Federal Court Cour fédérale

Date: 20240311

Docket: IMM-13154-22

Citation: 2024 FC 407

Ottawa, Ontario, March 11, 2024

PRESENT: Associate Chief Justice Gagné

BETWEEN:

JULIO ESCOBAR ESCOBAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Mr. Julio Escobar Escobar is a Mexican citizen who claimed refugee status in Canada in 2019 based on events that occurred in 2002 while he was in the army in his country. He alleged having witnessed his superior carrying out illegal drug activities and being offered to join the group. He refused and asked to be transferred. When his transfer was refused, he left the army.

[2] The Applicant was self-represented before the Refugee Protection Division (RPD), but an immigration consultant represented him before the Refugee Appeal Division (RAD).

[3] The RPD found that the claim had no nexus to the *Convention Relating to the Status of Refugee*, 28 July 1951, 189 UNTS 137 [Convention] and assessed the claim solely under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The RPD found that the Applicant had not demonstrated a prospective risk and rejected the claim. This finding was not challenged before the RAD, so it is not an issue before the Court.

[4] Relying on *Klinko v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 17111 (FCA), [2000] 3 FC 327 [*Klinko*] and *Vassiliev v Canada (Minister of Citizenship and Immigration)*, 1997 CanLII 5394 (FC), [1997] FCJ No 955 [*Vassiliev*], the RAD found that the claim had a nexus to the Convention as his refusal to accomplish illegal actions within the army met the criteria of "political opinion." However, the RAD nevertheless dismissed the appeal, finding that the RPD's error had no bearing on the outcome of the Applicant's claim. The RAD found that the Applicant was sufficiently questioned by the RPD member, had an opportunity to present his case, and, overall, had a meaningful opportunity to take part in the decision and to be heard.

[5] Before the Court, the Applicant alleges a breach of procedural fairness, as he did not have an opportunity to be heard by the RAD regarding the determination under section 96 of the IRPA. In response to this allegation, the Respondent contends that because the Applicant

presented no “new evidence” on appeal, the RAD could not hold a hearing pursuant to subsection 110(6) of the IRPA.

[6] With respect, the Respondent’s argument does not properly address the real issue at hand. The Applicant did not have a sufficient opportunity to provide evidence regarding the section 96 claim. Even if, on appeal to the RAD, the Applicant had filed new documentary evidence regarding the 2002 events relevant to the section 96 claim, the RAD would have rejected this request on the basis that the evidence did not meet the criteria for new evidence under section 110 of the IRPA. Section 110 of the IRPA provides procedural rules that restrict the admission of new evidence on appeal to the RAD for the purposes of a RAD hearing. This does not mean that the RPD did not have a duty to consider the evidence relating to the section 96 claim. The RAD must still intervene when the RPD fails to consider evidence and breaches procedural fairness.

[7] I reiterate that the Applicant was unrepresented before the RPD hearing. As the RPD was of the opinion that the Applicant’s claim had no nexus with the Convention, the RPD had no reason to assess any evidence related to a section 96 claim or explore this line of questioning during the Applicant’s testimony. The Applicant therefore did not have an opportunity to be heard on the section 96 issue. If indeed there is a nexus the Convention, it is the RPD’s role to first assess the relevant evidence, not the RAD.

[8] In my view, the RPD’s failure to assess evidence in relation to the section 96 claim amounts to a breach of procedural fairness.

[9] That said, I am far from being convinced that the Applicant's claim, as presented by him, has a nexus to the Convention. In *Vassiliev*, at page 341, Muldon J held the following:

> Refusing to participate in criminal activities, while laudable, has often been found not to be an expression of political opinion. In this regard, the Board's finding does not depart from recent jurisprudence of this Court which has found the opposition to criminal activity per se is not political expression. One example which this Court has considered is informing on drug traffickers [*Munoz v. (M.C.I.)*, [1996] F.C.J. No. 234, (IMM-1884-95)(February 22, 1996) and *Suarez v. (M.C.I.)*, [1996] F.C.J. No. 1036, (IMM-3246-96)(July 29, 1996)]. The situation before the Court is distinguishable from these cases. The facts as found by the CRDD show that in this case criminal activity permeates State action.

[10] In *Klinko*, the Federal Court of Appeal held the following:

> [35] Indeed, the record contains ample evidence that the machinery of government in the Ukraine was actually "engaged" in the subject-matter of Mr. Klinko's complaint. The country information reports, in the present instance, contain statements by the President of Ukraine and two senior members of the Security Service of Ukraine about the extent of corruption within the government and the need to eradicate it both politically and economically. Where, as in this case, the corrupt elements so permeate the government as to be part of its very fabric, a denunciation of the existing corruption is an expression of "political opinion". Mr. Klinko's persecution, in my view, should have been found to be on account of his "political opinion".

[11] In the present case, the RAD does not provide any reasons supporting its finding that the Applicant's claim has a nexus to the Convention and the evidentiary record seems tenuous on that front as compared to those discussed in *Vassiliev* and *Klinko*.

[12] However, since the Respondent did not raise this issue, I will send the matter back to the RAD to reassess the claim's nexus to the Convention, and, if the nexus with the Convention is

confirmed, to send the matter back to the RPD for an assessment of the Applicant's section 96 claim.

[13] The parties have not proposed any question of general importance for certification and no such question arises from the fact of this case.

JUDGMENT in IMM-13154-22

THIS COURT'S JUDGMENT is that:

1. The Application for judicial review is granted;
2. The matter is sent back to the Refugee Appeal Division for a new determination;
3. No question of general importance is certified.

"Jocelyne Gagné"
Associate Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-13154-22
STYLE OF CAUSE:	JULIO ESCOBAR ESCOBAR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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