

Federal Court



Cour fédérale

Date: 20230414

Docket: IMM-3256-20

Citation: 2023 FC 541

Toronto, Ontario, April 14, 2023

PRESENT: The Honourable Mr. Justice Henry S. Brown

BETWEEN:

**JUAN CARLOS CABRERA ALVAREZ
YOVANKA SANTOS CHINEA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the matter

[1] This is an application for judicial review of a decision by the Refugee Protection Division [“RPD”], dated June 23, 2020, which found that the Applicants are neither Convention refugees nor persons in need of protection due to concerns about the credibility of their claims.

II. Facts

[2] The Applicants are a husband and wife of Cuban citizenship, who will be referred to as the Principal Applicant [“PA”] and Associate Applicant [“AA”], respectively. Their narrative is as follows.

[3] In brief, the Applicants allege that the PA began receiving threats and surveillance after speaking out against the Cuban government’s proposed changes to the Constitution at a workplace assembly. The PA was supposedly dismissed from his government job for being “politically” unreliable due to his anti-government speech. Following this, the head of the Committee for the Defense of the Revolution apparently started to interview the PA’s family, friends, and neighbours for information about the PA. The PA claims that he has been denied access to employment and the AA was branded a “dissident” and dismissed from her government position after they departed Cuba.

[4] The Applicants had previously applied for visitor visas applications to Canada on July 10, 2018. The visas were issued a few days later on July 17, 2018. Fearing for their safety, the Applicants used these visas to travel to Canada on May 8, 2019.

III. Decision under review

[5] The determinative issue for the RPD panel was credibility. The RPD acknowledged in its reasons that the PA’s oral testimony was consistent with his narrative, but made no efforts to obtain important corroborating evidence that would have been expected. On a balance of probabilities, the RPD found this lack of effort not credible. The panel also made a negative credibility finding on a letter tendered by the PA from a friend within the Cuban Communist

Party. Given the above, the RPD found that the PA was not a credible witness on balance of probabilities.

[6] As such, the RPD went on to assess the documentary evidence, which it was found did not support a positive determination of the claim. These findings are broken down further below.

A. *PA not threatened*

[7] Regarding the PA's alleged speech at a workplace assembly, the RPD noted that the PA did not provide any letters from coworkers that confirmed this event and his subsequent summons to an official's office. The PA had been asked during the oral hearing whether there were any documents he had made attempts to obtain, but could not get. He replied that he had got everything he wanted to present. The PA had alleged that he could not obtain more because many people feared state authorities and do not want to take risks.

[8] The RPD found that simply assuming his colleagues would not write a letter of support out of fear is not a reasonable assumption to make.

[9] For the same reason the PA did not try to get any supporting documents from family or friends. In one case, he forgot to ask.

[10] Consequently, the RPD found the PA did not make any efforts to obtain documents to support the entire foundation of his claim and did not provide a reasonable explanation for not

doing so. As such, the RPD found on a balance of probabilities that the PA did not speak out against the government at his work assembly. An adverse credibility finding was also drawn.

B. *PA not fired*

[11] The RPD similarly found the letter of support from the PA's friend as containing several credibility issues. Specifically, the RPD took issue with the following: (1) the document is a print-out of an e-mail and not a signed or witnessed letter; (2) the e-mail is from a person with an unknown name, sent from an unrecognizable email address to another unrecognizable email recipient; and (3) the email writer misspelled the alleged sender's first and last name and omitted his second last name.

[12] The RPD found more likely than not that this letter is not genuine. In the RPD's view, it is unlikely that someone would misspell their name more than once in an e-mail they crafted themselves. Moreover, the RPD found the fact that the emailed letter was not sent directly to the Applicants from the e-mail writer also detracts from its reliability.

[13] Given these concerns, the RPD found that the PA has not been informed by his colleague that he had been dismissed for being "politically unreliable". The RPD also drew a further adverse inference against the PA's overall credibility.

[14] This finding was not contested at the hearing.

C. *Family not interviewed*

[15] The RPD similarly found that the PA simply assuming that his family, friends and neighbours are afraid to support him with a letter is not a reasonable excuse for not requesting one. Given this lack of evidence, the RPD found that the PA has not established that on a balance of probabilities that law enforcement interviewed his family, friends or neighbours. The RPD draw a further adverse inference against the PA's overall credibility.

D. *Delayed departure from Cuba*

[16] The RPD did not accept the PA's explanation that he delayed their departure from Cuba because he had a good job and thought that he would be forgotten by state authorities. In the RPD's view, if the PA believed he was being persecuted on the basis of his political opinion and knows that free expression is not allowed in Cuba, then it would be reasonable to flee the country at the earliest opportunity. Moreover, the RPD took issue with the PA's belief that the threats would dissipate given the allegedly increasing intensity in the state's interest in him.

[17] Given these issues, the RPD found that PA's explanations for the delay and the state's interest in him not credible. The RPD also drew a further adverse credibility finding. The totality of the credibility findings regarding the PA led the RPD to find that the Cuban authorities were never interested in the PA.

E. *AA not dismissed from her job*

[18] The RPD again took issue with a lack of corroborating documents regarding the AA's alleged dismissal and status as a "dissident". The RPD rejected the PA's submission that he

didn't think about obtaining a letter from his wife's co-worker to support their claim. The RPD found this explanation not reasonable on a balance of probabilities. Given these considerations, the RPD found on a balance of probabilities that the AA was not branded a dissident and dismissed from her job. The RPD also built on earlier adverse inference findings against the PA's credibility and found that the presumption of truthfulness had been rebutted. This finding was not contested at the hearing.

F. *No credible basis*

[19] Given the presumption of truthfulness had been rebutted, the RPD went on to consider whether the documentary evidence on its own could support a positive determination of the claim. Ultimately, the RPD found that the documentary evidence filed couldn't support a positive determination in the Applicants' claim in light of the negative credibility findings.

[20] Moreover, the RPD also considered objective country evidence to find that it is more likely than not that the Applicants would not face any consequences from the Cuban government upon their return to Cuba for being failed refugee claimants.

IV. Issues

[21] The Applicants submit the following issues:

- 1) Whether the RPD erred in drawing adverse credibility findings from the lack of corroborating evidence.
- 2) Whether the RPD erred in drawing adverse credibility findings from the Applicants' delay in leaving Cuba.
- 3) Whether the RPD erred in finding there to be no credible basis for their claims.

[22] The Respondent submits that the Applicants have failed to establish an error that merits overturning the decision of the RPD.

[23] The issue is whether the RPD's decision was reasonable.

V. Standard of Review

[24] The applicable standard of review is reasonableness. In *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67, issued at the same time as the Supreme Court of Canada's decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov], the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard:

[31] 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). Accordingly, when conducting reasonableness review “[a] reviewing court must begin its inquiry into the reasonableness of a decision by examining the reasons provided with ‘respectful attention’ and seeking to understand the reasoning process followed by the decision maker to arrive at [the] conclusion” (*Vavilov*, at para. 84, quoting *Dunsmuir*, at para. 48). The reasons should be read holistically and contextually in order to understand “the basis on which a decision was made” (*Vavilov*, at para. 97, citing *Newfoundland Nurses*).

[32] A reviewing court should consider whether the decision as a whole is reasonable: “what is reasonable in a given situation will always depend on the constraints imposed by the legal and factual context of the particular decision under review” (*Vavilov*, at para. 90). The reviewing court must ask “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, citing *Dunsmuir*, at paras. 47 and 74, and *Catalyst Paper Corp. v. North Cowichan (District)*, 2012 SCC 2, [2012] 1 S.C.R. 5, at para. 13).

[33] Under reasonableness review, “[t]he burden is on the party challenging the decision to show that it is unreasonable” (*Vavilov*, at para. 100). The challenging party must satisfy the court “that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable” (*Vavilov*, at para. 100).

[Emphasis added]

[25] *Vavilov* also requires the reviewing court to consider whether the decision meaningfully grapples with the key issues:

[128] Reviewing courts cannot expect administrative decision makers to “respond to every argument or line of possible analysis” (*Newfoundland Nurses*, at para. 25), or to “make an explicit finding on each constituent element, however subordinate, leading to its final conclusion” (para 16). To impose such expectations would have a paralyzing effect on the proper functioning of administrative bodies and would needlessly compromise important values such as efficiency and access to justice. However, a decision maker’s failure to meaningfully grapple with key issues or central arguments raised by the parties may call into question whether the decision maker was actually alert and sensitive to the matter before it. In addition to assuring parties that their concerns have been heard, the process of drafting reasons with care and attention can alert the decision maker to inadvertent gaps and other flaws in its reasoning: *Baker*, at para. 39.

[Emphasis added]

VI. Analysis

A. *Lack of corroborating evidence*

[26] The Applicants submit that the RPD erred in drawing adverse credibility findings from the lack of corroborating evidence. This is the central issue on this judicial review, and given my findings, it is the determinative issue.

[27] The Applicants correctly note that apart from a lack of corroborating evidence, the RPD gave no reasons for finding that PA's account of these events lacked credibility. In the Applicants' view, there were no other indications that his testimony was not credible.

[28] In my view, this case turns on the application of the exception or distinction from the principles set out in *MalDonado v. Minister of Employment and Immigration*, [1980] 2 FC 302 (CA), as stated in *Luo v. Canada (Citizenship and Immigration)*, 2019 FC 823 [*Luo*]. In *Luo* the law is summarized by Justice Strickland:

[20] Accordingly, it has been held that it is an error to make an adverse credibility finding solely on the basis of the absence of corroborative evidence (*He* at paras 22, 24; *Guyen* at para 37; and *Ismaili* at para 53). However, where there is a valid reason to doubt the claimant's credibility or where the claimant's story is implausible, the lack of documentary evidence can be a valid consideration for the purposes of assessing credibility if the applicant is unable to provide a reasonable explanation for the lack of corroborative evidence (*Guyen* at para 38; *Ismaili* at para 36). The RPD is entitled to take into account a claimant's lack of effort to obtain corroborative evidence to establish the elements of their claim and to draw a negative inference from this (*Ismaili* at para 33).

[21] Other jurisprudence has found that there is an exception to, or distinction from, the Maldonado principle of truthfulness in that a decision-maker may draw an adverse inference regarding a claimant's testimony if he or she fails to produce evidence that the decision-maker reasonably expects should be available in the claimant's circumstances, and the claimant does not provide a reasonable explanation for failing to produce that evidence (*Murugesu v Canada (Citizenship and Immigration)*, 2016 FC 819 at para 30; *Radics v Canada (Citizenship and Immigration)*, 2014 FC 110 at paras 30-32 [*Radics*]; also see *Tellez Picon v Canada (Citizenship and Immigration)*, 2010 FC 129 at para 12; *Ryan v Canada (Citizenship and Immigration)*, 2012 FC 816 at para 19; *Rojas v Canada (Citizenship and Immigration)*, 2011 FC 849 at para 6 [*Rojas*]; *Ding v Canada (Citizenship and Immigration)*, 2014 FC 820 at para 15; *Lakatos v Canada (Citizenship and Immigration)*, 2014 FC 785 at para 26; *Mowloughi v Canada (Citizenship and Immigration)*, 2019 FC 270 at para 65; *Delosevic*

v Canada (Citizenship and Immigration), 2012 FC 831 at para 14; *Jin v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 359 at para 28). That is, a failure to provide corroborating documentation is only a proper consideration for the decision-maker, in this case the RPD, where there are valid reasons to doubt a claimant's credibility, or, where the decision-maker does not accept the claimant's explanation for failing to produce documentary evidence when it would be reasonably expected to be available (*Radics* at para 30). In that circumstance, "precision was required as to the nature of the documentation expected and a finding made to that effect" (*Rojas* at para 6).

[22] Whether corroborative evidence can reasonably be demanded depends upon the facts of each case (*Lopera v Canada (Citizenship and Immigration)*, 2011 FC 653 at para 31).

[23] As to credibility findings based on implausibility, the RPD can make adverse findings of credibility based on the implausibility of an applicant's story provided that the inferences drawn can reasonably be said to exist. However, such findings should only be made in the clearest of cases such as where the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the applicant (*Valtchev v Canada (Citizenship and Immigration)*, 2001 FCT 776 at para 7; *Lin v Canada (Citizenship and Immigration)*, 2014 FC 683 at para 19).

[29] More particularly at issue is whether the RPD reasonably found the PA failed to produce corroborative evidence that the decision-maker reasonably expects should be available in the claimant's circumstances, and whether the RPD reasonably found the claimant had not provided a reasonable explanation for failing to produce that evidence. The allegedly unreasonably missing evidence would be supportive letters from co-workers who heard him speak at the workplace event, supportive letters from family or friends, and in a supportive letter from Rosie, who was in Canada. There is no doubt no such corroborative evidence was filed.

[30] When asked why he has no letters from co-workers the RPD reports and finds:

[16] The principal claimant responded that “in Cuba people there is a lot of fear. People don’t want to take risks and I understand that”. I accept that the population is likely afraid of their state authorities, but simply assuming that his colleagues would not write him a letter of support out of fear is not a reasonable assumption to make.

[17] The principal claimant did not make any efforts to obtain documentation to support what is essentially the entire foundation of his claim. He did not provide me with an explanation that I felt was reasonable for not making these efforts.

[18] Therefore, I find on a balance of probabilities that the claimant did not speak out against the government at his work assembly, nor was he summoned to the office of military counterintelligence.

[31] When asked why he had no letters from his family or friends, he gave the same answer, which the RPD found not reasonable. When asked about Rosie, he said he didn’t think about it, which the RPD again found unreasonable.

[32] With respect, the RPD’s determinations in this respect are not reasonable, in that they do not meaningfully grapple with the objective country condition evidence to the effect that Cuba is an authoritarian one party police state, characterized among other things, by repression of dissent, with multiple state apparatus conducting mass surveillance of communication.

[33] These conditions might reasonably be seen, I surmise although I make no findings in this regard as it is for the decision maker on redetermination to assess, as quite likely to create a state of fear in the Cuban population of the governing dictatorship, and resulting fear of taking risks to help dissidents, as the PA stated.

[34] As one country condition document (US DOS) reports:

Cuba is an authoritarian state led by Miguel Diaz-Canel, president of the Council of State and Council of Ministers, with former president Raul Castro serving as the first secretary of the Communist Party (CP). Cuba has a one-party system in which the constitution recognizes the CP as the only legal party and the highest political entity of the state. On March 11, citizens voted to ratify a preselected list of 605 candidates to the National Assembly. A CP candidacy commission prescreened all candidates, and the government actively worked to block non-CP approved candidates from the ballot. On April 19, the National Assembly elected Diaz-Canel president of the Council of State and Council of Ministers. Neither the legislative nor the national elections were considered to be free or fair.

The national leadership, including members of the military, maintained effective control over the security forces.

Human rights issues included reports of an unlawful and arbitrary killing by police; torture of political dissidents, detainees, and prisoners by security forces; harsh and life-threatening prison conditions; arbitrary arrest and detention; holding of political prisoners; and arbitrary or unlawful interference with privacy. The government engaged in censorship, site blocking, and libel is criminalized. There were limitations on academic and cultural freedom; restrictions on the right of peaceful assembly; denial of freedom of association, including refusal to recognize independent associations; and restrictions on internal and external freedom of movement and on political participation. There was official corruption, trafficking in persons, outlawing of independent trade unions, and compulsory labor.

Government officials, at the direction of their superiors, committed most human rights abuses and failed to investigate or prosecute those who committed the abuses. Impunity for the perpetrators remained widespread.

[35] In my respectful view, the RPD acted unreasonably when it rejected the PA's explanation for not asking co-workers, friends or family because of the state of fear and unwillingness to take risks supporting a dissident.

[36] Before the RPD could do that, it is required by *Vavilov* to meaningfully grapple with the objective country condition evidence which may confirm the reasonableness of the proposition that Cuba's population fears its government including its intelligence, military, police and state apparatus engaged in maintaining this undemocratic repressive one party state.

[37] For example, if the RPD is considering whether it may draw an adverse inference regarding a claimant's testimony because he or she fails to produce evidence that the decision-maker *reasonably expects* should be available in the claimant's circumstances, and the claimant does not provide a *reasonable explanation* for failing to produce that evidence (see *Luo* paragraph 21), it *may* be necessary for the RPD to assess 1) in the first place whether, country conditions in Cuba are such that workers, family or friends of dissidents *may reasonably be expected* to provide support to dissidents seeking asylum based on political persecution by Cuban authorities, or if their fear of the state makes that unreasonable, and if so 2) whether it was reasonable to assume that support of political dissidents would not be forthcoming based on fear of reprisals by the Cuban state.

[38] Given this, the RPD's credibility assessments cannot stand, and of course, the no credible basis determination must fall.

[39] There are other issues in this case, in respect of which I make no comment because the matter will be redetermined.

VII. Conclusion

[40] For the reasons above, this application for judicial review will be granted.

VIII. Certified Question

[41] Neither party proposed a question of general importance, and none arises.

JUDGMENT in IMM-3256-20

THIS COURT'S JUDGMENT is that this application for judicial review is granted, this matter is remanded for redetermination by a differently constituted decision maker, no question of general importance is certified, and there is no order as to costs.

"Henry S. Brown"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3256-20

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