Federal Court  Cour fédérale

Date: 20220131

Docket: IMM-1769-21

Citation: 2022 FC 105

Toronto, Ontario, January 31, 2022

PRESENT: Mr. Justice Diner

BETWEEN:

MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

ANDREA CATALINA NAVAS MONTOYA
SOFIA CANO NAVAS
EMMANUEL GANAN NAVAS

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The Respondents are citizens of Colombia who entered Canada in December 2018 and made claims for refugee protection on the basis that they fear that Revolutionary Armed Forces of Colombia (FARC) or FARC dissidents will harm them if they return. The Refugee Protection Division (RPD) rejected the claims, finding credibility to be determinative. They appealed.

[2] The Refugee Appeal Division (RAD), accepting new country condition evidence including two post-RPD decision news articles, allowed the appeal, substituted its decision, and declared the Respondents to be persons in need of protection. The Minister argues that in doing so, the RAD unreasonably failed to address the particular circumstances of the applicants in light of the new evidence, which included the RAD's decision not to address the credibility findings. I agree that this flaw was fatal to transparent rationale for its outcome, as explained below.

II. The Decisions Below

[3] The RPD's primary concerns with credibility included "evolving", "vague" and "hesitant" testimony in response to inconsistencies that were put to the principal claimant, an inability to offer reasonable explanations for certain discrepancies and omissions in her testimony, and a perceived lack of subjective fear. The Board noted that she attempted to "embellish" ongoing threats. The RPD also impugned the legitimacy of her claimed subjective fear based on explanations of her residence and work locations, in the context of the stated threats. The panel also did not believe that she was a military target, referring to difficulties squaring this claim with the country condition evidence.

[4] As for the minor claimants – her children – since their allegations of threats by FARC members were based on their mother's discredited allegations, the RPD found that they had not established that they were being pursued, and that the minor son had not established a personalized risk that he would be recruited into FARC, since the RPD found this was a "risk faced by the general population in Colombia".

[5] The RAD, on appeal, acknowledged that its role was to consider all the evidence and decide whether the RPD had made the correct decision. The RAD also accepted two 2020 articles referring to country conditions in Colombia during the COVID-19 pandemic as new evidence. The RAD found these articles to be relevant and probative with respect to the current risks faced by the Respondents at the hands of armed groups, including FARC.

[6] After stating that it had reviewed the record and conducted an independent assessment of the evidence, the RAD concluded – on the basis of the country condition evidence – that the Respondents would personally be subject to a risk to their lives, or to cruel and unusual punishment or torture if they were to return to Colombia. The RAD found it unnecessary to address the RPD's credibility findings, noting the prevalence of child recruitment by armed groups during the pandemic and the inadequacy of state protection and accountability with regard to FARC violence throughout the country. In light of this, the RAD granted protection on the basis of s 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *Act*].

III. Analysis

[7] The parties agree that the applicable standard of review for the RAD's decision is reasonableness. A court conducting reasonableness review scrutinizes the decision maker's decision in search of the hallmarks of reasonableness – justification, transparency and intelligibility – to determine whether it is justified in relation to the relevant factual and legal constraints that brought the decision to bear (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 99). Both the outcome and the reasoning process must

be reasonable and the decision as a whole must be based on an internally coherent and rational chain of analysis (*Vavilov*, at paras 83-85).

[8] The Minister asserts the RAD decision was unreasonable due to the failure to address (i) the particular circumstances of the Applicants, and (ii) the RPD's credibility findings. The Respondents assert that the Decision was reasonable in light of the profile of the children and the entire record, although conceding certain weaknesses in the RAD's reasons.

[9] While I commend counsel for the Respondents for doing everything possible before the Court to argue that the decision met the criteria for reasonableness, and while conceding that *Vavilov* neither demands that decisions be perfect nor that they respond to every line of argument raised by the parties (at paragraphs 91 and 128), the decision must, at minimum, be transparent, and responsive to the central issues raised (at paragraphs 95-96, 127-128).

[10] In my view, the RAD decision was fatally flawed by two critical weaknesses. First, it failed to provide any rationale as to why the two articles were sufficient to arrive at a s 97 determination, taking into account the particular circumstances of the Respondent. Such consideration is incumbent on the decision maker according to *Prophète v. Canada (Citizenship and Immigration)*, 2009 FCA 31 at paragraph 7 [*Prophète*], where the Federal Court of Appeal clearly stated: "the examination of a claim under subsection 97(1) of the Act necessitates an individualized inquiry, which is to be conducted on the basis of the evidence adduced by a claimant "in the context of a *present* or *prospective* risk"" (see also, for instance, *Dag v. MCI*, 2017 FC 375 at para 14 [*Dag*]).

[11] Here, the RAD panel failed to conduct an individualized enquiry. Doing so, especially in light of the focus of the reasons under appeal, would have involved referencing the Respondents' accounts of what had taken place in Colombia, including where they lived, the threats they faced, and the attendant risk to the children. That, in turn, would have necessarily required the RAD to address – at least in some manner and even if briefly – the credibility findings of the RPD, enumerated in its substantial 12-page decision. Instead, the RAD sidestepped the analysis on the following basis and rationale:

> [14] I have reviewed the record and conducted an independent assessment of the evidence. On the basis of the new evidence, I find, on a balance of probabilities, the Appellants would be personally subjected to a risk to life, or a risk of cruel and unusual treatment or punishment, or a danger of torture should they return to Colombia. I therefore do not find it necessary to address the RPD's credibility findings or the Appellants' arguments in response to them.

[12] I find the RAD's reasoning to be unduly conclusory in light of the full context, which *Vavilov* instructs reviewing Courts to consider holistically. The Court noted at paragraph 103, "formal reasons should be read in light of the record and with due sensitivity to the administrative regime in which they were given, a decision will be unreasonable if the reasons for it, read holistically, fail to reveal a rational chain of analysis or if they reveal that the decision was based on an irrational chain of analysis". I will now explain how the RAD fell short with respect to the specific circumstances of this case.

[13] Here, the RAD relied primarily on the two new newspaper reports, one published by InSight Crime Analysis and the other by Human Rights Watch. These articles highlighted threats from groups such as the National Liberation Army (ELN) and FARC in certain specific, rural

areas of the country, including with respect to child recruitment. The RAD, pointing specifically to these two articles (as well as one other from the national documentation package for Colombia that had been before the RPD), noted an uptick in child recruitment, threats to parents to have their children join the groups, and the difficulties faced by the state to combat child recruitment in remote areas. So far, the RAD's rationale was sound.

[14] However, from there, the RAD drew a direct line to the fact that the claimants included two children, and would therefore presumably be in danger, and subject to a s 97 risk. This is where the RAD erred. The RAD arrived at its deduction without any consideration of the articles' comments on the circumstances surrounding the recruitment described, including that it was reported to be prevalent in rural and remote locations. Hence the finding that the RAD's rationale was conclusory in nature, going from a finding that input (A), that the claimant family included two children, without any discussion of input (B) whether there was any risk that these particular children, given their age, family profile, and location, might be targeted, arriving directly at the outcome in having deduced that (C) the family was at risk.

[15] In so doing, the RAD missed the crucial interstitial step (B) between input (A) and a justifiable, transparent conclusion (C). In other words, step (B) required the tribunal to consider whether these children indeed resided in rural locations, or in parts of the country mentioned by the articles. The RAD also failed to consider, as a result of a reading of these two articles, whether the principal applicant, the mother, had been threatened.

[16] For this reason alone, given the requirements of a s 97 analysis as outlined in *Prophète* and *Dag*, above, the RAD's decision does not add up per the requirements of *Vavilov*, which also states at paragraph 104:

> [104] Similarly, the internal rationality of a decision may be called into question if the reasons exhibit clear logical fallacies, such as circular reasoning, false dilemmas, unfounded generalizations or an absurd premise. This is not an invitation to hold administrative decision makers to the formalistic constraints and standards of academic logicians. However, a reviewing court must ultimately be satisfied that the decision maker's reasoning "adds up".

[17] As mentioned above, while Respondents' counsel admitted weaknesses in the decision, he stated that it nonetheless withstood judicial review if one read the decision in the context of the entire record. In this regard, counsel also relied on *Cepeda-Gutierrez v. Canada (MCI)*, 1998 CanLII 8667 (FC), 83 ACWS (3d) 264, at paras 16-17, for the point that such a statement will often suffice to convince a reviewing Court that the decision maker directed itself to the totality of the evidence when making findings of fact.

[18] I cannot agree that the blanks can simply be filled in by a reading of the hundreds of pages of the record in this case, not to mention all the evidence in the national documentation package. *Vavilov* requires more than a reviewing Court being able to fill in the reasons for the decision-maker. While a contextual approach of the type endorsed by the Supreme Court in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, may have sufficed to filling in the blanks pre-*Vavilov*, the Court has since cautioned of the limitations of such an approach, in *Vavilov* at paragraph 97, and its endorsement

of *Komolafe v. Canada (Minister of Citizenship and Immigration)*, 2013 FC 431 at para 11, where Justice Rennie held:

> *Newfoundland Nurses* is not an open invitation to the Court to provide reasons that were not given, nor is it licence to guess what findings might have been made or to speculate as to what the tribunal might have been thinking. This is particularly so where the reasons are silent on a critical issue. It is ironic that *Newfoundland Nurses*, a case which at its core is about deference and standard of review, is urged as authority for the supervisory court to do the task that the decision maker did not do, to supply the reasons that might have been given and make findings of fact that were not made. This is to turn the jurisprudence on its head. *Newfoundland Nurses* allows reviewing courts to connect the dots on the page where the lines, and the direction they are headed, may be readily drawn.

[19] As noted on this score in *Ortiz v. Canada (Citizenship and Immigration)*, 2020 FC 188 at para 22, *Vavilov* requires a reasons first approach: the judge is to start with the reasons, and assess whether they justify the outcome (see also Paul Daly, "One Year of *Vavilov*", 2020 CanLIIDocs 3614 at p 6).

[20] Here, starting with the RAD's reasons, there were simply no dots to connect the lines drawn by the RAD, in that the new evidence related to isolated incidents of the recruitment of children to fight with FARC and related dissident groups, in other words a generalized risk to children in parts of Columbia. The reader is thus left to guess why, in the particular circumstances of the Respondents and absent any identified errors, the objective evidence alone warranted reversing the RPD's decision. Is the RAD tacitly implying that the country condition articles alone are sufficient for a finding of a generalized risk, whereby no child is safe in Colombia? Is the finding of risk general to all Colombian children or particular to the Respondents? When asked whether the counsel was aware of any similar decision – where the

mere fact of fitting within the category of children, without more, led to the conclusion of s 97 risk – counsel was unable to point to any decision.

[21] Finally, I note that if the RAD were to have referred to the evidence of the threat to the principal applicant, it would have needed to heed the directives in *Canada (Citizenship and Immigration) v. Huruglica*, 2016 FCA 93at paras 70 and 102-103. To do so, the RAD would have needed to point out the errors that allowed it to depart from the RPD's findings, in this case the credibility findings that were found by the RPD to be determinative.

[22] Here, absent any independent analysis by the RAD as to whether the RPD's credibility findings were reached in error, it is not for this Court to supplant the tribunal's role. Indeed, as the Respondents acknowledge, it is not the role of this Court to reweigh the evidence. I entirely agree. The Court cannot reweigh the evidence, because the RAD never did so in the first place. In failing to do so, the RAD abdicated its appellate role in these particular circumstances.

[23] If, on the other hand, the RAD had explicitly addressed the Applicants' particular circumstances, it may have been open to the RAD to determine that specific elements of the objective record were determinative in light of their circumstances and in spite of the credibility concerns identified by the RPD. However, such a finding would need to be transparently articulated, and justified with an intelligible explanation.

IV. Conclusion

[24] Where – as here – we are left guessing as to the foundation of the s 97 risk, we are not in the presence of a reasonable decision that can be described as adequately transparent and justified, particularly in light of the determinative credibility findings of the decision under appeal. The RAD's decision will thus be returned to the tribunal for reconsideration.

JUDGMENT in IMM-1769-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The matter is to be sent back to a differently constituted panel of the tribunal for redetermination.
3. There is no question for certification.

"Alan S. Diner"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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