

Federal Court



Cour fédérale

Date: 20240523

Docket: IMM-3227-23

Citation: 2024 FC 782

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 23, 2024

PRESENT: Associate Chief Justice Gagné

BETWEEN:

ITZEL MARQUEZ LOPEZ

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Itzel Marquez Lopez filed a claim for refugee protection in Canada, jointly with her sister, and on the basis of her sister's homosexuality. The sister's claim for refugee protection

was allowed by the Refugee Protection Division [RPD]; that of the applicant was rejected by the RPD and then by the Refugee Appeal Division [RAD].

[2] The issue in this case is whether the RAD erred in concluding that the applicant would not face a serious possibility of persecution because of her sister's homosexuality should she return to Mexico.

II. Facts

[3] In their original Basis of Claim Form [BOC Form], the applicant and her sister allege that in March 2019, their parents had to close their business in Mexico owing to threats of extortion and violence made against the family by a criminal group. They left Mexico, but their parents stayed as their father had to undergo medical treatment for retinitis pigmentosa.

[4] On the day of the hearing before the RPD, the applicants filed two amended BOC Forms, both of which appear to have been drafted by the applicant's sister. In the first paragraph of the BOC Form on page 185 of the Certified Tribunal Record, the declarant lists the people present during the criminals' visit and states: [TRANSLATION] “. . .and my sister, Itzel Marquez Lopez . . .”. This seems to confirm that this is not the applicant's narrative. As for the BOC Form on page 191 of the Certified Tribunal Record, the applicant's sister explains in detail the persecution she suffered in Mexico because of her sexual orientation.

[5] In her first amended BOC Form, the applicant's sister provides more details about the March 1, 2019, event and the identity of the criminal group she identifies as their agent of

persecution. She also explains that the criminals returned on March 31, 2019, to receive the requested sum, as well as on April 30 to extract a second sum and notify them that in May, the amount would increase. When their mother informed the criminals that the business was not generating enough income to pay the requested sum, the criminals replied that they simply had to hand over the business to them.

[6] If they failed to pay, or failed to hand over the business, they would pay with their lives.

[7] Finally, the applicant's sister alleges that the family received an additional message at their residence, addressed to her personally, indicating that they would beat her like a man because of her sexual orientation. As her sexual orientation had previously only been known to her sister, she realized that her life was in danger and that she had to leave. She added that she feared being judged by her family and felt discriminated against and rejected by society, and that this had also affected her sister.

[8] In the second amended BOC Form, the applicant's sister refers to the applicant only in the last paragraph, where she explains the psychological and social impact of her sexual orientation on her sister.

III. Impugned decision

[9] Since the RPD allowed the applicant's sister's claim for refugee protection, the applicant alone appealed to the RAD.

[10] The RAD agrees with the applicant that her claim under section 96 of the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]* was decided rather expeditiously by the RPD, which simply concluded that being separated from her sister would resolve the issue of her imputed sexual orientation.

[11] The RAD is of the opinion that the RPD erred in failing to consider the possibility of persecution because of her membership in a particular social group, namely the family of a lesbian.

[12] Having conducted its own analysis of the evidence presented by the applicant, the RAD concludes that the applicant has not established a serious possibility of persecution in her country.

[13] The RAD is of the opinion that the RPD offered the applicant several opportunities to express all her fears in Mexico. It notes from the evidence that it was only in the presence of her sister that the applicant was humiliated, excluded, hit and insulted. The evidence shows that the applicant was able to work in Mexico without being discriminated against or harassed. She has been out of Mexico since June 2019, and there is no indication that she would suffer persecution upon her return after several years.

[14] The RAD is of the view that the applicant has not demonstrated a serious possibility of persecution because of an imputed sexual orientation. For discrimination against a person to amount to persecution, it must be serious (*Noel v Canada (Citizenship and Immigration)*, 2018

FC 1062 at para 29; *Sefa v Canada (Citizenship and Immigration)*, 2010 FC 1190 at para 10; *Portuondo Vasallo v Canada (Citizenship and Immigration)*, 2012 FC 673 at para 15. Since the applicant only suffered discrimination in the presence of her sister, and since her parents remained in Mexico without being persecuted for being members of a lesbian family, the RAD is of the opinion that the applicant has not met her burden of proving that she has a well-founded fear of future persecution for being a member of her family.

[15] Furthermore, the RAD concludes that the applicant has not demonstrated that she would face a danger or risk under subsection 97(1) of the IRPA should she return to Mexico.

[16] The RAD lends little credibility to the threats of sexual violence allegedly made against her by the criminals, since they were not mentioned in the original BOC Form. While it is always possible to amend a BOC Form without impugning the claimant's credibility, the omissions that are significant to the claim or that relate to a central element of the claim may have an impact on the claimant's credibility (*Qi v Canada (Citizenship and Immigration)*, 2020 FC 400 at paras 13–14).

[17] The RAD therefore concludes that it was open to the RPD to draw a negative inference regarding the credibility of the allegations of threats because of this omission, as it relates to a crucial element of the claim, and it was not adequately justified.

[18] The applicant also failed to mention in her BOC Form that she had found refuge in Morelos for one month.

[19] The RAD agrees that the RPD speculated on how the applicant's father receives assistance from the Mexican government. However, the applicant has not been able to satisfactorily explain how her father could receive government cheques or medical treatment on a regular basis while he was on the run in order to ensure his safety. The RAD concludes that the applicant has not demonstrated, on a balance of probabilities, that her parents were living in hiding in Mexico.

IV. Issues and standard of Review

[20] This application for judicial review raises the following issues:

- A. *Did the RAD fail to observe the principles of procedural fairness by not returning the matter to the RPD for reconsideration?*
- B. *Did the RAD err in concluding that the applicant was not a Convention refugee or a person in need of protection?*

[21] To determine whether the RAD complied with the principles of procedural fairness, the Court must conduct its own analysis of the process followed to determine whether it was fair, having regard to all the circumstances of the case (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54).

[22] Furthermore, the standard of review to be applied to the second question is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65).

V. Analysis

A. *Was the process fair?*

[23] The applicant argues that the RAD violated the principles of procedural fairness by not returning the case to the RPD for reconsideration, despite the errors found in the RPD's analysis. It adds that the RAD does not have jurisdiction under subsection 111(1) of the IRPA to substitute its determination for the one that should have been made by the RPD.

[24] The applicant refers the Court to paragraphs 58, 59, 69 and 103 of the Federal Court of Appeal decision in *Huruglica v Canada (Citizenship and Immigration)*, 2016 FCA 93; she argues that the RPD's errors in this case were serious and went to the very heart of the claim for refugee protection, which justified returning the matter to the RPD. Following its own analysis, the RAD should not have confirmed the RPD's decision on grounds not addressed by the RPD.

[25] Finally, the applicant argues that the RAD did not give reasons for its conclusion that the discrimination faced by the applicant did not amount to persecution.

[26] I do not share the applicant's view and, in my opinion, the process followed by the RAD was fair.

[27] In *Huruglica*, the Federal Court of Appeal confirmed that the RAD can still confirm the decision of the RPD on another basis (*Huruglica*, at para 78; *Xu v Canada (Citizenship and Immigration)*, 2019 FC 639 at para 33). As noted by Justice Norris in *Xu*, "[n]evertheless, this power must be exercised in accordance with the principles of natural justice and procedural

fairness”. The RAD may “refer the matter back for redetermination with the directions that it considers appropriate only if it is ‘of the opinion’ that it cannot make a decision confirming or setting aside the RPD decision without hearing the evidence presented before the RPD”

(*Huruglica* at para 69).

[28] I agree with the SAR that the RPD provided several opportunities for the applicant to set out all her concerns about Mexico. She was represented before the RPD, and her counsel had the opportunity to ask her additional questions to elaborate on points that had not been sufficiently addressed by the RPD.

