Federal Court  Cour fédérale

Date: 20240524

Docket: IMM-9616-23

Citation: 2024 FC 791

Montréal, Quebec, May 24, 2024

PRESENT: Mr. Justice Gascon

BETWEEN:

SALVADOR VARGAS CERVANTES,
PAULINA GUTIERREZ VILLARREAL,
AND REGINA BELEN VARGAS GUTIERREZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Mr. Salvador Vargas Cervantes, accompanied by his wife, Paulina Gutierrez Villarreal, and their minor daughter, Regina Belen Vargas Gutierrez [the Cervantes family], are citizens of Mexico. They are seeking judicial review of a decision dated July 14, 2023, of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada

[Decision]. In the Decision, the RAD rejected their claim for refugee protection on the ground that they were not Convention refugees or persons in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], because they had a viable internal flight alternative [IFA] in Mérida, a city in the Mexican state of Yucatán. The RAD confirmed the decision that the Refugee Protection Division [RPD] had made to the same effect.

[2] The Cervantes family submits that the Decision is unreasonable because the RAD erred in its IFA analysis. They are asking the Court to set aside the Decision and refer the matter back to the RAD for a new hearing before a differently constituted panel. Moreover, they submit that the RAD's failure to consider their testimony and evidence regarding the IFA, and to convene an oral hearing, breached its duty of procedural fairness.

[3] For the following reasons, this application for judicial review will be dismissed. The Decision was responsive to the evidence, and the RAD's findings regarding the IFA location in Mérida are defensible based on the facts and the law. The Cervantes family failed to discharge their onus to convince the RAD that the IFA was not viable. The RAD's conclusions fall well within the range of possible, acceptable outcomes under the circumstances. Furthermore, I do not find any breach of procedural fairness in this matter.

II. Background

A. *The factual context*

[4] The Cervantes family fear persecution at the hands of the Cartel Jalisco New Generation [CJNG]. Specifically, they allege that the CJNG extorted money from Mr. Cervantes and asked

him to sell drugs for the cartel through the corner store he owned with his wife in the city of Guadalajara. They allege that should they return to Mexico, they would be in danger, as Mr. Cervantes refused to pay the extortion money and refused the CJNG's attempt to forcibly recruit him.

[5] In August 2017, Mr. Cervantes received the first threat and extortion demand from three members of the CJNG. From then on, members of the cartel began arriving at his corner store about every 15 days. On November 15, 2017, Mr. Cervantes was walking past a liquor store when it exploded, which led to his hospitalization. He attributed this explosion to his refusal to cooperate with the CJNG. Shortly after being discharged from the hospital, Mr. Cervantes and his family moved to San Ignacio Cerro Gordo, a town located approximately 100 kilometres outside of Guadalajara. They left the keys to their corner store with their business partner, Mr. Juan Trujillo.

[6] In December 2017, Mr. Trujillo told Mr. Cervantes that he received death threats from the CJNG and revealed that the CJNG demanded that he surrender the store to them. In January 2018, once Mr. Cervantes had sufficiently recovered from his injuries, he went back to Guadalajara with the hope of reopening his store. However, the CJNG had taken over the store. In exchange for relinquishing the store to the CJNG, Mr. Cervantes requested a return on his investment in the store of $5,500 US, despite the store being worth approximately $20,000 US. The CJNG refused and threatened him with a gun in response.

[7] Following this encounter and fearing for his life and the life of his family, Mr. Cervantes immediately returned to San Ignacio Cerro Gordo, hoping that the CJNG would forget about them. Instead, the CJNG texted them on a monthly basis demanding that they work for the cartel.

[8] In May 2019, Mr. Cervantes fled to Canada. Ms. Villarreal and their minor daughter fled to Canada a few months later, in December 2019, after receiving two threatening calls from strangers. The Cervantes family made a refugee claim in February 2021.

B. *The decisions of the RPD and the RAD*

[9] On November 7, 2022, the RPD denied the Cervantes family's refugee claim after determining that they had viable IFAs in Puebla and Mérida.

[10] The RPD accepted the Cervantes family's submissions with respect to their narrative and the described events that occurred. The RPD also found no credibility issues. However, the RPD determined that the CJNG would not be motivated to find them in the proposed IFAs. In coming to this conclusion, the RPD noted that the CJNG made no real attempts to locate them, other than employing methods of convenience, such as calling a known phone number. The RPD further noted that the Cervantes family lived safely in San Ignacio Cerro Gordo for one and a half years before fleeing to Canada and that the CJNG did not attempt to find them during that time. Ultimately, the RPD found that this indicates a lack of motivation and interest on the CJNG's part in locating them.

[11] The Cervantes family appealed the RPD's decision to the RAD. In the Decision, the RAD dismissed their appeal, finding that the evidence and facts did not demonstrate that the CJNG was motivated to locate them for the reasons cited by the RPD, such as the fact that they lived safely in San Ignacio Cerro Gordo for one and a half years. The RAD also determined the Cervantes family has an IFA in Mérida. However, the RAD disagreed with the RPD with respect to the second proposed IFA, and found that Puebla was not an acceptable IFA given that the

CJNG has some influence there. The RAD finally determined that the Cervantes family failed to demonstrate that the IFA in Mérida was unsafe or unreasonable.

C. *The standard of review*

[12] It is not disputed that the standard of reasonableness applies to findings regarding the existence of a viable IFA (*Singh v Canada (Citizenship and Immigration)*, 2023 FC 1715 at para 13 [*Singh 2023*]; *Khosla v Canada (Citizenship and Immigration)*, 2023 FC 1557 at para 16; *Valencia v Canada (Citizenship and Immigration)*, 2022 FC 386 at para 19; *Adeleye v Canada (Citizenship and Immigration)*, 2022 FC 81 at para 14; *Ambroise v Canada (Citizenship and Immigration*), 2021 FC 62 at para 6; *Singh v Canada (Citizenship and Immigration)*, 2020 FC 350 at para 17 [*Singh 2020*]; *Kaisar v Canada (Citizenship and Immigration)*, 2017 FC 789 at para 11). This is confirmed by the Supreme Court of Canada's landmark decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], where the Court established a presumption that the standard of reasonableness is the applicable standard in judicial reviews of the merits of administrative decisions (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 7 [*Mason*]).

[13] Where 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; *Mason* at para 64). 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).

[14] Such a review must include a rigorous and robust evaluation of administrative decisions. However, as part of its analysis of the reasonableness of a decision, the reviewing court must take a "reasons first" approach and begin its inquiry by examining the reasons provided with "respectful attention", seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion (*Mason* at paras 58, 60; *Vavilov* at para 84). The reviewing court must adopt an attitude of restraint and intervene "only where it is truly necessary to do so in order to safeguard the legality, rationality and fairness of the administrative process" (*Vavilov* at para 13), without "reweighing and reassessing the evidence" before it (*Vavilov* at para 125).

[15] 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. The court must be satisfied that there are "sufficiently serious shortcomings" (*Vavilov* at para 100).

[16] With respect to issues of procedural fairness, however, the Federal Court of Appeal has repeatedly stated that these do not require the application of the usual standards of judicial review (*Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35; *Lipskaia v Canada (Attorney General)*, 2019 FCA 267 at para 14; *Canadian Airport Workers Union v International Association of Machinists and Aerospace Workers*, 2019 FCA 263 at paras 24-25; *Perez v Hull*, 2019 FCA 238 at para 18; *Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at paras 33–56 [*CPR*]). It is for the reviewing court to ask, "with a sharp focus on the nature of the substantive rights involved and the consequences for an individual, whether a fair and just process was

followed" (*CPR* at para 54). Consequently, when an application for judicial review concerns procedural fairness and a breach of the principles of fundamental justice, the question that must be answered is not necessarily whether the decision was "correct". Rather, the reviewing court must determine whether, given the particular context and circumstances of the case, the process followed by the administrative decision maker was fair and gave the parties concerned the right to be heard, as well as a full and fair opportunity to be informed of the evidence to be rebutted and to have their case heard (*CPR* at para 56). Reviewing courts are not required to show deference to administrative decision makers on matters of procedural fairness.

III. Analysis

A. *The RAD did not violate the Cervantes family's procedural fairness*

[17] The Cervantes family submits that the RAD violated their right to procedural fairness in failing to admit new evidence, and therefore did not allow them to be properly heard by not considering the entirety of their submissions regarding the IFA. They further assert that the RAD breached their duty to procedural fairness by failing to convene an oral hearing.

[18] With respect, these arguments have no merit.

[19] First, the RAD committed no violation of procedural fairness in refusing to admit certain pieces of new evidence. As correctly noted by the respondent, the Minister of Citizenship and Immigration [Minister], the RAD's decision not to admit evidence presented by the Cervantes family as new evidence is reviewable on a standard of reasonableness. The failure to admit evidence in the context of an appeal to the RAD is not a breach of procedural fairness.

[20] The law on the admission of new evidence before the RAD is clear: pursuant to subsection 110(4) of the IRPA, applicants can only submit new evidence if such evidence was not before the RPD and was not reasonably available to them at the time of the RPD decision (*Guillen Gomez v Canada (Citizenship and Immigration)*, 2024 FC 340 at paras 18–19 [*Guillen Gomez*], citing *Singh v Canada (Citizenship and Immigration)*, 2016 FCA 96 at para 69 [*Singh FCA*]; *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paras 13–16).

[21] Here, the evidence proposed by the Cervantes family predated the RPD hearing and decision. Moreover, the RAD found that the Cervantes family had not provided any explanation as to why the evidence was not reasonably available, noting that they were aware that IFAs were live issues before the RPD, and the documents were all "open-source materials" and therefore accessible. The RAD must analyze the new materials through the lens of subsection 110(4) of the IRPA, and this Court has noted that it is reasonable for the RAD to reject evidence that does not meet the requirements of this provision (*Guillen Gomez* at para 19). In the case at bar, that is precisely what the RAD has done.

[22] Second, the decision of the RAD not to convene an oral hearing did not constitute a breach of procedural fairness and does not constitute a reviewable error. As noted by the Minister, the statutory conditions that would justify convening an oral hearing were not present in this case.

[23] Subsection 110(3) of the IRPA requires that an appeal before the RAD must proceed without a hearing, barring exceptional circumstances outlined in subsection 110(6). Proceeding without a hearing and on the basis of the record that was before the RPD is therefore the default option. In other words, there is no automatic right to an oral hearing before the RAD.

[24] In the case at bar, the RAD properly determined that it was not required to hold an oral hearing because none of the three conditions found in subsection 110(6) were met. That is, there was no documentary evidence that 1) raised a serious issue with respect to the credibility of the Cervantes family; 2) was central to the Decision; and 3) that if accepted, would justify allowing or rejecting the refugee claim. As the subsection 110(6) test is conjunctive, the absence of any one of the three conditions removes the RAD's discretion to hold a hearing (*Singh FCA* at para 71; *Ajagu v Canada (Citizenship and Immigration)*, 2023 FC 544 at para 24). Here, none of the conditions were present.

[25] Consequently, the RAD cannot be faulted for not convening an oral hearing — and the fact an oral hearing was not convened is certainly not a procedural fairness violation, given none of the conditions allowing for an oral hearing were present in this matter. The RAD is bound by its enabling statute and no other determination was possible (*Canada (Wheat Board) v Canada (Attorney General)*, 2009 FCA 214 at para 59 [*Wheat Board*]). Indeed, the RAD is a creature of statute, "and as such, it has no powers, rights and duties save those bestowed on it by the Act" (*Wheat Board* at para 59). Even if the RAD had wanted to conduct an oral hearing, its governing statute prohibited it from doing so under the present circumstances.

B. *The Decision is reasonable*

[26] Turning to the reasonableness of the Decision, the test to determine the existence of a viable IFA comes from *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (FCA) and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (CA) [*Thirunavukkarasu*]. Those decisions from the Federal Court of Appeal state that two criteria must be established, on a balance of probabilities, in order

to find that a proposed IFA is reasonable: 1) there must be no serious possibility of the claimant being subject to persecution in the part of the country in which the IFA exists; and 2) it must not be unreasonable for the claimant to seek refuge in the IFA, upon consideration of all their particular circumstances.

[27] In *Singh 2020*, the Court reminded that "the analysis of an IFA is based on the principle that international protection can only be offered to refugee protection claimants in cases where the country of origin is unable to provide to the person requesting refugee protection adequate protection everywhere within their territory" [emphasis added] (*Singh 2020* at para 26). If a refugee claimant has a viable IFA, this will negate a claim for refugee protection under either section 96 or 97 of the IRPA, regardless of the merits of other aspects of the claim (*Olusola v Canada (Citizenship and Immigration)*, 2020 FC 799 at para 7).

[28] When an IFA is established by the RPD or the RAD, the onus is on the refugee claimant to demonstrate that the IFA is inadequate (*Thirunavukkarasu* at para 12; *Salaudeen v Canada (Citizenship and Immigration)*, 2022 FC 39 at para 26; *Manzoor-Ul-Haq v Canada (Citizenship and Immigration)*, 2020 FC 1077 at para 24; *Feboke v Canada (Citizenship and Immigration)*, 2020 FC 155 at paras 43–44).

[29] On the first prong of the IFA test, I am satisfied that the RAD reasonably determined that Mérida constituted an appropriate IFA. To this effect, the RAD concluded that there was no direct evidence that the CJNG has any influence in Mérida. Moreover, it was reasonable for the RAD to find that the evidence did not establish that the CJNG was motivated to locate the Cervantes family, particularly given the fact that they lived safely in San Ignacio Cerro Gordo,

which is located relatively close to Guadalajara, and within a region where the CJNG has influence.

[30] Indeed, the available evidence indicates that the CJNG is not motivated to locate the Cervantes family. This Court has noted repeatedly "that there is a difference between a persecutor's *ability* to pursue an individual throughout a country and his *desire* to do so or *interest* in doing so. The fact that a persecutor is able to pursue an individual is not decisive evidence that he is motivated to do so. If the persecutor has no desire to find, pursue and/or persecute an individual, or interest in doing so, it is reasonable to conclude that there is no serious possibility of persecution" [emphasis in original] (*Leon v Canada (Citizenship and Immigration)*, 2020 FC 428 at para 13 [*Leon*]).

[31] As the RAD noted, the Cervantes family safely lived proximately to Guadalajara — a region where the CJNG has influence — without any incidents occurring other than a few threatening phone calls and texts. To this effect, the RAD highlighted that the efforts of the agents of persecution were efforts based on convenience, noting that the CJNG made no efforts to locate the Cervantes family other than to call them at known phone numbers. Consequently, the RAD found that had the CJNG been motivated to locate them, they could have done so but did not; and that it was subsequently reasonable for the RPD to conclude that the CJNG is not motivated to find them.

[32] Moreover, the RAD determined that, even though the Cervantes family might be qualified as enemies of the cartel, they did not have the profile of those the CJNG would be motivated to track based on the documentary evidence. According to the objective documentary evidence before the RAD, cartels in Mexico, such as the CJNG, are motivated to track

individuals for perceived betrayal, vengeance, rivalries, for cooperating as witnesses, for political reasons, or those with whom they have had serious conflict. The RAD concluded that the Cervantes family does not fit into any of these categories, and they do not have any serious or ongoing conflict with the CJNG, especially as they are no longer in possession of their convenience store.

[33] In their submissions, the Cervantes family claimed that the RAD's Decision did not have internal coherence and that the RAD put an unfair burden on them to demonstrate the lack of motivation of the CJNG. I am not persuaded by those arguments. It was open to the RAD to rely on the lack of any evidence showing interest or visits by the agents of harm to the family members still residing in Mexico. I also find that it was logical and coherent for the RAD to conclude from the limited phone interactions initiated by the CJNG that the cartel was not motivated to locate the Cervantes family.

[34] For an IFA to be unreasonable under the first prong of the test, an applicant must demonstrate that their agent of persecution has both the means and motivation to locate them in the IFA (*Leon* at para 13). Here, the Cervantes family has failed to demonstrate how the CJNG would be motivated to find them in Mérida.

[35] Turning to the second prong of the test, applicants are required to provide nothing less than "actual and concrete" evidence of conditions that would jeopardize their lives and safety in the IFA (*Lawal v Canada (Citizenship and Immigration)*, 2021 FC 964 at para 21, citing *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 at para 15 [*Ranganathan*]). The burden of proof to show that an IFA is unreasonable is therefore high (*Molina v Canada (Citizenship and Immigration)*, 2016 FC 349 at para 14; *Olivares*

Sanchez v Canada (Citizenship and Immigration), 2012 FC 443 at para 22, citing *Ranganathan* at paras 15–16).

[36] The Cervantes family submits that Mérida is presently plagued by cartel danger, not limited to the CJNG, and that the Mexican state cannot provide sufficient protection such that the IFA is objectively unreasonable.

[37] With respect, I do not agree.

[38] While the RAD disagreed with the RPD that Puebla was a viable IFA, the RAD reasonably concluded that the RPD correctly considered the particular situation of the Cervantes family, as well as the conditions in Mérida. Given their personal circumstances, it was reasonable for the RAD to find that Mérida was a viable IFA. To this effect, the RAD noted that there are no linguistic, logistical or other barriers to relocation to Mérida for the Cervantes family. Moreover, the RAD noted that Mr. Cervantes would be able to access the healthcare services he requires in Mérida.

[39] Ultimately, the Cervantes family's arguments simply express their disagreement with the RAD's assessment of the evidence and suggest that the Court ought to assess it differently. However, it is well established that this is insufficient for the Court to intervene (*Singh 2023* at para 62; *Khelili v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 188 at para 25). The Cervantes family has failed to identify any serious shortcomings or flaws in the Decision, and the Court must therefore avoid interfering with the RAD's conclusions (*Vavilov* at para 100). In fact, the RAD's expertise in matters of immigration requires the Court to show great deference to its findings of fact in the IFA test (*Singh 2020* at para 32).

[40] The RAD's reasons provide a transparent and intelligible justification for the Decision (*Vavilov* at paras 81, 136). At paragraph 102 of *Vavilov*, the Supreme Court held that the reviewing court "must be satisfied that 'there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived'". In the case of the Cervantes family, it is easy to trace and to follow the RAD's line of analysis of the situation they face, and the Decision bears the hallmarks of reasonableness, which are justification, transparency, and intelligibility (*Vavilov* at para 99).

IV. Conclusion

[41] For these reasons, this application for judicial review is dismissed. I am satisfied that the RAD reasonably considered the evidence before it in concluding that the Cervantes family has a viable IFA in Mérida, and that no issue of procedural unfairness arises in this case. There are no grounds for the Court to intervene.

[42] The parties have not raised any question of general importance to be certified, and I agree that none arises on the facts of this case.

JUDGMENT in IMM-9616-23

THIS COURT'S JUDGMENT is that:

1. This application for judicial review is dismissed, without costs.

2. There is no question of general importance to be certified.

"Denis Gascon"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9616-23
STYLE OF CAUSE:	SALVADOR VARGAS CERVANTES ET AL v CANADA (CITIZENSHIP AND IMMIGRATION)
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MAY 22, 2024
JUDGMENT AND REASONS:	GASCON J.
DATED:	MAY 24 2024

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