

Federal Court



Cour fédérale

**Date: 20200316**

**Docket: IMM-2681-19**

**Citation: 2020 FC 383**

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

**Ottawa, Ontario, March 16, 2020**

**PRESENT: The Honourable Mr. Justice Pamel**

**BETWEEN:**

**LORENA CASTILLO AVALOS  
HUMBERTO ALEJANDRO GUTIERREZ  
CASTILLO  
KEVIN GUTIERREZ CASTILLO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD] dated February 11, 2019, which dismissed the applicants' appeal and confirmed the determination of the Refugee Protection Division [RPD] that the applicants are not Convention

refugees within the meaning of section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] or persons in need of protection within the meaning of section 97 of the IRPA.

[2] The only issue raised by the applicants is whether the RPD should have adjourned the hearing and advised the principal applicant to have counsel present.

[3] For the following reasons, the application for judicial review is dismissed.

## II. Facts

[4] The principal applicant, Lorena Castillo Avalos, and her two sons are Mexican citizens.

[5] The principal applicant alleged that her husband was kidnapped in February 2016 by the Gulf Cartel, a Mexican criminal organization. A few days later, the principal applicant received a call threatening her and her children. The person on the telephone identified himself as “Canché” and stated that he belonged to the Gulf Cartel.

[6] As a result of this threat, the principal applicant suffered an emotional shock and had to be hospitalized. A Mexican psychiatrist concluded that she was suffering from persecutory delusions and recommended that she leave the country. Her husband was later found dead.

[7] The applicants stayed in Spain in March and April 2016. During their stay, one of the principal applicant’s sons was assaulted because of his religion. The applicants also found that

the Gulf Cartel was operating openly in Spain. For these reasons, the applicants decided to leave Spain and return to Mexico. The applicants did not apply for asylum in Spain.

[8] On December 5, 2016, the applicants learned that the principal applicant's uncle had been attacked by members of the Gulf Cartel who were looking for the applicants. The attackers informed the uncle that the principal applicant's dead husband owed them a lot of money. The attackers threatened to kill the applicants.

[9] The applicants left Mexico for Canada on December 25, 2016, and made claims for refugee protection upon arrival.

[10] The applicants fear being kidnapped, mistreated or killed by "Canché" and his associates because of an unpaid debt owed by the principal applicant's deceased spouse. The applicants based their claims on that of the principal applicant.

[11] The RPD rejected their claim for refugee protection on the basis that the applicants' allegations were not credible.

[12] Specifically, the RPD found that their stay in Spain, followed by a voluntary return to Mexico, constituted conduct inconsistent with a fear of persecution. The RPD also drew a negative inference regarding the principal applicant's credibility from her testimony that her office was vandalized while she was in Spain, even though this incident was not mentioned in the Basis of Claim Form [BOC Form].

[13] Similarly, the RPD drew a negative inference from the fact that the principal applicant testified that a neighbour had informed her of the presence of suspicious persons near her house, a fact that was not mentioned in the BOC Form. The RPD gave little probative value to the documentary evidence supporting her allegations. As a result of these deficiencies, the RPD did not believe the applicants' account of persecution and risk.

[14] The applicants were not represented by counsel of any kind at the RPD stage.

[15] Now that they have counsel, the applicants have appealed the RPD decision to the RAD. The applicants then argued that the RPD erred in failing to identify the principal applicant as a vulnerable person under the Chairperson's *Guidelines and Procedures with Respect to Vulnerable Persons Appearing Before the IRB* [Guidelines], despite a letter from a Mexican psychologist stating that the principal applicant had symptoms of post-traumatic stress disorder.

[16] The Guidelines provide for procedural accommodations for those qualified as vulnerable. A vulnerable person is defined as an "individual whose ability to present their cases before the IRB is severely impaired" (Guidelines at para 2.1).

[17] The applicants did not present any new evidence in their appeal.

III. RAD decision

[18] The RAD confirmed the RPD's decision that the applicants are neither Convention refugees nor persons in need of protection. In its decision, the RAD considered two issues, namely, characterization as a vulnerable person and the principal applicant's credibility.

[19] First, the RAD found that the RPD did not err in failing to characterize the principal applicant as a vulnerable person. The RAD rejected the Mexican psychologist's letter because it did not constitute a psychological report within the meaning of Chapter 8 of the Guidelines and did not demonstrate that the principal claimant had a severely impaired ability to present her case before the RPD. In particular, the short letter from the Mexican psychologist was imprecise about the psychologist's methodology and professional qualifications.

[20] The RAD went on to note that the applicants, who were not represented by counsel before the RPD, did not request that the principal applicant be characterized as a vulnerable person and did not propose any procedural accommodations before the RPD. The RAD also noted that the principal applicant explained that she did not want to be represented by counsel at the hearing before the RPD.

[21] The RAD listened to the recording of the hearing before the RPD and concluded that there was no evidence that the principal applicant had a severely impaired ability to present her case before the RPD. Moreover, the applicants did not file any additional evidence (such as a psychological report made in Canada) to establish the vulnerability of the principal applicant. For

all these reasons, the RAD confirmed that the principal applicant cannot be considered a vulnerable person.

[22] Second, the RAD concluded that the RPD did not err in its analysis of the principal applicant's credibility. The RAD was also of the opinion that a stay in Spain (without claiming refugee protection in that country) and voluntary return to Mexico constituted conduct inconsistent with the applicants' alleged fear.

[23] The RAD was also of the opinion that the failure to mention the vandalism of the applicants' home in Mexico and the failure to mention the fact that suspicious individuals were inquiring about the principal applicant on her BOC Form undermined the principal applicant's credibility. The RAD found that the psychological state of the principal applicant did not explain the contradictions and omissions found by the RPD.

#### IV. Issues

[24] This case raises two issues:

1. Did the RPD deny the applicants their rights to procedural fairness by continuing the hearing without legal representation?
2. Is the RAD's decision reasonable?

[25] The applicants raise a series of questions without much detail. They argue that the conclusion about vulnerability is erroneous. Moreover, they argue that the RAD improperly

assessed the testimony of the principal applicant. I have therefore grouped these issues together under the heading for the second issue.

[26] The applicants argue that the RAD erred in not analyzing evidence that was found to be inadmissible at the RPD stage. The applicants do not identify the relevant documents.

V. Standard of review

[27] The first issue raised in this case falls within the principles of procedural fairness and can therefore be considered on the standard of correctness (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Lawal v Canada (Citizenship and Immigration)*, 2008 FC 861 at para 15; *CUPE v Ontario (Canadian Region)*, 2003 SCC 29 at para 100; *Canada (Attorney General) v Sketchley*, 2005 FCA 404 at para 53). As I explained in *Weng v Canada (Immigration, Refugees and Citizenship)*, 2020 FC 151 at para 18, the case law in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov], does not alter the analysis of the standard of review for procedural fairness.

[28] On the other hand, the standard of reasonableness is relevant to the second issue, since none of the cases calling for a departure from the strong presumption of reasonableness is relevant here (*Vavilov* at paras 17, 23). Under the standard of reasonableness, a decision must be based on internally coherent reasoning and be justified in light of the applicable legal and factual constraints (*Vavilov* at paras 99–101).

VI. Analysis

A. *Did the RPD deny the applicants their rights to procedural fairness by continuing the hearing without legal representation?*

[29] The applicants do not in any way challenge the reasons for the RAD's decision.

[30] Rather, they argue that the RPD's decision is tainted by a violation of the right to counsel. Accordingly, they merely argue that the hearing before the RPD should not have taken place. They now argue that the RPD's decision should be set aside and a new hearing should be ordered.

[31] The applicants begin by arguing that the right to counsel is an important constitutional right in Canada that is intimately linked to the concept of the rule of law. The applicants argue that there was a breach of that right and that the RPD member did not take steps to ensure that the principal applicant was represented by counsel.

[32] In particular, the RPD member did not inform the principal applicant of the free legal services available to claimants residing in Quebec and did not automatically postpone the case so that the principal applicant could be assisted by counsel at the hearing.

