Federal Court Cour fédérale

Date: 20240207

Docket: IMM-9647-22

Citation: 2024 FC 194

[ENGLISH TRANSLATION]

Ottawa, Ontario, February 7, 2024

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

JOSE DAVID DEL ANGEL QUIROZ
KARINA HERNANDEZ GARCIA
DYLAN DAVID DEL ANGEL HERNANDEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants in this application for judicial review authorized under section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], are three family members of a family of five. Besides Dylan David Del Angel Hernandez, two other young children are

Canadian citizens by birth. The other two applicants are the parents. The applicants are Mexican citizens.

[2] The application for judicial review concerns to a decision by the Refugee Appeal Division [RAD] rejecting the applicants' claim for refugee protection under sections 96 and 97 of the Act. The RAD concurred with the Refugee Protection Division [RPD], which had concluded at first instance that the applicants had an internal flight alternative [IFA] in Mexico, precluding them from obtaining the international protection they were seeking in this case.

[3] The only issue that arises from the RAD's decision is whether it was reasonable to conclude that there was an IFA. The RPD did not question the applicants' credibility and neither did the RAD. The decision pertains only to the existence of an IFA. Before the reviewing court, the applicants also claimed that counsel who represented them before the RPD and the RAD did not do so effectively.

[4] After reading the record presented to this Court and hearing the parties, I can come to only one conclusion: the application for judicial review must be dismissed. The reasons follow.

I. The facts

[5] The facts of this case are simple. They took place between May 2019 and July 16, 2019, when the applicants left Mexico and arrived in Canada. Their Basis of Claim Form is dated August 21, 2019.

[6] The principal applicant is an environmental engineer, but to improve his financial situation he opened his own bakery in May 2019. He learnt the trade by working at his mother's bakery in the neighbouring town since 2015.

[7] The cartel Jalisco Nueva Generación (CJNG) started extorting merchants again in this region of Mexico. While the applicant believed he could avoid it since his mother was already paying the "quota", this was not the case. They had barely opened when CJNG members showed up and demanded a payment.

[8] Merchants then decided to work together, and a petition was prepared by an organization of businessmen united against organized crime [EUCCO]. The principal applicant was not the organizer, a person nicknamed "El Chuy" was, but he signed the petition on June 14, 2019; the petition was presented to the authorities responsible for public safety on June 17. El Chuy claimed to have received threats on June 25. The applicant said that CJNG members went to his bakery on June 28 and threatened to kidnap him (while he was not there) and to burn his bakery down with him locked inside. El Chuy was murdered on June 29. The applicant left Mexico on July 16.

II. The RAD's decision

[9] As stated above, the RAD confirmed the decision made by the RPD. Both concluded that the applicants have an IFA in two Mexican cities, both located more than a thousand kilometers from the region the applicants are from. The applicants' credibility is not at issue, since the RPD concluded that they were credible.

[10] With respect to the IFA, the RAD concluded that the prospective risk at the potential IFA location has not been established. Where there is an internal flight alternative, a serious possibility of persecution cannot be established if the agents of persecution do not have the means or the motivation to track the individuals (decision at para 20).

[11] For the RAD, the determining factor was the lack of motivation. The RAD considered the following elements to reach its conclusion:

> - The cartel has not made attempts to locate the male appellant since he left the country in July 2019.
> - The bakery in Castillo where his mother works is still open and his mother continues to pay the quota every month.
> - The second bakery in Tihuatlán, which the male appellant ran, has been closed since July 2019.
> - The CJNG has not bothered his mother since the male appellant's departure, and the cartel has not inquired about him since August 2019.
> - There is no evidence that the cartel would go to the lengths necessary to locate the appellants 1,100 kilometres from the state of Veracruz, even though the cartel has a presence in other Mexican states and alliances with other cartels.
>
> (Decision at para 21)

According to the RAD, this is the main issue: the agents of persecution have not shown the motivation to pursue the applicants since August 2019. Their ability to track the applicants was not considered by the RPD as their motivation was not established.

[12] I note that the RAD referred to the National Documentation Package on Mexico, updated only a few months before its decision. I reproduce paragraphs 29 and 30 of the decision, which refer to passages from tab 7.8 of the Package:

> [29] Although the cartel's ability to track down people within Mexico is not disputed, the objective evidence shows that relocation somewhere else in the country might work to eliminate the risk of harm if the conflict is not too serious:
>
> > …It is an oversimplification to say that a group will track just anyone. It really depends on who you are and what you did. Low ranking members are not worth the time or resources for armed groups to track and kill. Instead, high-ranking members or someone who betrayed a [high-ranking member of] a criminal organization may cause you to be tracked or targeted.
> >
> > …
> >
> > the safety of an individual who relocates to flee from one of these organizations' threats depend on the interests a group may have to punish or retaliate against them. If the conflict is not too serious, a relocation might work.
>
> [30] I also note that the objective evidence states the following:
>
> > criminal groups are motivated to track certain individuals because they steal or lose money; due to personal rivalries; for political incentives/reasons or due to "personal vengeance; perceived betrayal; public exposition of relationships with public officials, politicians or investments; or cooperation with authorities as informants or collaborative witnesses".

[13] The RAD then moved on to the second possibility for a refugee protection claimant to rebut an IFA, namely, that relocation to these locations would be unreasonable.

[14] In this regard, while acknowledging the prevalence of organized crime in Mexico, the RAD concluded that the documentary evidence is not such as to render the IFA unreasonable. The proposed locations are among the most peaceful, in contrast to the region from which the applicants originate.

[15] In fact, it was noted that the applicants' ages, education levels, work experience, freedom to practice their religion and speak their language in the locations under consideration in no way demonstrate that they will be unable to find employment and build an adequate life for themselves: just prior to the onset of the pandemic in 2020, the employment rate in the IFA cities was 97.5%, the highest in the country.

[16] There is no denying the difficulties inherent to relocation: but there is no evidence on the record that shows any extreme difficulties.

[17] Finally, the best interests of the children were taken into consideration. The preservation of the family unit was not called into question for a return to Mexico. In his testimony before the RPD, the principal applicant mentioned the danger of children being kidnapped for organ "donation" and the risk of recruitment by organized crime. The RAD concluded that no evidence was provided in this regard.

[18] The RAD therefore concluded that the applicants had not established that they are refugees or persons in need of protection.

III. Arguments and analysis

[19] Upon judicial review, the applicants submit that the RAD's decision is unreasonable. They also take issue with the quality of the professional representation they received before the RPD and the RAD; this would constitute a breach of procedural fairness if it were established.

A. *The RAD's decision is unreasonable*

[20] There is no question that the standard of review for a decision regarding an IFA is reasonableness (among others, *Humayun v Canada (Citizenship and Immigration)*, 2022 FC 1640). This means that expressing disagreement with the administrative decision maker is not enough. Rather, the burden is on the applicants to challenge the decision to show that it is unreasonable. It is necessary to satisfy the reviewing court of such serious shortcomings that the decision cannot be said to bear the hallmarks of reasonableness. What are they? They are justification, transparency and intelligibility, and the decision must be justified in relation to the factual and legal constraints *(Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65, [2019] 4 SCR 563 at paras 99, 100 *[Vavilov*]).

[21] Two fundamental flaws are a failure of rationality internal to the reasoning process and the decision being untenable in light of the relevant factual and legal constraints *(Vavilov* at para 101). *Vavilov* identifies certain areas that are useful in determining the reasonableness of an administrative decision: the governing statutory scheme; other statutory or common law rules; principles of statutory interpretation; evidence before the decision maker; submissions of the parties; past practices and decisions; and the impact of the decision on the individual. We will look at these areas to find considerations that could lead to a conclusion that the decision is untenable.

[22] It is important to remember that the reviewing court must not take the place of the administrative decision maker and impose its perspective on a given case: it is not a *de novo* decision. On the contrary, the reviewing court must adopt a posture of respect towards the administrative decision maker whom Parliament has designated as the decision maker in these matters, and whose competence in its field must be recognized *(Vavilov* at para 14). Judicial restraint is thus required, as "courts intervene … only where it is truly necessary to do so to safeguard the legality, rationality and fairness of the administrative process" *(Vavilov* at para 13). A reviewing court will defer to a decision that is based on a coherent and rational chain of analysis and justified in relation to the factual and legal constraints (*Vavilov* at para 85).

[23] In this case, the applicants thus had to identify serious shortcomings in some aspect of the RAD's decision to lead to the conclusion that it was unreasonable. The arguments relating to the ability of the agents of persecution to track the applicants were ineffective. That is not the issue. The serious shortcomings had to relate to the lack of motivation on the part of the agents of persecution. Mere disagreement on the part of the applicants is clearly not enough.

[24] Yet that is all the applicants put forward. The evidence before the RPD was clear: the agents of persecution no longer showed an interest in the principal applicant after August 2019. To simply claim a desire for revenge years later, without evidence to support such a claim, is supposition and conjecture. An allegation that the applicant is a [TRANSLATION] "particular enemy of the cartel" (Memorandum of Fact and Law at para 31) finds no support in the evidence: it can only be pure speculation.

[25] It is worth noting the basic principles that apply when an internal flight alternative is raised.

[26] Claimants have the burden of establishing that they are refugees. To do so, they must establish that there is no IFA in another part of the country they intend to flee. Internal flight alternative is inherent in the very concept of a refugee, but the burden falls to the claimant only once the issue has been raised *(Rasaratnam v Canada (Minister of Employment and Immigration)* (CA), [1992] 1 FC 706). Indeed, since the IFA is an inherent element of the definition of a refugee, it is necessary "to show, on a balance of probabilities, that there is a serious possibility of persecution throughout the country, including the area which is alleged to afford an IFA" *(Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (CA), [1994] 1 FC 589 at 594 *[Thirunavukkarasu*]). The burden is not shifted to the Minister.

[27] Once the IFA issue has been raised, the claimant must therefore establish that he or she is at a serious risk of persecution in the part of the country proposed as an IFA. The prospective risk can be established in several ways. The case law has recognized that, if the agent of persecution has the means and the motivation to track the refugee claimant, the administrative decision maker may not be satisfied that the refugee claimant is not at a serious risk of being persecuted in the proposed IFA location. Put another way, the IFA would not be a viable alternative. However, if there is no motivation to search for the claimants, the IFA may be established.

[28] The second way of showing that an IFA is not reasonable is for the claimant to prove that the IFA itself is unreasonable. Here is how the Federal Court of Appeal, per Linden JA, described what is expected from the claimant in *Thirunavukkarasu*:

> Let me elaborate. It is not a question of whether in normal times the refugee claimant would, on balance, choose to move to a different, safer part of the country after balancing the pros and cons of such a move to see if it is reasonable. Nor is it a matter of whether the other, safer part of the country is more or less appealing to the claimant than a new country. Rather, the question is whether, given the persecution in the claimant's part of the country, it is objectively reasonable to expect him or her to seek safety in a different part of that country before seeking a haven in Canada or elsewhere. Stated another way for clarity, the question to be answered is, would it be unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad?
>
> An IFA cannot be speculative or theoretical only; it must be a realistic, attainable option. Essentially, this means that the alternative place of safety must be realistically accessible to the claimant. Any barriers to getting there should be reasonably surmountable. The claimant cannot be required to encounter great physical danger or to undergo undue hardship in travelling there or in staying there. For example, claimants should not be required to cross battle lines where fighting is going on at great risk to their lives in order to reach a place of safety. Similarly, claimants should not be compelled to hide out in an isolated region of their country, like a cave in the mountains, or in a desert or a jungle, if those are the only areas of internal safety available. But neither is it enough for refugee claimants to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there. If it is objectively reasonable in these latter cases to live in these places, without fear of persecution, then IFA exists and the claimant is not a refugee.
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> (at 598–99)

We can clearly see that the bar is high. This was also noted by the Court of Appeal in *Ranganathan v Canada* (*Minister of Citizenship and Immigration*) (CA), [2001] 2 FC 164:

> 15 We read the decision of Linden J.A. for this Court as setting up a very high threshold for the unreasonableness test. It requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions. The absence of relatives in a safe place, whether taken alone or in conjunction with other factors, can only amount to such condition if it meets that threshold, that is to say if it establishes that, as a result, a claimant's life or safety would be jeopardized. This is in sharp contrast with undue hardship resulting from loss of employment, loss of status, reduction in quality of life, loss of aspirations, loss of beloved ones and frustration of one's wishes and expectations.

[29] There are therefore two ways for a claimant to rebut an internal flight alternative: prove the existence of a serious possibility of persecution at the IFA locations or establish that the IFA itself is unreasonable. Here, the applicants failed to do either before the RAD. Thus, they had to demonstrate that the RAD's decision was unreasonable under *Vavilov*.

[30] Attempting to prove that the agents of persecution had the means to locate them was unhelpful to the applicants. This was not what was decided by the RAD, which simply noted that there was no evidence of motivation. The respondent is right to point out that this is the key issue. If there is no motivation to pursue the applicants, then there is no prospective risk. My colleague Pamel J has explained this situation in his recent decision in *Torres Zamora v Canada (Citizenship and Immigration)*, 2022 FC 1071:

> [14] I cannot expect the RAD to make decisions in a vacuum. As the RAD had no evidence of the cartel's motivation to pursue the applicants, how can I criticize it for drawing the conclusion it did? I am of the view that the RAD's decision is reasonable because there is no evidence in the file demonstrating the motivation of the CJNG members to locate the applicants. There is indeed a difference between a persecutor's ability to pursue an individual and their desire to do so and interest in doing so (*Leon v Canada (Citizenship and Immigration)*, 2020 FC 428 at para 13 [*Leon*]). It

> is reasonable for the RAD to have taken into consideration the fact that the applicants were not bothered during the months prior to their departure for Canada despite the fact that they were not in hiding and also the fact that their family members did not receive any visits or telephone calls from members of the cartel (*Leon* at para 23). The onus is on the applicants to demonstrate that the decision under review is unreasonable, and I am of the view that they have failed to establish that the RAD's decision has sufficiently serious shortcomings such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency (*Vavilov* at para 100).

[31] This is similar to the situation in this case. The reasons for concluding to a lack of motivation were never looked into. As stated above, instead, the applicants relied on speculation and assumptions unsupported by the evidence. To make up for a lack of motivation, the applicants are seeking to file with the Court affidavits by the principal applicant's mother and his wife. It is even stated that the mother's affidavit is "conclusive" evidence (Memorandum of Fact and Law at para 28). Yet, this evidence is inadmissible as it was not before the decision maker (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263; *Delios v Canada* (*Attorney General)*, 2015 FCA 117; *Sharma v Canada (Attorney General)*, 2018 FCA 48). Judicial review is not an opportunity to try to address deficiencies in the evidence.

[32] The applicants even sought to rely on police corruption. It is difficult to see its relevance since the issue relates to the motivation of the agents of persecution, not their ability to track the applicants. Finally, it is surprising that the applicants never presented their allegations regarding the decision having fundamental flaws or being unreasonable due to a lack of coherence or justification.

[33] The same applies to the reasonableness of the proposed IFAs. The objections are general ([TRANSLATION] “Mexico is known to be an unsafe country”, Memorandum of Fact and Law at para 77; [TRANSLATION] “working in Mexico exposes the applicant to a risk to his life”, at para 81). Such generalities do not prove anything. The same applies to the argument that a mother of three would not be able to return to the job market without family support in the new city. The applicants do not explain how this differs from their situation in Canada or how this satisfies the test created by the Federal Court of Appeal. The Court of Appeal has set the bar very high when it comes to determining what is unreasonable. In this case, the applicants had to demonstrate that the RAD’s decision stating that this high bar had not been reached was unreasonable due to serious shortcomings. This was not done; instead, only the existence of inconveniences due to relocation was alleged. One cannot be insensitive to such a situation. But the law sets the bar higher. The application for judicial review must fail.

B. *Breach of procedural fairness given the alleged professional negligence of counsel for the applicant before the RPD and the RAD.*

[34] The applicants allege to have been represented by counsel who lacks the necessary professional competence. This allegation can be dealt with quickly given the grievances that have been presented.

[35] *Rendon Segovia v Canada (Citizenship and Immigration),* 2020 FC 99, essentially reproduces the analytical framework set out in *R v GDB,* [2000] 1 SCR 520 [*GDB*]. Three conditions must be met:

(i) prior counsel’s acts or omissions constituted incompetence;

> (ii) a miscarriage of justice resulted in the sense that, but for the alleged conduct, there is a reasonable probability that the result would have been different; and
>
> (iii) the representative was given a reasonable opportunity to respond.
>
> (*Rendon Segovia* at para 22)

I would add that the Supreme Court stipulates that incompetence is assessed according to the reasonableness standard and that the starting point is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. Thus, the burden is on the person claiming incompetence to prove it despite the presumption. As the Supreme Court states in *GDB*, "the wisdom of hindsight has no place in this assessment" (at para 27).

[36] In fact, the Supreme Court notes that "where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis" (at para 29). The object is not to grade counsel's performance.

[37] It is therefore established that the absence of prejudice means that there is no need to decide the issue of ineffective representation.

[38] In my opinion, this is the case here. The alleged errors did not cause any prejudice with respect to the determinative issue, namely the existence of an IFA.

[39] Thus, the applicants now argue that their counsel not preparing their testimony, while assistants met with them instead, harmed the applicants' credibility. However, since the applicants agree (Memorandum of Fact and Law at para 127) that their credibility was never at

issue, had there been any deficient preparation of the applicants; this could not have had any impact on their credibility. That was never the issue. It seems to me that to now claim that additional [TRANSLATION] “evidence” could have been provided is pure conjecture and wisdom of hindsight.

[40] I would add that if the affidavit of the principal applicant’s mother had to be considered despite being inadmissible because it was submitted after the administrative decision maker had rendered its decision; the result would have been the same since no prejudice arose from the absence of this “evidence” before the RAD and the RPD. The affidavit only corroborates the principal applicant’s testimony. Yet, his credibility regarding the threats received was not in doubt. General assertions devoid of any details concerning the CJNG members’ interest in the applicant offer no support for their motivation to find the principal applicant, which is the determinative issue.

[41] In addition, the applicants are complaining that, after receiving the RAD’s decision, their counsel at the time proposed filing an application for permanent residence from within Canada on humanitarian and compassionate grounds. He did not propose to challenge the RAD’s decision by judicial review. But clearly, there is no prejudice since the applicants’ counsel availed herself of section 72 of the Act, obtaining an extension of time to file the application for leave and for judicial review (Order of July 19, 2023). The application was initiated and heard.

[42] The applicants are also complaining of being unable to retrieve their file from their former counsel. As unpleasant as it might be, this is not an incident that has any impact on the

judicial review or can constitute prejudice. This had no impact on the application initiated since it occurred after the RAD's decision and did not prevent the applicants from applying for judicial review. Impolite professional conduct, if this is what happened here, is not a matter for this Court (*GDB* at para 29).

IV. Conclusion

[43] The application for judicial review must be dismissed.

[44] The allegations of ineffective representations cannot be accepted because the issue was decided on the basis of the absence of prejudice, considering the RAD's and RPD's decisions, which dealt only with the existence of an IFA and the lack of evidence regarding the motivation of the agents of persecution to track the applicants elsewhere in their country of nationality.

[45] Regarding the decision on the existence of an IFA, the applicants were unable to persuade the reviewing court that the RAD's decision did not bear the hallmarks of reasonableness, as was their burden.

[46] There is no serious question of general importance since this judicial review turns on the facts specific to this case.

JUDGMENT in IMM-9647-22

THE COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. No question is certified.

"Yvan Roy"
Judge

Certified true translation
Margarita Gorbounova

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9647-22
STYLE OF CAUSE:	JOSE DAVID DEL ANGEL QUIROZ, KARINA HERNANDEZ GARCIA, DYLAN DAVID DEL ANGEL HERNANDEZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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APPEARANCES:

Ana Mercedes Henriquez	FOR THE APPLICANTS
Patricia Nobl	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Henriquez avocats inc. Montréal, Quebec	FOR THE APPLICANTS
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT