Federal Court  Cour fédérale

Date: 20231207

Docket: IMM-817-23

Citation: 2023 FC 1647

[ENGLISH TRANSLATION]

Ottawa, Ontario, December 7, 2023

PRESENT: Madam Justice Azmudeh

BETWEEN:

JASSEFF DAVID ALVAREZ CALDERON
JARED OMAR PINA RODRIGUEZ
JONATAN JAIR PINA RODRIGUEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The principal applicant, Jasseff David ALVAREZ CALDERON and his two cousins, Jared Omar PINA RODRIGUEZ and Jonatan Jair PINA RODRIGUEZ (together the "applicants"), citizens of Mexico, challenge the decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board dated January 3, 2023, confirming the decision of the

Refugee Protection Division [RPD] that the applicants are neither Convention refugees nor persons in need of protection. The judicial review is dismissed for the following reasons.

I. Overview

[2] The following facts emerge from the RAD decision.

[3] The applicants alleged that they feared for their lives at the hands of the family of a murdered person with alleged ties to drug traffickers.

[4] They alleged that in March 2015, in San Pedro Pochutla, in Oaxaca, where they lived, there was an altercation between men in a bar, which resulted in the death of a man. At the time of the murder, the father and uncle of the principal applicant were present at the bar. An investigation was conducted and a man was found guilty, but the deceased's family did not believe in this person's guilt. As a result, the deceased's family began threatening the principal applicant's father and uncle so that the real murderer's identity would be revealed. Fearing for their lives, they fled.

[5] Since the principal applicant's father and uncle fled, the applicants and their family have been threatened by the deceased's family.

[6] They alleged that the principal applicant moved to Mexico City with his family, but they were found. In 2019 they returned to live in San Pedro Pochutla, in Oaxaca.

[7] The RAD drew negative inferences regarding some incidents alleged by the principal applicant and confirmed others. In all cases, the findings on these facts were challenged by the applicants and the RAD confirmed that a viable internal flight alternative ["IFA"] existed in the

city of Mérida, since the applicants did not demonstrate that the agents of persecution had the motivation to locate them in this other city.

[8] However, the RAD drew a negative inference from the principal applicant's allegation that he had been found by his agents of persecution in Mexico City, since he was not considered credible with regard to the allegation that he left Mexico City in 2019. The principal applicant was also unable to offer any substantial explanation as to how he was found as well as what happened after he was found by the agents of persecution.

[9] The RAD thus confirmed the negative inference that the RPD had drawn with regard to the principal applicant's credibility, namely that he returned to San Pedro Pochutla in 2019 because he and his family had been found in Mexico City.

[10] The RAD therefore found that the principal applicant had not demonstrated that he had been found by the agents of persecution when he took refuge in Mexico City.

[11] After reviewing the RPD's findings and analyzing the entire record and the arguments submitted on appeal regarding the applicants' stay in Chiapas, the RAD concluded that, given the inconsistency noted regarding their stay in Chiapas and the lack of plausible explanations, the applicants had not demonstrated that they had taken refuge in Chiapas for three months before leaving Mexico. Indeed, the RAD held that the RPD did not err when it drew a negative inference from their credibility, when the applicants failed to indicate in their written account that they occasionally returned to San Pedro Pochutla while living in Chiapas.

[12] In summary, while the RAD recognized the credibility of the threats suffered by the applicants in San Pedro Pochutla, it rejected the idea that they faced credible threats in any other

part of the country. The RAD presented a clear chain of reasoning to explain how it reached this conclusion.

A. *Preliminary issue: the applicants' motion to admit new evidence*

[13] Prior to the hearing, the applicants sought to amend their record to include two documents, namely:

a) Nadia Calderon Alvarez's Basis of Claim ["BOC"] Form signed on February 15, 2023. Ms. Alvarez is the mother of principal applicant Jasseff David Alvarez (the "Mother"); and

b) Jacqueline Naharai Pina Rodriguez's BOC Form signed on November 7, 2023. Ms. Rodriguez is the principal applicant's cousin and the other two applicants' sister (the "Cousin").

[14] The RPD has not yet heard the Mother's and the Cousin's claims for refugee protection, so there has been no finding of facts or legal analysis of their respective claims.

[15] Owing to their more recent arrival in Canada, evidence of the Mother's and the Cousin's experiences in Mexico was not presented to the RAD or the RPD. Consequently, it could not have been reasonably considered in the RAD's decision that is the subject of this judicial review.

[16] The applicants submit that it should nevertheless be admitted because it corroborates the applicants' allegations. Some of the recent facts also corroborate the current motivations of the agents of persecution.

[17] The respondent submits that many of the relevant facts predate the RPD and RAD decisions, and that the applicants could have admitted the evidence before either or both of these tribunals under their respective rules. The respondent also submits that evidence subsequent to the RAD's decision, i.e. the events that took place after January 3, 2023, should also not be admitted on judicial review because it was not presented to the RAD and none of the exceptions apply.

