Federal Court  Cour fédérale

Date: 20210507

Docket: IMM-246-20

Citation: 2021 FC 400

Ottawa, Ontario, May 7, 2021

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

JACOB WOLF FRIESSEN
ERIKA IVETTE MELGOZA MORENO
PETER AXEL MELGOZA MORENO
DANNA ANGELY WOLF MELGOZA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is an Application for judicial review of the December 5, 2019 decision [Decision] of the Refugee Appeal Division [RAD] pursuant to section 111(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, [*IRPA*]. The RAD dismissed the Applicants' appeal of

the Refugee Protection Division's [RPD] decision, confirming its determination that the Applicants are neither Convention refugees nor persons in need of protection under section 96 and subsection 97(1) of *IRPA*. The RAD held that the RPD did not err in determining that the Applicants have viable internal flight alternatives in Mexico City and Mérida [collectively, the IFAs].

[2] The application for judicial review is granted. The matter is re-mitted to another member of the RAD for re-determination.

II. Background

[3] Mr. Friessen, the Principal Applicant [PA], his wife Ms. Moreno [Associate Applicant], and their two minor children [all collectively, Applicants] are Mexican citizens. The Applicants lived in the state of Chihuahua where the PA owned a business with his wife's brother, Juan. When the business closed in August 2017, Juan wanted a larger share of the profits and equipment than they had previously agreed on. The PA refused. Juan's brother-in-law, Alberto, who had been an employee of the business, together with Juan [the brothers-in-law, or BILs] hired local people to threaten the Applicants.

[4] In August 2017, the PA and the Associate Applicant started receiving threatening phone calls. Arguments and interactions occurred with the BILs, culminating in armed men breaking into the Applicants' home the night of September 6, 2017. The armed men identified themselves as members of the La Linea gang and asked for the whereabouts of the PA. The PA had fled the house. The armed men threatened the Associate Applicant, including her son and mother, at

gunpoint, demanding 300,000 pesos and that they turn over all valuables by 3:00 p.m. the following day.

[5] On September 7, 2017, the Applicants reunited and fled Chihuahua with the help of the Associate Applicant's mother and father-in-law. They continued to run, staying at hotels and with family members and ultimately flew to Canada on October 7, 2017, and claimed refugee status. Throughout this period, the Associate Applicant's mother continued to receive calls from Juan but refused to tell him where the Applicants were.

[6] In November of 2017, the PA's sister, who lives in Mexico, called to inform him that his house had been broken into again. This time they stole all valuables and vandalized the house. This is the last time anyone threatened the Applicants.

[7] The Applicants fear returning to Mexico because of the risk posed by the BILs. They claim that regardless of where they are in Mexico, the BILs will not lose interest because the dispute is over an unpaid debt.

[8] The Applicants submitted before the RAD that the PA's status as a Mennonite exposes him to discrimination in Mexico. The PA claimed that Alberto has discriminated against Mennonites and this is another reason the Applicants are fearful.

III. RAD Decision

[9] The RAD stated that the determinative issue in the appeal was whether the RPD erred in its assessment of an IFA. Concluding that there was no error, the RAD stated that it had "conducted a complete and independent analysis of the evidence".

[10] The RAD correctly outlined the two-pronged test for determining whether there is an IFA:

1. The Board must be satisfied on a balance of probabilities that there is no serious possibility that the claimant would be persecuted or would face a risk under section 97 of *IRPA* in the part of the country to which it finds an IFA exists; and

2. The conditions in the IFA must be such that it would not be unreasonable for the claimant, in all the circumstances, including those particular to the claimant, to seek refuge there.

[11] The RAD considered only the first prong of the test stating that the "appellants do not contest the RPD's conclusions regarding the second prong of the IFA".

[12] The RAD disagreed with the Applicants' claims that the RPD erred in focusing on the wrong agents of harm. The RAD referred to the RPD decision where the RPD found that there was insufficient evidence to demonstrate that the claimants would face a risk from La Linea or

their family members. The RAD determined that, "[c]learly, the RPD understood that the appellants fear their family and took this into consideration".

[13] The RAD noted that at the RPD hearing, the Applicants testified that there is a link between the local Chihuahua La Linea gang and the Los Zetas gang, which has ties throughout Mexico. The RAD went on to note that the RPD was correct to analyze the ability of the local gang to find the Applicants in the proposed IFAs and that this factor must be assessed in analyzing the first prong of the test.

[14] Regarding the evidence of conditions in the IFAs the RAD stated:

> In my opinion, it should be noted that, even though the documentary evidence on the record does not state that Mexico City and Mérida are free from criminals, the appellants failed to demonstrate that, on a balance of probabilities, the brothers-in-law they fear can target them in the two cities in both locations, specifically by hiring local criminals. This is speculation. In my view, the fact that the brothers-in-law living in Chihuahua could hire local criminals in Chihuahua is not enough to demonstrate that, on a balance of probabilities, they can hire local criminals in both IFA locations to target the appellants.

[15] With regard to the PA's status as a Mennonite, the RAD stated that the Applicants did not contest the RPD's conclusion that the PA does not face risk based on his membership in the Mennonite community. The RAD did not address this issue any further.

IV. Issues and Standard of Review

[16] The sole issue is determining whether the RAD's IFA analysis is reasonable. The Applicants submit that the RAD's analysis of the risk presented by gang members was treated as

a wholly independent issue from the risk presented by the family members and that the RAD held the Applicants to the wrong standard of proof.

[17] The Applicants make no submissions addressing the standard of review. The Respondent submits that the presumptive standard is reasonableness and nothing warrants a departure from this standard. The Respondent cites *Vavilov v Canada (MCI)*, 2019 SCC 65 at para 83, which states that "the reviewing court must consider only whether the decision made by the administrative decision maker — including both the rationale for the decision and the outcome to which it led — was unreasonable".

[18] I agree that the appropriate standard of review is reasonableness.

V. Parties' Positions

A. *Applicants' Position*

[19] The Applicants submit there is a distinction between the ability of the BILs to find the Applicants and the Applicants facing a risk from the BILs, which the RAD failed to distinguish between.

[20] The Applicants submit that the RADs reasoning was based on the conclusion that the BILs had no motivation or resources to target the Applicants and not that the BILs could not find the Applicants. The Applicants maintain that the difference is that if the BILs did not have

resources to target the Applicants themselves, they may still learn of their location and pay to have them targeted, which presents a risk to the Applicants in the IFAs.

[21] The Applicants argue that the RADs finding that the BILs would lose interest in the Applicants if they relocate is "unmoored from the facts of the case". The Applicants submit that the fact that the BILs had the resources to hire criminals in Chihuahua gives rise to a presumption that the same risk will arise in the IFAs. They state that this presumption is similar to and overlaps with the presumption of past persecution. To support this assertion they cite *Fernandopulle v Canada (Minister of Citizenship & Immigration)*, 2005 FCA 91.

[22] With regard to the onus under the first prong of the IFA, the Applicants submit that the Respondent is wrong to assert the onus is high. The Applicants say that the jurisprudence cited by the Respondent in its memorandum of fact and law addresses the second prong of the IFA test. Therefore, the Respondent has confused the standards of proof. The Applicants submit that the standard of proof under the first prong of the IFA test is serious possibility, which places a low onus on the Applicants.

[23] The Applicants also submit that the RPD, in reviewing the National Documentation Package [NDP] for Mexico, did not review the most recent information in its determination that Mexico City and Mérida are not crime free.

B. *Respondent's Position*

[24] The Respondent submits that the Applicants have not challenged the RAD's finding that the IFAs are objectively reasonable in all of the circumstances; therefore, this finding concerning the second part of the IFA test must stand.

[25] The Respondent claims that the Applicants' assertion that the Decision is incoherent is "based entirely off the Applicants' evidence free assertions".

[26] The Respondent submits, "[e]vidence is required to go beyond mere conclusions, and must contain sufficient details". It cites *Azzam v Canada (Citizenship and Immigration)*, 2019 FC 549 [*Azzam*] for the proposition that the state does not have the resources to inquire into the facts of an applicants case, therefore, the applicant must adduce detailed evidence.

[27] The Respondent says the Applicants had to prove the feared agents had the means to find and target them in the proposed IFA locations on a balance of probabilities.

[28] The Respondent submits that the jurisprudence does not support the Applicants' argument that they are entitled to a rebuttable presumption that past persecution creates a presumption of future persecution. The Respondent submits that the Applicants cannot reverse the onus and require the RAD to prove the BILs could hire gangs in the IFAs.

[29] Finally, the Respondent submits that NDPs are general by nature and that the information in the most current NDPs is "not novel or of significance such that it could affect the decision of the RAD".

VI. Analysis

[30] The test for an IFA is objective. An applicant bears the burden of proof in demonstrating that an IFA either does not exist or is unreasonable in the circumstances. In addition, the threshold is high for what makes an IFA unreasonable in the circumstances (*Gallo Farias v Canada (Citizenship and Immigration)*, 2008 FC 1035 at para 34 [*Gallo Farias*]).

[31] The reasons of the RAD are short and without much analysis. The majority of the reasons are devoted to referring to paragraphs of the RPD reasons and then stating that the RPD did not err. The analysis section of the Decision reads like an endorsement of the RPD decision rather than an independent assessment of the record. The RAD does not comment further nor make any of its own findings regarding the ties between the gangs, nor whether a finding that the two gangs are affiliated presents a risk to the Applicants.

[32] The consideration of the RAD's risk analysis requires a review of some aspects of the RPD decision, even though that decision is not the decision under review. The RPD concluded that there was insufficient credible evidence to demonstrate that the Applicants would face risk "from La Linea or their family members". The central part of the Applicants' claim was that the BILs were the ones that they feared and, because the BILs engage with gang members, the Applicants feared the gangs.

[33] The RAD's focus, in adopting the RPD's findings, was on the failure of the Applicants to establish, with sufficient evidence, whether a connection between the La Linea gang and Los Zetas gang exists. In the RPD reasons, adopted by the RAD, two paragraphs address the issue of the connection between the gangs. There is no analysis by the RPD of how the BILs would or would not be able to hire gang members in the IFAs. Rather, the RPD's reasons simply state that it cannot be assumed that the BILs can hire gang members in the IFAs because they hired gang members in Chihuahua.

[34] Despite saying that it independently assessed the evidence and the hearing recording, there is no assessment in the Decision of whether the familial relationship between the Applicants and the feared agents presented a particular risk that would not have arisen but for that familial relationship.

[35] It is clear from the Applicants' narratives that they fear the BILs and what will happen if the BILs find them. There is no evidence that the Applicants fear gang members independently from the BILs. The Applicants' entire argument hinges on their submission that if the BILs find them, not the gangs, they will face persecution. Some consideration of this point was necessary for a thorough assessment of risk. The RADs failure to consider whether the feared agents would be more likely to find the Applicants because they are family results in the Decision being unreasonable.

[36] The Applicants also submit that the Respondent, in its initial memorandum of fact and law, confused the standard of proof for the two prongs of the IFA test. However, the Respondent

clarified its submission in its further memorandum of argument. As for the RAD's statement on the standard of proof, it states:

> …the appellants failed to demonstrate that, on a balance of probabilities, the brothers-in-law they fear can target them in the two cities in both locations, specifically by hiring local criminals. This is speculation. In my view, the fact that the brothers-in-law living in Chihuahua could hire local criminals in Chihuahua is not enough to demonstrate that, on a balance of probabilities, they can hire local criminals in both IFA locations to target the appellants.

[37] The law is clear that a refugee claimant must persuade the board, on a balance of probabilities, that there is a serious possibility of persecution in the proposed IFA (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (FCA) [*Rasaratnam*]; *Gallio Farias* at 34).

[38] As Justice Kane stated in *Adebayo v Canada (IRC)*, 2019 FC 330 at para 49, "the two part test for an IFA established in *Rasaratnam* has been consistently applied and elaborated upon, including in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 at paras 2, 12, [1993] FCJ No 1172 (QL) (CA) [*Ranganathan*]. First, the decision-maker must be satisfied, on a balance of probabilities, that there is no serious possibility of the applicant being persecuted in the proposed IFA. Second, the conditions in the proposed IFA must be such that it would not be unreasonable for the applicant to seek refuge there, upon consideration of all the circumstances, including the personal circumstances of the applicant." Justice Kane also stated at para 53, "[t]he high threshold set in *Ranganathan* at para 15 ("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") applies to both parts of the test".

[39] The Applicants' argument on this point fails.

[40] As explained above, I have nevertheless determined that the Decision is unreasonable for a failure of the RAD to show its chain of reasoning concerning the agents of harm.

VII. Conclusion

[41] If the RAD, in conducting its independent review, did not find the Applicants' evidence of the risk of harm to be sufficient, it could have been explained better in its reasons. The RAD did not intelligibly explain its findings. For this reason, I find that the RAD decision is unreasonable.

JUDGMENT in IMM-246-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed. The matter is remitted for re-determination.
2. There is no question for certification.
3. There is no order for costs.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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