

Federal Court



Cour fédérale

Date: 20180309

Docket: IMM-2884-17

Citation: 2018 FC 281

Ottawa, Ontario, March 9, 2018

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

**JAMES EDAFE EFETOBORE
EMELIA NEIZER
DAVID EDAFE EFETOBORE NEIZER
AARON EDAFE EFETOBORE NEIZER**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] James Edafe Efetobore and his wife, Emelia Neizer, are citizens of Nigeria and Mexico; their two young children are citizens of Mexico. They fled Mexico in 2016 due to persecution by a criminal named Juan Pichardo, who Mr. Efetobore believes is a member of a notorious gang known as Los Zetas. They arrived in Canada on July 13, 2016, and filed claims for refugee protection. The Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB]

rejected the Applicants' claims in a decision dated December 28, 2016, and the Refugee Appeal Division [RAD] of the IRB dismissed their appeal in a decision dated May 30, 2017, confirming the RPD's decision that they were neither Convention refugees nor persons in need of protection. The Applicants have now applied under subsection 72(1) of the *Immigration and Refugee Protection Act, SC 2001, c-27 [IRPA]*, for judicial review of the RAD's decision.

I. Background

[2] After Mr. Efetobore, a Christian, was threatened by his wife's Islamist family in 2010, he left Nigeria and attempted to enter the United States on a fraudulent Ghanaian passport. He was voluntarily deported from the United States to Ghana. Following his return to Nigeria, the family feud between Mr. Efetobore's family and his wife's family became such that, in October 2011, he and his wife fled from Nigeria to Mexico where their refugee claims were accepted and they eventually became naturalized citizens.

[3] In July 2012, during a soccer game in Puebla, Mexico, Mr. Efetobore had a dispute with an opposing team member named Juan Pichardo, during which Mr. Pichardo threatened to kill Mr. Efetobore. A team member advised Mr. Efetobore that Mr. Pichardo was a member of the Los Zetas gang. Although Mr. Efetobore sought assistance from the police, he was advised that no action would be taken since Mr. Pichardo had not harmed him. Following this dispute, Mr. Efetobore and his wife moved from Puebla to the city of Cuautitlan Izcalli where, in December 2012, Mr. Efetobore was attacked on the street by Mr. Pichardo and several other armed men who beat him and attempted to force him into a van. This attempted abduction was thwarted by the arrival of police, who arrested two of the attackers. Mr. Efetobore was briefly hospitalized

and after being discharged later that day attended the Tepito Police Station with a friend, Solomon Solanke, to find out about the next step to take. The police offered Mr. Efetobore 15,000 pesos to drop the charges against the two attackers, and though he dropped the charges he refused to accept the money.

[4] In March 2014, Mr. Solanke informed Mr. Efetobore that he had been attacked by a group of men who asked about his involvement in Mr. Efetobore's case and threatened to kill him. Mr. Solanke reported this incident to the local police, who took his report and stated that they would follow up; they did not do so. On January 9, 2015, Mr. Solanke and his family were found dead in their Mexico City apartment. The police concluded that the deaths were the result of a gas leak, but Mr. Efetobore believes they had been murdered by individuals affiliated with Mr. Pichardo. After these deaths, the Applicants moved to Tijuana, some 2,000 km from Cuautitlan Izcalli, to a house with improved security. On April 30, 2015, Mr. Efetobore hired a plumber to do some work in his home, and after he returned from a work-related trip in May 2015, he discovered his house had been burglarized. Neighbours informed Mr. Efetobore that they had seen the plumber enter his home and called the police; the plumber was arrested and later released on bail.

[5] In July 2015, Mr. Efetobore received a telephone call from Mr. Pichardo who identified Mr. Efetobore's address in Tijuana and threatened his life. After receiving this call, the Applicants moved to Mexico City where, on July 11, 2016, while visiting a bank with his family and a friend named Daniel, Mr. Efetobore encountered a man in the parking lot who he recognized as one of the men who had attempted to kidnap him in 2012. Mr. Efetobore

immediately got his family into Daniel's car and told his friend to drive away from the area. After a few minutes, the car was blocked by another car from which three armed men exited. Daniel managed to maneuver the car out of the situation and they drove away to the airport. Mr. Efetobore and his family spent the night at a hotel near the airport and the next day, on July 13, 2016, they flew to Canada.

[6] Shortly after their arrival in Canada, the Applicants claimed refugee protection. In a decision dated December 28, 2016, the RPD rejected their claims, with the determinative issues being credibility and state protection. The RPD found that the Applicants had not rebutted the presumption of state protection, noting that in a functioning democracy such as Mexico there is a heavy onus to show that they have exhausted all local avenues for state protection. With respect to credibility, the RPD drew a negative inference from Mr. Efetobore's attempt to enter the United States on a fraudulent passport in 2011 and found that he had not provided persuasive evidence that Mr. Pichardo was a member of the Los Zetas gang. The Applicants appealed the negative RPD decision to the RAD.

II. The RAD's Decision

[7] The RAD dismissed the Applicants' appeal in a decision dated May 30, 2017. After noting the RAD's role and reviewing the evidence, the RAD found the Applicants were victims of crime or targets of a vendetta and, as such, did not have a nexus to a Convention ground under section 96 of the *IRPA* and, consequently, assessed their claims under section 97. The RAD determined that the RPD had erred in drawing a negative inference from Mr. Efetobore's use of a fraudulent passport in 2011, but did not concur with the Applicants that this negative inference

led to an overall negative credibility finding. In the RAD's view, the RPD had erred by not providing sufficient reasons to explain why it did not accept Mr. Efetobore's account of attempted bribery on the part of the police. The RAD deferred to the RPD's finding that Mr. Efetobore's claim that Mr. Solanke had been threatened by associates of Mr. Pichardo was speculative, since the RPD "panel who was present at the hearing ... holds an advantage over me in assessing credibility of testimony of this nature." The RAD concurred with the RPD that Mr. Efetobore's claim that they had outmaneuvered a car full of armed men and booked a flight to Canada the next day was implausible. The RAD also found there was insufficient evidence to establish that Mr. Pichardo was a member of the Los Zetas gang, and deferred to the RPD's credibility finding on this issue.

[8] With respect to state protection, the RAD referenced documentary evidence indicating there was insufficient state protection in Mexico for people targeted by gangs like Los Zetas; however, in this regard the RAD stated that the Applicants had provided insufficient evidence to establish that the Los Zetas were involved. The RAD observed that:

[27] The only evidence adduced to link Juan or anyone else with Los Zetas was the testimony of the PA [Mr. Efetobore] that some person on the street told him Juan was an enforcer of Los Zetas. That is certainly insufficient evidence to convince me that Juan has any link to Los Zetas.

[28] Therefore, I find that if the actual threat and kidnapping of 2012 occurred, it was, on a balance of probabilities two events of random criminality with no connection to the murderous Los Zetas gang. As such, the exceptions to adequate state protection referred to by the Appellants in cases dealing with large criminal gangs, do not apply.

[9] After stating some of the jurisprudential principles of state protection, the RAD determined that Mr. Efetobore had not exhausted all avenues available to him for state protection by reporting the bribery incident to a higher authority, such as a senior police officer, and that the police responses to the kidnapping attempt, the death of Mr. Solanke's family, and the robbery of Mr. Efetobore's house in Tijuana were proof of the availability of adequate state protection in Mexico. The RAD therefore found that the Applicants were not persons in need of protection.

III. Analysis

[10] Although the Applicants raise several discrete issues, it is unnecessary to deal with these separately because the overarching issue, in my view, is whether the RAD's decision was reasonable.

A. *Standard of Review*

[11] The applicable standard for review of the RAD's decision is reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35, [2016] 4 FCR 157 [*Huruglica*]). Accordingly, the Court should not intervene if the RAD's decision is justifiable, transparent, and intelligible, and it must determine "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190. Those criteria are met if "the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes": *Newfoundland*

and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board), 2011 SCC 62 at para 16, [2011] 3 SCR 708.

[12] Additionally, “as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome”; and it is also not “the function of the reviewing court to reweigh the evidence”: *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paras 59 and 61, [2009] 1 SCR 339. The decision under review must be considered as “an organic whole” and the Court should not embark upon “a line-by-line treasure hunt for error” (*Communications, Energy and Paperworkers Union of Canada, Local 30 v Irving Pulp & Paper Ltd*, 2013 SCC 34 at para 54, [2013] 2 SCR 458).

