Federal Court  Cour fédérale

Date: 20240628

Docket: IMM-7418-23

Citation: 2024 FC 1025

Ottawa, Ontario, June 28, 2024

PRESENT: The Honourable Madam Justice Blackhawk

BETWEEN:

JORGE ANTONIO PENA GUTIERREZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant, Mr. Peña Gutiérrez, seeks to set aside a decision dated May 19, 2023, by the Refugee Appeal Division (RAD) of the Immigration and Refugee Board that upheld the September 14, 2022 decision of the Refugee Protection Division (RPD]), pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] (Decision).

[2] The Applicant asks this Court to set the Decision aside and send the matter back to the RAD for redetermination by a different panel because the Decision is unreasonable and procedurally unfair.

[3] For the reasons that follow, this application is dismissed.

II. Background

[4] The Applicant is a citizen of Mexico. He claims he cannot return to Mexico as he will be harmed or killed by a member of the Cartel Jalisco Nueva Generación (CJNG).

[5] The Applicant worked as a manager of a construction company in Mexico City. He alleges that he will be harmed or killed by members of the CJNG. In his capacity as a manager of a construction company, the CJNG attempted to extort the Applicant for money. In addition, the Applicant alleged that the CJNG threatened to kidnap and kill the Applicant's daughters on at least two different occasions. Finally, the Applicant alleges he was kidnapped and beaten by members of the CJNG, but managed to escape and filed a police denunciation report. Following that, the Applicant alleges the CJNG assaulted him for making a report with the Mexican authorities and they threatened to return the following week to collect the demanded money. The Applicant fled Mexico and entered Canada on November 25, 2019. He commenced his refugee claim on January 2, 2021, after the expiration of his temporary resident visa on May 24, 2020.

[6] The RPD rejected the Applicant's claim, finding that he was not a Convention refugee pursuant to section 96 of the *IRPA* and is not a person in need of protection pursuant to subsection 97(1) of the *IRPA*.

[7] The RAD upheld the RPD's September 14, 2022 decision. The RAD found that the Applicant is not a Convention Refugee pursuant to section 96 of the *IRPA*, because his risk did not link to a convention ground. In addition, the RAD found that the Applicant does not qualify as a person in need of protection pursuant to section 97 of the *IRPA*. The RAD found that the Applicant is a victim of the general criminality pervasive in Mexico.

[8] The RPD and the RAD had concerns with the Applicant's credibility because he failed to disclose relevant facts regarding the use of an alternate identity, date of birth, and his previous attempts to enter the United States. They also found that he failed to provide corroboration for the denunciation made with Mexican authorities and he did not name the CJNG as his persecutors in his narrative. In addition, they noted that the demands for extortion were in respect of his work as the manager of a construction company rather than to him personally. There was no evidence of a continuing or ongoing threat to him or members of his family. Finally, they found that the Applicant's delay in initiating his refugee claim was not reasonable if the Applicant had genuine concerns about his safety.

[9] The Applicant provided several pieces of new evidence for the RAD to consider including the report made to Mexican authorities, letters of support for his application, and a prescription note from a doctor. The RAD allowed the new evidence because the Applicant could not be reasonably expected to bring the materials to the RAD as he was self-represented at the hearing, is unfamiliar with the RPD's rules and processes, and would not have known that post-hearing disclosure was permissible. He therefore satisfied the statutory requirement for new evidence under subsection 110(4) of the *IRPA*.

[10] The RAD found the Applicant does not have nexus to the Refugee Convention as criminals targeted him. He therefore risks being a further victim of a criminal entity or cartel, neither of which link to a convention ground. The Applicant's claim was then considered under section 97 of the *IRPA*.

[11] The RAD found the analysis of the Applicant's claim under section 97(1)(b) of the *IRPA* stopped at the first prong of the legal test because the evidence did not establish a prospective or ongoing future risk to the Applicant. The alleged risk that the Applicant and his family would face retaliation because he refused to comply with CJNG demands was not accepted. The RAD determined that his actions do not give rise to an ongoing future risk because he no longer works at the company where he was extorted and it has been several years since the CJNG have pursued him or his family members.

[12] The RAD also found that the newly admitted copy of the denunciation report to the Mexican authorities did not identify the CJNG or members of the CJNG as the Applicant's extortionists or kidnappers. Thus, the complaint was not specifically against the CJNG or specific individuals and did not warrant ongoing retaliation. Therefore, the RAD concluded that there was no evidence that the CJNG are still interested in him.

[13] The Applicant commenced an application for leave and judicial review of the Decision on June 13, 2023. This Court granted leave for judicial review on March 21, 2024.

III. Position of the Parties

[14] The Applicant asserts that the RAD failed in its section 97 assessment and engaged in an erroneous consideration of the evidence. Specifically, the Applicant argued that the evidence

demonstrated a risk of death or cruel and unusual treatment or punishment, and that the RAD did not adequately evaluate the sequence of persecutory events. In view of this evidence, the Applicant argues that the Decision was not reasonable.

[15] The Applicant asserted that the RAD engaged in a selective review of the evidence and erred in concluding he would not be targeted as neither he nor his family members had contact with the CJNG since his arrival in Canada.

[16] The Applicant asserted that the previous attempts to harm him are demonstrative of an on-going risk if he returned to Mexico, and he would not be able to avail himself of state protection because of corruption.

[17] The Respondent argued that the RAD reasonably concluded their analysis at the first prong of the test because the evidence did not establish a prospective or ongoing future risk. The Applicant had resigned from his previous employment, there had been a three-year passage of time since CJNG last contacted the Applicant, CJNG had not contacted the Applicant's family members despite residing in the same city, and the denunciation report did not identify the CJNG or individual members as the agents of persecution.

[18] The Respondent argued that the RAD's insufficient evidence finding is not on its own a negative credibility finding. The RAD accepted the evidence and determined it to be insufficient to support a well-founded fear of persecution. The Applicant is ultimately asking this Court to re-weigh the evidence.

IV. Issues and standard of review

[19] This application only raises one issue: was the RAD's Decision to reject the Applicant's refugee claim reasonable?

V. Analysis

A. *Standard of Review*

[20] The parties submitted, and I agree, that that standard of review applicable to a RAD evaluation of a refugee claimant's risk of persecution under section 97 of the *IRPA* is reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at paras 13, 16–17).

[21] Reasonableness review is a deferential standard and requires an evaluation of the administrative decision to determine if the decision is transparent, intelligible, and justified (*Vavilov* at paras 12–15, 95). The starting point for a reasonableness review is judicial restraint and respect for the distinct role of administrative decision makers. Pursuant to the *Vavilov* framework, 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" (*Vavilov* at para 85). Courts should avoid undue interference with a decision-maker's discharge of its functions (*Vavilov* at paras 13, 24, 30, 100).

[22] To intervene on an application for judicial review, the Court must find an error in the decision that is central or significant which renders the decision unreasonable (*Vavilov* at para 100).

B. *The section 97 legal test*

[23] The well established two-prong test for assessing an internal flight alternative (IFA) pursuant to section 97 of the *IRPA* was set out by the Federal Court of Appeal in *Rasaratnam v Canada (Minister of Employment and Immigration) (CA)*, [1992] 1 FC 706 (FCA), 1991 CanLII 13517.

[24] The first prong of the test looks at whether a claimant, in the proposed IFA, faced a serious possibility of persecution, under section 96 of the *IRPA*, or a risk of harm, under subsection 97(1) of the *IRPA*. At this stage of the analysis the agent of persecution's means and motive to locate the applicant in the IFA are considered (*Singh v Canada (Citizenship and Immigration)*, 2023 FC 996 at para 8; *Adeleye v Canada (Citizenship and Immigration)*, 2022 FC 81 at para 21).

[25] The second prong of the test requires the claimant to prove that they could not reasonably seek refuge in the IFA location, when considering their particular circumstances (*Bhuiyan v Canada (Citizenship and Immigration)*, 2024 FC 351 at paras 6–7).

[26] To succeed in establishing that a proposed IFA is not reasonable, an applicant must persuade the RAD that at least one prong of the test is not made out (*AB v Canada (Citizenship and Immigration)*, 2021 FC 90 [*AB*] at para 39, citing *Aigbe v Canada (Citizenship and Immigration)*, 2020 FC 895 at para 9).

[27] To establish that an IFA is not reasonable, applicants are required to meet a very high threshold. In other words, they need "actual and concrete evidence proving that that are conditions that would jeopardize the life and safety of a claimant in travelling or temporarily

relocating to a safe area" (*AB* at para 40, citing *Ranganathan v Canada (Minister of Citizenship and Immigration) (CA)*, [2001] 2 FC 164 (FCA), 2000 CanLII 16789 at para 15).

