Federal Court  Cour fédérale

Date: 20200214

Docket: IMM-2915-19

Citation: 2020 FC 253

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, February 14, 2020

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

MIGUEL ANGEL ARANA DEL ANGEL
BEATRIZ ISELA ORDUNA GARCIA
BRANDON DONOVAN ARANA ORDUNA
LESLY MICHELL ARANA ORDUNA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants, a family of four, all Mexican nationals, are seeking judicial review of a decision made by the Refugee Appeal Division [RAD] handed down on March 28, 2019. The RAD, finding that their story was not credible, concluded that the applicants were neither refugees nor persons in need of protection within the meaning of sections 96 and 97 of the

Immigration and Refugee Protection Act, SC 2001 c 27 [Act]. The RAD thus confirmed a decision to the same effect made by the Refugee Protection Division [RPD].

[2] According to the applicants' refugee protection claim, the events that allegedly precipitated their departure from Mexico reportedly occurred on December 23, 2016, when the principal applicant, Miguel Angel Arana Del Angel, who is the father of the family and a trucker by trade, was allegedly intercepted by armed members of the criminal organization Los Zetas, who purportedly ordered him to work for them. They wanted him to transport drugs on behalf of the group. He was also told that if he refused to cooperate, his family members, whose names they said they knew, would pay the price.

[3] As a result of these events, the applicants claim to have hidden in various places with family members and in another house which they own. The principal applicant also says that he had to leave his job. The applicants finally left Mexico for Canada on February 2, 2017, not without first having filed a complaint with a judicial official. Their refugee protection claim was submitted a few days later.

[4] The RPD noted several contradictions, omissions and inconsistencies that undermined the credibility of the principal applicant's account of how the meeting with members of the Los Zetas group unfolded in December 2016. For example, the RPD found that the principal applicant could not satisfactorily explain why, in the "Basis of Claim" [BOC] form, he failed to mention that members of the group in question allegedly left a threatening note at his home or better still, appeared at his workplace, as he had mentioned in his testimony. The RPD also

expressed surprise at the fact that the applicants' principal residence was ransacked after the events of December 2016, which was also mentioned during the testimony of the principal applicant, was not mentioned in the BOC.

[5] Before the RAD, the applicants placed the blame for the rejection of their refugee protection claim mainly on their immigration consultant and counsel who represented them at the time they submitted the claim. In particular, they attributed the omissions in the BOC on their consultant and blamed the lawyer for not having made the necessary corrections to the document after they had detected inaccuracies in it and for not having prepared them adequately for the hearing before the RPD. In an affidavit submitted for the purposes of this review, the principal applicant stated having [TRANSLATION] "very difficult memories of this hearing", not knowing, according to him, how to react when faced with the questions asked by the RPD concerning irregularities in the BOC, even though he had reported them to their counsel.

[6] The RAD rejected these arguments on the grounds that each and every one of the contradictions and omissions identified by the RPD could not be explained by the fact that the applicants could have been poorly represented at the time of their refugee protection claim and their appearance before the RPD.

[7] The RAD also refused to file the documents that the applicants sought to submit under subsection 110(4) of the Act, including a number of letters from close relatives relating to the events leading up to their departure from Mexico. With regard to the filing of these letters, the RAD noted that the applicants could not explain why they were not reasonably available when

their refugee protection claim was denied or, if they were, why the letters were not presented at that time.

[8] The applicants contend that the RAD erred on two counts. In particular, they feel that the RAD did not take sufficient account of their reality as allophone refugee claimants who were not given the attention they needed by their counsel and immigration consultant, who presented themselves like professionals and whom they trusted in the presentation of their refugee protection claim. This is a breach in the rules of natural justice that the RAD could not, without having erred, help but notice.

[9] With regard to the admissibility of the evidence they wished to present before the RAD, the applicants argue that subsection 110(4) of the Act must be given a broad interpretation, in accordance with the intention of Parliament, in the spirit of the Act and case law. They say they had to request the filing of this additional evidence to compensate for the consequences of the incompetence of their immigration consultant and their counsel and claim, in these exceptional circumstances, that it is important that the rules governing the filing and admissibility of such evidence be given a broad interpretation. They add that the very tight time limits within which they had to file their refugee claims must also be taken into account in determining the admissibility of the additional evidence.

[10] The issue here is whether, in making its findings on these two issues, the RAD committed an error warranting the intervention of this Court.

[11] At the time this matter was argued, the standard of review applicable to decisions of the RAD concerning the incompetence of the representative or the admissibility of new evidence was that of reasonableness, as defined in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] (*Abuzeid v Canada (Citizenship and Immigration)*, 2018 FC 34 at paras 11-12 [*Abuzeid*]; *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at para 29 [*Singh*]) .

[12] However, a few days after taking this file under advisement, the Supreme Court of Canada rendered judgment in the case of *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], a case that was presented to it as an "opportunity to re-examine its approach to judicial review of administrative decisions" (*Vavilov* at para 1).

[13] As per a directive issued to the parties, I gave the parties an opportunity to make additional written submissions on the potential impact the decision might have on the matter at hand, which they accepted. The applicants argued that *Vavilov* strongly argues in favour of the application of the correctness standard to questions relating to the admissibility of new evidence on appeal because of the significant personal impacts these questions may have, particularly with respect to vulnerable people, as most refugee claimants are.

[14] This argument, which is based on paragraphs 133 to 135 of *Vavilov*, cannot succeed. Contrary to what the applicants claim, these paragraphs do not advocate the application of a standard other than reasonableness to decisions having a significant impact on the individual concerned. On the contrary, they are in the section of the judgment dealing with the content of the reasonableness standard and they emphasize the importance for administrative decision

makers of ensuring that their reasons demonstrate that they have considered the consequences of those decisions on the individuals affected and that those consequences are justified in light of the facts and law (*Vavilov* at para 135).

[15] As the respondent rightly points out, it is the standard of reasonableness that applies here. Indeed, for the purpose of clarifying and simplifying the applicable law with regard to determining the standard of review applicable in a given case, the Supreme Court adopted an "analysis begin[ning] with a presumption that reasonableness is the applicable standard in all cases" (*Vavilov* at paras 10 and 25). This analytical framework takes for granted, as the conceptual basis for this presumption, the expertise of the administrative decision maker, considered inherent to its specialized function (*Vavilov* at paras 26-28).

[16] As the respondent also rightly points out, we can only deviate from this presumption in two types of situations. The first type of situation concerns cases where the legislature has clearly indicated that it intends a different standard than that of reasonableness to apply. This will be the case where Parliament itself prescribes the applicable standard of review or where it provided a statutory appeal mechanism from an administrative decision to a court. The will of the legislature must be respected here (*Vavilov* at para 17).

[17] The second type of situation concerns, for its part, instances in which the presumption of the application of the reasonableness standard must give way when the rule of law requires that the standard of correctness be applied. This would be the case with questions of a constitutional nature, general questions of law of central importance to the legal system as a whole and

questions related to the jurisdictional boundaries between two or more administrative bodies (*Vavilov* at para 17).

[18] I agree with the respondent that this matter contains none of the characteristics that would permit deviating from the presumption of the application of the reasonableness standard.

[19] As to the impact of *Vavilov* on the contents of the standard of reasonableness, which the respondent considers to be consistent with the principles established in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], I reiterate what I recently wrote in *Elusme v Canada (Citizenship and Immigration)*, 2020 FC 225:

> [15] As for the contents of the reasonableness standard itself, the respondent submits that *Vavilov* is consistent with the framework for applying that standard, set out in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], and those decisions that followed it. I generally agree with this assertion. I should just add, for the purposes of the case at bar, that, as the Supreme Court reminds us, "a court applying the reasonableness standard does not ask what decision it would have made in place of that of the administrative decision maker, attempt to ascertain the 'range' of possible conclusions that would have been open to the decision maker, conduct a de novo analysis or seek to determine the 'correct' solution to the problem". It must "consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable" (*Vavilov* at para 83).
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> [16] With respect to that last point, the Supreme Court points out that a court reviewing the decision of an administrative decision maker on a reasonableness standard must defer to such a decision (*Vavilov* at para 85) and must take care not to engage in a "line-by-line treasure hunt for error" (*Vavilov* at para 102).
>
> [17] At the end of the day, a reviewing court must, according to the Supreme Court, "develop an understanding of the decision maker's reasoning process" and determine "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility" (Vavilov at para 99).

> [18] However, in so doing, a reviewing court must not interfere with an administrative decision maker's findings of fact, except where there are "exceptional circumstances", such as where the decision maker "has fundamentally misapprehended or failed to account for the evidence before it" (*Vavilov* at paras 125–126). In so doing, it must always bear in mind that the written reasons given by an administrative body "must not be assessed against a standard of perfection", given that administrative justice will not always look like judicial justice (*Vavilov* at para 91). Furthermore, when assessing the quality of the decision maker's reasoning, as revealed in the reasons for its decision, it should read these in light of the history and context in which they were rendered as well as the evidence that was before the decision maker (*Vavilov* at para 94).
>
> [19] This analytical method is therefore, in my view, consistent with the principles established in *Dunsmuir*, although one must ensure that the application of these principles to a given case aligns with those set out in *Vavilov*, the ultimate goal of which is to "develop and strengthen a culture of justification in administrative decision making" (*Vavilov* at paras 2 and 143).

[20] Applying the standard of reasonableness to the facts and circumstances of this case, I am of the view that there is nothing to justify the intervention of the Court.

[21] First, on the issue of inadequate representation, the applicants' counsel did not insist on this point at the hearing of this judicial review, stating that he was not convinced, ultimately, that the lawyer who represented the applicants at the refugee claim stage had done her job poorly.

[22] I would point out, in this regard, that the threshold for establishing such an argument is a high one. Indeed, the evidence of counsel's incompetence "must be so clear and unequivocal and the circumstances so deplorable that the resulting injustice caused to the claimant is blatantly obvious" (*Parast v Canada (Minister of Citizenship and Immigration)*, 2006 FC 660 at para 11

[*Parast*]; *Mbaraga v Canada (Citizenship and Immigration)*, 2015 FC 580 at para 25). We are talking here about only the most exceptional of circumstances (*Parast* at para 11).

[23] In any event, a reading of the RAD decision shows that the applicants failed to establish that the outcome of their refugee claim would have been different had it not been for the alleged incompetence of their counsel, which is one of the criteria to be met in order to overturn an unfavourable decision on the basis of such an argument (*Abuzeid* at para 21; *Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250 at para 84). The RAD had carefully examined this argument based on each of the omissions and inconsistencies identified in the RPD. It concluded that these omissions and contradictions largely, if not exclusively, resulted from omissions on the part of the principal applicant, omissions which he could not satisfactorily justify. I do not see anything that would warrant the Court's intervention, either in terms of the reasoning followed by the RAD or in terms of the outcome of its decision.

[24] The applicants continue to maintain, however, that the work of their immigration consultant caused them prejudice which should have convinced the RAD to intervene. However, the evidence on the record shows that the deficiencies in the BOC, which may have resulted from the work of that consultant, were brought to the attention of counsel thanks to the intervention of the principal applicant's sister, who lives in Montreal, and that amendments were made to the BOC in time for the hearing before the RPD (Certified Tribunal Record [CTR] at pp. 51, 393-396).

[25] The quality of the work done by the immigration consultant hired by the applicants, who were also represented by counsel whose competence is no longer questioned and who had been made aware of the problems related to the work of this consultant prior to the RPD hearing, therefore has no bearing, in the circumstances of this case, on the decision made by the RPD and later, by the RAD.

[26] Nor do I see reason to interfere with the RAD's decision not to admit the new evidence that the applicants wished to submit to it, for two reasons. First, the applicants' argument on this issue is largely anchored on the argument linked to the poor quality of the services they received from their immigration consultant and their counsel at the time of their refugee protection claim. The late filing of this evidence was, in their view, a direct consequence of the poor quality of these services. They argue that had to make up for the bad advice they had received on what was useful and necessary to produce to support their refugee claim.

[27] However, I have already disposed of this question and I recall that the applicants are, in any event, no longer convinced that the lawyer who represented them at the stage of their refugee protection claim did not do her job.

[28] Second, I am of the opinion that the RAD did not err in its application of subsection 110(4) of the Act regarding the documents that the applicants sought to produce before it.

[29] Subsection 110(4) of the Act reads as follows:

Evidence that may be presented	Éléments de prevue admissibles

110. (4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.	**110. (4)** Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet.

[30] This provision of the Act was analyzed in *Singh.* According to the teachings of the Federal Court of Appeal, only the following evidence will thus be admissible (*Singh* at para 34):

a. Evidence that arose after the rejection of the claim;

b. Evidence that was not reasonably available; or

c. Evidence that was reasonably available, but that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection.

[31] Contrary to the applicants' contention, the requirements of subsection 110(4) must be interpreted narrowly and leave no room for discretion on the part of the RAD (*Singh* at para 35).

[32] The applicants attempted to file the following documents with the RAD. First, they attempted to produce the BOC, as completed by the immigration consultant, as well as a copy of the emails exchanged between the principal applicant's sister and counsel who represented them at the time in order to identify the inaccuracies contained in the BOC. The RAD concluded that these documents were not new, the BOC being the one that had been filed with the RPD and the

emails that provided corrections having eventually been brought to the attention of the RPD (CTR, exhibit P-7, at p. 395).

[33] They also sought to file a document described as [TRANSLATION] ”the personal history [of the applicants] as it should have been filed in order to faithfully reproduce the events” as well as a letter from the principal applicant’s sister living in Montreal, dated May 17, 2017, reporting the poor quality of the work done by their immigration consultant. Upon noting that the document purporting to faithfully reproduce the events that prompted the applicants to flee Mexico, was neither signed nor dated, the RAD pointed out that the applicants had provided no explanation as to what could differentiate that document from the BOC produced before the RPD, with its corrections, any more than they had explained why this document was not available at the time of the refugee claim rejection or, if it was, how they could not reasonably have been expected in the circumstances to have presented it at the time of the rejection.

[34] As for the letter from the principal applicant’s sister, the RAD noted that it referred to facts prior to the rejection of the refugee claim and that, once again, no explanation had been provided by the applicants that would have enabled them to meet the criteria of subsection 110(4) of the Act.

[35] At the hearing of this judicial review, the applicants’ counsel admitted that it was not unreasonable for the RAD to have refused to allow the filing of the original BOC, which was already in the record, and that of the document purported to faithfully reproduce the events which prompted the applicants to leave Mexico. In this latter regard, it is important to remember

that the purpose of subsection 110(4) of the Act is not to provide a refugee claimant with the opportunity to complete a deficient or incomplete claim at the RAD appeal stage (*Singh* at para 54).

[36] Furthermore, it is open to question why the letter from the principal applicant's sister was not produced before the rejection of the refugee claim, especially since the principal applicant's sister appeared to have been involved in the steps taken by the applicants to complete their refugee claim, as the evidence in the file shows that she had interacted on a number of occasions with the immigration consultant and with the applicants' counsel. In any event, with what is now known about the applicants' position regarding the alleged incompetence of those two representatives, particularly that of their counsel, that evidence is no longer relevant, and, accordingly, there would be no practical use in returning the file to the RAD for it to reconsider the matter on the basis of that evidence.

[37] Finally, the applicants attempted to produce four letters from relatives living in Mexico. Those letters, all dated May 2017, recount the events that allegedly precipitated the applicants' departure for Canada. In order for them to be admitted, the applicants needed to convince the RAD that the letters (i) reported facts that had arisen since the rejection of the refugee claim, which was not the case; (ii) were not reasonably available at the time of the rejection of said claim; or (iii) that they were reasonably available at that time, but that it could not reasonably have been expected for the applicants, in the circumstances, to have presented them (*Singh* at para 34).

[38] In addition to the explanation related to the incompetence of the immigration consultant and counsel, which I have already dismissed, the applicants failed to provide any other explanation that would enable the RAD to rule on any of the final two criteria for the test of subsection 110(4) of the Act. This is sufficient to dismiss their complaints against the decision of the RAD on this point.

[39] It is true that the applicants also argued that the late receipt of these letters was due to the limited time that they had to process their refugee claims. However, there is no evidence in the record demonstrating that these time limits were more limited in their case than in that of the majority of other refugee claimants. At the hearing of this judicial review, the applicants' counsel went further, stating that the processing times for refugee claims from Mexican nationals were shorter than for nationals from other countries. Again, there is no evidence to support this contention.

[40] The applicants placed a great deal of emphasis on the fact that we are dealing here with one of the most violent and feared criminal groups in the world when it comes to Los Zetas. However, to obtain protection from Canada, they needed to credibly demonstrate that they are now targeted by this group. However, this demonstration, in the opinion of the RPD and the RAD, was not made.

[41] It is important to remember that judicial review on a reasonableness standard "finds its starting point in judicial restraint and respects the distinct role of administrative decision makers" (*Vavilov* at paras 75). This review must certainly be rigorous, but it requires that the court show

deference to the decision of an administrative decision maker and, in so doing, not ask what decision it would have made in place of that of the administrative decision maker, (*Vavilov* at paras 83-85). Applying these principles to the facts of this case, I conclude that the RAD's decision, when read as a whole, is reasonable.

[42] At the end of the hearing for this judicial review, the applicants' counsel indicated to the Court that this file did not lend itself to the certification of a question for appeal. However, he took advantage of the opportunity offered to him to submit additional submissions on the possible impact of the *Vavilov* judgment on the standard of review to be applied in this case to propose a question for certification.

[43] This question is the following:

> [TRANSLATION]
>
> Does section 110(4) of the Act comply with the Canadian Charter of Rights and Freedoms if there is evidence which is not considered that would establish a clear violation of rights guaranteed by the Charter?

[44] The respondent, with good reason, opposes it.

[45] This question has nothing to do with the impact of *Vavilov* on the standard of review to be applied and raises an issue that was neither raised nor debated in the context of this judicial review. It will not be certified.

JUDGMENT in IMM-2915-19

THE COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed;

2. No question is certified.

"René LeBlanc"
Judge

Certified true translation
This 9th day of March 2020

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2915-19
STYLE OF CAUSE:	MIGUEL ANGEL ARANA DEL ANGEL, BEATRIZ ISELA ORDUNA GARCIA, BRANDON DONOVAN ARANA ORDUNA, LESLY MICHELL ARANA ORDUNA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	DECEMBER 10, 2019
REASONS FOR JUDGMENT AND JUDGMENT:	LEBLANC J.
DATED:	FEBRUARY 14, 2020

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