Federal Court  Cour fédérale

Date: 20240314

Docket: IMM-8546-21

Citation: 2024 FC 422

Ottawa, Ontario, March 14, 2024

PRESENT: Madam Justice Whyte Nowak

BETWEEN:

WILLIAM ANDRES CELY TIRIA,
LAURA MARCELA QUIROZ MOGOLLON,
ANDRES FELIPE OCHOA QUIROZ,
AND MIRIAM SOPHIA CELY QUIROZ

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants, William Andres Cely Tiria [the "Principal Applicant"], his spouse, Laura Marcela Quiroz Mogollon, and their two children, Andres Felipe Ochoa Quiroz and Miriam

Sophia Cely Quiroz [collectively, the "Applicants"], seek judicial review of a decision by the Refugee Protection Division ["RPD"] dated November 3, 2021 [the "Decision"].

[2] In its Decision, the RPD determined that the Applicants, who are citizens of Colombia, are neither Convention refugees nor persons in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], because they have viable Internal Flight Alternatives in Cartagena and Santa Marta, Colombia [the "IFAs"].

[3] For the reasons that follow, I find that the Applicants have failed to demonstrate that there is any reviewable error. Since I have not found the Decision to be unreasonable, the application for judicial review is dismissed.

II. The Facts

The Principal Applicant's Encounters with the ELN

[4] The Ejercito de Liberacion Nacional [the "ELN"] is a large guerilla organization in Colombia with some 2,500 fighters and 4,000-5,000 members aided by a larger militia structure that includes members that live as civilians who act as informants and collaborators. The evidence before the RPD was that the ELN is the most powerful criminal group in Colombia.

[5] The Applicants' fear of the ELN originated with a series of events that occurred between February 10, 2018, and November 3, 2018 when the family was living in Duitama, Colombia and the Principal Applicant was a self-employed truck driver driving a truck owned by his sister.

[6] On February 10, 2018, the Principal Applicant first encountered the ELN when they destroyed a bridge that caused all traffic to stop. The Principal Applicant was in a line-up of stopped trucks when armed men wearing ELN emblems on their arms ordered him to get out of his truck. An ELN member took his cash and phone and made a note of his ID.

[7] Members of the ELN pursued the Principal Applicant again in May 2018 and September 2018 while he was travelling in his truck. The Principal Applicant was so shaken by the latter incident that he stayed at a hotel that night rather than sleep in his truck.

[8] The most serious incident occurred on November 3, 2018. A motorcycle pulled up beside his truck with two ELN members wearing face covers and carrying guns. The ELN members pulled the Principal Applicant out of the truck by his leg and walked him to the side of the road with guns pressed to his neck and chest. The ELN members told the Principal Applicant that they had his license plate and ID and had tried to contact him. They took his money from the truck and his cell phone. The ELN asked the Principal Applicant why he was avoiding them when he knew he had a "service they wanted of [him]." They warned him that if he did so again, they would look for him starting with his children then his wife before "dealing with [him]." The ELN members said they were well aware of where his family was. After this incident, the Principal Applicant decided to stop driving for a while. He returned the truck to his sister.

[9] The Applicants decided to leave Colombia, applying for and receiving visas from the United States in late November 2018. They travelled to Bucaramanga, Colombia and stayed with a relative from December 2, 2018, to January 10, 2018.

[10] The Applicants left Colombia on January 29, 2019. After travelling through the United States, the Applicants arrived in Canada claiming refugee protection at the port of entry on February 6, 2019.

The RPD's Decision

[11] The RPD expressly stated that credibility was not determinative of its Decision. Rather, the RPD made three key findings in determining that the Applicants are neither Convention refugees nor persons in need of protection with respect to the IFAs.

[12] First, the RPD found that the Applicants had not shown that they faced a serious possibility of persecution in Colombia since the ELN lacked the means and motivation to locate the Applicants in the IFAs.

[13] Second, the RPD held that the Applicants had not proven on a balance of probabilities that if they returned to Colombia, they will be subjected to torture, a risk to their lives or a risk to cruel and unusual treatment or punishment, because the ELN lacked presence in the viable IFAs in Cartagena and in Santa Marta. The RPD acknowledged that while violent crime does occur in the IFAs, these are "generalized risks" that all Colombians face and do not occur at a level that rendered the IFAs unsafe and/or unreasonable.

[14] Finally, the RPD found that it is reasonable for the Applicants to relocate to the IFAs considering the country conditions in the IFAs (with regard to language, religion, family,

housing and education and employment) and the personal circumstances of the Principal Applicant.

III. Issues

[15] The only issue on this judicial review is whether the Applicants have shown that the RPD's determination that Cartagena and Santa Marta constituted viable IFAs is unreasonable.

IV. Standard of review

[16] I agree with the parties that the applicable standard of review of the RPD's Decision is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16-17 and 23-25 [*Vavilov*]).

[17] The burden is on the party challenging the decision to show that it is unreasonable (*Vavilov* at para 100).

[18] The role of the Court in a reasonableness review is to holistically and contextually examine the administrative decision maker's reasoning and the outcome to determine whether the decision is "based on an internally coherent and rational chain of analysis and is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at paras 97 and 85). This Court must be satisfied that the Decision bears the hallmarks of the proper exercise of public power which requires that it be justified, intelligible and transparent to those who are

subject to it (*Vavilov* at paras 95 and 99). In conducting this analysis, the Court must not reweigh or reassess the evidence (*Vavilov* at paras 95 and 125).

V. Analysis

[19] A viable IFA will negate a claim for refugee protection under both section 96 and 97 of the *IRPA* since a Convention refugee and a person in need of protection must be found to face the identified risk in every part of their country of origin.

[20] The test for determining the existence of an IFA derives from three decisions of the Federal Court of Appeal, which have established a two-pronged test to determine if there is a viable IFA:

> (i) On the balance of probabilities, there must be no serious possibility of persecution in the proposed IFA and/or the claimant would not be personally subject to a risk to life, or a risk of cruel and unusual treatment or punishment, or a danger of torture in the IFA, believed on substantial grounds to exist; and
>
> (ii) Conditions in the proposed IFA must be such that it would not be unreasonable, in all the circumstances, including those particular to the claimants, for the claimants to seek refuge there (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (FCA); *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (FCA); and *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 (FCA) (the "IFA test").

[21] Both prongs of the IFA test have to be satisfied to find that there is a viable IFA (*Feboke v Canada (Citizenship and Immigration)*, 2020 FC 155 at para 15). Given this requirement, the Applicants need only show that the Decision was unreasonable on one of the prongs of the IFA

test in order to succeed on this judicial review (*Aigbe v Canada (Citizenship and Immigration)*, 2020 FC 895 at para 9).

[22] The Applicants' submissions only address the RPD's determination of the first prong of the IFA test.

A. *The RPD's Findings on the ELN's Means to Locate are not Unreasonable*

[23] The Applicants argue that the RPD made errors of fact and contradicted itself in determining that the ELN lacked the means to locate the Applicants in the IFAs.

[24] A decision may be unreasonable if the decision maker misapprehended the evidence before it (*Vavilov* at paras 125–126; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 73), however, I do not find the Applicants' criticisms are supportable on a fair reading of the Decision and the evidence before the RPD.

(1) *The ELN's Presence in the IFAs*

[25] The Applicants argue the RPD's finding that the ELN does not have a presence in the IFAs is an error of fact based on "cherry-picked" sources referenced in the National Documentation Package ["NDP"]. The Applicants point to a January 2020 source which states that the ELN operates in "the major cities" and a March 2021 source which reports that the ELN's Urban War Front has maintained a presence in "Colombia's largest cities", which they say would describe the IFAs.

[26] The RPD carried out a detailed review of the sources cited in the NDP. It canvassed not just the presence of the ELN and Urban War Front in the IFAs, but also their levels of influence and operational capacity. The RPD's finding with respect to the presence of the ELN and Urban War Front in the IFAs was more nuanced than the Applicants have acknowledged. The RPD held at para 27:

> …the ELN do not have a presence in either Cartagena or Santa Marta, and even if they have presence in the departments where these cities are located, it is not a strong area of the ELN influence or control.

[27] This finding was open to the RPD on the information contained in the NDP, which, as the Respondent points out, included sources listing cities in which the ELN operated as well as cities in which the Urban War Front had "active fronts" in Colombia, neither of which listed the IFA locations.

[28] Moreover, not all errors warrant judicial intervention. Even if I were to find that the RPD erred in not considering the presence of the ELN and Urban War Front in the IFAs, this is not a significant error which goes to an essential element of the Decision (*Vavilov* at paras 94 and 100). The RPD's Decision did not rest on either the presence of the ELN in the IFAs, nor on the ability of the ELN to locate the Applicants in the IFAs. Rather, what was decisive was the fact that the Principal Applicant does not fit into any of the categories of high-profile targets that ELN collaborators were known to pursue, and more critically, that the ELN had demonstrated an *actual* lack of motivation to pursue the Principal Applicant while he was still in Colombia.

(2) *The ELN's Ability to Locate Targeted Individuals in the IFAs*

[29] The Applicants argue that the RPD's Decision is contradictory in its conclusion that the ELN do not have the means to locate the Applicants despite having found that the ELN can track targeted individuals through urban collaborators.

[30] There is no contradiction in these findings; it flows from the RPD's determination that there was insufficient evidence to support the motivation of such urban collaborators to locate the Principal Applicant. This is consistent with the case law which goes so far as to say that evidence that the agent of persecution has the means to pursue the claimants in the IFAs is "irrelevant" in the absence of a finding that they are motivated to do so (*Lopez Gomez v Canada (Citizenship and Immigration)*, 2022 FC 1160 at paras 27-28; and *Leon v Canada (Citizenship and Immigration)*, 2020 FC 428 at paras 13 and 15).

B. *The RPD's Findings on the ELN's Motivation to Locate are not Unreasonable*

[31] The Applicants do not dispute that the Principal Applicant does not fit into any of the categories of high-profile targets that the ELN is known to pursue. Rather, the Applicants argue that the RPD erred in considering that this evidence precludes a finding that the ELN might plausibly target him nonetheless.

[32] The Applicants allege that the RPD made a series of "implausibility findings" related to the ELN's motivation to locate the Applicants in the IFAs. These findings include:

> a) the ELN did not approach the Principal Applicant at his residence despite having his national ID and his address;
>
> b) despite taking his phone twice (which gave the ELN access to the Principal Applicant's contact information and that of his family) the ELN never contacted the Principal Applicant or his family members and did not approach his house in Duitama;
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> c) the initial motivation of the ELN (for the Principal Applicant to provide services) ceased when the Principal Applicant's sister sold the truck; and
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> d) the Principal Applicant's father and brother still live in Duitama and have not been threatened by the ELN; and
>
> e) while the ELN has contacted the Principal Applicant's sister, they have not approached her directly [collectively, "the motivation findings].

[33] The Respondent disagrees with the Applicants' characterization of the motivation findings as "implausibility findings." The Respondent characterizes them instead as findings of fact from which the RPD simply drew an inference. I agree with the Respondent.

[34] It is important to recognize that in considering whether there is a serious *possibility* of the Applicants facing persecution in the IFAs, the RPD was required to engage in a type of speculation or conjecture about the future. There is, however, a difference between conjecture and inference as Justice Harrington emphasized in *Ukleina v Canada (Citizenship and Immigration)*, 2009 FC 1292 at paragraph 14 citing *Jones v Great Western Railway Co.* (1930), 47 T.L.R. 38 (H.L.) at p 45:

> The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible, but is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction, it may have the validity of legal proof.

[35] The Applicants did not challenge the accuracy of any of the motivation findings. I find that it was reasonable for the RPD to draw the common sense inference from these findings that because the ELN had not pursued the Applicant and his family while he was in Colombia despite having access to his contact information, it was not generally motivated to pursue the Principal Applicant in the IFAs.

[36] The Applicants also argue that the RPD crossed the line into conjecture because the RPD's motivation findings are not based on the *modus operandi* of the ELN. They say that the RPD engaged in an impermissible line of thinking about "how a rational agent of persecution ought to have demonstrated its ongoing motivation to pursue the Applicants" rather than the path the ELN actually pursued, which was to contact the Principal Applicant's sister.

[37] The Applicants submitted evidence in the form of letters from the Principal Applicant's sister, who was the owner of the truck he drove. She received calls from the ELN on March 27, 2019 and April 2021 *after* she had sold the truck and *after* the Applicants had fled Colombia. On those calls, the ELN told her they were aware she had sold the truck, inquired about the Principal Applicant, and threatened to kill him for defying the ELN. The Principal Applicant's sister blocked the number and moved from Duitama to different places in Colombia including Bogota, Mani and Casanare out of fear for her safety.

[38] The RPD considered the letters and gave them weight. However, the RPD held that this evidence does not overcome what it considered to be a "general lack of motivation" based on the motivation findings and the additional fact that while the ELN has contacted the Principal

Applicant's sister, they have not approached her directly. These findings (based on the inferences drawn from unchallenged findings of fact) were open to the RPD on the record and it is not for this Court to reassess or reweigh this evidence (*Li v Canada (Citizenship and Immigration)*, 2023 FC 1026 at para 9).

[39] Further, I find the Applicants' reasoning as to why the ELN might still be motivated to pursue the Principal Applicant in the IFAs, namely that as a truck driver he might have skills that would prove helpful to drug traffickers, amounts to the very type of speculation it criticizes the RPD for allegedly engaging in.

[40] As a result, the Applicants have not discharged their burden of showing that the RPD's Decision was unreasonable in its conclusions that the ELN lacked the means and motivation to pursue the Applicants in the proposed IFAs.

VI. Conclusion

[41] For these reasons, the Applicants have not persuaded me that the RPD's decision is unreasonable. Accordingly, the application for judicial review is dismissed.

[42] The parties have not argued that any serious questions of general importance for certification exist under paragraph 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT in IMM-8546-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There are no questions of general importance under paragraph 74(d) of the *IRPA*.

"Allyson Whyte Nowak"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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