Federal Court  Cour fédérale

Date: 20231017

Docket: IMM-8597-21

Citation: 2023 FC 1379

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 17, 2023

PRESENT: Mr. Justice Pentney

BETWEEN:

RAUL ERNESTO JARAMILLO ESCOBAR
ROSY YULIETH BUSTAMANTE GOMEZ
JUAN ANDRES JARAMILLO BUSTAMANTE
NICOLE VANESSA JARAMILLO BUSTAMANTE
SAMUEL SANTIAGO JARAMILLO BUSTAMANTE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Refugee Appeal Division (RAD) confirming the merits of a decision of the Refugee Protection Division (RPD) that the applicants are not Convention refugees or persons in need of protection within the meaning of

sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) for credibility reasons.

[2] The applicants argue that the RAD's decision must be set aside because the decision is tainted by a breach of procedural fairness and the finding with regard to their credibility is unreasonable. They noted some of their former counsel's shortcomings, the RAD's refusal to accept additional evidence, and the fact that the RAD did not provide a reasonable explanation as to the credibility findings.

[3] For the following reasons, this application for judicial review is dismissed.

I. Facts and underlying decision

[4] The applicants are citizens of Colombia. Raul Ernesto Jaramillo Escobar is the principal applicant. The applications of his spouse, Rosy Yulieth Bustamente Gomez, and their children refer to the principal applicant's written account.

[5] In 2015, the applicants opened an El Emporio restaurant and bar in Ibagué, Tolima, Colombia. In April 2019, the applicants received a letter from Autodefensas Gaitanistas de Colombia (AGC), a powerful criminal group in Colombia, demanding 50 million pesos and other items for their soldiers. The applicants did not comply with their extortion demand, initially considering that the threat was not serious. In the same month, two men visited the principal applicant in his bar, stabbed him in the arm and accused him of not complying with the AGC's demands. He received stitches. Later, the principal applicant stopped going to his bar and started managing the business by telephone.

[6] Two months later, in June 2019, the applicants opened another bar in Ibagué (Outside Bar) and closed the first bar that had caught the AGC's attention. In July 2019, the applicants filed a report with the attorney general's office and recounted the events to *Q'hubo*, a newspaper. After receiving some threatening telephone calls and text messages, the principal applicant filed a second report with the attorney general's office in the city and asked for police protection.

[7] As the police took no action to protect them, the applicants, fearing for their safety, moved to Bogota on July 25, 2019. On August 8, 2019, in Bogota, members of the AGC threatened the principal applicant and his spouse, who filed a third report with the attorney general's office on the same day. Since the AGC had managed to find them in Bogota, the applicants decided to return to Ibagué to live with the principal applicant's mother. On August 18, 2019, they received another threatening letter from the AGC and filed a fourth report with the attorney general's office in the city of Ibagué three days later. The principal applicant then filed a [TRANSLATION] "final complaint" with the national protection unit (UNP) and began to search for countries offering refuge. He chose Canada, and on September 4, 2019, the family left Colombia for Canada (with a stopover in the United States).

[8] The RPD hearing was held on October 26, 2020. At the beginning of the RPD hearing, the principal applicant added to his account that the AGC were still looking for him and that they had visited his former employer (job he left in September 2019) to find him, but that he had no evidence of this.

[9] The RPD accepted the untimely filing of the six affidavits but noted that none of the affidavits mentioned the visit to the former employer. The RPD was of the view that these last-minute allegations undermined the credibility of the applicants' account. The RPD did not

believe that the applicants intended to move to Bogota permanently to flee the AGC, in light of the father and mother's assertions that neither of them left their jobs, that they did not get rid of their apartment, and that they did not close the second bar during the period when they supposedly moved to Bogota. The RPD noted that they received visas for a trip to Disney in the U.S. in June and July 2019 and that they left for Bogota the day after their application to the Ibagué police for protection was approved. Relying on the same facts, the RPD concluded that the applicants were already intending to leave Colombia for Canada, without any intention of relocating to Bogota for their safety.

[10] The RPD also noted the following behaviours that are inconsistent with the applicant's alleged fear: the opening of a second bar in June 2019 for financial reasons, and the delay between the stabbing attack and the complaint to the authorities. The RPD also notes that the following facts demonstrate the absence of a prospective risk: The applicants closed their bars in Ibagué, and their other family members are safe in Ibagué and elsewhere in Colombia and have never received threats from the AGC.

[11] The RPD rejected their refugee protection claims on the grounds of lack of credibility and the absence of a prospective risk.

II. RAD decision

[12] On October 29, 2021, the RAD dismissed the applicants' appeal for lack of credibility.

[13] The RAD rejected the new evidence submitted by the applicants, citing subsection 110(4) of the IRPA. The RAD assessed the 11 items of evidence filed on appeal and found that no new

facts that had arisen since the rejection of the refugee protection claim. The applicants have presented to this Court arguments regarding Exhibit A-11, in particular a photograph, “text messages” and an invoice regarding a threatening message left at the applicants’ former address, dated no later than October 2020. With respect to Exhibit A-11, the RAD concluded that the evidence did not meet the statutory requirements because the documents related to events that occurred prior to the rejection of the refugee protection claim.

[14] The RAD also considered the applicants’ argument that the negligence or professional incompetence of their former representative explains the untimely filing of the six exhibits at the beginning of the RPD hearing—the untimely filings undermined the applicants’ credibility before the RPD. The RAD noted that the applicants argued before it that the actions of the former representative, not the actions of the RPD, apparently caused a breach of procedural fairness. The RAD clarified that such a procedural fairness issue is assessed on a correctness standard and that the representative’s incompetence is determined on a reasonableness standard. The RAD was of the view that it had to determine whether a complaint was made to the appropriate regulatory agency, and whether the former representative received sufficient notice of the alleged professional incompetence to have an opportunity to be heard.

[15] The RAD rejected the submissions regarding the allegations of incompetence against the former counsel:

> In this particular case, the new counsel for the principal appellant does not appear to have notified the former counsel of the allegations. There is no evidence adduced to show that the principal appellant took any further action, such as lodging a complaint with counsel’s governing body. In addition, the principal appellant did not submit into evidence any documents that directly relate to or support the principal appellant’s allegations against former counsel. The documents submitted as new evidence deal

> with the refugee protection claim, not the alleged misconduct of former counsel. For these reasons, I am of the opinion that the principal appellant has not fulfilled the obligation to notify his former counsel and give him an opportunity to respond.

[16] The RAD then assessed the refugee protection claim in light of the arguments on appeal and confirmed the RPD's negative finding with regard to the applicants' credibility.

[17] Regarding the negative credibility associated with the addition to the account on the morning of the RPD hearing, the visit to the former employer by the men searching for the principal applicant, an event that is not corroborated by the evidence filed after the deadline on the same day, the RAD noted that a month and a half passed between this event and the RPD hearing, and that this event is crucial to demonstrate the persistence of the alleged risk. The RAD concluded that this event did not occur and made a negative inference as to the credibility of the fear alleged by the applicants.

[18] With respect to the negative credibility associated with the opening of a second bar, the RAD drew the same conclusion as the RPD that, between financial needs and the fear for their lives that led the applicants to leave Colombia to seek refuge in Canada, this fear apparently outweighed financial needs. This undermines the credibility of the applicant's alleged fear.

[19] Regarding the RPD's conclusion that the move to Bogota was not genuine, in addition to making the same factual remarks as the RPD (summarized above), the RAD noted that the children remained in Ibagué while the parents were in Bogota and that, furthermore, the applicants obtained US visas in the meantime, which is inconsistent with their alleged fear. The RAD also noted that, although they stated on appeal that they did not close their businesses because they could work remotely, the applicants explained during the RPD hearing that they did

not request a transfer from their employers or take steps to move their businesses, contrary to the behaviour that the RAD expects of people who have a fear such as that alleged by the applicants. The RAD drew a negative inference from this as to the credibility of the applicants' intention to permanently relocate to protect themselves.

[20] With respect to the limited weight given by the RPD to the report filed with the attorney general three months after the attack in April 2019, the RAD confirmed that this delay undermined the credibility of the fear alleged by the applicants. The RAD also gave little weight to this report.

[21] The RAD also considered that the testimony at the RPD hearing was "unclear and contradictory," and that the RPD asked questions about the contradictions raised in the refugee protection claim form and their testimony and gave [TRANSLATION] "every opportunity to provide the necessary clarifications, which they also failed to do."

[22] For all these reasons, the RAD dismissed the appeal. The applicants seek judicial review of this decision.

III. Issues and standard of review

[23] The issues are as follows:

A. Did the RAD breach the principle of procedural fairness in its analysis of the allegations of negligence and incompetence, or by rejecting Exhibit A-11?

B. Did the RAD err in its assessment of the evidence and credibility?

C. Did the RAD err in failing to analyze the refugee protection claim under section 97 of the IRPA?

[24] The applicable standard as to whether the RAD committed a breach of procedural fairness is similar to the correctness standard: *Brefo v Canada (Citizenship and Immigration)*, 2020 FC 815 at para 13.

[25] The applicable standard as to whether the RAD applied the wrong test regarding the admissibility of new evidence is reasonableness, based on the analytical framework established in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. The reviewing court must "examine the reasons given by the administrative decision maker and ... determine whether the decision is based on an intrinsically consistent reasoning and is justified in light of the relevant legal and factual constraints" (*Canada Post Corp. v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post*] at para 2). It is the applicant's responsibility to satisfy the Court that "any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100, cited with approval in *Canada Post* at para 33).

IV. Analysis

A. *Did the RAD breach the principle of procedural fairness in its analysis of the allegations of negligence and incompetence, or by rejecting Exhibit A-11?*

(1) Parties' submissions

[26] First, the applicants consider that the RAD erred in criticizing them for not sharing their allegations of negligence or incompetence with the former representative before filing the appeal record. They are of the view that doing this before filing the appeal record is not required by the Immigration and Refugee Board's *Practice Notice – Allegations Against Former Counsel* (IRB Practice Notice) and that, in fact, this practice notice requires that it be done before the proceedings are completed.

[27] The applicants state that before the IRB, sending a written statement containing allegations against a former representative is not a condition for making an argument in relation to that person's incompetence. This is why when members consider that the files contain this type of allegation or that the issue is important to the matters in the file, they inform the claimants or appellants so that they comply with the Practice Notice. In the case at hand, the RAD did not do so. Therefore, according to the applicants, the issue is not the conduct of the former counsel but an argument that the RAD failed in its duty to inform them that they had to comply with the Notice procedure. The applicants submit that if the RAD were of the view that the recording of the hearing (which contained the applicant's criticism of his former counsel) was insufficient to explain the lack of communication on the allegation of incompetence, it had to inform them, which the RAD did not do in the case at hand.

[28] Second, the applicants argue that, in analyzing this argument, the RAD confused its role with that of the Federal Court. One clue raised was that it stated that it must assess the elements of procedural fairness on the correctness standard, while the RAD's role is always to assess the RPD file on that standard. This suggests that the RAD applied the Federal Court protocol "Re: Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court" (the Protocol), instead of following the rules contained in the IRB Practice Notice.

[29] Third, the applicants allege that the RAD's reasoning regarding allegations of negligence or incompetence is inconsistent with the principles of justification, transparency, and intelligibility described in *Vavilov*. In particular, the RAD refers to non-applicable procedures (it refers to a "complaint" and "judicial review proceedings") and refers to a "court" whose identity cannot be inferred.

[30] Fourth, the applicants state that the RAD erred in mentioning, in paragraph 18 of its reasoning, that the applicants did not raise the RPD's breach of procedural fairness, even though they did so in paragraph 12 of their appeal memorandum.

[31] With respect to the rejection of Exhibit A-11, the applicants consider that the rejection breaches procedural fairness because this determination prevented the application of section 110(6) of the IRPA, which would have allowed the RAD to hold a hearing. This would have remedied the RPD's breach of procedural fairness when it failed to ask why the applicants filed the new evidence out of time.

[32] In response, the respondent submits that the applicants do not have [TRANSLATION] "clean hands", as their conduct with respect to the previous representative and the rules of the RAD and this Court is not beyond reproach. The respondent submits that this justifies rejecting their arguments, citing *Wong v Canada (MCI)*, 2010 FC 569 at para 10.

[33] The respondent argues that, regardless of when the applicants were required to inform the former representative (in order to respect the representative's rights and so that this Court can have the benefit of the representative's point of view), they did not do so. Thus, according to the respondent, the applicants are barred from pleading their former representative's misconduct before this Court, and this Court must not consider these arguments. The respondent submits that the applicants' failure to comply with the Protocol is, in itself, a reason for this Court not to consider their allegations of professional misconduct, citing *Salaudeen v Canada (MCI)*, 2022 FC 39 at para 21.

[34] The respondent notes that the applicants would not have had to comply with the Protocol requirements if they had complied with the requirements of the IRB Practice Notice by informing the former representative (which they could have done in the nine months between the January 18, 2021 Notice of Appeal and the RAD's final decision dated October 29, 2021) before pleading this argument so that the representative's version of the facts could be presented to the RAD. The respondent argues that the applicants are merely reiterating arguments already submitted and rejected by the RAD.

[35] At the same time, the respondent submits that, even if the applicants' arguments that the RAD should have found a breach of procedural fairness were accepted, the reasonable conclusions of the RAD still stand with respect to the applicants' inconsistent behaviour and the

analysis of the principal applicant's credibility. The respondent cites *Paulo v Canada (MCI)*, 2020 FC 990, where the Honourable Mr. Justice Gascon explains that an error made by a decision maker is not determinative if the outcome would have been the same without the error.

[36] With respect to the exclusion of Exhibit A-11, the respondent argues that the RAD did not make a substantive error, because it is obvious that the email containing the exhibit was sent no later than October 2020, so prior to the RPD's decision. The fact that the RAD referred to October 2021 is only a typographical error.

(2) Discussion

[37] I do not accept the applicants' submissions on procedural fairness.

[38] While I agree that the RAD's analysis of this point is not perfect and can be confusing, I am of the view that its guideline is obvious: the RAD criticizes the applicants for failing to inform the former representative before the end of the proceeding, and for failing to file documents corroborating their version of the facts.

[39] The IRB Practice Notice is clear: a party that raises allegations of incompetence or negligence by a former representative must inform it "as soon as possible". The applicants did not do so. They filed their memorandum with the RAD on January 18, 2021, and the RAD rendered its decision on October 29, 2021. Therefore, the applicants had full opportunity to inform their former representative.

[40] The applicants state that it was not necessary to inform him of their complaints about his conduct, because the matter was discussed with the former representative at the beginning of the

RAD hearing. The applicants acknowledged at the hearing that there is a significant difference between a general discussion of concerns and an allegation of professional incompetence.

[41] Furthermore, I do not accept that a RAD policy (if any) to inform the parties when it perceives that the case involves an allegation of incompetence may replace or override the applicants' paramount obligation to inform their former representative as soon as possible of the allegations of incompetence that they have raised.

[42] At the hearing, the applicants' denied that they were making an argument of professional incompetence against their former representative, arguing that their complaint focused instead on the RAD's actions. The problem with this position is that the submissions and evidence filed by the applicants (before the RAD and before the Court) include clear and direct submissions regarding the conduct of their former representative. For example, the principal applicant's affidavit states:

> [TRANSLATION]
>
> 17. Before the Refugee Protection Division, I felt inadequately represented for the reasons set out in my appeal memorandum: see Exhibit "A";
>
> 18. I consider that this inadequate representation created a mindset in the panel that led it to unreasonably undermine my credibility because of facts beyond my control;

[43] It is clear that the applicants' arguments are entirely focused on the alleged incompetence of their former representative, and that the failure to notify the former representative that the allegations in question were made was the basis of the RAD's decision. There was no denial of procedural fairness.

[44] With respect to the RAD's decision not to accept the filing of the new evidence in A-11, I see no error. The RAD did not err in determining that the events described in this document occurred prior to the RPD's decision. It is obvious that the reference to October 2021 instead of October 2020 was simply a typographical error. The RAD's decision on this element complies with the statutory requirements, and there is no breach of procedural fairness.

B. *Did the RAD err in its assessment of the evidence and credibility?*

(1) Parties' submissions

[45] The applicants state that they were threatened several times prior to their departure from Colombia and that they took steps to protect themselves. They argue that the RAD did not deal with the allegations central to their application and instead placed too much emphasis on the ancillary elements. They also argue that the RAD relied on the RPD's findings of fact without assessing the evidence independently. The applicants are of the view that this led the RAD to an erroneous finding on their credibility.

[46] Further, the applicants submit that the RAD erred at paragraph 34 in considering the applicants' testimony to be "unclear and contradictory" but did not list the contradictions to which it was referring. Citing *Mohamed v Canada (MCI)*, 2020 FC 1145 at paras 36 and 37, the applicants state that this is an error that undermines the entire decision. The applicants argue that this lack of analysis is all the more unreasonable because the RAD recognized that the RPD did not identify any contradictions. The applicants state that it is not "intelligible" or "transparent", as required by *Vavilov*.

[47] The respondent submits that the RAD's decision as to the applicants' credibility is reasonable. The RPD discussed a series of factors, including the inconsistent behaviour of the applicants in not using the visas they obtained from the United States to flee Colombia, their delay in leaving Colombia, and the fact that they decided to open a second bar after the initial threats. The RAD did not find any errors in this analysis, and the respondent submits that the RAD's decision is not based solely on the determination that the applicants' testimony is unclear and contradictory.

(2) Discussion

[48] I am not satisfied by the applicants' submissions. The RAD's finding as to their credibility is logical and clear.

[49] The RAD correctly noted that, in addition to the late filing of the information the principal applicant received from his former employer that the AGC was looking for him at his workplace, the documentary evidence on the record (evidence that the RPD admitted) does not corroborate the principal applicant's testimony.

[50] The RAD also summarized the other elements central to the RPD's credibility finding, most of which relate to behaviour inconsistent with the alleged risk of harm they claim to have faced. The elements include: the fact that the applicants opened a second bar in Ibagué, given the threats they were already facing; that their move to Bogota is not genuine; and their delay in seeking state protection. It was only after discussing these elements in detail with reference to the facts of the case that the RAD also stated that the member "paid close attention to the recording of the hearing and found unclear and contradictory testimony" (RAD decision at para 34). While

I agree that the RAD could have explained this finding in more detail, I do not agree that this is an error sufficient to make the decision unreasonable.

[51] The Supreme Court's words in *Vavilov* at paragraph 125 should be remembered:

> 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 also refrain from reweighing and reassessing the evidence considered by the decision maker... (citations omitted).

[52] In light of my findings above, there is no reason to challenge the RAD's credibility findings.

C. *Did the RAD err in failing to analyze the refugee protection claim under section 97 of the IRPA?*

(1) Parties' submissions

[53] The applicants argue that the RAD's finding that their credibility was undermined by the lack of "fear" is unreasonable. They argue that their case is not based on section 96 of the IRPA (which deals with a "fear"), but on paragraph 97(1)(b) of the IRPA, which deals with "risk", which is entirely objective and does not require the concept of fear.

[54] According to the applicants, the impact of the RAD's error is amplified by repetition; the RAD mentioned the lack of fear on several occasions. As a result, it is not possible to know whether the RAD conducted its own analysis and applied the correct test. The applicants argue that it is not a reasonable analysis that is consistent with *Vavilov*'s analytical framework.

[55] The respondent rejects this position, noting that the applicants' memorandum before the RAD itself referred to the term "fear". According to the respondent, it is obvious that the RAD analyzed the case under section 97 of the IRPA, and the use of the term "fear" is simply a reflection of the fact that the RAD responded to the applicants' written representations.

(2) Discussion

[56] There are no errors in the RAD's analysis; it is clear that the RAD understood that the applicant's refugee protection claim is based on section 97 of the IRPA, and the RAD's analysis is consistent with the requirements of this statutory provision.

[57] The RAD's analysis reflects the applicants' submissions and how they expressed their position. The consideration of the parties' positions is an indication of a reasonable decision, according to *Vavilov*'s analytic framework. I agree with the respondent that the applicants referred to the concept of "fear" in their representations, and the RAD simply adopted their term in the decision. In reading the RAD decision as a whole, it is clear that the RAD reviewed the file from the perspective of section 97 of the IRPA. This is a reasonable analysis, and the use of the word "fear" is not an indication that the RAD erred in its understanding of the applicable legal framework.

V. Conclusion

[58] For all these reasons, the application for judicial review is dismissed.

[59] There are no questions of general importance to be certified.

JUDGMENT in IMM-8597-21

THIS COURT ORDERS as follows:

1. The application for judicial review is dismissed.

2. There is no question of general importance to certify.

"William F. Pentney"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8597-21
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