Federal Court  Cour fédérale

Date: 20230213

Docket: IMM-2456-22

Citation: 2023 FC 214

Ottawa, Ontario, February 13, 2023

PRESENT: Mr. Justice Pentney

BETWEEN:

CARLOS ALBERTO COTO PALAGOT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicant, Carlos Alberto Coto Palagot, is a Mexican citizen who came to Canada on a student visa. He remained in Canada after the visa expired and later claimed refugee status. He says he relied on an immigration consultant to prepare and file his claim. However, the forms that were submitted had an incorrect address listed for the Applicant.

[2] The Immigration and Refugee Board (IRB) sent the Applicant a “Notice to Appear” for his hearing to this address, but it was returned as no such address exists. The Minister sent a Notice of Intent to Intervene in the refugee hearing to the same address, but it was also returned. The IRB then sent a notice of its decision to this address, dismissing the Applicant’s claim for abandonment; once again, the document was returned. A few months later, the IRB sent the same notice to the Applicant’s new address, but it appears that he had moved by the time it was sent.

[3] In January 2022, the Canada Border Services Agency called the Applicant in for a meeting so that they could deliver his Direction to Report for removal. At that meeting, the Applicant learned that his refugee claim had been dismissed because he was deemed to have abandoned it.

[4] The Applicant immediately retained a lawyer, who filed an urgent request to the IRB to reopen his claim. His main argument was that he had been the victim of fraudulent immigration consultants who inserted the wrong address into his immigration forms, and thus he did not know his hearing had been scheduled. The Applicant argued that he was denied procedural fairness because he never received notice of the hearing in a manner that was accessible to him.

[5] The IRB dismissed his request to reopen his case, noting that after the Notice to Appear was returned, an IRB official contacted the Applicant by phone and he confirmed he would send his address and email by facsimile so that he could receive the link to his hearing. The RPD found that despite his problems with his immigration consultant, the Applicant bore the ultimate responsibility for his claim and he was obligated to inform the IRB of any change of address. In

dismissing his request, the RPD also considered the fact that IRB staff had contacted the Applicant, yet he did not provide updated information.

[6] Upon receipt of the negative decision, the Applicant's counsel submitted a second request for re-consideration, accompanied by an affidavit from the Applicant and some documents. His affidavit stated that he did not understand the immigration forms he had signed because they were not translated for him, and while he acknowledged that he had spoken with an IRB official, he said that he could not understand that person because they had a heavy accent and no Spanish translation was provided. The Applicant says that he did not understand he was to send his address and email by fax, but rather he thought he was to send the information by text message. He enclosed a screen shot of a text that he says corroborates this. The Applicant argued he was denied procedural fairness and asked that his claim be reopened.

[7] The RPD rejected the Applicant's second request, noting that under the IRB Rules, it could only grant it if the Applicant demonstrated exceptional circumstances supported by new evidence. The Board found that there was no new evidence, and that the Applicant had not established exceptional circumstances. It rejected his assertion that he did not understand English, because he had signed his Basis of Claim form and Declaration A, indicating that he spoke and understood English. The RPD also noted that IRB staff had contacted the Applicant, and so it rejected his argument that he had been denied procedural fairness.

[8] The Applicant seeks judicial review of this decision.

[9] The determinative issue is whether the RPD's decision is reasonable, in accordance with the framework set out in Canada *(Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[10] In summary, under the *Vavilov* framework, 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" (*Vavilov* at para 85). An administrative decision-maker's exercise of public power must be "justified, intelligible and transparent" (*Vavilov* at para 95). The onus is on the Applicant to demonstrate flaws in the decision that are "sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100).

[11] The parties raised a number of issues, but I do not find it necessary to deal with all of them. The determinative factor in this case is the RPD's failure to explain its reasoning on the key question of the Applicant's ability to understand English, in light of the conflicting evidence in the record.

[12] As noted earlier, the RPD relied on the attestation in the signed form that said the Applicant understood English as one of the key grounds to reject his application to reopen his claim. In making this finding, the RPD did not explain why it gave no credence to the Applicant's sworn affidavit that said he did not understand English, and in which he explained that although he signed the Basis of Claim form, it was prepared by his fraudulent immigration consultant, who never translated it.

[13] This is unreasonable.

[14] The Respondent pointed out that the Applicant signed his affidavit in English and there is no indication it was translated for him, and he had signed previous immigration documents, including a student visa application that said he intended to study English in Canada. That is all true. It must be acknowledged that the RPD may have had good reasons to doubt the authenticity of the Applicant's evidence. However, reasonableness demands that a decision maker explain its reasoning on the key factors that lead to the result. In this case, that must include the RPD's doubts about the Applicant's sworn evidence.

[15] In my view, the RPD's failure to explain its reasoning on this point is sufficiently serious to undermine the decision. This is a central aspect of the RPD's decision and its reasoning is simply absent.

[16] Therefore, despite the able and nuanced submissions of counsel for the Respondent, I find the decision is unreasonable, and it will be quashed. The matter will be remitted back for redetermination by a different decision-maker.

[17] There is no question of general importance for certification.

[18] Finally, a postscript is needed, to explain how this hearing unfolded. Counsel represented the Applicant when he initiated this proceeding, and counsel filed written submissions on his behalf. Shortly before the hearing, the Applicant filed a notice of intention to represent himself.

In exchanges with the Registry shortly before the hearing, the Applicant indicated that he would be retaining counsel for the hearing, but in the end that did not happen. He appeared alone on February 8, 2023, the day set for the hearing.

[19] In light of his evidence regarding the Applicant's limited abilities in English, I adjourned the hearing so that he could find someone to assist him with translation. The hearing resumed on February 10, 2023, and the Applicant was accompanied by a friend who translated the proceedings and his submissions to the Court.

[20] I want to acknowledge the assistance that the Applicant's friend provided to the Applicant and the Court. I also want to acknowledge the flexibility and professionalism of counsel for the Attorney General. His actions reflect the highest traditions of the Attorney General as the Chief Law Officer of the Crown.

JUDGMENT in IMM-2456-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The RPD decision refusing to reopen the Applicant's refugee claim is quashed.
3. The matter is remitted back for reconsideration by a different decision-maker.
4. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2456-22
STYLE OF CAUSE:	CARLOS ALBERTO COTO PALAGOT v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	FEBRUARY 10, 2023
REASONS FOR JUDGMENT AND JUDGMENT:	PENTNEY J.
DATED:	FEBRUARY 13, 2023

APPEARANCES:

Carlos Alberto Coto Palagot	FOR HIMSELF
James Todd	FOR THE RESPONDENT THE MINISTER OF CITIZENSHIP AND IMMIGRATION

SOLICITORS OF RECORD:

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