

Federal Court



Cour fédérale

**Date: 20231031**

**Docket: IMM-9634-22**

**Citation: 2023 FC 1453**

[ENGLISH TRANSLATION]

**Montréal, Quebec, October 31, 2023**

**PRESENT: Mr. Justice Gascon**

**BETWEEN:**

**PAUL EMILIO REYES CONTRERAS**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] The applicant, Paul Emilio Reyes Contreras, is a citizen of Peru. Mr. Reyes Contreras is seeking judicial review of a decision dated August 23, 2022 [Decision] in which the Refugee Protection Division of the Immigration and Refugee Board of Canada [IRB] determined that he was not a Convention Refugee or a person in need of protection under section 96 and

subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The RPD rejected Mr. Reyes Contreras' claim because of his lack of credibility and insufficient evidence in support of his case.

[2] Mr. Reyes Contreras submits that the RPD erred in finding that there was no credible basis for his refugee protection claim within the meaning of subsection 107(2) of the IRPA, relying on his lack of credibility and his inability to establish the allegations in his claim. He also claims that a breach of procedural fairness tainted the process before the RPD because of the incompetence of his former counsel, which, according to Mr. Reyes Contreras, should result in the Decision being set aside and a new hearing being held.

[3] For the following reasons, I will dismiss Mr. Reyes Contreras' application for judicial review. Mr. Reyes Contreras has not satisfied me that his former counsel committed sufficient malpractice to meet the test for incompetence of counsel. In addition, after reviewing the RPD's reasons and findings, the evidence before it and the applicable law, I see no grounds for overturning the Decision. The inadequacies in the evidence submitted by Mr. Reyes Contreras and the contradictions in his testimony reasonably support the RPD's negative credibility findings, and the RPD's reasons have all the qualities that make its reasoning logical and coherent, having regard to the relevant legal and factual constraints.

## **II. Background**

### **A. *Facts***

[4] In his refugee protection claim, Mr. Reyes Contreras alleges a fear of being killed by a gang started by the former mayor of Cajatambo, the Peruvian city where he lived. According to Mr. Reyes Contreras, the mayor and his administration are an organized and dangerous gang with ties to groups and corrupt municipal governments throughout Peru.

[5] In November 2013, Mr. Reyes Contreras took part in a challenge to the mayor's administration, acting as a driver for people wanting to remove the mayor from office. Near the end of December 2013, Mr. Reyes Contreras received telephone threats through the mayor's collaborators. According to those persecutors, if he did not stop meddling in their affairs, he might have an accident. Mr. Reyes Contreras did not file any complaints with the Peruvian police at the time because he did not believe that those comments were a real death threat.

[6] A month later, in January 2014, Mr. Reyes Contreras was assaulted by four of the persecutor's hit men, who stabbed him in the leg with a knife and kicked him. Mr. Reyes Contreras later received several telephone threats, including death threats. Finally, his persecutors told him that, if he continued to transport people protesting against the mayor, he would be killed.

[7] In February 2014, Mr. Reyes Contreras was chased in his car but was able to escape from his pursuers. He then received a call telling him that, the next time, he would not get away. A month later, on March 11, 2014, he was assaulted by several individuals, to the point that he had to go to the hospital for a broken nose. Mr. Reyes Contreras then filed a report with the Peruvian

police and requested their protection. However, the police told him that they could not help him, given their lack of capacity and the endemic violence in Peru.

[8] The following week, Mr. Reyes Contreras decided to leave the country for Mexico and eventually the United States. He arrived in the United States in 2014 and was placed in detention for irregular entry. He did not seek asylum in the United States. In 2020, six years later, Mr. Reyes Contreras left the United States for Canada. He arrived in Canada in October 2020 and filed his refugee protection claim two months later.

**B. *RPD decision***

[9] In its Decision, the RPD noted certain inconsistencies, implausibilities and contradictions in Mr. Reyes Contreras' Basis of Claim Form [BOC Form] and in his testimony. The RPD also concluded that Mr. Reyes Contreras had failed to discharge his burden of establishing that he faces a serious possibility of persecution on a Convention ground or that he would be subjected to a risk to his life or the risk of cruel and unusual treatment or punishment.

[10] The RPD also found that Mr. Reyes Contreras was not a credible witness. On several occasions, the RPD noted circumstances in which Mr. Reyes Contreras' testimony contradicted his written account in his BOC Form. When the RPD asked him about the reason for those contradictions, Mr. Reyes Contreras replied that his account in his BOC Form was poorly written. The RPD noted that, at the start of the hearing, Mr. Reyes Contreras had had the opportunity to make corrections to his account concerning the alleged incidents but did not do so. For example, the RPD asked several times why Mr. Reyes Contreras did not go to the Peruvian police to report the threats he received or his injuries following the first altercation.

Mr. Reyes Contreras replied that, in his view, the altercation with the four hit men was not related to his involvement in the activities against the mayor. When the RPD asked him why he had stated in his detailed account that the mayor's gang had sent those hit men, he replied that the account may have been poorly written.

[11] The RPD also noted that Mr. Reyes Contreras did not submit certain evidence in his file to support his testimony. For example, Mr. Reyes Contreras stated that he saw a doctor following the assault but did not include evidence to that effect in the file. Mr. Reyes Contreras stated that he forgot to include that information. The RPD thus rejected several of Mr. Reyes Contreras' explanations in his testimony because of the lack of evidence submitted.

[12] The RPD also found that the lack of fear of persecution undermined Mr. Reyes Contreras' overall credibility. In that respect, the RPD noted that it asked Mr. Reyes Contreras several times why he never went to the Peruvian police before the attack on March 11, 2014. Mr. Reyes Contreras' response that an individual needs to be almost dead in Peru for the authorities to pay attention to a complaint did not satisfy the RPD. The RPD instead found that Mr. Reyes Contreras did not provide any reasonable explanations or evidence to demonstrate a real fear of persecution.

[13] Furthermore, when the RPD asked Mr. Reyes Contreras for the police report and the medical report concerning the events on March 11, 2014, he claimed that he [TRANSLATION] "may" have given copies to his counsel but that he could not find a copy. However, his counsel confirmed that he had not received such documents from Mr. Reyes Contreras. The RPD then noted rule 11 of the *Refugee Protection Division Rules*, SOR/2012-256, which requires that refugee protection claimants provide acceptable documents to establish the elements of their

refugee protection claim or adequately explain why they did not provide those documents. The RPD found Mr. Reyes Contreras' explanations for the lack of evidence and the failure to provide acceptable documents to be unreasonable. Those elements led the RPD to make a negative finding concerning Mr. Reyes Contreras' credibility.

[14] The RPD also found that Mr. Reyes Contreras did not provide satisfactory explanations to justify his failure to seek asylum in Mexico and the United States, an omission that, in its opinion, contributed to the lack of fear of persecution and undermined Mr. Reyes Contreras' credibility. The RPD also asked why Mr. Reyes Contreras waited two months after arriving in Canada before filing his refugee protection claim. Although Mr. Reyes Contreras stated he feared doing so, the RPD found that he did not reasonably explain the delay in filing his refugee protection claim.

[15] In short, the RPD found that Mr. Reyes Contreras did not establish the main allegations contained in his BOC Form and that, in light of [TRANSLATION] "a multitude of negative credibility findings, contradictions and omissions", Mr. Reyes Contreras is not credible.

### **C. *Standard of review***

[16] There is no doubt that the standard of reasonableness applies to this case with respect to the RPD's findings on credibility and the lack of sufficient evidence to establish the basis of the refugee protection claim (*Regala v Canada (Citizenship and Immigration)*, 2020 FC 192, at para 5; *Janvier v Canada (Citizenship and Immigration)*, 2020 FC 142, at para 17; *Yuan v Canada (Citizenship and Immigration)*, 2018 FC 755, at para 13; *Warsame v Canada (Citizenship and Immigration)*, 2016 FC 596, at para 25).

[17] The standard of reasonableness is presumed to apply whenever a court must decide the merits of an application for judicial review. There are two exceptions to this presumption: where either the intent of the legislature or the rule of law requires that the standard of correctness be applied (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 17). Neither of these exceptions applies in this case to the issues of credibility and the weighing of evidence.

[18] The standard of reasonableness focuses on the decision made by the administrative decision maker, including both the reasoning process and the outcome (*Vavilov* at paras 83, 87). A reasonable decision is one that is justified by transparency and intelligibility and based on internally coherent reasoning (*Vavilov* at paras 86, 99). The reviewing court must consider the factual and legal constraints that bear on the decision maker (*Vavilov*, at paras 90, 99) without “reweighing and reassessing the evidence considered” by it (*Vavilov*, at para 125).

[19] The party seeking judicial review bears the burden of showing that the decision was unreasonable. For the reviewing court to set aside an administrative decision, it must be satisfied that there are sufficiently serious shortcomings to render the decision unreasonable (*Vavilov*, at para 100).

[20] However, in terms of procedural fairness, the Federal Court of Appeal has repeatedly concluded that procedural fairness does not require the application of the usual standards of judicial review (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24–25; *Perez v Hull*, 2019 FCA 238 at para 18;

*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [CPR] at para 54). Rather, it is a legal question to be assessed in light of the circumstances to determine whether the procedure followed by the decision maker met the standards of fairness and natural justice (CPR at para 56; *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 51–54).

### **III. Analysis**

[21] Mr. Reyes Contreras is challenging two aspects of the RPD: its unreasonableness and the lack of procedural fairness attributable to the incompetence of his former counsel.

#### **A. *Reasonableness of Decision***

[22] Mr. Reyes Contreras submits that, on several occasions in the Decision, the RPD simply focused on the responses that suited it, without considering explanations provided by Mr. Reyes Contreras or the evidence from the National Documentation Package [NDP] on Peru. Citing *Owusu-Ansah v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 442 (FCA), Mr. Reyes Contreras maintains that, in assessing the credibility of a refugee protection claimant, the RPD was required to consider and weigh all oral and documentary evidence, not just some. Mr. Reyes Contreras argues that the Decision is unreasonable because the RPD found a lack of credibility and a lack of evidence without having considered the entire file before it.

[23] In particular, Mr. Reyes Contreras alleges that the RPD failed to consider the documentary evidence in the file concerning Mr. Reyes Contreras' persecutor—the mayor of Cajatambo—and the fact that he was re-elected to that position in 2022. Thus, according to



Mr. Reyes Contreras, because he is still politically active, the mayor continues to be a risk to him if he were to return to Peru.

[24] Mr. Reyes Contreras also argues that he explained to the RPD that the contradictions between his testimony and his BOC Form stemmed from the fact that his counsel had prepared his BOC Form following conversations they had in Spanish, and that the counsel's interpretation of the facts was perhaps incorrect or flawed, given that he is not a translator. According to Mr. Reyes Contreras, the RPD failed to consider that fact in the Decision.

[25] Finally, with respect to the assaults in January 2014, Mr. Reyes Contreras criticized the RPD for finding that [TRANSLATION] "the refugee protection claimant replied that it was an inconsequential altercation that was not related, in his opinion, to his participation in the grassroots movement". Mr. Reyes Contreras submits that those conclusions ignore the context and the fact that he explained that, at the time of that incident, he had not made the connection between what happened to him and his involvement in the campaign against the mayor.

[26] Mr. Reyes Contreras' arguments are not persuasive.

[27] I first note, as did the Minister, that Mr. Reyes Contreras is relying on certain evidence that was not before the RPD at the time of the Decision, in particular some newspaper articles published after the RPD hearing. It is well established that the Court cannot consider such evidence in an application for judicial review.

[28] Moreover, Mr. Reyes Contreras himself acknowledged the accuracy and completeness of his written account when the translator read and translated it to him from French to Spanish, and when the RPD asked him at the start of the proceedings if he had any changes to make to it.

Mr. Reyes Contreras thus had several opportunities to amend his account at the hearing before the RPD and did not avail himself of them. I see no indication that would support a conclusion that the RPD did not consider this element in its Decision.

[29] It is clear from the Decision that Mr. Reyes Contreras' testimony and representations contradict the account he submitted. In those circumstances, I am of the view that the RPD's findings that these contradictions undermined Mr. Reyes Contreras' credibility are eminently reasonable.

[30] I would note that the RPD has "complete jurisdiction to determine the plausibility of testimony ... [and] is in a ... position ... to gauge the credibility of an account and to draw the necessary inferences" (*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 [*Aguebor*] at para 4). As a result, "[a]s long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review" (*Aguebor*, at para 4). Indeed, The reviewing court must consider the factual and legal constraints that bear on the decision maker (*Vavilov*, at paras 90, 99) without "reweighing and reassessing the evidence considered" by it (*Vavilov*, at para 125). Moreover, an accumulation of contradictions, inconsistencies, and omissions concerning fundamental elements of a claim can support a negative conclusion about an applicant's credibility (*Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 [*Lawani*] at para 22).

[31] In this case, there is nothing in the arguments put forward by Mr. Reyes Contreras that would allow the Court to identify errors that would warrant its intervention. The RPD's findings concerning Mr. Reyes Contreras' lack of credibility stem instead from transparent and intelligible reasons that show internally coherent reasoning (*Vavilov*, at paras 86, 99). A careful

reading of the Decision shows that the RPD properly considered Mr. Reyes Contreras' testimony and the evidence in the file to support its decision.

[32] I would add that it is also settled law that administrative decision makers are presumed to have weighed and considered all the evidence before them unless proven otherwise

*(Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86, at para 36; *Florea v*

*Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA), at para 1).

Similarly, a failure to mention a particular piece of evidence does not mean that it was ignored

*(Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*,

2011 SCC 62, at para 16), and a failure to analyze evidence that runs contrary to the tribunal's

decision does not necessarily make it unreasonable *(Aghaalikhani v Canada (Citizenship and*

*Immigration)*, 2019 FC 1080 at para 24; *Khair v Canada (Citizenship and Immigration)*, 2021 FC

160 at para 48).

**B. *Alleged incompetence of Mr. Reyes Contreras' former counsel***

[33] Mr. Reyes Contreras also submits that the incompetence of his former counsel prevented him from being heard and that he therefore suffered a breach of procedural fairness.

**(1) *Alleged acts of incompetence***

[34] Mr. Reyes Contreras alleges that the RPD erred in law by ignoring his counsel's repeated breaches of professional ethics and by [TRANSLATION] "punishing the applicant for his counsel's errors". Mr. Reyes Contreras is of the view that the Decision must be set aside because of that breach of procedural fairness.

[35] According to Mr. Reyes Contreras, the incompetence of his former counsel affected the hearing before the RPD and undermined his right to procedural fairness. First, Mr. Reyes Contreras alleges that his counsel made translation errors in preparing his account, which contributed to the contradictions noted by the RPD. Second, Mr. Reyes Contreras claims that his counsel did not explain to him that he had the right to submit additional evidence. Third, Mr. Reyes Contreras maintains that he [TRANSLATION] “may” have provided a copy of the police report and medical report concerning the events on March 24, 2014, but that his counsel did not submit them to the RPD. Finally, Mr. Reyes Contreras adds that his counsel was poorly prepared at the RPD hearing and therefore poorly represented him.

[36] In short, Mr. Reyes Contreras blames his former counsel for all the deficiencies in his case.

**(2) Test for counsel incompetence**

[37] As noted by the Minister, the burden of proof to demonstrate counsel incompetence is very high. Indeed, according to case law, “evidence of counsel’s incompetence must be so clear and unequivocal and the circumstances so deplorable that the resulting injustice caused to the claimant is blatantly obvious” (*Mbaraga v Canada (Citizenship and Immigration)*, 2016 FC 580, at para 25). In addition, “[t]he incompetence and the alleged prejudice must ... be clearly established” (*Dukuzumuremyi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 278, at para 19).

[38] The test to be applied in considering the allegations of ineffective or incompetent representation requires that three criteria be met. Mr. Reyes Contreras thus had to:

- A. corroborate the allegation by giving notice to the former counsel and providing him with an opportunity to respond;
- B. establish that the former counsel's act or omission constituted incompetence without the benefit and wisdom of hindsight; and
- C. establish that the outcome would have been different but for the incompetence (*Abuzeid v Canada (Citizenship and Immigration)*, 2018 FC 34, at para 21; *Badihi v Canada (Citizenship and Immigration)*, 2017 FC 64 [*Badihi*], at para 17, citing *Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250, at para 84).

[39] To demonstrate incompetence, “[t]he burden is on the applicants to establish the performance and the prejudice components of the test to demonstrate a breach of procedural fairness” (*Badihi*, at para 18). The test’s criteria are therefore cumulative and must all be established to meet the heavy burden on the applicant.

[40] With respect to the first element of the test, Mr. Reyes Contreras’ new counsel did contact his former counsel to advise him of the allegations before submitting the record, telling him that he had seven days to respond to those allegations. The record was also sent to him for his observations. There is therefore no doubt that the first element of the counsel incompetence test is met here.

[41] However, the same is not true for the other two criteria.

[42] With respect to the second criterion, Mr. Reyes Contreras did not provide sufficient evidence to show the clear and unequivocal nature of his counsel’s incompetence before the RPD. First, Mr. Reyes Contreras’ allegations against his former counsel concerning the account

and the lack of evidence were disputed by the counsel. Second, even if Mr. Reyes Contreras' former counsel were incompetent, that would not affect the contradictions made by Mr. Reyes Contreras himself—which certainly cannot be attributed solely to the former counsel. I note that Mr. Reyes Contreras himself acknowledged the accuracy and completeness of his written account when the translator read and translated it to him from French to Spanish and when the RPD asked him at the start of the hearing if he had any changes to make to it. Third, with respect to the lack of evidence concerning the altercation on March 11, 2014, the former counsel stated that Mr. Reyes did not provide him with any evidence concerning the hospital report or the police report. Moreover, Mr. Reyes Contreras acknowledged at the RPD hearing that he [TRANSLATION] “may” have given the evidence to his counsel.

[43] With respect to these elements, it must be observed that the evidence submitted concerning the alleged actions of Mr. Reyes Contreras' former counsel is far from conclusive, and that the second element of the test is therefore not met. We are quite far from a case that is “blatantly obvious” to the point of a denial of justice.

[44] I am of the view that the third criterion has also not been met. As noted by the Minister, the alleged incompetence is far from sufficient to justify the majority of the deficiencies noted by the RPD. The two contradictions by Mr. Reyes Contreras, even after hearing the translator read his account, clearly demonstrate this. In addition, the omission of several pieces of evidence and crucial facts from Mr. Reyes Contreras' account cannot be attributed solely to his former counsel. That is particularly the case for the assault in March 2014. Finally, Mr. Reyes Contreras did several things that are inconsistent with the actions of a person who truly fears for his life, such as not seeking asylum in Mexico or the United States, or even refugee protection in Canada

during his first two months here. Needless to say, all these facts and actions have nothing to do with the conduct or incompetence of his former counsel. However, they clearly undermined Mr. Reyes Contreras' credibility and contributed to the RPD's negative decision.

[45] There is nothing in the record to support a conclusion that the result of the RPD's analysis would have been different but for the alleged incompetence.

[46] The incompetence of counsel will only constitute a breach of procedural fairness in extraordinary or exceptional circumstances. In light of the analysis above, Mr. Reyes Contreras has failed to demonstrate that his former counsel's incompetence is so clear and unequivocal as to constitute a situation justifying the Court's intervention.

#### **IV. Conclusion**

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

[48] Neither party suggested any questions of general importance to certify, and I agree that there are none.

**JUDGMENT in IMM-9634-22**

**THIS COURT'S JUDGMENT is as follows:**

1. The application for judicial review is dismissed, without costs.
2. There are no questions of general importance to be certified.

“Denis Gascon”

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Judge

Certified true translation  
Michael Palles



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-9634-22

**STYLE OF CAUSE:** PAUL EMILIO REYES CONTRERAS v MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** BY VIDEOCONFERENCE

**DATE OF HEARING:** OCTOBER 4, 2023

**JUDGMENT AND REASONS:** GASCON J

**DATED:** OCTOBER 31, 2023

**APPEARANCES:**

Ludmila Lupu FOR THE APPLICANT

Suzon Létourneau FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

HENRIQUEZ AVOCATS INC. FOR THE APPLICANT  
Montréal, Quebec

Attorney General of Canada FOR THE RESPONDENT  
Montréal, Quebec