

Federal Court



Cour fédérale

Date: 20240514

Docket: IMM-2535-23

Citation: 2024 FC 736

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 14, 2024

PRESENT: The Honourable Madam Justice Ngo

BETWEEN:

VICTOR MANUEL MACIAS VARGAS

Applicant

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Background

[1] This application for judicial review relates to the decision of the Refugee Appeal Division [RAD] confirming a decision by the Refugee Protection Division [RPD] that concluded that Victor Manuel Macias Vargas [applicant] had an internal flight alternative [IFA] in Mexico.

Accordingly, the RAD determined that the applicant was not a refugee within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Before this Court, the applicant alleges that his former counsel, an immigration consultant who represented him before the RPD and the RAD [former counsel], was incompetent to a degree that breached procedural fairness. The applicant alleges that his former counsel was unable to state before the RPD and the RAD that he met the requirements set out in the IRPA.

[3] The application for judicial review must be dismissed because the applicant has not persuaded me that the alleged errors warrant intervention by this Court.

II. Facts

[4] On August 21, 2020, the applicant filed a claim for refugee protection with the assistance of his former counsel.

[5] The RPD held the refugee protection claim hearing on September 1, 2022, and rendered the reasons for its decision on September 8, 2022. Subsequently, on January 5, 2023, the RAD rendered its own decision, confirming the RPD's conclusion that the applicant was not a refugee because he had been unable to establish a serious possibility of an ongoing risk of persecution.

[6] According to the RAD, the fact that the applicant waited 10 months before leaving Mexico, during which time he lived at the same address and continued his regular activities, and the fact that he waited two years before submitting his claim for refugee protection in Canada

(opting for renewals of his authorization to stay) suggest that the applicant has not demonstrated an ongoing risk of persecution. These two facts were determinative with respect to the RAD's decision.

[7] The applicant alleges that there was a breach of procedural fairness and that the RAD did not base its decision on a complete record, as his former counsel was incompetent. The applicant alleges that, among other things, his former counsel was unqualified, having submitted insufficient evidence for the RAD to find that a risk of persecution existed in the other Mexican cities. The applicant alleges that his former counsel was unable to establish the link between the agent of persecution and other criminal organizations in the rest of the country. He also alleges that his former counsel did not advise him sufficiently well to prepare him for the hearing before the RPD or to make him aware of the remedies available to him after the RAD's decision was issued.

[8] The RAD rendered its decision on January 5, 2023 [Decision]. On February 15, 2023, the applicant found the lawyer who is currently representing him and who is now assigned to the applicant's case before this Court.

III. Issues

[9] The two issues before the Court are as follows:

1. Did the RAD render a decision that breached procedural fairness because of the incompetence of the applicant's former counsel?
2. Did the RAD render an unreasonable decision by finding that the applicant had an IFA elsewhere in Mexico?

IV. Law

[10] Sections 96 and 97 of the IRPA describe the law as follows:

Convention refugee

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97(1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

[11] The parties agree that the Court must review the merits of the Decision on a standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 16–17, 25 [*Vavilov*]). I also agree that the standard of reasonableness applies to this application for judicial review.

[12] The Court must develop an understanding of the decision maker’s reasoning process in order to determine whether the decision as a whole is reasonable. To make this determination, the reviewing court asks 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 (*Vavilov* at para 99).

[13] The burden is on the party challenging the decision to show that it is unreasonable. There must be sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency (*Vavilov* at para 100).

[14] The standard of review applicable to the issue of procedural fairness is correctness (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54, *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, cited in *Abdinur v Canada (Citizenship and Immigration)*, 2020 FC 880 at para 7).

[15] To determine whether the applicant’s former counsel conducted himself so incompetently as to bring about a breach of procedural fairness, this Court adopts the test set out in *Rendon Segovia v Canada (Citizenship and Immigration)*, 2020 FC 99 at para 22 [*Rendon*], which was

confirmed by Justice Roy in *Del Angel Quiroz v Canada (Citizenship and Immigration)*, 2024 FC 194 at para 35 [*Del Angel Quiroz*]:

[35] *Rendon Segovia v Canada (Citizenship and Immigration)*, 2020 FC 99, essentially reproduces the analytical framework set out in *R v GDB*, [2000] 1 SCR 520 [*GDB*].

Three conditions must be met:

- (i) prior counsel's acts or omissions constituted incompetence;
- (ii) a miscarriage of justice resulted in the sense that, but for the alleged conduct, there is a reasonable probability that the result would have been different; and
- (iii) the representative was given a reasonable opportunity to respond.

[16] The burden rests with the person alleging incompetence. More specifically, “incompetence is assessed according to the reasonableness standard and . . . the starting point is a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance” (*Del Angel Quiroz* at para 35).

[17] To determine whether there has been a breach of procedural fairness based on alleged incompetence, the Court must apply a very stringent test (*Galyas v Canada (Citizenship and Immigration)*, 2013 FC 250 at para 83). Incompetence or negligence must be sufficiently specific and clearly supported by the evidence. In other words, the evidence must reach a relatively high threshold (*Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at para 3).

V. Preliminary issue: new admissible evidence

[18] The applicant submitted two new pieces of evidence to the Court. They are the statements of Manuel Moron Salas and Mario Lizarraga Rojas. The two statements were not on the record before the RAD.

[19] Manuel Moron Salas's statement is neither dated nor signed. The declarant confirms that organized crime exists in Mexico and that the Mexican government is corrupt. The declarant also states that the applicant is being sought in Mexico and that he had to hide from the people who were looking for him.

[20] The statement of Mario Lizarraga Rojas is dated April 16, 2023. The declarant states that heavily armed individuals were searching for the applicant.

[21] The respondent objects to the admission of the new evidence with respect to both statements. The respondent submits that the Court should not admit this new evidence at the judicial review stage (*Vaamonde Wulff v Canada (Citizenship and Immigration)*, 2023 FC 566 at para 5; *Bekker v Canada*, 2004 FCA 186 at para 11; *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 [*Access Copyright*] at paras 18, 19).

[22] As a general rule, the Court does not admit new evidence on judicial review. However, there are a few exceptions that allow the Court to depart from the general rule without offending

the role conferred upon administrative decision makers by Parliament. These exceptions are as follows: (a) evidence that provides general background information to assist the Court in understanding the issues relevant to the judicial review; (b) evidence of procedural defects that cannot be found in the evidentiary record of the administrative decision maker; and (c) evidence establishing the complete absence of evidence available to the administrative decision maker when it made its finding (*Access Copyright* at para 20).

[23] In this case, the statements of Manuel Moron Salas and Mario Lizarraga Rojas fall under none of these three exceptions. Accordingly, the Court will give no weight to either statement.

VI. Incompetence of former counsel

[24] The applicant raises several allegations regarding the incompetent conduct of his former counsel, particularly that his former counsel had prepared him inadequately for his testimony at the hearing before the RPD, that he had inadequately prepared the applicant's case on appeal before the RAD and that he had not explained to the applicant the recourses he had available to him after the RAD's decision was rendered.

[25] Former counsel had been made aware of the allegations of professional incompetence filed against him in accordance with the *Consolidated Practice Guidelines for Citizenship, Immigration, and Refugee Protection Proceedings* (June 24, 2022). He filed a response to the allegations and prepared an affidavit sworn on April 17, 2023. Former counsel is challenging the allegations brought against him.

A. *Incompetence before RPD*

[26] Essentially, the applicant alleges that because of his former counsel's incompetent conduct, the applicant was unable to demonstrate to the RPD that there was a risk of persecution and that the cartel had an ongoing interest in finding the applicant in Mexico and was motivated and able to do so.

[27] The applicant alleges that his former counsel did not prepare him adequately to answer the questions asked at the hearing before the RPD. Former counsel was unable to bring the evidence required to establish the link between the agent of persecution and the other groups, evidence that, according to the applicant, did exist. Former counsel neither provided an explanation attached to the claim form to explain the changes to the written account nor corrected the errors regarding the dates in the amended written account. The inconsistencies in the dates undermined his credibility before the RPD. The applicant alleges that his former counsel did not refer to his particular circumstances or his personal characteristics. Accordingly, former counsel did not advance the arguments that would have weighed in the applicant's favour when the RPD analyzed the reasonableness criterion in relation to the IFA. The applicant alleges that his former counsel erred in giving bad advice to his spouse.

B. *Incompetence before RAD*

[28] The applicant was represented before the RAD by the same counsel. The applicant alleges that his former counsel submitted an incomplete record in the notice of appeal to the RAD. Former counsel did not include, in the notice of appeal, relevant information that might

have addressed the concerns raised by the RPD. The applicant alleges in particular that his former counsel submitted evidence that insufficiently demonstrated the link between the risk of persecution and the fear of criminal groups.

[29] The applicant alleges that his former counsel should have put more emphasis on the link between the risk from the agents of persecution and the risk from the other criminal groups, despite the fact that the National Documentation Package for Mexico does not mention this link. The applicant alleges that his former counsel did not address his particular circumstances and personal characteristics and that he insufficiently explained the reasons for which the applicant had waited 10 months before fleeing Mexico and two years before submitting his claim for refugee protection.

[30] After the applicant reviewed the RAD's Decision, he criticized his former counsel for not having explained that he could benefit from the right to challenge the Decision by way of an application for judicial review.

VII. Analysis

[31] The Court notes that the applicant's allegations regarding his former counsel's misconduct arose at different stages of the case. The applicant states that he only discovered his former counsel's misconduct at the RPD and RAD after finding his new legal counsel. It is for this reason that the applicant is raising allegations of misconduct by his former counsel in the context of the case before the RPD. The applicant alleges that the RAD's Decision was vitiated

from the outset by breaches of procedural fairness. The respondent points out that the Court must consider only the RAD's Decision in the context of this review.

[32] Respectfully, the issue that is subject to judicial review involves the RAD's Decision. That Decision considered the record before the RPD as well as the supplementary arguments and documents on appeal. The RAD determined that the applicant did not meet the requirements to be a refugee under sections 96 and 97 of the IRPA because an IFA existed.

[33] In this case, I must consider whether the applicant has been able to prove that he meets each of the conditions of the applicable test in order to recognize the incompetence or negligence of his former counsel before the RAD.

[34] The respondent submits that the crux of the case is that the applicant waited 10 months before leaving Mexico and two years before filing a claim for refugee protection in Canada. Given that the facts (the determinative factor) that the RAD considered had nothing to do with the allegations of misconduct by former counsel, there was nothing that former counsel could have done to change the RAD's Decision.

[35] The issue of the link between the agent of persecution and the other criminal groups was supported by the evidence on the record before the RAD. The evidence showed that alliances existed temporarily between the hundreds of criminal groups. The RAD had received two pieces of evidence that were not before the RPD and that had been filed in the form of two articles, one

dated September 5, 2014, and the other dated August 13, 2019. The two articles were submitted to articulate the evidence about conflicts that took place before 2017.

[36] The RAD confirmed the RPD's conclusion, which was that the applicant had continued to live at the same address and pursue his regular activities for 10 months before leaving Mexico without appearing to be bothered by the criminal group responsible for his cousin's disappearance. The RAD found that the applicant had taken 10 months to leave the country despite holding a valid passport and despite the fact that Canada did not require a visa for Mexicans. The RAD found that the applicant waited two years before filing his claim for refugee protection in Canada.

[37] I note that these facts occurred well before his former counsel was assigned to the case. It was reasonable for the RAD to rely on "the determinative factor in this case", which is "the lack of interest of the agents of harm in searching for the appellant across Mexico to harm him". In addition, the applicant's criticisms relate to an evaluation of the evidence, which falls within the jurisdiction of the RAD; this Court must therefore show deference.

[38] This Court cannot conclude that the RAD's Decision was unreasonable, especially considering that the case law relied upon involves delays, such as those in the applicant's case, and that such delays suggest a negative conclusion (*Diabo v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1772 at para 7, *Mallampally v Canada (Citizenship and Immigration)*, 2012 FC 267 at para 36, and *Ndoungo v Canada (Citizenship and Immigration)*, 2019 FC 541 at paras 17–19).

[39] I agree that the RAD's conclusions could not have been affected by the allegations of misconduct by former counsel. The context in which the RAD rendered its Decision involved facts that occurred long before former counsel was assigned to the case. These are determinative facts based on the record, and the RAD's conclusion was supported by the case law.

[40] The applicant alleges that his former counsel failed to refer to the applicant's particular circumstances and personal characteristics, especially his age and his level of education, in relation to the IFA. From reading the reasons issued by the RAD, it is clear that the RAD considered the factors referred to by the RPD, namely, the applicant's level of education, his diverse work experience and his resourcefulness. I note that the RAD, through its own analysis, considered the factors relating to the particular circumstances and personal characteristics of the applicant and then concluded that an IFA existed.

[41] In circumstances where professional incompetence is alleged, the Court clarifies in *M.N. v Canada (Citizenship and Immigration)*, 2023 FC 663 at para 76 [*M.N.*], that the judicial review assessment should not be based on hindsight. In *M.N.*, Justice Roy summarized the case law on evidence of professional incompetence and reiterated that the evidence "must be so clear and unequivocal and the circumstances so deplorable that the resulting injustice caused to the claimant is blatantly obvious ..." (*Parast v Canada (Minister of Citizenship and Immigration)*, 2006 FC 660 at para 11). The evidence of incompetence must be "clear and unequivocal to the point of being blatantly obvious" (*M.N.* at para 79).

[42] The applicant submits that his former counsel's arguments were insufficient or of poor quality because he was unable to persuade the RAD. In this case, I agree with the respondent that former counsel presented arguments before the Court that were not accepted by the RAD. However, the fact that the RAD did not accept his arguments does not necessarily, in the circumstances of this case, constitute professional incompetence. I understand that the applicant blames his former counsel for having poorly prepared his case and for being the reason that his testimony before the RPD did not reflect his true fear with respect to the IFA. Unfortunately, I cannot conclude that the applicant's [TRANSLATION] "bad testimony" before the RPD was the fault of his former counsel.

[43] The applicable test for determining whether former counsel was incompetent is cumulative, which means that all three conditions must be met to demonstrate the incompetence of counsel (*Rendon* at para 22, *Del Angel Quiroz* at para 35). If a single condition is not met, the test is not met.

[44] In this case, the applicant has been unable to establish that but for his former counsel's misconduct, the RAD's Decision would have been different. Therefore, I cannot conclude that there has been a breach of procedural fairness.

A. *Decision not unreasonable*

[45] Finally, the Court holds that the RAD's Decision is not unreasonable. As for the IFA finding, the RAD determined that it was reasonable for the applicant to seek refuge in other parts of the country in light of all the circumstances.

[46] The RAD concluded that the RPD had noted that, aside from his fear of the cartel, the applicant had stated at the hearing that he saw no barriers to relocating to an IFA. However, I note the applicant's criticism regarding his testimony before the RPD. On the other hand, I note that the RAD had also considered other factors and evidence in its IFA analysis. It was therefore not unreasonable for the RAD to determine that the applicant had failed to establish a well-founded fear of persecution in a part of the country. When the RAD reasonably determines the reasonable existence of an IFA, this Court's intervention is unwarranted.

[47] In light of the evidence on the record, the RAD determined that the arguments opposing the IFA were insufficient to demonstrate that the applicant was at risk of persecution in the other parts of the country. I cannot therefore conclude that the Decision was unreasonable.

[48] Furthermore, in light of the facts in the case, and given the conclusion that an IFA exists, it was not unreasonable for the RAD to conclude that the applicant was not a Convention refugee.

VIII. Conclusion

[49] I cannot conclude that there was a breach of procedural fairness or that the RAD's decision was unreasonable.

[50] This Court dismisses the application for judicial review.

[51] Neither party has proposed a question for certification. I agree that there is no question for certification.

JUDGMENT in IMM-2535-23

THIS COURT ORDERS as follows:

1. The application for judicial review is dismissed.
2. No question is certified.

“Phuong T.V. Ngo”

Judge

Certified true translation
Francie Gow

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2535-23

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DATED: MAY 14, 2024

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