

Federal Court



Cour fédérale

Date: 20221214

Docket: IMM-363-22

Citation: 2022 FC 1733

Ottawa, Ontario, December 14, 2022

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

**BEATRIZ ADRIANA GONZALEZ JERONIMO
YESHUA NAHIN HERNANDEZ GONZALEZ
ADRIAN AGUSTIN HERNANDEZ GONZALEZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD], dated December 15, 2021 [the Decision]. In the Decision, the RAD confirmed the decision of the Refugee Protection Division [RPD], which determined that the Applicants had

viable internal flight alternatives [IFAs] within Mexico. As such, the RAD confirmed the RPD's determination that the Applicants are neither Convention refugees nor persons in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] As explained in greater detail below, this application is allowed, because the Applicants were denied procedural fairness in connection with the RAD's analysis of the identity of the agents of harm.

II. **Background**

[3] The Principal Applicant, Beatriz Adriana Gonzalez Jeronimo, and the other two Applicants, who are her minor children [the Minor Applicants], are all citizens of Mexico. Their refugee claims were initially joined with the claim of the Principal Applicant's husband [the Husband], who is also the father of the Minor Applicants. However, the Husband's claim was subsequently separated from the others due to a potential exclusion issue applicable to his claim.

[4] The Applicants rely on the Basis of Claim [BOC] form and narrative of the Husband. They claim fear of harm based on threats made against the Husband by corrupt former government officials and an associated criminal cartel in the State of Veracruz in Mexico. The Husband was employed as a driver for the government of the State of Veracruz, during what has been referred to in this application as the Duarte regime.

[5] The Applicants asserts that, during the course of his employment, the Husband was asked to collect cash funds from several government offices and purchase art and deliver it to wealthy businesspersons, senators, deputies, and judges. He was also instructed to collect cash funds and put a down-payment on a condominium and purchase an expensive vehicle.

[6] In October 2016, following a regime change in the context of investigations and allegations of embezzlement, money laundering, forced disappearances, and other acts of corruption, those who were close collaborators of the Duarte regime began receiving calls and threats alleging that they knew where the money was hidden. The Husband claims to have received threats on behalf of both corrupt government officials and an associated criminal cartel that sought to obtain information in pursuit of debts they were owed. He says that this included him being intercepted on his way home from work and being told that his children would be killed if he did not provide the requested information.

[7] The Principal Applicant left Mexico in April 2017, and she and the Minor Applicants came to Canada in August 2018 and claimed refugee protection.

[8] The Principal Applicant provided the bulk of the evidence before the RPD. Although she did not have much first-hand knowledge of the risks she and her family feared in Mexico, the RPD found her to be credible. The Husband provided the remainder of the evidence, as he was the person with the most first-hand knowledge. The RPD found the Husband not to be a credible witness, owing to omissions in his BOC and narrative, and therefore concluded that the agents of

harm were not the Los Zetas cartel as he had testified. It also found that the Applicants' claim lacked a nexus to a Convention ground.

[9] Assessing the claim under section 97 of IRPA, the RPD noted that no threats had been made against the family since 2016 and concluded that there was no evidence that the agents of harm had the motivation or means to locate the Applicants in the proposed IFAs of Merida, Campeche, and Cabo San Lucas. The RPD therefore rejected their claim, and the Applicants appealed to the RAD.

III. **Decision under Review**

[10] The determinative issues before the RAD were credibility and the viability of the three IFAs identified by the RPD.

[11] At the outset, the RAD identified the following four findings of the RPD that the Applicants had not specifically disputed: (1) the Husband omitted key information from his BOC without a reasonable explanation; (2) the additional incidents of in-person threats that the Husband testified about did not, on a balance of probabilities, occur; (3) the agent of harm is not, on a balance of probabilities, the Los Zetas cartel; and (4) the IFAs are objectively reasonable.

[12] Despite the fact that these findings were found to be unchallenged on appeal, the RAD noted the significance of the RPD's finding that the Los Zetas cartel were not the agents of harm. As a result, it conducted an independent analysis of this issue.

[13] The RAD found that the Husband omitted material information from his narrative without a reasonable explanation. The omission was that additional in-person threats took place and that the agents of persecution identified themselves as members of the Los Zetas cartel. In the RAD's view, this omission was significant as it went to a central element of the Applicants' claim. The Husband explained during the RPD hearing that the detail had slipped his mind due to his nerves and the trauma he was experiencing at the time. The RAD found this explanation to be unreasonable and further noted that the Applicants, who were represented by counsel, had more than three years to provide an amendment to the Husband's narrative.