[33] The principal applicant submits that these failures had a determinative effect on the RPD's decision because she could have had evidence admitted in support of her allegations, ensured consistency in the factual framework, ensured that the best interests of the children were considered, and submitted an amended BOC Form.



[34] I see no evidence to that effect in the transcript of the hearing before the RPD or in the RPD's decision. In any event, there are a number of problems with the applicants' arguments.

[35] First, this issue was not raised before the RAD; it is a new argument presented to me for the first time by the applicants' new counsel.

[36] In the appeal memorandum before the RAD, the applicants presented three grounds of appeal. None of these grounds of appeal deal with the issue of representation at the hearing before the RPD:

A) The RPD erred in law and/or violated principles of procedural fairness and natural justice by failing to consider whether the Principal Appellant should be considered a "vulnerable person" as per the IRB Guidelines.

B) The RPD erred in law in its treatment of the psychological evidence on record and in failing to consider this evidence in its assessment of the Appellants' credibility.

C) The RPD erred in law or rendered an unreasonable decision in its credibility findings by mischaracterizing, ignoring and/or unjustifiably refusing to admit evidence and/or explanations that were presented.

[37] In response, the RAD addressed these three issues and did not discuss the issue of representation as a separate ground of appeal. That said, the RAD did briefly discuss the issue of representation as a factor in its analysis of the first ground of appeal, which is the principal applicant's vulnerability:

[TRANSLATION]

[23] The appellants, who were not represented by counsel before the RPD, did not request that the principal appellant be designated as a vulnerable person, nor did they suggest any procedural accommodations.

[24] When the RPD asked about the lack of counsel to represent them, the principal appellant explained that she did not want to be represented by counsel and that she had the assistance of her sister, who had herself claimed refugee protection in Canada in the past, to complete the required documentation, including the BOC Form, and to file in evidence the documentation she felt was relevant.

[25] Listening to the recording of the hearing before the RPD, I am of the opinion that there is no evidence that the principal appellant had a severely diminished ability to present her case before a tribunal. On the contrary, the principal appellant appeared to me to be no more stressed than any person appearing before a tribunal might be. She responded calmly to the questions asked by the RPD, always in an atmosphere of sensitivity and respect. Nor did the appellant ever report any great difficulty in presenting her case.

[38] From my reading of these reasons, it is clear that the RAD analyzed the reasons for the principal applicant to not choose to retain legal counsel, as well as the effects of that choice on the administrative process before the RPD.

[39] Since the principal applicant never raised the argument before the RAD that the RPD did not respect her right to counsel, I believe that the general rule that judicial discretion in judicial review proceedings should not be exercised “in favour of an applicant on judicial review where the issue could have been but was not raised before the tribunal” (*Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 SCR 654 at paras 23–25).

[40] In this case, the applicants were informed of the opportunity to be represented by legal counsel or other counsel at their own expense on the front page of their BOC Forms, pursuant to rule 3(4)(c) of the *Refugee Protection Division Rules*, SOR/2012-256. In fact, the front page of the BOC Form contains the following notice:

**IMPORTANT NOTICE REGARDING COUNSEL AND DOCUMENTS THAT MAY SUPPORT YOUR CLAIM**

You have a right to be represented by counsel at your own expense, but the counsel you choose must be available on the date fixed for the hearing. . . .

[41] From the partial transcript of the hearing before the RPD, it is clear that the RPD member was aware that the principal applicant was not represented by legal counsel:

[TRANSLATION]

Member: The claimants are present, hello. They are not represented by lawyers or consultants, so no counsel today. . .

Member: So, Ms. Castillo, you were appointed as the designated representative for your son Kevin's refugee protection claim, who is a minor, so you received a form in that regard and you returned the form duly signed as you agreed.

Lorena: Yes.

Member: I received the form and the signed copy. So you understand that form, and do you accept the responsibilities of such a designation?

Lorena: Yes.

Member: Especially since you do not have any counsel today, I want to make sure that you understand all the responsibilities that are in that document.

[42] After some preliminary questions, the RPD member questioned the principal applicant about the reasons for the absence of legal counsel:

[TRANSLATION]

Member: So, Ms. Castillo, just before we started the recording and the arrival of the interpreter, you gave me the list of documents . . . that you submitted at the same as your BOC Forms, your refugee protection claim forms, and I understand that you are not represented by counsel today. Is that a choice on your part?

Lorena: No, I don't have a lawyer.

Member: Is it by choice that you don't have a lawyer?

Lorena: I am the one doing everything.

Member: Is it by choice that you are doing this on your own, Ms. Castillo?

Lorena: When I arrived at the airport, I was told that I had the right to a lawyer, but I thought it was not necessary, the lady told me that there were some documents to present. I had brought the documents with me so I (thought) it was not necessary.

Member: So at first glance, you seem to have been assisted in making your refugee protection claim, in completing the BOC Form and submitting the documents?

Lorena: My niece helped me, she is my sister's daughter, and they live here.

Member: Is she used to applying for refugee protection or helping people apply for refugee protection?

Lorena: No, she is in school so she speaks French and that is why.

Member: But it goes beyond knowledge of the French language. You have prepared the list in the same way counsel would here, even though there is nothing that explains how to prepare the document. For example, it was ordered in a list in advance, it was translated, and there were statements and everything.

Lorena: It is my sister Monica who told me about it because she knows a little bit about how it works because she had claimed refugee status, so when I prepared my documents, she said, did you assign numbers to the documents, did you prepare a list, I said no and Monica said, yes you have to do it. That is why I showed you -

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Member: So you were not helped by any counsel; it was your family that helped you and a lady at the airport that you saw?

Lorena: That is right.

[Emphasis added.]

[43] Counsel for the applicants asks me to see, in the underlined passages, confirmation that the principal applicant stated that did not choose not to retain counsel. That is not my reading. I note that the principal applicant simply confirmed that she did not have a lawyer.

[44] The RPD did, in fact, continue to explore this issue, and the entire passage seems to confirm that the principal applicant chose to not have counsel.

[45] The evidence indicates that the applicants were informed of the possibility of legal representation through the BOC Form. It appears from the transcript of the hearing before the RPD that the principal applicant stated that she was prepared to testify without the assistance of a representative. Indeed, she testified that the assistance of counsel was not necessary given the nature of the case.

[46] In addition, no adjournments were requested by the applicants.

[47] I am of the opinion that the RPD member followed the appropriate process with respect to legal representation. It seems to me that the applicants simply waived their right to legal representation because they felt that the assistance of counsel was not necessary.

[48] In addition, the RPD is not required to inform refugee protection claimants of the availability of legal aid services (*Cyril v Canada (Citizenship and Immigration)*, 2015 FC 1106 at paras 15–16).

[49] Second, contrary to the applicants' allegations, it is not within the jurisdiction of this Court to set aside the RPD's decision. The application for leave and for judicial review was filed against the decision of the RAD pursuant to subsection 72(1) of the IRPA. The application for leave regarding the RAD decision was allowed by this Court on October 22, 2019.

[50] It is therefore clear that the decision or "matter in respect of which relief is sought" before me is that of the RAD, and since there is no challenge to any of the RAD's conclusions on the issues raised before it by the applicants' former counsel, I see no reason to conclude that it was unreasonable (subsection 18.1(1) of the *Federal Courts Act*, RSC 1985, c F-7).

[51] I would like to add that judicial review of a decision that has already been appealed is inappropriate in light of the general principle that reviewing courts should not revisit decisions that have already been reviewed (*Fairhurst v Unifor Local 114*, 2017 FCA 152 at paras 10, 15–16; *Vidéotron Télécom Ltée v Communications, Energy and Paperworks Union of Canada*, 2005 FCA 90 at para 12). In this case, the RPD's decision was appealed to the RAD, which decided to confirm the RPD's decision (paragraph 111(1)(a) of the IRPA; *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 78).

[52] Judicial review of the RPD's decision would therefore be inappropriate.

[53] The applicants argue that they have a right to be heard and that, in this case, the RPD did not respect the applicants' rights to a fair trial because it excluded certain documents, but none of this was raised by the principal applicant's previous counsel before the RAD.

[54] It is apparent from all of these factors that the principal applicant was aware of the opportunity to be represented, but instead voluntarily chose not to retain counsel of any kind (*Austria v Canada (Minister of Citizenship and Immigration)*, 2006 FC 423 at paras 8–11; *Balasingam v Canada (Citizenship and Immigration)*, 2012 FC 1368 at para 51; *Li v Canada (Citizenship and Immigration)*, 2015 FC 927 at para 37).

[55] For that reason, it is not necessary to intervene in this case.

B. *Is the RAD's decision reasonable?*

[56] Before me, the applicants discussed only the issue of the alleged breach of natural justice because they were allowed to continue the hearing before the RPD without counsel.

[57] I will therefore discuss the other issues solely on the basis of their written submissions.

[58] The applicants argue that the RAD's decision is unreasonable on two points.

[59] First, the applicants argue that the RAD did not consider all of the evidence that the principal applicant is a vulnerable person. The applicants' memorandum in this case states that this point will be discussed in more detail at the hearing. The memorandum does not, therefore, set out any further details.

[60] Second, the applicants argue that the RAD's decision is subject to judicial review because the RAD did not fully appreciate the testimony that would have been given if the principal applicant had been assisted by counsel.

[61] Again, the applicants' memorandum does not provide any further details.

[62] In its memorandum, the respondent summarizes the RAD's findings on the principal applicant's vulnerability and concludes that they are reasonable. The respondent also submits that the RAD's findings on the principal applicant's credibility were reasonable.

[63] At the outset, I note that the applicants' memorandum does not identify any specific errors in the analysis of the principal applicant's vulnerability or credibility.

[64] In its decision, the RAD concluded that the RPD did not err in failing to characterize the principal applicant as a vulnerable person because no evidence to that effect was provided. In reaching this conclusion, the RAD reviewed the letter from the Mexican psychologist and concluded that this document did not provide a diagnosis by a competent professional in order to justify the characterization as a vulnerable person.

[65] The RAD listened to the recording of the hearing and found no evidence that the principal applicant had a severely diminished ability to present her case before the RPD. The RAD noted that the principal applicant did not present any new evidence before it, even though she was represented by counsel.



[66] I see nothing unreasonable in the RAD's conclusions.

[67] On the other ground of appeal, the RAD found that the RPD did not err in its analysis of credibility.

[68] The RAD was also of the opinion that a stay in Spain (without claiming refugee protection in that country) and voluntary return to Mexico constitute behaviour inconsistent with the fear alleged by the principal applicant. In reaching this conclusion, the RAD noted the principal applicant's explanations about the nature of the stay in Spain.

[69] The RAD was also of the opinion that the failure to mention the acts of vandalism against the applicants' home in Mexico and the failure to mention the fact that suspicious individuals were inquiring about the principal applicant on her BOC Form undermined the principal applicant's credibility.

[70] In addition, the RAD noted that the principal applicant failed to mention her office work in her IMM 5669 form. The RAD found that the psychological state of the principal applicant does not explain the contradictions and omissions found by the RPD.

[71] I see nothing unreasonable in this analysis.

[72] The applicants did not identify any evidence that was omitted by the RAD. In the absence of further explanations of the nature of the alleged errors, I reject the applicants' arguments.

VII. Conclusion

[73] For these reasons, the application for judicial review is dismissed. The applicants ask this Court to certify a question; however, they do not specify that question. I see no question of such importance to certify in this case.

**JUDGMENT in IMM-2681-19**

**THIS COURT'S JUDGMENT** is as follows:

1. The application for judicial review is dismissed.
2. No question is certified.

“Peter G. Pamel”

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Judge

Certified true translation  
This 29th day of April 2020.  
Michael Palles, Reviser

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-2681-19

**STYLE OF CAUSE:** LORENA CASTILLO AVALOS,  
HUMBERTO ALEJANDRO GUTIERREZ CASTILLO,  
KEVIN GUTIERREZ CASTILLO v THE MINISTER  
OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** MONTRÉAL, QUEBEC

**DATE OF HEARING:** MARCH 5, 2020

**JUDGMENT AND REASONS:** PAMEL J.

**DATED:** MARCH 16, 2020

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