Federal Court Cour fédérale

Date: 20221214

Docket: IMM-961-22

Citation: 2022 FC 1723

Ottawa, Ontario, December 14, 2022

PRESENT: The Honourable Justice Fuhrer

BETWEEN:

Jose Armando MONTES CAMACHO
Maria De Los Angeles MONTES CAMACHO
Martha Itzel VILLALOBOS ROSAS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Jose Armando Montes Camacho, the Principal Applicant [PA], his spouse Martha Itzel Villalobos Rosas [PA's spouse], and his sister, Maria De Los Angeles Montes Camacho [PA's sister] [collectively, the Applicants] are citizens of Mexico who made refugee protection claims

in Canada on the basis of their fear of persecution at the hands of the Cartel del CIDA who threatened the PA's father, a local doctor.

[2] The Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB] dismissed their claim, finding that they have a viable internal flight alternative [IFA] in Merida or Cabo San Lucas. The Refugee Appeal Division [RAD] dismissed their appeal, finding that the Applicants had not met their burden of showing they received ineffective representation, and agreeing with the RPD that they have a viable IFA. Under subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], the RAD admitted the Applicants' new evidence on appeal but did not hold an oral hearing, further to subsection 110(6) of the *IRPA*. The Applicants seek judicial review of the RAD's decision, requesting that it be set aside and that the matter be redetermined by a differently constituted panel.

[3] See Annex "A" below for the relevant legislative provisions.

[4] I find the determinative issue is not so much that the RAD failed to hold an oral hearing, one of the errors the Applicants assert that the RAD made, but rather that the RAD unreasonably failed to provide any reasons why an oral hearing was not warranted. See *Tchangoue v Canada (Citizenship and Immigration)*, 2016 FC 334 [*Tchangoue*] at para 12 regarding the applicable, reasonableness standard of review. For the reasons provided below, I therefore grant the Applicants' judicial review application.

II. Analysis

[5] The RAD decision here is silent regarding subsection 110(6) and the possibility of a hearing. This puts the Court in the difficult, if not impossible, position of attempting to review, essentially in a vacuum, the RAD's unstated and unexplained decision to proceed on the written record only without an oral hearing.

[6] The Respondent argues that the RAD was not required to provide reasons why it did not hold a hearing, where the Applicants' credibility was not in issue and the RAD simply engaged in a weighing exercise regarding the Applicants' new evidence. The Respondent points to the decision of this Court in *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 [*Ferguson*] at para 26 where Justice Zinn found that the trier of fact might move first to the assessment of weight and dispense with credibility if the trier determines that little or no weight is to be given to the evidence in question.

[7] While I do not disagree with the principle enunciated in *Ferguson*, the RAD panel in the case before me stated "I have only considered the credibility issues as far as they relate to the determination of a viable IFA" but did not state how it assessed credibility.

[8] Further, as I explain, the RAD erred in its consideration of the Applicants' amended narrative, one of the new documents the RAD accepted on appeal, in the context of the cartel's motivation to find the Applicants in the proposed IFAs. Specifically, the RAD mentions that the

RPD found the Applicants were not credible because they failed to mention the murder of a second uncle. The RAD then states that the "amended narrative also retains this inconsistency."

[9] The amended narrative describes, however, that the Applicants learned of the murder of their second uncle while they were in Canada. From there, the RAD discusses the murder of the first uncle in April 2018 and the lack of discussion in the parents' affidavits regarding any further action against the family. The RAD concludes that "there is insufficient evidence that the criminal cartel continues to be motivated to find the [Applicants]." The Court is left to wonder whether or how the stated inconsistency factors into the conclusion.

[10] I thus find that the RAD's rationale regarding the cartel's motivation does not "add up" in that it does not permit the reviewing court "to connect dots on the page where the lines, and the direction they are headed, may be <u>readily</u> drawn" [emphasis added]: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 97 (citing *Komolafe v Canada (Minister of Citizenship and Immigration)*, 2013 FC 431, 16 Imm. L.R. (4th) 267, at para 11) and 104.

[11] Further, and perhaps more importantly, the Respondent did not point to any authority for the proposition that the RAD was not required to provide reasons explaining why it proceeded without an oral hearing. To the contrary, the jurisprudence on which the Applicants rely points to the necessity of the RAD to justify its decision. For example, Justice Roussel (formerly of this Court), held that "while an oral hearing is discretionary, that discretion must be exercised

reasonably in the circumstances of the case": *Tchangoue*, above at para 12, citing *Zhuo v Canada (Citizenship and Immigration)*, 2015 FC 911 [*Zhuo*] at para 11.

[12] In *Zhuo*, Justice O'Reilly held (at para 11, with emphasis added), "the mere fact that a party has not requested a hearing will generally not be sufficient reason <u>to justify a refusal to convene one</u> when the circumstances appear to require it[; … t]he onus rests with the RAD to consider and apply the statutory criteria reasonably."

[13] The Respondent argues that the circumstances do not require a hearing to be convened. I find, however, that such argument misses the point. The RAD nonetheless must justify its refusal to convene one, especially where, unlike in *Zhuo*, the Applicants here requested an oral hearing which went unaddressed and which, in my view, "warranted an assessment of whether a hearing was required": *Hundal v Canada (Citizenship and Immigration)*, 2021 FC 72 at paras 26-28.

III. <u>Conclusion</u>

[14] For the above reasons, I conclude that the RAD decision lacks the necessary justification and transparency, having failed to provide reasons why it chose to proceed on the written record only (or put another way, why a hearing was not warranted), where it accepted the Applicants' new evidence and they requested an oral hearing.

[15] The Applicants requested in written and oral submissions that the style of cause be amended in two respects. First, the first name of the PA's spouse should be shown as "Martha" instead of "Marth" as it currently is shown in the Application for Leave and Judicial Review

[ALJR] as filed. Second, the Respondent's name should be amended to read, "The Minister of Citizenship and Immigration," instead of "The Minister of Immigration, Refugees and Citizenship" as currently shown in the ALJR. Noting that the Respondent does not object to these changes, the Court orders the style of cause amended accordingly with immediate effect.

[16] No party proposed a serious question of general importance for certification and I find that none arises in the circumstances.

JUDGMENT in IMM-961-22

THIS COURT'S JUDGMENT is that:

1. The style of cause is amended, with immediate effect, to show the first name of the Applicant "Marth Itzel VILLALOBOS ROSAS" as "Martha" and to show the name of the Respondent as "THE MINISTER OF CITIZENSHIP AND IMMIGRATION."
2. The Applicants' judicial review application is granted.
3. The January 4, 2022 decision of the Refugee Appeal Division is set aside.
4. The matter will be redetermined by a differently constituted panel of the Refugee Appeal Division.
5. There is no question for certification.

"Janet M. Fuhrer"

Judge

Annex "A": Relevant Provisions

***Immigration and Refugee Protection Act* (S.C. 2001, c. 27)**
***Loi sur l'immigration et la protection des réfugiés* (L.C. 2001, ch. 27)**

Appeal to Refugee Appeal Division	**Appel devant la Section d'appel des réfugiés**
Evidence that may be presented	**Éléments de preuve 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.
Hearing	**Audience**
110 (6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)	**110 (6)** La section peut tenir une audience si elle estime qu'il existe des éléments de preuve documentaire visés au paragraphe (3) qui, à la fois :
(a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal; **(b)** that is central to the decision with respect to the refugee protection claim; and **(c)** that, if accepted, would justify allowing or rejecting the refugee protection claim.	**a)** soulèvent une question importante en ce qui concerne la crédibilité de la personne en cause; **b)** sont essentiels pour la prise de la décision relative à la demande d'asile; **c)** à supposer qu'ils soient admis, justifieraient que la demande d'asile soit accordée ou refusée, selon le cas.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-961-22
STYLE OF CAUSE:	JOSE ARMANDO MONTES CAMACHO, MARIA DE LOS ANGELES MONTES CAMACHO, MARTHA ITZEL VILLALOBOS ROSAS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	DECEMBER 12, 2022
JUDGMENT AND REASONS:	FUHRER J.
DATED:	DECEMBER 14, 2022

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