Federal Court  Cour fédérale

Date: 20231114

Docket: IMM-8335-22

Citation: 2023 FC 1506

Ottawa, Ontario, November 14, 2023

PRESENT: Madam Justice St-Louis

BETWEEN:

Fatih OZDEMIR
Fatih EMRE OZDEMIR
Zeyned Nur OZDEMIR
Pakize PECHLIYE OZDEMIR
Beyza NUR OZDEMIR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants seek judicial review of the August 9, 2022, Refugee Appeal Division [RAD] decision that dismissed their appeal of the March 10, 2022, Refugee Protection Division [RPD] decision. The RAD found the RPD was correct in finding that the Applicants are neither

Convention refugees nor persons in need of protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Immigration Act].

[2] They submit that it was unreasonable for the RAD to conclude that (1) the Principal Applicant's prosecution in Brazil discloses no nexus to a Convention ground; (2) the Principal Applicant's treatment in Brazil would not amount to persecution or cruel and unusual treatment or punishment; and (3) state protection in Brazil is adequate.

[3] For the reasons that follow, the application for judicial review will be dismissed. In brief, the Applicants have not shown the decision to be unreasonable. I am satisfied it falls within the range of possible, acceptable outcomes in the circumstances.

II. Overview

[4] The Applicants are a family composed of the parents and three minor children, all dual citizens of Turkey and Brazil. Mr. Ozdemir, the Principal Applicant, was born in Turkey while Mrs. Ozdemir and the children were born in Brazil. The Applicants sought refugee protection in Canada for fear of persecution in both Turkey and Brazil based on being open members of the Hizmet movement. Notably, they claimed against Brazil based on their fear that the Brazilian authorities will extradite them to Turkey, at the request of the Turkish authorities, to face criminal charges due to being members of the Hizmet movement, or that Turkey will kidnap them from Brazil.

[5] The RPD determined it was generally accepted that Turkey is politically persecuting followers of Hizmet, and that Turkey's actions were caught by the Convention. The RPD found

the determinative issues were forward-looking risk, state protection, and nexus (persecution vs. prosecution) all in relation to Brazil as a country of reference.

[6] In brief, the RPD essentially found that (1) there were no personalized allegation that the Applicants feared kidnapping in Brazil and there was no evidence that Turkey had taken such illegal steps in that country; (2) the Applicants had not made out a nexus to any ground of the Convention with respect to their fears in Brazil because the actions they fear do not amount to persecution as (a) Mrs. Ozdemir and the children are immuned from extradition proceedings under the Brazilian Law of Migration as Brazilian-born individuals; (b) the risk the Principal Applicant will be prosecuted in extradition proceedings did not amount to persecution per the principles stated in *Zolfagharkhani v Canada (MEI)*, (FCA), [1993] 3 FC 540 [*Zolfagharkhani*], in that the Convention does not provide protection from laws of general application that are drafted and applied neutrally in accordance with fundamental human rights; (3) the Applicants had not rebutted the presumption of state protection; and (4) the Applicants would face some risks should they return to Brazil (religious grounds), but it would not amount to persecution.

[7] The Applicants appealed the RPD decision to the RAD, arguing that the RPD (1) erred in evaluating the risk of extradition and extrajudicial kidnapping the Applicants face in Brazil; (2) erred in its state protection analysis as it misunderstood the test; and (3) demonstrated a mistaken understanding of the concept of prosecution vs persecution, and wrongly determined that the Applicants had no nexus to section 96 of the Immigration Act.

[8] Regarding the Applicants' claim against Turkey, the RAD noted there was ample documentary evidence to support the conclusion that they would face a serious possibility of

persecution on account of their Hizmet or Gulen affiliation if they returned to Turkey and that they would not have access to state protection in Turkey. This is not at play in this proceeding

[9] Regarding the Applicants' claim against Brazil, the RAD found that (1) the RPD did not err in finding that the Applicants do not face a serious possibility of persecution in Brazil; (2) the Applicants have access to adequate state protection; (3) the previous jurisprudence on Hizmet supporters in Brazil is not binding, not determinative and not persuasive; and (4) the procedural fairness issue was not made out. Given the arguments raised, the first two issues discussed by the RAD are at issue in this application for judicial review.

[10] In regards to the first issue, hence that the RPD did not err in finding that the Applicants do not face a serious possibility of persecution risk nor a risk of harm as defined in subsection 97(1) of the Immigration Act in Brazil, the RAD examined the Applicants' allegations regarding extradition and extra judicial kidnapping. On extradition, the RAD first found Mrs. Ozdemir and the three minor applicants were immune from extradition as natural born citizens of Brazil. The RAD also found that, if the Principal Applicant was subject to extradition proceedings, he would be subject not to persecution, but to a law of general application that is drafted and applied neutrally by the Courts in Brazil in accordance with fundamental human rights. On extrajudicial kidnapping, the RAD found the Applicants had not established that they face a serious possibility of extrajudicial kidnapping in Brazil. The RAD recognized that the documentary evidence for Turkey establishes that it engages in state-sponsored territorial abduction, but found there was no evidence (a) of a country cooperation from Brazil; (b) to relate the serious kidnapping concerns in Brazil to Turkey's interest in extrajudicial kidnapping of Hizmet followers; (c) that Turkey has attempted to extrajudicially kidnap Hizmet members from Brazil; and (d) that any individual or

paramilitary or criminal group in Brazil has been involved in enforced disappearances to extrajudicially kidnap Hizmet members or other individuals sought for extradition.

[11] In regards to the second issue, the RAD found that the RPD was correct in determining that the Applicants did not rebut the presumption that Brazil is capable of providing protection. The RAD rejected the Applicants' submission that the fact that Brazil has pursued extradition proceedings against Hizmet members is evidence that the country is *per se* an agent of persecution, and disagreed with the Applicants' submissions that the Brazilian Supreme Court cannot provide protection from extradition-as the Court has precisely done so- and that Bolsonaro's attempts to undermine the Court had compromised the Court's independence. The RAD recognizes that Brazil has serious problems with police and government corruption, and impunity, and that the Bolsonaro regime has engaged in anti-human rights discourse. The RAD found, however, that Brazil is not in a state of complete breakdown, but a functioning democracy with an "unfettered multiparty system marked by vigorous competition among the rival parties".

[12] Before the Court, the Applicant submits that the decision under review is unreasonable and should be set aside for redetermination by a newly constituted tribunal. They add that it was unreasonable for the RAD to conclude that (1) the Principal Applicant's prosecution in Brazil discloses no nexus to a Convention ground; (2) the Principal Applicant's treatment in Brazil would not amount to persecution or cruel and unusual treatment or punishment; and (3) state protection in Brazil is adequate.

III. Analysis

A. *Standard of review*

[13] It is well settled that reasonableness is the presumptive standard that reviewing courts must apply when conducting a judicial review of the merits of an administrative decision (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 17).When the applicable standard of review is reasonableness, the role of a reviewing court is to examine the reasons given by the administrative decision-maker and to 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). The reviewing court must therefore ask whether the "decision bears the hallmarks of reasonableness—justification, transparency and intelligibility" (*Vavilov* at para 99). Both the outcome of the decision and its reasoning process must be considered in assessing whether these hallmarks are met (*Vavilov* at paras 15, 95, 136). The onus is on the party challenging the decision to prove that it is unreasonable. Flaws must be more than superficial for the reviewing court to overturn an administrative decision. It must be satisfied that there are "sufficiently serious shortcomings" (*Vavilov* at para 100).

B. *Nexus to the convention: prosecution vs persecution*

[14] The Applicants contends the RAD rightly considered whether the law itself is discriminatory, but failed to consider the reasons for the Principal Applicants' being subject to prosecution under the law from the perspective of his alleged agents of persecution and that this is a reviewable error. The Applicants add that the Principal Applicant's prosecution in Brazil, in

being subject to extradition proceedings, can only be considered an extension of his prosecution in Turkey, which the RAD accepted would amount to persecution, and should thus have been sufficient to establish the required nexus to a convention ground. The Applicants add that the Brazilian authorities are significantly involved in the extradition process.

[15] The Applicants contend that, applying the tests set out in the UNHCR Handbook and in *Zolfagharkhani*, the Applicant's risk of prosecution is for his political opinion not for any politically-motivated acts in violation of a law of general application. They submit that this is a sufficient connection between the Applicant's political opinions and his risk of extradition to establish the requisite nexus under section 96, and stress that the RAD's finding to the contrary is unreasonable and should be set aside.

[16] The Minister responds that based on the evidence, the RAD reasonably determined that the Applicants have not shown a serious possibility of persecution or risk of extradition in Brazil to Turkey or extrajudicial abduction by Turkish security forces or by agents on behalf of Turkey.

[17] The RAD's conclusion regarding Mrs. Ozdemir and the children being immune from extradition is not contested. The Applicants challenge only the conclusion that pertain to the Principal Applicant. In regards to the Principal Applicant, I note that the RAD properly examined the legislation that applies in an extradition case in Brazil, here the Brazilian Law of Migration, as the risk claimed was of extradition. The RAD stated it had considered the principles articulated by the Federal Court of Appeal in Z*olfagharkhani* regarding laws of general application, which are presumed to be valid and neutral. The RAD stated that the onus

was on the Applicants to demonstrate that the Law of Migration is inherently or for some other reason persecutory.

[18] I find no error in the RAD's indications. In Z*olfagharkhani*, the Federal Court of Appeal set forth some general propositions relating to the status of an ordinary law of general application in determining the question of persecution, these propositions are:

> (1) The statutory definition of Convention refugee makes the intent (or any principal effect) of an ordinary law of general application, rather than the motivation of the claimant, relevant to the existence of persecution.
>
> (2) But the neutrality of an ordinary law of general application, *vis-à-vis* the five grounds for refugee status, must be judged objectively by Canadian tribunals and courts when required.
>
> (3) In such consideration, an ordinary law of general application, even in non-democratic societies, should, I believe, be given a presumption of validity and neutrality, and the onus should be on a claimant, as is generally the case in refugee cases, to show that the laws are either inherently or for some other reason persecutory.
>
> (4) It will not be enough for the claimant to show that a particular regime is generally oppressive but rather that the law in question is persecutory in relation to a Convention ground.

[19] The prosecution here in Brazil is related to the risk of extradition, as claimed, and the RAD did consider it, contrary to the Applicants' argument.

[20] The RAD found there was nothing in the text of the Law of Migration that makes it persecutory and like the RPD, discerned no improper intent. The RAD outlined there is evidence that the Brazilian Supreme Court applies the Law of Migration neutrally, having dismissed the request for extradition of two other individuals. Ultimately, the RAD determined that, even if the Turkish authorities are still interested in the Mr. Ozdemir's extradition, it presents a risk of

prosecution, not persecution mainly because there is not sufficient evidence to demonstrate that the Brazilian Supreme Court no longer operates independently or is influenced by the Executive. The RAD agreed with the RPD that the possibility of arrest and the need to obtain judicial bail in the event of an extradition request is not per se persecutory. As taught by the Federal Court of Appeal, the onus was on the claimant to show that a law of general application is either inherently or for some other reason persecutory; in light of the record and arguments presented, it was reasonable for the RAD to conclude that this had not been shown in regards to the Brazilian Law of Migration.

C. *The Applicants' treatment in Brazil: arrest and detention*

[21] The Applicants submits that the RAD's failure to consider the cumulative impact of their treatment is itself a reviewable error in law sufficient to set this decision aside. The Applicants assert that both tribunals found that while the Applicant may be arrested and detained by Brazilian authorities in cooperation with the Turkish authorities, the Courts of Brazil would test the legality of their detention fairly in accordance with the laws of Brazil. They add that it was unreasonable for the RAD to find that because arrest and detention under a law of general application is not per se persecutory, it is not so in the case at hand. The Applicants also assert that it is clear that a prosecution can lead to a successful claim under section 97 if, as a result of prosecution, there is a risk the person will be detained in conditions that constitute cruel, inhumane or degrading treatment and that it engages the person's right under section 7 of the Canadian *Charter*.

[22] I have examined the appeal record closely and the Applicants' submissions to the RAD. I have found nothing indicating they challenged or raised an issue with the findings found at paragraphs 31 and 32 of the RPD decision in relation to arrest and detention. I have similarly found no allegations from the Applicants in relation to a fear of being arrested, detained and mistreated on that basis in Brazil, or that the possibility of arrest and the need to obtain judicial bail in the event of an extradition request amounts to persecution.

[23] These arguments are thus raised for the first time before the Court, they were not raised before the RAD. The longstanding case law states that it is generally not admissible to raise arguments that were not put to the administrative decision-maker in judicial reviews before this Court: *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association*, 2011 SCC 61; *Klos v Canada (Attorney General)*, 2023 FCA 205; *Law Society of Saskatchewan v Abrametz*, 2022 SCC 29; ***Khan v Canada (Citizenship and Immigration)***, 2020 FC 1101 at para 27; *Oluwo v Canada (Citizenship and Immigration)*, 2020 FC 760 at paras 54, 59, 60; *Saint Paul v Canada (Citizenship and Immigration)*, 2020 FC 493 at para 39. I will thus not entertain this argument.

D. *State protection in Brazil*

[24] The Applicants submit that it was unreasonable for the RAD to find that the Applicant has not provided a specific case where Brazil has failed to protect Hizmet followers from kidnapping by Turkish authorities.

[25] First, the Applicants submit that this finding lacks transparency. They add that RAD accepted evidence that Brazil's police are corrupt and that kidnapping is an unresolved problem

throughout the country and assert that this is clear and convincing evidence that state protection is lacking in Brazil. They submit that the RAD cites no report to the contrary, providing any favorable review of police or other security forces in Brazil and their ability to protect residents. The Applicants thus argue that the RAD's finding that state protection is adequate therefore fails to disclose a coherent line of reasoning from factual findings to conclusion. This is a reviewable error.

[26] Second, the Applicants submit that, to support its conclusion, the RAD appears to rely exclusively upon evidence disclosing that there has not been a "complete breakdown" of democratic institutions in Brazil and that the RAD has conflated an assessment of the health of Brazil's democratic institutions with the proper assessment of the operational adequacy of state protection, which is a reviewable error.

[27] Third, the Applicants submit that the RAD imposed an elevated standard upon the Applicant to prove his claim; as what the RAD is asking them to corroborate is impossible to do (*Senadheerage v Canada (Citizenship and Immigration)*, 2020 FC 968 at para 24).

[28] Finally, the Applicants submit that the RAD ignored evidence that state protection in Brazil is not operationally adequate

> *In Canada (Attorney General) v Ward*, 1993 CanLII 105 (SCC), [1993] 2 SCR 689 [*Ward*], the Supreme Court of Canada restated that international refugee law was formulated as a back-up to the protection an applicant can expect from the state of which he or she is a national (*Ward* at 709). Hence, the presumption that the state is capable of protecting its citizens, with the exception of countries where there has been a complete breakdown of state apparatus (*Ward* at 725). The applicant bears the burden of establishing that his or her home state is unable to provide

> adequate protection (*Notar v Canada (Citizenship and Immigration)*, 2021 FC 1038 at para 26). The applicant must thus provide clear and convincing evidence of the state's inability to protect, which will usually require a claimant to show "that they sought, but were unable to obtain, protection from their home state, or alternatively, that their home state, on an objective basis, could not be expected to provide protection" (*Glasgow v Canada (Citizenship and Immigration)*, 2014 FC 1229 at para 35; citing *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at para 37). The appropriate test in a state protection analysis commands an assessment of the adequacy of that protection at the operational level, not solely the efforts or intentions of the state (*Mata v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 1007 at paras 13–14; *Vidak v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 976 at para 8). The evidence must be "relevant, reliable and convincing" and must satisfy the decision-maker, on a balance of probabilities, that adequate protection is unavailable (*Flores Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at para 30; *Rstic v Canada (Citizenship and Immigration)*, 2022 FC 249 at para 29).

[29] The RAD correctly stated that the onus was on the Applicants to rebut the presumption that the state is capable of protecting them and to demonstrate with clear and convincing evidence that the state is unable to provide adequate protection. The RAD found that the Applicants had not met this onus. It noted that the objective documentary evidence indicates that state protection in Brazil is imperfect; however, it does not indicate that it is not operationally effective.

[30] I agree with the Minister that in this case, the RAD explained why it was of the view that the Applicants had failed to establish that there was an objective basis to their fear in Brazil. The RAD explained why it concluded that the Applicants' evidence did not show that Brazil would be unable to protect them. The RAD did not ignore or fail to consider the evidence but, after weighing all the evidence on the record, it came to the conclusion that state protection was not shown to be inadequate. I understand the Applicants disagree with the RAD conclusions;

however, they ask the Court to weigh the evidence differently, which is not a ground for judicial review.

IV. Conclusion

[31] Under the reasonableness standard, the RAD decision must be based on an inherently coherent and rational analysis, and be justified having regard to the legal and factual constraints to which the decision-maker is subject. Given the record and the evidence presented to the RAD, I find it is the case here. The RAD decision presents the attributes of transparency, justification, and intelligibility required by *Vavilov*. The Application for judicial review will be dismissed.

JUDGMENT in IMM-8335-22

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

FEDERAL COURT

SOLICITORS OF RECORD

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