

Federal Court



Cour fédérale

Date: 20210224

Docket: IMM-7190-19

Citation: 2021 FC 175

[ENGLISH TRANSLATION]

Ottawa, Ontario, February 24, 2021

PRESENT: The Honourable Madam Justice Walker

BETWEEN:

**ARACELI GUERRERO JIMENEZ
ARMANDO GARCILAZO CASTILLO
DULCE NEREIDA GARCILAZO
GUERRERO
ALEXIS GARCILAZO GUERRERO**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The principal applicant, Armando Garcilazo Castillo, his wife, Araceli Guerrero Jimenez, and their two adult children are seeking judicial review of the Refugee Appeal Division's (RAD) decision issued on October 18, 2019. In the decision, the RAD dismissed their appeal and

confirmed the decision of the Refugee Protection Division (RPD) that they are neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] For the reasons that follow, the application for judicial review is dismissed. Having reviewed the record and all of the RAD's reasons and findings, I am not persuaded that the decision was unreasonable. The RAD addressed the issues that the applicants raised on appeal regarding breaches of procedural fairness before the RPD and the RPD's errors in its credibility assessment. The RAD's decision is consistent and its finding is justified within the legal and factual constraints that apply.

I. Context

[3] The applicants are all citizens of Mexico. In their claims for refugee protection, they allege a fear of police officers in the state of Mexico, where they lived. The applicants allege that, on several occasions since 2017, these police officers extorted money from them and threatened them.

[4] The principal applicant left Mexico for Canada in June 2017 after a threatening encounter with police officers in February 2017. Since then, he alleges that his wife and daughter were intercepted on October 31, 2017, by two men in police uniforms who threatened them and demanded money. Ms. Jimenez left Mexico and traveled to Canada on November 29, 2017. Their two children arrived in Canada on March 8, 2019. The principal applicant's son alleged

that he received a threatening call on December 19, 2018, while still living in Mexico and that some men attempted to kidnap his sister in December 2018.

[5] On May 6, 2019, the RPD denied the applicants' refugee protection claim on the grounds that their allegations are not credible.

[6] The applicants appealed the RPD's decision before the RAD, where they argued that they did not have a "fair hearing" before the RPD. The applicants stated that they were not represented by counsel at the hearing and that their testimony was not properly interpreted. In addition, they alleged that the RPD erred in its assessment of their credibility.

[7] The RAD dismissed the appeal. First, the RAD pointed out that the applicants never expressed a desire to be represented by counsel. In fact, the principal applicants filed their refugee protection claims more than a year before they had their RPD hearing. Therefore, they cannot allege before the RAD that their desire was to be represented by counsel before the RPD. The RAD then argued that the interpretation at the RPD was continuous, precise, competent, impartial and contemporaneous. Finally, the RAD concludes that there was no breach of procedural fairness at the RPD hearing.

[8] The RAD noted that the applicants did not challenge specific RPD findings about their credibility. The RAD highlighted the fact that the RPD's decision was based on a number of omissions found in the applicants' Basis of Claim Form (BOC Form) in relation to their testimony. According the RAD, the applicants did not reasonably explain these contradictions

and implausibilities, and the RAD reached the same conclusion as the RPD, “that these omissions, contradictions and implausibilities, taken cumulatively, can only affect the credibility of the claimants’ essential allegations”.

II. Issues and standard of review

[9] The applicants argue that the RAD unreasonably reviewed the RPD’s credibility findings, notwithstanding the RAD’s intention to review the decision on appeal applying the standard of correctness. In addition, the applicants argue that the RAD failed to consider their arguments regarding lack of counsel and inadequate interpretation before the RPD.

[10] The standard of review for RAD decisions on credibility and assessment of evidence is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 143 (*Vavilov*); *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35 (*Huruglica*); *Braveus v Canada (Citizenship and Immigration)*, 2020 FC 1153 at para 8). The standard of reasonableness also applies to findings by the RAD as to whether there was a breach of procedural fairness at the RPD hearing (*Atim v Canada (Citizenship and Immigration)*, 2018 FC 695 at para 33).

[11] Where the standard of reasonableness applies, “[t]he burden is on the party challenging the decision to show that it is unreasonable” (*Vavilov* at para 100). A reasonable decision is one that is “based on an internally coherent and rational chain of analysis” (*Vavilov* at para 85). Moreover, before setting aside a decision on the basis that it is unreasonable, the Court must be satisfied “that there are 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).

