Federal Court Cour fédérale

Date: 20240208

Docket: IMM-413-23

Citation: 2024 FC 213

Calgary, Alberta, February 8, 2024

PRESENT: Madam Justice Go

BETWEEN:

BYRON ABEL ZEPEDA ROSALES

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Mr. Byron Abel Zepeda Rosales [Applicant] is a citizen of Guatemala. In 2013, the Applicant started working in Canada under the Seasonal Agricultural Workers program and travelled to and from Guatemala annually between 2013 and 2019.

[2] The Applicant fears members of his extended family because of a decades-long feud in which several family members were jailed, killed, or injured. In mid-2020, the Applicant's daughter informed him that she received phone messages from unidentified persons inquiring about the Applicant's whereabouts. On January 2, 2021, the Applicant's half-brother, O, was shot while working on the family farm. The Applicant claims all of these incidents were related to the family conflict and that the shooter mistook O for the Applicant. After the shooting incident, the Applicant filed his refugee claim.

[3] The Applicant seeks judicial review of a decision of the Refugee Appeal Division [RAD] rejecting the Applicant's claim for refugee protection [Decision] in which the RAD found the Applicant was neither a Convention refugee nor a person in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [*IRPA*]. The RAD found the Applicant did not establish a forward-looking risk for three reasons. First, the Applicant was not contacted or threatened by any member of his family for over 30 years. Second, the corroborating evidence that the Applicant provided did not establish the identity of the agents of persecution. Third, the RAD found insufficient evidence to conclude the incidents relating to the Applicant's half-brother and daughter were related to the family conflict.

[4] For further reasons below, I find the Decision reasonable and I dismiss the application.

II. Issues and Standard of Review

[5] The central issue before me is whether the Decision was reasonable. Based on his written submission, I summarize the Applicant's issues as follows:

a. Did the RAD err by finding the Applicant had not been contacted or threatened by his family for over 30 years?

b. Did the RAD err by finding the Applicant failed to identify the agents of harm?

c. Did the RAD err by finding there was insufficient evidence linking the phone messages and the shooting of his half-brother to the family dispute?

d. Did the RAD err by finding the Applicant regularly travelled back to Guatemala with no incident?

[6] At the hearing, counsel for the Applicant raised a new argument that the Decision was unreasonable because the RAD erred by assessing the evidence based on sufficiency and not credibility.

[7] The parties agree the standard of review in this case is reasonableness, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[8] Reasonableness is a deferential, but robust, standard of review: *Vavilov* at paras 12-13. The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified: *Vavilov* at para 15. 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. Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences: *Vavilov* at paras 88-90, 94 and 133-135.

[9] For a decision to be unreasonable, the Applicant must establish the decision contains flaws that are sufficiently central or significant: *Vavilov* at para 100. Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances: *Vavilov* at para 125. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep:" *Vavilov* at para 100.

III. Analysis

A. *Did the RAD err by making findings based on the sufficiency of evidence and not based on credibility?*

[10] As noted above, the Applicant's counsel made a new argument at the hearing. If I understood his argument correctly, counsel submitted that the type of evidence concerning the shooting incident and phone messages required a credibility determination. Counsel argued that by failing to consider credibility and instead making findings based on sufficiency, the RAD erred.

[11] I reject this argument for the following reasons. First, the Applicant was raising a new issue for the first time at the hearing, a practice strongly discouraged by the Court because it prejudices the other party: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 19, *Abdulkadir v Canada (Citizenship and Immigration)*, 2018 FC 318 at para 81, and *Kabir v Canada (Citizenship and Immigration)*, 2023 FC 1123 at para 19. Second, the RAD did assess credibility and found the Applicant to be credible. Third, the Applicant was unable to explain why a focus on sufficiency

of evidence, as opposed to credibility, rendered the Decision unreasonable. Counsel drew parallels to cases where the Court found officers erred by making veiled credibility findings in Pre-Removal Risk Assessment applications. Those cases, however, often involve a breach of procedural fairness, which the Applicant has not alleged here.

B. *Did the RAD err by finding the Applicant had not been contacted or threatened by his family for over 30 years?*

[12] The Applicant disagrees with the RAD's finding regarding the lack of contact or threats for 30 years, pointing to his Basis of Claim [BOC] where he stated that his siblings, who have relocated to another city, continue to live in fear of being tracked and killed by their extended family members.

[13] The Applicant further argues the RAD "refutes the plausibility" that his agents of harm would locate and threaten him despite his continued movement and his family relocating. The Applicant also argues the RAD failed to account for the fact that a new generation of family members wish to take on the torch of the long-standing feud and avenge their relatives who were jailed for murdering the Applicant's mother.

[14] I reject the Applicant's submission for two reasons.

[15] First, the RAD did not base the Decision on a finding of implausibility, but on the insufficiency of evidence. As Justice Gascon explained in *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at para 43: "Even if presumed credible and reliable, evidence from a

refugee applicant cannot be presumed to be sufficient, in and of itself, to establish the facts on a balance of probabilities… Rather, the trier of fact determines whether the evidence provided, assuming it is credible, is sufficient to establish, on a balance of probabilities, the facts alleged (*Zdraviak v Canada (Citizenship and Immigration)*, 2017 FC 305 at paras 17-18)."

[16] Second, the RAD relied on the Applicant's own testimony confirming there was no contact with or threat from the agents of persecution for over 30 years. The RAD acknowledged the Applicant's argument that this "may be attributed to his continual movement, or hiding," but found the Applicant did not establish he was living in hiding. The RAD further found the Applicant returned to Guatemala regularly and his family continued to reside in the same general area. The Applicant may disagree with these findings, but does not point to any reviewable error.

C. *Did the RAD err by finding the Applicant failed to identify the agents of harm?*

[17] The Applicant submits that according to paragraph 97(1)(a) of the *IRPA*, the identity of the agents of harm is not relevant when assessing the prevalence of risk, citing *Diaz v Canada (Citizenship and Immigration)*, 2010 FC 797 [*Diaz*] at para 19 and *Gomez Giraldo v Canada (Citizenship and Immigration)*, 2022 FC 950 [*Gomez Giraldo*] at para 20. He also submits it is difficult to assess means and motivation when the agents of persecution are unknown, and cites *Haider v Canada (Citizenship and Immigration)*, 2022 F 1775 [*Haider*] at para 6.

[18] Based on his above arguments, the Applicant submits it was unreasonable of the RAD to find there was insufficient evidence (or less than 50 percent as the Applicant puts it) that the

shooter was not hired to kill the Applicant. The Applicant argues that in any event he has identified who his agents of harm are.

[19] Contrary to the Applicant's argument, the RAD did not find that the Applicant failed to identify the agents of persecution. Rather, the RAD found none of the corroborating evidence – the police report about the shooting and a letter from the Applicant's daughter about the phone messages she received – named the agents of persecution the Applicant identified in his BOC.

[20] The RAD further noted that the Applicant neither identified the shooter, David, as a family member nor listed an individual named David among his agents of persecution. The RAD also found there was no evidence any of the agents of persecution the Applicant identified crafted or sent the phone messages to the Applicant's daughter.

[21] As such, the case law the Applicant cites is not on point. The Applicant's claim was not rejected because he was unable to identify his agents of persecution. Rather, the RAD found the Applicant failed to proffer evidence linking the agents of persecution to the alleged incidents of harm.

[22] Further, the case law the Applicant cites does not stand for the position the Applicant asserts.

[23] While the case law confirms that in certain circumstances, the identity of an agent of persecution is not relevant to the "probability of risk" under section 97, as held in *Gomez*

Giraldo at para 20 and *Diaz* at para 22, there are also circumstances where the Court found this to be relevant. In *Haider*, a case that dealt with Internal Flight Alternative, Justice Grammond explained:

> [6] The applicants argue that it was unreasonable for the RAD to focus on the fact that the identity of those who murdered the brother is unknown. Based on *Diaz v Canada (Citizenship and Immigration)*, 2010 FC 797 at paragraph 22, they say that one may be a refugee even if the identity of the agent of persecution is unknown. This may be true in theory, but it is difficult to assess an agent of persecution's motivation and means if we have no idea of who they are. By noting this issue, the RAD did not ignore the evidence nor engage in illogical reasoning.

[24] I also agree with the Respondent that *Gomez Giraldo* is distinguishable. In *Gomez Giraldo*, the panel failed to explain how its credibility concerns surrounding the applicants' identification of their agents of persecution undermined the applicants' claim: *Gomez Giraldo* at para 23. In the case at bar, the RAD had no concern with the Applicant's credibility but was concerned with the insufficiency of evidence linking the two incidents to the agents of persecution. Similarly, in *Diaz*, the Court's comment about the identity of the agent of persecution not being relevant was made in the context of the circumstances of that case: *Diaz* at paras 19-22.

[25] I also find the Applicant's argument conflates the legal test for section 97 risk with the standard of proof required to establish his claim.

[26] The test for section 97 of the *IRPA* requires the claimant to prove that it is "more likely than not" they would personally be subjected to a danger of torture, cruel and unusual treatment if returned, and an applicant must establish his case on "a balance of probabilities:" *Li v Canada*

(Minister of Citizenship and Immigration) (FCA), 2005 FCA 1 [*Li*] at paras 9-14, 29. Moreover, *Li* confirms that a claimant must demonstrate that he would "personally be subjected" to a danger under section 97.

[27] In short, before the claimant's risk can be assessed, they must first establish that they are personally subjected to a danger, on a balance of probabilities.

[28] The Applicant also submits he only needs to establish the objective element of forward-looking risk on a less than 50 percent probability, and cites *Gomez Dominguez v Canada (Citizenship and Immigration)*, 2020 FC 1098 [*Gomez Dominguez*]. In *Gomez Dominguez*, the Court observed that given the evidence of recent threats, the RAD's conclusion that the agent of harm has lost their motivation and means to pursue the applicant were not findings of fact, but rather a risk assessment: *Gomez Dominguez* at para 30.

[29] Here, by contrast, the RAD found the Applicant failed to establish his case due to the insufficiency of evidence on a balance of probabilities. It was not, as the Applicant suggests, a risk assessment based on an improper legal test. As such, this case is more similar to *Liang v Canada (Citizenship and Immigration)*, 2020 FC 116 [*Liang*], which the Respondent cites. The issue in *Liang* similarly centred on insufficient evidence and the applicant's speculation of fear based on certain phone calls made to the applicant's family. Justice Russel noted that while the applicant's fear was understandable, subjective fear without the objective evidence required to establish a refugee claim is not enough: *Liang* at para 41. The same conclusion, in my view, is applicable to the case at hand.

D. *Did the RAD err by finding there was insufficient evidence linking the phone messages and shooting of the Applicant's half-brother to the family dispute?*

[30] The Applicant submits the RAD's finding that there was insufficient evidence to conclude that the phone messages and shooting were related to the family feud was unreasonable based on the several arguments he raised. I reject all of the Applicant's arguments.

[31] First, the Applicant relies again on *Gomez Dominguez* with respect to the threshold required to establish forward-looking risk. I find this case does not assist the Applicant, for reasons already outlined above.

[32] The Applicant also cites *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 [*Valtchev*] in which the Court cautioned that implausibility findings should be made in the clearest of cases only, with an attentiveness to a claimant's cultural background, and specific and clear reference to the evidence: *Valtchev* at para 7. *Valtchev* is not applicable, as the RAD based its finding on insufficiency of evidence.

[33] The Applicant argues it was unreasonable of the RAD to assume the shooter, David, had to be the Applicant's family member to link the incident to the family dispute. The Applicant argues a family member could have hired David, but that such evidence would have been impossible to obtain. I reject this argument as the onus was on the Applicant to establish his case and he simply failed to do so.

[34] Lastly, the Applicant takes issue with the RAD stating that one gunshot wound was the result of a “stray bullet” such that it was not targeted at the Applicant’s half-brother or alternatively, it was shot by an individual with no previous dispute with the Applicant. The Applicant argues these findings are speculative and not based on evidence. The Applicant also points to the police report and argues the RAD has failed to grapple with the evidence.

[35] With respect, the Applicant is essentially rearguing his case before the Court, and asking the Court to reweigh the evidence, which is not the Court’s role to do.

E. *Did the RAD err by finding the Applicant regularly travelled back to Guatemala with no incident?*

[36] The RAD found that the Applicant was not exposed to harm or risk in his travel between Canada and Guatemala during his time as a seasonal worker. The Applicant contends that his back-and-forth travelling is actually how he avoided threats and persecution in the first place and submits that someone had contacted his daughter to ask about his whereabouts, which indicated that the caller knew the Applicant was out of Guatemala and that he was being looked for.

[37] Once again, the Applicant’s argument amounts to a disagreement with the RAD’s findings and does not raise any reviewable error. I see no basis to interfere with the RAD’s findings, for all the reasons I have set out above.

IV. Conclusion

[38] The application for judicial review is dismissed.

[39] There is no question for certification.

JUDGMENT in IMM-413-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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