Federal Court  Cour fédérale

Date: 20200102

Docket: IMM-4056-19

Citation: 2020 FC 4

Ottawa, Ontario, January 2, 2020

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

LUIS FELIPE GARCES CACERES

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Luis Felipe Garces Caceres, seeks judicial review of the decision of the Immigration Appeal Division [IAD] dated May 30, 2019 [the Decision] setting aside the decision of the Immigration Division [ID] dated March 9, 2018.

[2] The IAD allowed the appeal of the Respondent, the Minister of Public Safety and Emergency Preparedness [Minister], and determined the Applicant to be inadmissible to Canada on the ground of membership in an organization, the Revolutionary Armed Forces of Colombia [FARC], pursuant to paragraph 34(1)(*f*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[3] The Applicant submits there was a breach of procedural fairness because the IAD made a disguised credibility finding without an oral hearing. He also argues that the IAD's weighing of evidence was unreasonable.

[4] For the reasons that follow, the application for judicial review is dismissed.

II. Facts

[5] The Applicant is a citizen of Colombia. In April 2017, he arrived in Canada and made an inland claim for refugee status.

[6] After sending the Applicant's fingerprints to US authorities, the Canada Border Services Agency [CBSA] was informed that the Applicant was on a list of FARC members.

[7] The Applicant was interviewed by a hearings advisor with the CBSA [CBSA Officer] on July 21 and August 11, 2017. The interviews were conducted with the assistance of a Spanish interpreter.

[8] The Applicant told the CBSA Officer that he was a young, unemployed person in Colombia. When questioned whether he was ever a member of FARC, the Applicant admitted that he declared himself to Colombian authorities in 2007 as a member but claimed he was never a real member. The Applicant explained that in January 2007, he was approached by police and a FARC member and taken to work at a sawmill with 30 other young men. The group was provided uniforms to make it seem as though they were FARC members. The Applicant stated that after a month, he was registered as a demobilized FARC member and obtained a monthly allowance upon his surrender. According to the Applicant, he was just pretending ("falso positivo") to be a FARC member in order to receive the financial benefits the government was offering.

[9] On August 18, 2017, the CBSA initiated an admissibility hearing against the Applicant pursuant to paragraph 34(l)(*f*) of the IRPA. His refugee claim was suspended in the interim.

A. *Immigration Division Decision*

[10] On March 9, 2018, the ID held the admissibility hearing. No witnesses were called. The parties relied instead on documentary evidence, including transcripts of the Applicant's interviews with the CBSA Officer, statutory declarations of the Applicant's ex-spouse, former employer, and former co-worker and newspaper articles.

[11] At the end of the hearing, the ID member rendered an oral decision. The member noted that there was no indication on the record before him as to how the US authorities concluded that the Applicant was a member of FARC. The member went on to find that the story the Applicant

told to the CBSA Officer was believable and consistent with documents showing that Colombia was trying at the time to weed out fake FARC members that were demobilized. The ID member concluded that the Minister had failed to prove his case and accordingly ruled in the Applicant's favour.

B. *Immigration Appeal Division Decision*

[12] The Minister appealed the ID's decision to the IAD pursuant to subsection 63(5) of the IRPA.

[13] On November 28, 2018, counsel for the parties held a pre-hearing conference with the IAD member assigned to hear the appeal. Counsel for the Minister indicated that a package of additional documents had already been provided. Both counsel confirmed that an oral hearing was not needed as they would not be calling any additional witnesses and would be relying on the evidence and submissions presented before the ID. The IAD member advised she would be making her own credibility assessment and fixed a timetable for final or supplemental written submissions.

[14] There was no dispute before the IAD that the Applicant was neither a Canadian citizen nor a permanent resident. The parties also agreed that FARC is or was an organization as defined in paragraphs 34(1)(*b*), (*b*.1) or (*c*) of the IRPA. The only issue to be determined by the IAD was whether the Applicant was a member of FARC, including considerations of duress.

[15] The IAD member concluded that given the specific relief provided in subsection 42.1(1) of the IRPA to a person found to be a member of an organization, the issue of duress or coercion should not be considerations in the determination of membership. She found that membership in an organization under paragraph 34(1)(*f*) should continue to be given a broad interpretation because of public safety and national security concerns and that the issue of duress should instead be a consideration for exemption from inadmissibility under subsection 42.1(1). The IAD member concluded that, in any event, the Applicant could not rely on duress as he did not appear to face serious and imminent physical harm when he decided to declare himself as a member of FARC, nor was there any evidence of attempts to leave the situation. He chose instead to continue receiving financial benefits for over a year as a demobilized member.

[16] The IAD member found there was sufficient credible evidence to conclude that there were reasonable grounds to believe the Applicant was a member of FARC. She gave limited weight to the statutory declarations of the Applicant's former employer and ex-spouse declaring that the Applicant was not a member of a criminal organization or FARC on the basis that the former employer did not appear to have any knowledge of the Applicant's declaration as a demobilized FARC member and that his ex-spouse stated that they began their relationship at the time he became a demobilized FARC member. She placed greater weight on the documentary evidence confirming the Applicant's membership in FARC and the Applicant's own declaration to the Colombian authorities that he was a member.

III. Issues

[17] The Applicant raises two issues:

A. *Whether the IAD breached procedural fairness?*

B. *Whether the IAD's analysis of his evidence was unreasonable?*

IV. Standard of Review

[18] At the hearing of the application on December 18, 2019, the parties agreed that the standard of review for an alleged breach of procedural fairness is correctness. This standard requires the Court to determine whether the process followed in arriving at the decision under review achieved the level of fairness required by the circumstances of the matter: *Bataa v Canada (Citizenship and Immigration)*, 2018 FC 401 at para 3.

[19] There was also agreement that the legal issue raised with respect to a determination of membership in an organization engaged in subversion pursuant to section 34 of the IRPA is a question of mixed fact and law and that the appropriate standard of review is reasonableness: *El Werfalli v Canada (Public Safety and Emergency Preparedness)*, 2013 FC 612 at para 39. Reasonableness presumes deference to administrative tribunal decision-making. As long as the decision falls within a range of acceptable outcomes, which are defensible in respect of the facts and law, this Court need not intervene.

[20] After hearing the submissions of counsel for the parties, the matter was taken under reserve. In light of the intervening decisions of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66, and the Court's admonition at paragraph 144 in *Vavilov*, the parties were directed to advise whether they wished to make additional submissions

on the appropriate standard of review or the application of that standard. By letter dated December 23, 2019, counsel for the Minister wrote that neither party intended to make additional submissions.

[21] The majority of the Court in *Vavilov* articulated a new approach to determining the applicable standard of review, holding that administrative decisions should presumptively be reviewed on the reasonableness standard, unless either legislative intent or the rule of law requires otherwise. I am satisfied that neither of these two exceptions apply in the present case.

[22] At paragraph 99 in *Vavilov*, the Court instructs that when reviewing the merits of an administrative decision, the judge must determine, "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", clarifying the continued relevance of the existing jurisprudence.

[23] The approach to be taken regarding an alleged breach of procedural fairness has not changed. It remains flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected: *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817. The purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker.

V. Analysis

A. *Whether the IAD breached procedural fairness*

[24] The Applicant submits that he was denied procedural fairness when the IAD member rejected his credibility. The Applicant claims that the IAD made a negative credibility finding against him despite the fact that he did not testify at his admissibility hearing and there is no further record of any statement from him regarding his participation in the demobilization program on this file, other than his answers to questions from the CBSA Officer.

[25] The Applicant submits there was an obvious need for him to testify orally at the hearing, as the IAD rejected his credibility without providing him any opportunity to defend himself and address the IAD's credibility concerns. According to the Applicant, this is contrary to the principle expressed by Madam Justice Eleanor Dawson in *Ayele v Canada (Minister of Citizenship and Immigration)*, 2007 FC 126, at paragraph 11 where she held:

> […] one can never rule on the credibility of evidence that has not yet been heard. The presiding member violated this principle when he stated that even if the witness corroborated Mr. Ayele's testimony that subsequent testimony would not be credible.

[26] The Applicant submits that fairness dictates that an opportunity should be provided to give oral testimony when an appellant's credibility is being challenged. He argues that the IAD was required to hold a hearing in light of subsection 25(1) of the *Immigration Appeal Division Rules*, SOR/2002-230 [the IAD Rules] which provides as follows:

Proceeding in writing	**Procédures sur pièces**
25 (1) Instead of holding a	**25 (1)** La Section peut, au lieu

hearing, the Division may require the parties to proceed in writing if this would not be unfair to any party and there is no need for the oral testimony of a witness.	de tenir une audience, exiger que les parties procèdent par écrit, à condition que cette façon de faire ne cause pas d'injustice et qu'il ne soit pas nécessaire d'entendre des témoins.

[27] This argument is without merit.

[28] The scope of the IAD's jurisdiction is not limited to that of an appellate court. Appeals pursuant to subsection 63(5) of the IRPA are on a *de novo* basis and no deference to the ID decision is required. Subsection 25(1) of the IAD Rules gives the IAD the ability to proceed by way of a written proceeding. As master of its own procedure, the IAD is afforded significant deference in determining when to hold an oral hearing.

[29] Paragraph 34(1)(*f*) of the IRPA provides that a foreign national is inadmissible on security grounds for "being a member of an organization that there are reasonable grounds to believe engages, has engaged or will engage in acts referred to in paragraph (a), (b), (b,1.) or (c)." Section 33 states that the facts that constitute inadmissibility for the purposes of section 34 ". . . include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur." The standard of "reasonable grounds to believe" is less than a balance of probabilities but more than mere suspicion and must be based on compelling and credible evidence.

[30] The credibility of the Applicant was at the heart of the ID's decision that the Minister failed to prove his case. Moreover, the weight to be given the Applicant's evidence was a central issue raised in the Minister's appeal to the IAD.

[31] At a pre-hearing teleconference before the IAD member, the Applicant was represented by counsel. There is no indication that the IAD ever exercised its discretion "to require to the parties to proceed in writing." To the contrary, it appears that counsel for the Applicant made an informed and calculated decision not to call any witnesses for the purpose of the appeal. It lies ill in the Applicant's mouth to now seek to take issue with the very procedure he agreed to because the result is not to his liking.

[32] The Applicant was fully aware that the Minister was concerned about his membership in FARC, and he had a full opportunity to provide documentary evidence and submissions in response.

[33] The Minister argued in his written submissions to the IAD that the Applicant did not provide any evidence that confirms his statements that he was not a real FARC member and that its was unreasonable to accept the statements. The Minister submitted that the Applicant had admitted to his membership in FARC to the Colombian authorities and to having received government benefits as a demobilized member. The Minister further argued that there was evidence to further support the Applicant's membership in FARC and that the information from Colombian authorities should weigh more than the statements made by the Applicant. The Applicant responded that the fact that he accepted benefits as a fake demobilized FARC member

did not undermine his credibility. He argued that he did not intend to get involved with a fake FARC demobilization, but rather thought he was going to get a job at the mill. He submitted that after being falsely demobilized, he accepted the benefits because his economic circumstances were difficult.

[34] The IAD cannot be criticized for conducting an independent assessment of the evidence on the record without giving the Applicant an opportunity to explain himself given that the Applicant's credibility was raised by the Applicant himself on appeal.

[35] In the circumstances, the Applicant has not persuaded me that the decision to proceed in writing was unfair, nor am I convinced there was a need for any witnesses to testify orally.

B. *Whether the IAD's analysis of the evidence was reasonable*

[36] The Applicant did not dispute that FARC is an organization involved in subversion or terrorism as described in section 34 of the IRPA. Therefore, the IAD was only required to determine whether there were reasonable grounds to believe the Applicant was a member of FARC.

[37] In *Karakachian v Canada (Citizenship and Immigration)*, 2009 FC 948 at paragraph 32, Mr. Justice Yves de Montigny stated the standard of proof that corresponds to the existence of "reasonable grounds to believe" requires more than mere suspicion but less than the civil standard of balance of probabilities. He stated reasonable grounds exist where there is an objective basis for the belief which is based on compelling and credible information.

[38] There is no definition of the term “member” in the IRPA. The term “member” has been given an “unrestricted and broad interpretation”, as these provisions deal with security, subversion and terrorism, which are among the most serious concerns of government: *Poshteh v Canada (Citizenship and Immigration)*, 2005 FCA 85 at paras 26-32; *Ismeal v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 198 at para 20 [*Ismeal*]).

[39] Neither proof of formal membership nor personal participation in specific acts of the organization are required to establish inadmissibility under paragraph 34(1)(*f*): *Ismeal* at paras 19-20. Instead, in *Kanagendren v Canada (Citizenship and Immigration)*, 2015 FCA 86 at paragraph 22, the Federal Court of Appeal accepted:

> […] nothing in paragraph 34(1)(*f*) requires or contemplates a complicity analysis in the context of membership. Nor does the text of this provision require a “member” to be a “true” member who contributed significantly to the wrongful actions of the group. These concepts cannot be read into the language used by Parliament.

[40] Following a review of the record, I am satisfied that the IAD’s Decision is based on an internally coherent and rational chain of analysis and it is justified in relation to the facts and law. The IAD applied a broad definition of “member” to its analysis and assessment of the facts based on jurisprudence of this Court and the Federal Court of Appeal.

[41] The IAD took into account the statutory declarations provided by the Applicant from his former employer, his former co-worker, and his ex-spouse. The Applicant does not dispute that the declarations were considered. He submits, however, that the reasons for placing little weight on this sworn evidence were unintelligible or not supported by the evidence. I disagree.

[42] The IAD member discounted the former employer's declaration as he did not appear to have any knowledge of the Applicant's declaration as a demobilized FARC member. She afforded little weight to the ex-spouse's statement because the spouse only began her relationship with the Applicant at the time he became a demobilized FARC member. The reasons provided by the IAD, although brief, are sufficient to understand why the IAD placed more weight on the documentary evidence related to the Applicant's membership in FARC.

[43] The IAD noted that the Applicant did not declare he was a member of the FARC or that he has previously declared he was a demobilized FARC member when he entered Canada and filed his refugee claim. The IAD found that the Applicant did not provide a satisfactory explanation for not doing so. This finding is well supported by the evidence and is unassailable.

[44] The IAD member basically accepted the Applicant's story, including his evidence that he participated in the demobilization process, registered his name as a FARC member, and obtained an allowance payment as a FARC member. The member accepted that the Applicant likely suffered many injustices over the years and some of his participation with the FARC may have been under duress or coercion. She considered the Applicant's actions, whether taken under pretence or otherwise.

[45] In my view, the IAD could reasonably find on the evidence before it that the Applicant was not under any duress when he registered his name as a FARC member and that he willingly participated in the FARC demobilization. The Applicant's motivation for participating in the

alleged charade does not detract from the fact that there were reasonable grounds to believe that he was a member of FARC.

VI. Conclusion

[46] For the above reasons, I see no reviewable error in the IAD's determination that the Applicant is inadmissible to Canada. The application for judicial review is accordingly dismissed.

[47] There are no questions for certification.

JUDGMENT in IMM-4056-19

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Roger Lafrenière"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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