III. Analysis

[12] The applicants argue that the RAD failed to meet its obligation to undertake a rigorous and consistent analysis in accordance with the principles set out in *Huruglica*. According to the applicants, the RAD merely reiterated its agreement with the RPD decision. They criticize the RAD for repeating the RPD’s findings in the form of a split opinion and allege that the RAD’s reasons were confusing and its conclusions unreasonable.

[13] I find the applicants’ argument to be without merit. The decision reflects an assessment that, in light of the applicants’ appeal memorandum and the evidence on the record, was comprehensive and independent. The RAD considered each of the applicants’ arguments in light of the recording of the RPD hearing, the evidence, and the decision on appeal. The RAD did not limit itself to a repetition of the RPD’s findings.

[14] I will first discuss the arguments concerning the credibility findings made by the RPD and the RAD. The applicants provided the RAD with an appeal memorandum that only refers to general principles regarding the assessment of their credibility. They simply stated that the RPD “panel rejected the claim for lack of credibility”. The applicants did not specify what errors they believe were made.

[15] The applicants had an obligation to identify in their memorandum the errors made by the RPD and could not fault the RAD for failing to address each of the RPD's findings (rule 3(3)(g)(i) and (ii) of the *Refugee Appeal Division Rules*, SOR/2012-257; *Liu v Canada (Citizenship and Immigration)*, 2017 FC 736 (*Liu*)). I recognize that the applicants have raised the general issue of credibility, but it is not the function of the RAD "to supplement the weaknesses of an appeal before it" (*Liu* at para 25).

[16] Notwithstanding the lack of detail from the applicants, the RAD reviewed the factors that were important to the RPD's credibility determination. The RAD began its assessment by listing the omissions and implausibilities identified by the RPD in the applicants' BOC Forms in relation to their testimony. Thereafter, within its own assessment of the applicants' credibility, the RAD considered the evidence presented. Its decision was not a split opinion or a mere affirmation of the RPD's decision. The fact that the RAD was brief in its reasons is not a determinative error.

[17] By way of specific argument before the Court, the applicants state that the RAD and RPD erred in finding that the principal applicant failed to indicate in his BOC Form that an attempted kidnapping occurred in February 2017 and that death threats were made in a telephone call in May 2017.

[18] The RAD made negative findings on the applicants' credibility based on omissions and contradictions in the BOC Forms in relation to their testimony. In doing so, the RAD committed no reviewable error (*Ali v Canada (Citizenship and Immigration)*, 2018 FC 1178 at para 24;

Garay Moscol v Canada (Citizenship and Immigration), 2008 FC 657 at para 21). In this case, the applicants did not mention an attempted kidnapping in their BOC Form. In fact, they noted an incident in February 2017, but there was no mention of an attempted kidnapping. This aspect of the incident is important with respect to the applicants' subjective fear of persecution in Mexico. Moreover, there was no mention of any death threats in May 2017 and this omission is not an insignificant nuance. Both of these elements strike at the heart of the applicants' narrative.

[19] The RAD also considered the applicants' behaviour (*Guecha Rincon v Canada (Citizenship and Immigration)*, 2020 FC 173 at para 19). It should be recalled that the burden is on the claimant to show a well-founded fear of persecution in his or her country. The time taken to leave the place of persecution and one's country of origin following the alleged threats is one of the relevant factors that the panel may consider in assessing the fear of persecution (*Osorio Mejia v Canada (Citizenship and Immigration)*, 2011 FC 851 at paras 14–15; *Zeah v Canada (Citizenship and Immigration)*, 2020 FC 711 at para 61). The RAD did not err in noting that the principal applicant's wife and daughter continued to work near their former home after they had moved away to protect themselves from the alleged threats. The RAD's finding that their behaviour was inconsistent with someone who has a genuine fear of persecution was a reasonable one.

[20] The applicants subsequently argue that the RAD did not adequately consider their lack of legal representation at the RPD hearing or the inadequacy of the interpretation. As a result, the RAD's analysis of their case and the contradictions in their narrative was overly stringent and

unreasonable. They claimed that the RAD had punished them for not being supported by counsel at the RPD hearing.

[21] I agree with the respondent's argument that legal representation in administrative or judicial proceedings is not mandatory. It is a decision for the claimant to make. Therefore, proceeding without counsel does not, in itself, establish a breach of procedural fairness. To make their case, claimants must establish that the RAD's review in relation to the fact that they lacked representation before the RPD was unreasonable.

[22] After listening to the recording of the RPD hearing, the RAD noted that the applicants never expressed a desire to be represented by counsel at the hearing. According to the RAD, they voluntarily decided to be heard without representation. Also, the RAD found that the fact the principal applicants claimed refugee protection more than a year before the RPD hearing led to a conclusion that they had ample time to find counsel to represent them.

[23] I confirm the RAD's finding that the applicants cannot retrospectively allege that their wish was to be represented by counsel. I also note that the applicants addressed this argument briefly in their appeal memorandum. They wrote only that they did not receive a fair hearing because they were not represented by counsel. In my opinion, the RAD has clearly and logically explained its reasons for rejecting this argument. The RAD's assessment of the applicants' credibility was based on multiple omissions and central contradictions, and did not present an unduly rigorous examination. I am not persuaded by the applicants' argument that the RAD

punished them for not being supported by counsel at the RPD hearing. The RAD's reasons do not refer to any type of punishment.

[24] Finally, the applicants argue that the quality of the interpretation at the hearing was inadequate. They maintain that the reasons in the decision were unclear and that it was difficult to follow the RAD's reasoning and its finding.

[25] In *Mohammadian v Canada (Minister of Citizenship and Immigration)*, 2001 FCA 191, at paragraph 4, the Federal Court of Appeal found that interpretation services provided to applicants must "be continuous, precise, competent, impartial and contemporaneous". The right to adequate interpretation services should not be confused with the right to perfect interpretation services (*Singh v Canada (Citizenship and Immigration)*, 2010 FC 1161 at para 3). A claimant does not have to establish actual prejudice, but must show that the interpretation error was material to the RPD's decision (*Batres v Canada (Citizenship and Immigration)*, 2013 FC 981 at para 12; *Haggar v Canada (Citizenship and Immigration)*, 2018 FC 388 at para 22). I find that the applicants have not presented such an argument. They failed to provide any examples of what they allege or of prejudicial impact as a result of the interpretation at the hearing.

[26] First, I note that the applicants were required to raise any concerns about the adequacy of the interpretation provided to them at the earliest opportunity (*Murugesu v Canada (Citizenship and Immigration)*, 2016 FC 819 at paras 26–27; *Siddiqui v Canada (Citizenship and Immigration)*, 2015 FC 1028 at para 65). The applicants' failure to raise their concerns at the first opportunity, which was at the hearing before the RPD, suggests a waiver on their part.

[27] Moreover, the applicants had an obligation to identify serious errors in interpretation, but they failed to cite any examples of such errors, either in their submissions to the Court or in their appeal memorandum. Although some clarifications were sought from the interpreter during the hearing, the RAD found that questions and clarifications were normal in a four-hour hearing and that this “does not render the interpretation erroneous”. The Court notes that the interpreter was certified by the RPD and had taken an oath to accurately translate what was said. Furthermore, the applicants and the interpreter confirmed at the beginning of the hearing that they understood each other well. The RAD repeatedly stated in the decision that it listened to the recording of the hearing. The RAD met its obligation to consider the applicants’ claim regarding interpretation at the hearing in an eminently reasonable manner and its reasons were comprehensive and consistent.

[28] In conclusion, I am satisfied that, when read holistically and contextually, the RAD’s decision meets the standard of reasonableness set out in *Vavilov*. The RAD considered each argument made by the applicants in an intelligible and transparent manner. Its decision was based on reasons that are internally coherent and justified in light of the facts and applicable law. Accordingly, the application for judicial review is dismissed.

[29] The parties have not proposed any issues for certification, and I agree that there are none.

JUDGEMENT in IMM-7190-19

THIS COURT’S JUDGMENT is as follows:

1. The application for judicial review is dismissed.
2. The style of cause is amended to replace “Minister of Immigration, Refugees and Citizenship” with “Minister of Citizenship and Immigration”.
3. No question of general importance is certified.

“ Elizabeth Walker ”

Judge

Certified true translation
This 14th day of April 2021
Sebastian Desbarats, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7190-19

STYLE OF CAUSE: ARACELI GUERRERO JIMENEZ, ARMANDO
GARCILAZO CASTILLO, DULCE NEREIDA
GARCILAZO GUERRERO, ALEXIS GARCILAZO
GUERRERO v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: MATTER HEARD BY VIDEOCONFERENCE IN
OTTAWA, ONTARIO (COURT) AND IN
MONTRÉAL, QUEBEC (PARTIES)

DATE OF HEARING: FEBRUARY 8, 2021

JUDGMENT AND REASONS: WALKER J.

DATED: FEBRUARY 24, 2021

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