Federal Court Cour fédérale

Date: 20241008

Docket: IMM-10641-23

Citation: 2024 FC 1591

Calgary, Alberta, October 8, 2024

PRESENT: Madam Justice Go

BETWEEN:

YONATHAN CAMILO FINO VALDERRAMA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Yonathan Camilo Fino Valderrama [Applicant] is a citizen of Colombia. He and his spouse, who is not part of this judicial review application, allege fear of persecution in Colombia from a paramilitary group. The Applicant and his spouse filed a refugee claim upon entry into Canada in December 2019.

[2] The Minister of Public Safety [Minister] intervened in the Applicant's proceedings before the Refugee Protection Division [RPD] and sought the Applicant's exclusion from refugee protection. The Minister alleged there are serious reasons for considering that the Applicant committed a serious non-political crime prior to his entry into Canada pursuant to Article 1F(b) of the *United Nations Convention on the Status of Refugees* [Convention] and section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [*IRPA*].

[3] In their disclosure package, the Minister included a document titled "Colombian Open Source Criminal Database Check" [Document]. The Document indicates that the Applicant was convicted of "Illegal manufacturing, trafficking or carrying of weapons or ammunition – Attempted homicide" under the Colombian Penal Code and received a sentence of 4 years and 10 months.

[4] During the RPD hearings, the Applicant requested the Minister to provide the hyperlink for the Document, as Applicant's counsel was unable to locate the Document through a Google search. The Minister never provided the hyperlink despite repeated assurances from the Minister's representative that they would do so. The RPD found the Document to be genuine and excluded the Applicant from refugee protection.

[5] The Applicant appealed the RPD decision to the Refugee Appeal Division [RAD]. The Minister did not intervene and did not provide the hyperlink even though the Applicant raised the issue again with the RAD. The RAD upheld the RPD's findings, after determining that the

Document is authentic and finding that the information provided therein satisfied Article 1F(b) on a balance of probabilities [Decision].

[6] The Applicant seeks judicial review of the Decision. I grant the application as I find the RAD's reasons in finding the Document authentic fell short of the requisite justification. I also find that in the context of this case, the RAD had an obligation to consider asking the Minister for further information about the hyperlink before rendering a decision that carries serious consequences for the Applicant.

II. Issue and Standard of Review

[7] In essence, the Applicant argues that the RAD's findings with regard to the provenance and reliability of the Document were unreasonable, given that the Minister failed to provide the hyperlink to the Document and there was no evidence as to the database source of the Document.

[8] Prior to the hearing, I asked the parties to provide further submissions as to whether there was an obligation on the part of the RAD to request information about the hyperlink from the Minister. I thank counsel for their co-operation and their helpful submissions.

[9] The two issues before me are as follows:

a. Did the RAD err in its findings with respect to the authenticity of the Document?

b. Did the RAD have an obligation to request the Minister to provide further information about the hyperlink of the Document?

[10] The parties agree that the appropriate standard of review for the Decision is reasonableness: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker: *Vavilov* at para 85.

III. Analysis

A. *Exclusion based on Article 1F(b)*

[11] Article 1F(b) of the Convention states:

> **F.** The provisions of this Convention shall not apply to any person with respect to whom there are serious reasons for considering that:
>
> …
>
> **(b)** he has committed a serious non-political crime outside of the country of refuge prior to his admission to that country as a refugee
> …

[12] Article 1F(b) of the Convention is directly incorporated into the *IRPA* in section 98 which reads as follow:

> A person referred to in section E or F of Article 1 of the Refugee Convention is not a Convention refugee or a person in need of protection.

[13] The onus is on the Minister to establish that there are "serious reasons for considering" that the Applicant has committed a serious non-political crime: *Quintana Murillo v. Canada (Citizenship and Immigration)*, 2008 FC 966 at para 24; *Ezokola v Canada (Minister of*

Citizenship and Immigration), 2013 SCC 40 [*Ezokola*] at para 29, citing *Ramirez v Canada (Minister of Employment and Immigration)*, [1992] 2 FC 306, 1992 CanLII 8540 (FCA) at 314. "Serious reasons for considering" is a standard that falls below the balance of probabilities but above mere suspicion: *Ezokola* at paras 101−102.

B. *Did the RAD err in its findings with respect to the authenticity of the Document?*

[14] The Minister decided to intervene in the Applicant's refugee claim after the RPD had already held its hearing into the Applicant's claim. The RPD held a second sitting to address the Minister's intervention application.

[15] The database source of the Document became an issue almost right from the start of the second sitting of the RPD hearings.

[16] Twice during the second sitting of the RPD hearings, the Applicant asked the Minister to provide the hyperlink to the Document, as Applicant's counsel was unable to locate the link through a Google search and it was not provided in the Minister's materials and intervention. Upon the first request, the Minister's representative responded, "Yeah, I will have to just consult with where it was obtained from exactly, so I can send the hyperlink, but I will get that as soon as I could." In response to the second request, the Minister's representative said, "Yeah, so I am going to contact the hearings advisor during the break and hopefully I can get something ASAP. I will try to get it done during the hearing, but I will keep you updated." The Minister did not provid the hyperlink before the RPD hearings were completed.