[18] I agree with the respondent that the new documents cannot be admitted into evidence in this judicial review under the well-known general principle that only evidence before the administrative tribunal is to be considered by the Court. The Court of Appeal reiterated this principle in *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 (CanLII) [*Association of Universities and Colleges of Canada*]:

> [19] Because of this demarcation of roles between this Court and the Copyright Board, this Court cannot allow itself to become a forum for fact-finding on the merits of the matter. Accordingly, as a general rule, the evidentiary record before this Court on judicial review is restricted to the evidentiary record that was before the Board. In other words, evidence that was not before the Board and that goes to the merits of the matter before the Board is not admissible in an application for judicial review in this Court. As was said by this Court in *Gitxsan Treaty Society v. Hospital Employees' Union*, 1999 CanLII 7628 (FCA), [2000] 1 F.C. 135 at pages 144-45 (C.A.), "[t]he essential purpose of judicial review is the review of decisions, not the determination, by trial *de novo*, of questions that were not adequately canvassed in evidence at the tribunal or trial court." See also *Kallies v. Canada*, 2001 FCA 376 at paragraph 3; *Bekker v. Canada*, 2004 FCA 186 at paragraph 11.

[19] I agree with the respondent that it is inappropriate in an application for judicial review to raise information for the first time unless it meets limited exceptions. I also agree that none of

this personal information falls within the exceptions set out in *Association of Universities and Colleges of Canada* (at paragraph 20).

[20] Accordingly, the Court will not consider this new personal information or the new evidence relating to the country conditions. Judicial review is based on the record presented to the RAD, not on documents filed after a negative decision. It is entirely inappropriate to view judicial review as an opportunity to conduct a *de novo* hearing and update it as it progresses through the system for the sole purpose of obtaining a decision different from that obtained before the administrative decision-makers.

[21] In addition, the facts alleged in the Mother's and Cousin's BOC Forms have not been tested for reliability, nor did the tribunals draw any legal conclusions about them. These are untested allegations that were not submitted to the RAD.

[22] I therefore deny the applicants' motion to include the new evidence in the record. In the absence of exceptional circumstances, which have not been established, this would be contrary to the legal foundations of judicial review.

II. Standard of review

[23] The parties submit, and I agree, that the standard of review in this case is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 SCR 653 [*Vavilov*]).

A. *Legislative framework*

[24] The two-pronged test for an IFA is well established:

a) the claimant will not be persecuted (on the "serious possibility" test) or exposed to danger or risk under section 97 of the *Immigration and Refugee Protection Act* [IRPA] (on a "balance of probabilities") in the proposed IFA; and

b) in all the circumstances, including circumstances particular to the claimant, conditions in the IFA are such that it would not be unreasonable for the claimant to seek refuge there.

[25] Once an IFA is raised, the refugee protection claimant has the burden of proving that there is no viable IFA. This means that to counter the proposition that he or she has a viable IFA, the claimant has the onus of showing either that he or she would be at risk in the proposed IFA, or that, even if he or she is not at risk in the proposed IFA, it would be unreasonable, in all circumstances, for him or her to relocate there. The threshold for this second test (reasonableness of the IFA) is very high, as the Federal Court of Appeal, in *Ranganathan v Canada (Minister of Citizenship and Immigration)* (CA), 2000 CanLII 16789 (FCA), [2001] 2 FC 164 [*Ranganathan*], found that it required nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. Moreover, actual and concrete evidence of the existence of these conditions is required. For the IFA test in general, see *Rasaratnam v Canada (Minister of Employment and Immigration)*, 1991 CanLII 13517 (FCA), [1992] 1 FC 706; *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, 1993 CanLII 3011 (FCA), [1994] 1 FC 589 (CA); *Ranganathan*; and *Rivero Marin v Canada (Citizenship and Immigration)*, 2023 FC 1504 at para 8.

III. Analysis

A. *First prong: Was it reasonable for the RAD to conclude that, in the IFA, the applicants did not face a serious possibility of persecution on a Convention ground under section 96*

of the IRPA or, on a balance of probabilities, a personal risk of harm under subsection 97(1) of the IRPA?

[26] The RAD conducted its own independent assessment of the facts found by the RPD. The RAD's independent analysis of the facts even included facts not relevant to its analysis of the IFA. With regard to what is pertinent for the IFA analysis, the RAD unequivocally concluded that each threat and act of violence took place in the applicants' hometown of San Pedro Pochutla, where they were known to the agents of persecution. The SAR unequivocally concluded that the threats made in Mexico City or Chiapas were not credible. Indeed, it did not find credible the applicants' allegations that they had moved to Chiapas a few months prior to their departure. Accordingly, the RAD concluded that the RPD had not erred when it drew a negative inference with respect to the principal claimant's credibility, namely that he had returned to San Pedro Pochutla in 2019 because he and his family had been found in Mexico City.

[27] The RAD established a logical chain of reasoning on how the credible facts were limited to the events that took place in San Pedro Pochutla. It demonstrated that the applicants had referred to being discovered by their agents of persecution in Mexico City as the reason they believed their enemies were motivated to find and locate them in Mérida. The RAD's reasoning demonstrated its reasons for rejecting the credibility of these facts, as well as the skepticism surrounding the applicants' relocation to Chiapas.

[28] On the basis of a well-reasoned analysis, the SAR concluded that the agents of persecution were not motivated to follow the applicants elsewhere, including to the proposed city of Mérida. It is on this basis that it concluded that the first prong of the IFA test had been met. I find the RAD's reasoning reasonable.

[29] Once the RAD found that the agents of persecution lacked the motivation to search for the applicants in Mérida, it addressed the issue of ability, but found that in the absence of motivation, the latter was more relevant:

> Ability to find the appellants
>
> [35] Given that the appellants did not demonstrate that the agents of harm had the motivation to find them in Mérida, I need not to analyze the ability of the agents of harm.

[30] The RAD's decision not to pursue the issue of capacity when it had already concluded that there was no motivation was reasonable. Motivation and capacity are conjunctive factors, and case law recognizes that a claimant must demonstrate that the agents of persecution have the motivation and means to pursue or search for him of her in an IFA. See *Nimako v Canada (M.C.I.)*, 2013 FC 540, at para 7; *Feboke v Canada (M.C.I.)*, 2020 FC 155, at para 43; *Saliu v Canada (M.C.I.)*, 2021 FC 167, at paras 46–47 and 50–51; *Bhatti v Canada (M.C.I.)*, 2021 FC 1386, at paras 36 and 37.

[31] At the hearing, the applicants argued that what made the RAD's decision unreasonable, in part, was its lack of attention to the personal vengeance that the agents of persecution felt towards them. It was the strong feeling of revenge that would motivate them, but the RAD member failed to consider the effect of revenge on motivation. I disagree. The RAD examined the evidence relating to the actions of the agents of persecution and drew logical and reasonable conclusions.

B. *Second prong: Could the RAD reasonably conclude that it would be reasonable for the applicants, in their particular circumstances, to relocate to Mérida?*

[32] The unreasonableness of the IFA is very high. It requires the actual and concrete existence of conditions which would jeopardize the life and safety of the person temporarily relocating to a safe area and not only undue hardship, which the applicants have not demonstrated (*Ranganathan*).

[33] On appeal to the RAD, the applicants argued that the RPD failed to consider the documentary evidence on the record and in the National Documentation Packages ["NDPs"], as it mentions that Mérida is the municipality in the state of Yucatán with the highest number of homicides. In addition, they allege that the criminal groups' determination to track someone down and take revenge, as well as their capacity and motivation, mean that it would be wrong to conclude that Mérida is a reasonable IFA for them.

[34] On appeal to the RAD, the applicants' arguments related to the first prong of the test, namely the forward-looking assessment of risk in the IFA. The RAD then reasonably concluded that their arguments did not demonstrate that it would be objectively unreasonable for the applicants to seek refuge in the proposed IFA. Furthermore, the RAD analyzed the RPD's reasons in this regard and found no error.

[35] The RAD reasonably analyzed the fact that the agents of persecution lacked motivation to follow the applicants to Mérida. Therefore, it is reasonable to consider revenge-motivated homicides as a first-prong issue. The fear of a statistically high homicide rate is speculative and constitutes a risk that is faced generally by other individuals, which falls within an exception to the protection under subparagraph 97(1)(b)(ii) of the IRPA. Consequently, it was reasonable for the RAD not to become further involved in the circumstances.

[36] I find that the RAD considered the relevant arguments of the applicants in the context of the high threshold of the second prong of the IFA test. This was reasonable.

IV. Conclusion

[37] Following the assessment of the two prongs of the IFA test, the RAD came to the conclusion that the first instance decision was correct and that the applicants are not Convention refugees or persons in need of protection. The RAD's independent analysis of the evidence in reaching its conclusion that there is a viable IFA in Mérida was reasonable.

[38] Because of the availability of an IFA in Mérida, the RAD concluded that the applicants had neither established a serious possibility of persecution on any of the five Convention grounds, nor demonstrated, on a balance of probabilities, that in the event of their return to Mexico, they would be personally subjected to a danger of torture, to a risk to their lives, or to a risk of cruel and unusual treatment or punishment under subsection 97(1) of the IRPA.

[39] The application for judicial review is therefore dismissed.

JUDGMENT in IMM-817-23

THIS COURT DECIDES as follows:

1. The application for judicial review is dismissed.

2. There is no question for certification.

"Negar Azmudeh"
Judge

Certified true translation
Daniela Guglietta

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-817-23
STYLE OF CAUSE:	JASSEFF DAVID ALVAREZ CALDERON ET AL. v MCI
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	NOVEMBER 29, 2023
JUDGMENT AND REASONS:	AZMUDEH J.
DATED:	DECEMBER 7, 2023

APPEARANCES:

Majorie Demeulenaere	FOR THE APPLICANTS
Steve Bell	FOR THE RESPONDENT

SOLICITORS OF RECORD:

ROA Services Juridiques Montréal, Quebec	FOR THE APPLICANTS
Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT