Federal Court  Cour fédérale

Date: 20220405

Docket: IMM-3382-21

Citation: 2022 FC 479

Ottawa, Ontario, April 5, 2022

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

NERIO MIGUEL GONZALEZ JIMENEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The applicant, Nerio Miguel Gonzalez Jimenez, is a citizen of Venezuela and Colombia. In Canada since June 2018, the applicant fears returning to these two countries because of his political views against the current regime in Venezuela, whose influence, he alleges, extends to Colombia, where Venezuelan immigrants are also victims of xenophobia and discrimination.

[2] On February 3, 2020, the Refugee Protection Division [RPD] found the applicant to be credible and that he could not avail himself of state protection or an internal flight alternative [IFA] in Venezuela. However, it determined that he had failed to establish, through clear and convincing evidence, that Colombia was unable to protect him.

[3] On appeal to the Refugee Appeal Division [RAD], the applicant submitted that the RPD had erred in its assessment of state protection in Colombia, had failed in its duty of procedural fairness by not giving sufficient reasons for its decision, and had failed to be impartial by not giving him the benefit of the doubt.

[4] In a decision issued on April 27, 2021, the RAD confirmed the RPD's decision, but for different reasons. Unlike the RPD, the RAD believed that the determinative issue was not state protection in Colombia, but rather the prospective risk that the applicant might face there. It did not consider prospective risk to be a new issue, as the applicant pointed out in his memorandum that the RPD's decision was unfounded with respect to his fears in Colombia. As for the applicant's other arguments, the RAD confirmed that procedural fairness had been breached, particularly in the RPD's rather brief analysis of state protection in Colombia. It also found that the applicant had not based his allegation of bias on concrete evidence and that the test set out in *Committee for Justice and Liberty v National Energy Board*, [1978] 1 SCR 369, had not been met.

[5] The applicant is seeking judicial review of this decision. In particular, he criticizes the RAD for breaching its duty of procedural fairness by deciding on a matter that was not raised on appeal. He also submits that it erred in its assessment of the documentary evidence.

II. Analysis

[6] The standard of review applicable to RAD decisions that involve the assessment of evidence is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16–17 [*Vavilov*]; *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35).

[7] When the reasonableness standard applies, the Court must develop an understanding of the decision maker's reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, it asks "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" (*Vavilov* at para 99). In addition, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov* at paragraph 100).

[8] With respect to the alleged breach of procedural fairness, the role of this Court is to determine whether the procedure was fair having regard to all of the circumstances (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 at para 35; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 54–56).

[9] The applicant submits that the RAD violated his right to procedural fairness by determining the prospective risk in Colombia. Since this was a "new issue", the RAD had an obligation to allow him to make submissions on the issue.

[10] The Court agrees.

[11] In *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600, the Court defined a "new question" as follows:

> [25] . . . A "new question" is a question which constitutes a new ground or reasoning on which a decision-maker relies, other than the grounds of appeal raised by the applicant, to support the valid or erroneous nature of the decision appealed from.

[12] When a new issue is raised by the RAD, it must generally notify the parties so that they can make submissions on the issue (*Herrera Salas v Canada (Citizenship and Immigration)*, 2021 FC 1363 at para 18; *Ojarikre v Canada (Citizenship and Immigration)*, 2015 FC 896 at para 22; *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at paras 66–67; *Jianzhu v Canada (Citizenship and Immigration)*, 2015 FC 551 at para 12).

[13] In this case, the RPD's decision mainly relates to the lack of state protection and an IFA in Venezuela for the applicant and his partner, who has citizenship only in Venezuela. The RPD granted the applicant's partner refugee protection status. However, since the applicant also holds Colombian citizenship, it looked at state protection in Colombia. Under the heading [TRANSLATION] "State Protection – Colombia", covering only four brief paragraphs, the RPD

found that the applicant had failed to establish, with clear and convincing evidence, that the Colombian state was unwilling or unable to provide him with adequate protection.

[14] In his appeal memorandum before the RAD, the applicant stated at the outset that all his new evidence [TRANSLATION] "contradict[ed] the RPD's determination of adequate protection [for the applicant] in Colombia". He then criticized the RPD for its brief, deficient analysis of state protection. While the applicant's appeal memorandum does make some references to the possibility of persecution in Colombia, the applicant's arguments are intended rather to demonstrate Colombia's inability to protect him. The evidence on which the RAD relied to find that this was not a new issue should be interpreted in the context in which the applicant submitted it, that of a lack of state protection in Colombia.

[15] The respondent is relying on *Baez De La Cruz v Canada (Citizenship and Immigration)*, 2021 FC 457 [*Baez*], to argue that prospective risk is not a new issue as it is a core element of any refugee protection claim, citing the following excerpt from the decision in particular:

> [10] Second, the RAD had jurisdiction to consider the issue of prospective risk. In this case, the RAD did not breach procedural fairness in determining that, even if it believed the applicant regarding all of the information provided as evidence, it would still conclude that the applicant had not established, on a balance of probabilities, that he faced a prospective risk (RAD decision at para 69). This is not a new issue, as the applicant claims; the existence of a prospective risk is always central to the right to protection under section 97 of the IRPA (*Portillo v Canada (Citizenship and Immigration*), 2012 FC 678 at para 40). <u>It is clear from paragraph 19 of the RPD's decision, read in light of the decision as a whole, that the RPD also had in mind the absence of a prospective risk and that it ruled on this issue, if not explicitly, then at least implicitly.</u>
>
> [Emphasis added.]

[16] The respondent submits that in the case at hand, the RPD also considered the issue of prospective risk implicitly. In support of the respondent's position, the respondent refers to the paragraph of the decision in which the RPD holds that the evidence does not indicate that elements connected with the Venezuelan government are active on Colombian territory.

[17] The Court finds the applicant's argument to be flawed.

[18] First, it is important to distinguish *Baez* from this case. In *Baez*, the applicant had not challenged the reasonableness of multiple credibility findings in his regard before this Court. He had limited himself to raising the issue of procedural fairness. The Court found that the matter should not be referred back because the applicant's story was not credible, making the conclusion that there was no prospective risk reasonable. But in this case, the RPD did find the applicant to be credible. In addition, the issue of prospective risk was one of the determinative issues for the RAD.

[19] Second, while the issue of prospective risk is a central issue in any refugee protection claim, the fact remains that the RPD did not make a definitive finding on this factor, so the applicant did not raise the issue on appeal. When analyzing the applicant's situation from a prospective risk perspective, the RAD found that the applicant did not provide further clarifications in his appeal memorandum as to his argument that "the RPD did not take his testimony into account or his numerous explanations to justify his claim and his fears with respect to Colombia". This lack of clarifications is due to the fact that the applicant's arguments were more concerned with state protection. The Court is of the view that the basis on which the

RAD relied to determine the applicant's prospective risk was not solid enough for this issue to become the determinative issue on appeal.

[20] The Court recognizes that there is a thin line between the RAD raising and addressing a new issue and it merely supporting an existing finding. However, in this case, the issue of prospective risk was not one of the appellants' grounds of appeal, and the Court finds it to be a new ground on which the RAD relied to reject the appeal. The RAD should have given the applicant an opportunity to make submissions to address the issue. Given these circumstances, the Court finds that procedural fairness was breached.

[21] Because of this finding, the Court does not have to examine the applicant's other arguments.

[22] For these reasons, the application for judicial review is allowed. The decision is set aside, and the matter is referred back to the RAD for reconsideration before a differently constituted panel. The outcome may well be the same when the case is reconsidered. However, it is essential that the applicant be given an opportunity to make submissions on the issue of his prospective risk in Colombia.

[23] No question of general importance was submitted for certification, and the Court is of the opinion that this case does not raise any.

JUDGMENT in IMM-3382-21

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed.
2. The style of cause in this matter is amended to name the Minister of Citizenship and Immigration as the appropriate respondent.
3. The decision of the Refugee Appeal Division, dated April 27, 2021, is set aside;
4. The matter is referred back to the Refugee Appeal Division for reconsideration before a differently constituted panel; and
5. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

Certified true translation
Johanna Kratz

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3382-21
STYLE OF CAUSE:	GONZALEZ JIMENEZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
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APPEARANCES:

Nancy Cristina Muños Ramirez	FOR THE APPLICANT
Evan Liosis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

ROA Services juridiques Montréal, Quebec	FOR THE APPLICANT
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT