Federal Court  Cour fédérale

Date: 20241011

Docket: IMM-10633-22

Citation: 2024 FC 1620

Ottawa, Ontario, October 11, 2024

PRESENT: Mr. Justice Norris

BETWEEN:

ULISES ANDRE SERRANO ESPINOZA
PIA LORETO ARANDA PEREZ
RAFAEL ANTONIO SERRANO ARANDA

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Ulises Andre Serrano Espinoza, his common law partner Pia Loreto Aranda Perez, and their child Rafael Antonio Serrano Aranda, are citizens of Chile. They sought refugee protection in Canada on the basis of Mr. Serrano Espinoza's fear of persecution due to his perceived support for Mapuche activists and other leftist causes. The Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (IRB) found Mr. Serrano Espinoza's account

of his experiences in Chile to be credible and that he had established a subjective fear of persecution. The RPD rejected the claims, however, because it found that Mr. Serrano Espinoza had not established that his fear was objectively well-founded and because he had not rebutted the presumption of state protection.

[2] The applicants appealed the RPD's decision to the Refugee Appeal Division (RAD) of the IRB. The RAD agreed with the applicants that the RPD had erred in certain respects; however, the RAD dismissed the appeal because, on the basis of its own analysis, it agreed with the RPD that the applicants had "not sufficiently established their objective basis for a forward-looking serious possibility of persecution." Given this, it was not necessary for the RAD to address the issue of state protection.

[3] The applicants now apply for judicial review of the RAD's decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*).

[4] The parties agree, as do I, that the RAD's decision should be reviewed on a reasonableness standard. 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 a reviewing court (*ibid.*). 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). To set aside a decision on the

basis that it is unreasonable, 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).

[5] As I will explain, I agree with the applicants that the RAD's analysis of the central question of whether they established a serious possibility of persecution is unreasonable. This application will, therefore, be allowed and the matter remitted for redetermination.

[6] Beginning around 2012, Mr. Serrano Espinoza worked in Santiago, Chile as a tattoo artist. Around the end of 2017, a Mapuche man he came to know as Koke became a client. (The Mapuche are the largest indigenous community in Chile. They are also one of the most socially and economically disadvantaged groups in the country.) Soon, Koke introduced many friends and associates to Mr. Serrano Espinoza and they also became clients. From time to time, groups of Koke's friends and associates would meet at Mr. Serrano Espinoza's studio and they would often have political discussions, including about the plight of the Mapuche people, their oppression by the Chilean government, and political activism against the government.

[7] Returning from his studio one evening in mid-July 2019, Mr. Serrano Espinoza was attacked and beaten by two men after he got off the bus near his home. He could not see their faces or otherwise identify them. When Mr. Serrano Espinoza asked why they were attacking him, one responded that he was involved with revolutionaries and he should stop. The men said they knew about the meetings at his tattoo studio. They warned him he should take care of his wife (who also worked at the studio) and his son. One said "*estan todos identificados*" ["I have

you all identified"]. Mr. Serrano Espinoza recognized this as a phrase that is commonly used by military forces of the far right. The men seemed older to him, which led him to think that they may be ex-military. He recounted in his Basis of Claim form that he "had heard that retired military had been called to assist the government quell the protests organized by indigenous activists." As well, the men's hands were wrapped in cloth, something Mr. Serrano Espinoza's uncle, who had been arrested during the Pinochet regime, had told him was a common practice then when beatings were inflicted on opponents of the government. At the hearing before the RPD, Mr. Serrano Espinoza also explained that he believed his attackers were military trained because of how quickly and methodically they attacked him.

[8] The applicants left Chile for Canada on September 17, 2019. Mr. Serrano Espinoza later learned from his brother that, on or around November 10, 2019, two men had tried to break into the family home in Chile. Mr. Serrano Espinoza's brother yelled at them and asked what they were doing. They said they were looking for Mr. Serrano Espinoza, identifying him by name. The men eventually fled.

