

Federal Court



Cour fédérale

Date: 20230724

Docket: IMM-2194-22

Citation: 2023 FC 1001

Ottawa, Ontario, July 24, 2023

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

**APOLONIO DZIB TUZ
BRITTANY NAYELI DZIB FIGUEROA
HILARY ESTEFANNY DZIB FIGUEROA
NAYELI FIGUEROA CHAVEZ**

Applicants

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

JUDGMENT AND REASONS

[1] This is the judicial review of the decision of the Refugee Appeal Division [RAD] affirming the determination of the Refugee Protection Division [RPD] finding that the Applicants are not Convention Refugees nor persons in need of protection, pursuant to s 96 and s 97(1), respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

Background

[2] The Applicants are a family, Apolonio Dzib Tuz [Principal Applicant], his spouse [Spouse] and their two minor children [Minor Applicants]. They are all citizens of Mexico and the Principal Applicant is of Mayan descent.

[3] The Applicants lived in Cancun, Mexico, where the Principal Applicant worked as an independent contractor in construction. They claim that on September 7, 2018, the Principal Applicant received a call from a man who identified himself as a member of the Los Zetas cartel [Los Zetas]. That man demanded that the Principal Applicant pay him a monthly fee, meaning extortion money. The Principal Applicant did not take this phone call seriously, as he thought it was a scam. On September 11, 2018, while the Principal Applicant was driving home from work with his brother-in-law, they realized they were being followed by a motorcycle. They pulled over and hid in the bush where they overheard one of the men tell the other to “go look for them and kill them”.

[4] The Principal Applicant and his Spouse went to stay with the Spouse’s grandmother, who lives in an isolated part of Cancun, before fleeing to Canada on September 14, 2018. The Minor Applicants arrived in Canada eight months later, on May 18, 2019. In August 2019, the Applicants initiated their refugee claim on the basis that they feared that the Los Zetas would kill them because they tried to escape.

[5] On October 25, 2021, the Refugee Protection Division [RPD] found that the Applicants were not Convention Refugees as they did not have a well-founded fear of persecution related to a Convention ground, such as ethnicity. Nor were they persons in need of protection as they had an internal flight alternative [IFA] within Mexico. The Applicants appealed to the RAD, and on March 1, 2022, the RAD confirmed the decision of the RPD.

[6] This is the judicial review of the RAD's decision.

Decision Under Review

[7] The RAD found that the Applicants' fear of persecution from the Los Zetas does not have a nexus with the one of the Convention grounds under s 96 of the *IRPA*. Nor had the Applicants established that they fear persecution based on their ethnicity or for any other Convention reason.

[8] The RAD also found, based on the objective documentary evidence and on a balance of probabilities, that the Los Zetas do not have a presence in the state of Durango, the proposed IFA. The RAD also found there was insufficient evidence to establish that the Los Zetas have any influence in Durango through its alliances with other drug cartels, specifically as it relates to the tracking or locating of specific individuals.

[9] With respect to the first prong of the IFA test, whether there is a serious possibility of persecution or likely risk of s 97(1) harm in the city of Durango, the IFA, the RAD agreed with the Applicants that the RPD erred in finding that the Los Zetas do not have the means to locate them there. However, the RAD agreed with the RPD that the Los Zetas do not have the

motivation to locate the Applicants in the IFA location. As to the second prong of the IFA analysis, the RAD found that it would be objectively reasonable for the Applicants to relocate to the city of Durango. With respect to the concern that the Principal Applicant and the Minor Applicants would face discrimination because of their Mayan ethnicity, the RAD found that there was no evidence that the Principal Applicant faced discrimination in accessing housing, employment or even schooling for himself or his daughters while living in Cancun. Accordingly, they had failed to establish they would face such discrimination in the IFA location because of their ethnicity. With respect to the Applicants' submission that the IFA would be unreasonable because of their mental health issues, the RAD found that the Applicants did not provide evidence that the mental health services they require would not be available or accessible at the IFA location.

[10] Accordingly, the RAD confirmed the decision of the RPD and dismissed the appeal.

Issues and Standard of Review

[11] The matters identified by the Applicants give rise to two issues:

- i. Was the decision rendered in breach of the duty of procedural fairness?
- ii. Was the decision reasonable?

[12] Issues of procedural fairness are to be reviewed on a correctness standard (*Mission Institution v Khela*, 2014 SCC 24 at para 79 and in *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43). In *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 [CPR], the Federal Court of Appeal held that although the required

reviewing exercise may be best – albeit imperfectly – reflected in the correctness standard, issues of procedural fairness do not necessarily lend themselves to a standard of review analysis.

Rather, the Court is to determine whether the proceedings were fair in all of the circumstances (*CPR* at paras 54-56; see also *Watson v Canadian Union of Public Employees*, 2023 FCA 48 at para 17).

[13] The parties submit, and I agree, that in assessing the merits of the Officer’s decision the reasonableness standard applies (*Canada (Minster of Citizenship and Immigration) v Vavilov* 2019 SCC 65 at paras 23, 25 [*Vavilov*]).

[14] When appearing before me, counsel for the Applicant submitted, as I understood it, that a failure by a decision maker – the RAD in this case – to consider an issue or evidence is “elevated” and governed by the correctness standard of review. There is no merit to this submission. In *Vavilov*, the Supreme Court set out that the presumption of reasonableness can be rebutted in two types of situations (para 17), neither of which come into play in this matter. Failures to consider evidence or to grapple with an issue fall within the reasonableness standard of review (*Vavilov* at paras 98, 99, 101, 105, 126, 128). Contrary to counsel’s submissions, such errors are not failures of natural justice or procedural fairness attracting the correctness standard.

No Breach of Procedural Fairness

[15] The Applicants submit that the RAD was in breach of the duty of procedural fairness because it failed to put new issues to them.

[16] Specifically, in finding that relocation to the IFA location would not be unreasonable, the RAD noted that psychotherapy assessment reports concerning the Principal Applicant and his Spouse recommended 10 sessions of therapy for each of them. Before the RPD, they testified that they had been attending the sessions, but not how many were completed. The RAD noted that before it the Applicants did not provide evidence that the 10 sessions had not been completed or whether they require additional treatment or therapy. Nor did they provide evidence that the mental health services they require would not be available or accessible to them in the IFA location. Accordingly, the IFA location would not be unreasonable because of their mental health issues.

[17] The Applicants submit that the RPD did not ask the Applicants how many sessions they attended and that when the RAD raises new questions, or comments about evidence submitted by the Applicants, it is necessary to present the questions to the Applicants and allow them to respond.

[18] In my view, the RAD did not raise a new question and did not err in further considering this issue or the Applicants' evidence. The case law cited by the Applicants pertains to the opportunity to respond to new credibility concerns raised by the RAD (*Bouchra v Canada (Citizenship and Immigration)*, 2020 FC 1063; *Isapourkhoramdehi v Canada (Citizenship and Immigration)*, 2018 FC 819). Here, however, the RAD was referring to the sufficiency of the evidence before them relating to the reasonableness of the IFA location in light of the Applicants' mental health issues. The Applicants raised both the Principal Applicant's and his Spouse's mental health before the RPD. The Principal Applicant's testimony was that he and his

Spouse were attending the therapy sessions. As the RAD noted, the RPD addressed the psychotherapy assessments and concluded that there was no evidence that treatment is unavailable in Durango. While the RAD noted the lack of any evidence before the RPD or the RAD as to the status of the therapy sessions or of a need for further therapy, like the RPD, it also found that the Applicants had not provided evidence that the services would not be available in Durango. That is, even if there had been evidence of a need for further therapy, the Applicants had not established that this would not be available to them in Mexico.

[19] In my view, the insufficiency of the evidence pointed out by the RAD was not a new question. Rather, the onus was on the Applicants to put forward evidence and arguments supporting their position that the proposed IFA is unreasonable in view of their mental health. The RAD reasonably found that they had not done so.

[20] Nor did the RAD raise any other new issues, as counsel for the Applicant submitted, for the first time, when appearing before me.

Decision Was Not Reasonable

i. Risk to Minor Applicants

[21] The Applicants first submit that the RAD erred by failing to consider their submission on the risk to the Minor Applicants due to their Mayan ethnicity. In their written submissions, the Applicants point to post-hearing submissions made to the RPD to support their position that the Minor Applicants were at an increased risk of becoming targets of the cartels for human

trafficking and were more likely to be killed simply for being Indigenous women. The Applicants assert that the RAD failed to analyse this argument.

[22] However, unnoted by the Applicants, is that the RPD indicated in its decision that, at the end of the hearing before it, counsel for the Applicants did not seek to submit post-hearing documentation or further written post-hearing submissions. Counsel had subsequently sought to file additional written submissions on persecution and femicide and psychoanalytical assessments for the Minor Applicants. The RPD refused to accept those submissions finding that counsel had every opportunity to make submissions at the conclusion of the hearing, and the submissions spoke to matters that were not a part of the claim and were not canvassed at the hearing. Further, the psychoanalytical assessments for the Minor Applicants were reasonably available for disclosure given that they were dated August 1, 2021 – the same date as the psychoanalytical assessments of the Principal Applicant and his Spouse – which were submitted prior to the hearing. Thus, the materials that the Applicants now say were not considered by the RAD were not admitted into the record by the RPD.

[23] As the Respondent points out, the Applicants did not raise the RPD's refusal to accept these submissions as an issue before the RAD. The RAD did not err by failing to consider submissions that were not before it.

ii. Consideration of relevant evidence

[24] The Applicants also submit that the RAD erred by failing to consider relevant evidence when making findings of fact as it pertained to: (i) the method of tracking used by Los Zetas, (ii)

the reasonableness of the Principal Applicant relocating to Durango, and (iii) the reasonableness of the Minor Applicants relocating to Durango.

[25] With respect to the first point, the Applicants submit that the RAD erred by failing to consider that family networks are only one of the methods available to the Los Zetas cartel to track individuals despite having noted that the cartel: has a communication network consisting of cameras and radios; informants including taxi drivers, food vendors, police, and lookouts to gather information; has private investigators to track people; has access to property records in the United States and Mexico; and can place GPS trackers on cars.

[26] However, given that the RAD agreed with the Applicants that the RPD erred in finding that the Los Zetas do not have the means to locate them in the IFA location – and accepted that the Los Zetas do have the means to track the Applicants at the IFA – I fail to see an error or how the purported error by the RAD renders the decision unreasonable.

[27] As to the second point, the Applicants submit that the RAD erred by failing to consider evidence that Indigenous persons like the Principal Applicant and the Minor Applicants cannot obtain employment and that the Principal Applicant was fortunate to find work as a contractor because of a special connection in Cancun, but that he has no relationships in Durango that would go out of their way to help him find work.

[28] Review of the transcript indicates that the RPD asked the Principal Applicant if he would be able to work in construction in Durango. He said that he would but because organized crime is

“within the construction field”, they would find him. Later, when questioned by his counsel about his assertions of being discriminated against on the basis of his ethnicity, he stated that it is difficult to get work. When asked how he got work in Cancun, his response was that it took him a long time and he worked very hard to find employment and “[t]he people that opened the door and gave me a job, an opportunity, would refer me to other friends and other people”. When asked if he has those same connections in Durango, he stated that he does not.

[29] In their submission to the RAD, the Applicants pointed to this testimony as well as objective country documents indicating that Indigenous persons have access to fewer employment opportunities and are excluded from employment and other benefits. They submitted that the RPD erred in finding that there was no evidence to indicate that the Principal Applicant had been excluded from employment opportunities in Cancun. More specifically, that the Principal Applicant’s testimony was relevant evidence concerning the treatment of Mayans in Mexico and corroborated the documentary evidence in the NDP.

[30] The RAD acknowledged the Applicants’ submission that the Principal Applicant would have difficulty in finding work because of his Mayan ethnicity and because organized crime and infiltrated the construction industry. However, having conducted its own independent assessment of the evidence, it agreed with the RPD that it was objectively reasonable, in all of the circumstances, for the Applicants to relocate to Durango. As to the Applicants’ documentary evidence of the construction industry being infiltrated by organized crime, that evidence dealt with the construction industry in another area of Mexico and was insufficient to establish that the cartels have infiltrated the construction trade in the state or city of Durango. The RAD

acknowledged that at the hearing the Principal Applicant stated why he felt it would be more difficult for him to continue to work in the construction industry. However, it found that he did not establish that he would not be able to work in that industry at all, or that he would not be able to find some other form of work. The RAD found that the Principal Applicant's reasons related to being employed in the construction industry were insufficient to find that the IFA location was unreasonable.

[31] In my view, while the RAD did not explicitly refer to the Principal Applicant's testimony, the RAD did state that it considered why the Principal Applicant held the view that it would be more difficult for him to work in the construction industry in Durango. His evidence was that he had faced discrimination in Cancun but that, ultimately, he was able to get construction jobs and referrals from those jobs. I do not agree that the RAD failed to consider the Principal Applicant's testimony.

[32] That said, I do agree that the RAD's statement that there was no evidence that the Principal Applicant had faced discrimination in accessing employment in Cancun was in error given the Principal Applicant's testimony described above. The Applicants also referred to country conditions documentation, specifically the Response to Information Requests, *Mexico: Situation and treatment of Indigenous persons by society and by the authorities; state protection and support services available; situation of Indigenous persons living in cities, particularly Mexico City, Guadalajara and Monterrey (107- September 2020)*. This states, among other things, that "Indigenous persons have access to 'fewer' formal employment opportunities" and "may be excluded from employment and other benefits". While it was certainly open to the RAD

to assign little weight to this country condition evidence or to afford more weight to the Principal Applicant's ability to obtain work in the past, it did not make that finding. The RAD failed to assess whether this documentary evidence supported the Principal Applicant's claim that he would face discrimination in accessing employment in the IFA due to his ethnicity.

[33] Similarly, the Applicants had submitted that the Minor Applicants suffered discrimination in Cancun because of their ethnicity. In their submission to the RAD, they pointed to the testimony before the RPD that the Minor Applicants were bullied at school, called names and pushed on a daily basis. While the RAD acknowledged the submission that the Minor Applicants would continue to face discrimination and bullying at school in the IFA location, it found, as set out above, that the Principal Applicant and the Minor Applicants failed to establish that they would face discrimination in accessing housing, employment, schooling, or social services in the IFA location as a result of their ethnicity. In my view, the RAD did not engage with the Applicants' submission as to discrimination to which they asserted the Minor Applicants would be subjected. Whether, as the Applicants assert, this bullying would amount to "past persecution" is simply not addressed by the RAD in determining whether the proposed IFA was reasonable.

[34] I acknowledge the general statement by the RAD that the Applicants had not established that they fear persecution based on their ethnicity. However, the failure to address the evidence of discrimination renders this a conclusion without justification.

iii. *Persecution of family members*

[35] The Applicants submit that the RAD erred by requiring persecution of family members. According to the Applicants, this error arises from the RAD's finding that the Los Zetas would not be motivated to track the Applicants in Durango, specifically its statement that "none of the [PA]'s family have been threatened by the Los Zetas in retaliation for ignoring their telephone call for extortion money or payment of same". The Applicants submit that the Court stated, in *Fodor v Canada (Citizenship and Immigration)*, 2020 FC 2018 [*Fodor*] at paragraph 51, that implying a legal requirement that a relative should be persecuted is an error of law. Further, in *Agudo v Canada (Citizenship and Immigration)*, 2021 FC 320 at paragraph 45, the Court held that when families are similarly situated, this may be evidence that an applicant might be targeted, however, this does not imply that family members who are not similarly situated must be targeted. The Applicants submit that their family members are not similarly situated to the Principal Applicant as the Los Zetas are after him because he is a contractor and his family members are not.

[36] The Respondent submits that, contrary to the Applicants' submissions, the RAD did not require persecution of persons similarly situated to the Applicants in order to conclude that the Los Zetas cartel were motivated to track the Applicants. However, the lack of evidence of threats or attempts to locate the Applicants through their family in Cancun was an indication of the level of interest of the Los Zetas cartel in the Applicants, which the RAD reasonably took into account.

[37] I do not agree with the Applicants that the RAD imported a requirement of persecution of family members in finding that the Los Zetas did not have the motivation to pursue the Applicants in the IFA location. In *Fodor*, at para 51, Justice McHaffie noted, in the context of a pre-removal risk assessment, that since there is no obligation for a claimant to demonstrate that they have themselves been persecuted in the past, it would be incongruous to effectively require evidence that a claimant's sibling has faced persecution in their stead. As will be discussed below, that is not the situation before me.

[38] When appearing before me, counsel for the Applicants also argued that the RAD erred by elevating the use of an applicant's family network as a means to track them to a mandatory requirement for establishing motivation by their agent of persecution. However, the RAD did not do so. Nor did it ignore the evidence.

[39] The RAD referred to the documentary evidence and found that this indicates that Los Zetas will not track down just anyone. If a large debt is owed, or if there is a personal vendetta or a high-ranking betrayal, then it might be worth the time and resources to track a person. Based on the circumstances of the interaction that the Principal Applicant allegedly had with the Los Zetas, the RAD found, on a balance of probabilities, that they would not be motivated to find him. Further, the fact that his family remained in Cancun, including his cousin, and that the Minor Applicants had remained there for eight months before joining their parents in Canada, and had not been personally approached by anyone asking about the Applicants' whereabouts, confirmed this. While a letter of support from a neighbour indicated that after the Applicants left their home in 2018, different men on several occasions asked about the Principal Applicant's

whereabouts, the RAD found this was insufficient to establish that they were members of Los Zetas or that they would be motivated to pursue the Applicants to the IFA. The RAD found on a balance of probabilities that the evidence as a whole did not demonstrate that Los Zetas are motivated to seek the Applicants out. The RAD also noted that the country conditions evidence indicates that cartels use family networks to track a person in which they are interested. However, no one had approached any of the Applicants' family members. The RAD did not make this a mandatory requirement. It was simply one of many factors it considered in determining that the Los Zetas would not be motivated to pursue the Applicants in the IFA. Viewed in context, it is also clear that the RAD did not import a requirement of persecution of similarly situated family members. Rather, the RAD was assessing the motivation of the Los Zetas to pursue the Applicants.

Conclusion

[40] Although the RAD's reasons were largely sound, given my finding that the RAD erred by failing to assess some of the Applicants' evidence of discrimination based on ethnicity that the Applicants claimed the Principal Applicant and Minor Applicants would face in the IFA location, the decision is unreasonable and must be returned for reconsideration.

JUDGMENT IN IMM-2194-22

THIS COURT'S JUDGMENT is that

1. The application for judicial review is granted;
2. The decision is set aside and the matter shall be remitted to another officer for redetermination;
3. There shall be no order as to costs; and
4. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2194-22

STYLE OF CAUSE: APOLONIO DZIB TUZ, BRITTANY NAYELI DZIB FIGUEROA, HILARY ESTEFANNY DZIB FIGUEROA, NAYELI FIGUEROA CHAVEZ v THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

PLACE OF HEARING: BY VIDEOCONFERENCE USING ZOOM

DATE OF HEARING: JULY 12, 2023

JUDGMENT AND REASONS: STRICKLAND J.

DATED: JULY 24, 2023

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