Federal Court Cour fédérale

Date: 20200122

Docket: IMM-2520-19

Citation: 2020 FC 99

Toronto, Ontario, January 22, 2020

PRESENT: Mr. Justice Diner

BETWEEN:

GUSTAVO EVIEL RENDON SEGOVIA
MARCELA NALLELY SALAZAR OCHOA
EDWIN EVIEL RENDON SALAZAR
EDSON GABRIEL RENDON SALAZAR

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] In this judicial review, the Applicants, a family of four from Mexico, challenge the refusal of their refugee claim appeal. After having read their submissions, and then upon hearing oral arguments, Applicants' counsel persuaded me that reviewable errors occurred, which require

me to send this appeal back to the tribunal for redetermination. I advised the parties that written reasons would follow. These are the reasons promised.

[2] The Principal Applicant, who was employed as a unionized driver, claims that members of the Los Zetas drug cartel: kidnapped him in April 2017, drove him to an ATM and extorted from him the maximum daily withdrawal; kidnapped him again in May 2017, detaining and beating him for three days, and demanded a significant monthly sum after showing pictures of his wife and children; and then approached him on three occasions in June 2017, asking for said money. As the Principal Applicant did not have the funds that he claims Los Zetas asked of him, the family fled to Canada shortly afterwards, claiming refugee protection on August 1, 2017.

[3] The Refugee Protection Division [RPD] dismissed the claim under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], because nothing on the record raised a nexus between the alleged harm suffered and a Convention ground. Under subsection 97(1), the RPD found the Applicants had internal flight alternatives [IFAs] in Cancun, Hermosillo, and La Paz. The RPD found that the Applicants would not face a risk of harm, particularly in Cancun, as the facts asserted were that the assailants operated as a group, had weapons, drove a big car, and bribed the police, but did not necessarily indicate that the assailants belonged to a cartel or were motivated to locate the Applicants. Rather, the RPD found the Applicants were targeted due to a perception of wealth and thus common victims of crime, and they could move to avoid future extortion. The RPD deemed the IFAs reasonable alternatives given the adult Applicants' professional skills, assets, language ability and cultural heritage, including their religion (Catholic).

II. Decision under Review

[4] On March 29, 2019, the Refugee Appeal Division [RAD or tribunal] confirmed the RPD's decision, and it is the RAD decision [Decision] now under review.

[5] The Applicants submitted eleven new pieces of evidence to the RAD. Five of these were submitted with the appeal record. Six were submitted after the appeal's perfection. Claimants who seek to submit evidence after an appeal's perfection should do so in accordance with Rule 29 of the *Refugee Appeal Division Rules*, SOR/2012-257 [Rules]. Applicants' then-counsel did not comply with this rule. Nonetheless, the RAD considered all eleven documents, admitting two letters of support from the Principal Applicant's: (a) mother, who noted that unknown people driving vans and carrying guns had been asking after the Principal Applicant, and that one of his uncles had disappeared, and (b) brother-in-law, a police officer in Mexico, who named Los Zetas as the cartel to which the assailants belong.

[6] The RAD rejected the other pieces of evidence (see a listing of these documents at Appendix A). The RAD found that it had sufficient information to complete the appeal without an oral hearing under subsection 110(6) of the Act.

[7] The RAD held that the only evidence produced to demonstrate that the assailants belong to Los Zetas was his brother-in-law's letter, but gave it little weight, stating it did not constitute convincing evidence that the assailants belong to Los Zetas. The RAD further agreed with the RPD's finding on the section 96 nexus (extortion based on perceived wealth rather than a

Convention ground) as well as a lack of section 97 risk, noting that the Applicants provided "no rebuttal of the IFA in the Memorandum."

III. Analysis

[8] The Applicants cite errors in the RAD's assessment of evidence (both admitted and excluded), and consequently in the RAD's IFA analysis. As these issues relate to the merits of an administrative decision, they will be reviewed for reasonableness, since that presumption has neither been rebutted by a statutory nor rule of law exemption (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]).

[9] The Applicants also claim procedural unfairness due to the representation by their counsel (an immigration consultant) before the tribunal. This third issue does not challenge the merits of the Decision, but instead asks whether the process was fair. In *Vavilov*, the Supreme Court appeared to leave the prior jurisprudence on this point unchanged, meaning correctness review still applies to breaches of procedural fairness (*Vavilov* at para 23; *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

A. *The RAD erred in analyzing the evidence and the IFAs*

[10] The Applicants argue that the RAD unreasonably assessed the letters from the Principal Applicant's brother-in-law (an active member of the Mexican Federal Police) and mother, and

that it unreasonably excluded his mother's police complaint and the psychological assessment of the minor Applicant. The latter, they say, also led to an incomplete assessment of the IFA.

