

Federal Court



Cour fédérale

Date: 20220603

Docket: IMM-5590-21

Citation: 2022 FC 815

Ottawa, Ontario, June 3, 2022

PRESENT: Madam Justice McDonald

BETWEEN:

JESSICA MATUS URBIETA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicant, a citizen of Mexico, sought refugee protection on the grounds that she is at risk in Mexico because of her brother's involvement in organized crime. The Refugee Protection Division (RPD) denied the Applicant's claim. On July 30, 2021, the Refugee Appeal Division (RAD) upheld the finding of the RPD. The Applicant's credibility was the determinative issue for the RAD.

[2] The Applicant argues that the RAD should have accepted her new evidence and should have held an oral hearing. She argues that the credibility findings are unreasonable, and that the country condition evidence alone is sufficient to support her claim for protection.

[3] For the reasons that follow, the application is dismissed as I have concluded that there was no breach of the Applicant's right to a fair hearing and that the decision of the RAD is reasonable.

I. Background

[4] The Applicant is a 28-year-old woman from Mexico. Her eldest brother was involved with criminal gangs and killed in 2016. The Applicant suspects he was murdered by the Los Zetas cartel. The Applicant feared she would be targeted for her brother's past actions. She states both she and her father began receiving threatening phone calls, saying vengeance would be carried out.

[5] The Applicant came to Canada in July 2018 and claimed refugee protection, fearing the cartel that killed her brother.

II. RAD Decision

[6] Before considering her appeal, the RAD provided the Applicant with notice of the credibility concerns and provided her an opportunity to address these concerns. In response, the Applicant submitted additional evidence and requested an oral hearing. The RAD concluded that

the information submitted by the Applicant was available prior to the RPD decision and therefore did not meet the requirements of subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The RAD determined that an oral hearing was not necessary in the circumstances.

[7] The RAD accepted that the Applicant's brother was involved in organized crime and was killed at the hands of a competing cartel. The RAD also accepted that the objective documentary evidence supported the prevalence of cartel violence including killings in the area where her brother lived. However, the RAD concluded that the Applicant "has not established her key allegations, namely that she herself was targeted or that the alleged agents of persecution or harm have shown any interest in her as a result of her brother's involvement in organized crime or otherwise." This, according to the RAD, was determinative of the Applicant's claim.

[8] The RAD concluded that the Applicant did not demonstrate that she faces a risk at the hands of the alleged agents of persecution under either section 96 or 97 of the IRPA.

[9] The RAD made a series of negative credibility findings on matters raised by the Applicant in support of her claim, including:

- the allegation concerning the kidnapping of her cousin and the killing of her cousin's friend;
- the allegation concerning the murder of her uncle and uncle's son;
- the omissions from her testimony concerning the killing of her brother's girlfriend's father;

- the inconsistent evidence concerning police involvement in her brother's death;
- the inconsistent evidence that the Applicant was living in hiding; and
- the discrepancies in her evidence regarding the location of her family members.

[10] The RAD – after noting the credibility concerns with the Applicant's evidence – then considered whether the documentary evidence could overcome those concerns. The RAD considered: two statements from Mexican authorities regarding her brother's death; her brother's death certificate; a newspaper article about her brother's murder; a 2018 Amnesty International report about enforced disappearances; a 2019 Amnesty International report calling for reparations for police torture survivors in Mexico; a 2018 United States Department of State report on trafficking of persons in Mexico; a 2016 UN High Commissioner for Refugees country report on Mexico; and a newspaper article on cartel hit men.

[11] The RAD accepted the documentary evidence, however, concluded that this evidence was not “probative as to the Appellant's particular risk at the hands of the alleged agents, such that they overcome the considerable credibility concerns identified in these reasons with respect to the Appellant's evidence concerning her own pursuit by the alleged agents of persecution or harm.” As noted by the RAD, country evidence – without sufficient connection to the circumstances of the Applicant – is insufficient to support a positive risk assessment.

III. Issues

[12] The Applicant raises the following issues:

- A. Was the Applicant's right to procedural fairness breached?

- B. Did the RAD err in refusing to accept new evidence?
- C. Are the RAD's credibility findings reasonable?
- D. Is the country condition evidence sufficient to support the claim for refugee protection?

IV. Standard of Review

[13] The Federal Court of Appeal has held that the standard of review with respect to issues of procedural fairness is correctness (*Canadian Association of Refugee Lawyers v. Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35).

[14] The RAD's interpretation and application of subsection 110(4) of the IRPA is assessed on a reasonableness standard (*Ozomba v Canada (Citizenship and Immigration)*, 2016 FC 1418 at para 6. Likewise, a review of the RAD's credibility findings and overall assessment of the evidence is conducted on a reasonableness standard. The Court asks "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" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 99).

V. Analysis

A. *Was the Applicant's Right to Procedural Fairness Breached?*

[15] The Applicant raises various issues with the fairness of the process before the RPD and before the RAD. The competence of her immigration representative at the RPD was raised as

was the quality of the interpretation of her answers to questions at the RPD hearing. In submissions, legal counsel for the Applicant suggested that the Applicant was very guarded in her answers because of her distrust of Mexican authorities, and that this context was not fully appreciated.

[16] Applicant's counsel also argues that the RPD took an overly aggressive approach in questioning the Applicant, impacting the Applicant's ability to respond. There is also a suggestion that the RPD member failed to ask the Applicant a critical question, namely, when the member only asked the Applicant if the information in her Basis of Claim (BOC) was "true and correct" but did not ask if the information was "complete". The Applicant therefore argues the RAD's statement at paragraph 114 that "she confirmed at the hearing that her BOC was true, complete and correct" is wrong.

[17] Further, the Applicant argues a procedural fairness issue arises from an interaction between the Applicant and the RPD member, when the Applicant attempted to provide evidence contained in her cellphone. When the member asked the Applicant if she had any proof of the events alleged, she indicated she had information in her cellphone, but her representative told her it was not necessary. The member declined to discuss the issue during the hearing, indicating there was an issue of solicitor-client privilege. The Applicant argues any solicitor-client privilege was hers to waive, and both the RPD and the RAD should have accepted the evidence contained in the Applicant's cellphone.

[18] First, with respect to the general and vague allegations about the competence of the immigration consultant, I note that no formal complaint was made against the consultant. In the circumstances, such allegations are not sufficient to demonstrate “extraordinary incompetence” tantamount to a denial of natural justice (*Julien v Canada (Citizenship and Immigration)*, 2010 FC 351 at para 36). In my view, there is no merit to this submission.

[19] Further, the record does not disclose that the Applicant raised the issue of the quality of translation services to the RAD or the “aggressive” approach by the RPD. Accordingly, these submissions are not borne out by the record.

[20] With respect to the RPD’s question regarding the contents of the BOC, in my view, the instructions provided in the BOC itself fully respond to this submission. The BOC form instructs:

WHY ARE YOU CLAIMING REFUGEE PROTECTION

When you answer the questions in this section, please explain everything in order, starting with the oldest information and ending with the newest. INCLUDE EVERYTHING THAT IS IMPORTANT FOR YOUR CLAIM. INCLUDE DATES, NAMES AND PLACES WHEREVER POSSIBLE.

[21] Further, at the end of the BOC, in the section titled “**YOUR DECLARATION AS A CLAIMANT**”, it states:

I declare that the entire content of this form and all attached documents have been interpreted to me. I declare that the information I have provided in this form is **complete, true and correct**. My declaration has the same force and effect as if made under oath. [Emphasis added].

[22] Finally, with respect to the RPD's refusal to accept evidence contained in the Applicant's cellphone at the hearing, in my view, both the RPD and the RAD reasonably found the Applicant had not explained why she did not submit the evidence in a timely manner prior to the RPD hearing. A reference by the RPD to solicitor-client privilege in the discussion about this evidence cannot support an allegation that this is somehow a breach of procedural fairness on the reconsideration of the matter before the RAD.

[23] Overall, the Applicant has not established that she was denied a fair process.

B. *Did the RAD Err in Refusing to Accept New Evidence?*

[24] In advance of the RAD's consideration of her appeal, the Applicant received a letter requesting that she specifically respond to the RAD's credibility concerns.

[25] In response to this request, the Applicant sought to introduce additional documents, including the following:

- (i) Her statement, dated July 16, 2021;
- (ii) Photographs of two deceased persons;
- (iii) A missing person poster of a man named "Jenri", who is one of the deceased persons in the photos above;
- (iv) A letter from Jose Zavala Urbieta; and
- (v) A Facebook post regarding the murder of her uncle and cousin.

[26] The RAD considered whether these documents could be admitted as new evidence pursuant to section 110(4) which states:

Evidence that may be presented

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.

[27] With respect to the Applicant's statement of July 16, 2021, the RAD determined that because the Applicant did not confirm that this evidence could not have been provided to the RPD, it was not evidence that was proper for the RAD to consider.

[28] With respect to the photographs of deceased persons, the RAD held the Applicant had not explained why these were not submitted in a timely manner before the RPD. Further, while the Applicant had the photos on her cellphone at the RPD hearing, the RAD noted the RPD could not reasonably be expected to take her cellphone into evidence, and the RPD Rules state that documents are to be provided on paper. The RAD noted the Applicant had also not attempted to submit the photos in an acceptable format following the hearing.

[29] Regarding the missing persons poster, the letter of Jose Urbieta and the Facebook post, the RAD found this was not evidence that arose after the RPD hearing and therefore it was evidence that could have been provided to the RPD.

[30] On this issue, the RAD noted that the Applicant had not established how the new evidence relates to her claim, and the RAD concluded that even if the documents were admitted,

they would not objectively support the Applicant's claim for refugee protection. The RAD therefore held the evidence did not meet the requirements of subsection 110(4) of the IRPA.

[31] The Federal Court of Appeal in *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 [*Singh*] confirmed that the conditions set out in subsection 110(4) are explicit conditions that must be met. As explained by the Court of Appeal at paragraph 34, only the following evidence is admissible:

- Evidence that arose after the rejection of the claim;
- Evidence that was not reasonably available; or
- 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.

[32] The court in *Singh* further confirms that there is no discretion on the part of the RAD if these conditions are not met (at para 35).

[33] The RAD considered the evidence but determined that the evidence submitted by the Applicant did not meet the test outlined in subsection 110(4) of the IRPA. Accordingly, the RAD did not accept the evidence and determined that an oral hearing was not necessary in the circumstances.

[34] The obligation is on the Applicant to demonstrate that the proposed new evidence meets the requirements of subsection 110(4) (*Abdulrahman v Canada (Citizenship and Immigration)*, 2019 FC 821, (at para 12)). Further, as noted in *Singh* the purpose of subsection 110(4) is not to

provide the Applicant with an opportunity to complete a deficient or incomplete record at the RAD appeal stage (at para 54).

[35] In my view, the conclusion of the RAD that the Applicant's submissions did not meet the requirements of subsection 110(4) is defensible and reasonable.

C. *Are the RAD's Credibility Findings Reasonable?*

[36] The Applicant argues that the RAD's credibility findings are unreasonable as they fail to reconcile the evidence on record with the Applicant's testimony. The Applicant also argues that the credibility findings fail to account for the language and cultural considerations.

[37] As noted above, the RAD made a series of negative credibility findings arising from the Applicant's evidence.

[38] The Applicant testified at the RPD that individuals came to her grandparents' house to kidnap her cousin, and that there was a video of her cousin's friends being "cut in pieces, mutilated", as well as a photograph of her cousin. However, this was not mentioned in the Applicant's BOC, and the Applicant offered no explanation for the omission despite being asked by the RAD to do so. The RAD noted "[t]he events the Appellant alleges in this regard are dramatic and threatening by any standard [...] it is reasonable to expect that the Appellant would recount these significant incidents in her BOC. She failed to do so, and failed to offer any explanation whatsoever for the omission."

[39] The Applicant also did not mention in her BOC that her uncle and his son were kidnapped, and their bodies found with a note saying “We are going to destroy all the Matuses”. The Applicant did not explain the omission despite having the opportunity to do so.

[40] Likewise, while the Applicant stated in her BOC, that the agents of persecution had killed her brother’s girlfriend’s father, she did not mention this in her testimony, nor explain why she failed to mention this when asked by the RAD.

[41] Further, while the Applicant testified that the police were involved in her brother’s killing, she did not state this in her BOC. The RAD noted the BOC explicitly asks claimants to indicate if they asked authorities to protect them, and if not, why not. The Applicant again failed to provide an explanation for this in response to the RAD’s letter.

[42] The RAD also noted the Applicant did not contest the finding of the RPD that she was not in hiding in Mexico.

[43] As stated in *Zamor v Canada (Citizenship and Immigration)*, 2021 FC 672, “It is well established that all material facts of a story must be included in the BOC Form and that failure to do so can be fatal to the credibility of a claim for refugee protection” (at para 14).

[44] Finally, the RAD held the Applicant was inconsistent about the location of her family members. The RAD stated this was “material to her claim, because at the heart of her claim lies the allegation that she and her family are being pursued and threatened by her brother’s killers

because of their proximity to him. Her evidence as to the whereabouts of her immediate family members contains significant discrepancies, which the Appellant has not reasonably explained.”

[45] The RAD considered the Applicant’s explanation for the discrepancies and omissions in her evidence and concluded “I do not find that the Appellant has demonstrated that any deficiencies in her evidence are reasonably explained by incompetence or inadequacy on the part of former counsel.”

[46] Overall, the Applicant has not demonstrated any error on the numerous and substantial credibility findings made by the RAD.

D. *Is the Country Condition Evidence Sufficient to Support the Claim for Refugee Protection?*

[47] The Applicant argues that the RAD’s assessment of the country condition evidence, after it accepted that her brother was part of a gang, was unreasonable. In particular, she argues that the RAD’s consideration of this issue is deficient.

[48] On this issue, the RAD states as follows:

[121] In the Memorandum, Counsel points to several sections of the NDP for Mexico as to cartel violence, police corruption and the involvement of police in cartel activity, and the impunity enjoyed by police for human rights abuses in Mexico. The Appellant also points to a United States Department of State report in evidence concerning police and military involvement in human rights abuses. The Appellant argues that the RPD failed to consider the totality of the evidence before it, including the NDP evidence. I cannot agree. The RPD pointed out several credibility concerns with the Appellant’s evidence, and while I do not sustain all of the

RPD's findings, I do not find that, on my own independent assessment, my review of the objective documentary evidence on file serves to overcome the considerable credibility concerns identified with the Appellant's evidence. Again, I point out that the Court has consistently found that pointing to country evidence, without sufficient connection to the applicant, is insufficient to warrant a positive risk assessment.

[49] In support of her position, the Applicant places emphasis on how cartels operate in Mexico, the high level of police corruption, and the fact that cartels operate with relative impunity. This is largely borne out by the country condition evidence.

[50] However, the Applicant still must link this information to her personal circumstances and demonstrate that she is targeted by the cartel. The RAD reasonably found that the Applicant had failed to do so.

VI. Conclusion

[51] As the Applicant has not established any reviewable error on the part of the RAD, this application for judicial review is dismissed.

JUDGMENT IN IMM-5590-21

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.
2. There is no certified question.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5590-21

STYLE OF CAUSE: JESSICA MATUS URBIETA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: MAY 11, 2022

JUDGMENT AND REASONS: MCDONALD J.

DATED: JUNE 3, 2022

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