Federal Court  Cour fédérale

Date: 20211021

Docket: IMM-757-21

Citation: 2021 FC 1118

[ENGLISH TRANSLATION]

Ottawa, Ontario, October 21, 2021

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

JUDITH ARACELI DIAZ CASTILLO
REGINA MONTSERRAT ARREDONDO DIAZ
NAOMI SUGEY ARREDONDO DIAZ
JESUS AARON ARREDONDO HERNANDEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Background

[1] The applicant, Jesus Aaron Arredondo Hernandez, his wife, Judith Araceli Diaz Castillo, and their minor daughters are citizens of Mexico. They are seeking judicial review of a decision of the Refugee Appeal Division [RAD] finding that the applicant falls within the exclusion provided for in Article 1F(b) of the United Nations *Convention Relating to the Status of Refugees*, July 28, 1951, 189 UNTS 137 [Convention] and section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] In Canada since September 29, 2018, the applicant alleged that he was targeted by members of the Jalisco Nueva Generación [JNG] cartel from 2010 to 2018.

[3] The Minister of Public Safety and Emergency Preparedness [Minister] intervened before the Refugee Protection Division [RPD] to raise the applicant's exclusion under Article 1F(b) of the Convention. In his notice of intervention, the Minister alleged that there are serious reasons to believe that the applicant committed serious non-political crimes prior to his entry into Canada which, if committed in Canada, would be punishable by a maximum term of imprisonment of five to fourteen years, pursuant to subsection 402.2(2), section 467.11 and subsection 467.12(1) of the *Criminal Code*, RSC 1985, c C-46 [CrC].

[4] Despite the Minister's intervention, the RPD concluded that the applicant's allegations as a whole were not credible because of the multiple contradictions and variations in his testimony, in the account attached to his Basis of Claim Form [BOC Form] and in his comments made during an interview with the Canada Border Services Agency. It also found that the applicant's lack of credibility regarding the applicant's involvement with the JNG cartel renders the

applicant ineligible for exclusion under Article 1F(b) of the Convention. The RPD therefore dismissed all of the claims, all of which were based on the applicant's account.

[5] On appeal to the RAD, the applicants first argued that the RPD had erred in not recognizing that the applicant had participated in the cartel's activities, but that he had done so under duress, thereby justifying the applicant's non-exclusion under the Article 1F(b) of the Convention. Second, they alleged that the RPD made its decision before even hearing them and that it did not take their profile into account. Finally, they challenged the RPD's credibility findings, arguing that they had given reliable testimony that would allow them to benefit from the presumption set out in *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA).

[6] In its January 14, 2021 decision, the RAD found that the RPD did err in failing to consider the issue of the applicant's exclusion under Article 1F(b) of the Convention. After setting forth the applicable framework for exclusion analysis, the RAD first noted that it appears from the applicant's BOC Form, his pre-hearing interview with an immigration officer, and his testimony that the applicant acknowledges that he collaborated with members of the JNG cartel on numerous occasions over a period of approximately eight years to perform various tasks for the benefit of the cartel. It then examined the offences committed by the applicant and the circumstances surrounding the commission of the crimes. In this regard, it emphasized, among other things, that the applicant acted as an occasional driver, transporting proceeds of crime, including drugs and weapons. The applicant also allegedly witnessed criminal acts involving physical assaults on other cartel members. The RAD acknowledged that the applicant did not

handle the merchandise or participate in the physical assaults he witnessed. However, it considered that the impact of these crimes on the corporation and the participation in the activities of a major cartel constitute aggravating circumstances. It concluded that the evidence shows serious reasons to believe that the applicant committed several common law offences which, under Canadian law, would consist, at a minimum, of participation in the activities of a criminal organization (s 467.11 of the CrC) and of the commission of an offence for such an organization (s 467.12 of the CrC).

[7] The RAD then considered the applicant's argument that he had committed these crimes under duress. Relying on the test for the defence of duress set out in *R v Ryan*, 2013 SCC 3 [*Ryan*], the RAD found that the applicant does not meet the first criterion, that is, the presence of express or implied threats to cause death or bodily harm, either immediate or future, directed at the applicant or a third party. It found the applicant not credible regarding the alleged threats to his life. While it believed the applicant when he argued that he had worked on behalf of the cartel, the RAD did not accept that he was compelled to conduct his business, at any time between 2014 and 2018, because of death threats made against him or his family members.

[8] Having found that the applicant is a person described in Article 1F(b) of the Convention, the RAD determined that he cannot be a refugee or a person in need of protection under section 98 of the IRPA. As the other applicants' refugee protection claims are based on the applicant's allegations and testimony, the RAD found, as did the RPD, that they are also not persons described in sections 96 and 97 of the IRPA.

[9] In this application for judicial review, the applicants first argued that the RAD failed to observe procedural fairness because it drew adverse inferences from inconsistencies in the applicant's testimony without giving him an opportunity to explain them. Second, the applicants argued that the RAD erred in its analysis of the defence of duress by adding a criterion that is not among those set forth in *Ryan*. Finally, the applicants argued that the RAD's finding that the applicant engaged in willful blindness between 2010 and 2014 is not supported by the evidence.

II. Analysis

[10] The standard of review applicable to a question of exclusion under Article 1F(b) of the Convention is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16–17 [*Vavilov*]; *Sanchez v Canada (Citizenship and Immigration)*, 2014 FCA 157 at para 8; *Abbas v Canada (Citizenship and Immigration)*, 2019 FC 12 at para 12). The same is true for the application of the defence of duress and issues of credibility (*Guerra Diaz v Canada (Citizenship and Immigration)*, 2013 FC 88 at paras 20, 22).

[11] Where the standard of reasonableness applies, the Court must ensure that it understands the reasoning of the decision maker in order to determine whether the decision as a whole is reasonable. It must consider whether the decision "bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99). In addition, the "burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov* at para 100).

[12] Regarding the allegation of a breach of procedural fairness, the role of this Court is to determine whether the proceedings were fair in all the circumstances (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Canadian Pacific Railway v Canada (Attorney General)*, 2018 FCA 69 at paras 54–56).

[13] The applicants argued that there was a breach of procedural fairness in that the applicant was not given an opportunity to explain certain inconsistencies raised by the RAD in its assessment of the duress defence.

[14] The Court does not agree.

[15] Although the RPD did not confront the applicant on the issues raised by the RAD, this was not a new issue that required the RAD to give the applicant an opportunity to be heard. Under the jurisprudence of this Court, a new issue is one that is not part of the grounds of appeal raised by the parties (*Zhang v Canada (Citizenship and Immigration)*, 2019 FC 870 at para 13; *Bebri v Canada (Citizenship and Immigration)*, 2018 FC 726 at para 16; *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at para 67–68; see also *R v Mian*, 2014 SCC 54 at para 30).

[16] In this case, the issues raised and considered by the RAD were directly related to the applicants' submissions on appeal and the RPD's findings. The applicants challenged the RAD's findings on the applicant's credibility. The RAD independently assessed the evidence and made its own findings. The applicants have not demonstrated a breach of procedural fairness.

[17] At the hearing, the applicants argued that the finding of wilful blindness on the part of the applicant was another breach of procedural fairness. However, this is a new argument that was not in their memorandum, as the applicants only raised the unreasonableness of this finding. While the Court does have discretion to consider new arguments, the Court does not intend to exercise it as considering this new argument would deprive the respondent of the opportunity to respond to it in a meaningful way(*Obineze v Canada (Citizenship and Immigration)*, 2018 FC 1150 at paras 12–13; *Mohseni v Canada (Citizenship and Immigration)*, 2018 FC 795 at paras 28–36; *Zhou v Canada (Citizenship and Immigration)*, 2018 FC 182 at para 6).

[18] The applicants further argued that by referring to the "constant nature" of the threats, the RAD imported a new test, the pervasiveness of threats, into those set out in *Ryan*. They argued that it is normal that the threats were not repeated between 2014 and 2018 since the applicant continued to operate under the threat of the cartel.

[19] The Court finds that the applicants are misreading the RAD's reasons. The RAD analyzed the contradictions between the applicant's oral testimony, in which he argued that he has been constantly threatened with death since his September 2014 attack, and the applicant's account, in which no threats were made between 2015 and 2018. It found the applicant's explanations for the lack of any reports of death threats for three and a half years to be not credible and concluded that the applicant did not meet the first prong of the *Ryan* test. When it used the phrase "constant nature" it was referring to the applicant's testimony. The Court is not persuaded, as the applicants argued, that the RAD imported a new test into the duress defence.

Rather, the RAD correctly identified the parameters of the first test and conducted a detailed analysis of the evidence.

[20] Finally, the applicants faulted the RAD for its conclusion that the applicant was willfully blind. They alleged that this conclusion is based on assumptions and that there is nothing in the evidence to cast doubt on the applicant's allegations that he was unaware, prior to the summer of 2014, that he was dealing with cartel members.

[21] To the contrary, the RAD's conclusion on this point is based on the applicant's written account and testimony. It pointed out that although the applicant did not seek their cooperation in 2010 when he was approached by the cartel members, he took no steps to end that affiliation and even stated during his testimony that he was satisfied with the various monetary arrangements made between 2010 and 2014. The RAD also set forth the facts on which it relied that led it to believe that the applicant was willfully blind to the criminal nature of his alleged abusers' activities prior to the summer of 2014. The Court is of the opinion that the RAD could reasonably conclude that there was some inconsistency in the applicant's ignorance. In this case, it could rely on reason and common sense to assess the credibility of the applicant's arguments (*Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (FCA) (QL) at para 2).

[22] In any event, even if the Court agreed with the applicant, this would not be determinative since the RAD made it clear that this was an alternative finding.

[23] It is important to remember that findings regarding the credibility of a refugee protection claimant and the weighing of evidence require a high degree of deference from this Court. While the applicants may disagree with the findings of the RAD, it is not for this Court to reweigh and reassess the evidence to reach a conclusion that it would prefer (*Vavilov* at para 125; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59, 61).

[24] In conclusion, the Court considers that when the reasons for the RAD are interpreted in a comprehensive and contextual manner, they possess the characteristics of a reasonable decision, namely, justification, transparency and intelligibility (*Vavilov* at paras 97, 99). The Court therefore sees no reason to intervene in this case.

[25] For these reasons, the application for judicial review is dismissed. No questions of general importance are submitted for certification, and the Court is of the view that there are none.

JUDGMENT in IMM-757-21

THE COURT ORDERS as follows:

1. The application for judicial review is dismissed.

2. No question of general importance is certified.

"Sylvie E. Roussel"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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