Federal Court Cour fédérale

Date: 20240228

Docket: IMM-13524-22

Citation: 2024 FC 325

Ottawa, Ontario, February 28, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

JOSE ANTONIO SERNA MEDINA
ERIKA GARCIA ESPINO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants seek judicial review of a decision by an officer (the "Officer") of Immigration, Refugees and Citizenship Canada dated October 26, 2022, dismissing the Applicants' application for a pre-removal risk assessment ("PRRA"). The Officer was not satisfied the Applicants had displaced the identified internal flight alternative ("IFA") in Mexico City.

[2] The Applicants submit that they were denied procedural fairness and natural justice due to ineffective or incompetent representation by former counsel (the "Former Counsel") in their PRRA application.

[3] For the following reasons, I find that the Applicants' procedural rights have not been breached. This application for judicial review is dismissed.

II. **Preliminary Issue**

[4] The Respondent submits that the expert report provided by the Applicant should not be admitted. I agree. This report does not fall under the exceptions to inadmissibility of new evidence proffered on judicial review and is not needed to resolve the issues of procedural fairness (*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at para 20). This report instead seeks, in large part, to replace the Officer's "job of finding the facts" (*Delios v Canada (Attorney General)*, 2015 FCA 117 at para 41). At many points, this report goes further and seeks to explicitly argue the Applicants' case for them, running afoul of the requirement that an affidavit is not to contain "opinion, argument or legal conclusions" (*Canada (Attorney General) v Quadrini*, 2010 FCA 47 at para 18).

III. **Analysis**

A. *Background*

[5] On August 26, 2022, the Applicants provided an updated PRRA application. In a decision dated October 26, 2022, this application was refused.

[6] The Officer found that the Applicants had not displaced the previous findings that they have a viable IFA in Mexico City, the evidence being either speculative or not probative. The Officer further found that objective evidence did not establish that the Applicants had a profile such that they would be targeted by cartels in Mexico upon relocation to an IFA, nor that a cartel or other individual or group had shown an interest or ability to pursue them to an IFA. The Officer considered objective evidence to find that it would not be unreasonable for the Applicants to relocate to an IFA and found that the Applicants had not demonstrated there was an ongoing risk of harm to them that is more than the generalized criminality present in Mexico.

B. *Issue and Standard of Review*

[7] The sole issue in this application for judicial review is whether Former Counsel was ineffective such that the Applicants' procedural rights were breached.

[8] The parties agree that the issue of whether the Former Counsel's ineffectiveness breached procedural fairness and natural justice is reviewed on a standard of correctness. I agree (*Xiao v Canada (Citizenship and Immigration)*, 2021 FC 1360 at para 25).

[9] Correctness is a non-deferential standard of review. The central question for issues of procedural fairness is whether the procedure was fair having regard to all of the circumstances, including the factors enumerated in *Baker v Canada (Minister of Citizenship and Immigration)*,

[1999] 2 SCR 817 at paras 21-28 (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

C. *The Applicants have not established a breach of their procedural rights*

[10] My colleague Justice Pamel has found "that ineffective or incompetent counsel may be sufficient grounds for a breach of natural justice" (*Satkunanathan v Canada (Citizenship and Immigration)*, 2020 FC 470 ("*Satkunanathan*") at para 33). An applicant who alleges incompetence or negligence by their former counsel must show that: a) the impugned counsel's acts or omissions constituted incompetence; and b) the acts or omissions must have resulted in a miscarriage of justice (*Satkunanathan* at para 35).

[11] The Applicants submit that Former Counsel did not know about the law surrounding PRRAs and failed to file material evidence showing they did not have an IFA, including their updated BOC narrative, a police report, country condition documentation, and evidence the Refugee Appeal Division ("RAD") refused to admit (including medical reports, emails, and pictures). The Applicants maintain that Former Counsel erred by failing to file to re-open their RAD appeal based on new country condition evidence and did not understand their risk profile and/or the nature of their claims, having failed to make helpful or relevant submissions in the PRRA application.

[12] The Respondent submits that the Former Counsel understood the law surrounding PRRAs. The Respondent maintains there was no incompetence in Former Counsel not having

submitted the BOC form and narrative, the "new" evidence rejected by the RAD, the police report, and the country condition reports that were already accessible to the Officer. The Respondent submits that incompetence is not established by Former Counsel not filing to re-open the Applicants' appeal before the RAD nor by Former Counsel allegedly failing to make relevant and/or helpful submissions about the nature of the Applicants' risk.

