Federal Court  Cour fédérale

Date: 20230224

Docket: IMM-465-22

Citation: 2023 FC 270

Ottawa, Ontario, February 24, 2023

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

MAURICIO ORTIZ CORRALES
ELIZABETH MARQUEZ CUARTAS
LUNA ORTIZ MARQUEZ
SOFIA ORTIZ MARQUEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an application for judicial review of a decision by the Refugee Protection Division ("RPD"), dated December 30, 2021, which found that the Applicants are neither convention

refugees nor persons in need of protection due to a finding of a lack of forward-facing risk and state protection.

II. Facts

[2] The Applicants are citizens of Colombia who allege a serious possibility of persecution on a *Convention* ground and a risk to life or of cruel and unusual punishment or treatment on a balance of probabilities in Colombia from the *Autodefensas Gaitanistas de Colombia*, a group which I will refer to as the "agents of persecution". Their allegations are as follows. The evidence submitted by the Applicants was considered credible by the RPD.

[3] The Applicants allege they have been declared military targets by the agents of persecution because the Principal Applicant ("PA"), advocated for a social housing project opposed by a local politician. The RPD rejected this submission essentially because there was no evidence to support any linkage between the agents of persecution and the local politician.

[4] In September 2016, the PA and his spouse purchased an apartment in a social interest housing project, which had not yet begun construction. In 2017, a councilman and mayoral candidate started to oppose the housing project over concerns regarding its impact on local water systems. The Applicants suggest that the councilman's motivation for opposing the project was to attract people to his mayoral campaign.

[5] In August 2018, a judge suspended the project temporarily. As a result, buyers in the housing project (like the PA) formed groups to save the project, which would save their

investments. The PA was designated as the main spokesperson for the group, which represented more than 600 families that had made investments. The group reached out to various governmental offices without desired results. The group decided to take their complaints to the public through the local media.

[6] On November 3, 2019, following a public pronouncement, the PA received a threatening phone call mentioning the project and demanding he back off. There was no evidence of who made the threat, whether bythe local councilman or the agents of persecution or another group or entity.

[7] On February 4, 2020, the PA attended a public hearing regarding the project. On his way home, he was stopped by two men on a motorcycle who threatened to kill him if he did not leave the housing project alone. Again there is no evidence about who made this threat, whether the alleged agents of persecution or the councilman or someone else. On February 5, 2020, the PA was so upset he sought treatment at the emergency ward at the hospital.

[8] The Applicants moved to a new residence on February 15, 2020, and decided to take precautions. The Applicants purchased plane tickets to the U.S., but were unable to travel due to pandemic restrictions.

[9] On September 4, 2020, the PA and his wife were followed by two men on a motorcycle after visiting a family member. The couple were able to lose the men, but heard the sound of a

gunshot following their escape. Upon their return, the Applicants did not return to their home as a precaution.

[10] On September 7, 2020, the PA attended a local “inspection” office and spoke with someone who recommended he file a report with Fiscalia, which is the Office of the Attorney General of Colombia. The PA filed the report on September 9, 2020, but did not hear back.

[11] On September 9, 2020, the Applicants moved to go live with a relative elsewhere in Colombia and never returned to their apartment. Despite this, a letter threatening to kill the PA was left at the main gate of the relative’s home on October 19, 2020. There is no evidence who sent this letter. The Applicants thereafter decided to move again to live with another relative. On October 30, 2020, the PA received another phone call from a private number alerting him that he has become a military target and threatening to kill him.

[12] The PA then contacted a relative in Canada who suggested the Applicants come to Canada so that she could help them. On December 1, 2020, they left for Miami, Florida, using the plane tickets previously purchased. On January 15, 2021, the Applicants entered Canada and made a claim for protection.

III. Decision under Review

A. *Nexus to the Convention*

[13] The RPD considered the evidence and found the Applicants do not have a nexus to the Convention ultimately owing to the finding that the PA was targeted for criminal reasons by a criminal organization, and not on any Convention ground. The RPD considered several points in coming to this conclusion.

[14] The panel noted the PA provided no evidence that could tie or link the opposing politician to the threats of the alleged agents of persecution. On this, the panel further found based on the evidence, particularly that in the National Documentation Package ("NDP"), that the agents of persecution are a criminal organization and not a political one. As per the Federal Court of Appeal's decision in *Klinko v. Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 327 (CA), the panel found the agents of persecution were not so interconnected with the state that a refusal to cooperate with them could be construed as an expression of political opinion. In the panel's view, the PA's public and televised pleas to the government to intervene in the dispute do not change these facts. Ultimately, the RPD concluded that the fact the PA has not abandoned his financial stake in the project, on a balance of probabilities, would not be construed as an expression of political opinion.

[15] Given the finding on a lack of nexus to section 96, the RPD then assessed the claim under section 97(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*].

B. *Forward-Facing Risk*

[16] The panel begins its assessment by outlining a chronological timeline of events leading up to the Applicants' refugee claim. The panel made factual findings regarding the PA, namely that the agents of persecution were solely interested in the PA and not his family, and that it was not established on a balance of probabilities that the agents of persecution knew of the PA's complaint to the Attorney General's office. The panel noted both this Court and the Federal Court of Appeal decided in *Sanchez v Canada (Citizenship and Immigration)*, 2007 FCA 99 and *Olori v Canada (Citizenship and Immigration)*, 2021 FC 1308, that it could be objectively reasonable, for those fearing risk on their return in relation to business or property interests located in their country of nationality, to abandon those interests. If they abandoned those interests, they might no longer be at risk.

[17] The RPD pointed out the Applicants have been outside of Colombia for over a year now and are no longer involved in the litigation of the housing project matter. Apart from a single brief phone call the PA's mother received in June 2022, there was also no evidence of a strong motivation from the agents of persecution to locate the PA or intimidate his family members on their return.

[18] The panel examined various objective evidence in the record, also finding the PA does not fit the profile of an individual likely to be pursued by groups like the agents of persecution in this matter, such as journalists, human rights activists or social leaders.

[19] Overall, the panel did not find a serious possibility under section 96 they would be targeted by the agents of persecution for any reason—not just any Convention reasons—should they return to Colombia. Under section 97, the panel found the documentary evidence did not establish on a balance of probabilities that the agents of persecution would turn their attention to the Applicants on their return.

C. *State Protection*

[20] The panel also found that the Applicants had not rebutted the presumption of state protection with clear and convincing evidence. The RPD found the Applicants did not take all reasonable steps to avail themselves of state protection, nor did they demonstrate with clear and convincing evidence that Colombia is unable or unwilling to provide adequate state protection. In this regard, the panel pointed out several instances of the PA choosing not to report threatening incidents to law enforcement due to his subjective belief that they would not help him. Neither did the PA follow-up with the Attorney General's office regarding his complaint. Moreover, the panel pointed out that the Attorney General's office did offer the family protection, as stated in the Fiscalia report, but that the PA did not give the Fiscalia their new home address.

[21] In considering these circumstances, the panel found on a balance of probabilities the PA delayed his report to the Attorney General's office for reasons of *subjective* reluctance that were not *objectively* established. In doing so, the PA did not comply with the prerequisites of the offer of protection, namely that he follows up with them and provide an address so they could impose those protective measures.

[22] The panel considered next whether adequate state protection would have been provided. The reasons conducted what I consider a thorough assessment of the objective background evidence that provided insight into the process of filing a complaint with law enforcement. The panel also assessed quantitative data concerning the operational effectiveness of various Colombian law enforcement entities.

[23] In assessing these factors, the panel affirmed that the Applicants' *subjective* reluctance to engage the state is not a basis to rebut the presumption of state protection. Notably the panel found that apart from making one complaint three months prior to leaving the country, the Applicants did not avail themselves of any other measures of protection, all based on their subjective distrust of the authorities.

[24] The panel agreed the Applicants did not need to exhaust all avenues of protection, but considered it reasonable to expect the Applicants to have taken reasonable steps in their specific circumstances. In the panel's view, the Applicants had two basic avenues to protection: the National Protection Unit and the Fiscalia/Attorney General. The Fiscalia offered them protection but the Applicants chose not to give their address. As such, the panel concluded the Applicants had not presented clear and convincing evidence that the state's protection if forthcoming would have been operationally inadequate, either systematically or in their specific circumstances.

IV. Issues

[25] The only issue is whether the RPD's decision was reasonable.

V. Standard of Review

[26] The parties agreed, as I do, that the applicable standard of review is that of reasonableness. In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

> [31] 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" (*Vavilov*, at para. 85). Accordingly, when conducting reasonableness review "[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with 'respectful attention' and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion" (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand "the basis on which a decision was made" (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).
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> [32] A reviewing court should consider whether the decision as a whole is reasonable: "what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review" (*Vavilov*, at para. 90). The reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para. 99, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).
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> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or

> significant to render the decision unreasonable" (*Vavilov*, at para. 100).
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> [Emphasis added]

[27] That said, the Supreme Court of Canada in *Vavilov* makes it clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". No such circumstances exist in the case at bar. The Supreme Court of Canada instructs as follows:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": CHRC, at para. 55; see also Khosa, at para. 64; Dr. Q, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see Housen, at paras. 15-18; Dr. Q, at para. 38; Dunsmuir, at para. 53.
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> [Emphasis added]

[28] In addition, the Federal Court of Appeal recently held in *Doyle v Canada (Attorney General)*, 2021 FCA 237 [*Doyle*] that the role of this Court is not to reweigh and reassess the evidence:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role.

> Sticking to its role, the Federal Court did not find any fundamental errors.
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> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.
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> [Emphasis added]

VI. Analysis

A. *Nexus*

[29] The Applicants submit the RPD unreasonably determined that the agents of persecution are a solely criminal organization, and thereby rendered a negative decision regarding nexus. The Applicants point out that certain evidence directly contradicts the RPD's finding that the agents of persecution are not a political organization, referring to the NDP documentation. The Applicants submitted the PA's refusal to work with the agents of persecution could be construed as an expression of political opinion, and there was no need to find a linkage between the agents of persecution and the local councilman.

[30] The Applicants contend that the evidence in this case is not of "little probative value" and therefore should be ascribed significant weight in establishing a nexus to a Convention ground.

[31] With respect, in my view and in these respects, the Applicants are asking this Court to reweigh and reassess the evidence. That role is withheld from this Court by both *Vavilov* and *Doyle*, cited above, absent exceptional circumstances which are not present in this case. These

issues are dealt with in the lengthy, careful and detailed reasons of the RPD, and I am not persuaded its conclusions warrant judicial review.

[32] Notably, the RPD made an express factual determination to the contrary, namely that the agents of persecution are a criminal organization. The RPD had ample evidence in the NDP on which to make that finding. The Applicants provided no evidence linking the politician opposing the housing project to the alleged agents of persecution. In fact—as the RPD found—there was no evidence as to why the agents of persecution was opposed to the housing project.

[33] In this respect, the RPD correctly followed constraining law in *Flores Romero v Canada (Citizenship and Immigration),* 2011 FC 772 at paragraph 7, and others including *Olmedo Rajo v Canada (Citizenship and Immigration),* 2011 FC 1058 at paragraph 17, which stand for the proposition that crime and personal vendettas cannot generally be the basis for a well-founded fear of persecution:

> [7] […] Victims of crime and personal vendettas cannot as a general proposition, establish a link between fear of persecution and the Convention grounds. In this regard I agree with the observation of Justice Legacé in *Starcevic v Canada (Citizenship and Immigration)* 2008 FC 1370 that:
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> > […] criminality, revenge, and personal vendetta cannot be the foundation of a well-founded fear of persecution by reason of a Convention ground for the simple reason that such a persecution is not related to one of the Convention grounds.

B. *Forward-Facing Risk*

[34] The Applicants take issue with the RPD's understanding of the PA's status as a military objective, which the panel found did not change the assessment of forward-facing risk because the connotation behind the phrase "military objective" was ambiguous in the documentary evidence. The Applicants point to a specific item in the record that defines "military objective" as a person whose "life, physical integrity, and freedom are endangered." The RPD's finding as to the PA's military objective status is limited to one statement:

> [47] The fact that the PC was declared a military objective by the AGC does not change my assessment in this regard. The connotation behind this phrase is somewhat ambiguous in the documentary evidence.

[35] There is no assertion here that the RPD member disputed the PA's status as a military objective; rather it is the opposite. This comment is simply making a finding as to the impact of this status based on the RPD's assessment of the evidence, which, as mentioned above, I am not at liberty to disturb in the absence of exceptional circumstances. Again, and with respect, this submission invites the Court to reweigh and reassess the evidence. That, however, is the role of the RPD, which in that respect is entitled to deference, in addition to such reassessment being withheld on judicial review by *Vavilov* and *Doyle*.

[36] The Applicants also dispute the RPD's finding that the PA was not a social leader. It seems to me this also engages the reassessment and reweighing of evidence.

[37] The Applicants also reject the RPD's finding the PA and his family would likely not face a forward-looking, personalized risk if they were to walk away from their financial investment in the housing project. There is certainly precedent that those facing risk in their country of nationality due to property holdings or business interests should, where reasonable, abandon those interests to eliminate that risk: see *Sanchez v Canada (Citizenship and Immigration)*, 2007 FCA 99 at paragraph 17 per Richard, C.J., and more recently Justice Pamel's decision in *Olori v Canada (Citizenship and Immigration)*, 2021 FC 1308 at paragraph 32.

[38] In addition, as the Respondent notes, when reporting the threat posed by the motorcyclists, the PA said he was told to withdraw from the housing project; however, when asked whether he could abandon his apartment unit, he stated his "belief" the agents of persecution would continue to pursue him because of his interviews to the media and because he had made a "denunciation". This dovetails into the overall conclusion of the RPD that the Applicants are motivated by subjective concerns that are not objectively reasonable. His answer was also problematic because there was no evidence the agents of persecution knew the Applicant had reported their threats because the PA did not say who made the threats. I also note the PA does not fit the profile of targets of the agents of persecution noted in country condition documents, namely journalists, human rights activists and social leaders. It seems to me the RPD's conclusions are reasonably grounded in constraining law and the record. Judicial intervention is not warranted.

C. *State Protection*

[39] The Applicants reject the findings made by the RPD regarding considerations of state protection, namely:

a. The Applicants only made one complaint, and it was three months prior to leaving Colombia;

b. there was no follow-up to the complaint made;

c. the documentary evidence shows that the Applicants could have made an application to the National Protection Unit, failed to do so in a timely manner and did not prove that they were ineligible to receive protection;

d. the Applicants did not exhaust all avenues of protection and failed to take reasonable steps to obtain protection;

e. the Fiscalia told the Applicants to provide them with their new address and they failed to do so and after which he could obtain a protection measure.

[40] Again, and with respect, this is an evidentiary determination based on a heavily factually suffused issue. In my respectful view, the RPD identified the correct constraining law in terms of looking for adequate state protection at the operational level. The RPD reasonably required the Applicants to present "clear and convincing" evidence Colombia was unable or unwilling to provide them state protection. The RPD made the findings just outlined based on the record before it, and with respect, I am not persuaded these warrant judicial review. Particularly fatal to the Applicants on this point is their failure to give their address to Colombian authorities, begging the question how they could expect protection without Colombia knowing where in that country the Applicants were located. Overall on this issue I am not persuaded the RPD acted unreasonably in relation to the adequacy of state protection at the operational level.

VII. Conclusion

[41] Given the Court's findings above, this application for judicial review will be dismissed.

VIII. Certified Question

[42] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-465-22

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, no question of general importance is certified and there is no Order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	MAURICIO ORTIZ CORRALES, ELIZABETH MARQUEZ CUARTAS, LUNA ORTIZ MARQUEZ, SOFIA ORTIZ MARQUEZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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