Federal Court  Cour fédérale

Date: 20240325

Docket: IMM-14600-23

Citation: 2024 FC 462

[ENGLISH TRANSLATION REVISED BY THE AUTHOR]

Ottawa, Ontario, March 25, 2024

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

LUCIA GUADARRAMA VAZQUEZ
CLAUDIA GUADARRAMA VAZQUEZ
MATTHEW BENJAMIN GUADARRAMA VAZQUEZ
MARIA DE LA LUZ VAZQUEZ LOPEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] The applicants are seeking judicial review of a decision rendered by the Refugee Appeal Division [RAD] rejecting their refugee protection claim. With the consent of the applicants, the respondent has filed a motion for judgment granting the application for judicial review. I am

dismissing this motion as I am not bound by the consent of the parties and I am not convinced that the RAD committed the alleged error.

I. Background

[2] The applicants are a Mexican family. They came to Canada and claimed refugee protection based on the fear of being attacked or killed by a Mexican criminal organization.

[3] Both the Refugee Protection Division [RPD] and the Refugee Appeal Division [RAD] of the Immigration and Refugee Board rejected the claim. Both tribunals rejected the refugee protection claim on the grounds of lack of prospective risk.

[4] The applicants then filed an application for leave and for judicial review of the RAD's decision. Shortly after the applicants' record was filed, the respondent filed a motion seeking a consent judgment to set aside the RAD's decision and send the matter back for redetermination. The only explanation as to why the RAD's decision should be set aside is the following sentence in the consent to judgment signed by both parties: [TRANSLATION] "the member appears to have confused the tests for sections 96 and 97 of the Act by using the terms 'risk of harm' and 'persecution' interchangeably throughout his analysis". The RAD's decision was not annexed to the motion. Although the applicants had already filed their record, which contained a memorandum of fact and law, this was not brought to the Court's attention.

[5] Upon receipt of the motion, I issued a direction to the parties requesting that I be provided with the RAD's decision and a brief summary of the reasons why it should be set aside.

The respondent then provided me with the RAD's decision. As for the reasons it should be set aside, the respondent essentially referred me to the sentence quoted above.

[6] After reviewing the RAD's decision, I ordered that a hearing be held to allow the parties to make submissions as to why the decision should be set aside. I also requested the original English version of the RAD's decision.

II. Analysis

[7] I am dismissing the motion. When the parties agree to settle an application for judicial review out of court, their consent is not binding on the Court. Rather, they must convince the Court that the impugned decision is unreasonable. In this case, the parties have failed to do so. A careful examination of the decision shows that the RAD did not confuse the tests for sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act].

A. *Motions for Consent Judgment*

[8] It is first necessary to clarify the principles governing the analysis of what is commonly referred to as a motion for consent judgment.

[9] The courts encourage parties to settle disputes themselves through negotiation, mediation or other consensual means. This leads to a win-win situation. Parties can agree on a settlement that better suits their needs than a court judgment. They can be creative in devising a settlement, and enjoy greater latitude than the courts in this regard. An out-of-court settlement is usually less

costly and quicker than a trial, and the case can remain confidential. The courts can devote their limited resources to cases that really require their attention.

[10] In matters of private law, it is not the role of the courts to review or approve out-of-court settlements. Situations in which the court may decline to approve a settlement are extremely rare.

[11] On the other hand, in matters of public law, it is not always possible to settle a case without the intervention of the court. This is particularly the case when it comes to judicial review of a decision made by an independent tribunal. Even if they agree, the parties cannot overturn such a decision on their own volition. This power belongs exclusively to the Court. This is why parties who reach this type of out-of-court settlement must ask the Court to issue a judgment giving effect to their settlement. Although the expression “consent judgment” is often used, it can be misleading, since it is not the parties’ consent that determines the outcome of the case.

[12] In *Canada (Attorney General) v Goulet*, 2012 FCA 62, at paragraph 16, the Federal Court of Appeal summarized these principles in the following terms:

> . . . [S]uch a judgment is not rendered on the consent of the parties, but is rather a judgment on the merits of the application for judicial review rendered in a summary way on joint motion. Thus, the application for judicial review can only be allowed insofar as the parties demonstrate an error by the umpire that justifies such a conclusion. It is therefore incumbent upon the parties to set out in their motion record the facts justifying the intervention of this Court and the legal grounds that support such an intervention. . .

[13] Similarly, in *Garshowitz v Canada (Attorney General)*, 2017 FCA 251, at paragraph 18, the Federal Court of Appeal specified the situations in which it is necessary to obtain a judgment to ratify the settlement reached by the parties:

> . . . [A] consent dismissal and the discontinuance of an application differ from the allowing of an application on consent. The former is not normally controversial. In the case of a consent dismissal or a discontinuance of an application, the legal *status quo* is not changing: a binding administrative order that was the subject of the application will remain in place. But allowing an application on consent is controversial. The legal *status quo* is changing: the binding administrative order is now being affected in some way. A reviewing court must be persuaded on the facts and the law before it that it can grant the application and change the legal *status quo*.

[14] As explained by the Federal Court of Appeal, a judge tasked with deciding a motion for a consent judgment is not bound by the agreement of the parties. They must be convinced that there are grounds for setting aside the contested decision. Of course, the agreement of the parties can simplify the judge's task and relieve them of the duty to analyze the issue at length or provide exhaustive reasons. However, the parties must provide sufficient information and explanations for the judge to reach this conclusion.

[15] Despite these principles established by the Federal Court of Appeal, it is common for consent judgment motions to contain very little explanation of the error committed by the decision maker, and for the impugned decision not even to be appended to the motion. The Court can hardly play its role in such circumstances. In fact, such an approach assumes that the Court is bound by the agreement of the parties, which is not the case.

[16] The party bringing a motion for a consent judgment should at the very least provide the impugned decision. It should also make submissions in sufficient detail for the Court to verify the existence of the alleged error. If possible, it is also useful to draw the Court's attention to the precise paragraphs of the decision containing the error. It is not necessary to provide lengthy explanations or numerous supporting case law citations. What is important is that the Court be able to understand the basis of the parties' common position, enabling it to decide the matter independently.

[17] Proceeding in this way also enables the Court to issue a judgment that contains a description of the error that warrants setting aside the contested decision. Even though this description is usually brief, it prevents the next decision maker from repeating the same error.

[18] Where the judge hearing such a motion has doubts as to its merits, they may give the parties an additional opportunity to present written submissions: *Stojka v Canada (Citizenship and Immigration)*, 2020 FC 1042. In this case, I thought it preferable to convene a hearing.

B. *Confusion Between Sections 96 and 97*

[19] As I mentioned above, the only ground the parties offered in support of the motion is that the RAD allegedly confused the tests for sections 96 and 97 of the Act. I am dismissing the motion, since the parties have not shown that the RAD committed any such error. In so doing, I will not rule on the applicants' other grounds in support of their application for judicial review.

[20] The parties criticize the RAD for confusing the tests for sections 96 and 97 of the Act by using the terms “risk of harm” and “persecution” interchangeably in its analysis. To understand why the RAD did not confuse the two provisions by using this terminology, it is useful to summarize the purpose of each and the applicable test.

[21] Section 96 of the Act implements the 1951 *Convention Relating to the Status of Refugees*, Can TS 1969 No 6, to which Canada acceded in 1969. In essence, a refugee is defined as a person who has a “well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion”. Fear of persecution is thus an essential element in the definition of a refugee. It is also essential that the claim have a nexus to one of the grounds listed in the definition.

[22] Over time, it became clear that removing a person to a foreign country can give rise to serious human rights violations, even if the person in question does not meet the Convention’s definition of a refugee: Jane McAdam, *Complementary Protection in International Refugee Law* (Oxford, Oxford University Press, 2007). Among other things, Canada has undertaken not to return a person to a country where they would be exposed to a substantial danger of torture: *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Can TS 1987 No 36 at s 3. The Supreme Court of Canada has also concluded that removal in such circumstances would be contrary to section 7 of the *Canadian Charter of Rights and Freedoms*: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1 SCR 3.

[23] To guard against such situations, Parliament grants refugee protection not only to refugees, but also to those who qualify as a "person in need of protection", defined in section 97 of the Act as a person who would be exposed to a danger of torture or "a risk to life or risk of cruel and unusual treatment or punishment". This danger or risk need not have a nexus in one of the five grounds listed in the Convention.

[24] When the RPD and RAD make a decision on a refugee protection claim, they must determine whether the person is a refugee under section 96 or a person in need of protection under section 97. As we have just seen, the tests applicable to these two sections are different, and the RPD and RAD must usually deal with them separately. Nevertheless, this Court recognizes that a separate analysis is not always necessary, especially where a finding of fact simultaneously defeats sections 96 and 97. For example, if the claimant is not credible, this is usually sufficient to conclude that they are neither a refugee nor a person in need of protection: *Kaur v Canada (Citizenship and Immigration)*, 2012 FC 1379 at paragraphs 48 to 51, [2014] 2 FCR 3; *Matsika v Canada (Citizenship and Immigration)*, 2019 FC 602 at paragraph 23; *Labana v Canada (Citizenship and Immigration)*, 2022 FC 414 at paragraph 20; *Pedro v Canada (Citizenship and Immigration)*, 2022 FC 1575 at paragraph 14. Another example is the internal flight alternative, which applies to both situations: *Salman v Canada (Citizenship and Immigration)*, 2021 FC 1396 at paragraphs 22 to 25.

[25] Similarly, both sections 96 and 97 require proof of the risk of an event occurring in the future. Past events may help to demonstrate the existence of a future risk, but are not in themselves sufficient to justify protection. The term "prospective risk" is often used to describe

this requirement. In this sense, prospective risk is an essential element of a claim under both sections 96 and 97, although the nature of the risk may be different: *Sanchez v Canada (Citizenship and Immigration)*, 2007 FCA 99 at paragraph 15; *Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678 at paragraph 40, [2014] 1 FCR 295; *Gaspar v Canada (Citizenship and Immigration)*, 2016 FC 1337 at paragraph 6; *Weche v Canada (Citizenship and Immigration)*, 2021 FC 649 at paragraph 42.

[26] In this case, the RAD did not disregard these principles. In paragraphs 18 to 24 of its reasons, it began its analysis by correctly setting out the tests applicable to sections 96 and 97 of the Act. In the original English version of the decision, it then noted, in paragraphs 26 and 27, that the criteria of sections 96 and 97 have in common the requirement of a "forward-facing risk of harm", also referred to as a "prospective risk". These two expressions were translated in French by "*risque de préjudice dans l'avenir*". Again, this conclusion is consistent with what I explained above.

[27] Further on in its reasons, the RAD concluded that the determinative issue was the fact that the applicants "failed to establish a prospective risk of section 96 or section 97 harm". The RAD then analyzed the issue separately under section 96 and then under section 97.

[28] With respect to section 96, the RAD found that "the conduct, as alleged, is not of a substantially prejudicial nature, such that it gives rise to a serious possibility of persecution" (emphasis in original). It added that "the frequency and scope of the incidents do not suggest that the physical or moral integrity of the Appellants is threatened on an ongoing basis." It concluded

that the applicants "have failed to establish a prospective risk of section 96 harm" ("*un risque de préjudice dans l'avenir*").

[29] With respect to section 97, the RAD stated the following:

> I have also considered whether the Appellants' fear gives rise to a risk to their lives, cruel and unusual treatment or punishment, or danger of torture. Once again, I find that the Appellants have not met their burden.
>
> . . . [A] prospective and personalized risk of section 97 harm is a threshold requirement. Having not presented sufficient evidence pointing to such a risk, the Appellants' claims under section 97 of the IRPA must fail.

[30] As I understand it, the parties are criticizing the RAD for using the expression "risk of harm" in its section 96 analysis. However, when one reads both versions of the decision, it is clear that the phrase *"risque de préjudice dans l'avenir"*, or its various synonyms, are the translation of "prospective risk". There is no mistake here. As I pointed out above, the concept of prospective risk is a common way of describing a requirement common to sections 96 and 97. By using this expression in its analysis under section 96, the RAD did not confuse the two provisions, especially since the facts alleged under both provisions are the same.

[31] The applicants also argue that the concept of risk employed by the RAD refers to an imminent risk, whereas section 96 contains no such temporal requirement. I see no basis for this distinction. As I pointed out above, the concept of prospective risk is often used to describe risks covered by sections 96 or 97. It does not connote any requirement of immediacy. In using this term, the RAD has not distorted the tests applicable to sections 96 and 97.

[32] In short, by using the concept of future or prospective risk, the RAD did not confuse the tests applicable to sections 96 and 97 of the Act. The manner in which the RAD used these terms does not render its decision unreasonable. This illustrates the principle that a decision should be read with an eye to understanding it, rather than with an eye to finding error.

III. Conclusion

[33] For these reasons, the motion for consent judgment will be dismissed and the case will follow its ordinary course.

ORDER in IMM-14600-23

THE COURT ORDERS as follows:

1. The motion for consent judgment is dismissed.

2. The respondent will serve and file its response within 30 days of the date of this order.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-14600-23
STYLE OF CAUSE:	LUCIA GUADARRAMA VAZQUEZ, CLAUDIA GUADARRAMA VAZQUEZ, MATTHEW BENJAMIN GUADARRAMA VAZQUEZ, MARIA DE LA LUZ VAZQUEZ LOPEZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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