Federal Court  Cour fédérale

Date: 20230612

Docket: IMM-7761-22

Citation: 2023 FC 829

Ottawa, Ontario, June 12, 2023

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

SAUL DAVID RAMIREZ GARCIA
MARIA DE JESUS ARENAS GARCIA
SARA RAMIREZ DZUL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a Refugee Appeal Division [RAD] decision, dated July 19, 2022 [Decision] finding the Applicants were not Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*].

[2] Having considered the record before the Court, including the parties' written and oral submissions, as well as the applicable law, the Applicants have failed to persuade me that the RAD's decision is unreasonable. For the reasons that follow, this application for judicial review is dismissed.

II. **Background**

[3] The Applicants are common law spouses and their minor daughter. They are all citizens of Mexico.

[4] They fear being targeted by the Union de Tepito cartel and Los Zetas cartel due to the PA's work and activism in the nightclub industry. The PA claimed he was a former activist member of the association "Movimiento PRO Entretenimiento Erotico," where he advocated for the rights of workers in the nightclub industry, as well as against illicit activity by organized criminal organizations in the industry.

[5] The PA's issues with the cartel began in 2018 when he became aware of the illicit activities being carried out by cartels at the clubs/bars where he worked. When the PA asked them to cease selling drugs to minors for example, a cartel member recited his exact address and made it clear they were aware he had a daughter.

[6] The PA received several death threats demanding that he stop resisting and remain silent.

[7] At some point, a customer of a bar the PA managed overdosed there and authorities suspended its operations pending an audit. In response, members of the cartel threatened the PA with death and kidnapped him. They ultimately drove him to his home address despite the fact that he never told them where he lived.

[8] The threats persisted despite the PA quitting his position and attempting to work at other locations.

[9] The PA ultimately fled Mexico in September 2019 joining his wife and daughter in Canada who had fled a month prior. They then initiated a claim for refugee protection.

[10] The Refugee Protection Division [RPD] heard the Applicants' claim on December 21, 2021 and rejected it on January 5, 2022.

[11] The determinative issue for the RPD was the PA's credibility. More specifically, the RPD found that the Applicants failed to provide reliable and cogent corroborative evidence to substantiate their allegations, including evidence that the PA ever worked in the nightclub industry.

[12] The Applicants appealed the RPD decision to the RAD.

[13] On July 19, 2022, the RAD dismissed the appeal finding the RPD had correctly determined the Applicants were neither Convention refugees nor persons in need of protection.

III. **Decision under Review**

[14] The RAD rejected new evidence tendered by the Applicants finding that they failed to meet the legislative criteria in subsection 110(4) of the *IRPA.*

[15] The RAD also found that the RPD correctly determined that there was no nexus to a Convention ground and thus assessed the claim under section 97(1)(b) of the *IRPA.*

[16] After conducting an independent assessment, the RAD, unlike the RPD, accepted that the PA did work in the nightclub industry and was a member of Movimiento Pro Entretenimiento Erotico.

[17] However, the RAD ultimately found that due to material inconsistencies and omissions, the Applicants had not credibly established they would face a serious possibility of persecution or a likelihood of harm in Mexico.

IV. **Issues and Standard of Review**

[18] The Applicants assert the Decision is both procedurally unfair and unreasonable, arguing the RAD erred in three ways: (i) in rejecting new evidence tendered by the PA, (ii) in assessing the Applicants' credibility and (iii) by raising a new issue and failing to notify the Applicants or provide them with an opportunity to respond.

[19] With respect to the first two issues, the applicable standard of review is reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. It is the Applicant who bears the onus of demonstrating that the RAD's decision is unreasonable: *Vavilov* at para 100.

[20] For the reviewing court to intervene, the challenging party must satisfy the court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency", and that such alleged shortcomings or flaws "must be more than merely superficial or peripheral to the merits of the decision": *Vavilov* at para 100.

[21] With respect to the third issue, breaches of procedural fairness in administrative contexts have been considered reviewable on a correctness standard or subject to a "reviewing exercise … 'best reflected in the correctness standard' even though, strictly speaking, no standard of review is being applied": *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54 [*Canadian Pacific*].

[22] The focus of the reviewing court is whether the procedure followed by the decision maker was fair and just: *Canadian Pacific* at para 54; *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35.

V. **Analysis**

A. ***The RAD reasonably rejected new evidence***

[23] The Applicants submit that the RAD erred in rejecting their new evidence by failing to consider their probative value and relevance. They further submit that the new evidence met the statutory conditions set out in subsection 110(4) of the *IRPA.*

[24] In support of their RAD appeal, the Applicants submitted an affidavit from the PA outlining the reasons why the remainder of the new evidence was not provided sooner, which included four letters of support, a USB with four translated YouTube videos, and four news articles. All of the new evidence was originally in Spanish and translated copies were provided to the RAD.

[25] The PA's affidavit explained that in June 2021, their counsel informed them that she was leaving the firm and could no longer represent them. The Applicants could not secure a new legal aid certificate in time for the hearing and due to a loss of employment, they did not have the financial means to afford legal fees and translating the evidence before the RPD decision. New counsel agreed to represent the Appellants at the RPD hearing *pro bono.*

[26] The PA had also testified to these circumstances when questioned by the RPD about a lack of documentary evidence to support that he was a member of Movimiento Pro Entretenimiento Erotico.

[27] The RAD accepted the PA's affidavit but rejected the four letters of support, the four translated YouTube videos, and the news articles finding that all of the evidence could reasonably have been presented before the RPD rendered its decision.

[28] The RAD noted that while it was sympathetic to the financial challenges of accessing counsel, this was an "insufficient reason" to accept their new evidence.

[29] The Applicants argue that the RAD erred by focusing only on whether the evidence was new, relying on *Arisekola v Canada (Citizenship and Immigration)*, 2019 FC 275 [*Arisekola*] to support their argument.

[30] This argument is without merit. *Arisekola* concerned a request to introduce new evidence to the RAD after the applicants' appeal record was perfected. Contrary to the Applicants' submissions, Rule 29 of the RAD rules is not applicable in this case as the Applicants sought to introduce their new evidence prior to perfection.

[31] The Applicants also state the RAD failed to take a flexible approach in deciding whether to admit new evidence, citing *Singh v Canada (Citizenship and Immigration)*, 2014 FC 1022 at paragraph 55.

[32] The Respondent counters that the RAD reasonably refused the new evidence pursuant to subsection 110(4) of the *IRPA*, having thoroughly considered and rejected the Applicants' explanations for not providing it sooner.

[33] I agree with the Respondent. Under subsection 110(4) of the *IRPA*, new documentary evidence is only admissible in a RAD appeal if it (a) arose after the rejection of a claim by the RPD; (b) was not reasonably available; or (c) was reasonably available but the person could not reasonably be expected in the circumstances to have presented it at the time of the rejection: *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 34.

[34] The Applicants do not dispute that the newspaper articles and YouTube videos predate the RPD decision. However, they maintain they could not have reasonably presented the evidence sooner due to the change in counsel and costs associated with translation.

[35] The RAD however, reasonably considered the Applicants' explanation and found with respect to the YouTube videos that 3 of them were posted in 2015 and one was posted in 2018 - long before the Applicants' signed their Basis of Claim form in 2019. The RAD took note of the fact that despite the change in counsel for their RPD hearing, the Applicants had been represented by counsel for 20 months to help them prepare and translate evidence. The RAD also reasonably considered the fact that counsel before the RPD submitted that they only received the videos from the Applicants two days before the hearing, and no explanation had been provided as to why they waited until that point to forward them to counsel.

[36] With respect to the news articles, they were dated 2013, 2014, and 2018, predating the RPD decision by several years. The RAD reasonably considered that these articles were accessible online at the time of the RPD's decision and given the fact that they speak to cartel

presence in the nightclub industry, they reasonably could have been expected to be provided before the RPD rendered its Decision.

[37] Finally, with respect to the four letters of support, the RAD similarly concluded that they failed to meet the legislative criteria for newness. While they post-dated the RPD decision, they spoke to events that occurred before the RPD rendered its decision. The RAD considered the length of time between the Applicants signing their Basis of Claim (BOC) on September 20, 2019 and the date of their RPD hearing on December 21, 2021, and when the RPD rendered its decision on January 5, 2022. The RAD also took note of the fact that the PA testified that from January to July 2021 he worked as a cleaner and after that, began working in construction and painting.

[38] In coming to this conclusion, I note the RAD, unlike the RPD, accepted that the PA worked in the nightclub industry and was a member of Movimiento PRO Entretenimiento Erotico. These were critical findings made by the RPD that the new evidence was intended, in part, to overcome.

[39] Absent a proper explanation for why the documents tendered by the Applicants could not have been translated during the 20 months in which they had representation, it was reasonable for the RAD to conclude that the documents could have been obtained and provided to the RPD sooner.

B. *The RAD's credibility analysis was reasonable*

[40] The Applicants submit the RAD made two errors in its credibility analysis.

