Federal Court Cour fédérale

Date: 20230310

Docket: IMM-1549-22

Citation: 2023 FC 318

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 10, 2023

PRESENT: The Honourable Madam Justice St-Louis

BETWEEN:

JOSE JAVIER NATAREN LEIVA
ANGEL JAVIER NATAREN ORELLANA
ERIKA ELICENA ORELLANA DOMINGUEZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Jose Javier Nataren Leiva, his spouse, Erika Elicena Orellana Dominguez, and their minor son, all citizens of Honduras, are applying for judicial

review of the Refugee Appeal Division's [RAD's] decision dismissing their appeal and confirming the determination of the Refugee Protection Division [RPD].

[2] In short, the RAD determined that the RPD was right to find that the applicants were neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[3] The RPD and the RAD both found that the refugee protection claim could not be reviewed under section 96 of IRPA and that credibility was a determinative factor. Specifically, the RAD reviewed the issues related to the arguments raised by the applicants before it, namely: (1) procedural fairness and the principle of natural justice in the finding that the applicants were not persecuted based on their political opinion under section 96 of IRPA; (2) the assessment of the documents submitted as evidence; and (3) the speculations raised to make findings as to the main applicant's credibility.

[4] Before the Court, the applicants argue that the RAD (1) violated the principle of natural justice and procedural fairness; (2) erred in its finding that this case has no nexus with one of the five Convention grounds within the meaning of section 96 of IRPA; (3) erred in the analysis of the evidence entered in the record; (4) erred in its assessment of credibility; and (5) erred in its finding that the applicants behaved in a manner that was inconsistent with their subjective fears.

[5] However, and as discussed during the hearing, the applicants' arguments can instead be grouped and articulated thus: that the decision is unreasonable because the RAD erred (1) in refusing to examine the refugee protection claim under section 96 of IRPA; and (2) in its assessment of credibility.

[6] Before the Court, the applicants also state that the RAD should have examined the prospective risk despite the fact that they themselves had not included it in their grounds for appeal before the RAD. In this regard, the applicants argue that the RAD must review the entire refugee protection claim *de novo* without being constrained by the grounds raised by the appellants before it.

[7] From the outset, I do not agree with the applicants' position on this last item. First, the Court has effectively recognized that the RAD must conduct its own analysis of the file in order to decide whether the RPD has committed the errors alleged by an appellant. However, the Court has also stated that this does not mean that it is required to start the analysis from scratch, since an appeal to the RAD is not a true *de novo* proceeding (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at paras 79, 98 and 103; *Bautista Montero v Canada (Citizenship and Immigration)*, 2021 FC 1432 at para 15). Next, the Court has also recognized that findings made by the RPD that were not challenged by the applicants on appeal may not form the basis of judicial review of the RAD's decision (*Akintola v Canada (Minister of Citizenship and Immigration)*, 2020 FC 971 at para 21; *Abdulmaula v Canada (Citizenship and Immigration)*, 2017 FC 14 at paras 13–16). The applicants did not raise arguments involving the prospective risk before the RAD; consequently, the RAD was not required to review it in its analysis and the Court cannot consider it as part of this judicial review.

[8] The applicants are requesting that the Court allow their application, set aside the RAD's decision and return the matter for redetermination.

[9] After reading and hearing the parties' arguments, and after considering the RAD's reasons, the appeal case presented to it and the applicable law, I find nothing that warrants the Court's intervention. The applicants have not established that the RAD's decision is unreasonable.

II. Background

[10] On September 26, 2017, the main applicant, who was selected and hired by a Canadian company, received his Canadian visitor visa as a worker and, on October 19, 2017, he arrived in Canada and received his work permit.

[11] On March 6, 2018, the main applicant claimed refugee protection in Canada. At the time, he alleged that he feared returning to his country because his life was in danger from Mara members, who demanded that he keep quiet after witnessing a theft. In fact, in his written account, the main applicant states that, on June 15, 2015, four unidentified and armed young men committed an armed robbery at the business where he worked as a security guard. He adds that these men told him to throw down his weapon and lie on the ground and, before leaving, informed him that they would be watching him so that he did not talk. Two weeks later, two of the four unidentified men appeared at his house and stayed there for two minutes. The next day, the applicant and his spouse, who was pregnant at the time, moved to another neighbourhood 45 minutes away to escape these men. The main applicant alleges that on July 15, 2015, he was targeted by a shooter when he was leaving his neighbourhood, which motivated him to move again to another neighbourhood and to quit his job on August 7, 2015. On several occasions,

Mara members in the neighbourhood to which he had moved reportedly stopped him and pointed a gun at his temple to ask him where he came from.

[12] On July 11, 2019, the female applicant and her minor son received American visas for multiple valid entries for 10 years, while around the same period, their two successive applications for Canadian visitor visas were denied. On October 25, 2019, the female applicant and her minor son left Honduras for the United States and on December 13, 2019, they arrived in Canada and claimed refugee protection. In her written account, the female applicant highlights that in December 2017, she was accosted by a man who questioned her about her husband and she fled. In June 2018, two armed men appeared at the female applicant's residence stating that they were still looking for the male applicant and that he had to continue keeping quiet. The female applicant stated that following that encounter, she moved to her mother's residence in the same town. She added that in January 2019, gang members started extorting 500 lempiras per week from her, since her spouse was abroad, and that to date, the applicants are continuing to pay this bribe through the female applicant's mother.

[13] On September 1, 2021, the RPD found that the applicants were not Convention refugees as described in section 96 of IRPA or persons in need of protection as described in subsection 97(1) of IRPA.

[14] The RPD found first that (1) on a balance of probabilities, the applicants' actions did not show a rejection of the Maras' ideology and are not political; and (2) victims of crime do not meet the criteria to establish the existence of a social group under section 96 of IRPA (*Canada*

(PG) v Ward, 1990 2 FC 667). The RPD found that the applicants were not covered by one of the five Convention grounds and that section 96 of IRPA could not be applied.

[15] The RPD therefore analyzed the claim under subsection 97(1) of IRPA, considered that the determinative issue of the refugee protection claim was credibility and determined that the main applicant was not credible regarding the key aspects of his claim. The RPD took particular note of (1) the inconsistent testimony as to the motivation of the agents of harm; (2) behaviour that was inconsistent with that of a person who alleges that they are subjected to risks pursuant to section 97; and (3) the vague testimony to prove, on a balance of probabilities, the identity of the agents of harm or at least their association with the Maras.

[16] The RPD confirmed that it considered the documentary evidence submitted by the applicants (evidence of the male applicant's employment in Honduras, evidence of mistreatment by the Canadian employer and evidence to corroborate the *cuota* paid by the female applicant's mother) but did not give them any weight and found that they did not overcome the negative findings of credibility.

[17] The applicants appealed this decision by the RPD. In opposition to the RPD's decision, they raised the same arguments as those that they raise before the Court in opposition to the RAD decision. These arguments are that the RPD (1) violated the principle of natural justice and procedural fairness; (2) erred in its finding that this case has no nexus with one of the five Convention grounds within the meaning of section 96 of IRPA, since the male applicant would have had to be recognized for an imputed political opinion, citing the document *UNHCR*

Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras from Tab 1.5 of the National Documentation Package for Honduras; (3) erred in its analysis of the evidence entered in the record; (4) erred in its assessment of credibility; and (5) erred in its finding that the applicants behaved in a manner that was inconsistent with their subjective fears.

[18] In particular, the applicants argue that being threatened to keep quiet and extorted by a criminal gang is virtually the same as having an "imputed political opinion" and that they qualify for a claim under section 96 of IRPA.

[19] On April 27, 2022, the RAD dismissed the applicants' appeal. In connection with the applicant's refugee protection claim under section 96 of IRPA, based on imputed political opinion, the RAD noted the applicants' arguments and reviewed the excerpt from Tab 1.5 of the National Documentation Package for Honduras (April 2021) to which the applicants referred.

[20] The RAD determined that the excerpt specifies that the position stated in relation to imputed political opinion depends on the circumstances of the case and that the RPD had rightly noted that the applicants had done nothing to suggest that they disputed the gangs' demands. The RAD also noted that this is not a case of individual witnesses of criminal acts involving state actors and it found that the RPD's decision regarding the absence of persecution due to political opinion was correct.

[21] The RAD then reviewed the RPD's findings about the documents submitted as evidence and found that the RPD had erred in its assessment of the evidence regarding employment and its assessment of local protocols, but not of any other items.

[22] The RAD analyzed these documents taking certain events experienced by the applicants as proven. For example, the RAD stated that, on a balance of probabilities: (1) the applicants were victims of crime in Honduras; (2) the main applicant reportedly witnessed a theft at his workplace in 2015 committed by unknown men; (3) the members of a gang allegedly tried to intimidate him at his home two weeks later; (4) he was reportedly targeted by shots from an opposing gang after moving in 2015; and (5) the female applicant and her mother had bribes extorted from them by the gang that controlled their neighbourhood as of 2019.

[23] However, the RAD noted that there was no need to find that all these events were linked to the first. It stated that the events occurred in locations that were distant from one another and that they were spread out over time. The RAD therefore found that the events experienced by the applicants were, on a balance of probabilities, linked to crime in Honduras, and not linked to each other.

[24] Lastly, the RAD found that the RPD had not erred by finding that the applicants' behaviour was inconsistent with their alleged fears. In particular, it highlighted the delay in leaving the country for both the main applicant and his spouse and the explanations that were presented.

III. Decision

A. *Standard of review*

[25] The applicants raise two arguments related to procedural fairness and natural justice. At the hearing, they confirmed that one of these arguments was not within the Court's jurisdiction and abandoned it immediately. The other argument is related to the RAD's analysis of section 96 of IRPA, and I find that this is not an issue of procedural fairness or natural justice.

[26] Thus, all the issues raised by the applicants must be reviewed in light of the reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]). Under this standard, the Court must examine the reasons given by the administrative decision maker and determine whether the decision is based on "an internally coherent and rational chain of analysis" and is "justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). A court must consider "the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified" (*Vavilov* at para 15). This Court must therefore determine "whether the decision bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at para 99, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47, 74; and *Catalyst Paper Corp v North Cowichan (District)*, 2012 SCC 2 at para 13).

[27] With respect to the RAD's assessment of credibility, I note the remarks by my colleague Justice Gascon in *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 15:

> This deferential approach is particularly required when, as in this case, the impugned findings relate to the credibility and plausibility

> of a refugee claimant's story. It is well established that RPD's conclusions in that regard command a high degree of judicial deference upon judicial review, considering the role of trier of fact conferred to the administrative tribunal (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 [*Khosa*] at paras 59, 89; *Lawal v Canada (Citizenship and Immigration)*, 2015 FC 155 at para 9). Credibility findings go to the very core of the RPD's expertise and have indeed been described as the "heartland" of the RPD's jurisdiction (*Siad v Canada (Secretary of State)*, 1996 CanLII 4099 (FCA), [1997] 1 FC 608 (FCA) at para 24; *Gomez Florez* at para 19; *Soorasingam* at para 16; *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 [*Lubana*] at paras 7–8). The RPD is better placed to assess the credibility of a refugee claimant as the panel members see the witness at the hearing, observe the witness's demeanour and hear his or her testimony. The panel members thus have the opportunity and ability to assess the witness in respect of frankness, readiness to answer, coherence and consistency of oral testimony before them (*Navaratnam v Canada (Citizenship and Immigration)*, 2011 FC 856 at para 23). In addition, the RPD benefits from the specialized knowledge of its members to assess evidence relating to facts stemming from their field of expertise (*El-Khatib v Canada (Citizenship and Immigration)*, 2016 FC 471 at para 6).

[28] It is therefore in this light that the Court must review the RAD's decision.

B. *Section 96 of IRPA: imputed political opinion*

[29] Relying on an excerpt from Tab 1.5 of the National Documentation Package, the applicants submit that given the objective evidence, the circumstances as they are in this case must be analyzed under section 96 of IRPA. They first submit that the applicants' circumstances allow for imputed political opinion to be considered, as well as membership in a social group.

[30] However, and as the Minister points out, the applicants have the onus of establishing a nexus between their situation and a political opinion, which was not done in this case. They must

also demonstrate, using credible evidence, that their fears have a nexus with a Convention ground (*Tobias Gomez v Canada (Citizenship and Immigration)*, 2011 FC 1093 at para 25; *Castaneda v Canada (Citizenship and Immigration)*, 2011 FC 1012 at para 14).

[31] However, according to the very excerpt from Tab 1.5 cited by the applicants, challenging and resisting recruitment by a gang or refusing to pay the requested bribe money, depending on the circumstances, may be seen as an imputed political opinion. Yet in this case, the evidence in the record reveals that the applicants did not oppose the requests to keep quiet and pay, and that they continue to do so. Furthermore, the applicants did not identify any evidence that would indicate that the gang members are state actors.

[32] Thus, according to the documentary evidence and the facts in the record, everything indicates that the RAD made a reasonable finding that section 96 of IRPA did not apply to the applicants' situation.

C. *Credibility*

[33] As the Minister points out, the applicants, in their written account, reiterate the allegations of risk and the conditions in Honduras. What they are asking is that the Court reweigh the evidence to reach a different conclusion regarding the RAD's finding that there is no nexus between the events in 2015 and those in 2019, and with respect to the applicants' behaviour, which was deemed to be inconsistent with a subjective fear. In fact, the applicants do not identify the mistakes that were allegedly committed by the RAD, but instead express their disagreement with its findings.

[34] However, on judicial review, the role of the Court is not to weigh the evidence or replace the RAD's finding with another that it prefers (*Latif v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 104 at para 55; *Vavilov* at para 125; *Oladihinde v Canada (Citizenship and Immigration)*, 2019 FC 1246 at para 16). Instead, the Court must ensure that all the evidence presented is reasonably considered and it must determine whether the RAD's finding is reasonable in relation to the facts and law that constrain the decision maker (*Vavilov* at para 85).

[35] Given the circumstances and the evidence in the record, I am not satisfied that the RAD's findings in this matter are unreasonable. The RAD's reasons for each of the factors raised by the applicants reveal a rational chain of analysis and do not reveal any fatal flaws in its overarching logic (*Vavilov* at paras 102–103). The finding as to the imputed political opinion is supported by objective documentation, given that the evidence reveals that the applicants did not oppose the gangs' requests. The evidence confirms that the events described by the applicants effectively occurred in locations that are distant from one another and that they were spread out over time; it is reasonable to infer that they are not linked and that they are instead connected to crime. Lastly, the RAD could also draw inferences as to the behaviour of the applicants, who were not quick to leave the country, and the explanations that they provided. The applicants may disagree with the RAD's findings, but that does not warrant intervention by the Court.

[36] It must be repeated that it is not for this court to reassess or reweigh the evidence in order to make findings that would be favourable to them (*Vavilov* at para 125; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59). The RAD's findings are reasonable and justified, and there is no reason for the Court to intervene.

JUDGMENT in IMM 1549-22

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question is certified.

3. No costs are awarded.

"Martine St-Louis"
Judge

Certified true translation
Francie Gow

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1549-22
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