Federal Court Cour fédérale

Date: 20241104

Docket: IMM-8326-23

Citation: 2024 FC 1750

Ottawa, Ontario, November 4, 2024

PRESENT: The Honourable Madam Justice Kane

BETWEEN:

CARLOS SACRAMENTO BAHENA VELAZQUEZ, VIZEL JACQUELINE BAHENA RODRIGUEZ, CARLOS SANTIAGO BAHENA BAHENA and KARLA ROMINA BAHENA BAHENA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants, Mr. Bahena Velazquez, his wife and two children, bring this application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] to set aside the June 5, 2023, decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board of Canada. The RAD dismissed the Applicants' appeal from the

Refugee Protection Division [RPD] and found that the Applicants were neither Convention refugees nor persons in need of protection pursuant to sections 96 and 97 of the Act because they had an internal flight alternative [IFA] within Mexico in Merida.

[2] The RAD noted that the Applicants did not contest the RPD's finding that they were not Convention refugees pursuant to section 96 of the Act. The RAD confirmed the RPD's finding that the Applicants were not persons in need of protection pursuant to section 97 and had an IFA in Merida.

[3] For the reasons that follow, the Application for Judicial Review is dismissed. The RAD reasonably concluded that the RPD did not err in finding that the Applicants had an IFA in Merida.

I. Background

[4] Mr. Bahena Velazquez was a police officer in Mexico City. On February 9, 2020, in the course of his duties, Mr. Bahena Velazquez and fellow police officers transported the leader of La Unión Tepito, a cartel, from a detention centre to the courthouse and subsequently transported him back to the detention centre. The leader of La Unión Tepito, Óscar Andrés Flores "El Lunares", was convicted of murder, abduction and drug offences. Mr. Bahena Velazquez recounts that following the conviction, in transit to the detention centre, El Lunares noted his name on his uniform and threatened to kill him and his family claiming that "all of you" had ruined his life. Mr. Bahena Velazquez recounts that in the following days he noticed strangers around his workplace and also following him, pointing at him and intimidating him. His wife

also noticed strangers near their home and cars passing by. Mr. Bahena Velazquez also recounts that his son was threatened at his school by an unnamed person in a white truck.

[5] Mr. Bahena Velazquez and his family fled Mexico and arrived in Canada on February 28, 2020, and subsequently claimed refugee protection.

[6] The RPD accepted that Mr. Bahena Velazquez was a police officer in Mexico City and was threatened as he had claimed, but found that the determinative issue was the availability of an IFA. The RPD cited the two-part test to establish an IFA, noting that the onus was on the Applicants to show, on a balance of probabilities, that there remained a risk to them (as described in section 97) in the IFA location. The RPD found that the IFA in Merida was both safe and reasonable.

[7] The RPD concluded that La Unión Tepito would not have the motivation to track the Applicants to Merida, which is 1,300 km from Mexico City. The RPD noted that apart from Mr. Bahena Velazquez's account that he and his family were followed in the days after the prison transport, La Unión Tepito had not contacted or pursued any family members of the Applicants in the following years.

[8] The RPD acknowledged that the Applicants could be of interest to the cartel members if they returned to Mexico City, but this would not likely be the case if they relocated to the IFA.

[9] The RPD further found that even if the cartel members were motivated to pursue the Applicants, there was no evidence that the cartel operated outside of Mexico City or had any physical presence in Merida.

[10] The RPD added that it had considered "the large geographic size of Mexico, the large number of ports of entry to the country, and the considerable distance the IFA location is from where the claimants were threatened". The RPD concluded that it would require a "significantly large, motivated, connected, coordinated and national organization" to know they had returned and to harm them in the IFA location, and that there is no evidence that the cartel has the motivation or capacity to do so.

[11] With respect to the second part of the test, the RPD found that Merida was a reasonable location taking into account all the circumstances including the particular circumstances of Mr. Bahena Velazquez and his family. The RPD noted that Mr. Bahena Velazquez had transferable skills and experience to find employment and there were no language barriers for the family. The RPD added that the Applicants had not provided persuasive evidence to show that they could not successfully re-establish themselves in Merida and that, on a balance of probabilities, it was not unreasonable for them to do so.

II. Decision under Review

[12] The RAD conducted an independent assessment and confirmed the decision of the RPD that although the Applicants' claims were credible, they had a viable IFA in Merida.

[13] The RAD noted that the Applicants did not contest the RPD's findings that their allegations regarding their risk from La Unión Tepito cartel are allegations of criminality and there is no nexus to a Convention ground of persecution in accordance with section 96 of the Act. The RAD also assessed the claims in accordance with section 97, noting that the onus is on the Applicants to establish that it is more likely than not that they would be subjected to a risk to their lives or a risk of other forms of serious harm, including in the proposed IFA in Merida.

[14] The RAD cited the well-established two-part test to assess whether an IFA exists.

[15] With respect to the first part of the test, the RAD concluded that the RPD did not err in finding that the Applicants did not establish that it is more likely than not that the La Unión Tepito cartel would be motivated to track them to Merida and seriously harm them. The RAD also found that the RPD did not err in finding that the evidence did not establish that it was more likely than not that members of La Unión Tepito would have the motivation to track the family down and seriously harm them or would have the capacity to locate the family in Merida.

[16] The RAD found that the evidence did not support the contention that cartel members would pursue Mr. Bahena Velazquez and his family in Merida to implement an order or vendetta from their leader arising from Mr. Bahena Velazquez's interaction with El Lunares. The RAD acknowledged the country condition documents that explained that criminal organizations will track targets through their family networks, but noted that there was no indication that the Applicants' family members in Mexico had been approached by cartel members over the last three years since the Applicants departed Mexico City. The RAD noted that while the lack of

such pursuit is not determinative of lack of motivation, the jurisprudence has found that this is a good sign that the agent of harm does not have the motivation to track the subject to the IFA in another part of the country.

[17] With respect to Mr. Velasquez's profile as a police officer, the RAD noted that news articles reporting on cartels targeting police officers referred to by the Applicants were not submitted to the RAD. The RAD acknowledged that the country condition documents noted that police officers had been targeted by criminal organizations, but noted that this does not establish that La Unión Tepito would have the motivation to track down the Applicants in Merida. The RAD concluded that Mr. Velazquez's profile as a former police officer would not make it more likely than not that he would be subjected to a risk of serious harm in the IFA location.

[18] The RAD noted that while the country condition documents explain that large criminal organizations have the resources to locate people throughout the country, this capacity varies with the nature of the criminal organization. The RAD noted that the few references to La Unión Tepito in the country condition documents described the cartel as highly localized to Mexico City.

[19] With respect to the second part of the test—whether it would be unreasonable in all the circumstances to expect the Applicants to relocate to the IFA—the RAD noted that the Applicants had not contested the RPD's finding that it was not unreasonable. The RAD explained that the threshold for unreasonableness is high and agreed with the RPD's finding and their reasons.

III. The Applicants' Submissions

[20] The Applicants made oral submissions and noted that they continued to rely on their more extensive written submissions. In their oral submissions, the Applicants focus on passages of the RAD decision and argue that the RAD misstated and misapplied the test for refugee protection.

[21] The Applicants also argue that the RAD erred in its analysis of both parts of the test to establish the availability of an IFA.

[22] The Applicants argue that the RAD erred in finding that La Unión Tepito would not have the motivation or capacity to locate them in Merida. They argue that the RAD erred in finding that it was speculative that Mr. Bahena Velazquez is wanted by the cartel and erred in finding that there was no such evidence. They argue that it is well known that police officers are targeted by cartels and organized crime. They submit that they would be required to live in hiding in Merida and conceal the fact that Mr. Bahena Velazquez was a police officer to avoid detection.

[23] The Applicants also now argue that the RAD erred in confirming the RPD's finding that it was not unreasonable in all the circumstances for them to relocate to Merida. They argue that they would suffer undue hardship in Merida.

IV. The Respondent's Submissions

[24] The Respondent submits that the RAD's decision is entirely reasonable and the Applicants have not identified any error in the RAD's decision.

[25] The Respondent notes that the two-part test to establish an IFA is well-established. The Respondent submits that the Applicants have not met their onus to show on a balance of probabilities that they would be subjected to serious harm in the IFA location. The Respondent adds that the Applicants have not provided any concrete evidence that their safety would be in jeopardy in travelling to or relocating in Merida.

[26] The Respondent notes that although the RPD and RAD did not raise any credibility concerns, this does not mean that the RAD must accept their claim based on their belief that they would be at risk. The Respondent notes that the RAD is entitled to rely on the objective country condition documents regarding the capacity and reach of the cartel.

[27] The Respondent submits that the role of the Court is not to probe the country condition documents in search of information upon which other contrary inferences could be drawn.

[28] The Respondent further submits that the Applicants cannot now argue that the RAD erred in confirming the RPD's finding regarding the second part of the test—that they had not established that it was unreasonable in all the circumstances for them to relocate to Merida—given that they did not challenge this finding in their appeal to the RAD.

[29] The Respondent adds that, in any event, the RAD's decision regarding both parts of the test is reasonable.

V. The Standard of Review

[30] The RAD is an appeal tribunal and applies the standard of correctness when reviewing a RPD decision (*Canada (Citizenship and Immigration) v Huruglica,* 2016 FCA 93 at para 103). The RAD did so and found that the RPD was correct in their findings.

[31] The standard of review is not in dispute. The Court judicially reviews a decision of the RAD on the reasonableness standard (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17, 25 [*Vavilov*]; see also for example *Terganus v Canada (Citizenship and Immigration)*, 2020 FC 903 at para 15; *Feboke v Canada (Citizenship and Immigration)*, 2020 FC 155 at para 13; *Barros Barros v Canada (Citizenship and Immigration)*, 2022 FC 9 at para 36.)

[32] 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; see also paras 102, 105–07). A decision should not be set aside unless it contains "sufficiently serious shortcomings ... such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). Courts should refrain from reweighing and reassessing the evidence that was before the decision maker, although they may interfere where the decision-maker has fundamentally misapprehended or failed to account for the evidence (*Vavilov* at paras 125–26).

VI. The Decision is Reasonable

A. *Section 96 v section 97*

[33] The RAD did not misstate or misapply the test for refugee protection. The test for refugee protection pursuant to section 96 differs from the test pursuant to section 97. The Applicants' claim was assessed only pursuant to section 97 given that their risk from the cartel arises from criminality and not from persecution on a Convention ground.

[34] As noted by Justice Régimbald in *Sierra v Canada (Citizenship and Immigration)*, 2023 FC 881, the test for refugee protection pursuant to section 96 is lower than the test for protection pursuant to section 97. Justice Régimbald explained the test pursuant to section 96 at para 28:

> [28] In order to meet their burden and demonstrate that they meet the definition of "refugee" under section 96 of the IRPA and the Convention, refugee protection claimants must meet the applicable legal test, namely, that there is a "serious possibility" or "reasonable chance" of persecution in the event of a return (*Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4 [*Alam*] at para 8).

[35] Justice Régimbald explained that the test pursuant to section 97 differs, at para 48:

> [48] The threshold for the test is therefore lower for section 96 than for section 97, because section 97 requires that it be "more likely than not" (therefore that there is a more than 50% chance) that a claimant will be subject to a risk of harm identified in section 97 in the event of a return. Furthermore, section 97 requires that this risk be personalized and different from that of other citizens of the country (and unlike section 96, membership in a group that is persecuted is insufficient)…
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> [Emphasis added.]

[36] Contrary to the Applicants' submissions, the RAD did not err in stating and applying the test of "more likely than not".

B. *The jurisprudence on IFA*

[37] With respect to the determination of the IFA, as explained in the governing jurisprudence, a refugee claimant is a refugee from their country as a whole, not from a city or region of their country. A refugee claimant cannot seek the protection of another country while there is a place within their own country—even if it may not be their choice of location—that can offer safety from the risk they claim and that is not unreasonable in all the circumstances.

[38] The RAD cited and applied the well-established two-part test to determine whether the proposed IFA in Merida was viable for Mr. Bahena Velazquez and his family, as did the RPD. As noted by the RAD, the second part of the test was not challenged on appeal to the RAD.

[39] The test requires that, first, the decision-maker be satisfied, on a balance of probabilities, that there is no serious possibility of the refugee claimant(s) being persecuted in the proposed IFA. Second, the conditions in the proposed IFA must be such that it would not be unreasonable for the refugee claimant(s) to seek refuge there, upon consideration of all the circumstances, including their personal circumstances (*Rasaratnam v Canada (Minister of Employment and Immigration)*, 1991 CanLII 13517 (FCA) at 710; *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, 1993 CanLII 3011 (FCA) at paras 2, 12 [*Thirunavukkarasu*]).

[40] As noted by the RAD, the onus is on the refugee claimant(s) to demonstrate that a proposed IFA is unreasonable and that threshold is “very high” (*Ranganathan v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16789 (FCA) at para 15 [*Ranganathan*]).

[41] In *Thirunavukkarasu,* the Federal Court of Appeal described the relevant considerations for finding an IFA noting, among other things:

> […] the question is whether, given the persecution in the claimant’s part of the country, it is objectively reasonable to expect him or her to seek safety in a different part of that country before seeking a haven in Canada or elsewhere. Stated another way for clarity, the question to be answered is, would it be unduly harsh to expect this person, who is being persecuted in one part of his country, to move to another less hostile part of the country before seeking refugee status abroad?
>
> [Emphasis added.]

[42] The Court of Appeal added that the IFA must be a “realistic attainable option”. While “hiding out” is not expected, the Court of Appeal explained:

> […] But neither is it enough for refugee claimants to say that they do not like the weather in a safe area, or that they have no friends or relatives there, or that they may not be able to find suitable work there. If it is objectively reasonable in these latter cases to live in these places, without fear of persecution, then IFA exists and the claimant is not a refugee.
>
> In conclusion, it is not a matter of a claimant’s convenience or the attractiveness of the IFA, but whether one should be expected to make do in that location, before travelling half-way around the world to seek a safe haven, in another country.

C. *The RAD did not err in applying the test for IFA*

[43] The RAD's conclusion that the Applicants had not established that it was more likely than not that they would face a risk of being seriously harmed (in other words, that it was not more likely that they would face this risk) in Merida is based on the objective evidence considered by the RAD. The RAD considered that while large cartels may have the ability to track their targets, La Unión Tepito was a localized smaller organization with no evidence of a broad reach or motivation to find the Applicants. The RAD also considered that there was no evidence that La Unión Tepito had made any overtures to the Applicants' "family network" in Mexico in terms of threats or attempts to locate them in the three years since the Applicants left Mexico City.

[44] As the Respondent notes, although the RAD agreed with the RPD's findings that the Applicants' claim was credible, the Applicants' own belief that La Unión Tepito will track them to Merida does not overcome the objective evidence relied on to support the RAD's finding that this was not likely.

[45] The RAD can find the Applicants to be credible, but still find that they failed to provide sufficient evidence to support their assertion or belief that the IFA is not reasonable. As Justice McHaffie noted in *Chavero Ramirez v Canada (Citizenship and Immigration)*, 2023 FC 984 at para 23:

> The applicants underscore that the RPD found them to be credible and accepted their story regarding their interactions with the CJNG. They argue this should "carry over" to the IFA analysis and their subjective fear of returning to Mexico and moving to Mérida.

> The applicants are quite correct that their credibility was not in issue; both the RPD and the RAD emphasized this point, accepting both their account of past events and their subjective fear. However, being a credible and reliable witness about events that have occurred in the past does not itself establish a refugee claim, and in particular does not establish that an applicant will be at a prospective risk of harm if they return to an IFA: *Adeleye v Canada (Citizenship and Immigration)*, 2022 FC 81 at paras 20–21. A refugee claimant may, as here, be entirely credible in their evidence and may subjectively fear a return yet not meet their burden to establish they would be at risk if they returned to a different part of their country.

[46] The jurisprudence supports the analysis of the RAD; namely, that the agent of harm must have both the means to track the Applicants to the IFA and the motivation to do so. Although the objective country condition documents note that other larger cartels operate in various parts of Mexico, there is little mention of La Unión Tepito. The country conditions and other documents support the RAD's finding that La Unión Tepito remains highly localized in Mexico City and is not on the same scale as other cartels.