[29] The RPD’s reasons concerning the alleged persecution because of the applicant’s membership in the family of a lesbian, or because of her imputed sexual orientation, are indeed succinct, but the allegations on this subject in the original and amended BOC Forms are also vague and very succinct.

[30] Moreover, the RAD was not required to advise the applicant that it intended to analyze the question of whether the alleged discrimination was sufficiently serious, repetitive or systematic to constitute persecution. This issue underlies the question of whether the applicant runs a prospective risk of persecution should she return to Mexico. It was therefore at the heart of her claim for refugee protection.

[31] As mentioned by Justice McVeigh in *Canada (Citizenship and Immigration) v Kaler*, 2019 FC 883 at paragraph 15 (citing *Xu* at para 33), the RAD is not obligated to provide notice if

the basis on which it confirms the decision can reasonably be said to stem from the issues as framed by the parties.

B. *Is the decision reasonable?*

[32] The applicant raises three errors made by the RAD that render its decision unreasonable:

1. The RAD erred in its definition of social group by confusing the family of an LGBTQ+2 person with the LGBTQ+2 community itself;
2. The RAD cannot ask her to give up associating with other members of the LGBTQ+2 community in order to live free from persecution;
3. The RAD recognizes that the applicant has faced discrimination and violence because of an imputed sexual orientation, and it should have found a prospective risk of persecution.

[33] Once again, I cannot accept the applicant's arguments.

[34] A reasonable decision is one that is "based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85). It must take the evidentiary record and the general factual matrix that bears on the applicant's rights into account (*Vavilov* at para 126).

[35] The RAD has concluded from the evidence presented that it was only in the presence of her sister that the applicant suffered episodes of discrimination. Although she has suffered certain acts of discrimination because of an imputed sexual orientation in the past, she presents no evidence of the possibility of future persecution because of an imputed sexual orientation. She

has not provided evidence of any event in which she was mistreated when she was not with her sister. It was therefore open to the RAD to conclude that the only reason a sexual orientation other than her own was imputed to her was because she was mistaken for her sister's partner. Unlike her sister, the applicant was not discriminated against in the course of her work and was not forced to attend meetings organized by the church with the aim of converting her.

[36] Nor has the applicant shown that, in the absence of her sister, she would be perceived as a lesbian.

[37] It was also reasonable for the RAD to conclude that the applicant had not established that she would face persecution because of her membership in the family of a lesbian. The RAD could consider that the applicant's parents are still in Mexico and that it is not alleged, let alone proven, that they would be victims of such persecution. The RAD's analysis in this regard is reasoned and based on the evidence.

[38] Finally, as for the alleged threats of sexual violence by the criminal gang, there are sufficient shortcomings in the evidence presented by the applicant to support the RAD's conclusion. The evidence relating to the threats that allegedly followed the closure of the parents' business was found not to be credible, and the applicant did not demonstrate any error on the part of the RAD. In this context, the RAD could draw a negative inference from the fact that the original BOC Form makes no mention of a threat of sexual violence against the applicant.

VI. Conclusion

[39] The RAD did not fail to respect the principles of procedural fairness by not referring the matter to the RPD for redetermination and by ruling on the applicant's claim for refugee protection.

[40] Moreover, the RAD's decision is reasonable in light of the evidence before it, so the Court's intervention is not required.

[41] The parties have not submitted any questions of general importance for certification, and no such question arises from the facts of this case.

JUDGMENT in IMM-3227-23

THIS COURT ORDERS as follows:

1. The application for judicial review is dismissed;
2. No question of general importance is certified.

“Jocelyne Gagné”

Associate Chief Justice

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-3227-23

STYLE OF CAUSE: ITZEL MARQUEZ LOPEZ v THE MINISTER OF
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PLACE OF HEARING: MONTRÉAL, QUEBEC

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