Federal Court Cour fédérale

Date: 20220207

Docket: IMM-4934-20

Citation: 2022 FC 152

Toronto, Ontario, February 7, 2022

PRESENT: Madam Justice Go

BETWEEN:

GERSON HARVEY GOMEZ GUZMAN
YUDITH ALEXANDRA GARCIA LOZANO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Ms. Garcia Lozano and her common law spouse Mr. Gomez Guzman [together the Applicants] are citizens of Colombia. They seek judicial review of the Refugee Appeal Division [RAD]'s decision [Decision] confirming the decision of the Refugee Protection Division [RPD] that the Applicants are not Convention refugees or persons in need of protection under the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The Applicants submitted new country condition documents to the RAD in support of their appeal. The RAD refused to admit some of these documents and confirmed the RPD's finding that the Applicants had a viable internal flight alternative [IFA] within Colombia, in Bogotá.

[3] I allow the application as the RAD has erred by not admitting new country condition documents that the RAD found to be relevant and probative.

II. Background

A. *Factual Context*

[4] In 2000, the farm belonging to Ms. Garcia Lozano's father was taken by the Autodefensas Unidas de Colombia [AUC], a paramilitary group. The group made threats against her father and he was murdered in 2001.

[5] In 2006, Ms. Garcia Lozano saw an advertisement on television for restitution of land taken by violence, and she wanted justice for her family and her late father. The family began the process of land restitution, which became Ms. Garcia Lozano's responsibility in 2009 when her mother died. Ms. Garcia Lozano would go into the Justice and Peace Office once or twice a year. When the process was not progressing, she made a request for information about her complaint in 2016. On December 30, 2016, she received an anonymous phone call telling her to "stop pissing them off" and threatening that if she continued to do so she and her family would be killed.

[6] Ms. Garcia Lozano filed a report with the local prosecutor's office in Cúcuta. Not hearing back, she wrote a letter to the Prosecutor's Office in Bogotá. For 90 days, the police department in Cúcuta came to their house once per day to check if they were still alive.

[7] Ms. Garcia Lozano followed up again with the land claim on September 11, 2017. On September 25, 2017, Mr. Gomez Guzman arrived home and was threatened by armed men who told him to stop pursuing the land claim and leave Cúcuta within three days, or be killed. Mr. Gomez Guzman recognized the armed men from the neighbourhood as belonging to the Black Eagles (also referred to as the *Águilas Negras*), a paramilitary group which emerged amidst Colombia's demobilization of the AUC.

[8] The Applicants fled to a motel at the outskirts of Cúcuta. They considered contacting the prosecutor's office. But knowing that the authorities had been unable to protect them before, the Applicants decided to fly to Canada with visas they had previously obtained and made refugee claims upon arrival.

B. *The RPD Decision*

[9] The RPD refused their claims in January 2018. The RPD found they had a viable IFA in Bogotá, noting that the research does not support that the Black Eagles has influence and presence throughout Colombia and that they lack interest and motivation to pursue the Applicants outside of Cúcuta. Noting also the Applicants' employment and residential history, and that they could be reasonably expected to adapt in the IFA, the RPD found it reasonable for Ms. Garcia Lozano to abandon her land claim.

C. *Decision under Review*

[10] The Applicants appealed to the RAD in April 2018, arguing that the RPD had ignored objective evidence that contradicted its IFA findings. The Applicants did not submit any new evidence at the time but filed extensive submissions challenging the RPD decision.

[11] In July 2020, the Applicants provided the RAD with updated evidence, including evidence on the COVID-19 pandemic in Colombia and evidence from 2019 documenting the activities of the Black Eagles in Bogotá. The RAD admitted the evidence regarding COVID-19 but not the evidence with regard to the Black Eagles. The RAD dismissed their appeal in September 2020, agreeing with the RPD that there was a viable IFA in Bogotá.

III. Issues and Standard of Review

[12] The Applicants raise the following issues: (1) whether the RAD erred by refusing to admit new evidence, (2) whether the RAD's IFA findings were reasonable, and (3) whether the RAD erred in finding that the Applicants should abandon their land claim. The Respondent argues that the RAD conducted an independent and thorough review of the record, and that its findings were reasonable.

[13] The parties agree that all three issues are reviewable on a reasonableness standard, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], *Dunsmuir v New Brunswick*, 2008 SCC 9 and also *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] at para 29. To set aside a decision on this basis, "the reviewing court must be

satisfied that there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", and the onus is on the Applicant to demonstrate that the decision is unreasonable: *Vavilov*, at para 100.

IV. Analysis

A. *Did the RAD err by refusing to admit new evidence?*

[14] The Applicants submit that the RAD erred first of all, by requiring that the new evidence satisfy the requirements of an application under Rule 37 of the *Refugee Appeal Division Rules* (SOR/2012-257) [*RAD Rules*] and secondly, by concluding that the articles about the Black Eagles were not new evidence. I will address both of these arguments.

(a) *Did the RAD err by requiring that the new evidence satisfy the requirements of a Rule 37 application?*

[15] On June 15, 2020, upon reopening of the RAD's offices (following closure due to the COVID-19 pandemic), the RAD wrote to the Applicants' counsel [the RAD letter], giving counsel 30 days to submit documents in support of the appeal which "will be accepted without an application." The RAD letter further specified that "[o]ther requirements of Rule 29 and 110(4) continue to apply." These references were to subsection 110(4) of *IRPA*, which sets out the timeliness requirement for new evidence, and Rule 29 of the *RAD Rules*, which requires a claimant to make an application to submit new evidence and requires the RAD to consider (among other factors) "any new evidence the document brings to the appeal."

[16] In July 2020, the Applicants submitted new evidence relating to both the COVID-19 pandemic and the Black Eagles. The RAD set out its considerations for deciding whether to admit these articles in the Decision, with a footnote reference to Rule 29(4):

> [10] With regard to additional evidence provided after the Memorandum of Appeal. I must first decide it can be accepted considering whether it has relevance and probative value, brings new evidence to the appeal, and whether, with reasonable effort, it could have been provided with the Appellant's Record.

[17] The Applicants submit that the RAD erred by relying on the Rule 29(4) factors which pertain to an application under Rule 37. Specifically Rule 29(4) states:

> Factors
>
> (4) In deciding whether to allow an application, the Division must consider any relevant factors, including
>
> (a) the document's relevance and probative value;
>
> (b) any new evidence the document brings to the appeal; and
>
> (c) whether the person who is the subject of the appeal, with reasonable effort, could have provided the document or written submissions with the appellant's record, respondent's record or reply record.

[18] The Applicants submit that the RAD should have relied only on s. 110(4) of *IRPA,* which asks whether the evidence could have been provided earlier, was not available, or postdates the RPD Decision. At the hearing, the Applicants further submitted that Rule 29 deals with new evidence filed after the appeal record is submitted, as opposed to the post-RPD Decision timeline that s. 110(4) is concerned with, and that the test dealing with new evidence that could be filed under Rule 29 is a different test from the s. 110(4) test.

[19] I am not persuaded by the Applicants' submission. While the RAD letter essentially waived the requirement for an application under Rule 37, it made clear that other requirements of Rule 29 and s. 110(4) of *IRPA* continued to apply. Based on the wording of the letter, it was reasonable for the RAD to continue to refer to Rule 29(4), which set out the factors the RAD must consider in admitting new evidence. Accepting the Applicants' argument that Rule 29(4) only pertains to a Rule 37 application would render the wording in the RAD letter that "other requirements of Rule 29 and 110(4) continue to apply" meaningless.

[20] Even if I were to accept the Applicants' argument that the RAD should only apply s.110(4) of *IRPA*, it would still be reasonable for the RAD to consider "newness" as a factor in admitting post-appeal record evidence.

[21] In *Singh*, the Federal Court of Appeal found that in addition to considering the evidence's timeliness under s. 110(4) of *IRPA*, the RAD must also consider the relevant factors set out in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 [*Raza*]. As noted in *Singh* at para 38, the *Raza* test includes an assessment of "newness." The Federal Court of Appeal does not found this newness requirement on the RAD Rules, but rather appears to base it in a statutory interpretation of s. 110(4) of *IRPA* when it states: "the implicit criteria from *Raza* do not truly add to the wording of subsection 110(4) but are necessarily implied": *Singh*, at para 64.

[22] *Singh* thus confirms "newness" as a requirement that RAD has to consider pursuant to s.110(4) in determining whether to admit evidence filed post-RPD decision – which by definition would apply to evidence filed post-appellant's record. In other words, even if the Applicants in

this case could submit new evidence without being subject to Rule 29, the fact that s.110(4) of *IPRA* continued to apply, and that the newness requirement under *Raza* is implicit in s.110(4), the RAD would still have to apply "newness" as a factor in determining whether to accept the articles on the Black Eagles.

(b) *Did the RAD err by concluding that the new evidence was not new?*

[23] Having found that the RAD did not err when it decided to apply the "newness" criteria, I still need to consider if the RAD erred by concluding that the articles on the Black Eagles/*Águilas Negras* did not constitute new evidence.

[24] The RPD found the Applicants had an IFA in Bogotá on the basis that "there is little evidence that the *Águilas Negras* operate as a systemic organization" and instead, "they are an expression that can be used by any person who wants to engage in social or political extermination, threats and activities."

[25] Among the new evidence that the Applicants sought to submit to the RAD was an article dated June 28, 2019 reporting that Colombia's Prosecutor General Office "has begun an investigation into the elusive 'Águilas Negras', the far-right group that authorities insist doesn't exist." The article went on to describe the denial of the group's existence by the National Police after the assassination of two men in the northern La Guajira province shortly after they appeared on a death list signed by the *Águilas Negras*. The article quoted analysts who said that "the threats that have appeared in Bogotá and La Guajira appear to come from one group after analyzing the language and the use of symbols of the Águilas Negras." It went on to state:

"[a]ccording to newspaper El Espectador, Police intelligence agents established last year that the group or groups sent 282 death threats between 2006 and 2018 throughout the country." It also cited analysts who have been unable to establish any kind of structure indicating a centralized hierarchy, despite the consistent reference to regional chapters.

[26] Another article the Applicants sought to submit, dated February 25, 2019, noted that "[b]oth authorities and independent experts assume the Águilas Negras have no central leadership and are mainly a name used presumably by far-right extremists in politics, the private sector and the security forces to impose terror." But it also stated: "[w]hile the group first appeared in the northeastern Catatumbo region, it is now active throughout Colombia." The article further noted that *Águilas Negras* factions emerged throughout Colombia within a year of its first appearance, but have not shown any signs of a centralized leadership or common purpose. But the article also noted the group's recent concentration of violent political activity in Bogotá.

[27] The RAD refused to admit these articles on the following grounds:

> [12]While I do agree that this evidence is relevant, has probative value, and could not have been provided with the Appellants' record (considering the dates of the documents), this is far outweighed by the fact that this evidence does not bring new evidence to the appeal.
>
> [13]Indeed, the fact that some Black Eagles and AUC continue to operate with impunity throughout Colombia, including in Bogotá, merely confirms documentary evidence that was already on record before the RPD. Additional examples where such was the case does not bring new evidence to the appeal.

[28] The Applicants argue that the rejected evidence was at the crux of the claim. The RPD had concluded that the Black Eagles did not have influence and presence throughout Colombia, including in Bogotá. The Applicants submit that this was the RPD's principal finding, as it allowed the RPD to conclude that the Applicants could safely relocate in Bogotá. The articles rejected by the RAD included evidence from 2019 placing the Black Eagles' activities in Bogotá and throughout Colombia. The Applicants argue that therefore, there is no doubt as to the newness and relevance of the new evidence.

[29] I agree with the Applicants that the RAD has erred in rejecting these articles as new evidence.

[30] The criteria of "newness" is defined in *Raza* at paragraph 13:

> Newness: Is the evidence new in the sense that it is capable of:
>
> (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
>
> (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
>
> (c) contradicting a finding of fact by the RPD (including a credibility finding)?
>
> If not, the evidence need not be considered.

[31] I find that the RAD erred by rejecting the evidence both on grounds (a) and (c) of the *Raza* test.

[32] First of all, the articles submitted by the Applicants post-date the decision of the RPD, which in turn relied on documentary evidence from 2014-2016. The new articles, both dated 2019, thus go towards “proving the current state of affairs” in Colombia while describing events and circumstances that arose after the decision of the RPD. These events include, for instance, the decision of Colombia’s Prosecutor General office to investigate a group that authorities such as the National Police claim not to exist, which may lend credence to the Applicants’ submission about the significant threat posed by Black Eagles on a national level.

[33] Second, while the evidence presented by the articles is mixed, the evidence does partially contradict a central finding of fact by the RPD, namely, that the Black Eagles does not have any reach in Bogotá, in light of the reported threats in Bogotá cited in the articles which appear to have come from the *Águilas Negras*.

[34] While it was up to the RAD to decide how much weight to give to the new evidence, and whether or not the new evidence was sufficient to overcome the RDP’s finding on IFA after the articles were admitted, to not admit the articles at all rendered the Decision unreasonable in light of the *Raza* test.

B. *Were the RAD’s IFA findings reasonable?*

[35] The RPD and RAD both concluded that the Applicants had a viable IFA in Bogotá. The Applicants argue that the RAD’s IFA analysis was necessarily unreasonable because of the excluded evidence addressed above. In addition, the Applicants argue that the IFA analysis was unreasonable even based on the evidence already on record before the RPD.

[36] As I am sending this matter back for reconsideration, I will defer to the newly constituted RAD to consider this issue in light of any updated evidence it may admit, along with the previously submitted evidence, in its assessment of the IFA.

C. *Did the RAD err in finding that the Applicants should abandon their land claim?*

[37] In the event that the newly constituted RAD comes to the same conclusion about the first prong of the IFA, and finds that the Black Eagles do not have reach in Bogotá, I find it necessary to address the Applicants' submission about the RPD's finding – confirmed by the RAD – that they should abandon their land claim.

[38] Under the second prong of the IFA analysis, the RPD found that it would not be unreasonable to expect Ms. Garcia Lozano to abandon her family's land claim, given her mobility and adaptability, and given that the land was last occupied by her family member in December 2000.

[39] The Applicants challenged this finding before the RAD, arguing that it was contrary to the case law stating that "the law does not require a victim of politically motivated persecution to necessarily abandon his commitment to political activism in order to live safely in a country like Venezuela": *Pimental Colmenares v Canada (Minister of Citizenship and Immigration)*, 2006 FC 749 [*Pimental Colmenares*] at para 14; see also *Buyuksahin v Canada (Citizenship and Immigration)*, 2015 FC 772 [*Buyuksahin*] at para 26. The Applicants argued that Ms. Garcia Lozano's attempt to reclaim her family's land should be considered as her political opinion. According to the United Nations High Commissioner for Refugees [UNHCR]'s Eligibility

Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Colombia [UNHCR Report], "human rights defenders, including but not limited to land restitution claimants and their leaders, may be in need of international refugee protection on the basis of their (imputed) political opinion" (National Documentation Package for Colombia (31 May 2017), Item 1.7, page 41).

[40] The RAD concluded that the RPD did not err, at paragraph 53:

> It has not been established that abandoning their land restitution claim would jeopardize the life and safety of the Appellants as both were able to sustain themselves for their whole adult lives without this farm. Therefore, I do not find that the RPD erred in this regard.

[41] In my view, the RAD's finding in this regard was unreasonable. The Applicants argue, and I agree, that the second branch of the IFA test is a "reasonableness" test, and using language like whether abandoning the land claim would "jeopardize the life and safety" of the Applicants elevates the test to a higher threshold: *Khan v Canada (Citizenship and Immigration)*, 2020 FC 1101 at para 10.

[42] More importantly, I agree that the RAD ignored the Applicants' submissions about the right of Ms. Garcia Lozano's family to this land and the fact that it had been stolen, not to mention her father's loss of life over it. Indeed, it was her pursuit of the land claim that has led to the incidents of threats received by Ms. Garcia Lozano – incidents that the RAD found to have been established. Having accepted that the Applicants' family had sustained loss of life and threats over the land claim, the RPD's – and subsequently the RAD's – conclusion that the Applicants should abandon the land claim became all the more problematic.

[43] I agree with the Applicants that the issue of land claims in Colombia is essentially a political issue, in view of the UNHCR Report noting that human rights defenders are being killed in Colombia because of land claims. I also note that one of the two 2019 articles the Applicants submitted referred to the killing of land restitution claimants by local elites under the *Águila Negras* brand. Rather than considering the political nature of the Applicants' land claim, the RAD unreasonably adopted the RPD's framing of the issue purely from a financial perspective by assessing whether the Applicants need the land for their livelihood.

[44] The Respondent submits that the Applicants took the RAD's comments out of context. The Respondent argues the RAD did not instruct the Applicants to abandon the land claim, but rather responded to the Applicants' submissions about the impacts of being internally displaced, concluding that the effects of losing the traditional family farm would be less given the Applicants' education and employment backgrounds. I reject the Respondent's contention. It is one thing to conclude the Applicants would be able to find gainful employment in the IFA due to their educational and employment background, it is quite another to say that they should abandon their claim to their family land because they could live without it.

[45] In so finding, the RAD has committed the same error as that found by this Court in *Pimental Colmenares* and *Buyuksahin*. I find, in particular, Justice Zinn's comment in *Buyuksahin* instructive:

> [26] The RPD inferred that that the applicant would not continue his political activities if he returned to Turkey, notwithstanding his evidence to the contrary. The inference of the RPD is unreasonable because it fails to recognize that the applicant has a history for advocating for many years. He stopped only because he feared for his life and his family. To suggest that a claimant can safely return

> because he will have abandoned his political views in order not to be persecuted, is to turn the refugee system on its head.

[46] Further, just as "the law does not require a victim of politically motivated persecution to necessarily abandon his commitment to political activism in order to live safely in a country": *Pimental Colmenares*, para 14, it was unreasonable for the RPD and hence the RAD to require the Applicants to abandon their land restitution claim, an issue of justice for her family and her father that Ms. Garcia Lozano has pursued for more than a decade.

[47] At the hearing, the Respondent further argued that the land claim issue "clearly cannot be that controversial" if the female Applicant saw the restitution process advertised on television. Given that Ms. Garcia Lozano has already lost her father over the land in question, and in view of the documentary evidence about the killings of land restitution claimants in Colombia, I find this submission trivializes the Applicants' claim and the suffering they have endured.

[48] The case cited by the Respondent, *Franco Garcia v Canada (Minister of Citizenship and Immigration)* 2021 FC 1006, can be distinguished on the facts. At paras 22-23, the applicants did not adduce any evidence to suggest that the factual finding of the RAD that they have abandoned their land restitution proceedings was incorrect. Here, the Applicants clearly intended to pursue their land claim but were forced to flee their country due to threats received. Neither the RPD nor the RAD found the Applicants to have abandoned their land claim – which was made evident by the RPD's suggestion that they do exactly that.

[49] As an *obiter*, I find the whole notion that the Applicants should abandon their land claim curious, to say the least. If the RPD and the RAD were both firmly of the view that the Applicants would not be pursued by the Black Eagles in Bogotá and that they do not need the land to live, then it should not make any difference if the Applicants continue with their land claim. It begs the question as to why that suggestion was made in the first place. It would only matter if continuing with the land claim would somehow jeopardize the Applicants' life and safety, which in turn would put into question the RPD and RAD's findings that there is an IFA in Bogotá.

V. Conclusion

[50] The application for judicial review is allowed and the matter is referred back for redetermination by a different decision maker.

[51] There is no question for certification.

JUDGMENT in IMM-4934-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed.

2. The matter is referred back for redetermination by a different decision maker.

3. There is no question for certification.

"Avvy Yao-Yao Go"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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