including failure to comply with extortion demands, is viewed as political opposition to its cause. The Guidelines encourage recognition of persecution by the FARC for real or perceived opposition to the movement, including non-compliance with extortion demands, as having a nexus to the grounds of perceived political opinion.

[27] More specifically, the Guidelines state:

> *On page 25: "*Depending on the particular circumstances of the case, UNHCR considers that persons in professions susceptible to extortion, including but not limited to […] persons involved in informal and formal commerce […] may be in need of international refugee protection on the basis of their (imputed) political opinion.*"*
>
> *On page 53: "*Where the agents of persecution are non-State agents, consideration must be given to whether the persecutor is likely to pursue the claimant in the proposed area of relocation. Given the purported ability of some NAGs and guerrilla groups to operate country-wide, and indeed internationally as part of international criminal networks, a viable IFA/IRA may not be available to individuals at risk of being targeted by such actors. It is particularly important to note the operational capacity of NAGs and the FARC, in particular, to carry out attacks in all parts of Colombia, irrespective of territorial control.*"*

[28] Disregarding key statements that contradicts its findings amounts to a failure to weigh and assess the relevant evidence and an unreasonable failure to provide transparent justification for the findings, the Applicants submit. The RPD cannot make selective use of the documentary evidence by citing it in part yet ignoring its conclusions.

[29] The Respondent observes that the two groups of Applicants were extorted by different organizations: a FARC dissident group in Florencia in January 2019 and FARC dissidents in Bogota in August 2019. The Respondent submits that the RPD reasonably concluded that the Applicants had not met their burden of proof showing that they would be at risk in Cartagena from either assailant organization because they did not present sufficient objective evidence to establish that either group of FARC dissidents had any interest in pursuing the Applicants. While this may have been a conclusion open to the RPD, it does not appear to have been considered.

[30] Furthermore, the Respondent argues, the Applicants' submissions to the effect that the FARC is motivated to persecute people who do not comply with its demand is not reflected in what either group of Applicants experienced after their initial encounters with their agents of persecution. Additionally, in support of this argument, the RPD found that the family members remaining in Colombia were not approached or threatened by FARC members.

[31] With regard to the second prong of the IFA test, the Respondent submits there is insufficient evidence that it would be objectively unreasonable for the Applicants to relocate to Cartagena. The Respondent submits the threshold is very high and "requires nothing less than the existence of conditions which would jeopardize the life and safety" of a claimant: *Hamdan v Canada (Minister of Immigration, Refugees and Citizenship)*, 2017 FC 643 at para 12.

[32] I agree with the Applicants that the RPD's IFA finding was unreasonable. 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: *Vavilov* at para 85.

[33] Recognizing that the RPD's reasons do not need to meet a standard of perfection or address all of the arguments presented, I am satisfied that the decision maker misapprehended or failed to take into account the evidence before the panel: *Vavilov* at paras 91 and 126.

[34] As the Applicants contend, the RPD cannot make selective use of the documentary evidence by citing it in part, yet ignoring its conclusions. The RPD decision in this instance does not account for the contradictory evidence contained in the objective documentary evidence. The

decision does not show a rational chain of analysis as to why its conclusion about the Applicants having an IFA in Cartagena differs from the objective documentation from the UNHCR and Colombia Reports.

[35] The Applicants have also demonstrated that the decision in this instance differs from those of other RPD panels. While the RPD is not bound by decisions of other members of the tribunal, where the evidence and facts are similar, the panel should normally provide an explanation as to why a particular RPD member, reviewing the same evidence, could reach a different conclusion. The failure to explain the basis for such differences undermines the integrity of tribunal decisions and gives them an aura of arbitrariness: *Siddiqui v Canada (MCI),* 2007 FC 6 held at para 18-19; *Petrovic v Canada (Citizenship and Immigration),* 2016 FC 637 at para 13.

V. **Remedy**

[36] In a pre-hearing communication to the Court and Respondent, the Applicants requested that the Court issue a direction that credibility findings be retained on redetermination of the RPD hearing. In support of that request, the Applicants cite the recent decision of the Court in *Echavarria Quinones v Canada (Minister of Citizenship and Immigration)* 2022 FC 1754 [*Echavarria*].

[37] In *Echavarria,* at paras 84-94, Madam Justice Go considered a similar request based on decisions where the Court had found such a direction appropriate: *Garcia v Canada (Minister of*

Citizenship and Immigration), 2007 FC 79 [*Garcia*] at para 31 and *Mugugu v Canada (Citizenship and Immigration)*, 2012 FC 409 [*Mugugu*] at paras 1 and 4. *Garcia* was distinguished as it involved a consent redetermination on a state protection issue, which the Court agreed to assess. While the facts in *Mugugu* were similar to those in *Echavarria*, Justice Go declined to make the direction the Applicant sought, as factual findings remained to be determined.

[38] Justice Go noted that several cases cited by the Respondent dealt with “directed verdicts” which the Court has described to be an exceptional power that should be exercised only in the clearest of circumstances, as opposed to a direction respecting credibility: *Rafuse v Canada (Pension Appeals Board)*, 2002 FCA 31 at paras 13-14; *Vavilov* at paras 140-141; *Canada (Public Safety and Emergency Preparedness) v LeBon*, 2013 FCA 55 at paras 13-14; *Freeman v Canada (Citizenship and Immigration)*, 2013 FC 1065 at paras 75-81;

[39] In *Camargo v Canada (Citizenship and Immigration)*, 2015 FC 1044 [*Camargo*] at paras 42-44, Justice Gleeson noted that s 18.1(3)(b) of the *Federal Courts Act*, RSC 1985, c F-7 gives the Court jurisdiction to issue directions when referring a decision back for a redetermination by a different panel. As in this matter, and *Echavarria*, the applicants in *Camargo* had not sought direction that would determine the outcome of the application. Rather, they sought a direction from the Court that would require the Board to accept, based on a previous finding on the issue of credibility, that the reconsideration be limited to the issue of state protection.

[40] Justice Gleeson found that the issue would not be confined to a question of law but would require the tribunal to engage issues of fact and law, which must be considered in their totality.

Thus, he declined to exercise his discretion and limit the scope of the reconsideration. See also *Nikwo v Canada (Citizenship and Immigration)* 2022 FC 1616 at paras 31-33 where Justice Favel declined to direct that a redetermination proceed on the basis that the applicant's bisexuality had been credibly established.

[41] In the present matter, the RPD member stated at the outset of his analysis that the determinative issue in the case was the availability of an IFA to Cartagena. The member went on to state "[f]or the purposes of this decision, I have not drawn any negative credibility inference against the Claimants". In my view, that is not an affirmative finding that the Applicants were found to be credible. In the circumstances, it would be inappropriate for the Court to exercise my discretion and limit the scope of the tribunal's reconsideration.

VI. **Conclusion**

For the above reasons, the application will be granted and the matter remitted to the RPD for redetermination. No serious questions of general importance are certified and no direction will be issued with respect to the redetermination.

JUDGMENT in IMM-6955-21

THIS COURT'S JUDGMENT is that the application is granted and the matter is remitted for reconsideration by a different member of the Refugee Protection Division. No question is certified.

"Richard G. Mosley"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

RAOUL BOULAKIA	FOR THE APPLICANTS
MICHAEL BUTTERFIELD	FOR THE RESPONDENT

SOLICITORS OF RECORD:

RAOUL BOULAKIA BARRISTER AND SOLICITOR TORONTO, ONTARIO	FOR THE APPLICANTS
ATTORNEY GENERAL OF CANADA TORONTO, ONTARIO	FOR THE RESPONDENT