Federal Court Cour fédérale

Date: 20231218

Docket: IMM-3535-22

Citation: 2023 FC 1713

Toronto, Ontario, December 18, 2023

PRESENT: Justice Andrew D. Little

BETWEEN:

JORGE IVAN BELTRAN MORALES
DIANA PATRICIA ZAPATA VERA
DANNA ISABELLA BELTRAN ZAPATA
SARA VALENTINA BELTRAN ZAPATA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The applicants are two adults and their two daughters. They are all citizens of Colombia. They attempted to file claims for refugee protection under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the *"IRPA"*) but could not do so through an online portal.

[2] In this proceeding, they requested judicial review of that refusal. They requested that the Court set aside removal orders that prevented them from filing the claims.

[3] I conclude that the application must be dismissed.

I. **Events Leading to this Application**

[4] The following chronology is taken from the materials filed on this application, principally the affidavit of one of the adult applicants.

[5] In March 2021, the applicants travelled from Colombia to the United States.

[6] On March 21, 2021, the applicants presented themselves at the Champlain-St. Bernard de Lacolle Port of Entry (“POE”) to Canada. They advised a border services officer that they wanted to apply for refugee protection in Canada.

[7] Sometime after midnight on March 22, 2021, the officer determined that the applicants’ claims were ineligible for referral to the Refugee Protection Division (“RPD”) under paragraph 101(1)(e) of the *IRPA*, owing to the *Safe Third Country Agreement* between Canada and United States.

[8] A delegate of the Minister also issued exclusion orders against the adult applicants (the “Exclusion Orders”) dated March 22, 2021. The adult applicants signed acknowledgments that they were informed they must not return to Canada during the one-year period following the day

on which they are removed from Canada or otherwise leave Canada, unless they meet other criteria.

[9] On March 22, 2021, the applicants were returned to the United States.

[10] Later the same day, the applicants attempted to enter Canada through Roxham Road. They told an officer that they wanted to apply for refugee protection in Canada and explained why they were afraid to return to Colombia. The officer determined that they were not permitted to enter Canada under paragraph 101(1)(c) of the *IRPA*, because they had already been determined to be ineligible to be referred to the RPD. The officer also issued an inadmissibility report under subsection 44(1) of the *IRPA*.

[11] On March 23, 2021, the applicants were returned again to the United States.

[12] On September 9, 2021, Canada Border Services Agency ("CBSA") asked the applicants via email whether they intended to continue the refugee protection claim they initiated at Roxham Road. The applicants were not invited to attend the Canadian border at this time.

[13] On September 24, 2021, the applicants received a communication from Immigration, Refugees, and Citizenship Canada ("IRCC") advising that they had been granted an exemption to return to Canada to resume their refugee claim. The communication advised that they were exempt from the then-applicable restrictions on travel to Canada owing to the COVID-19 pandemic. The IRCC invited them to return to the border on September 27, 2021, at 8:00AM

Eastern time at the POE at Champlain-St. Bernard de Lacolle, "in order to resume" their refugee claims.

[14] On September 27, 2021, the applicants attended the POE at Champlain-St. Bernard de Lacolle and sought refugee protection in Canada. An officer determined that the applicants' claims were ineligible to be referred to the RPD.

[15] On September 28, 2021, a delegate of the Minister issued deportation orders to the adult applicants because under *IRPA* paragraph 41(a), there were grounds to believe that they were inadmissible for failing to comply with the *IRPA*. (Only one Deportation Order was filed in the application record but it appears from the applicants' submissions that CBSA issued one to each of the adult applicants. I will refer only to one "Deportation Order"). The Deportation Order referred to the requirement in *IRPA* subsection 52(1) that when a removal order has been enforced, a foreign national shall not return to Canada unless authorized by an officer or in other prescribed circumstances.

[16] However, the applicants were permitted to enter Canada.

[17] By email on November 24, 2021, CBSA advised the applicants that they had made a claim at a place other than a designated POE (i.e., at Roxham Road) and had been directed to return to the United States pursuant to paragraph 41(d) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the *"IRPR"*), which prohibited their entry into Canada "by an order made under the *Emergencies Act*". CBSA advised that if the applicants were still in

the United States, they could return to Canada to resume processing their refugee claim. CBSA also advised that, if the applicants were no longer in the United States, they should respond to the correspondence, indicate the country in which they are currently residing, and await further instruction on how to continue with their refugee claim.

[18] On March 11, 2022, CBSA advised the applicants that they were subject to a removal order and were required to attend in person for an interview on March 29, 2022.

[19] On March 29, 2022, the CBSA informed the applicants that they may apply for a Pre-Removal Risk Assessment ("PRRA"). I understand that they did so on April 22, 2022, and received a negative decision in February 2023, which is currently the subject of an application for leave and for judicial review ("ALJR").

[20] On April 8, 2022, the applicants, still in Canada, attempted to file their refugee claims through an IRCC portal.

[21] On April 13, 2022, IRCC rejected the applicants' refugee claim through the portal. The applicants received letters from IRCC dated April 13, 2022, advising that they were not allowed to make a refugee claim under subsection 99(3) of the *IRPA*, as they were subject to a removal order. Subsection 99(3) of the *IRPA* provides that a claim for refugee protection made by a person inside Canada must be made to an officer and may not be made by a person who is subject to a removal order. The Exclusion Orders and the Deportation Order are all removal orders under section 223 of the *IRPR*.

[22] On April 14, 2022, the applicants filed an ALJR challenging the negative IRCC decisions made on April 13, 2022. However, in their ALJR, their submissions on leave, and on this application, the applicants asked for the following remedies:

a) To quash the Exclusion Orders and the Deportation Order; and

b) To issue a writ of *mandamus* ordering the Minister of Public Safety and Emergency Preparedness (Canadian Border Services Canada) and/or the Minister of Citizenship and Immigration to determine whether the applicants are eligible to make refugee protection claims in Canada.

[23] As of the hearing of this application in November 2023, the applicants had not filed an ALJR of the decision(s) made in March 2021 to issue the Exclusion Orders or an ALJR of the decision made in September 2021 to issue the Deportation Order, nor have they filed motions to request an extension of time to do so under subsection 18.1(2) of the *Federal Courts Act*, RSC 1985, c F-7. The Exclusion Orders and the Deportation Order are all subject to judicial review – indeed, the record confirms that the Exclusion Orders attached a notice to that effect.

[24] The certified tribunal record (“CTR”) in this proceeding is for the April 2022 refusal to accept the applicants’ refugee protection claims through the portal. For each applicant, the Global Case Management Notes contained the following entry:

> A refugee claim request was received for this client online. Not eligible to make a refugee claim as client is subject to a removal order. Reply sent to client via the portal.

[25] There are no CTRs for the decisions to issue the Exclusion Orders and the Deportation Order.

II. The Parties' Positions

[26] The applicants' position was that IRCC's refusal to allow the applicants to file refugee claims was unfair and that the officer unfairly issued the Exclusion Orders in March 2021 after learning why the applicants feared to return to Columbia.

[27] The applicants relied on an IRCC "policy" concerning port of entry examinations, apparently taken from an operations manual on enforcement (which was not in the record but was quoted in the applicants' memorandum). The applicants' position was that the officer had the discretion to allow them to withdraw their request to enter Canada on March 21, 2022, but did not exercise that discretion in a reasonable manner because the officer did not properly determine whether the objectives of the *IRPA* were better served by allowing them to withdraw their application to enter Canada. According to the applicants, the objectives would have been better served by allowing them to withdraw their applications voluntarily, explaining to them why they would not enter Canada at a POE, warning them about returning to a POE and advising them to contact a lawyer.

[28] The applicants challenged the Deportation Order because CBSA's communication dated November 24, 2021, granted them an exemption on national interest grounds from the prohibition on re-entering Canada made with the Exclusion Orders. CBSA expressly advised them that they "may now return to Canada at a designated port of entry to resume the processing of [their] refugee claim without an appointment". Yet, they contend, when they appeared at the POE in late September, 2021, CBSA made the Deportation Order against them based on their previous interactions at the border in March 2021.

[29] The respondent made several arguments related to the Court's judicial review process. These included:

a) there was no "decision" amenable to judicial review in this proceeding, because the IRCC's computer simply prevented the applicants' claim from being filed;

b) none of the applicant's submissions was directed at the refusal that was the subject of the ALJR filed in this proceeding;

c) there was nothing before the Court to enable a judicial review of the Exclusion Orders or the Deportation Order – they could have been the subject of an ALJR, but were not; and

d) there are no CTRs for the Exclusion Orders or the Deportation Order, so the Court does not have any information from CBSA's perspective concerning what happened at the border on March 21-22, 2021, or on September 27, 2021.

[30] The respondent also argued that the time to challenge the Exclusion Orders made in March 2021 had long passed – a position known to the applicants as it was raised in the respondent's submissions at the leave stage of this application.

[31] The respondent submitted that the officers followed the requirements of the *IRPA* in subsection 99(3) and paragraphs 101(1)(c) and (e). In particular, the respondent submitted that the language of the *IRPA* clearly required border officers to make eligibility determinations and that they do not have the discretion not to determine whether the applicants' claims were eligible for referral to the RPD. The respondent referred to subsection 100(1) of the *IRPA*:

Examination of Eligibility to Refer Claim	**Examen de la recevabilité par l'agent**

Referral to Refugee Protection Division	**Examen de la recevabilité**
100 (1) An officer shall, after receipt of a claim referred to in subsection 99(3), determine whether the claim is eligible to be referred to the Refugee Protection Division and, if it is eligible, shall refer the claim in accordance with the rules of the Board.	100 (1) L'agent statue sur la recevabilité de la demande et défère, conformément aux règles de la Commission, celle jugée recevable à la Section de la protection des réfugiés.

[32] The respondent argued that the relevant officers properly found that the applicants, arriving at the border from the Unites States, were subject to the *Safe Third Country Agreement* when they arrived at the POE on March 21, 2021, as contemplated by *IRPA* paragraph 101(1)(e), and nothing in the *IRPA* or *IRPR* constrained the officers to do otherwise. In April 2022, the applicants, being subject to removal orders that had not been set aside, were not eligible under *IRPA* subsection 99(3) to file claims for protection.

III. Analysis

[33] In my view, the applicants have not satisfied their onus to demonstrate, on the record filed in this case, that the refusal to accept their claims for *IRPA* protection via the online portal in April 2022 was unreasonable under the principles set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65,* [2019] 4 SCR 653 and *Mason v. Canada (Citizenship and Immigration),* 2023 SCC 21.

[34] Before the applicants arrived at the POE to Canada on March 21, 2021, they had travelled from their country of origin and citizenship, Colombia (where they claimed to fear persecution), to the United States.

[35] It was not disputed, at least in this proceeding, that the applicants were not eligible to make a claim for refugee protection in Canada when they arrived at the POE in March 2021, owing to the *Safe Third Country Agreement*. As the Supreme Court has recently explained, the *Safe Third Country Agreement* is a treaty between Canada and the United States that provides that refugee claimants must, as a general rule, seek protection in whichever of the two countries they first enter after leaving their country of origin. Parliament has given effect to the treaty in Canadian domestic law through the *IRPA* and the *IRPR*. Under *IRPA* paragraph 101(1)(e), refugee status claims are ineligible to be considered in Canada if the claimant came from a country designated by the regulations. A designated country is thus seen as a safe third country in that it is viewed as an appropriate partner with which Canada can share responsibility for considering refugee claims. The United States is designated under section 159.3 of the *IRPR*: *Canadian Council for Refugees v. Canada (Citizenship and Immigration),* 2023 SCC 17, at paras 1-2, 37-48, 135.

[36] The applicants' concern in this proceeding arose in part from the Exclusion Orders issued at the POE on March 22, 2021. While the applicants submitted that a border services officer failed to follow a policy applicable to examinations on March 21 and in the early hours of March 22, 2021, the record before this Court is not sufficient to make a determination on the issue. Setting aside the fact that neither party filed an affidavit attaching the policy, there is no CTR for

the decisions made at the POE or, for that matter, at Roxham Road in March 2021. There is insufficient evidence to ground a determination that an officer at the POE did not follow the objectives of the *IRPA* or otherwise unreasonably failed to offer the applicants an opportunity to withdraw their applications to enter Canada. The applicant's affidavit, filed in the application record without objection, advised that she was not able to advise the officer at the POE why she feared returning to Colombia, but was able to do so at Roxham Road. It was silent on whether or not the officer offered the applicants an opportunity to withdraw their applications to enter Canada.

[37] On the existing record before the Court, there may be some lingering questions about what happened in March 2021 and in September 2021 (and to some extent afterwards), and why. Perhaps they could be answered with a complete record related to the decisions made, along with additional argument. Perhaps they are answered by the fact that the applicants had to make their claims in the United States owing to the *Safe Third Country Agreement*. However, it is not appropriate to attempt to answer such questions on the basis of this record and the submissions made in this proceeding.

[38] These reasons do not determine whether the Exclusion Orders or the Deportation Order were reasonable or unreasonable.

[39] The application will be dismissed. No question arises to certify for appeal.

JUDGMENT in IMM-3535-22

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. No question is certified under paragraph 74(*d*) of the *Immigration and Refugee Protection Act.*

"Andrew D. Little"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	JORGE IVAN BELTRAN MORALES, DIANA PATRICIA ZAPATA VERA, DANNA ISABELLA BELTRAN ZAPATA, SARA VALENTINA BELTRAN ZAPATA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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