[41] First, the Applicants argue the RAD erred in finding that the omission from their BOC narrative regarding the owner of the nightclub also being a police commander, was a significant one. The Applicants state the omission was not central to their claim and the PA reasonably added this detail in his testimony before the RPD.

[42] Second, the Applicants take issue with the RAD's conclusion that the PA failed to credibly demonstrate how his participation in Movimiento Pro Entretenimiento Erotico made him a target of the alleged incidents of harm. The RAD came to this conclusion in part, because the Applicants failed entirely to mention the PA's involvement with this organization in their BOC.

[43] The Respondent submits that it was open to the RAD to find the Applicants had omitted significant information from their BOC narratives when they failed to mention that one of the owners of the bar the PA worked at was a prominent police official. With respect to both omissions, the RAD considered the Applicants' explanation that he had a "mental block" but reasonably found this explanation was not sufficient given the significance of that detail.

[44] I agree with the Respondent. I am not persuaded the RAD erred in finding this omission to be a significant one.

[45] I also agree with the Respondent that the fact that the Applicant had a “mental block”, without more, does not require the RAD to accept his explanation. The fact that the nightclub owner was also a police commander went to the heart of the claim because, as noted by the RAD, it explained why the Applicants were unable to access state protection.

[46] Overall, I find the omissions of the nightclub owner also being a police commander and the PA’s participation with an activist organization provided the RAD with a reasonable basis for impugning the Applicant’s credibility: *Ogaulu v Canada (Citizenship and Immigration)*, 2019 FC 547 at paras 18-20.

C. *The RAD did not breach procedural fairness by raising a new issue*

[47] The Applicants state the RAD made a new credibility finding regarding the PA’s decision to return to work in the same region where he was targeted by the Tepito cartel. The Applicants submit that this was a new issue and the RAD was not entitled to raise it without first giving them an opportunity to respond.

[48] I am not persuaded that the Applicants have established a breach of procedural fairness.

[49] In *Corvil v Canada (Minister of Citizenship and Immigration)*, 2019 FC 300, at paragraph 13, Mr. Justice LeBlanc, a member of this Court at the time, set out the following principles:

> [13] It goes without saying that when considering a question which was not raised before the RPD or by any of the parties to the appeal, the RAD must first notify the parties accordingly and give

> them an opportunity to respond thereto (*Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at para 71[*Ching*]). However, it is now a well-established fact that when the credibility of a refugee protection claimant is at the heart of the RPD's decision and the grounds for appeal before the RAD, the RAD is entitled to make independent findings in this regard, without having to question the applicant or giving the applicant another opportunity to make submissions. That said, the RAD must avoid disregarding contradictory evidence on the record or making findings based on evidence unknown to the applicant [citations removed].
>
> [my emphasis]

[50] Mr. Justice Gleeson in *Zhang v Canada (Citizenship and Immigration)*, 2019 FC 870 stated at paragraph 13, "[w]here issues raised and considered by the RAD are linked to the parties' submissions or the RPD's findings, the RAD is entitled to independently assess the evidence or make credibility findings", citing *Bebri v Canada (Citizenship and Immigration)*, 2018 FC 726 at paragraph 16.

[51] The RAD explicitly considered that it was not making findings based on evidence unknown to the Applicants and the fact that credibility was the core issue at the RPD and on appeal.

[52] I find that the RAD did not raise a new issue on appeal because the Applicant's credibility was already at issue before the RPD. As noted above, there is no procedural fairness issue when the RAD finds an additional basis to question the Applicant's credibility using the evidentiary record before the RPD: *Sary v Canada (Citizenship and Immigration)*, 2016 FC 178 at paras 27-32. The Applicant was already on notice that credibility was a live issue based on the RPD's original decision.

VI. **Conclusion**

[53] For the foregoing reasons, I am not persuaded the RAD's decision is unreasonable.

[54] This application for judicial review is therefore dismissed.

[55] No serious question of general importance for certification was proposed by the parties, and I agree that no such question arises on these facts.

JUDGMENT in IMM-7761-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no serious question of general importance to certify.

"E. Susan Elliott"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7761-22
STYLE OF CAUSE:	SAUL DAVID RAMIREZ GARCIA, MARIA DE JESUS ARENAS GARCIA, SARA RAMIERZ DZUL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY WAY OF VIDEOCONFERENCE
DATE OF HEARING:	MARCH 15, 2023
JUDGMENT AND REASONS:	ELLIOTT J.
DATED:	JUNE 12, 2023

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