

Federal Court



Cour fédérale

**Date: 20230329**

**Docket: IMM-4675-21**

**Citation: 2023 FC 435**

**Ottawa, Ontario, March 29, 2023**

**PRESENT: Mr. Justice Norris**

**BETWEEN:**

**MIGUEL ANGEL ORTIZ LAVARIEGA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. OVERVIEW**

[1] The applicant is a 42 year-old citizen of Mexico. He has sought protection in Canada on the basis of his fear of the *Cartel Jalisco Nueva Generacion* (“CJNG”), a transnational drug trafficking organization.

[2] In a decision dated January 15, 2020, the Refugee Protection Division (“RPD”) of the Immigration and Refugee Board of Canada (“IRB”) determined that, in the absence of any nexus to a Convention ground, the claim should be assessed solely under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (“*IRPA*”). The RPD then went on to reject the claim because it found that, in several material respects, the applicant’s testimony was not credible.

[3] The applicant appealed this decision to the Refugee Appeal Division (“RAD”) of the IRB. In his appeal, the applicant challenged the RPD’s adverse assessment of his credibility. He also submitted new evidence in support of his appeal. He did not contest the RPD’s determination that the claim for protection should be considered only under section 97 of the *IRPA*.

[4] The RAD dismissed the appeal in a decision dated June 17, 2021. The RAD refused to admit any of the new evidence submitted by the applicant. The RAD also upheld as correct the RPD’s adverse determinations concerning the applicant’s credibility. Accordingly, the RAD confirmed the RPD’s determination that the applicant is not a Convention refugee or a person in need of protection.

[5] The applicant now applies for judicial review of the RAD’s decision under subsection 72(1) of the *IRPA*. He submits that the RAD fell into reviewable error in refusing to admit some of the new evidence he tendered and in its assessment of his credibility.

[6] As I will explain in the reasons that follow, I am not persuaded that there is any basis to interfere with the RAD's decision. While I agree with the applicant that the RAD misapprehended one of the items of new evidence, even if it erred in refusing to admit this item, this could not possibly have affected the outcome of the appeal. As for the RAD's assessment of the applicant's credibility, I am satisfied that it was altogether reasonable. This application will, therefore, be dismissed.

## II. BACKGROUND

[7] The applicant worked as a passenger bus driver in Mexico. He claims that, on August 8, 2017, while driving a bus from Oaxaca to Mexico City, he was pulled over by what appeared to be two police vehicles. A masked and heavily armed man approached the bus and ordered the applicant to get out. The man demanded the applicant's driver's license and voter card, which he then photographed with his phone and returned to the applicant. After a few minutes, the vehicles drove away and the applicant continued on his route to Mexico City.

[8] Feeling that the encounter was suspicious, on August 10, 2017, the applicant reported the incident to the Oaxaca State Attorney General's Office. In the record of his complaint (which was provided to the RPD), the applicant reported that the man who approached him had identified himself and the others as members of the CJNG. The man had told him that they were going to authorize him to continue on his route but that they would contact him later and give him information about "who they are specifically and what their intentions are."

[9] According to the applicant, on November 15, 2017, he received a telephone call from someone identifying himself as a member of the CJNG demanding that he meet with them. The caller threatened the applicant when he refused. According to the applicant, that day and the next he received numerous calls from numbers he did not recognize and which he did not answer. The applicant changed his telephone number and moved several times with his family but the calls continued.

[10] After learning that a former colleague had been murdered, the applicant decided to leave Mexico and seek refugee protection in Canada. Having obtained a visitor's visa, on September 8, 2018, the applicant flew directly from Mexico to Toronto. With the assistance of an immigration consultant, the applicant submitted an inland claim for refugee protection in late November 2018. The same immigration consultant represented the applicant at the RPD hearing and on the appeal to the RAD.

[11] As noted above, the RPD rejected the applicant's claim on credibility grounds. The RPD's key findings in this regard were the following:

- The applicant testified that, when his bus was stopped on August 8, 2017, the individual who spoke to him identified himself as a member of the CJNG and told him that they wanted him to transport cocaine and weapons for them. The applicant had omitted both of these details from his Basis of Claim ("BOC") narrative. Noting that the applicant had stated in his August 10, 2017, complaint that the man had identified himself as a member of the CJNG, the RPD member did not consider this a material omission from the BOC narrative. However, the applicant had not mentioned being told that the

organization wanted him to transport cocaine and weapons in either his August 10, 2017, complaint or in his BOC narrative. The member found that this was a material inconsistency between the applicant's testimony and his earlier accounts of the incident for which the applicant could not give a credible or consistent explanation. The member found that the CJNG had not asked the applicant to transport cocaine and weapons on August 8, 2017, and drew an adverse inference regarding the applicant's credibility in this regard.

- The applicant testified that he never answered any calls from the CJNG yet he stated in his BOC narrative that he had answered the first call from them on November 15, 2017.
- The applicant stated in his BOC narrative that he had received a threatening message from the CJNG on March 21, 2018, yet he could not credibly explain how the message had been communicated to him given that, as he testified, he did not answer any calls from the group or receive any voicemails or other messages from them. The applicant's suggestion that perhaps his wife had seen a text message on his phone when he was in the shower and then may have told him about it after deleting the message was rejected as not credible.
- The applicant had not made any attempt to obtain telephone records to corroborate his account of the telephone calls and did not have a reasonable explanation for this.
- The applicant had not made any attempt to obtain a statement from his wife (who, according to the applicant, had witnessed several material events) and did not have a reasonable explanation for this.

- The applicant claimed to have hidden for a time with an uncle in Tehuacan yet he left this place of safety to return to Oaxaca in February 2018 when he was offered a job there. This was inconsistent with the applicant's alleged fear of the CJNG.
- The applicant's testimony was at times evasive and defiant. This too reflected poorly on his credibility.
- Many of the supporting documents provided by the applicant (e.g. employment reference letters) were irrelevant to the core allegations.
- The member accepted the documents relating to the applicant's August 10, 2017, complaint to the Oaxaca State Attorney General at face value. However, the information in the documents did not establish a forward-facing risk to the applicant. The fact that the CJNG had stopped the applicant on August 8, 2017, and learned his identity did not establish on a balance of probabilities that they continue to pose a risk to him, especially given the absence of any credible evidence of ongoing attempts to contact the applicant.

[12] On the basis of these findings, the RPD concluded that the applicant had failed to demonstrate either a serious possibility of persecution on a Convention ground under section 96 of the *IRPA* or a personalized, forward-looking risk under section 97 of the *IRPA*. Accordingly, the RPD rejected the claim for protection.

[13] The applicant filed his Appellant's Record with the RAD on February 24, 2020. According to the written statement required by Rule 3(3)(d) of the *Refugee Appeal Division Rules*, SOR/2012-257, ("*RAD Rules*"), the applicant intended to rely on new evidence under

subsection 110(4) of the *IRPA* but that evidence was still being obtained. In particular, the applicant was in the process of obtaining records for telephone calls on November 15 and 16, 2017, an affidavit from his wife describing events both before and after the applicant left Mexico on September 8, 2018, and a transcript of the RPD hearing.

[14] In very brief written submissions in support of the appeal, counsel for the applicant argued that the RPD had erred in assessing the credibility of the applicant's corroborative documents "without ever assessing the credibility of his testimony itself" and that it had erred by making "a global adverse credibility finding solely on the basis of its impression of his corroborative documents" without determining "whether the appellant testified in a consistent and believable manner."

[15] The appeal was not assigned to a member of the RAD until March 2021. At that point, the member noted that, despite the representation in the Rule 3(3)(d) statement, the applicant had not submitted any new evidence in support of his appeal. The member therefore directed the RAD's Registry to advise the applicant's counsel that any new evidence and the requisite application under Rule 29 of the *RAD Rules* must be received by the RAD no later than May 12, 2021.

[16] On May 12, 2021, the applicant's counsel submitted a letter to which were attached the originals and English translations of: (1) the applicant's telephone records for November 15 and 16, 2017; (2) a notarized statement from the applicant's wife dated April 1, 2021; and (3) a report from the office of the Attorney General for Oaxaca dated

March 29, 2021, which described the status of the applicant's complaint regarding events on August 8, 2017.

[17] The applicant's counsel asked that his covering letter be treated as an application under Rule 29 for the admission of the new evidence. Among other things, Rule 29 provides that, in an application to admit new evidence that was not included in the Appellant's Record, an appellant (unless the Minister is the appellant) must provide an explanation of how the documents meet the requirements of subsection 110(4) of the *IRPA*. Under subsection 110(4) of the *IRPA*, the applicant may only present evidence that arose after the rejection of his claim, that was not reasonably available at the time his claim was rejected, or that he could not reasonably have been expected in the circumstances to have presented to the RPD. While counsel's letter describes the contents of the various documents and provides submissions as to their relevance, on the subject of the "newness" of the evidence, it simply asserts without elaboration that the documents "were just possible to be obtained very recently."

### III. DECISION UNDER REVIEW

[18] As noted above, the RAD did not admit the new evidence. The RAD also upheld the RPD's credibility findings.

[19] The RAD found that none of the documents submitted by the applicant were new in the sense that the information they contained arose after the rejection of the applicant's claim by the RPD. The applicant had not provided any explanation for why these documents were not reasonably available to him before the RPD rejected his claim, nor had he provided any



explanation for why he had only obtained them recently. Since none of the documents met the requirements of subsection 110(4) of the *IRPA*, the RAD refused to admit them.

[20] With respect to the RPD's adverse credibility findings, the RAD did not agree that the RPD had erred in any of the ways alleged by the applicant in his memorandum of argument. As demonstrated by several examples set out by the RAD in its decision, the RPD had assessed the applicant's testimony and found that it was inconsistent with respect to important aspects of his claim. The applicant could not provide an adequate explanation for these inconsistencies. It was clear to the RAD that "not only did the RPD assess the Appellant's testimony, but the Member also provided him an opportunity, and in some cases, many opportunities, to clarify each of the elements found problematic in his testimony. The Appellant failed to provide credible responses that would have explained these problems." As well, in addition to these shortcomings, the RPD had pointed out that the applicant had made no effort to obtain supporting documentation from his wife, from the telephone company, or from others and he had had no explanation for not even trying to obtain this evidence. Contrary to his submission on appeal, the RPD "did not make a global adverse credibility finding solely based on the Appellant's corroborative documents."

[21] Separate and apart from the applicant's arguments challenging the RPD's decision, the RAD reviewed the RPD's conclusions "and found them to be correct for the same reasons as the RPD." The RAD was satisfied that, on core aspects of the claim, "the RPD had valid reasons to discount the truthfulness of the Appellant's testimony."

[22] Accordingly, the RAD dismissed the appeal and confirmed the RPD's determination that the applicant is neither a Convention refugee nor a person in need of protection.

#### IV. STANDARD OF REVIEW

[23] The parties agree, as do I, that the RAD's decision should be reviewed on a reasonableness standard.

[24] Judicial review on a reasonableness standard considers not only the outcome but also, where reasons are required (as is the case here), the justification for the result (*Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 at para 29).

[25] 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" (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*). On the other hand, "where reasons are provided but they fail to provide a transparent and intelligible justification [. . .], the decision will be unreasonable" (*Vavilov* at para 136).

[26] When applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances (*Vavilov* at para 125). At the same time, reasonableness review is not a rubber-stamping process; it remains a robust form of review (*Vavilov* at para 13).

[27] The onus is on the applicant to demonstrate that the RAD's decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied 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" (*Vavilov* at para 100).

## V. ANALYSIS

### A. *The Admissibility of the New Evidence*

[28] The applicant does not contest the RAD's determination that the notarized statement from his wife is not admissible as new evidence. However, he does submit that the RAD erred in refusing to admit the telephone records and the report from the office of the Oaxaca State Attorney General.

[29] Looking first at the telephone records, the applicant submits that the RAD erred in rejecting these documents as new evidence because there is an explanation for why he had not provided them at the time of his RPD hearing and the RAD never addresses it. Specifically, at the hearing before the RPD, the applicant stated that the only way to obtain records such as the ones he required was "to go in person [to the telephone company] and show your ID" and this was why he had not been able to obtain any records for his RPD hearing.

[30] The RAD member takes note of this explanation but does not comment on it expressly. In my view, however, it is obvious that the RAD member rejected this explanation. It is also obvious why the member rejected this explanation: it cannot be true given that the applicant had

now been able to obtain the records without going to the telephone company in person and showing his ID. The reasonableness of the conclusion that the telephone records are not admissible as new evidence is not jeopardized by the fact that the RAD member did not find it necessary to spell this all out. Notably, in his Rule 29 application, the applicant had not provided any explanation whatsoever for how he had finally been able to obtain the phone records when before he could not. On the record before it, it was entirely reasonable for the RAD to conclude that the applicant had failed to establish that the information in the document was not reasonably available to him at the time of the RPD hearing.

[31] Turning to the report from the office of the Attorney General, the RAD found that all of the information in the report pertained to events prior to the rejection of the claim by the RPD and that the applicant had failed to explain why he had not been able to obtain the document until recently. Since the applicant had not met the statutory precondition for the admission of new evidence under subsection 110(4) of the *IRPA*, the new evidence could not be received (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 35).

[32] As I have already said, I agree with the applicant that the RAD member misapprehended the contents of the report from the office of the Attorney General. The member noted the date of the document (March 29, 2021) but found that its contents all pertained to events that had occurred before the RPD rejected the applicant's claim. This is incorrect. In fact, the document states that, on November 9, 2020, the Federal Forces Division – Criminal Investigation Directorate was requested to conduct investigations into the applicant's complaint "in order to determine the direct or eventual perpetrators of the aforementioned crimes." It also states that, as

of January 12, 2021, this investigation had “failed to determine individual responsible parties for the crimes in question,” although it was “presumed” that the perpetrators were members of the CJNG. However, since “it is impossible to individually identify the subjects under investigation,” the file was closed and the proceedings were terminated. All of these things took place after January 15, 2020, the date of the RPD’s decision. While some of the information in the report does pre-date the rejection of the claim, a great deal of the information post-dates the RPD’s decision. Consequently, the RAD erred in concluding that the report was not admissible because none of the information it contained arose after the rejection of the claim and the applicant had failed to explain why it only became available recently.

[33] Since the RAD concluded that the requirements of subsection 110(4) of the *IRPA* were not met, it did not go on to consider the additional factors discussed in *Singh* at paras 38-49. I am prepared to assume for the sake of argument that, had it considered these factors, the RAD would have found the report to be admissible. On this basis, I therefore agree with the applicant that the RAD erred in refusing to admit the report.

[34] Nevertheless, I am satisfied that, despite this error, the result on the appeal would have been the same. This is because, in my view, the new information in the report could not have made any difference to the ultimate decision to dismiss the appeal. The report was only relevant to the question of whether the individuals the applicant encountered on August 8, 2017, were members of the CJNG. This was a question that the RPD had resolved in the applicant’s favour. The report adds little if any further evidence in support of the applicant’s narrative in any event. It states that, after investigating the matter, the authorities were unable to identify the

perpetrators and had closed the file. At its highest, the report merely confirms that the authorities “presumed” that the perpetrators were members of the CJNG, which adds nothing to a point which (as I have already noted) had been decided in the applicant’s favour. Contrary to the applicant’s submission, the report does not corroborate his claim that he had been the victim of extortion, persecution and threats at the hands of the CJNG. Rather, it simply confirmed that this is what the applicant had reported to the authorities when he made his complaint on August 10, 2017.

[35] In sum, even if the RAD erred in refusing to admit this report because it contained (at least in part) genuinely new information, this could not possibly have affected the result of the appeal. Put another way, the RAD’s error is merely peripheral to the merits of the decision. Consequently, it does not provide a basis for setting aside the RAD’s decision (*c.f. Vavilov* at para 100).

B. *The RAD’s Credibility Findings*

[36] The applicant submits that the RAD’s conclusion that the RPD correctly found his credibility to be wanting in material respects is unreasonable. Specifically, the applicant submits that the RAD made adverse credibility findings without considering “the totality of the evidence” and on the basis of misapprehensions of the evidence. The applicant also submits that the RAD erred in finding that the omission of the fact that the CJNG wanted the applicant to transport cocaine and weapons from his BOC narrative was a material omission.

[37] I do not agree that the decision is unreasonable. The RAD thoroughly assessed the applicant's grounds of appeal (such as they were) and explained why they did not call the correctness of the RPD's adverse credibility findings or its ultimate determination into question. The RAD's reasons are transparent and intelligible. They are entirely tenable in light of the record. While the RAD's own independent assessment of the evidence is relatively brief, the applicant has not persuaded me that it is unreasonable. As the RAD had already explained, it agreed in all respects with the RPD findings concerning the applicant's lack of credibility about central elements of his narrative. In such circumstances, it was not necessary for the RAD to say more than it did for the decision to be transparent, intelligible and justified.

[38] With respect to the specific issue of the omission from the BOC narrative of what the CJNG wanted the applicant to do for them (namely, to transport drugs and weapons), the RAD found that this omission was important as it relates to the reason the organization had targeted the applicant in the first place. Further, the RAD was not satisfied that the applicant's explanation for the omission (since it was not in his original complaint to the Oaxaca State Attorney General, he did not think he could include it in his BOC narrative) was reasonable. It was open to the RAD to make this finding, a finding which it explained with cogent (if brief) reasons. The applicant argues that the RAD erred in treating this as an important element of his claim when it was simply an additional detail in his narrative the omission of which ought not to have weighed against his credibility. In making this argument, the applicant is essentially asking me to reweigh the evidence and come to a different conclusion about the importance of this part of his account and the credibility of his explanation for why he omitted it from his BOC narrative. That is not my role in conducting judicial review on a reasonableness standard.

[39] In short, the applicant has not established any grounds on which I could interfere with the RAD's adverse credibility findings or with the RAD's ultimate determination based on those findings.

VI. CONCLUSION

[40] For these reasons, the application for judicial review will be dismissed.

[41] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that no question arises.



**JUDGMENT IN IMM-4675-21**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is dismissed.
2. No question of general importance is stated.

“John Norris”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4675-21

**STYLE OF CAUSE:** MIGUEL ANGEL ORTIZ LAVARIEGA v THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** AUGUST 24, 2022

**JUDGMENT AND REASONS:** NORRIS J.

**DATED:** MARCH 29, 2023

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