Federal Court Cour fédérale

Date: 20220506

Docket: IMM-2481-21

Citation: 2022 FC 665

Ottawa, Ontario, May 6, 2022

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

JOSE ANTONIO AISPURO SOTO
GRACIELA GARAY MARTINEZ
JASON AISPURO GARAY
ELVIN SAM AISPURO GARAY

Applicants

and

MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are a family from Mexico: mother, father ("adult Applicants") and at the time of the underlying decision, two minor children ("minor Applicants"). A third child, the

youngest son, is not included in this application for judicial review because his refugee claim was accepted by the Refugee Appeal Division [RAD].

[2] The claims of the two minor Applicants were rejected by the Refugee Protection Division [RPD] because they also have citizenship in the United States and had not established their claim against the United States. This determination by the RPD was not challenged at the RAD and accordingly, also not raised on this application for judicial review.

[3] The Applicants' claim, along with their youngest son, who does not have citizenship in the United States, was based upon their fear of the Sinaloa cartel, who had threatened and attacked the adult male Applicant. The RPD rejected this claim on the basis that the Applicants had not demonstrated that the threats and attack were personalized and connected, and that the family had an internal flight alternative ("IFA"). The RAD overturned the RPD's finding with respect to the nature of the risk faced by the Applicants and determined that the risk was a personal one and the incidents were connected. The RAD, however, confirmed the RPD's determination that there was an IFA in Campeche and Merida for the adult Applicants. The RAD found the suggested IFAs unreasonable for the youngest son, who has Down Syndrome, because of his increased susceptibility to severe consequences from COVID-19.

[4] The Applicants make two arguments on judicial review. First, they argue that the RAD erred in not accepting news articles that pre-dated the RPD decision as new evidence. Second, they argue that the RAD's determination on both prongs of the IFA analysis was unreasonable.

[5] I do not agree that the RAD erred in not accepting the new evidence that pre-dated the RPD decision because no arguments were made to the RAD as to why these documents were either not reasonably available or could not have been reasonably expected to have been available at that time.

[6] The determinative issue is the RAD's IFA analysis, and in particular, the second prong — the reasonableness of the proposed IFA locations. I find it unreasonable that the RAD did not consider the separation of the adult Applicants from their youngest son. The RAD determined that the proposed IFAs were unduly harsh, or unreasonable, for the adult Applicants' youngest son because of his medical condition but then failed to consider how this finding impacted their analysis of the second prong of the IFA test for the youngest son's parents, the adult Applicants in this judicial review.

[7] For the reasons set out below, I grant this judicial review.

II. Background Facts

[8] The Applicants are citizens of Mexico. In March 2018, the adult male Applicant and his cousin witnessed members of the Sinaloa cartel attempt to murder someone near the family's home in Culiacan, Mexico. The adult male Applicant did not report what he had witnessed to the police due to his fear of retribution by the cartel.

[9] A few months later, in July 2018, when the adult male Applicant was driving to work, a man on a motorcycle with the markings of the Sinaloa cartel approached him. He pointed a gun

at his head and threatened to kill him. He did not stop his vehicle and continued driving to a hotel where he saw a police officer, who then pursued the man.

[10] A few weeks after this incident, when the adult male Applicant was driving to work, he was stopped by individuals driving a truck bearing the markings of the Sinaloa cartel. The adult male Applicant was then beaten, a gun was put to his head and he was asked if he had seen anything. The adult male Applicant understood that the members of the cartel were referring to the shooting he had witnessed in March 2018.

[11] In fear of his safety, the adult male Applicant relocated to Queretaro for about 15 days but was unable to find work, so he returned to Culiacan. He stayed at home and delegated work to his employees out of fear of being stopped by the cartel again.

[12] Approximately a year later, the Applicants left Mexico, along with the adult Applicants' youngest son, and made a claim for refugee protection.

[13] Their claim before the RPD was heard on March 5, 2020. In a decision dated March 13, 2020, the RPD refused the Applicants' claim on the basis that they had a viable IFA in Campeche or Merida. The Applicants were not represented by counsel at the RAD.

[14] The RAD asked for further submissions from the Applicants about COVID-19 and the impact on their claim. The RAD refused the Applicants' claim and accepted the youngest son's claim on March 27, 2021.

III. Issues and Standard of Review

[15] There are two issues raised in this judicial review: i) the RAD's decision to not admit evidence that had pre-dated the RPD decision; and ii) the RAD's IFA analysis.

[16] In reviewing the decision of the Officer, I will apply a reasonableness standard of review. The Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] confirmed that reasonableness is the presumptive standard of review when reviewing administrative decisions on their merits. This case raises no issue that would justify a departure from that presumption.

IV. Analysis

A. *New evidence*

[17] I do not see any basis to interfere with the RAD's determination on the admission of new evidence. The RAD accepted the new evidence that post-dated the rejection of the refugee claim, but refused to admit evidence that pre-dated it where no explanation was provided as to either why the evidence was not reasonably available or could not have been reasonably expected to be available at the time of the RPD decision.

[18] Section 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] limits the admission of new evidence on appeal to the following three circumstances where the evidence: i) arose after the rejection of the claim; ii) was not reasonably available at the time of

the rejection of the claim; or iii) could not have reasonably been expected to be presented at the time of the rejection of the claim.

[19] The criteria applicable to the admission of evidence found at common law, such as relevance and credibility (*Canada (Minister of Citizenship and Immigration) v Singh*, 2016 FCA 96 at paras 38-39, citing to *Raza v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385 at paras 13-15), are additional requirements over and above the statutory requirements. There is no basis for the Applicants' argument that these additional requirements need to be weighed against the statutory ones. If the new evidence does not meet the statutory requirements for admission in s 110(4), there is no need to consider the further constraints at common law.

B. *Second prong of IFA analysis*

[20] The determinative issue for the RAD was the availability of an IFA. I find it unreasonable for the RAD to have considered the adult Applicants' claim separately from their youngest son at the second stage of the IFA assessment. Moreover, having considered their claims separately at this stage, the RAD had to have at least considered whether it was objectively reasonable for the parents to live separately from their youngest son in the proposed locations.

[21] The RAD agreed with the RPD that members of the Sinaloa cartel were not motivated or interested to continue to seek out the Applicants if they were to relocate to Campeche or Merida. Given that the basis of the adult Applicants' risk and their youngest son's risk were based on the same facts, this assessment was performed together. Their claims were linked. The issue of the

youngest son's medical condition was not a relevant factor in evaluating the adult Applicants' risk.

[22] It was only at the second prong of the IFA test where the RAD considered the youngest son's circumstances apart from his parents. The second stage of the IFA test is a flexible assessment, taking into account the particular circumstances of a claimant in the proposed location (*Haastrup v Canada (Minister of Citizenship and Immigration)*, 2018 FC 711 at para 26; *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (CA)). The RAD determined that it was unreasonable for the youngest son with Down Syndrome to live in the proposed IFAs, but not unreasonable for his parents. In order to engage in this exercise, the RAD had to presuppose that the adult Applicants would be separated from their minor son. I find this to be unreasonable.

[23] The Respondent has directed me to a number of cases that discuss how the principle of family unity is not applicable to an assessment of an individual's claim for protection under ss 96 or 97(1) of *IRPA* (*Weche v Canada (Minister of Citizenship and Immigration)*, 2021 FC 649 at paras 42-44; *Ly v Canada (Minister of Citizenship and Immigration)*, 2021 FC 379 at paras 13-15). I accept this point. The issue in this case is different. It does not concern importing the concepts of family unity or the best interests of the child test into the refugee definition.

[24] The adult Applicants' claims and that of their youngest son were inextricably linked. He faced the same risk as his parents in Mexico because of the cartel. The only site where his disability was raised was at the second stage of the IFA analysis in relation to the objective

reasonability of the proposed IFAs. The reasonableness of the IFA—the second stage of the IFA analysis — is a separate consideration from the question of risk. The youngest son's disability was not a basis to find that he faced a s 96 or s 97(1) risk in Mexico; his disability was considered with respect to the reasonability of the IFA locations being proposed for his family.

[25] In any case, even supposing it was appropriate for the RAD to consider the second prong of the IFA test separately for the youngest son from his parents, the IFA assessment for the adult Applicants remains flawed. The RAD's assessment of the objective reasonability of the proposed IFA locations for the adult Applicants failed to consider the impact of separating the adult Applicants from their dependent son with Down Syndrome. The separation of parents from their dependent child is a factor that had to be considered in assessing whether the proposed IFA was objectively unreasonable (*Ramachanthran v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 673 at paras 77-81 [*Ramachanthran*]; *Sooriyakumaran v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1402 at paras 7-9 [*Sooriyakumaran*]). The RAD did not consider whether this forced separation from their son with a disability would jeopardize the life and safety of the adult Applicants (*Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 (CA) at para 15).

[26] The Minister proposed the following question for certification:

> On an assessment of section 96 and/or section 97 refugee protection by the Refugee Protection Division (RPD) or the Refugee Appeal Division (RAD) under IRPA, are the RPD/RAD limited to considering the principle of family unity solely in situations where the claims of family members are inextricably linked?

[27] I do not find that the proposed question is determinative of the issue before this Court (*Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22 at para 46). As noted above, the claims were already inextricably linked in the RPD's and RAD's assessment of the claim for protection, but only separated in considering whether or not the proposed IFA locations were objectively reasonable for the family. This Court has already found that in considering whether an IFA location is objectively unreasonable, separation of family is a relevant consideration (*Ramachanthran* at paras 77-81; *Sooriyakumaran* at paras 7-9; *Pajarillo v Canada (Minister of Citizenship and Immigration)*, 2019 FC 1654 at paras 31-32). The RAD did not turn their mind to this issue in any way despite their finding that the IFAs were not objectively reasonable for the adult Applicants' youngest son.

[28] Based on the reasons set out above, I find that the RAD's IFA analysis was unreasonable. The application for judicial review is allowed.

JUDGMENT IN IMM-2481-21

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;

2. The matter is sent back to the RAD for redetermination by a different Member; and

3. No question of general importance is not certified.

"Lobat Sadrehashemi"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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