Federal Court  Cour fédérale

Date: 20220706

Docket: IMM-6189-18

Citation: 2022 FC 1000

Toronto, Ontario, July 6, 2022

PRESENT: The Honourable Madam Justice Furlanetto

BETWEEN:

WILLIAM MOISES CAMPOS SANDOVAL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a September 13, 2018 decision [Decision] of the Refugee Protection Division [RPD], wherein the RPD rejected the Applicant's claim for protection [Claim] under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The RPD found that the Applicant was not a credible witness and that the Applicant had not established a personalized risk of harm.

[2] For the reasons that follow, I find that the Decision was not unreasonable and that the application should be dismissed.

I. Background

[3] The Applicant is a citizen of El Salvador who at the time of the Claim was 21 years old. He asserts a fear of persecution by the El Salvadoran gang, Mara Salvatrucha [MS].

[4] In his Basis of Claim Form [BOC], the Applicant stated that on February 27, 2016, he found a threatening note on his family property that said he had one week to join the MS, leave the country or be killed [Letter]. On March 1, 2016, he fled El Salvador and went to the United Stated [US] where he was apprehended for illegal entry, held in detention, and then deported back to El Salvador. He stayed in hiding for two months and then left for the US again where he stayed with his brother for nine months before he came to Canada. He asserts that he did not make a US asylum claim because he feared poor treatment or deportation.

[5] The Applicant entered Canada in early 2018. His Claim was referred to the RPD as he fell under an exception to the Safe Third Country Agreement because he had a family member who was a permanent resident in Canada.

[6] The RPD refused the Claim on September 13, 2018. The Applicant's counsel agreed that section 96 of the IRPA did not apply. The RPD's decision was based on credibility and whether the Applicant faced a personalized risk sufficient to satisfy s. 97 of the IRPA.

[7] The RPD expressed concern that the Applicant did not provide more details about his Claim and more fulsome answers to simple questions. It drew negative credibility inferences against the Applicant on four grounds:

- failing to include an attempted recruitment by the MS in his BOC, despite being asked if the BOC was complete or needed correction, and providing no legal explanation for the omission;
- being unable to describe important details of the Letter, which was written in red ink and included a drawing of a gun and a knife and said he would be killed if he went to the police;
- failing to make an asylum claim in the US; and
- failing to obtain a written statement from his parents corroborating his claims that the MS were looking for him after he left the country, pursuant to rule 11 of the *Refugee Protection Division Rules*, SOR/2012-256 [*RPD Rules*], and to include these details in his BOC.

[8] The RPD found there to be insufficient credible evidence to conclude any of the alleged events actually occurred or to ground a claim of personalized risk under subsection 97(1) of the IRPA. It further found that even if the events were accepted as being true, the risk to the Applicant was not personalized as youth in El Salvador are at a general risk of being subjected to gang violence.

II. Issues

[9] The following issues are raised by this application:

- Did the RPD err in finding the Applicant lacked credibility?
- Did the RPD err in finding that the Applicant did not face a personalized risk within the meaning of section 97?

III. Standard of review

[10] The Respondent asserts that factual findings and inferences drawn by the RPD should be reviewed on a standard of palpable and overriding error. The Respondent relies on *Xiao v Canada (Citizenship and Immigration)*, 2021 FC 386 [*Xiao*], *Housen v Nikolaisen*, 2002 SCC 33 and Justice Deschamps' concurring opinion in *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 161. However, this argument cannot be accepted.

[11] Indeed, it was soundly rejected by this Court in *Xiao*, and in other cases, where the Court clearly stated that the reasonableness standard is the appropriate standard of review: *Xiao* at paras 7-9; *AB v Canada (Citizenship and Immigration)*, 2020 FC 915 at paras 13-14; *Sivalingam v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 1078 at paras 24-25; *Liao v Canada (Citizenship and Immigration)*, 2021 FC 857 at paras 21-22; *Gurung v Canada (Citizenship and Immigration)*, 2021 FC 1472 at paras 6-9; *Mburu v Canada (Citizenship and Immigration)*, 2022 FC 316 at paras 22-24.

[12] As stated by this Court in *Xiao* at paragraphs 8-9:

> [8] The Minister argues that a different standard should apply to the RAD's factual inferences. Drawing on Justice Annis' pre-*Vavilov* decision in *Aldarwish*, the Minister argues the RAD's findings of fact should be subject to the "palpable and overriding error" appellate standard: *Aldarwish v Canada (Citizenship and Immigration)*, 2019 FC 1265 at paras 21-30; *Housen v Nikolaisen*, 2002 SCC 33 at paras 3–6, 10–25, 36. In my view, the concerns and principles raised in *Aldarwish* are subsumed in the Supreme Court's analysis in *Vavilov*, which confirmed that the standard applicable to the findings of fact of an administrative decision maker is that of reasonableness: *Vavilov* at paras 125–126; *Sivalingam v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 1078 at paras 24–25.

> [9] In particular, Justice Annis focused on the importance of deferring to an administrative decision maker's assessment of the weight to accord to evidence: *Aldarwish* at paras 22–30. This principle is captured in *Vavilov*'s reasonableness review, which instructs that the Court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *Vavilov* at para 125. Justice Annis also concluded that allegations of "fact-finding process errors," such as failing to consider relevant evidence, should be owed less deference: *Aldarwish* at paras 21, 33, 42. The Supreme Court in *Vavilov*, likewise, clarified that this is an element of reasonableness review, recognizing that a decision may be unreasonable if it misapprehends or fails to account for relevant evidence: *Vavilov* at paras 125-126.

[13] The Supreme Court in *Vavilov* made clear that reasonableness is the presumptive standard of review absent certain exceptions, none of which are present here: (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 16-17 and 36. Palpable and overriding error does not apply in these circumstances. The applicable standard of review for the factual findings and inferences of the RPD is reasonableness as described in *Vavilov* at paragraphs 125-126.

[14] A reasonable decision is "based on an internally coherent and rational chain of analysis" that is "justified in relation to the facts and law that constrain the decision maker": *Vavilov* at paras 85-86. A decision will be reasonable if when read as a whole and taking into account this administrative setting, it bears the hallmarks of justification, transparency, and intelligibility: *Vavilov* at paras 91-95, 99-100.

IV. Preliminary Matter – Style of Cause

[15] As a preliminary matter, I note that the style of cause for this proceeding has been amended to reflect the correct Respondent – The Minister of Citizenship and Immigration.

V. Analysis

A. *Did the RPD err in finding the Applicant lacked credibility?*

[16] The Applicant argues against each of the credibility findings made by the RPD; however, I do not consider there to be any reviewable error, as set out below.

(1) Failure to refer to attempted recruitment in the BOC

[17] The Applicant argues that the RPD did not consider the reasons he gave for why the attempted recruitment was not included in the BOC. He asserts that the RPD did not explain what it meant by his failure to provide a "legal explanation" for the omission in view of the testimony given.

[18] The Respondent argues, and I agree, that the RPD adequately explained why it rejected the Applicant's explanation for failing to include the attempted recruitment in the BOC. The RPD stated that "the claimant has failed to give any legal explanation for this omission and subsequently the panel therefore draws a negative credibility inference." It went on to conclude that it was reasonable to expect that a claimant, who had retained competent counsel that had affirmed as to the completeness of the BOC, would have mentioned such an important encounter in the BOC. It is clear from its comments that the RPD considered the encounter to be important and central to the Claim and that this would be the type of information that should be included in the Applicant's primary narrative. However, the only explanation given by the Applicant was that he did not have any documents to corroborate the matter, it was personal and he did not remember the event.

[19] In my view, it was reasonable in the face of this explanation and the importance of the event to state that a proper legal explanation was not given, especially as the Applicant was represented by counsel and was asked about the BOC at the outset of the hearing.

(2) The Letter

[20] The Applicant asserts that the primary reason the RPD impugned his credibility regarding the Letter was a failure to describe its physical appearance even though he was not asked to do so. He contends that the RPD did not consider his lack of sophistication and the innocent misunderstandings that often arise when an applicant testifies through an interpreter.

[21] The Respondent argues that the Applicant was hesitant and vague in his testimony and made obvious and glaring omissions when describing the Letter. It asserts that the RPD's analysis of this testimony was accordingly reasonable. I agree.

[22] As set out in the following passage from the testimony of the Applicant before the RPD, the Applicant was asked a series of questions regarding the Letter in an attempt to elicit its key features. However, I agree with the Respondent, the answers given were not detailed and were evasive:

> PRESIDING MEMBER: Okay. Describe the letter.
>
> CLAIMANT: It said that if I were not to be part of the group they were going to kill me and that it was best for me to leave before arriving to that crime.
>
> PRESIDING MEMBER: Can you describe the letter?
>
> CLAIMANT: No
>
> PRESIDING MEMBER: Why not?

> CLAIMANT: I don’t remember.
>
> [...]
>
> PRESIDING MEMBER: So why do you not recall the content or the appearance of the letter?
>
> INTERPRETER: Thank you, [Speaking in Spanish]
>
> CLAIMANT: I don’t remember the date.
>
> PRESIDING MEMBER: Do you recall anything about the appearance of the letter?
>
> CLAIMANT: That it said that if I decided not to be part of them that I should leave the country. If not I was going to be another member of Death.
>
> PRESIDING MEMBER: Was the letter polite?
>
> CLAIMANT: No.
>
> PRESIDING MEMBER: Why would you say it was not polite?
>
> CLAIMANT: Because they treated me or called me a dog.
>
> PRESIDING MEMBER: Can you describe anything else about the letter?
>
> CLAIMANT: No.

[23] In my view, it was not unreasonable for the RPD to comment on the omission of such obvious elements as the red ink and picture of the gun and knife, especially when the Applicant was asked to describe the letter and was asked about its appearance. As stated by the RPD:

> While the claimant was able to recall, the letter refers to the claimant as a dog. He gave no more further fulsome details during the questioning achieved by the panel.
>
> In the panel’s view, it is reasonable to expect that a person in the current situation should have known the contents of his own disclosure.
>
> The claimant was unable to do so, despite this being easily described by any person who had seen the letter as being hand

> written again in red ink with these threatening logos of weapons front and centre on the letter.
>
> The claimant displayed a lack of sensitive detail regarding the content of this important document which forms much of the basis of his current fear of alleged return to El Salvador.
>
> In the panel's view, he has given no reasonable explanation for his lack of memory or recollection.

[24] The Applicant argues that the RPD failed to consider the lack of sophistication of the Applicant when evaluating his answers. However, the RPD expressly stated in its introductory comments that when assessing the testimony of the Applicant it took into account the Applicant's assertion that he was from an agricultural background, had only 10 or 11 years of education and did not graduate from high school.

[25] Moreover, unlike *Ali v Canada (Citizenship and Immigration)*, 2018 FC 688 and *Khan v Canada (Minister of Citizenship and Immigration)*, 2006 FC 1490 which were cited by the Applicant, the sophistication of the Applicant did not play a part in the questions regarding the Letter as the questions were straightforward and simply worded. This is not a case where a particular word or cultural practice by the Applicant was misunderstood. Rather, the RPD took issue with the lack of detail provided by the Applicant despite the number of questions that were asked in multiple different ways.

[26] The Applicant's further argument that the RPD ignored innocent misunderstandings arising from translation is also not persuasive, as there are no apparent misunderstandings on the transcript arising from the Applicant's testimony on the Letter. As stated in *Owochei v Canada (Citizenship and Immigration)*, 2012 FC 140 at paragraph 25, an applicant is expected to raise

any issues relating to translation at the earliest opportunity. No such issues were raised during testimony in this case.

[27] In my view, it was not unreasonable for the RPD to raise a concern regarding the Applicant's memory regarding the Letter considering its contents and appearance and the fact that it was in the possession of the Applicant up to the time of the hearing. I agree with the Respondent that it was open for the RPD to make a negative credibility finding in these circumstances.

(3) Failure to claim US asylum

[28] The Applicant states that US asylum was not sought because the Applicant feared deportation and US imprisonment. He argues that the RPD failed to consider his explanation and to provide sufficient reasons for rejecting it: *Valencia Pena v Canada (Citizenship and Immigration)*, 2011 FC 326 at para 4.

[29] The RPD stated that it asked the Applicant why there was no US asylum claim, and that the claimant responded it was because of fear of deportation by the President. The RPD noted that the claimant referred to Mr. Donald Trump as being President of the United States at the time, when the United States was still under the Obama administration.

[30] The RPD acknowledged that an applicant's allegations are presumed to be true unless there are reasons to doubt their truthfulness: *Khokhar v Canada (Citizenship and Immigration)*, 2008 FC 449 at para 20. However, it noted *Sun v Canada (Citizenship and Immigration)*, 2015

FC 387, which stated at paragraph 28, that while "refugee claimants are not obliged to seek asylum in the first country they enter after flight, the failure to claim is considered a relevant consideration to impugn the credibility of a claimant, provided it is not the sole basis of that credibility finding" (see also *Sidiqi v Canada (Citizenship and Immigration)*, 2017 FC 17 at paras 26-29).

[31] The Applicant argues that his delay of nine months in leaving the United States was explained by his need to raise $800 to obtain private transportation to Canada. He states that a delay in claiming asylum cannot be a reason to reject a claim where the delay can be explained: *Riche v Canada (Citizenship and Immigration)*, 2019 FC 1097 at para 15.

[32] However, as noted by the Respondent the RPD does not impugn the Applicant's credibility based on his nine-month delay in the US. Rather, the RPD highlights his ultimate failure to claim asylum. As stated by the RPD, "the panel draws an adverse inference regarding the claimant's overall credibility furthermore from a failure to claim in the U.S.A. despite the claimant's protracted sojourns there". I agree with the Respondent that there is no reviewable error in considering the failure to claim asylum in the United States as part of the Applicant's credibility assessment.

(4) Rule 11 of the *RPD Rules* and corroborating evidence

[33] The Applicant further contends that the RPD ignored the explanation he provided as to why he did not provide corroborating evidence from his parents. He asserts that the RPD erred in its application of rule 11 of the *RPD Rules*.

[34] The Court has held that it is an error to make an adverse credibility finding solely on the basis of the absence of corroborative evidence. However, where there is a valid reason to doubt a claimant's credibility, the lack of documentary evidence can be a valid consideration for assessing credibility: *Luo v Canada (Citizenship and Immigration)*, 2019 FC 823 at paras 19-21; *Pazmandi v Canada (Citizenship and Immigration)*, 2020 FC 1094 at paras 25-26.

[35] The following two-part test for determining when a decision-maker can require corroborative evidence was proposed in *Senadheerage v Canada (Citizenship and Immigration)*, 2020 FC 968 at paragraph 36 and applied in *Nadarajah v Canada (Citizenship and Immigration)*, 2022 FC 171 at paragraph 13:

> [36] To summarize, a decision-maker can only require corroborative evidence if:
>
> 1. The decision-maker clearly sets out an independent reason for requiring corroboration, such as doubts regarding the applicant's credibility, implausibility of the applicant's testimony or the fact that a large portion of the claim is based on hearsay;
>
> 2. The evidence could reasonably be expected to be available and, after being given an opportunity to do so, the applicant failed to provide a reasonable explanation for not obtaining it.

[36] In my view, the RPD's reasons demonstrate that it considered each of these points. The RPD raised several concerns in the Decision regarding the Applicant's credibility, which grounded its request for corroborative evidence. The RPD acknowledged the Applicant's explanation that he was only receiving advice from his parents, but found this to be unacceptable

on the view that he “might readily” have obtained a written statement in light of the ability to obtain other documents from his parents. I see no error in this analysis.

[37] For all these reasons, in my view, the Applicant has failed to demonstrate a reviewable error with the RPD’s cumulative credibility findings.

B. *Did the RPD err in finding that the Applicant did not face a personalized risk within the meaning of section 97?*

[38] The Applicant asserts that the RPD’s conclusion that he was only subject to generalized risk is unreasonable. He argues that if an individual is personally targeted with a threat, the risk they face can no longer be said to be general, even if there is generalized risk in the country.

[39] The Respondent argues that there was no credible basis to accept that the Applicant was personally targeted. As such, the Applicant’s argument must fail.

[40] In this case, the RPD reviewed the country condition evidence and found there was a generalized risk to the population of El Salvador from the MS. The RPD found that the Applicant had failed to establish that the MS were looking for him or had returned to look for him since he left the country. Contrary to the arguments of the Applicant, the RPD did not find on the evidence that the Applicant had sufficiently established that he had been personally targeted in a manner that would lead to a heightened risk compared to the general population in El Salvador. I find no reviewable error in this analysis.

[41] The application is accordingly dismissed. No question for certification was proposed by the parties and none arises in this case.

JUDGMENT IN IMM-6189-18

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended to correctly identify the Respondent as The Minister of Citizenship and Immigration.

2. The application for judicial review is dismissed.

3. No question of general importance is certified.

"Angela Furlanetto"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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