[28] The onus is on the Applicant to ensure that there is sufficient evidence before the RAD to assess refugee claims. Visa officers are not required to further investigate or provide an opportunity for applicants to clarify their application or provide additional information to supplement their application (*Ohuaregbe v Canada (Citizenship and Immigration)*, 2023 FC 480 at paras 31–33).

[29] The Applicant has not demonstrated that the RAD overlooked or failed to address any particular element of the Applicant's allegations. The Applicant did not submit evidence to substantiate his assertions of becoming "a permanent target" of the CJNG because he refused to make a payment in response to the extortion demands and made a denunciation report. The evidence shows that the Applicant left his previous managerial position where he became the target of extortion. The evidence also illustrates that a significant period of time has passed since he or members of his family have had any contact with the CJNG. This despite the fact that members of the Applicant's family reside in the same city (Mexico City) and it was noted by the RAD that the CJNG is a powerful cartel with national reach. Finally, the evidence shows that the denunciation report did not implicate CJNG or any specific individuals.

[30] The Applicant's attempt to distinguish his circumstances from those in *Flores v Canada (Citizenship and Immigration)*, 2015 FC 201 [*Flores*] at paras 2, 25–27 are not persuasive. In *Flores*, the applicant had received death threats if she did not make weekly payments. However, she failed to establish that her risk was prospective given that after her departure, neither she, nor her sister who still lived in the same city, had any further contact with the alleged agents of

persecution. The Court concluded that this determination was reasonable. Here, the Applicant argues that his filing of a denunciation report differentiates the circumstances. However, the RAD specifically considered the denunciation report and found that it did not name or identify the perpetrators, and thus would not warrant ongoing retaliation.

[31] The Applicant's arguments alleging ongoing risk are speculative and were reasonably considered by the RAD. The Applicant states that the CJNG has no mechanisms to reach him while he is living in Canada. However, the objective evidence considered by the RAD indicated that organized crime groups such as the CJNG abduct relatives to find information about a target's location. Despite such a mechanism being within the cartel's capacity and *modus operandi*, the CJNG has not made any contact with the Applicant's family who reside in Mexico City. The RAD reasonably found that the Applicant does not face a prospective risk in returning to Mexico. The Applicant's speculation that the CJNG likely found out that he fled Mexico is not grounded in the evidence nor does it change the fact that they have not sought out the Applicant's family or inquired about his whereabouts since he left Mexico in 2019.

[32] This Court has held that it is reasonable for an officer to consider that a claimant's family members have not been contacted by the agent of persecution (*Kanu v Canada (Citizenship and Immigration)*, 2022 FC 674 at paras 23–28; *Rendon Segovia v Canada (Citizenship and Immigration)*, 2023 FC 868 at paras 23–24). Further, while past persecution may support one's claim to a forward-facing risk, it will not necessarily do so (*Fernandopulle v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 91 at para 25; *Zuniga v Canada (Citizenship and Immigration)*, 2018 FC 634 at paras 34, 37).

[33] A finding of insufficient evidence does not entail a negative credibility finding *per se*, as it pertains to an applicant's ability to prove facts on a balance of probabilities. This is not a matter of credibility. The onus remains on applicants to provide sufficient evidence to support their claim (*Sallai v Canada (Citizenship and Immigration)*, 2019 FC 446 at para 57).

[34] In my opinion, the RAD's finding that the Applicant is a victim of the general criminality pervasive in Mexico, but that there is no evidence to support that he is an individual in need of protection, is reasonable. The RAD reasonably concluded that the Applicant does not face a prospective risk. While the Applicant may not agree with this conclusion, this is not grounds for judicial review.

VI. Conclusion

[35] In light of the foregoing, this application for judicial review is dismissed.

[36] The parties did not pose any questions for certification, and I agree that there are none.

JUDGMENT in IMM-7418-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. No question is certified.

"Julie Blackhawk"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7418-23
STYLE OF CAUSE:	JORGE ANTONIO PENA GUTIERREZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 12, 2024
JUDGMENT AND REASONS:	BLACKHAWK J.
DATED:	JUNE 28, 2024

APPEARANCES:

Karim Escalona	FOR THE APPLICANT
Eli Lo Re	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lewis & Associates LLP Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT