Federal Court  Cour fédérale

Date: 20201127

Docket: IMM-7094-19

Citation: 2020 FC 1098

[ENGLISH TRANSLATION REVISED BY THE AUTHOR]

Ottawa, Ontario, November 27, 2020

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

LILIANA GOMEZ DOMINGUEZ
JOSÉ LUIS GOMEZ
JEFFREY MARTINEZ GOMEZ
ALBEIRO CAJIAO CARVAJAL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants are Colombian citizens who claim to have received death threats from the Revolutionary Armed Forces of Colombia [FARC]. They seek judicial review of the rejection of their claim for asylum. Their claim was rejected on the grounds that they have an internal flight alternative [IFA] in Cartagena, and as a result of the 2016 peace accord, the FARC would no

longer be able to find them there. In my view, this decision is unreasonable, as it is based on a cursory review of the evidence regarding the current capacity of the FARC or its splinter groups and a misunderstanding of the applicants' burden of proof.

[2] Moreover, I believe that the decision makers should have considered whether the applicants, particularly Ms. Gomez, have "compelling reasons" for refusing to return to Colombia, pursuant to subsection 108(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

I. Background

[3] The principal applicant, Ms. Gomez; her spouse, Mr. Cajiao; and her son José Luis are citizens of Colombia. Her son Jeffrey is a citizen of the United States.

[4] Ms. Gomez is originally from the Valle del Cauca region of Colombia. Beginning in 2002, several members of her family were tortured and murdered by the FARC, apparently because the FARC believed they were collaborating with paramilitary groups. The FARC threatened her and her husband personally, and her husband was murdered in 2003. Other family members disappeared. Throughout these years, Ms. Gomez lived in hiding and moved frequently. She also lived in Ecuador for a brief period in 2010 and 2011, but then returned to Colombia.

[5] In 2012, the FARC began extorting money from the company that employed Mr. Cajiao, Ms. Gomez's new husband, and threatened to kill him.

[6] In 2013, Mr. Cajiao travelled to the United States. Ms. Gomez followed him in 2014, as did José Luis in 2015.

[7] In November 2016, Ms. Gomez's brother, who had returned to the Valle del Cauca region after living elsewhere in Colombia for 15 years, was kidnapped by guerrillas and has been missing ever since.

[8] The applicants came to Canada in 2017 and claimed refugee protection.

[9] The Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] rejected their claim. The RPD found the applicants' story to be credible. However, it ruled that the applicants had an IFA in Cartagena, a city located in the north of the country, 1,000 km from the Valle del Cauca region. Based on the fact that Ms. Gomez's brother had lived in other parts of Colombia for 15 years before being abducted in the Valle del Cauca region, the RPD concluded that the FARC had no motivation to search for family members in Cartagena. It added that the FARC would have lost interest in the applicants, given their absence from Colombia for more than five years. In addition, the RPD concluded that the FARC was [TRANSLATION] "not very active" in the Cartagena region. The RPD also summarily rejected their argument based on subsection 108(4) of the Act. It concluded that this provision could apply when circumstances in the country of origin had changed, but that no such change had occurred in Colombia, since the FARC is still active there.

[10] The applicants appealed to the Refugee Appeal Division [RAD] of the IRB. The RAD dismissed their appeal. It essentially endorsed the RPD's findings regarding the IFA. With respect to subsection 108(4) of the Act, the RAD appeared to recognize that there had been a change of circumstances in Colombia as a result of the 2016 peace accord. However, the RAD asserted that since the applicants had an IFA, they never met the definition of Convention refugee and therefore cannot claim the protection of subsection 108(4).

[11] The applicants now seek judicial review of the RAD's decision.

II. Analysis

[12] Decisions of the RAD are reviewed by this Court on the standard of reasonableness. In *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, at paragraph 101 [*Vavilov*], the Supreme Court of Canada stated that a decision may be unreasonable if it is "in some respect untenable in light of the relevant factual and legal constraints that bear on it."

A. *Internal Flight Alternative*

[13] The applicants argue that the RAD's conclusion regarding the IFA is unreasonable, as it is not based on a thorough analysis of the evidence. I agree. In upholding the RPD's findings, the RAD relied on fragmentary evidence and failed to consider evidence demonstrating that the applicants could be at risk throughout Colombia despite the peace accord. It also failed to consider the seriousness of the risk the applicants would face if they returned to Colombia.

(1) Legal Principles

[14] Refugee protection is surrogate protection, as it only applies where a person cannot find protection in their country of citizenship: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, at 709. Thus, a person cannot be considered a refugee if they are safe in certain parts of their country of origin. This situation is referred to as an internal flight alternative, or IFA.

[15] The criteria for establishing the existence of an IFA are well known. They were set out by the Federal Court of Appeal in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA) [*Rasaratnam*]. They are usually summarized by the following two propositions:

1. "the Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists" (*Rasaratnam*, at 710); and

2. "conditions in that part of the country must be such that it would not be unreasonable, in all the circumstances, for the claimant to seek refuge there" (*Rasaratnam*, at 709).

[16] See also *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (CA); *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 (CA).

[17] To resolve this case, the nature of the applicant's burden when the issue of an IFA is raised must be clarified. Since the concept of IFA is a component of the definition of "refugee," the burden is the same. One should not confuse balance of probabilities, which relates to evidence of the facts, with serious risk, which is the cornerstone of the definition of "refugee." These two concepts are intertwined in the description of the first condition for an IFA, found in *Rasaratnam*. In *Chan v Canada (Minister of Employment and Immigration)*, [1995] 2 SCR 593, at paragraph 120 [*Chan*], the Supreme Court of Canada distinguishes the two concepts more clearly and sets out the threshold applicable to each:

> Both the existence of the subjective fear and the fact that the fear is objectively well-founded must be established on a balance of probabilities. In the specific context of refugee determination, it has been established by the Federal Court of Appeal in *Adjei v. Canada* (*Minister of Employment and Immigration*), [1989] 2 F.C. 680, that the claimant need not prove that persecution would be more likely than not in order to meet the objective portion of the test. The claimant must establish, however, that there is more than a "mere possibility" of persecution. The applicable test has been expressed as a "reasonable possibility" or, more appropriately in my view, as a "serious possibility".

[18] Delineating the scope of application of each of these concepts is not an easy task. See, for example, *Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4, paragraphs 5–8; *Ramanathy v Canada (Citizenship and Immigration)*, 2014 FC 511, paragraphs 15–17. Putting too much emphasis on proof on a balance of probabilities may tend to obscure the fact that asylum claimants are not required to demonstrate that they will probably be persecuted: Hilary Evans Cameron, *Refugee Law's Fact-Finding Crisis: Truth, Risk, and the Wrong Mistake*, (Cambridge, UK: Cambridge University Press, 2018). Nevertheless, in many claims, the primary issue is whether the events of which the applicant alleges to have been a victim actually took place. There is no doubt that such events must be proven on a balance of probabilities. The risk

resulting from these facts, however, is assessed according to the less demanding test of serious possibility.

[19] Formulating a test that would delineate the scope of the two concepts across the full range of cases before the IRB is no easy task. In *Pacificador v Canada (Citizenship and Immigration)*, 2007 FC 1050 at paragraph 74, Justice Yves de Montigny, then a member of this Court, provided a useful guideline:

> It is well established that the standard of proof a refugee claimant must satisfy to show an objective basis for a fear of persecution is a serious possibility or reasonable chance of persecution in the future. The facts grounding the claim, however, must be established on a balance of probabilities. In other words, one must distinguish between what happened in the past, to be established on the civil standard of the balance of probabilities, and what will happen in the future, to be determined on the basis of the reasonable chance yardstick.

[20] According to *Vavilov*, this distinction between balance of probabilities and serious risk is among the legal constraints bearing on immigration decision makers. Obviously, decision makers are not required to elaborate on the question in every decision, particularly when the issue in dispute relates to facts specific to the applicant. However, where the situation requires it, decision makers must demonstrate that they were aware of the distinction and applied the standard of serious risk to the ultimate question, that of a well-founded fear of persecution.

(2) Application to the Facts

[21] The RAD made two errors in assessing the first criterion for determining the existence of an IFA. Before demonstrating this, I would like to point out that the facts relating to the threats

made against Ms. Gomez and Mr. Cajiao and the murder campaign against members of Ms. Gomez's family are not in dispute. Credibility is not in issue in this case.

[22] The first error involves a selective assessment of the evidence regarding the situation in Colombia since the signing of the peace accord: *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14, at paragraphs 91–93 [*Magonza*]. The certified tribunal record includes only two pages from the National Documentation Package on Colombia (pp 166–67). These two pages contain background information on the peace accord and the demobilization of the FARC. They also include a statement to the effect that there are illegal armed groups in Colombia, but that none are active throughout the entire country.

[23] On the basis of this information, the RPD concluded that [TRANSLATION] "the FARC does not have the capacity to find the applicants in Cartagena since it is not very active in that region." The RPD also cited a news article submitted by the applicants, but stated that the article supports its finding regarding the FARC's lack of capacity. The RAD fully endorsed these findings. Yet, the applicants had submitted three articles from reputable sources demonstrating that many FARC militants are continuing the armed struggle and that the success of the peace accord is far from assured.

[24] Given the seriousness of the risk claimed by the applicants, the RPD and the RAD were required to conduct more than a cursory review of the evidence. In *Vavilov*, at paragraphs 133–135, the Supreme Court of Canada stated that administrative decision makers have a "heightened responsibility" to justify their decisions when those decisions have "consequences that threaten

an individual's life, liberty, dignity or livelihood." The scant evidence in the certified tribunal record simply does not support a finding that there is no serious risk that the applicants will be found by the FARC.

[25] My analysis is buttressed by several decisions of this Court in which my colleagues considered that findings that a person pursued by the FARC had access to an IFA in areas of Colombia not or no longer controlled by the FARC as a result of the peace accord were unreasonable: *Rodriguez Cabellos v Canada (Citizenship and Immigration)*, 2019 FC 40, at paragraph 27; *Marino Ospina v Canada (Citizenship and Immigration)*, 2019 FC 930, at paragraph 33; *Ruiz Triana v Canada (Citizenship and Immigration)*, 2019 FC 1431 [*Ruiz Triana*]; *Losada Conde v Canada (Citizenship and Immigration)*, 2020 FC 626. In that last case, my colleague Justice James Russell states, at paragraph 81:

> The RPD also appears to equate the likelihood of assassination with particular areas of Colombia that the FARC controls. However, the evidence supports that victims do not have to live in particular areas dominated by FARC. The Ramirez assassination demonstrates that a target can be murdered by an agent who is not necessarily a FARC dissident. Assassinations are a real danger even where there is no territorial control.

[26] Given this Court's recent jurisprudence, the RAD would have been well advised to undertake a more comprehensive and balanced assessment of the information in the National Documentation Package on Colombia: *Magonza*, at paragraphs 77–83. As my colleague Justice Alan Diner points out in *Ruiz Triana*, at paragraph 9:

> In order to have been reasonable, [the Board] needed to engage with the credible sources that reported FARC breakaway individuals and groups that continued to operate underground in Colombia.

[27] The RAD committed a second error by applying the balance of probabilities standard to all of the issues in the case. In so doing, it failed to apply the standard of serious risk to the persecution to which Ms. Gomez would be exposed. As the Supreme Court of Canada noted in *Chan*, the standard of serious risk does not require that there be more than a 50% probability that the risk will materialize.

[28] The RAD's error is reflected in the following excerpt from its reasons for decision:

> After examining the evidence, I find that the RPD did not err in concluding that FARC dissidents do not have the capacity or motivation to find them in Cartagena, on a balance of probabilities.

[29] A conclusion as to the capacity or motivation of agents of persecution, while it may depend on certain facts, is essentially a risk assessment. As Justice de Montigny pointed out in *Pacificador*, the decision maker then looks to the future. Future events are not proven, but feared. This fear justifies refugee protection even if the probability of the event occurring is less than 50%.

[30] In this case, the evidence shows that the FARC has murdered or abducted eight members of Ms. Gomez's family, that the latest of these murders is relatively recent and that Ms. Gomez has been personally threatened. These facts are not in dispute. They are proven on a balance of probabilities. They establish that the FARC has demonstrated, over a long period of time, an extraordinary motivation to attack family members, and the capacity to carry out its plans. However, the RAD concludes that this motivation and capacity have been lost due to the fragmentation of the FARC following the peace accord and the prolonged absence of Ms. Gomez and Mr. Cajiao. These conclusions are not findings of fact, but rather a risk assessment.

[31] In reality, the capacity, and more importantly the motivation, of agents of persecution are central to the risk assessment that the RAD must conduct in order to grant refugee status. If the analysis is segmented and these elements must be proven on a balance of probabilities, there is little left to be assessed according to the standard of serious risk. Rather than considering whether the motivation and capacity of the agents of persecution had been proven on a balance of probabilities, the RAD should have conducted an overall assessment of the risk to which Ms. Gomez would be exposed upon her return to Colombia, and assessed whether that risk is serious.

[32] To illustrate this, suppose for a moment that the FARC's motivation for murdering Ms. Gomez can be estimated at 25%. That motivation would not be proven on the balance of probabilities. Yet, no one would dispute that the risk is serious.

[33] I would add that this assessment should take into account not only the likelihood of the risk materializing, but also its intrinsic gravity. Ms. Gomez fears that she will be the next victim in a murder campaign against her family members. A graver risk cannot be imagined. It follows that the probability of realization required for this risk to be considered serious should be lower than for risks that are less grave. In an injunction case, Chief Justice Robert Richards of the Saskatchewan Court of Appeal made remarks that can be applied to the issue at hand: the "true overall risk of irreparable harm will always be a function of *both* the likelihood of the harm occurring and its size or significance should it occur:" *Mosaic Potash Esterhazy Limited Partnership v Potash Corporation of Saskatchewan Inc*, 2011 SKCA 120, at paragraph 59.

[34] Furthermore, I find it hard to understand how the RAD could rely on the absence of Ms. Gomez and Mr. Cajiao from Colombia for five or six years to conclude that the FARC had lost its motivation to attack them. In this regard, it should be recalled that Ms. Gomez's brother was kidnapped in 2016, after a much longer absence.

[35] In short, the RAD decision does not include any assessment of the gravity of the risk or the likelihood of its occurrence. The RAD did not truly analyze the central issue whether Ms. Gomez's fear of persecution is well founded according to the serious risk standard established in *Chan*. The matter must therefore be remitted for reconsideration.

B. *The "Compelling Reasons" Provision*

[36] As an alternative argument, the applicants maintain that the RAD's refusal to apply subsection 108(4) of the Act was unreasonable. I agree. The RAD misunderstood the facts that give rise to application of this provision.

(1) Legal Principles

[37] Section 108 of the Act deals with situations involving loss of refugee protection. Subsection 4 of this section makes an exception to the loss of refugee protection in cases where there are "compelling reasons." These provisions read as follows:

108 (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection,	**108** (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :

in any of the following circumstances:	
. . .	. . .
(e) the reasons for which the person sought refugee protection have ceased to exist.	e) les raisons qui lui ont fait demander l’asile n’existent plus.
. . .	. . .
(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.	(4) L’alinéa (1)e) ne s’applique pas si le demandeur prouve qu’il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu’il a quitté ou hors duquel il est demeuré.

[38] One could imagine that, due to the structure of these provisions, the “compelling reasons” exception would apply only to persons who have been recognized as refugees but who are then subject to a cessation application by reason of a subsequent change of circumstances in their country of origin. However, since *Canada (Minister of Employment and Immigration) v Obstoj*, [1992] 2 FC 739 (CA), it has been established that this exception may also apply in the initial determination of refugee status, where there has been a change in circumstances prior to that determination.

[39] The *Obstoj* case dealt with the previous *Immigration Act*, RSC 1985, c I-2. Although the current Act is structured somewhat differently, the interpretation given in *Obstoj* still prevails. See, for example, *Kotorri v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1195; *Shpati v Canada (Citizenship and Immigration)*, 2007 FC 237 at paragraph 6; *Villegas Echeverri v Canada (Citizenship and Immigration)*, 2011 FC 390 [*Villegas Echeverri*]; *Lici v Canada (Citizenship and Immigration)*, 2011 FC 1451 at paragraphs 15–18; *Moya v Canada (Citizenship and Immigration)*, 2016 FC 315, [2016] 4 FCR 113; *Velez v Canada (Citizenship and Immigration)*, 2018 FC 290 [*Velez*]; *Ravichandran v Canada (Citizenship and Immigration)*, 2018 FC 811.

[40] Thus, when an claimant invokes the "compelling reasons" exception, the RPD and the RAD should consider the following questions:

1. Has the claimant, at any time in the past, met the definition of "refugee" or "person in need of protection" under sections 96 and 97 of the Act?

2. Has there been a change in circumstances in the country of origin that results in the claimant no longer meeting the definition of "refugee"?

3. If the answer to both of the above questions is yes, does the claimant have "compelling reasons" for not wanting to return to the country of origin?

(2) Application to the Facts

[41] The RAD's reasoning on the issue of "compelling reasons" appears to have stopped at the first of these three steps. Indeed, the RAD stated:

> . . . [T]he RPD rejected the Appellants' claim because it determined that they had an IFA in Colombia. In other words, since they have an IFA, the Appellants have not proven that they would have met the definition of a Convention refugee or person in need of protection which is a pre-condition that is required to trigger the exception in ss. 108(4) of the IRPA.

[42] However, the RPD's finding on the IFA pertains to the present, and not the past. It depends entirely on the evidence regarding the territories controlled by the FARC, or FARC splinter groups, following the 2016 peace accord. Thus, nothing can be inferred about Ms. Gomez's situation prior to the peace accord, and it was unreasonable for the RAD to conclude its analysis at this stage.

[43] Furthermore, the RAD appears to acknowledge the existence of the second element necessary for applying the "compelling reasons" provision when it writes, "it is true that the situation has changed in Colombia as a result of the peace process in 2016 with the FARC."

[44] Finally, and without attempting to compare the degree of horror in individual cases, Ms. Gomez's situation is likely, *prima facie*, to give rise to "compelling reasons." In *Villegas Echeverri*, a case strikingly similar to this one, my colleague, Justice Paul Crampton (prior to his appointment to Chief Justice), stated, at paragraph 49, that the applicant's brothers "had been subjected to persecution that, *prima facie*, rose to the level of being 'appalling' or 'atrocious,' by

virtue of the fact that they were murdered by the FARC." See also *Velez*, at paragraph 34, for another case in which an applicant's family members were murdered by the FARC, and *Umwizerwa v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 564, which involved a somewhat different context.

[45] The RAD must therefore reconsider the application of subsection 108(4) of the Act to Ms. Gomez's case.

III. Conclusion

[46] For these reasons, the RAD's decision is unreasonable, and Ms. Gomez's application for judicial review, and that of her son José Luis, must be allowed.

[47] As for Mr. Cajiao, although the facts underlying his claim are different, the RAD dismissed it on the same grounds as for Ms. Gomez, namely the existence of an IFA and the inability to rely on the "compelling reasons" provision. Since these grounds are unreasonable, Mr. Cajiao's application for judicial review must also be allowed.

[48] Jeffrey, meanwhile, is a citizen of the United States. The RAD rejected his refugee protection claim on the basis that he had no fear of persecution in that country. That finding is entirely reasonable and is not challenged.

[49] The applicants are also asking me to declare that [TRANSLATION] "there is no internal flight alternative for someone threatened by the FARC in Colombia, and there is no effective and

efficient State protection in Colombia." It is not the role of this Court to issue declarations that go beyond the scope of the matter before it. To the extent that the applicants are seeking a direction binding on the RAD when it reconsiders the case, I do not think it is necessary. When a reviewing court overturns an administrative decision, the usual remedy is to remit the matter: *Vavilov*, at paragraph 141; *Canada (Citizenship and Immigration) v Yansané*, 2017 FCA 48 at paragraphs 17–18 [*Yansané*]. There is no reason to depart from that practice in this instance. Nevertheless, "it goes without saying that an administrative tribunal to which a case is referred back must always take into account the decision and findings of the reviewing court, unless new facts call for a different analysis:" *Yansané*, at paragraph 25.

JUDGMENT in IMM-7094-19

THIS COURT'S JUDGMENT is as follows:

1. The style of cause is amended to indicate the "Minister of Citizenship and Immigration" as respondent.

2. The application for judicial review is allowed with respect to applicants Liliana Gomez Dominguez, José Luis Dominguez and Albeiro Cajiao Carvajal.

3. The decision made by the Refugee Appeal Division of the Immigration and Refugee Board on October 16, 2019, is set aside with regard to these three applicants.

4. The matter is returned to the Refugee Appeal Division of the Immigration and Refugee Board for redetermination with regard to these three applicants.

5. The application for judicial review is dismissed with regard to applicant Jeffrey Martinez Gomez.

6. No question is certified.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7094-19
STYLE OF CAUSE:	LILIANA GOMEZ DOMINGUEZ, JOSÉ LUIS GOMEZ, JEFFREY MARTINEZ GOMEZ, ALBEIRO CAJIAO CARVAJAL v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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