[9] In his Basis of Claim narrative, Mr. Serrano Espinoza states: "I fear I will face persecution by the government authorities for my perceived association with indigenous activists." This fear was based, in part, on his belief that the men who attacked him were "connected to the government."

[10] Among the grounds of appeal the applicants advanced before the RAD was that the RPD had erred in failing to identify the agents of persecution. The applicants set out this point in their

Memorandum of Argument as follows: "Whereas the Appellants testified that they feared state agents, police, and right-wing actors, the Board only considered the individual perpetrators of the two individual incidents." After quoting the RPD's reasons for concluding that the applicants had not established that the same perpetrators were involved in both incidents (that is, the attack in July 2019 and the attempted break-in on November 10, 2019), the Memorandum of Argument continued: "With respect, it is irrelevant whether or not the men in the two incidents were the same individuals or not. What is relevant is whether or not they are state, police, or other right-wing actors who are seeking the Appellants for political reasons. The Board completely failed to analyze this."

[11] The RAD found that the RPD had erred in this respect; however, I agree with the applicants that the RAD's own analysis of the issue of the identity of the agents of persecution is unreasonable. This is because the RAD misunderstood the applicants' complaint on appeal and then fell into the same error as the RPD.

[12] The RAD writes:

> The Appellants have argued that the RPD erred in correctly identifying the agents of persecution. The Appellants argue that the RPD erred in only considering the two sets of attackers who actually attacked the Principal Appellant, and not <u>also</u> considering '… state agents, police and right-wing actors…' [emphasis added].

[13] But this was not the applicants' complaint. Rather, as set out above, it was that the RPD had erred in failing to determine whether the attackers <u>were</u> state, police, or other right-wing actors.

[14] In its own analysis of the evidence, the RAD also fails to answer this central question. The RAD writes:

> It is for the Appellants to prove their case. In relation to the allegations of state agents, the police, or right-wing actors being a threat to the Appellants, I have nothing beyond the subjective fear and speculation that any of these actors would be a future threat to the Appellants. The previous attackers have never been identified as state agents or police. They could be considered "right-wing actors" [footnote omitted], but this term is so vague and general as to be unhelpful in establishing who would specifically be the agents of persecution providing the future risk.

[15] In my view, the RAD has misapprehended both the issue and the evidence before it. Mr. Serrano Espinoza had clearly and consistently maintained that he feared state authorities and individuals who were connected to the government who opposed the political causes with which he was thought to be sympathetic. His account of the July 2019 attack, in which he was expressly targeted because of his alleged political sympathies, was found to be credible. Contrary to the RAD's finding quoted above, he did identify the attackers as state agents, whether actual state actors or private individuals acting on behalf of the state. Mr. Serrano Espinoza gave several reasons for why he believed this to be the case, including the motive for the attack and the manner in which he was attacked. Like the RPD, the RAD failed to consider whether this evidence concerning the identity of his attackers was sufficient to provide an objective basis for his subjective fear. Instead, it concluded, unreasonably, that Mr. Serrano Espinoza had not provided anything but an account of his agents of persecution as "right-wing actors," which the RAD found to be "so vague and general as to be unhelpful in establishing who would specifically be the agents of persecution providing the future risk." This finding was central to the RAD's ultimate conclusion that the appeal should be dismissed

because the applicants had not established a well-founded fear of persecution. As a result, the RAD's decision cannot stand.

[16] For these reasons, the application for judicial review will be allowed. The decision of the RAD will be set aside and the matter will be remitted for redetermination by a different decision maker.

[17] 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-10633-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Refugee Appeal Division dated October 11, 2022, is set aside and the matter is remitted for redetermination by a different decision maker.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-10633-22
STYLE OF CAUSE:	ULISES ANDRE SERRANO ESPINOZA ET AL v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HALIFAX, NOVA SCOTIA
DATE OF HEARING:	APRIL 10, 2024
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