B. *Was the RAD's Decision Reasonable?*

[13] The Applicants contend that both the RPD and the RAD incorrectly characterized the individual who informed Mr. Efetobore of Mr. Pichardo's affiliation with Los Zetas as “some person on the street” rather than his soccer teammate Uriel. In the Applicants' view, this error is fatal to the RAD's decision. The Applicants also note the difficulty of establishing conclusive evidence of an individual's membership in a criminal gang.

[14] The Respondent argues that the question of whether Mr. Efetobore was informed of Mr. Pichardo's gang affiliation by a “fellow on the street” or a “teammate” is a distinction without a difference. According to the Respondent, the Applicants' contention that a teammate would be a more reliable source of information is a bald assertion, noting that Mr. Efetobore himself

characterized Uriel in similar language, and that the Applicants have not suggested why the RAD erred in adopting the RPD's language in this regard.

[15] In my view, the RAD unreasonably assessed the basis of Mr. Efetobore's information about Mr. Pichardo's affiliation with Los Zetas. In Mr. Efetobore's Basis of Claim form, his narrative states that:

After the game on that day Juan threaten [*sic*] to kill me and my family and make us disappear for disrespecting him. I was advised by a team mate to move away from the city because Juan is a member of the notorious armed group, Los Zetas.

[16] In Mr. Efetobore's complaint to the Mexico City police authorities dated December 27, 2012, following the attempted kidnapping incident, it is stated that:

However, at the end of the football game, Juan Pichardo continued to insult and provoke until finally threatened me and my wife by name EMELIA NEIZER, manifesting that we were dead we were going to disappear. On the other hand, I want to say that after the match and because when things calmed down a little, a person who is my teammate of the football team where I play, called URIEL said to me that I should be very careful because apparently Juan Pichardo is a member of a group so-called "Zetas"...

[17] The transcript of Mr. Efetobore's testimony before RPD member Marlene Hogarth shows the source of information about Mr. Pichardo's affiliation with Los Zetas as being one or more soccer teammates:

M.HOGARTH: And what did your teammates say?

J.E.EFETOBORE: They advised me, that is from [inaudible] my teammates [inaudible] and want me to leave the city because [inaudible] they are very ruthless [inaudible] Mexico.

M.HOGARTH: Yes, I think we all know about Los Zetas. So they advise you to leave the city because he belongs to, but how did they know he belongs to Los Zetas?

J.E.EFETOBORE: Actually, at that time I was very new in the city, they had been living in the city all their lives I couldn't tell [inaudible], they were very sure of what they told me.

...

M.HOGARTH: But besides the fact that some person, who was it that told him they were members of Los Zetas, who said that to you in the first place?

J.E.EFETOBORE: A friend of mine [inaudible].

M.HOGARTH: Decide your friend saying this is there is there any other reason that you feel that he belongs to Los Zetas?

J.E.EFETOBORE: After it was [inaudible] attacked, I sure my body was [inaudible]. And I was like, this guy Juan Perchado (ph) I fear [inaudible] him and I wasn't really telling him what was happening then he became interested in this. And I told him everything, then he said okay. He doesn't really know the [inaudible]. Then the next day when I came home from work he told me Juan is actually an enforcer for the Los Zetas group.

M.HOGARTH: And did you believe him?

J.E.EFETOBORE: Yes I believe him.

M.HOGARTH: And who is he that he would be able to find this information out?

J.E.EFETOBORE: This [inaudible] Is like in the street, is the only person who always comes to visit us, his name's Raul. Like, hi how are you going? He check on us frequently so I thought he was [inaudible], so what I thought, he should people. [*sic*]

[18] In the same transcript, Mr. Efetobore's counsel submitted to the RPD that:

... with respect to the question of how does the [inaudible], James know that Juan is a member of Los Zetas? It is a difficult question that probably he cannot give any better answer than what he gave. That apart from, right there on the field [inaudible] advised him that, whoa, that guy that threatens you is a [inaudible] member.

And pretty much, is within the society [inaudible], police know, so that's a way to get information. Because he can't join the cartel to be able to know who is under that member of that cartel. And even if he joins, it depends on the [inaudible] know somebody like the enforcer. So he still has to get the news from the street. And he said [inaudible] and the people that told him were people that he met in that community and it is reasonable for him to trust their judgment.

[19] In the face of this evidence, the RAD stated that:

[23] ...the [RPD] panel did not believe that Juan is a member of Los Zetas as there was insufficient evidence adduced to convince the panel that Juan was a member of Los Zetas. This finding, although not clearly explained by the panel, is a reasonable option that the panel had in his or her decision making. As the Appellant notes, it is a little difficult to produce documentary evidence that a person belongs to a criminal organization. However, when asked how the PA knew that Juan belonged to Los Zetas, his testimony was that he had heard this from some fellow on the street. That is insufficient evidence to convince me that this soccer playing man is a member of the notorious Los Zetas criminal organization. I have no doubt that the PA believes this man is a member of Los Zetas; however, that does not make it a fact. The panel's advantage over me is that the panel had the opportunity to assess this testimony first hand whereas I can only read a transcript and listen to a mediocre recording of the hearing. I will defer to the RPD on this credibility issue as it seems to me to be a reasonable option open to the panel....

[20] Mr. Eftobore's belief in Mr. Pichardo's gang affiliation was based not only upon something he had heard from "some fellow on the street," namely, Raul, an acquaintance whom Mr. Eftobore often spoke to on the street; but also upon what his soccer teammates, notably Uriel, had told him at the soccer game in 2012. The issue to resolve is not, as the Respondent argues, whether the RAD properly characterized Mr. Eftobore's teammate Uriel as a fellow on the street but, rather, whether the RAD ignored the fact that Mr. Eftobore's belief about Mr. Pichardo was founded on at least two sources.

[21] It is well-established that a decision-maker such as the RAD in this case is presumed to have “weighed and considered all the evidence presented...unless the contrary is shown” (*Boulos v Public Service Alliance of Canada*, 2012 FCA 193 at para 11, [2012] FCJ No 832, citing *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 at para 1). A failure to refer to some relevant evidence will not typically justify a finding that the decision was made without regard to the evidence, prompting the Court to grant relief as contemplated by paragraph 18.1(4) (d) of the *Federal Courts Act*, RSC 1985, c F-7. This is not always the case though, since “...the more important the evidence that is not mentioned specifically and analyzed in the...reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact ‘without regard to the evidence’” (*Hinzman v Canada (Citizenship and Immigration)*, 2010 FCA 177 at para 38, [2012] 1 FCR 257, citing *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425 at para 17, 157 FTR 35 (TD)).

[22] In this case, it appears that the RAD ignored the evidence of what Uriel had told Mr. Efetobore about Mr. Pichardo’s gang affiliation, referring only to “some person on the street.” It was incumbent upon the RAD to assess and consider all of this evidence in conducting its own analysis of the record (see *Huruglica* at para 103). In my view, it was unreasonable for the RAD not to have explicitly mentioned or assessed this evidence.

[23] Moreover, in my view the RAD unreasonably characterized the evidence about Mr. Pichardo’s gang affiliation as a credibility issue in respect of which it could defer to the RPD. Although the RAD did not doubt that Mr. Efetobore was sincere in his belief that Mr. Pichardo

was a member of Los Zetas, it nonetheless found his testimony about what Raul had told him on the street to be insufficient evidence to establish this as a fact. That is a sufficiency of evidence issue rather than a credibility issue, and it was unreasonable for the RAD to defer to the RPD in this regard and not conduct its own independent assessment of the basis for Mr. Efetobore's belief about Mr. Pichardo. The RAD's determination that there was insufficient evidence to establish that Mr. Pichardo was a member of Los Zetas cannot be justified because it did not fully assess all of the evidence in this regard. The RAD's decision is unreasonable and the matter must be returned to the RAD for redetermination.

IV. Conclusion

[24] The Applicants' application for judicial review is therefore granted. The RAD's decision is set aside, and the matter returned to the RAD for a new determination by a different panel member in accordance with these reasons for judgment.

[25] Neither party proposed a serious question of general importance to be certified under paragraph 74(d) of the *IRPA*; so, no such question is certified.

JUDGMENT in IMM-2884-17

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed; the matter is returned to the Refugee Appeal Division for redetermination by a different panel member in accordance with the reasons for this judgment; and no question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: JAMES EDAFE EFETOBORE, EMELIA NEIZER,
DAVID EDAFE EFETOBORE NEIZER, AARON
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APPEARANCES:

Sina Ogunleye FOR THE APPLICANTS

Stephen Jarvis FOR THE RESPONDENT

SOLICITORS OF RECORD:

Sina Ogunleye FOR THE APPLICANTS
Barrister and Solicitor
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario