Federal Court  Cour fédérale

Date: 20211213

Docket: IMM-1146-21

Citation: 2021 FC 1404

[ENGLISH TRANSLATION]

Ottawa, Ontario, December 13, 2021

PRESENT: Mr. Justice Roy

BETWEEN:

EDSON ARMANDO GUTIERREZ MOLINA
DARINKA ROSA PENA DAVILA
DARED ARMANDO GUTIERREZ PENA
DANIELA ALESSANDRA GUTIERREZ PENA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants in this case are all Mexican citizens who have claimed refugee protection in Canada. They are a family. This application for judicial review raises a single issue. The Refugee Appeal Division (RAD) found that the applicants had an internal flight alternative (IFA)

available to them in Mexico itself. The applicants argued that this IFA was unreasonable. This is why they are seeking judicial review under section 72 of the *Immigration and Refugee Protection Act* (SC 2001, c 27) [IRPA].

I. Facts

[2] Three of the applicants were on vacation in Montréal on April 26, 2019. The fourth was born in Mexico in July 2019. The Basis of Claim (BOC) form, shared by the four applicants, indicates that on June 6, 2019, the principal applicant (Edson Armando Gutierrez Molina) received a message through Facebook from a person who reportedly called himself Sergio NGJ. The Refugee Protection Division (RPD) noted in its decision that the principal applicant's spouse, who was pregnant at the time, had returned to Mexico earlier with her son as the principal applicant continued his stay in Canada. The man who called himself Sergio reportedly indicated he was a member of the Jalisco Nueva Generacion cartel (CJNG).

[3] The message referred to surveillance being conducted of the principal applicant's family. In addition, this surveillance was reportedly extended to the principal applicant's mother, father, brother, and grandmother, and the author of the message indicated that he knew that the principal applicant operated a restaurant. The message reportedly went on to state that its author knew that the Principal applicant was not in Mexico at that time, and he was asked for 100,000 pesos to ensure his family's safety. The principal applicant was warned not to contact the police.

[4] The principal applicant replied that he did not have the money, but offered a cheque of 10,000 pesos to be left alone. He returned to Mexico on June 7.

[5] The principal applicant received six messages on June 7. The offer to hand over his vehicle was not well received because, as his correspondents insisted, they needed money to leave them alone. Other messages stated that these individuals claimed they were serious and that they were not stupid. The threats are presented in the BOC as being that [TRANSLATION] "the man calling himself Sergio replied that it was not clear for you, we will destroy everything, the elderly, babies, children, the wives of everything we destroy, first you say that you have a Chevy (car) and 10,000, do not leave us with (bad words), I want to have them by early tomorrow morning, in response to what I told you, I told you that I will come get them, that this means that I had only a Chevy in poor condition" (lines 54–60 of the BOC).

[6] Other messages appear to have been sent. Thus, on June 8, the man who called himself Sergio sent another message stating that he had to receive the money by June 9. On June 10, it appears that "Sergio's" message consisted of six question marks. Another message was reportedly sent late in the afternoon on June 14. The threats continued, with the correspondent stating that this was not a game, indicating that he had found out where the principal applicant's mother worked and what school his son attended (the principal applicant's son was born on March 6, 2018, and his daughter was born on July 25, 2019). Another message was sent on June 15, 2019. On June 17, 2019, the principal applicant went to the Attorney General's Office to report what was happening.

[7] Since he had received no response to his last message earlier in June 2019, the principal applicant was led to believe that it was over. It was not. On June 29, 2019, while he was away from his restaurant, an employee contacted the principal applicant around 12:30 p.m. to tell him

that two armed men had been there looking for him and that they had ransacked the restaurant. It was at that point that the principal applicant and his wife decided to shut down their business for an indeterminate period. On July 1, 2019, the applicants sought refuge at a friend's house, elsewhere than at their place of residence. They reportedly returned to their home on July 15, 2019. On July 23, 2019, a number of strangers tried to break into their home; it appears that the applicants did not hear anything that night because they were on the second floor. On July 24, the principal applicant's spouse went to the hospital; according to the BOC, as indicated above, she gave birth to a baby girl on July 25, 2019. The applicants flew from Mexico to Canada on September 15, 2019. They then claimed refugee protection (the BOC is dated October 25, 2019).

II. Decisions of administrative tribunals

[8] The RPD noted at the outset that the applicants had not made any allegations with respect to the five grounds set out in section 96 of the IRPA to obtain refugee protection in Canada. This is why only section 97 of the IRPA could apply. The RPD decided to review the application from the perspective of an IFA, which it felt existed. I note that the applicant's credibility was not beyond reproach. At paragraph 10 of its decision, the RPD wrote:

> [TRANSLATION]
>
> [10] Although the panel had reasons to question allegations made by the applicants, the credibility issues raised are insufficient to be fatal to their refugee protection claim. That is why, for the sake of expediency, the panel considers the applicants' allegations as being true for the purpose of this analysis, except with respect to their assessment of the risk to which they would be exposed in case of being relocated in the IFA suggested by the panel.

[9] Searching for a different area where the applicants could escape from the extortion demands of CJNG members, which had been verified for the purpose of the exercise, the RPD proposed two possibilities: Tuxtla, in Chiapas; and Mérida, in Yucatán. The RPD asked the principal applicant about the two areas but does not appear to have given further consideration to the city of Mérida before ultimately choosing the Chiapas area, where Tuxtla is located, about 900 kilometres from Toluca, the city the applicants are from.

[10] According to the RPD, the applicants would be safe in Tuxtla. No evidence was submitted regarding the CJNG's operational capability. On the contrary, the National Documentation Package (NDP) on Mexico lists the states where this cartel was reported to be active, and it did not include Chiapas. In addition, despite the power of this cartel, it is reportedly at war with other cartels active in Chiapas. This suggested to the RPD that the CJNG's operational capabilities were severely limited. The RPD noted the following in paragraph 15 of its decision:

> [TRANSLATION]
>
> [15] …The evidence in the NDP clearly indicates that cartels can use electronic and human means to track down their victims; however, given the difficulties related to the CJNG's operational limitations in Chiapas, the applicants would have to be a high-profile target for it to use such means against them.

[11] Essentially, the applicants alleged before the RPD that the CJNG cartel was everywhere in Mexico. Furthermore, the applicants indicated that since leaving Mexico, family members who had remained in Mexico had not been bothered by the cartel. To the RPD, this showed that the applicants were not a sufficiently important target to use special means to locate them. The

RPD also commented on the reasonableness of being relocated to Tuxtla, as required by the analysis framework in these matters.

[12] Obviously, it is not the RPD's decision that is under judicial review, but rather that of the RAD. We will therefore now turn our attention to the decision for which judicial review is being sought.

[13] It is widely known that the RAD uses a correctness standard of review for RPD decisions. As a result, the RAD does not have to defer to the decision it is reviewing on appeal. In fact, section 111 of the IRPA sets out that it can confirm the decision under review, refer the matter back to the RPD, or set it aside and substitute a determination that, in its opinion, should have been made. That is what happened in this case.

[14] The RAD concluded that the internal flight alternative was not in Tuxtla, in the state of Chiapas, as the RPD had decided, but rather in the city of Mérida, in the state of Yucatán.

[15] The RAD claimed that Tuxtla was not safe because the cartel was present in that state. The RAD appeared to be satisfied that the documentary evidence in the NDP on Mexico showed that CJNG was present in the state of Chiapas. That is why the RAD stated that it disagreed with the RPD.

[16] Therefore, the RAD conducted its own review. The RAD listened to the recording of the RPD hearing, and, contrary to the applicants' claims, the RPD asked the principal applicant the

same questions about the state of Chiapas as for Yucatán. Since the RPD had chosen Chiapas, the RAD was careful to ask the applicants to file additional submissions about an IFA in Mérida. They were strikingly sparse. Essentially, the applicants settled for arguing that the RAD should not consider an alternative in Tuxtla. However, Mérida had been considered by the RPD. Again, when they were questioned by the RPD about Mérida, the applicants relied on their claim that the cartel was everywhere in the country. When asked how the applicants could be located, the principal applicant indicated that cartel members had the means to do so. As for the reasons why the cartel might pursue them all the way to Mérida, the principal applicant could only reaffirm that the cartel was everywhere and that, in fact, the same would be true regardless of where he and his family would be.

[17] Noting that the issue of an IFA is reviewed in two stages, the RAD concluded that, first, the applicants had to demonstrate that the area they would relocate to would not be safe; and second, they had to demonstrate that it was also objectively unreasonable for them to relocate there.

[18] To the RAD, the evidence showed that the CJNG was not present in Mérida or the state of Yucatán. However, there is more. The applicants knew nothing about the extortionists, and it is not known whether the break and enter on July 23, 2019, was related to the threats that were allegedly made from June 6 to June 29, 2019. In any event, no other incidents were reported by the applicants since July 23, 2019. The RAD concluded as follows in paragraph 20 of its decision:

> Lastly, considering all the evidence, the RAD is of the opinion that the appellants did not demonstrate, on a balance of probabilities,

> that the members of this cartel had the interest or motivation to go after them, should they return to the country, to the city of Mérida.

[19] The second part of an IFA analysis requires asking ourselves whether it would be objectively reasonable for a refugee claimant to move there. The burden is on the applicants to demonstrate that the relocation would be unreasonable. The RAD concluded that although Mérida was not free from all forms of violence, it was nonetheless one of the most peaceful cities in the country. People there speak Spanish, there is an airport there, and the two principal applicants are educated and considered to have [TRANSLATION] "considerable" work experience. Therefore, it was not demonstrated that it would be objectively unreasonable for them to relocate to Mérida.

III. Argument and analysis

[20] All parties agreed that reasonableness is the standard for judicial review (for example, *Alvarez Valdez v Canada (Immigration, Refugees and Citizenship)*, 2021 FC 796 [*Alvarez Valdez*] at para 14). The applicants are questioning the reasonableness of the decision in two respects for the first part of the analysis framework. Was it unreasonable to find that the extortionists did not have the means or the capacity to locate the applicants in their internal flight alternative? Furthermore, was it unreasonable to find that the agents of persecution would have neither the interest nor the motivation to locate them?

[21] It is useful to remember the well-known analysis framework that applies where it is suggested that there is an IFA. The decision in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706, [*Rasaratnam*] remains the leading case in which the Federal

Court of Appeal sets out the content of the first part of the test to be conducted: “The Board must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which it finds an IFA exists” (p. 710). The second part was taken from the submissions the applicant made in this case. It states that “the conditions in that part of the country must be such that it would not be unreasonable in all the circumstances for him to seek refuge there” (p. 709). As for the second part, it sets “a very high threshold for the unreasonableness test.” *(Ranganathan v. Canada (Minister of Citizenship and Immigration) (CA)*, [2001] 2 FC 164 at para 15). In fact, the Federal Court of Appeal’s decision in *Thirunavukkarasu v Canada (Minister of Employment and Immigration) (CA)*, [1994] 1 FC 589 is authoritative. As Linden J. stated for the Court on page 599:

> **15.** In conclusion, it is not a matter of a claimant’s convenience or the attractiveness of the IFA, but whether one should be expected to make do in that location, before travelling half-way around the world to seek a safe haven, in another country. Thus, the objective standard of reasonableness which I have suggested for an IFA is the one that best conforms to the definition of Convention refugee. That definition requires claimants to be unable or unwilling by reason of fear of persecution to claim the protection of their home country in any part of that country. The prerequisites of that definition can only be met if it is not reasonable for the claimant to seek and obtain safety from persecution elsewhere in the country.

[22] Given such a high threshold, it is perhaps not surprising that applicants in many cases challenge adverse decisions based on the safety component of the test. This is the case here, given that the applicants are challenging two aspects of the safety component.

[23] First, with respect to the ability to locate the applicants, they submitted that the decision was unreasonable in that the RAD failed to consider the contradictory evidence on the safety situation in the Yucatán area. In support of their argument, the applicants looked for excerpts

from the NDP on Mexico, on which they based their argument. It is very limited. Although the RAD considered the state of Chiapas to be insufficiently safe because the CJNG reportedly operated there, the applicants asserted that the same logic should apply to Yucatán. In addition, the applicants claimed that the CJNG could forge alliances in Yucatán, enabling them to locate the applicants there.

[24] In the end, the applicants were speculating when they alleged that [TRANSLATION] "the fact that CJNG does not conduct operations from Yucatán does not mean that they do not commit crimes in these states and that living in Mérida precludes the possibility that the applicant may be harmed" (memorandum of fact and law at para 16). However, the burden on a refugee claimant is not to speculate, but rather "to show, on a balance of probabilities, that there is a serious possibility of persecution throughout the country, including the area which is alleged to afford an IFA" (*Thirunavukkarasu*, p. 594). This argument is based exclusively on a reference made in the NDP concerning the possibility of an alliance between cartels. The applicants' speculations were based on that reference.

[25] In the same vein, the applicants found in the NDP that databanks could be accessible. This means that the applicants speculated that the extortionists could find them. The argument is based on the NDP. I can only refer to paragraph 15 of *Trevino Zavala v Canada (Citizenship and Immigration)*, 2009 FC 370 as to the merits of the proposal:

> [15] In this proceeding, the vague allegation that the principal applicant could be found anywhere in Mexico through computerized databanks seems without merit and is not corroborated by the evidence in the record, which clearly shows that the principal applicant's family lived in Tampico without any problem for several months and that the principal applicant himself

> lived there for a few weeks before his departure for Canada. The assumption that it is only a matter of time before the Principal applicant is found in Mexico seems speculative under the circumstances.

A more fundamental problem seems to undermine this kind of argument: The applicants never submitted those arguments to the RAD. The RAD had never addressed the argument because it had not been raised.

[26] If the applicants believed that the NDP would lend weight to their case, they should have raised the issues with the RAD at the time of their appeal, as the burden of proof was on them. However, I have read the written submissions provided by the applicants to the RAD in response to the request to provide arguments regarding the IFA in Mérida, Yucatán. The applicants merely challenged the change of the IFA from the state of Chiapas to the state of Yucatán. It is even stated in the submissions that [TRANSLATION] "the Refugee Appeal Division should maintain deference to the IFA assessment that was raised by the panel" (written submissions, paragraph 5; the "panel" in paragraph 5 refers to the RPD). This argument is without merit. It is contrary to the decision in *Huruglica v Canada (Citizenship and Immigration)*, 2016 FCA 93, [2016] 4 FCR 1457, where the standard of review of RPD decisions was found to be that of correctness, where no deference is required. The position taken by the applicants was that [TRANSLATION] "the RAD should not take into consideration the city in question" (written submissions at paragraph 6). That proposal is also without merit. Nowhere is there an argument about the city of Mérida, nor is there any argument in this regard from the NDP.

[27] We are far from the actual and concrete evidence required to establish the conditions that would endanger the applicants' lives or safety.

[28] The applicants repeatedly claimed that the RAD ignored the documentary evidence that would contradict the decision it intended to make. This raises a number of difficulties. The first, and most fundamental, is that if this evidence was never submitted, the applicants did not meet their burden of proving their claim. There is no shift of the burden to the administrative decision-maker. However, the evidence the applicants would like to be considered was never submitted. As is well known, the role of the reviewing court is not to consider the merits of the administrative tribunal's decision, but rather to review its legality *(Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65; *Bernard v Canada (Revenue Agency)*, 2015 FCA 263). It is what was before the RAD that can be subject to judicial review, not what has not been brought before the administrative tribunal and that is wished to be raised later before the reviewing court. The burden of demonstrating that the IFA was unreasonable is on the applicant before the appropriate body (the administrative tribunal), not before the reviewing court.

[29] The second difficulty is that it is far from clear what the conflicting evidence the applicants referred to consisted of; the possibility of an alliance in Yucatán or possible access to databanks allows only for speculation. In fact, what the applicants found in the NDP was not contradictory evidence. Rather, it is the source of a completely new argument that the applicants are seeking to make before the Court and which is mere speculation. I fail to see how an administrative tribunal should seek out and develop arguments in the place of the applicant. We

are not considering contradictory evidence. Rather, we are looking for arguments that were not before the RAD but which the applicants now want to assert was a fault by the RAD for not developing and considering such arguments. It is not up to the RAD to rely on the most recent NDP, but rather to think of arguments that have not been made by an applicant. Ultimately, this would result in the burden of evidence now being shifted to the administrative decision-maker.

[30] This leads to the third difficulty, the lack of real and concrete evidence linking the documentary evidence to the applicants' personal situation. A very similar situation recently occurred in *Alvarez Valdez* (above). Paragraphs 21 and 22 are worth reproducing as follows:

> [21] The RAD's conclusion that the CJNG does not have "any meaningful presence in either Yucatan state or Merida" was adequately supported by the documentary evidence it considered. The Applicants presented no personalized evidence to support their contention that the CJNG has the ongoing means or motivation to pursue them in Yucatan State. The Principal applicant's wife and daughter were not apprehended by the CJNG while they lived in Mexico for more than a year after he and his brother fled to Canada. The Principal applicant's father continues to live in Mexico, and has not reported any interactions with the CJNG.
>
> [22] The Applicants had a responsibility to establish a link between the general documentary evidence and their specific situation, which they failed to do *(Iskandar v Canada (Citizenship and Immigration)*, 2019 FC 1372 at para 27, citing *Ayikeze v Canada (Citizenship and Immigration)*, 2012 FC 1395 at para 22). Subjective fear is not enough to establish persecution or a risk of harm *(Liang v Canada (Citizenship and Immigration)*, 2020 FC 116 at para 41).

This disposes of the [TRANSLATION] "means and ability to find the applicants" component, which allegedly suffered from an error in law. However, if the applicants had demonstrated capability and means, which they did not, it would still have been necessary to demonstrate motivation to

find the applicants. In my opinion, the applicants were no more successful with respect to the motivation required.

[31] Once again, the applicants were speculating. The extortionists would have more than a financial interest: The applicants defied the cartel. Returning to the NDP, the applicants found an excerpt indicating that a significant debt or personal revenge could motivate the search for the applicants. I asked at the hearing how much 100,000 pesos was worth in Canadian currency. The answer is about CDN $6,000.

[32] This allegation of any motivation to search for the applicants was also not made before the RAD. References to excerpts from the NDP were not submitted to the RAD. In any case, we are delving into speculation without finding any real and concrete evidence of anything. If we are to believe the allegations, the Principal applicant was reportedly targeted for 23 days in June 2019. Since then, nothing. In *Leon v Canada (Citizenship and Immigration)*, 2020 FC 428, the Court noted the following:

> [25] I do not accept Mr. Gonzalez Leon's argument that the finding that these criminal groups have no desire to locate him is inconsistent with the fact that he was targeted by them in 2017. The fact that he was threatened in certain circumstances does not establish that he will be pursued throughout all of Mexico in the future. As the RAD noted, the evidence does not demonstrate that Mr. Gonzalez Leon is a particular [TRANSLATION] "enemy" of these groups who would be the subject of ongoing interest after his departure from the region. His arguments that he is still a target because the criminal groups are actively seeking funds, that he had tried to report them to the authorities and that members of the CJNG may believe that he chose to cooperate with Los Zetas are mere speculation unsupported by evidence.

That viewpoint applies perfectly to this particular matter.

[33] There is no evidence of any motivation to find the applicants. There appears to have been extortion-related activities in June 2019. We do not know who attempted the break-in on July 23, 2019, as noted by the RAD in paragraph 19 of its decision. Therefore, until the departure of the applicants on September 15, 2019, apart from speculation, the Court has no evidence.

[34] The applicants have not demonstrated that the agents of persecution would have any motivation to go after the applicants. This was their burden before the RAD. On judicial review, it becomes impossible to demonstrate an unreasonable decision when the RAD was not even asked to make such a decision. The applicants would have had to provide their arguments on Mérida as an IFA to the RAD for a decision to have been made.

[35] As a result, the applicants were unable to satisfy the Court in terms of either the means and capacity, or the motivation, of the extortionists to go after them upon their return to Mexico. The lack of evidence is fatal. The application for judicial review is therefore dismissed.

[36] It is agreed that the parties have no question to certify.

JUDGMENT in IMM-1146-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question to certify.

"Yvan Roy"
Judge

Certified true translation
Sebastian Desbarats

FEDERAL COURT

SOLICITORS OF RECORD

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