

Federal Court



Cour fédérale

Date: 20230413

Docket: IMM-2360-21

Citation: 2023 FC 537

Ottawa, Ontario, April 13, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

**ANGEL FELIPE AGUILAR CEDENO AND
KATLEEN ISNEIDA RUBIANO BARRETO**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The applicants are citizens of Colombia. They sought refugee protection in Canada on the basis of their fear of armed groups in Colombia. In a decision dated March 18, 2021, the Refugee Protection Division (“RPD”) of the Immigration and Refugee Board of Canada rejected their claims, finding that the applicants are neither Convention refugees nor persons in need of

protection. The determinative issues were credibility and state protection. The RPD concluded that the applicants' evidence concerning events in Colombia underlying their claims was not credible. The RPD also concluded that, even assuming that their allegations about events in Colombia were true, the applicants had not rebutted the presumption of state protection.

[2] The applicants now apply for judicial review of the RPD's decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27. They submit that the RPD's credibility and state protection determinations are unreasonable. For the reasons that follow, I agree that the RPD made a critical error about the identity of the agent of persecution. As a result of this error, neither the credibility determination nor the state protection determination can withstand scrutiny. This application must, therefore, be allowed and the matter remitted for redetermination.

II. BACKGROUND

[3] The applicants are a common law couple. Mr. Aguilar Cedeno was born in June 1989. Ms. Rubiano Barreto was born in March 1991. Both received degrees in public administration from *La Escuela Superior de Administracion Publica* in Bogota – Ms. Rubiano Barreto in February 2014, Mr. Aguilar Cedeno in October 2015. In July 2016, Ms. Rubiano Barreto received another degree from the same school with a specialization in management and planning of urban and regional development.

[4] As set out in their Basis of Claim (“BOC”) narratives, the applicants alleged that they face persecution in Colombia by a neo-paramilitary group and drug cartel known variously as the

Autodefensas Gaitanistas de Colombia (“AGC”), the *Clan del Golfo*, and *Los Urabeños*. The principal narrative is provided by Mr. Aguilar Cedeno. In her claim, Ms. Rubiano Barreto simply adopted that narrative.

[5] In his narrative, Mr. Aguilar Cedeno described the following incidents that underlie the applicants’ fear of returning to Colombia:

- a) In March 2016, Mr. Aguilar Cedeno began working as a consultant under a limited-term contract for the town of La Apartada, a municipality located in the Department of Córdoba in northern Colombia. His mandate was to advise on institutional redesign of the municipal administration. On July 19, 2016, while he was in a grocery store near his apartment, Mr. Aguilar Cedeno was assaulted and threatened by a man claiming to be acting on behalf of Carlos Emilio Arango, the husband of the town’s mayor.

Mr. Aguilar Cedeno understood the mayor’s husband to be affiliated with *Aguilas Negras*, a paramilitary group linked to the *Clan del Golfo*, and to be a powerful political leader in his own right. According to his narrative, Mr. Aguilar Cedeno believed the attack was in response to his refusal to follow the mayor’s direction to terminate five city hall employees and to increase municipal taxes by 100 per cent. He left La Apartada for Bogota immediately after he was attacked.

- b) Mr. Aguilar Cedeno returned to the region a few months later to work under another limited-term contract, this time advising on the institutional redesign of the municipal administration of Pueblo Nuevo. One day in October 2016, when he was sitting outside city hall, Mr. Aguilar Cedeno was threatened by someone who identified himself as a member of the Usuga Clan, which is part of the *Clan del Golfo*. Then, in November 2016

Mr. Aguilar Cedeno received a call on his cell phone from the husband of the mayor of La Apartada. The caller said he wanted to kill Mr. Aguilar Cedeno with his bare hands because he had not obeyed his orders. Mr. Aguilar Cedeno left the region again and returned to Bogota.

- c) In February 2017, Mr. Aguilar Cedeno began working on a two-year contract for Cideter, a land development company based in Bogota. He was part of a national-scale project creating maps for city planning. According to Mr. Aguilar Cedeno, this project, which was funded by the World Bank, also involved training community organizations on property law and land rights. In July 2017, when he and others who were part of the project were travelling by boat to Francisco Pizarro (a municipality in the Department of Nariño in the southwest part of the country), they were stopped by heavily armed men in another boat. The men claimed to be members of the *Guerillas Unidas del Pacifico*. They told Mr. Aguilar Cedeno and the others that they had no business there. They shot dead a local social leader who was part of the group. Mr. Aguilar Cedeno and the rest of the group were released after about two hours. Mr. Aguilar Cedeno eventually made his way back to Bogota. He reported what had happened to his manager.
- d) In July 2018, a printed flyer from the AGC was slid under the door of the applicants' home in Bogota. The flyer warned that anyone taking part in activities under the framework of the peace agreement would be declared a military target. (The peace agreement referred to is the one concluded in 2016 between the Government of Colombia and the Revolutionary Armed Forces of Colombia – commonly known by their Spanish acronym FARC.) He reported receiving the flyer to his employer, who said they would contact the Ministry of Defence.

e) In November 2018, the applicants moved to Madrid, a municipality just outside Bogota. In February 2019, a local shopkeeper told Mr. Aguilar Cedeno that two men claiming to be members of the national police had showed her photos of him, his brother, and Ms. Rubiano Barreto and said they were looking for them. The security guard at the building where the applicants were living told Mr. Aguilar Cedeno that the same men had come by there looking for them, claiming to be family members.

[6] After this last incident, the applicants quit their jobs and moved to the home of Ms. Rubiano Barreto's grandmother in Bogota. Mr. Aguilar Cedeno left Colombia for the United States on March 15, 2019 (he had obtained a US visitor visa in September 2013 that was valid for 10 years). After obtaining her own US visitor visa in June 2019, Ms. Rubiano Barreto left Colombia for the United States on July 2, 2019. The two eventually made their way to the Fort Erie, Ontario, Port of Entry where they made claims for refugee protection on July 24, 2019. They were admitted to Canada under an exception to the Safe Third Country Agreement because Mr. Aguilar Cedeno's brother is a Canadian citizen who lives in Brampton, Ontario.

[7] Prior to the hearing before the RPD, counsel for the applicants provided a comprehensive package of personal identification and supporting documents. This included a set of annotated photographs. One of the photographs was of a handwritten note written in Spanish. In English translation, the note read: "TRAITOR H.P. (an abbreviation for 'son of a bitch') WE ARE GOING TO KILL YOU." The photo is annotated as follows:

Date: 14/Sept/2018

Place: Workplace

Who: Death threat to me Angel Aguilar

[8] Mr. Aguilar Cedeno testified at the RPD hearing that he received the note at work in an envelope with his name on it. At the time, he was still working for the Cideter company. He had reported receiving the note to his employer, who again said they would contact the Ministry of Defence.

III. DECISION UNDER REVIEW

[9] As noted above, the RPD rejected the claims on credibility grounds and because the applicants had not rebutted the presumption of state protection. In doing so, throughout the decision, the RPD identifies the FARC as the alleged agent of persecution. This is incorrect. The applicants never alleged that this was the group they feared. The significance of this error will be addressed below.

[10] In finding that the applicants' account was not credible, the RPD made the following key findings:

- It is not reasonable to think that, under his consulting contract with the municipality of La Apartada, Mr. Aguilar Cedeno would be responsible for firing employees or raising taxes. When asked about this at the hearing, he stated that he was being pressured to recommend these changes. The RPD found that his account was likely an exaggeration: he did not have the authority to do what he alleged he was being required or pressured to do. This “impugns the allegation of threats and assaults that the claimants allege occurred due to his refusal.”

- The letter placed under the applicants' door in July 2016 [*sic*] was a "general call to arms and a threat to public officials and human rights leaders, generally." The applicants claim that it was a direct threat to Mr. Aguilar Cedeno because of the nature of the work he was doing at the time; however, on its face, "the document does not support such a conclusion."
- The incident of the two men visiting the shop and the applicants' home in November 2018 is likely a fabrication because Mr. Aguilar Cedeno could not explain how the security guard at his home would have known that the men he saw were the same men the shopkeeper had seen (as he had stated in his narrative).
- Mr. Aguilar Cedeno had omitted the threatening note he claimed to have received at work from his original narrative, which was submitted in August 2019. When asked why he had omitted it, Mr. Aguilar Cedeno said he had forgotten to include it. The RPD found that this explanation "is not reasonable." The original narrative had been prepared "only a few months after the threat was alleged to have been received" and the amended narrative "was submitted shortly before the hearing but did not include any reference to the note either." Furthermore, Mr. Aguilar Cedeno testified that when he told his employer about the note, his employer said they would speak with the Ministry of Defence about it. This was the same response his employer had given when Mr. Aguilar Cedeno reported the flyer that had been slipped under his door. The RPD found that "the note is likely a fabrication."

- Supporting letters provided by the applicants largely report what the writers were told by the applicants. They do not add anything to the analysis of the credibility of the allegations.

[11] On the basis of these findings, the RPD concluded that the applicants' evidence was not credible.

[12] Turning to the issue of state protection, the RPD assumed for the sake of argument (and contrary to the foregoing findings) that the applicants' allegations regarding events in Colombia were true. The RPD found that Colombia "is in effective control of its territory, and that it has a functioning security force in place to uphold the laws and constitution of the country. The documentary evidence does not support a finding that Colombia is in a state of complete breakdown." Thus, it is presumed that Colombia can afford protection to the applicants. Further, the applicants did not have any compelling reasons for not seeking out the protection of the state before leaving for Canada. As a result, they had failed to rebut the presumption of state protection. Their claims for protection failed on this ground as well.

[13] Accordingly, the RPD rejected the claims, finding that the applicants are not Convention refugees or persons in need of protection.

IV. STANDARD OF REVIEW

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

[15] 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.*). For a decision to be reasonable, a reviewing court “must be able to trace the decision maker’s reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that there is a line of analysis within the reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived” (*Vavilov* at para 102, internal quotation marks and citation omitted). 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).

[16] 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). Nevertheless, the test of reasonableness and its requirements of justification, intelligibility and transparency apply to an administrative decision maker’s assessment of the evidence before them and the inferences that may be drawn from that evidence (*Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at para 46). Consequently, adverse findings of fact and conclusions or inferences with respect to credibility must find their justification in the evidence before the decision maker and their expression in the decision maker’s reasons (*ibid.*).

[17] The onus is on the applicants to demonstrate that the officer’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

[18] The applicants challenge the reasonableness of the RPD’s decision in a number of respects but I am satisfied that the RPD’s mistake about the identity of the agent of persecution alone is sufficiently serious to require that the matter be reconsidered. As the Supreme Court of Canada has emphasized, “a reasonable decision is one that is justified in light of the facts” (*Vavilov* at para 126). The reasonableness of a decision “may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it” (*ibid.*) I am satisfied that this is what occurred in the case at bar.

[19] The applicants were clear in their evidence that they feared the AGC (or *Clan del Golfo*) and related right-wing paramilitary groups. The RPD never acknowledges this and never identifies the alleged agent of persecution correctly in the decision. Instead, all four times the alleged agent of persecution is mentioned, it is identified as the FARC. While these four instances all relate to the flyer the applicants received from the AGC in July 2018, I am not satisfied that they can be excused as mere slips of the pen. Indeed, I do not understand the respondent to suggest otherwise.

[20] In my view, this error undermines the reasonableness of both the credibility and the state protection findings made by the RPD.

[21] Looking first at the adverse credibility findings, I acknowledge that, simply as a matter of logic, the identity of the agent of persecution is irrelevant to some of the reasons why the RPD found that the applicants' account was not credible. For example, the gap in Mr. Aguilar Cedeno's account that led the RPD to conclude that the incident involving the two men in Madrid did not occur has nothing to do with the identity of the agent of persecution. But this is not the case for all of the grounds on which the RPD found that the applicants were not credible.

[22] The RPD does not appear to doubt that the applicants received a flyer at their home in July 2018 (even though the RPD states the wrong year in the decision). The significance of the flyer, however, may be quite different depending on whether the author is the AGC or the FARC.

[23] One of the applicants' fundamental concerns was that the AGC had targeted Mr. Aguilar Cedeno because of his social development work. The reasonableness of the RPD's adverse assessment of this fear is called into question by the fact that it is evidently based on the belief that the agent of persecution is a different group with an entirely different political ideology. Even if the flyer was not addressed to Mr. Aguilar Cedeno personally, the applicants' concern was that, as demonstrated by the delivery of the flyer to their home, he had been singled out for attention because of his community development work. From their perspective, this was consistent with the political ideology of the AGC, which potentially lends credibility to his account. On the other hand, there was no basis in the evidence to think that the FARC would have been similarly motivated to target him.

[24] On a related point, I agree with the applicants that it was unreasonable for the RPD to reject Mr. Aguilar Cedeno's evidence that his work with Cideter included teaching people about territorial rights solely on the basis of the wording of his contract of employment. While the RPD was not required to accept Mr. Aguilar Cedeno's evidence on this central point, before rejecting it the RPD was required to address other evidence that supported his position (including photographs of him delivering presentations to community groups). The RPD's failure to do so leaves the decision lacking transparency, intelligibility and justification.

[25] Furthermore, even though the concerns the RPD had with the credibility of Mr. Aguilar Cedeno's account of receiving the threatening note at work in September 2018 have nothing directly to do with the identity of the agent of persecution, the RPD's analysis of this evidence gives rise to other concerns. Contrary to the RPD's finding, Mr. Aguilar Cedeno did not prepare his original BOC narrative "only a few months after the threat was alleged to have been received." The original narrative was submitted in August 2019 – that is, nearly a year after he allegedly received the note. As well, it is entirely unintelligible why the RPD thought that the fact that the same person (Mr. Aguilar Cedeno's employer) had the same reaction (contacting the Ministry of Defence) to similar threats (the AGC flyer and the handwritten note) received two months apart raised doubts about the credibility of the account. If anything, one might reasonably think that the contrary was the case. In the absence of any explanation of its reasoning by the RPD, this finding is unreasonable.

[26] The respondent contends that, even if the RPD's credibility findings are flawed (which the respondent does not concede), this does not affect the overall reasonableness of the decision

because the claims were also rejected on the basis that the applicants had failed to rebut the presumption of state protection. The state protection analysis was premised on the applicants' allegations being taken as true, which nullifies any errors the RPD may have made in finding the applicants to be not credible, and, according to the respondent, that analysis is reasonable.

[27] I do not agree. Assuming without deciding that an unreasonable analysis of credibility can be displaced by an alternative ground for rejecting a claim that is premised on the claimant's allegations being true, I am satisfied that the error about the identity of the agent of persecution undermines the reasonableness of the state protection analysis. It is self-evident that, to reasonably determine that the presumption of state protection has not been rebutted, the decision maker must have the correct agent of persecution in mind. The strength of that presumption, whether it even applies, and whether it is reasonable for a refugee claimant not to have sought the protection of the state all surely depend on the identity of the agent of persecution.

[28] In the case at bar, the evidence before the RPD demonstrated that, unlike the FARC, the *Clan del Golfo*/AGC had infiltrated the armed forces and the justice system, including the police. Indeed, the *Clan del Golfo*/AGC is the largest and most powerful paramilitary group in Colombia. This is all relevant to the question of state protection when that group is the agent of persecution. By misidentifying the agent of persecution as the FARC, the decision leaves one with serious doubts that the RPD considered this relevant and highly probative evidence before concluding that the applicants had failed to rebut the presumption of state protection.

[29] *Vavilov* holds that the principles of justification and transparency “require that an administrative decision maker’s reasons meaningfully account for the central issues and concerns raised by the parties” (at para 127). Reasons “are the means by which the decision maker communicates the rationale for its decision” (*Vavilov* at para 83). They are “the primary mechanism by which decision makers demonstrate that they have actually *listened* to the parties” (*Vavilov* at para 127, emphasis in original). A decision maker’s “failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it” (*Vavilov* at para 128).

[30] The RPD’s mistake about the identity of the agent of persecution raises a serious concern in this regard. The significance of this concern is compounded by the fact that, in a claim for refugee protection, where the stakes are indisputably high, “the perspective of the individual or party over whom authority is being exercised” is central to the necessity of adequate justification (*Vavilov* at para 133). The RPD’s decision leaves the applicants with the reasonable belief that the member fundamentally misunderstood the basis of their claims for protection. In such circumstances, the requirements of justification, transparency and intelligibility have not been met.

VI. CONCLUSION

[31] For these reasons, the application for judicial review will be allowed. The decision of the RPD dated March 18, 2021, is set aside and the matter is remitted for redetermination by a different decision maker.

[32] 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-2360-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Refugee Protection Division dated March 18, 2021, is set aside and the matter is remitted for redetermination by a different decision maker.
3. No question of general importance is stated.

“John Norris”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2360-21

STYLE OF CAUSE: ANGEL FELIPE AGUILAR CEDENO ET AL v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

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APPEARANCES:

Lisa R. G. Winter-Card FOR THE APPLICANTS

Michael Butterfield FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lisa R. G. Winter-Card FOR THE APPLICANTS
Welland, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario