Federal Court Cour fédérale

Date: 20240307

Docket: IMM-1619-23

Citation: 2024 FC 390

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 7, 2024

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

SALOME OYAGA PAVA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] Salome Oyaga Pava is seeking judicial review of a decision of the Refugee Appeal Division [RAD] confirming a decision of the Refugee Protection Division [RPD] to reject her claim for refugee protection. This application for judicial review is made under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The applicant, a Colombian citizen, alleges a fear of persecution at the hands of military personnel involved in extra-judicial executions. She claims that the RAD's decision is unreasonable. In my view, it is unreasonable because of the quality of the reasons submitted in support of the decision. The matter should therefore be returned to the RAD for reconsideration of the appeal by a differently constituted panel.

I. Facts

[3] Given the conclusion reached by the Court, it is preferable to avoid commenting on the facts giving rise to the claim for refugee protection. The RPD and RAD both considered the applicant's credibility to be the determinative issue. However, it is not clear from the RAD's reasons why her credibility is so lacking as to justify the rejection of the claim. This remains to be determined in a forthcoming RAD decision.

[4] A brief summary of the allegations is taken from the Basis of Claim Form [BOC Form] (June 18, 2018) and a supplement (June 9, 2022); it will suffice at this stage.

[5] The applicant presents herself as a human rights activist. She claims to have been accompanied in her venture by a certain Michael Arturo Ronacios Cassollas [Michael Ronceros or Michael]. He also sought protection in Canada, but his claim was withdrawn when he was sponsored; he became a permanent resident via another route.

[6] According to the BOC Form, the applicant is concerned about the Colombian justice system's lack of respect and its inefficiency; governmental corruption, disorganization and

abuse, as well as mismanagement of public funds in her country of citizenship, are said to be endemic problems. Around 2008, she turned her focus in particular on what she calls extra-judicial executions committed, she claims, by soldiers. Hundreds of innocent people were allegedly killed across the country and passed off as guerrillas killed in combat. Investigations were conducted into 2,000 of those cases. Only a few convictions against subordinates have been recorded over the years. Some documentary evidence suggests that senior officers are involved and escaping justice.

[7] Starting in February 2017, the applicant and Michael Ronceros created a blog in which they denounced senior officers. They received information about such abuses, including information from mothers whose children had disappeared. The authors of the blog wanted to publish their stories.

[8] The applicant claims to have become subjected to reprisals and threats for the purpose of forcing her to cease her activities. She states that the blog was [TRANSLATION] "hacked" on November 24, 2017, preventing her from accessing it. Then, on November 28, 2017, the applicant received an initial anonymous telephone call threatening her with death and ordering her to shut down the blog. She was also ordered to keep quiet and be careful about her relationships. Michael received a similar message at the same time.

[9] These calls raised fears for both of them, but the applicant did not cease her activities, and on December 3, 2017, she received a request from a "mother" to meet her about the death of her brother. A meeting was organized for December 7 at 3:00 p.m. in a travel terminal. The

applicant and Michael were unsuccessful; the person they were to meet did not show up, and their attempts to contact her were fruitless. As they were leaving the premises, a police officer stopped them.

[10] On December 8, the applicant received another telephone call during which she was asked how she (and her companion) had been treated at the travel terminal. The voice told her that they only wanted to know her identity because [TRANSLATION] "we have already done 95% of our work with the help of our friends in the police and now all we need are two bullets for each of your heads" (BOC Form, at pp 3–4/5, para 21). The voice threatened to kill a loved one to make it clear that the blog had to be abandoned and not resumed once the threats had been carried out.

[11] This time, the applicant grew very fearful. She consulted a lawyer, who advised her to file a complaint with the police because he believed that both of them were in danger. On December 11, a complaint was lodged with the Paloquemao Immediate Response Unit. No file was opened because the call that gave rise to the complaint had been anonymous.

[12] The claimant and her companion therefore opted to leave the blog available on the Internet with the compiled information, but letting it [TRANSLATION] "slide a little", "not completely" (BOC Form, at para 41).

[13] On December 26, 2017, an anonymous threatening letter arrived. The senders stated that they knew where the applicant and Michael were and that they would be hearing from them

soon. The applicant states that that was when she decided to move to another city. She did so on January 2, 2018; she was put up by an acquaintance. Michael found refuge in a city other than the one where the applicant went to live. Having received new advice from the lawyer, the applicant contacted the Immediate Response Unit to report on developments.

[14] In the late afternoon of February 15, 2018, two individuals in an armoured vehicle allegedly showed up where Michael had taken refuge. They got out of the vehicle and smashed the windows of the house with clubs. They then left. Witnesses described them as looking [TRANSLATION] “like soldiers”.

[15] The applicant and Michael again changed addresses, again in two different cities. The person who had put up the applicant before her latest move called her and told her that three men had come looking for her in that city and that she and her friend would be found. This would be their last encounter. Again, it is stated in the BOC Form that the men looked like soldiers; they were armed. The applicant left Colombia on April 10, 2018.

[16] The BOC Form was filed on June 18, 2018. A supplement followed on January 9, 2022. It reports that the applicant’s parents received threatening phone calls claiming that her life would be in danger if she were to return to the country. In January 2020, two men came to the parents’ home and made death threats. In April 2021, other men who appeared to be soldiers allegedly repeated the act. The applicants’ parents then moved out of Bogotá and changed their telephone numbers.

II. The law

[17] The applicant argues that the decision is unreasonable. Since *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 653 [*Vavilov*], the Supreme Court of Canada has sought to establish a culture of justification within administrative tribunals (at paras 2 and 14). As the Court states at paragraph 15, the reviewing court's scrutiny of the decision under judicial review when the standard of review is reasonableness focuses on its justification and not on the conclusion the court itself would have reached. When the determinative issue is the applicant's credibility, the standard of review is, of course, reasonableness. A decision may be flawed because the outcome arrived at by the administrative decision maker does not meet the standard of reasonableness or when the reasons given for the justification, regardless of the quality of the outcome, are themselves deficient.

[18] The reasons provided by an administrative decision maker explain how and why a decision was made. Reasons "are the primary mechanism by which administrative decision makers show that their decisions are reasonable — both to the affected parties and to the reviewing courts" (*Vavilov* at para 81). Thus, the reviewing court must keep its focus on the rationale followed, which can be seen from the reasons provided in support of a given conclusion:

> [84] As explained above, where the administrative decision maker has provided written reasons, those reasons are the means by which the decision maker communicates the rationale for its decision. A principled approach to reasonableness review is one which puts those reasons first. 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 its conclusion: see *Dunsmuir*, at para 48, quoting

> D. Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286.

It must consider the internal coherence of the decision under judicial review and its rationality to determine whether it is justified in light of the legal and factual constraints. Only reasoning that possesses these qualities is entitled to deference (*Vavilov,* at para 85).

[19] The reasons provided by the administrative decision maker must be of a certain quality because the hallmarks of reasonableness — justification, transparency and intelligibility — and the decision's justification in relation to the factual and legal constraints (*Vavilov*, au para 99) demand nothing less. The reviewing court must not substitute its own reasons for the administrative tribunal's flawed reasons; nor must it try to fill in the gaps. Decision makers must, through their reasons, justify their decisions to those to whom the decisions apply. Of course, this does not mean that the litigant has to be convinced that the decision maker was right after all; in many cases, it is impossible to persuade a litigant that his or her claim is ill-founded. Rather, the decision must have the quality of intelligible, rational reasoning that flows from the transparency of the decision-making process. This has led the Supreme Court to state at paragraph 95 of *Vavilov*:

> [95] That being said, reviewing courts must keep in mind the principle that the exercise of public power must be justified, intelligible and transparent, not in the abstract, but to the individuals subject to it. <u>It would therefore be unacceptable for an administrative decision maker to provide an affected party formal reasons that fail to justify its decision, but nevertheless expect that its decision would be upheld on the basis of internal records that were not available to that party</u>.
>
> [Emphasis added.]

As noted by the Supreme Court at paragraph 96, it is not open to an administrative decision maker "to abdicate its responsibility to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion".

[20] My review of the RAD's decision leads me to conclude that it lacks the hallmarks of a reasonable decision in that it is not justified in a manner that is transparent and intelligible. The impression that emerges is more of a search for reasons to reject the claim for refugee protection than a decision whose reasons are grounded in the evidence. Put simply, it is not clear what it is about the applicant's credibility that requires the rejection of the claim. This does not mean that the claim should have been accepted. Rather, the need for adequate justification has not been met.

III. Analysis

[21] Given that it will be up to a differently constituted panel of the RAD to perform its own analysis without undue influence from the reviewing court, I will explain my finding briefly.

[22] As everybody now knows, it is only the decision of the RAD that is the subject of the application for judicial review. It must be reasonable when the credibility of the testimony is the determinative issue (*Janvier v Canada (Citizenship and Immigration)*, 2020 FC 142, at para 17). It is therefore these reasons, and not the RPD's, that must have the hallmarks of a proper decision.

[23] With respect, the decision under review is deficient in terms of the justification provided for dismissing the appeal. It contains several statements by the RAD, the sources of which are unknown, other than the fact that the RPD had questioned the applicant and that the details provided at the hearing were not included in the BOC Form.

[24] There is no doubt that a claim to be recognized as a refugee may be rejected on the grounds that the evidence is insufficiently credible. The RPD and the RAD certainly have well-established expertise in assessing the credibility of refugee protection claimants (*Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 [*Lawani*], at para 15). Nonetheless, some caution is warranted (Stephen Paskey, *Telling Refugee Stories: Trauma, Credibility and the Adversarial Adjudication of Claims for Asylum*, 56 Santa Clara L. Rev. 457 (2016)). The traditional factors of demeanour, candour, plausibility of the evidence, internal coherence and consistency with other evidence can all be taken into account, while keeping in mind the circumstances in which the events occurred.

[25] The administrative decision maker has a duty to say why credibility is undermined without evading key points (*Utoh v Canada (Citizenship and Immigration)*, 2012 FC 399). It is worth recalling some of the principles that govern the assessment of credibility, as set out at paragraph 4 of *Cooper v Canada (Citizenship and Immigration)*, 2012 FC 118 [*Cooper*]:

> . . .
>
> a. A board is entitled to make findings of credibility based on implausibility, common sense and rationality: *Hilo v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 228; *Lubana*, above;
>
> b. Uncontradicted evidence may be rejected if it is not consistent with the probabilities of the case as a whole, or where

inconsistencies are found in the evidence: *Akinlolu v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 296;

c. Inferences must be reasonable and must be set out in clear and unmistakable terms: *Hilo*;

d. Not all inconsistencies and implausibilities will support a negative finding of credibility. Adverse credibility findings should not be based on microscopic examination of issues irrelevant or peripheral to the claim: (*Attakora v Canada (Minister of Employment and Immigration)*, [1989] FCJ No 444;

e. Evidence or testimony with respect to whether a claimant travels on false travel documents, destroys travel documents or lies about them upon arrival is peripheral and of very limited value to a determination of credibility: *Lubana*;

f. Assessment of testimony should take into account the age, culture, background and prior social experience of the witness, as should a lack of coherence in testimony where the psychological condition of the witness has been medically established;

g. Similarly, in assessing statements made by refugees to immigration officials on first arrival to Canada, the trier of fact must consider that "most refugees have lived experiences in their country of origin which gives them good reason to distrust persons in authority": Professor J.C. Hathaway, *The Law of Refugee Status* (Toronto, Butterworths) (1991), pp 84-85, as cited by Justice Martineau in *Lubana*;

h. Where a credibility finding is based on inconsistencies of the applicant, specific examples of inconsistency must be set out. The inconsistency must arise in respect of other evidence which was accepted as trustworthy. Put otherwise, an inconsistency can arise in one of two ways: evidence is internally inconsistent in the testimony of the witness, or; evidence that is inconsistent with respect to the testimony of other witnesses or documents. If, in the later situation, that of external inconsistency, the evidence on which the inconsistency is predicated must be accepted as trustworthy;

i. The cumulative effect of minor inconsistencies and contradictions can support an overall finding that an applicant is not credible: *Feng v Canada (Citizenship and Immigration)*, 2010 FC 476; and

> j. A general finding of a lack of credibility may conceivably extend to all relevant evidence emanating from the testimony of a witness: *Sheikh v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 238.

These principles have since been reiterated (see *Lawani*, above).

[26] In this case, I note in particular the principles listed in paragraphs c, d, f, h and i. The administrative decision maker was required to explain in clear and unmistakeable terms the inconsistencies and implausibilities justifying finding a lack of credibility. If the inconsistencies and implausibilities are minor, justification must be provided that a cumulative effect is at work and not the same failure repeated over and over. While the RAD owes no deference to the RPD (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93, [2016] 4 FCR 157), it must explain the conclusions it has reached.

[27] As a result, a decision that dwells on unimportant issues or issues of ultimately minor importance in relation to the overall story, or that finds a lack of credibility on the basis of vague and imprecise reasons, may be seen as failing to meet the standard of review. In the words of Rennie J, then a member of this Court, in *Cooper* (above), regarding that decision, "[r]eading the decision as a whole it cannot be said that the Board has provided, in clear and unmistakeable terms, reasons for casting doubt on the applicant's credibility" (at para 6). The same can be said of this case.

[28] The RAD's short decision is largely based not on inconsistencies or contradictions, but rather on what it considers to be significant gaps in the evidence provided by the applicant. If this is to be the basis of the decision, the gaps must have a certain weight within the story and must

not be peripheral to it, or, worse still, gaps resulting from the virtual impossibility of identifying the attackers, for example.

[29] According to the administrative decision maker, it would be a significant deficiency not to have established the link between the soldiers responsible for the extra-judicial executions and the blog authored by the applicant (and Michael). It is also raised that no link has been established between the soldiers and the allegation that the applicant met with mothers of victims. It is difficult to grasp on the face of the decision how this could constitute a gap when it is the very anonymity of the agents of persecution that increases the fear. The decision maker must, in my view, explain why this type of information should have been available. If a witness deliberately chooses to tell a story that lacks detail, it must be explained on what basis the information should have been available.

[30] The elements affecting the applicant's credibility are a rather confused mixture of gaps presented in the form of inconsistencies that is not easy to understand or follow. If I understand one of the criticisms, the applicant failed to clearly identify in her BOC Form the meetings with mothers and the connection with the writing of blog posts since, it is claimed, the published posts made no mention of the mothers in question. The BOC Form lacks detail in this regard. and the applicant is criticized for this. And yet, the BOC Form is five pages long, single-spaced, for a total of 34 paragraphs. That is quite a lot compared to what is usually seen. At the heart of the matter was the fact that the applicant, a human rights activist, not only denounced extra-judicial executions by participating in demonstrations, but published blog posts highlighting abuses attributed to the country's armed forces. The RAD is seeking in the BOC Form itself details of

meetings with mothers, as if everything needed to be reported in the BOC Form right down to the smallest detail. In fact, even the attempt to justify the criticism is lacking. Paragraph 20 of the decision states that "[w]hen the BOC Form is compared with her testimony, it is clear that several details regarding her meeting with 10 to 20 women have been omitted and that the description of this event is inconsistent with the sparse information in her BOC Form". Justification based on circular reasoning such as this is a patent error in terms of internal rationality (*Vavilov*, at para 104). If the details do not appear in the BOC Form, it is circular to conclude that the BOC Form is inconsistent with the testimony. It is natural to conclude that the administrative decision maker appears to be looking for reasons to refuse the remedy sought rather than identifying genuine deficiencies.

[31] The same can be said about paragraph 21 of the decision. This time, the RAD comments on the failed meeting with the mother who had made an appointment to meet with the applicant and Michael in a travel terminal. The RAD states that it notes "that the appellant never met the mother in question and that the police never saw them with a victim's mother", but how could this possibly affect the credibility of a witness? The applicant testified that she went to the meeting and the person she was to meet was not there: what is there to note? What is it that is being emphasized, and for what purpose? What does the fact that the police did not see the applicant with a victim's mother, if this is indeed the case, change about the applicant's account?

[32] Is there any doubt that meetings were held with mothers during public demonstrations, as the applicant stated? If so, the reasons should have included an explanation of the doubt without resorting to a false dilemma. The administrative decision maker concludes that "the appellant's

explanations [this may refer to explanations about why the applicant was allegedly targeted by the soldiers] are insufficient, as they do not establish how the soldiers could have known that they [probably the applicant and Michael] had met with victims' mothers and that they had a blog on which they were going to publish articles incriminating them". Again, this suggests that the applicant should have established knowledge on the part of the persecutors even though they are not known, on pain of having the explanation declared insufficient. This is an example of a false dilemma or a premise that strikes me as absurd. How can a victim of persecution know how the anonymous persecutor was able to identify her as an activist because she met with victims' mothers? Is this indeed how the applicant became a target of reprisals? What appears to be expected of the applicant is that she have conducted a full investigation into the identity of her persecutors at the very time the alleged victim says she was attempting to hide from them for fear for her life.

[33] All the more disturbing is the fact that the RAD recognizes that there is documentary evidence showing that "Colombian security forces" are responsible for numerous arbitrary killings of human rights defenders, political activists being "often victims of abuse by armed groups and police authorities" (Decision, at para 24). Against all expectations, the RAD states that this evidence does not apply here, "given that the appellant did not establish that she was persecuted because of her political activities or her imputed political opinion" (Decision, at para 25).

[34] This assertion is unreasonable for at least two reasons. First, paragraph 24 of the Decision addresses documentary evidence regarding the killings of human rights defenders. This is clearly

the allegation made by the applicant. This documentary evidence cannot simply be excluded without explanation. Next, the RAD states that it is the political activities that are at issue and that the applicant has failed to establish that her political activities were the cause of her alleged persecution. I do not understand the dichotomy that the RAD seems to be trying to draw between human rights activism in a country where killings by certain members of government security forces are known to occur and "political activities". One might think that this type of activism is political by definition. At the very least, this requires a much better justification than the rather muddled one provided.

[35] The hallmarks of a reasonable decision are its justification, transparency and intelligibility. These are sorely lacking. Peremptory conclusions do not constitute justification in light of factual and legal constraints.

[36] The administrative decision maker repeatedly states that the information provided by the applicant in the BOC Form was insufficient in relation to the account given during her testimony. The complaint is not so much that the applicant contradicts herself or is inconsistent, but rather that the BOC Form does not say enough. There is no indication whatsoever of why the information is insufficient, so the reviewing court cannot assess whether the bar was set too high, making it unattainable. This also tends to make the Decision unreasonable for lack of transparency and intelligibility. With respect, the reasons provided suffer from a lack of clarity and precision, making it difficult even to assess their reasonableness.

[37] This is not to suggest that the applicant should have been covered by sections 96 and 97 of the IRPA. Parliament has given this responsibility to the Refugee Protection and Refugee Appeal Divisions. Rather, the Decision rendered is unreasonable in light of the reasons provided. One must, on examining them, be capable of understanding the line of reasoning that led to the conclusion. The RAD's reasons are so deficient as to be unreasonable. Paragraph 135 of *Vavilov* strikes me as being particularly relevant:

> [135] Many administrative decision makers are entrusted with an extraordinary degree of power over the lives of ordinary people, including the most vulnerable among us. The corollary to that power is a heightened responsibility on the part of administrative decision makers to ensure that their reasons demonstrate that they have considered the consequences of a decision and that those consequences are justified in light of the facts and law.

IV. Conclusions

[38] As a result, the application for judicial review must be allowed. The matter must therefore be returned to the RAD for reconsideration by a different panel. There is no question to certify.

JUDGMENT in IMM-1619-23

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed.
2. The matter is referred back to the Refugee Appeal Division for reconsideration by another member.
3. There is no question to be certified pursuant to section 74 of the IRPA.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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