Federal Court  Cour fédérale

Date: 20230523

Docket: IMM-764-22

Citation: 2023 FC 696

Ottawa, Ontario, May 23, 2023

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

CORNELL LAVANDER FRANK
ARETHA ANGELA HUYLER
RONALD TARON FRANK
TAKIYAH KEANNA ROLLE
FAITH SEIANNA FRANK
(A.K.A. FAITH SEIANNA ANGELA FRANK)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] Cornell Lavander Frank [Principal Applicant or PA], Aretha Angela Huyler [Associate Applicant or AA] [collectively, Adult Applicants], and their children [collectively, Applicants]

seek judicial review of the Refugee Appeal Division's [RAD] decision dated January 10, 2022 [Decision] wherein the RAD upheld the Refugee Protection Division's [RPD] determination that the Applicants are neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] The application for judicial review is dismissed. The Applicants have not met their burden of establishing that the RAD committed a reviewable error.

II. Background

[3] The Applicants' claims are detailed and extensive. A summary of the essential parts of the claims follows.

[4] The Applicants are citizens of the Bahamas and are all related to one another. The PA is a 51-year-old single mother. Two of the PA's children, Ronald, a minor, and Faith, age 19, are included in this application. The PA's sister, the AA, is a 53-year-old single mother. One of her minor children, Takiyah, is also included in this application. The Adult Applicants' claims were joined before the Tribunals and the mother of each minor served as the Designated Representative for their children.

[5] Both the Adult Applicants have other older children residing in the Bahamas. The Adult Applicants' mother, who died in December of 2012, was born in Jamaica, while their father was born in Haiti.

[6] The Applicants' claims for protection arose from the AA's son, Lavardo, being charged with the murder of his wife, Harderia, and the resulting threats and harms directed by Harderia's family toward the Applicants. The Applicants claim that Harderia's family and other Bahamians blamed the AA and Lavardo for Harderia's death. The AA and Harderia also had an altercation before Harderia's death. The case became the subject of intense media interest. The Applicants claim that Lavardo was coerced into giving a false confession and, as a result, was imprisoned for two years while awaiting trial. Lavardo was released on bail in 2019 but it is not clear what his status is in terms of the criminal allegations.

[7] The Applicants claim that Harderia's family is well connected and influential in the Bahamian government. Her death has resulted in the Applicants' family facing immediate and ongoing backlash from members of Harderia's family and the public.

[8] Threats from Harderia's family prompted the AA and her daughter to go into hiding at the AA's brother's home. The PA and her children joined them. The AA claims she was threatened by Harderia's father while they were working at an airport and beaten at the courthouse by Harderia's family. Various members of her family were harassed when unaccompanied. The AA also experienced harassment, including on a plane, learned that Harderia's father had arranged for her death, and lost employment as a result of the situation.

[9] The Applicants allege that the Bahamian police did not provide assistance when they brought the threats and harassment to their attention.

[10] In August and September 2019, Hurricane Dorion touched down in the Bahamas, resulting in mass relocation. The Applicants lost everything and took shelter in Nassau. On September 16, 2019, the AA and her daughter fled the Bahamas and arrived in Canada. The PA followed with her two children in November 2019.

[11] The Applicants initiated separate refugee claims. In support of their applications, the Applicants submitted letters of support, country condition evidence, and various psychotherapy assessment reports. The reports noted that the Applicants had been receiving treatment for anxiety, depression, and Post-Traumatic Stress Disorder arising from the events in the Bahamas. The authoring psychologist found that the Applicants' symptoms would likely not stop or would be exacerbated if they were forced to return to the Bahamas. The psychologist described some of the Applicants as "vulnerable" and "in need of help". In particular, the PA's daughter was diagnosed with severe depression and anxiety.

[12] The Applicants' claims were heard before the RPD on May 11, 2021. Upon submitting identification information, the parties discovered that the Adult Applicants could acquire citizenship in Jamaica, raising the question of country of reference.

[13] The RPD found that the Adult Applicants could acquire Jamaican citizenship and therefore could not avail themselves of Canada's protection. While Jamaica was not a country of reference for the three children, the RPD found that they did not establish a nexus to a Convention ground and therefore were not persons in need of protection. Further, the RPD found that the Applicants did not rebut the presumption of state protection in the Bahamas. For the

RPD, the children did not face the same risk as the AA, who was explicitly targeted by Harderia's family. The Applicants appealed the decision.

III. The Decision

[14] The RAD refused to admit an affirmation by the AA and text messages between the AA and her daughter, Anqunque [New Evidence]. The New Evidence explained that the threats and harassment from Harderia's family forced Anqunque to separate from her 2-year-old daughter and that Anqunque believed her daughter to be at risk of abuse. The RAD did admit the updated psychotherapy reports of the Adult Applicants and the PA's adult child.

[15] The RAD confirmed that Jamaica was a country of reference for the Adult Applicants because their mother was born there. The RAD found that they had not made reasonable efforts to overcome impediments to obtain citizenship in Jamaica. Although they had little time to prepare for this issue before the RPD, counsel received an additional 10 days after the hearing to make further submissions, and the Applicants did not take further steps to investigate citizenship constraints in Jamaica.

[16] The RAD also agreed with the RPD that the children did not have a nexus to a Convention ground because their fears stemmed from Harderia's family's threats. The RAD rejected the Applicants' submissions that the children would be targeted because of their mothers' membership in a particular social group, being "women who become victims of abuse due to their familial ties and to an individual accused of committing a serious crime or accused of having harmed a member of a prominent family." While the Adult Applicants had

experienced “negative interactions” at the hands of Harderia’s family, this did not place the children in any particular social group for the purpose of a Convention ground. The children’s claims relied on the Adult Applicants’ evidence regarding perceived retaliatory events.

[17] The RAD also agreed with the RPD that the Applicants had not rebutted the presumption of state protection. The children failed to adduce clear and convincing evidence that the Bahamas would not provide adequate protection against any future harm they might face. The children had not tested the effectiveness of the state’s protection; rather, they “argued about perceptions of ineffectiveness in relation to their mothers’ experiences.”

[18] Finally, the RAD considered the Applicants’ “[m]iscellaneous arguments that do not affect the outcome”. First, contrary to the Applicants’ assertions, the RPD did not err in failing to consider *Chairperson Guideline 3: Child Refugee Claimants: Procedural and Evidentiary Issues* [Guideline 3]. As for the Applicants’ mistreatment or discrimination in the Bahamas due to their gender, status as single parents, and perceived minority ethnic status as children of foreigners, the RAD determined that general discrimination was insufficient to ground these claims. While the Applicants suggested that some of their police and family interactions had a racial or discriminatory tone, they failed to adduce sufficient information demonstrating a cumulative effect amounting to the likely future persecution of their children. Lastly, the RAD considered the effect of their Decision, being “that the children are able to return to the Bahamas, while their mothers are expected to go to Jamaica if they fear persecution in the Bahamas.” The RAD accepted that this would be problematic. However, it was possible that they would join their

mothers in Jamaica. The potential separation, given the circumstances, was speculative. Nonetheless, the RAD found that it was not a basis to allow the claims.

IV. Issues and Standard of Review

[19] After reviewing the submissions of the parties, the sole issue is whether the Decision is reasonable. The sub-issues are best characterized as follows:

1. Did the RAD err in its treatment of New Evidence?
2. Did the RAD reasonably find that Jamaica was a country of reference for the Adult Applicants?
3. Did the RAD err in finding no nexus to a Convention ground for the children?
4. Did the RAD err in its state protection analysis?

[20] I agree with the parties that the standard of review for the merits of the Decision is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). None of the exceptions outlined in *Vavilov* arise in this matter (*Vavilov* at paras 16-17). A reasonableness review is a robust form of review that requires the Court to consider both the outcome of the decision and the underlying rationale to assess whether the decision, as a whole, 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 paras 13, 15, 87, 99). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made and determine whether it falls within the range of acceptable outcomes, the decision will be reasonable (*Vavilov* at paras 85-86). However, a

reviewing Court must refrain from reweighing and reassessing the evidence considered by the decision-maker (*Vavilov* at para 125, citing *Canada (Canadian Human Rights Commission) v Canada (Attorney General)*, 2018 SCC 31 at para 55).

V. Analysis

A. *Did the RAD err in its treatment of the New Evidence?*

(1) Applicants' Position

[21] The RAD erred in refusing to admit the New Evidence. The New Evidence is relevant because it speaks to a forward-looking risk and involves evidence of similarly situated persons. The consideration of the latter is also directed by Guideline 3 and is supported by jurisprudence (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 724-25, [1993] SCJ No 74 [*Ward*]).

[22] A flexible approach should be taken in the admission of New Evidence under subsection 110(4) of the *IRPA* (*Singh v Canada (Citizenship and Immigration)*, 2014 FC 1022 at para 55; *Olowolaiyemo v Canada (Citizenship and Immigration)*, 2015 FC 895 at para 28).

(2) Respondent's Position

[23] The RAD did not err in rejecting the New Evidence, as it was not relevant to the determinative issues.

[24] Many of the Applicants' arguments amount to a dispute over the adequacy of reasons. A reasonableness review is not a line-by-line treasure hunt for errors (*Vavilov* at para 102). Rather, it is appropriate for a reviewing Court to "connect the dots on the page, where the lines, and the direction they are headed, may be readily drawn" (*Vavilov* at para 97, citing *Komolafe v Canada (Citizenship and Immigration)*, 2013 FC 431 at para 11).

(3) Conclusion

[25] Before assessing the RAD's treatment of the New Evidence, I will briefly discuss the applicable legal principles. The RAD's decisions concerning admissibility of evidence demand deference from this Court (*Khan v Canada (Citizenship and Immigration)*, 2020 FC 438 at para 32). The RAD must also ensure that, when assessing the admissibility of new evidence pursuant to subsection 110(4) of the *IRPA*, it ensures that the implied conditions of inadmissibility are fulfilled, including credibility, relevance, newness, and materiality (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at paras 34-38; *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 13).

[26] Turning now to the RAD's assessment of the New Evidence, I am of the view that the RAD did not commit a reviewable error in refusing to admit the New Evidence. While it is true that this evidence was not available before the RPD hearing, I agree with the RAD that the New Evidence is neither relevant nor probative in relation to the Applicants' determinative issues. The AA's affirmation, which speaks to the difficulties living in Jamaica, is not relevant because the harms outlined in the Applicants' claims relate to the Bahamas. The AA's affirmation also speaks to Lavardo's specific personal situation, which is also not relevant to the Applicants'

claims. Further, Anqunque's evidence is specific to her and her daughter's personal experiences. It would be speculative to draw a direct analogy to any of the Applicants. For these reasons, the RAD's refusal of the New Evidence was reasonable.

B. *Did the RAD reasonably find that Jamaica was a country of reference for the Adult Applicants?*

(1) Applicants' Position

[27] The loss of the Adult Applicants' mother's identification impeded the Applicants' ability to exercise their right of citizenship in Jamaica by descent. Whether the Applicants made reasonable efforts involves a case-by-case assessment of the circumstances. The Applicants provided objective documentation to the RPD regarding this impediment, such that it would not be automatic or within their control to acquire Jamaican citizenship.

(2) Respondent's Position

[28] The Applicants failed to take any steps to obtain Jamaican citizenship. The RAD considered the potential impediments to obtaining citizenship, but found that the Applicants made no efforts to contact Jamaican authorities or family members despite being put on notice of this issue before the RPD. The Applicants' submissions before the RAD also contained no evidence of their attempts to obtain Jamaican citizenship.

(3) Conclusion

[29] The RAD did not err in determining that Jamaica is a country of reference for the Adult Applicants.

[30] The RAD considered that the Adult Applicants' mother's identification was lost or destroyed; however, the RAD also stated that the Applicants needed to undertake "reasonable efforts" to overcome this impediment. In the absence of these reasonable efforts, the presumption remained that Jamaica is a country of reference for the Adult Applicants.

[31] The Applicants failed to point to any evidence that would overcome this presumption. In particular, there is no evidence that the Applicants reached out to their extended family seeking further information, nor is there evidence that the Applicants contacted the Jamaican government to ask about citizenship requirements. The Applicants did not so much as include an email chain inquiring with a government agency in Jamaica as to citizenship requirements despite being represented by counsel throughout this process. Based on the record, the RAD reasonably determined that Jamaica is a country of reference for the Adult Applicants.

C. *Did the RAD err in finding no nexus to a Convention ground for the children?*

(1) Applicants' Position

[32] The children are directly affected by the Adult Applicants' intersecting identities. The Adult Applicants are members of a particular social group, namely "women who become victims

of abuse due to their familial ties to an individual accused of committing a serious crime or accused of having harmed a member of a prominent family", single mothers, and have a minority ethnic background. The minor male Applicant is also implicated by virtue of his family ties.

[33] For the female Applicants, male family members in the Bahamas do not face the same risks as the female Applicants do, as indicated in a letter from the PA's daughter who described how having a male presence in her home meant she did not have to relocate.

[34] Lastly, the Adult Applicants' perceived ethnic minority status as children of foreigners further establishes their mistreatment. In this context, the children face a vulnerable societal status, especially with their persecutors, who have high-level connections and hold positions of power.

(2) Respondent's Position

[35] The Applicants initially claimed they were targeted as a family due to Harderia's murder. They now claim that they were targeted due to their female gender. None of the Applicants' initial claims involve or allege gender. Additionally, these claims included or implicated the Adult Applicants' sons. Applicants who are victims of criminality often attempt to avoid the application of jurisprudence stating that victims of crime are not a social group by claiming they are being targeted for being part of a family (*Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 345 at paras 7-8 [*Gonzalez*]). However, this Court has consistently found that being targeted for being part of a family – when that family is not targeted for a Convention reason – does not form a nexus between the harm feared and a Convention ground

(*Serrano v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 570, 166 FTR 227 at para 42 [*Serrano*]; *Granada v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1766 at para 16 [*Granada*]). Therefore, the RAD's conclusion that the minor Applicants had no nexus to a Convention ground is reasonable.

(3) Conclusion

[36] The RAD reasonably found that the minor Applicants' claims had no nexus to a Convention ground.

[37] I agree with the Respondent that the claims did not originate as claims based on gender. Rather, the claims were based on the circumstances arising from Harderia's death and Harderia's family's perception of the AA's and Lavardo's involvement. As such, I agree that this matter falls within the parameters as discussed in *Serrano* and *Granada*. There was no evidence that the children were targeted or would be targeted. In my view, it boils down to the insufficiency of evidence. As such, there is no reason to disturb the RAD's finding on this matter.

D. *Did the RAD err in its state protection analysis?*

(1) Applicants' Position

[38] The Applicants provided extensive personal and objective evidence demonstrating that state protection would not be available to them because of Harderia's family's connections and standing in the Bahamas. Notwithstanding this, the RAD adopted the RPD's finding that the

Bahamas was a functioning democracy with a functioning security force. This finding directly conflicts with their evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC 53 at paras 14-17, [1998] FCJ No 1425). Even in democratic states, a persecutor with proximity to power can make it difficult for applicants to access state protection (*Gonzalez Torres v Canada (Citizenship and Immigration)*, 2010 FC 234 at para 39 [*Torres*]).

[39] The Applicants further rely on their submissions related to Guideline 3 and *Ward*, above.

(2) Respondent's Position

[40] The RAD provided a sufficient rationale as to why the children failed to rebut the presumption of state protection in the Bahamas. The Applicants' evidence demonstrated that the police intervened on several instances, including when the AA received a threat from Harderia's father. The RAD provided comprehensive reasons on this point.

(3) Conclusion

[41] I agree with the Respondent that the RAD provided a sufficient rationale as to why the Applicants did not rebut the presumption of state protection. Specifically, the Applicants have not demonstrated that state protection is operationally unobtainable.

[42] The Applicants discuss how the AA was harassed on a plane by Harderia's aunt and that the Applicants contacted airport police for assistance. The record illustrates that the police responded. This suggests that the state was able to assist the AA. The Applicants then go on to

state that the AA tried to take the perpetrator to court but nothing resulted in terms of legal recourse. This kind of evidence is highly unspecific and not clearly indicative of a lack of state protection. In fact, some of the evidentiary items on the Applicants' list of personal evidence are entirely unrelated to the Applicants' state protection argument. The Applicants are effectively asking this Court to make a series of logical inferences to succeed in their argument. This is a speculative and inappropriate exercise to undertake.

[43] As noted by Justice Kane, "although state protection need not be perfect, it must be effective to a certain degree and the state must be both willing and able to protect" (*Soe v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 557 at para 118). In the case at hand, the Applicants make numerous representations as to what they think police should have done when they deferred to the state for assistance. This is a subjective assessment and runs contrary of this Court's jurisprudence.

[44] The Applicants face similar difficulties in terms of their documentary evidence. The Applicants cite broad evidence in the National Documentation Package pertaining to gender-based violence and reports of corruption and police misconduct, none of which tie the Applicants personally to these issues or serve as evidence of a lack of state protection in their particular circumstances (*Iskandar v Canada (Citizenship and Immigration)*, 2019 FC 1372 at para 27).

[45] I also disagree with the Applicants' interpretation of *Torres*. As explained by Justice Russell, the "applicant's failed attempts to obtain protection were a significant factor in Torres… the applicant's failed attempts to seek protection were "crucial," and [they] were all that could

rebut the presumption of state protection" (*Mendoza-Rodriguez v Canada (Citizenship and Immigration)*, 2012 FC 1367 at para 58). That does not ring true in the case at hand. There is no evidence that Harderia's family blocked the Applicants from seeking state protection. The Applicants also raised concerns as to Harderia's family members occupying positions of power but, again, there is no personal nexus between these family members and the Applicants' access to state protection.

[46] For these reasons, the RAD reasonably determined that the Applicants failed to rebut the presumption of state protection.

VI. Conclusion

[47] The Decision falls within the range of acceptable outcomes. Put simply, the Decision was reasonable.

[48] At the hearing, the Applicants indicated that they would like to propose certified questions. Although this was not undertaken in compliance with the Federal Court's Practice Guidelines For Citizenship, Immigration and Refugee Law Proceedings (November 5, 2018), I nevertheless permitted the parties to file their submissions post-hearing.

[49] The test for certification was recently restated by Justice Roussel in *Dor v Canada* (Citizenship and Immigration), 2021 FC 892:

> [97] The criteria for certifying a question are well established. The proposed question must be determinative of the outcome of the appeal, transcend the interests of the parties to the litigation, and

> involve matters of significant consequence or general application. In addition, the issue must have been considered by the Federal Court and it must arise from the case itself, not simply from the way in which the Federal Court decided the case. A question that is in the nature of a reference or whose answer depends on the facts of the case cannot raise a properly certified question (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22, at paras 46–47; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130, at para 36; *Mudrak v Canada (Citizenship and Immigration)*, 2016 FCA 178, at para 15–17; *Lai v Canada (Public Safety and Emergency Preparedness)*, 2015 FCA 21, at para 4; *Zhang v Canada (Citizenship and Immigration)*, 2013 FCA 168, at para 9; *Varela v Canada (Citizenship and Immigration)*, 2009 FCA 145, at paras 28–29; *Canada (Minister of Citizenship and Immigration) v Zazai*, 2004 FCA 89, at paras 11–12; *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FCA No 1637 (FCA) (QL), at para 4).

[50] The Applicants' two questions for certification are as follows:

1. In refugee claims of a child, must the RPD and the RAD consider or apply Guideline 3 notwithstanding the fact that the claimant has not raised an issue of procedural unfairness or an issue of procedural fairness is not engaged?
2. In refugee claims of a female claimant where the RAD has found that there is no gender-based nexus, is it reasonable for the RAD not to consider or rely on objective country conditions documentary evidence of gender-related police misconduct, or police misconduct toward women and girls, on the basis that such evidence is not relevant to the issue of rebutting state protection?

[51] The Applicants submit that both proposed certified questions are determinative of the application and that they have not been previously considered by this Court.

[52] The Respondent submits that both questions do not arise on the facts nor are they dispositive.

[53] I am refusing to certify the proposed questions. They do not satisfy the criteria established by this Court in that the questions “must be determinative of the outcome of the appeal, transcend the interests of the parties to the litigation, and involve matters of significant consequence or general application”. I am also of the view that the proposed questions relate to the particular circumstances of this matter. The facts of this matter do not share characteristics with the average case.

JUDGMENT in IMM-764-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-764-22
STYLE OF CAUSE:	CORNELL LAVANDER FRANK, ARETHA ANGELA HUYLER, RONALD TARON FRANK, TAKIYAH KEANNA ROLLE, FAITH SEIANNA FRANK, (A.K.A. FAITH SEIANNA ANGELA FRANK) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	DECEMBER 12, 2022
JUDGMENT AND REASONS:	FAVEL J.
DATED:	MAY 23, 2023

APPEARANCES:

Soo-Jin Lee	FOR THE APPLICANTS
Ada Mok	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Nazami & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT