

Federal Court



Cour fédérale

**Date: 20190417**

**Docket: IMM-4052-18**

**Citation: 2019 FC 468**

**Toronto, Ontario, April 17, 2019**

**PRESENT: The Honourable Mr. Justice Diner**

**BETWEEN:**

**GERARDO BETANCOURT AROCHA  
ALBERYS JOSE MARTINEZ DE  
BETANCOURT  
LUCAS BETANCOURT MARTINEZ  
ELIAS BETANCOURT MARTINEZ**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] This is an application for judicial review of a decision rendered by the Refugee Appeal Division [RAD] which held that the Applicants are neither Convention refugees nor persons in need of protection, arising from their fear of persecution based on political opinion. The RAD reasonably found that a central incident which led the Applicants to flee the country was not

persecutory, and that they would not be subject to risk from the state agents responsible for that incident. However, the RAD failed to consider whether there was a serious possibility that the Applicants would suffer future persecution as a result of their political opinion, or perceived political opinion. For that reason, the judicial review will be granted.

I. Background

[2] The Applicants consist of the Principal Applicant, Mr. Arocha, and his family. They are all Venezuelan citizens. They fear persecution from the state due to Mr. Arocha's political opinion. According to his basis of claim narrative [BOC], Mr. Arocha started working as an engineer for a government-owned petrochemical company in June 2006 and was therefore employed by the Venezuelan government. His superiors supported the ruling United Socialist Party of Venezuela [USPV], harassed him to support USPV activities, and threatened negative performance evaluations if he failed to do so. He openly refused to comply, and ultimately received negative performance evaluations.

[3] As a result of this conflict, Mr. Arocha resigned in June 2014, and launched a business selling spare auto parts. On July 3, 2016, while he was taking care of his father's house, a group of four men broke in, and identified themselves as officers of the Cuerpo de investigaciones científicas, penales y criminalísticas [CICPC], a national police agency responsible for investigating crimes, stating that he was under investigation. They said they knew about his previous employment, US bank accounts, store, and home safety deposit box. They pointed guns at the Applicants, searched the home, and threatened to kill Mr. Arocha unless he revealed the location of a safety deposit box (which did not exist). Ultimately, the men left after searching

the home and stealing money and goods. They threatened to kill Mr. Arocha if they discovered that he lied to them, or if he reported the matter to the police.

[4] Later that day, Mr. Arocha reported the incident to the Grupo de antiextorsion y secuestro [GAES], a special force for anti-extortion and kidnapping. On the recommendation of a GAES officer, Mr. Arocha reported the incident to the CICPC, who instructed him to send pictures of his home. Fearing that it would reveal their remaining possessions and incite another incident, he did not send the photos. The Applicants never heard back from either agency. They left Venezuela several months later and claimed refugee status in Canada.

## II. RPD decision, RAD decision

[5] The Refugee Protection Division [RPD] dismissed the claim based on the identity of the agents, subjective fear, nexus to a Convention ground, and the likelihood of future harm. The Refugee Appeal Division [RAD] overturned the first two of these findings, accepting that the four officers were CICPC members, and the Applicants' reasons for delay in leaving Venezuela, but upheld the other findings.

[6] Specifically, the RAD supported the RPD's findings that nothing tied the home invasion incident to Mr. Arocha's political views. Rather, the RAD agreed with the RPD that these were rogue members of the government-backed police force, driven by greed, and not motivated by sanctioning Mr. Arocha and his family as a result of his political opinion: while the perpetrators were agents of the state, they were not necessarily acting on the state's behest. Regarding Mr. Arocha's experience at his former workplace, both tribunals found it did not amount to

persecution and that, on a balance of probabilities, the Applicants had not been targeted due to Mr Arocha's political opinion.

[7] Regarding future risk, the RAD acknowledged that the four CICPC agents would be able to find the Applicants if they were interested in them. However, since nothing occurred after the incident in July 2016, and since Mr. Arocha was one of millions who did not belong to the USPV, the Applicants faced no personalized or future risk.

### III. Issues and Parties' Positions

[8] This judicial review turns on whether the RAD erred by concluding that the Applicants did not establish a nexus between a Convention ground, and the Applicants' forward-looking fear of persecution. Whether refugee claimants meet the legal requirements of section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] is within the RAD's expertise and must be reviewed on a reasonableness standard (*Raj v Canada (Citizenship and Immigration)*, 2019 FC 251 at para 14).

[9] The Applicants challenge the RAD's finding that they are no different from the millions of other Venezuelans who do not support the USPV. They argue that Mr. Arocha had expressed political opinions against the ruling government and was targeted by state agents who knew that he expressed these opinions – making him a specific target, particularly because he reported the incident to the CICPC.

[10] The Respondent counters that the Applicants are asking the Court to reweigh the evidence: it was open to the RAD to find that the CICPC agents were rogue members who committed a crime for money rather than state agents who targeted Mr. Arocha for his political opinions, given the lack of issues since the incident. As such, neither the treatment of Mr. Arocha at work, nor the robbery, was connected to political opinion, and therefore neither amounted to persecution.

#### IV. Analysis

[11] I begin by noting some general principles regarding the assessment of a refugee claim brought under section 96 of IRPA. First, before analyzing issues such as objective fear, state protection, or the availability of an internal flight alternative, a claimant must establish a nexus between the risk of persecution and a Convention ground, such as political opinion (*Salazar v Canada (Citizenship and Immigration)*, 2018 FC 83 at para 51).

[12] Once having established that nexus between a Convention ground and a risk of persecution, a claimant must demonstrate a serious possibility that s/he would be persecuted on the basis of that Convention ground. Without such a nexus, the analysis would proceed under subsection 97(1) of IRPA which requires proof on a balance of probabilities of a personalized risk not faced generally by other individuals in or from that country (*Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 1061 at para 36).

[13] However, to establish a risk of persecution on a Convention ground, a claimant need not show that they have been persecuted in the past, as persecution under section 96 of IRPA can be

established by examining the treatment of similarly situated individuals (*Cao v Canada (Citizenship and Immigration)*, 2019 FC 231 at para 26 [*Cao*]; *Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 250 [*Salibian*], 1990 CanLII 7978 (FCA) at paras 16–19). Therefore, to properly adjudicate a section 96 claim, the RAD must consider both a particular claimant’s specific circumstances and evidence, as well as the general documentary evidence, to determine if the claimant faces a risk of persecution (*Olah v Canada (Citizenship and Immigration)*, 2017 FC 921 at para 15).

[14] Looking more closely at the alleged incident of past persecution, it is entirely possible – as both the RPD and the RAD found – that the incident was unrelated to Mr. Arocha’s political opinion and refusal to support the USPV during his employment. This factual finding is not itself unreasonable. While the RPD and the RAD did not impugn the credibility of Mr. Arocha’s narrative, neither panel accepted that the agents raided the home due to his expressed political opinion or refusal to support the USPV.

[15] Certainly, the country condition documents contained in the National Documentation Package [NDP] speak of raids on private property committed by Venezuelan police officers “indiscriminately”, that is, regardless of the victim’s political views or affiliations. However, the NDP also contains evidence of politically-based attacks (Certified Tribunal Record at 171).

[16] While the RAD could have reasonably inferred that the CICPC agents invaded the home because of Mr. Arocha’s political opinion, the inference it made was also open to it. As such, both factual inferences fall within a range of reasonable outcomes. I agree with the

Respondent's argument that it is not for this Court to suggest that the RAD ought to have opted for one conclusion as opposed to the other regarding the incident in question.

[17] However, the RAD cannot only look to the past: it must also look to and pronounce on future risk, through the lens of the Convention ground claimed. In my view, this is where the RAD fell short. The RAD limited its analysis of future risk to the four officers involved in the incident, and what those four men might do, rather than considering the future general risk of politically-motivated persecution going forward. When assessing the question of nexus, the RAD must determine if the claimant's future fear of persecution has a nexus to a Convention ground.

[18] As a result, while the RAD reasonably characterized the four CICPC agents' motives for the incident, this did not absolve the RAD from assessing whether the expressed political opinion could put the Applicants at risk if returned to Venezuela. The country condition documents – that were before both the RPD and the RAD – attest to a number of issues faced by those who oppose the political order in Venezuela, including individuals who openly oppose the USPV, former government employees, and whistleblowers.

[19] Mr. Arocha was found to be credible; both the RPD and the RAD accepted that his difficulties at work and ultimate departure were due to his expressed political opinion. He was pressured by his employer to support the USPV and refused to do so for the eight year period in which he worked as an employee of the state-run company. The objective evidence

demonstrates that individuals, on the other hand, in Venezuela have undeniably experienced persecution as a result of their political opinions.

[20] Thus, the issue here is that the RAD did not examine Mr. Arocha's circumstances in light of other similarly situated individuals, even though it did not dispute that he openly opposed the USPV, and suffered consequences as a result. Instead of considering whether the Applicants had a nexus to a Convention ground, and then analysing whether any such nexus could result in persecution going forward, the RAD unreasonably limited the scope of the Applicants' fears of future persecution based on the one past incident, and the four CICPC officers responsible for it, as is shown in the following extract from its Decision:

[35] Counsel argues that the mere fact that the Appellants are not members of the Socialist Party and that the PA has been identified in the past as being against the government, is sufficient to put them at risk.

[36] Venezuela has approximately thirty-two million people as its population. It has been claimed but is unsubstantiated, that the United Socialist Party of Venezuela has a membership of about seven million. Even if that number is close to accurate, that would still leave about twenty-five million people in Venezuela who are not members of the Party, including the Appellants. That would translate to twenty-five million people being at the same risk as the Appellants, which I find to be a problem. It is simply not very likely that being one of millions not belonging to a specific Party would put one at risk.

[37] In analyzing the possible future risk, that analysis must be based on the alleged agent of harm. In this case, that "agent" is a handful of rogue agents who were committing profit oriented crime while using their badges to get away with that crime.

[38] Counsel's argument that the "Colectivos" may one day learn that the PA does not care for the government is not an argument for this appeal. The Colectivos are not included in this appeal as the agents of harm. Nor, for that matter, is the Socialist Party.



[39] The forward looking risk I am concerned with is a risk of danger from the four bandits with badges who robbed the Appellants on July 3, 2016. As there was no further action taken against the Appellants, even after the PA reported the robbery, I find that on a balance of probabilities, there is less than a mere chance that these Appellants will face any risk of harm should they return to Venezuela.

[Emphasis added]

[21] I recognize that when a claimant's forward-looking fears are not connected to a Convention ground, it will undoubtedly be open to the RAD to conclude that the claimant failed to establish a nexus (see for instance *Cao* at paras 56–58; *Su v Canada (Citizenship and Immigration)*, 2017 FC 66 at paras 44–45; *Vickram v Canada (Citizenship and Immigration)*, 2007 FC 457 at paras 9–14; and *Lei v Canada (Citizenship and Immigration)*, 2016 FC 665 at paras 22–26). In these cases – the first three from Guyana and the last, from Honduras – the alleged past incidents were not connected to Convention grounds. Furthermore, the documentary evidence did not satisfy the tribunal that the fears of similarly situated individuals would arise from Convention grounds, and as such, neither could the claimant's fear of future persecution.

[22] However, that may not be the case here (pending the tribunal's analysis on the point). Here, having believed that Mr. Arocha openly expressed his political opinion in the past, the proper approach would have been to determine whether the Applicants had established (i) a nexus between their fear and Mr. Arocha's political opinion, and (ii) a serious possibility of future persecution by assessing their objective and subjective fear grounded in the documentary and oral evidence on the record. That exercise cannot be short-circuited by tying a lack of future persecution to the incident of claimed past persecution. Going back to a stark example to illustrate this point, a Tutsi fleeing the genocide in Rwanda during the summer of 1994 might

have been fortunate enough to have evaded past persecution. On the other hand, a refugee claim at that time could not have properly been limited to any lack of past events relating only to the particular claimant.

[23] While the past is certainly one key indicator, it is not the sole barometer of future persecution. One can meet the serious possibility standard by establishing that similarly situated individuals face the risks that the claimant fears. As the Federal Court of Appeal stated in *Salibian* at paragraph 18:

In the context of claims derived from situations of generalized oppression, therefore, the issue is not whether the claimant is more at risk than anyone else in her country, but rather whether the broadly based harassment or abuse is sufficiently serious to substantiate a claim to refugee status. If persons like the applicant may face serious harm for which the state is accountable, and if that risk is grounded in their civil or political status, then she is properly considered to be a Convention refugee.

[24] Here, the RAD's error lay in dismissing the Applicants' section 96 claim on the basis that there was no nexus because one incident of alleged past persecution was not itself connected to Mr. Arocha's political opinion (*Salibian* at paras 16–19; *Ariprasatham v Canada (Citizenship and Immigration)*, 2016 FC 16 at paras 21–24). Rather, the RAD had to assess if, on the basis of this Convention ground, the Applicants demonstrated a serious possibility that they would be persecuted in the future.

[25] After all, Mr. Arocha never stated that he is at risk for the sole reason that he is not a member of the USPV, putting him in the same camp as a majority of other Venezuelans. Rather, Mr. Arocha's testimony was that he worked for a state-run company for eight years, while

openly refusing to support the USPV. His employers were aware of this situation. They harassed and sanctioned him accordingly. As a result, he left his position. It is in consideration of these personalized facts, and the general documentary evidence, that the RAD had to determine if the Applicants faced a serious possibility of persecution if returned to Venezuela on account of any nexus to his political opinion – whether or not it concluded that the home invasion incident was a random act by rogue authorities.

V. Conclusion

[26] For the reasons outlined above, the RAD's decision is unreasonable. The matter is remitted to another RAD panel for redetermination.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. This application for judicial review is granted.
2. The RAD decision is set aside, and the matter remitted for redetermination by a differently constituted panel.
3. No questions for certification were argued, and none arise.
4. There is no award as to costs.

"Alan S. Diner"

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Judge

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

**DOCKET:** IMM-4052-18

**STYLE OF CAUSE:** GERARDO BETANCOURT AROCHA ET AL v THE  
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