[14] The RAD also considered the husband's testimony that he knew who the cartel was because of the news about the corrupt government and cartels in Veracruz. The RAD noted that the objective documentation submitted by the Applicants indicated that the Duarte regime switched the "government's allegiance from the Zetas to the CJNG". The RAD found that this information indicated that the cartel associated with the Duarte regime, that would therefore be in a position to be owed money or other property by the regime, was not the Los Zetas cartel. The RAD therefore concurred with the RPD that the agents of harm were not the Los Zetas cartel.

[15] With respect to the viability of the three IFAs proposed by the RPD, the Applicants argued that the fact that the Husband worked for a corrupt government was sufficient to establish a nexus to a Convention ground based on political opinion. They argued that the agents of persecution and other major cartels in the proposed IFAs would target them based on their imputed political opinion as a result of their opposition to cartels. The RAD disagreed. It noted

that the RPD indicated in its decision that the Applicants' counsel agreed that the claim was properly assessed under section 97 of the IRPA, because criminal acts of threats and extortion do not usually form a nexus to a Convention ground. As such, the RAD found that the argument that the Applicants have a nexus to a Convention ground was inconsistent with the position taken at the RPD and was raised for the first time on appeal.

[16] The RAD also observed that its independent review led to the conclusion that the Applicants' risk is not based on any political activity, and was instead a risk based on criminal acts of extortion and threats. The RAD found that the Husband was not being pursued because the corrupt government officials or the cartel did not agree with his political opinion or activities.

[17] With respect to the first prong of the IFA test, the RAD noted that it had identified no error in the RPD's finding that the Los Zetas cartel were not the agents of harm and, therefore, the agents of harm were unknown. The RAD then adopted the reasoning of jurisprudence from this Court finding that, where the agent of harm is unknown, it is reasonable to conclude that a claimant has not established that they are at risk in a proposed IFA.

[18] Concluding that viable IFAs existed, the RAD dismissed the appeal.

IV. **Issues**

[19] The Applicants' arguments raise the following issues in this application:

- A. Did the RAD breach procedural fairness in concluding that the Applicants were not threatened by the Los Zetas cartel?

- B. Did the RAD rely on unreasonable findings in concluding that the Applicants were not threatened by the Los Zetas cartel?
- C. Did the RAD unreasonably fail to consider the substance of the Applicants' claim under section 96 of the IRPA, irrespective of the identity of the agent of harm?
- D. Did the RAD err in treating the uncertainty as to the identity of the cartel as dispositive?

[20] The parties agree (and I concur) that the standard of review applicable to the last three issues is reasonableness.

[21] In relation to the first issue, the standard of review for issues of procedural fairness remains correctness (see *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35). Functionally, this requires the Court's analysis to focus on whether the procedure followed was fair, having regard to all the circumstances (see *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

V. **Analysis**

[22] My decision to allow this application for judicial review turns on the first issue articulated above - whether the RAD breached procedural fairness in concluding that the Applicants were not threatened by the Los Zetas cartel.

[23] The RPD impugned the credibility of the Husband's assertion that the Los Zetas cartel were the agents of harm, and as a result found that the Applicants did not know the identity of the agents of harm, based omissions from his BOC, in particular in relation to their having identified themselves as the Los Zetas cartel. The RAD conducted an independent analysis of this issue and, like the RPD, concluded that the Husband omitted material information from his BOC narrative without reasonable explanation.

[24] However, the RAD also based its analysis on consideration of the Husband's testimony that he knew the identity of the cartel because of news reports, which the RAD compared to objective documentary evidence explaining that the Duarte regime switched the government's allegiance from the Los Zetas cartel. The Applicants argue that the RAD thereby breached procedural fairness by relying on a new and distinct analysis in support of its credibility finding, without affording the Husband or the Applicants an opportunity to address this concern.

[25] The Applicants refer the Court to the leading case of *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 [*Kwakwa*] at para 25, in which Justice Gascon explained as follows:

25. In *Ching v Canada (Minister of Citizenship and Immigration)*, 2015 FC 725, the Court concluded that, when a new question and a new argument have been raised by the RAD in support of its decision, the opportunity must be given to the applicant to respond to them. In that case, the RAD had considered credibility conclusions which had not been raised by the applicant on appeal of the RPD decision. This amounted to a "new question" on which the RAD had the obligation to advise the parties and offer them the opportunity to make observations and provide submissions. Similarly, in *Ojarikre v Canada (Minister of Citizenship and Immigration)*, 2015 FC 896 at para 20 and *Jianzhu v Canada (Minister of Citizenship and Immigration)*, 2015 FC 551 at para 12, the RAD had raised in its decision questions which had not been reviewed or relied on by the RPD or advanced by the

applicant. These situations can be distinguished from *Sary v Canada (Citizenship and Immigration)*, 2016 FC 178 at para 31, in which I found that the RAD did not examine any “new questions” but rather referred to evidence in the record which supported the conclusions reached by the RPD. A “new question” is a question which constitutes a new ground or reasoning on which a decision-maker relies, other than the grounds of appeal raised by the applicant, to support the valid or erroneous nature of the decision appealed from.

[26] The Applicants submit that the RAD’s analysis based on the objective documentation in the case at hand represents new reasoning, neither relied upon by the RPD nor raised in the Applicants’ appeal, to which the Applicants were entitled to an opportunity to respond.

[27] The Respondent submits that an argument of this nature was rejected in *Gedara v Canada (Citizenship and Immigration)*, 2021 FC 1023 at para 32:

32. The Applicant submits the RAD breached the duty of fairness by raising credibility concerns not identified by the RPD. In my view, there is no merit to this submission for two reasons. First, the jurisprudence establishes the RAD, without the need for notice, may consider and determine issues of credibility arising on the record if the issue of credibility was considered and determined by the RPD. Secondly, on the facts of this case, a comparison of his submissions to the RAD against the RAD’s credibility findings leads me to conclude the Applicant himself asked the RAD to consider many if not most of the RAD’s now complained of credibility assessments. Having asked the RAD to assess his credibility, the Applicant may not come to this Court and claim he had no notice of what he had asked the RAD to do. With respect, that makes no sense at all.

[28] At the hearing of this application, the Applicants’ counsel argued that there is no substantive divergence in the jurisprudence cited by the parties. Rather, the question for the Court to consider is whether the analysis relied upon by the RAD represents a line of reasoning

distinct from that of the RPD. I agree with this submission. Ultimately, as with all procedural fairness concerns, the Court must assess whether the Applicants knew, and were afforded an opportunity to respond to, the case they had to meet (*Kwakwa* at para 28).

[29] In my view, the RAD's analysis, based on the documentary evidence of the Duarte regime's shifting alliances with criminal cartels, is a line of reasoning distinct from the analysis based on BOC omissions upon which the RPD relied. The Applicants could not have been expected to anticipate the RAD's reliance on this additional line of reasoning. They argue that the Husband's testimony as to news about cartels is not inconsistent with the documentary evidence, which they submit is unclear as to the timing of the purported switch of cartel allegiances. I express no opinion on this argument, other than to observe that the Applicants were not afforded an opportunity to raise this argument, or any evidence potentially relevant to the issue, in response to the RAD's concern.

[30] I have considered the Respondent's argument that the RAD's analysis based on the objective evidence merely supplements its analysis based on the Husband's BOC omissions, such that the Applicants' procedural fairness point is not determinative. I agree with the Applicants' response that the RAD's overall analysis can be characterized as comparable to that which was impugned as follows in *Dalirani v. Canada (Citizenship and Immigration)*, 2020 FC 258 (at para 30):

30. ... It is clear that the RAD found those credibility issues significant in upholding the RPD decision by adding those credibility findings. The description of a "new question", as being "a question which constitutes a new ground or reasoning on which a decision-maker relies, other than the grounds of appeal raised by the applicant, to support the valid or erroneous nature of the

decision appealed from” (*Kwakwa*, para 25), fits nicely the new reasons given for finding fault with the applicant’s credibility. It says, if the grounds of the RPD do not suffice, here are others. As Justice Hughes colorfully said in *Husian v Canada (Citizenship and Immigration)*, 2015 FC 684, “if the RAD chooses to take a frolic and venture into the record to make further substantive findings, it should give some sort of notice to the parties and give them an opportunity to make submissions” (para 10).

[31] I find that the Applicants were deprived of requisite procedural fairness in connection with the analysis canvassed above. The resulting finding by the RAD, that the agents of harm were not the Los Zetas cartel and were therefore unidentified, leads directly to the RAD’s conclusion that there are viable IFAs for the Applicants. As such, my conclusion on the procedural fairness argument is determinative of this application for judicial review, and it is unnecessary for the Court to consider the other issues raised.

[32] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-363-22

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the Decision is set aside, and the matter is returned to a differently constituted panel for redetermination. No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-363-22

STYLE OF CAUSE: BEATRIZ ADRIANA GONZALEZ JERONIMO
YESHUA NAHIN HERNANDEZ GONZALEZ
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THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

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