[13] I agree with the Respondent. This is not an "extraordinary circumstance" warranting Former Counsel be deemed incompetent and a breach of natural justice established (*Rodriguez v Canada (Citizenship and Immigration)*, 2022 FC 774 ("*Rodriguez*") at para 25, citing *Gombos v Canada (Citizenship and Immigration)*, 2017 FC 850 at para 17; *Yang v Canada (Citizenship and Immigration)*, 2015 FC 1189 ("*Yang*") at para 15).

[14] It is unclear how the information highlighted by the Applicants in the BOC would displace the PRRA officer's IFA finding, given the Officer's finding that police officers likely do share information that could lead to determining an address for an individual in Mexico. I also agree that Former Counsel reasonably did not include evidence that had been deemed inadmissible before the RAD. The evidence did not arise after the rejection of the RAD decision (*IRPA*, s. 113(a)), having predated the RAD decision (or being undated) and therefore not being "new" under section 113(a) of the *IRPA* for the purposes of the PRRA application (see e.g. *Huang v Canada (Citizenship and Immigration)*, 2018 FC 940 at paras 23-24).

[15] Furthermore, Former Counsel did not act incompetently by not submitting specific pieces of country condition evidence found in the National Documentation Package ("NDP"). Officers

are presumed to have acquired knowledge of the most up to date country conditions, whether submitted or not, and rely upon this knowledge and all information before them, absent evidence to the contrary (*Idu v Canada (Citizenship and Immigration)*, 2021 FC 1081 ("*Idu*") at paras 32-33). Former Counsel did not have to submit these documents as evidence. And the Applicants do not lead any evidence to suggest that the Officer was unaware of NDP documents. The Officer explicitly acknowledged evidence about the cartels and their ability and willingness to track certain individuals across the country and harm them, should the cartel wish.

[16] Moreover, Former Counsel did not act incompetently by not filing the police report. This report was already before the RAD. The RAD did not reject this report as evidence. The Applicants' PRRA submissions explicitly point to this evidence. I agree with the Respondent that there is little evidence demonstrating that the police report would have affected the PRRA Officer's IFA findings, absent a mix of speculation and reliance upon plucked snippets from NDP evidence. This cannot form the basis for deeming Former Counsel incompetent, especially in light of *Idu*.

[17] Moreover, Former Counsel was not incompetent in not filing to re-open the RAD appeal, the RAD alleged to having been "ignorant of its own evidence." This impugns whether the RAD's decision is justified in relation to its factual constraints—in other words, its reasonableness (*Minister of Citizenship and Immigration) v Vavilov,* 2019 SCC 65 at paras 99-101). But this application is not for the judicial review of the RAD's decision. I further accept Former Counsel's submissions that Former Counsel conferred with the Applicants and decided that judicial review would be a more appropriate mechanism for challenging the RAD's decision,

rather than filing to re-open the appeal. This decision does not form the basis for a finding that Former Counsel was incompetent.

[18] Furthermore, the evidence contradicts the Applicants' claim that Former Counsel did provide helpful submissions about possible IFAs. These submissions include that "the more recent evidence shows that the Applicants' agents of persecution are still looking for them" and "the evidence shows that the Applicants were targeted by a criminal organization… and that up to recently they continue to look for [the Applicants] with the direct involvement of different Mexican police forces." While perhaps not what counsel for the Applicants would have done, the Applicants have failed to establish that Former Counsel's PRRA submissions specifically and with support by the evidence constitute incompetence (*Yang* at para 15, citing *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at para 36).

[19] And while the failure to establish Former Counsel's incompetence is dispositive of this matter, the Applicants do not lead nor point to any *specific* or *admissible* evidence that would substantiate that there was a reasonable possibility their PRRA decision would have been different should Former Counsel have been competent. Thus, I cannot find that the acts or omissions of Former Counsel resulted in a miscarriage of justice.

IV. **Conclusion**

[20] This application for judicial review is dismissed. The Applicants have not demonstrated that there has been a breach of procedural fairness or natural justice. No questions for certification were raised, and I agree that none arise.

JUDGMENT in IMM-13524-22

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed.

2. There is no question to certify.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-13524-22
STYLE OF CAUSE:	JOSE ANTONIO SERNA MEDINA AND ERIKA GARCIA ESPINO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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