(1) Analysis of Evidence

[11] I agree with the Applicants that the RAD erred in its assessment of the letters from the Principal Applicant's brother-in-law and mother. Both letters contain allegations of Los Zetas involvement in the kidnappings, a central issue of the appeal. The RAD's analysis regarding the letter from the Principal Applicant's brother-in-law was contained in the following paragraph:

> As there has been insufficient evidence adduced to convince me that the agents of harm are members of *Los Zetas*, the only evidence of *Zeta* involvement, which consists of a letter of support by the principal Appellant's brother-in-law, carries little weight and certainly not sufficient weight to convince me of the *Zetas'* involvement in this crime against the principal Appellant.

[12] Regarding the mother's letter, the RAD found that certain parts of the letter provided new information – namely that unknown armed people driving in vans were asking for her son's whereabouts, and that her brother had disappeared. When deciding to admit this document, the RAD stated that it would "assess the weight it deserves later," but made no further mention of it.

[13] This is problematic. I recognize that the RAD may have had a reasonable basis for assigning little weight to this evidence for various reasons. Perhaps it was thinking that the letters were self-serving (*Fadiga v Canada (Citizenship and Immigration)*, 2016 FC 1157 at para 14). Or perhaps the tribunal felt they otherwise lacked credibility. However, the RAD failed to provide any explanation for assigning the brother-in-law's letter little weight and, in the case of the mother's letter, failed to provide any assessment of weight that it had promised. As a result,

the Court cannot know what the tribunal thought about the letter and how it impacted the Decision. Thus, the RAD provided no means for this Court to determine whether the outcome was reached on a proper basis.

[14] In my view, the RAD's determination of the weight it attributed to these letters was essential to the outcome, because there was little to no other corroborating evidence. If the RAD had accepted that Los Zetas – a criminal organization with wide reach – had targeted the Principal Applicant, this may have impacted a central question of the appeal, namely, whether the proposed IFAs were indeed safe. As the Supreme Court recently held, where "a decision maker's rationale for an essential element of the decision is not addressed in the reasons and cannot be inferred from the record, the decision will generally fail to meet the requisite standard of justification, transparency and intelligibility" (*Vavilov* at para 98).

[15] For a similar reason, I also agree with the Applicants that the RAD unreasonably rejected the psychological assessment of one of the minor Applicants on the basis that it was not relevant. This report noted an intellectual disability, in that his "cognitive and academic functioning is significantly delayed relative to same-aged peers," and that he "would benefit from consistent exposure to an education setting where specialized accommodations can be provided."

[16] The RAD should have provided reasons to dismiss this evidence (e.g. for non-compliance with the Rules). Non-relevance, however, was an unreasonable ground on which to reject the evidence, because the report was relevant to the IFAs, in terms of potential hardship an applicant will face in those cities and, ultimately, whether those IFAs are reasonable (*Iyere v Canada*

(Citizenship and Immigration), 2018 FC 67 at para 52 [*Iyere*]). Again, *Vavilov* is instructive, when the majority states "[e]ven if the outcome of the decision could be reasonable under different circumstances, it is not open to a reviewing court to disregard the flawed basis for a decision and substitute its own justification for the outcome" (at para 96).

[17] The unreasonable missteps made in the analysis of the documents described above are, in my view, sufficient to return the matter to the tribunal. However, I will briefly discuss the other issues raised for the sake of completeness.

(2) Analysis of IFA

[18] My conclusion that the RAD wrongly failed to consider the psychological report gives rise to an error in the IFA analysis, and as such is related to the first error. Specifically, after stating that counsel had made no argument to rebut the proposed IFAs (and this in turn is related to the procedural fairness issue regarding the conduct of counsel as discussed below), the RAD determined that the Applicants adduced insufficient evidence to prove that Los Zetas were the agents of harm when it wrote:

> As the RPD found that there were multiple possible IFAs, including Cancun, and that those IFAs were reasonable and safe and no argument has been made to rebut the RPD's finding, I concur with the RPD and find that the Appellants have multiple IFAs in Mexico.

[19] The two-pronged test for assessing an IFA is well established: the RAD must be satisfied, on a balance of probabilities, that (1) there is no serious possibility of the claimant being persecuted in the IFA; and (2) conditions in the IFA are such that it would not be unreasonable

for the claimant to seek refuge there (*Iyere* at para 30; *Figueroa v Canada (Citizenship and Immigration)*, 2016 FC 521 at para 51 [*Figueroa*]).

[20] Here, the RAD simply concurred with the RPD on the availability of the IFAs on the basis that the RPD found the "IFAs were reasonable and safe and no argument has been made to rebut" this finding. Certainly, the RAD, after conducting its own IFA analysis, may arrive at the same conclusion as the RPD. But here, the RAD could not undertake an analysis under the second prong of the test to determine whether the IFAs are reasonable, given that it did not have key evidence before it: the psychological evidence provided a basis upon which the RAD should have considered the second part of the test, and should not have simply parroted the RPD, as that evidence post-dated the RPD decision.

B. *Counsel's incompetence resulted in a breach of procedural fairness*

[21] The immigration consultant who acted as "counsel" for the Applicants before the RAD should have known IFA was a central issue in the appeal: after all, the RPD deemed it to be the determinative issue. There is no doubt that the immigration consultant should have addressed the IFA in written submissions to the RAD.

[22] This Court has stated that in proceedings under the Act, the incompetence of counsel will only constitute a breach of natural justice in "extraordinary circumstances" (*Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at para 36 [*Memari*]). To demonstrate that the incompetence of counsel amounted to a breach of procedural fairness, applicants must establish that each element of a tripartite test is met, namely that (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 (*Guadron v Canada (Citizenship and Immigration*), 2014 FC 1092 at para 11 [*Guadron*]). However, one begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance (*R v GDB*, 2000 SCC 22 at paras 26-27 [*GDB*]).

[23] In the proceedings before the RAD, the only argument that the Applicants' immigration consultant advanced on the issue of IFA was the following statement that is both unintelligible, and also fails to address or challenge the key RPD findings regarding the IFAs:

> In his decision, the Board Member states that the Applicant failed to produce sufficient evidence to convince him that he had approached the police or any other government agency that adequate state protection would not reasonably in Mexico [sic].

[24] In the Decision, the RAD made a point of criticizing this deficiency, when it found "[a]s there has been no rebuttal of the IFA in the Memorandum, <u>I must consider that there is no argument against the proposed IFAs</u>" (emphasis added). Then, in its decision to dismiss the appeal, the RAD – like the RPD – noted that the IFA was determinative.

[25] In short, there is little doubt that, under the first arm of the tripartite test set out in *Guadron*, failing to make submissions on the determinative issue in a decision – when appealing the merits of that decision – amounts to pure incompetence. This is particularly the case when the appellate tribunal reminds the representative of the key issue in the decision being challenged, as occurred here. Put otherwise, this is not a situation where the immigration

consultant's actions would be covered by the usual presumption of a "wide range of reasonable professional assistance" with the benefit and "wisdom of hindsight" (*GDB* at para 27). This was not, for instance, an *ex post facto* criticism of the chosen litigation strategy – of which others existed – and where the chosen option proved unsuccessful, only to be criticized by Monday-morning quarterbacks with twenty-twenty hindsight.

[26] The second and third components of the tripartite test are also met. I will, however, address them in reverse order, because some of the responses of the immigration consultant to the allegations (the third part of the test), help to inform the second – that a miscarriage of justice occurred in these circumstances because there is a reasonable probability that the result would have been different but for the incompetence.

[27] Applicants' counsel before this Court followed the procedures set out in the March 7, 2014 protocol entitled *Re: Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court*. In particular, Applicants' current counsel notified the immigration consultant in writing of the allegations and the possibility of them being raised on judicial review, and provided the consultant an opportunity to respond. The response is included in the record for this judicial review, and the allegations are fully canvassed in the pleadings before this Court. This satisfied the *Guadron* notice requirement.

[28] In the response to the Applicants' current counsel, the immigration consultant stated that "the attached articles suggest that criminal organizations and their smaller branches and allies are

located all over Mexico." However, this does not explain the lack of submissions made on the IFA. It also does not explain the non-compliance with the Rules with respect to the new evidence presented (see Annex A).

[29] In short, the Applicants' counsel for this judicial review maintains that key evidence was missed and unaddressed regarding both (i) the risks they faced and will face from Los Zetas, particularly with respect to the IFAs, and (ii) the reasonability of such IFA for their son.

[30] I agree. First, the former immigration consultant failed to comply with the tribunal's Rules in submitting evidence. Second, once the RAD nonetheless agreed to consider the late evidence, the immigration consultant failed to address key evidence regarding the determinative issue (IFA). Third, the immigration consultant failed to provide updated evidence regarding the risks of Los Zetas operating in the three named IFAs (which were properly included by current counsel in the judicial review record, even though they were not put before the RAD, precisely because of the procedural fairness allegations).

[31] These acts and omissions <u>cumulatively</u> satisfy the burden to establish that a miscarriage of justice resulted from the immigration consultant's incompetence (*Memari* at paras 38-39 and 64), in the sense that but for the alleged conduct, there is a reasonable probability that the result would have been different.

[32] This was made abundantly clear from the RAD member's criticism of the lack of any argument on IFA, when he reasoned that since the immigration consultant did not rebut the IFA,

"I must consider that there is no argument against the proposed IFAs." Again, IFA was the determinative issue before the RPD, and it became the determinative issue once again in the RAD Decision under review. As this Court has previously found, the Board would not have sent this message if it did not feel that a serious omission had occurred (*Mcintyre v Candada (Citizenship and Immigration)*, 2016 FC 1351 at para 37).

[33] As the (i) cumulative effects of counsel's failures amounted to incompetent conduct, (ii) incompetent conduct resulted in a miscarriage of justice, and (iii) the immigration consultant had the opportunity to fully explain her perspective, I find that a breach of procedural fairness occurred in the Decision under review.

IV. Conclusion

[34] The RAD erred in its assessment of the evidence by failing to explain why it attributed little weight to evidence that spoke to a significant issue on appeal. It also erred in rejecting the psychological assessment on the basis that it was irrelevant, when it was indeed relevant to the IFA analysis. This error led to another, in that the RAD failed to engage in the second prong of the IFA analysis. Given that the IFAs were determinative, these shortcomings render the Decision unreasonable in that the Decision was neither justified nor transparent in relation to both its factual and legal constraints (*Vavilov* at para 99). The incompetent representation of their immigration consultant before the RAD and resulting breach of procedural fairness also vitiates the Decision. As a result, I will grant this application for judicial review, and return the appeal to the RAD for redetermination.

JUDGMENT in IMM-2520-19

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is granted.
2. The matter is returned to the Refugee Appeal Division for redetermination by a different panel.
3. No questions for certification were argued, and I agree none arise.
4. There is no award as to costs.

"Alan S. Diner"

Judge

APPENDIX A

1-4 submitted on time (included in the RAD appeal record), 5-9 submitted late:

1. News Article - "Impunity worse due to institutional failings" (March 13, 2018)
   - RAD excluded this because not relevant and the immigration consultant did not attempt to explain how it might be relevant.

2. News Article - "Mexico's war on drugs: Arrests fail to drive down violence" (January 25, 2018)
   - RAD excluded as it pre-dates the RPD hearing and is therefore inadmissible under subsection 110(4), evidence not relevant, and the Applicants did not attempt to explain how it might be relevant.

3. Photographs of Banners with Death Threats (February 2018)
   - RAD dismissed because while the translation indicates that the banners were produced in February 2018, this was impossible to verify; thus photographs inadmissible under subsection 110(4). Further, as the banners do not name the Applicants, they are not relevant.

4. Facebook Posts (April 10, 2018)
   - Relate to the disappearance of the uncle; not relevant.

5. Psychological Assessment (April 13, 2018)
   - RAD dismissed this psychological assessment about child's impaired learning abilities - not relevant.

6. Police Complaint (April 11, 2018)
   - RAD dismissed this complaint made by the Applicant's mother to the police reporting uncle missing - not relevant.

7. Inter-American Commission on Human Rights Report. "Children and youth of Mexico, the future of organized crime" (March 16, 2017)
   - RAD dismissed this evidence because it pre-dates the RPD hearing.

8. Transparency Law Report - "Who are and where do the Mexican drug cartels operate?" (September 29, 2017)
   - The RAD dismissed because it pre-dates the RPD hearing.

9. Universidad de las Américas Puebla Article. "Impunity in Mexico is 99.3%; there are not enough police or judges." March 13, 2018. The RAD dismissed this evidence because it is not relevant.

FEDERAL COURT

SOLICITORS OF RECORD

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