Federal Court  Cour fédérale

Date: 20221114

Docket: IMM-2789-21

Citation: 2022 FC 1545

Ottawa, Ontario, November 14, 2022

PRESENT: Mr. Justice Norris

BETWEEN:

ANDY ENGENLBERS QUIROZ MORENO
ANGIE CAROLINA QUIROZ GONZALES
LILIANA CAROLINA GONZALES GONZELES

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants, who are citizens of Honduras, sought protection in Canada on the basis of their fear of the *Mara Salvatrucha*, a criminal gang also known as MS-13. The Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada appears to have found their account of targeting by MS-13 to be credible. The RPD concluded, however, that the

applicants are not Convention refugees or persons in need of protection because they have a viable Internal Flight Alternative ("IFA") on Roatán, an island off the coast of Honduras.

[2] The applicants apply for judicial review of this decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). They submit that the RPD's determination that Roatán is a viable IFA is unreasonable. As I explain in the reasons that follow, I agree. This application must, therefore, be allowed and the matter remitted for redetermination by a different decision maker.

[3] Briefly, Ms. Gonzales Gonzeles worked as an elementary school teacher in the small town of Oropoli. She was physically assaulted in front of her students by a member of MS-13 and then targeted for extortion after she had spoken critically about MS-13 to her students after the gang robbed one of her colleagues. Mr. Quiroz Moreno, Ms. Gonzales Gonzeles's common law husband, earned income by selling clothing and other items at local fairs. He, too, was targeted for extortion by MS-13. The gang also threatened to harm their daughter, Angie (who was 9 years old at the time). Fearing further harm at the hands of MS-13, the family fled Honduras. They eventually made their way overland to Canada via Guatemala, Mexico, and the United States.

[4] The RPD considered the claims solely under section 97 of the *IRPA* because there was no nexus between the applicants' experiences in Honduras and a Convention ground. The applicants do not take issue with this conclusion.

[5] As noted, the RPD rejected the claims for protection because, while it did not express any concerns about the applicants' credibility, it found that they had a viable IFA on the island of Roatán.

[6] Simply put, an IFA is a place in their country of nationality where a party seeking protection would not be at risk (in the relevant sense and on the applicable standard, depending on whether the claim is made under section 96 or 97 of the *IRPA*) and to which it would not be unreasonable for them to relocate. When there is a viable IFA, a claimant is not entitled to protection from another country. To counter the proposition that they have a viable IFA, a party seeking protection has the burden of showing either that they would be at risk in the proposed IFA or, even if they would not be at risk in the proposed IFA, that it would be unreasonable in all the circumstances for them to relocate there: see *Aigbe v Canada*, 2020 FC 895 at para 9; for the IFA test generally, see my discussion in *Sadiq v Canada (Citizenship and Immigration)*, 2021 FC 430 at paras 38-45 and the cases cited therein.

[7] The RPD concluded that both branches of the test for rejecting the claims on the basis that the applicants have a viable IFA were met: the applicants had failed to establish that they would be at risk on Roatán and that it would be unreasonable in all the circumstances for them to relocate there. The applicants challenge both of these determinations on this application for judicial review.

[8] It is well-established that the substance of the RPD's decision is to be reviewed on a reasonableness standard. This includes the RPD's determination as to the availability of an IFA.

Reasonableness is now the presumptive standard of review, subject to specific exceptions "only where required by a clear indication of legislative intent or by the rule of law" (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10). There is no basis for derogating from this presumption here.

[9] A reasonable decision "is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). A decision that displays these qualities is entitled to deference from the reviewing court (*ibid.*).

[10] As discussed in *Vavilov*, the exercise of public power "must be justified, intelligible and transparent, not in the abstract but to the individuals subject to it" (at para 95). For this reason, an administrative decision maker has a responsibility "to justify to the affected party, in a manner that is transparent and intelligible, the basis on which it arrived at a particular conclusion" (*Vavilov* at para 96). As *Vavilov* also emphasizes, "Central to the necessity of adequate justification is the perspective of the individual or party over whom authority is being exercised. Where the impact of a decision on an individual's rights and interests is severe, the reasons provided to that individual must reflect the stakes" (at para 133). See also *Gomez Dominguez v Canada (Citizenship and Immigration)*, 2020 FC 1098 at para 24.

[11] The onus is on the applicants to demonstrate that the RPD's decision is unreasonable. Before a decision can be set aside on this basis, the reviewing court must be satisfied that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the

requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). Importantly, when applying the reasonableness standard, it is not the role of the reviewing court to reweigh or reassess the evidence considered by the decision maker or to interfere with factual findings unless there are exceptional circumstances (*Vavilov* at para 125).

[12] In my view, the RPD's IFA determination is unreasonable in two key respects.

[13] First, under the first branch of the test, the RPD's conclusion that the applicants had failed to establish that they would be at risk on Roatán is unreasonable because the decision fails to account for the evidence before the RPD. The RPD found that MS-13 lacked the motivation to seek out the applicants on Roatán. A key factor the RPD relied on in determining that MS-13 no longer had any interest in the applicants is that the gang had not targeted the applicants' family members, who still lived in Oropoli, either as a means of locating the applicants after they left or as targets in their own right.

[14] I do not agree with the applicants that the RPD's analysis on this point is speculative or that it presumed unreasonably that the agents of harm would act rationally. Rather, given the evidence in the record of how MS-13 typically operates, I agree with the respondent that the absence of such efforts by the agents of harm reasonably could suggest a loss of interest in the applicants. A decision maker may rely on logic and common sense to draw rational inferences from clear and non-speculative evidence or from established facts: see *Ifeanyi v Canada (Citizenship and Immigration)*, 2018 FC 419 at para 32, and *Soos v Canada (Citizenship and Immigration)*, 2019 FC 455 at paras 13-14. Thus, if there had indeed been no efforts to pursue

the applicants, it would not be unreasonable for the RPD to consider this fact in determining whether the applicants had met their onus under the first part of the IFA test.

[15] The difficulty, however, is that there was some evidence that, after the applicants left Honduras, the agents of harm had come looking for them at the home of Ms. Gonzales Gonzeles's mother, the place where they all used to live. The RPD does not address this evidence at all in concluding that the agents of harm were no longer motivated to seek out the applicants.

[16] As I have already noted, the RPD appears to have found the applicants' narrative to be credible; there is no basis to think that this part of their account was rejected. While the respondent attempts to explain away this evidence and points to other evidence that supports the RPD's conclusion, this amounts to an impermissible supplementing of the reasons the RPD actually gave: see *Vavilov* at paras 96-98. Similarly, the RPD finds that there is no evidence that the agents of harm have the means to track the claimants to the IFA location without addressing the applicants' evidence (which is consistent with the country condition evidence) that MS-13 has networks of informers throughout Honduras. In view of these deficiencies in the reasons, it cannot be said that the RPD's determination under the first branch of the IFA test is justified and intelligible in relation to the evidence before the decision maker: see *Vavilov* at para 126.

[17] Second, it was unreasonable for the RPD to reject the evidence submitted by the applicants post-hearing on current conditions on Roatán.

[18] Some additional background is necessary to put this issue in context.

[19] At the outset of the hearing before the RPD, the member identified the existence of a viable IFA as among the issues that had to be determined. The member identified two potential IFAs in particular: San Pedro Sula and Roatán. The applicants' evidence as well as counsel's submissions focused on the first branch of the IFA test – that is, on the means and the motivation of MS-13 to locate them anywhere in Honduras. Little if any evidence about what their lives would be like in the proposed IFAs was adduced from the applicants.

[20] Counsel for the applicants candidly acknowledged that she had not been prepared to address conditions in the proposed IFAs as they related to the second part of the test (it appears she was not expecting IFA to be an issue at all) so she requested the opportunity to provide post-hearing evidence and submissions. After some discussion, the RPD member invited counsel to submit an application for leave to do so.

[21] Following the hearing, counsel for the applicants provided written submissions addressing the second branch of the IFA test along with three country condition documents – one dealing with Roatán, the other two with San Pedro Sula. The RPD member accepted the post-hearing submissions but refused to accept the country condition documents, finding that they were "not relevant nor probative." The member also found that the document dealing with Roatán was general in nature and did not "provide any relevant information about how the claimants would face an undue hardship that is particular to their profile and situation." The

member also noted that all three articles were published in 2019 so there was no reason why they could not have been submitted before the hearing.

[22] Given that the RPD ultimately found Roatán to be a viable IFA, the applicants do not take issue with the refusal to accept the documents relating to San Pedro Sula. On the other hand, in my view, it was unreasonable for the RPD to refuse to accept the document relating to Roatán. The document, which was prepared by an NGO, Circle of Health International, that works on Roatán, described current conditions there – in particular, the devastating impact the COVID-19 pandemic had had on local tourism, the principal source of income on an already impoverished island. It was unreasonable for the RPD to determine that its contents were not relevant to or probative of the second branch of the IFA test. Further, by their very nature, country condition documents contain general information. The fact that this document was not particular to the applicants' "profile and situation" was no reason to reject it. As well, having had no notice before the hearing that Roatán was being considered as a potential IFA, the applicants would have had no reason to submit the document in advance. Finally, it simply makes no sense for the RPD to accept the applicants' post-hearing submissions but not the evidence on which those submissions were based.

[23] In short, the RPD member properly emphasized the high threshold that the applicants had to meet to demonstrate that it would be unreasonable for them to relocate to Roatán: see *Ranganathan v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16789 (FCA), [2001] 2 FC 164 (CA) at para 15; and *Hamdan v Canada (Immigration, Refugees and*

Citizenship), 2017 FC 643 at para 12. However, this is not a reasonable basis to refuse to accept relevant evidence relating to current conditions in the proposed IFA.

[24] For these reasons, the application for judicial review is allowed. The decision of the RPD dated April 1, 2021, is set aside and the matter is remitted for redetermination by a different decision maker.

[25] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

[26] Finally, the applicants' Notice of Application for Leave and Judicial Review included a request for costs. This request was not pursued in their Memorandum of Fact and Law or in oral submissions. In any event, having regard to Rule 22 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, there is no basis for an award of costs in this case.

JUDGMENT IN IMM-2789-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Refugee Protection Division dated April 1, 2021, is set aside and the matter is remitted for redetermination by a different decision maker.
3. No question of general importance is stated.
4. No costs are awarded.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2789-21
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