

Federal Court



Cour fédérale

Date: 20220318

Docket: IMM-4466-20

Citation: 2022 FC 371

Ottawa, Ontario, March 18, 2022

PRESENT: The Honourable Madam Justice Aylen

BETWEEN:

**WILLIAM YESID CASTANEDA ESPINDOLA
JESSICA JOHANNA SANCHEZ CHAPARRO
LUNA NICOL CASTANEDA MARTINEZ
MIA LAURENT CASTANEDA SANCHEZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Principal Applicant, William Yesid Castaneda Espindola, his spouse and his two minor daughters, who are all citizens of Columbia, seek judicial review of an August 26, 2020 decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada [RAD]

confirming the decision of the Refugee Protection Division [RPD] that the Applicants are not *Convention* refugees or persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicants assert that the RAD's decision is unreasonable on the basis that: (a) the RAD failed to properly consider the evidence of Luna (one of the minor Applicants), whose evidence they assert was obtained and considered in a manner that is inconsistent with the Chairperson's Guideline 3 – *Child Refugee Claimants: Procedural and Evidentiary Issues* [Guideline]; (b) the RAD erred in upholding the RPD's negative credibility findings vis-à-vis the Principal Applicant; (c) the RAD disregarded documentary evidence regarding country conditions and that without regard for that evidence, the panel was unable to properly assess the Principal Applicant's testimony and that the RAD misconstrued other evidence; (d) the RPD and the RAD erred in its assessment of the police report; (e) the RPD and the RAD failed to consider that the Applicants had a good life in Columbia and thus had no reason to give it all up and become refugees; and (f) the RAD erred by simply approving the RPD's decision without meaningfully addressing and independently analyzing the issues raised by the Applicants.

[3] For the reasons that follow, the application for judicial review shall be dismissed.

II. Background

[4] In November of 2017, the Principal Applicant's then 14-year-old daughter Luna attended a party held at the home of one of her friends in Bogota. The Applicants claim that students from a different school attended and brought beer and cookies laced with drugs, which Luna consumed,

and thereafter Luna could not recall what transpired during the balance of the evening. Upon returning to school the following Monday, Luna asserted that a boy that she did not know showed her a video of her having sex with him and threatened to leak the video to the entire school if she did not do as he said. Luna testified before the RPD that notwithstanding the boy's threats, the boy never approached her again and never told her what she was required to do.

[5] Luna eventually told the Principal Applicant about this event, which led the Principal Applicant to talk with the school personnel who referred him to the Fundacion Amigos, a non-profit organization that promotes and guides vulnerable communities in Colombia. The Principal Applicant claims that it was through Fundacion Amigos that he learned that organized crime groups target underage girls to force them into prostitution. The Principal Applicant alleges that, thereafter, he began to receive threatening phone calls. He claims that he advised the police of what happened to Luna and the subsequent threatening phone calls.

[6] The Applicants assert that on February 24, 2018, they moved to the City of Armenia, in western Columbia. Two days later, two men attempted to kidnap Luna while she was walking to a store. Luna claims that she screamed and fought back and that she was helped by neighbours who witnessed the incident, which led the men to abandon their kidnapping attempt. The Applicants assert that they immediately reported the attempted kidnapping to the police.

[7] On March 30, 2018, the Applicants moved to the United States. They lived in the United States for approximately six months before crossing illegally into Canada and making their claim for refugee protection. In support of their refugee claim, the Applicants asserted that they were

forced to leave Columbia as a result of Luna's sexual exploitation and attempted kidnapping and due to the fact that the Principal Applicant was a target of threats and intimidation by members of a gang associated with a paramilitary group. The Applicants asserted that the police in Columbia were unwilling or unable to provide the Applicants with any meaningful protection from the risk of harm.

III. Decisions of the RPD and the RAD

[8] In its decision dated August 26, 2019, the RPD found that the Applicant were not *Convention* refugees as they did not have a well-founded fear of persecution for a *Convention* ground in Columbia. Further, the RPD found that the Applicants were not people in need of protection as their removal to Columbia would not subject them personally to a risk of life, to a risk of cruel and unusual treatment or punishment or to a danger of torture.

[9] After determining that the Applicant had established their identities, the RPD went on to consider whether there was a forward facing risk to the Applicants as a result of Luna's sexual exploitation at the party and her attempted kidnapping. The RPD held that, with respect to the incident at the party, there was no forward facing risk to Luna or the other Applicants as the RPD was not satisfied that the incident was gang related, Luna never saw the boy again, the video never went public and the RPD was not persuaded that what happened at the party was linked to the kidnapping attempt in Armenia. With respect to the attempted kidnapping, the RPD also found that there was no forward facing risk to the Applicants as it concluded that the attempted kidnapping was a random attempt at crime and unrelated to what transpired at the party in Bogota.

[10] In making these determinations, the RPD made numerous credibility findings regarding the evidence and narrative presented by the Principal Applicant and found that Luna's narrative did not corroborate that of the Principal Applicant.

[11] Regarding Luna's testimony at the hearing, the RPD noted the *Guideline* both in terms of the procedure followed at the hearing and the RPD's assessment of Luna's evidence. The RPD noted that it determined that Luna understood the nature of an affirmation to tell the truth, that she was asked a series of "warm-up" question regarding basic information and questions on topics that would be of interest to her. The RPD noted that these questions were intended to determine if Luna was able to communicate evidence, to determine if she understood the terminology used when asking questions, to get an idea of the level of detail that she was able to provide, to allow her to get comfortable with the question and answer format of a hearing and to develop a rapport with Luna.

[12] The RPD found that Luna's evidence did not corroborate the Applicants' claim that she was being recruited for forced prostitution by a criminal gang. The RPD asked Luna several questions about the unknown teenagers at the party and the boy that approached her at school and Luna never once mentioned that the boys were members of a gang. Moreover, the RPD found that despite the fact that the family continued to live in Bogota for another three months, the boy never actually asked Luna to do anything, she never saw him again and the video never went public.

[13] Regarding the Principal Applicant's narrative and the documents provided in relation thereto, the RPD found many material discrepancies. The RPD had concerns with respect to the

authenticity of the police report related to the denunciation made by the Principal Applicant after he received a threatening phone call on November 28, 2017, as well as inconsistencies in his testimony with respect to the number of phone calls received, which led the RPD to find that the police report had been falsified and to assign no weight to the report. In that regard, the RPD pointed out that the Principal Applicant testified he only found out about the sexual aspects of what happened to Luna at the party when they were in the United States in 2018, whereas the police denunciation contained the fact that Luna was depicted in a sexual video. The RPD found it impossible for the Principal Applicant to have included this information in a denunciation made on November 28, 2017 if he only learned about it several months later.

[14] The RPD also did not believe the Principal Applicant that after the attempted kidnapping, he continued to receive threatening phone calls. The RPD noted that this allegation was not contained in either of the two Basis of Claim [BOC] narratives that he prepared, and when asked why he did not change his cell phone number, the Principal Applicant testified that the number was important for his family business. The RPD did not accept this explanation and stated that if one is receiving continuous threatening phone calls, one would naturally take the simple step of getting a new number, even if the phone number is linked to a business, as new contact information can easily be distributed to clients.

[15] Moreover, the RPD found inconsistencies in the Principal Applicant's narrative regarding the denunciation that followed the attempted kidnapping, which inconsistencies were not adequately explained by the Principal Applicant at the hearing. According to the Principal Applicant's amended BOC, after the attempted kidnapping, the Applicants "immediately went to

the police to give their best account of events”. In the police denunciation, the Principal Applicant was specifically asked “does your daughter use drugs or has she been linked to a problem in the school or neighbourhood?”, to which he responded “not that I know of”. When asked to explain that inconsistency, the Principal Applicant asserted that he wanted to answer the police’s questions and leave as quickly as possible because he did not trust them. He testified that the police took him to the police station to make the denunciation. This explanation was found to contradict the Principal Applicant’s amended BOC, as the relevant passage did not suggest that the police forced the Principal Applicant to make a denunciation nor that the Applicants gave the police limited information. The RPD also found it was not reasonable that the Principal Applicant would mislead the police as to what was going on with his daughter after someone tried to kidnap her, if he felt the incidents were related.

[16] Finally, regarding the existence of a forward facing risk in Colombia following the attempted kidnapping, the Principal Applicant alleged at the hearing he had been told by Luna’s biological mother (who lives in Armenia) that people had been asking about him at the apartment where he lived in Armenia. The RPD noted that this allegation had been omitted from both of the Principal Applicant’s BOC narratives and that no evidence from the mother had been provided to that effect. When asked about this omission, the Principal Applicant explained that the events happened at the beginning of 2019. The RPD stressed that the second BOC was provided just 10 days prior to the first sitting of the hearing, and when asked why he did not put this information in the recent narrative, the Principal Applicant explained that he was not asked this question. Moreover, the Principal Applicant testified that his sister had been approached in Bogota, but this information was also omitted in his BOC narratives and no evidence from the Principal Applicant’s

sister was provided. When asked why, the Principal Applicant explained that his sister did not provide him specific information.

[17] The RPD found that the existence of an ongoing threat in Colombia is a core element of the Applicants' claim given that risk is assessed on a forward looking basis and that the Applicants left Colombia well over a year ago. The RPD noted that the Principal Applicant was represented by counsel, and that counsel would be aware that a BOC is a foundational document on which his client's refugee claim is considered and that omissions could result in adverse credibility findings against his client. He would have extensively interviewed his client to prepare his narrative to detail all relevant incidents, and the fact that the Principal Applicant did not detail an on-going threat in his narrative was an indication of a serious embellishment.

[18] In its August 26, 2020 decision, the RAD stated that the primary arguments raised on appeal by the Applicants (who were unrepresented before the RAD) were that the RPD breached procedural fairness in its treatment of Luna, that the Applicants were denied the right to a fair hearing and that the RPD's key credibility findings were flawed for a number of reasons, including that the RPD was biased and improperly weighed the evidence.

[19] The RAD held that the Applicants received a fair hearing. The RAD found no evidence to support the Applicants' assertion that the RPD was biased or acted inappropriately in how they questioned Luna or assessed her evidence. The RAD held that the Principal Applicant's omission of on-going threats in Armenia and Bogota in his narrative was material (and not minor as alleged by the Applicants) and that the RPD was correct to find that the Principal Applicant's explanation

for the omissions was inadequate and that these omissions negatively impacted credibility of forward-facing risk. The RAD found no error in the RPD's reasoning underpinning its credibility assessment and adopted the RPD's reasons as its own. The RAD further held that contrary to the submissions of the Applicants, the RPD had considered all of the evidence before it and did not err in concluding that the Applicants had not credibly established a forward-facing risk in Columbia.

IV. Issue and Standard of Review

[20] The sole issue for determination on this application is whether the RAD's decision was reasonable.

[21] The parties submit, and I agree, that the presumptive standard of review is reasonableness. No exceptions to that presumption have been raised nor apply [see *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 23, 25].

[22] According to the standard of reasonableness, a reviewing Court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision-maker [see *Vavilov*, *supra* at paras 15, 85].

V. Analysis

[23] First, the Applicants assert that the RAD erred in upholding the RPD's consideration of Luna's evidence, thus failing to properly assess the application of the *Guideline*. Had the RAD listened, and paid close attention, to the form and content of Luna's testimony, the Applicants assert that the RAD would have concluded that Luna was extremely uncomfortable with the hearing process and that "many if not all" of her answers were vague and evasive and obviously intended to finalize the questioning process as soon as possible.

[24] I reject this assertion. It is clear from the RAD's reasons for decision that the RAD did in fact listen to the hearing and reviewed the written transcript of Luna's evidence and found that there was no evidence to support the Applicants' assertions made before the RAD that the questioning of Luna was in any way inappropriate. Moreover, notwithstanding that the Applicants assert that "many if not all" of Luna's answers were vague or evasive, the Applicants have not pointed the Court to a single answer given by Luna that could be so characterized.

[25] As properly noted by the RAD, had the Applicants been of the view that the RPD's questioning of Luna was in any way inappropriate, the Applicants (who were represented by legal counsel before the RPD) were required to raise their concerns with the RPD, which they did not do [see *Tsigehana v Canada (Minister of Citizenship and Immigration)*, 2020 FC 426 at paras 21-22].

[26] The Applicants further assert that the RPD's and the RAD's expectations of Luna regarding the quality of her evidence were age-inappropriate, as she should not have been required to make a link between her sexual exploitation and the kidnapping attempt nor to provide justifications for her conclusions. I am not satisfied that the Applicants have demonstrated any such inappropriate expectation. To the contrary, based on the material before the Court, I find that the questions asked of Luna and the RAD's conclusions based on her evidence were reasonable.

[27] The Applicants further assert that the RAD turned a blind eye to Luna's evidence and that it was "open to the RAD" to find that the kidnapping attempt was not random, but was linked to the sexual exploitation incident at the party. Again, I reject this assertion. The Applicants have not pointed to any specific evidence that was overlooked by the RAD. Rather, what the Applicants are asking the Court to do is to reweigh the evidence and come to a different conclusion, which is not the role of the Court on an application for judicial review [see *Vavilov*, *supra* at para 125; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59]. Based on the evidence before it, I find that the RAD's conclusion that the two events were unrelated was reasonable.

[28] Second, the Applicants assert that the RAD erred in upholding the RPD's negative credibility findings vis-à-vis the Principal Applicant. The Applicants assert that the omissions from the Principal Applicant's original BOC narrative were minor and a credible explanation was provided for the discrepancies – namely, that the Principal Applicant held the mistaken belief that he could elaborate on his narrative at the hearing.

[29] I reject this assertion. I find that it was open to the RAD to conclude that the omissions made by the Principal Applicant, as detailed above, were not minor. In that regard, the Applicants have not provided any submissions to support their assertion that the omissions were minor in nature and not central to the Applicants' claim. Moreover, I also find that the RAD's determination that the omissions had not been adequately explained was reasonable. In that regard, the Applicants have not pointed to any irrelevant consideration taken into account by the RAD in reaching this conclusion. To the contrary, the RAD properly took into consideration the fact that the Applicants had not obtained evidence from the mother or sister to corroborate a portion of the Principal Applicant's explanations, as well as the fact that the Principal Applicant completed a second narrative just ten days before the RPD's first hearing when he was represented by legal counsel and would therefore have appreciated that he had a mistaken belief about his ability to elaborate on his narrative at the hearing.

[30] It is also important to recall that the RAD's negative credibility assessment of the Principal Applicant was not based solely on omissions in the Principal Applicant's narratives. The RAD also found that the Principal Applicant gave inconsistent evidence regarding the number of threatening phone calls he alleges he received, the Principal Applicant gave contradictory evidence regarding when he learned of the sexual nature of the party incident, and that the police denunciation submitted by the Principal Applicant had been falsified. Even if the RAD had accepted the Principal Applicant's explanation for certain omissions in his narratives, there remained a more than sufficient basis upon which the RAD could reasonably make a negative credibility finding.

[31] Third, the Applicants assert that the RAD disregarded documentary evidence regarding country conditions and that without regard to such documentation, the RAD was unable to properly assess the Principal Applicant's testimony and misconstrued other evidence. However, the Applicants have failed to explain what country condition documents evidence was disregarded or what evidence was misconstrued.

[32] Fourth, the Applicants assert that the RPD and the RAD failed to consider that the police in Columbia are poorly trained, inadequately resourced, often incompetent and highly corrupted. The Applicants assert that to expect the standards of the developed world from the work and documents generated by the police in Columbia is either a sign of a lack of specific knowledge or serious error in judgment, both of which constitute reviewable errors. However, the Applicants did not raise this issue before the RAD and therefore it is not open to them to raise it on this application [see *Canada (Citizenship and Immigration) v RK*, 2016 FCA 272 at para 6; *Dahal v Canada (Citizenship and Immigration)*, 2017 FC 1102 at para 35]. In any event, given the testimony of the Principal Applicant before the RPD, it was entirely open to the RPD and the RAD to conclude that responsibility for the inconsistencies between the police report and the Principal Applicant's testimony rested with the Principal Applicant and not the police.

[33] Fifth, the Applicants assert that the RPD and the RAD failed to consider that the Applicants had well-settled, successful and happy lives in Columbia and had absolutely no reason to give that up in order to embark on the uncertainties and indignities of the refugee life. Again, this issue was not raised before the RAD and therefore is not properly before the Court.

[34] Finally, the Applicants assert that the RAD erred by simply approving the RPD's decision without meaningfully addressing and independently analyzing the issues raised by the Applicants. Put differently, the Applicants assert that the RAD simply "rubber stamped" the RPD's decision. The Applicants assert that the brevity and rigidity of the RAD's reasons and its failure to address most of the key grounds of appeal reveal a failure to undertake an independent analysis of the issues.

[35] I reject this assertion. The reasonableness of the RAD's decision is not determined by its length, but rather by its substance. The Applicants have not pointed to any specific ground of appeal raised before the RAD that the RAD failed to address. To the contrary, a review of the RAD's decision reveals that the RAD considered and analyzed the issues raised by the Applicants and agreed with the determinations made by the RPD.

VI. Conclusion

[36] For the reasons set out above, I find that the RAD's decision was reasonable, as it was based on an internally coherent and rational chain of analysis and was justified in relation to the evidence before it and the applicable legal principles. Accordingly, the application for judicial review shall be dismissed.

[37] No question for certification was raised by the parties and I agree that none arises.

JUDGMENT in IMM-4466-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.
2. The parties proposed no question for certification and none arises.

“Mandy Ayles”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4466-20

STYLE OF CAUSE: WILLIAM YESID CASTANEDA ESPINDOLA,
JESSICA JOHANNA SANCHEZ CHAPARRO, LUNA
NICOL CASTANEDA MARTINEZ, MIA LAURENT
CASTANEDA SANCHEZ v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HEARD BY VIDEOCONFERENCE

DATE OF HEARING: MARCH 15, 2022

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DATED: MARCH 18, 2022

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