[17] In their post-hearing submission, counsel for the Applicant again raised the issue of the hyperlink, noting that the Document was at the core of the Minister's intervention. The Minister did not address the issue of the source of the Document nor the Applicant's request for the hyperlink in their post-hearing submission to the RPD.

[18] Finally, as noted above, the Applicant once again raised the issue of the lack of the hyperlink in their appeal submission to the RAD. The Minister provided no submission as they chose not to intervene before the RAD.

[19] Both before the RPD and the RAD, the Applicant questioned the authenticity of the Document. In his submission to the RAD, the Applicant noted that as the Document is "Open-Source," it should be accessible by anyone. However, counsel for the Applicant was unable to locate the Document through a Google search. Counsel also noted there was no evidence that the Document was provided to the Minister by the Government of Colombia or any of its Departments or Agencies.

[20] In confirming the RPD's finding that the Document is genuine and rejecting the Applicant's claim that Open-Source information can be manipulated, including by agents of persecution, the RAD cited the following reasons:

a. The Document is obtained from a website hosted by the Republic of Colombia, Judicial Branch, Superior Council of the Judiciary, Courts of the Enforcement of Sentences and Security Measures;

b. The Document is adorned with the coat of arms for the Judicial Branch and the Superior Council of the Judiciary;

c. Citing *Chen v Canada (Citizenship and Immigration)*, 2015 FC 1133 [*Chen*] at para 10 for the proposition that documents issued by a foreign authority are presumed to be valid, the RAD rejected the Applicant's submission that the Minister failed to establish the authenticity of the Document because the Minister did not provide a hyperlink to the website;

d. The fact that the Minister did not provide the hyperlink to the source of the Document does not undermine its authenticity; and

e. The Minister's reference to the Document being Open-Source was misleading, and the Minister used the terminology of Open-Source to refer to publicly available information, on a balance of probabilities.

[21] The Applicant submits, and I agree, that the RAD's findings with regard to the authenticity of the Document were unreasonable. I say this for the following reasons.

[22] First, there was no evidence to support the RAD's finding that the Document was obtained from a website hosted by the Republic of Colombia. The RAD stated this was indicated in the Minister's submission, when the Minister's submission made no such claim. Indeed, the very reason why the Applicant requested the hyperlink in the first place was due to the lack of information about the database source of the Document, and the lack of evidence that the Document was provided to the Minister by the Government of Colombia.

[23] Second, I agree with the Applicant that a finding of exclusion from refugee protection has serious consequences for the Applicant and therefore having all the information used to support the exclusion finding was important to the RAD's findings on exclusion. In the context of this case, where the Minister claimed the Document came from an Open Source and counsel for the Applicant was unable to locate the Document online, the information about the source of the Document thus became important to assessing its authenticity. Yet, in dismissing the importance

of the Minister's failure to provide a hyperlink to the Document, the RAD failed to provide responsive justification, particularly in light of the severe impact of the Decision on the Applicant's rights and interests, and the Applicant's submission on this issue, contrary to the principles outlined in *Vavilov* at para 133.

[24] Third, in finding the Minister's reference to the Document being "Open-Source" to be "misleading," the RAD made a speculative finding. As the Applicant submits, and I agree, the RAD's finding also ran contrary to the evidence and submission made by the party who submitted the Document, and who had labelled the Document as "Open Source." I also note that the RAD's finding that "Open Source" means "publicly available information" did not address counsel's concern that they were unable to locate the Document through a Google search.

[25] Fourth, I find the RAD's reliance on *Chen* to be misplaced. *Chen* stands for the proposition that documents are presumed valid when issued by a foreign authority: *Chen* at para 10. In this case, however, the Applicant questioned whether the Document was in fact issued by a foreign authority. By citing *Chen* to reject the Applicant's argument that the Document is not authentic, the RAD thus engaged in circular reasoning.

[26] I reject the Respondent's new argument at the hearing that the Applicant never requested the source of the Document but only requested the hyperlink. The Respondent's hair-splitting argument overlooks the fact that the Applicant requested the hyperlink in order to ascertain the source of the Document.

[27] I also find the Respondent's submission about the Applicant's failure to take further steps to counter the Document irrelevant. The Minister carries the burden of proof in exclusion proceedings. In this case, the Document was the only evidence the Minister submitted of the Applicant's alleged conviction. When the RAD erred in its assessment of the authenticity of the Document, the Decision as a whole must fail, irrespective of whether the Applicant had provided any evidence to counter the Minister's allegation.

C. *Did the RAD have an obligation to request the Minister to provide the hyperlink?*

[28] Prior to the hearing, I issued the following direction to the parties:

> In light of the context of this case, where the Applicant challenged the authenticity of a document that the Minister relied on to exclude him from refugee protection, and where the Minister failed to provide the hyperlink to an open source document despite the Applicant's repeated requests without any explanations, was there an obligation on the part of the RAD to request such information from the Minister prior to issuing its decision, as per *Paxi v Canada (Citizenship and Immigration)*, 2016 FC 905?

[29] Having considered the parties' submissions, I find that in the context of this case, the RAD had an obligation to request the Minister to provide information about the hyperlink.

[30] In *Paxi v Canada (Citizenship and Immigration)*, 2016 FC 905 [*Paxi*], the Court was concerned with a letter provided by a refugee claimant which the RPD found to be unauthentic. At para 52, the Court took issue with the fact that the RPD was concerned about the document's authenticity, and yet would not simply take the opportunity to use the contact information provided by the letterhead before demanding notarized and other objective identification documents. As the Court continued in para 52:

> Lives are at stake here, and yet a simple check is not made. For the Board to take issue with the authenticity of the document yet make no further inquiries despite having the appropriate contact information to do so is a reviewable error: *Kojouri v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1389 at paras 18-19; *Huyen v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 1267 at para 5.

[31] The Applicant likens his circumstances to those of the applicants in *Paxi* in that the stakes are high for him. According to the Applicant, the RAD's failure to undertake a simple request or check through the Minister, especially where the Minister had indicated on more than one occasion that they would look into the matter of the hyperlink and report back, was a reviewable error.

[32] I agree.

[33] I reject the Respondent's submissions that the RAD was not obligated to request the hyperlink because the RAD did not rely on the hyperlink in making its findings pursuant to Article 1F(b), and neither did the Minister in making their submissions before the RPD.

[34] Contrary to the Respondent's submissions, the RAD did make a finding on the hyperlink by dismissing the Applicant's submission in this regard, by positing that the Minister was being "misleading" about the "Open-Source" nature of the Document, and by concluding that the Document was obtained from a government website. Further, while the Minister did not rely on the hyperlink in their submission, it was the Minister who asserted that the Document was from an "Open Source" and repeatedly agreed to provide the hyperlink to the Applicant yet failed to do so.

[35] The Respondent also distinguishes *Paxi* on the grounds that the Court in that case found the RPD mistakenly missed a material fact and overlooked that the letter contained strong evidence of authenticity including detailed contact information, making it easy to verify its authenticity. In the present case, the Respondent asserts that the RAD found the government-issued criminal record check to be authentic after assessing its authenticity, and made no similar errors regarding this Document as were made by the RPD in *Paxi*.

[36] While I acknowledge that the situation here is in some way the reverse, I find the Court's observation in *Paxi* is just as instructive. As I have already found, the RAD's reasons for finding the Document to be authentic lack justification.

[37] Moreover, just as refugee claimants are often required to specify the source of any document they rely on, the Minister should similarly be held to account when they seek to rely on a document to exclude a claimant on the basis of Article 1F(b).

[38] In this case, the Minister relied on the Document that they claimed to be Open-Source. The Minister then failed to disclose the hyperlink for the Document, despite counsel informing the Minister that they were unable to locate the Document and despite the Minister's agreement to provide the hyperlink. In view of these facts, fairness required the RAD to take a small step of asking the Minister to provide the hyperlink before rendering its decision to exclude the Applicant.

[39] As Justice Battista noted recently in *Ali v Canada (Minister of Public Safety and Emergency Preparedness)*, 2024 FC 1085 [*Ali*]:

> [33] The RPD was wrong when it stated that "the method of gathering evidence is not relevant to the case." In fact, an assessment of the probative value of evidence first requires a determination of the reliability of that evidence: David M. Paciocco et al, *The Law of Evidence*, 8th ed (Toronto: Irwin Law Inc., 2020) at p 274-275. Determining the reliability of the evidence being used against him was exactly what the Applicant was trying to achieve. This could involve questions about the process used to obtain the evidence, the reliability or propriety of that process, the risk of human or other error, and potentially other considerations…

[40] Justice Battista went on to quote Justice Grammond in *Mawut v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 1155 [*Mawut*] at para 29 to find that "full disclosure benefits the justice system as a whole because it facilitates the search for truth, allowing access to information and the testing of assertions."

[41] While *Ali* and *Mawut* dealt with issues different from those in the case at hand, their core teaching about the need for full disclosure with a view to facilitate access to justice is equally applicable.

[42] The database source of the Document that the Minister relied on was central to the Applicant's appeal to the RAD. Requiring the Minister to provide further information about the hyperlink that they had already promised to provide was a small step that the RAD could have taken. Doing so would have allowed the RAD to test the veracity of the Minister's assertions before rendering a decision that would lead to serious consequences for the Applicant.

[43] For all these reasons, I set aside the Decision.

IV. Conclusion

[44] The application for judicial review is allowed.

[45] There is no question to certify.

JUDGMENT in IMM-10641-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The decision under review is set aside and the matter referred back for redetermination by a different decision-maker.
3. There is no question to certify.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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