[47] The RAD reiterated that it is the responsibility of the Applicants to establish on a balance of probabilities that La Unión Tepito would be motivated to pursue them. The RAD reasonably concluded that there was no such evidence.

[48] With respect to the second part of the IFA test, given that the Applicants did not challenge the RPD's finding on appeal to the RAD, the Court is not required to consider this new argument on judicial review.

[49] Paragraph 3(3)(g) of the *Refugee Appeal Division Rules*, SOR/2012-257 requires, among other things, that an appellant provide "a memorandum that includes full and detailed submissions regarding (i) the errors that are the grounds of the appeal…". The Applicants did not argue that there was an error with respect to the second part of the test.

[50] In *Ogunmodede v Canada (Citizenship and Immigration)*, 2022 FC 94, Justice Gleeson addressed whether an issue not raised on appeal to the RAD could be challenged before the Court and concluded that it could not. Although the context and issue raised differ, the principle is equally applicable. Justice Gleeson cited the Federal Court of Appeal, noting at para 24:

> [24] In *Canada (Citizenship and Immigration) v RK,* 2016 FCA 272, the Federal Court of Appeal addressed the question of whether the applicant was precluded from arguing the RAD erred in failing to conduct a *de novo* hearing where a *de novo* hearing was not sought before the RAD. The Federal Court of Appeal held that a decision of the RAD cannot normally be impugned on the basis of an issue not put to it:
>
> > [6] In my view, this appeal turns on a single issue: the failure of the claimants, the respondents in this Court, to request a *de novo* hearing before the Appeal Division. Because the claimants did not request that the Appeal Division conduct a *de novo* hearing on all of the evidence, they were precluded from raising in the Federal Court any issue relating to the Appeal Division's failure to hold a *de novo* hearing. This is because the reasonableness of the Appeal Division's decision cannot normally be impugned on the basis of an issue not put to it particularly where, as in the present case, the new issue raised for the first time on judicial review relates to the Appeal Division's specialized functions or expertise (*Alberta (Information and Privacy Commissioner) v. Alberta Teachers' Association*, 2011 SCC 61, [2011] 3 S.C.R. 654 at paragraphs 23-25).
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> [Emphasis added.]

[51] There are exceptions in special circumstances where the Court may exercise its discretion to consider a new argument on judicial review, particularly where the Respondent is not prejudiced and has had an opportunity to respond (see for example, *Al Mansuri v Canada (Minister of Public Safety and Emergency Preparedness*), 2007 FC 22 at para 12). However, in the present case, no special circumstances arise. Moreover, even if the Court considered the new argument, the Court would find the RAD's confirmation of the RPD's finding, which was supported by the RPD's consideration of the relevant factors, reasonable. The RAD (and the RPD) reasonably found that the Applicants had not met their onus to show that they could not live in Merida; they could speak the language and Mr. Bahena Velazquez could find employment. Although Merida may not be their choice of location and they may believe that they would have to maintain a low profile, there was no evidence that Merida would be unsafe or "unduly harsh". The Applicants had not met the high threshold to demonstrate with sufficient evidence that relocating to Merida is unreasonable in their circumstances (*Ranganathan* at para 15).

[52] The Applicants appear to be asking the Court to reweigh the evidence considered by the RAD and to remake the decision. This is not the role of the Court. The Court's role is to ensure that the RAD's decision is justified in relation to the facts and the law, and that it is transparent and intelligible. The Court finds that the RAD's decision meets these hallmarks of reasonableness.

JUDGMENT in file IMM-8326-23

THIS COURT'S JUDGMENT is that:

1. The Application for Judicial Review is dismissed.

2. There is no question for certification.

"Catherine M. Kane"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8326-23
STYLE OF CAUSE:	CARLOS SACRAMENTO BAHENA VELAZQUEZ, VIZEL JACQUELINE BAHENA, RODRIGUEZ, CARLOS SANTIAGO BAHENA BAHENA & KARLA ROMINA BAHENA, BAHENA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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