Federal Court

Cour fédérale

Date: 20211007

Docket: IMM-2610-20

Citation: 2021 FC 1052

Ottawa, Ontario, October 7, 2021

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

MARCO VINICIO GUERRERO GARCIA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] This is an application for judicial review of a decision by the Refugee Appeal Division [RAD] dated March 2, 2020 [the Decision]. In that Decision, the RAD confirmed a decision of the Refugee Protection Division [RPD], which determined that the Applicant has viable internal flight alternatives [IFAs] in either Veracruz or Tampico, Mexico and therefore is neither a

Convention Refugee nor a person in need of protection under sections 96 and 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[2] As explained in more detail below, this application is allowed, because the RAD failed to reasonably analyze the effect of a move to the IFA upon the Applicant's mental health.

II. **Background**

[3] The Applicant is a Mexican citizen. In January 2017, he was approached by a childhood acquaintance to become a drug dealer for the Sinaloa cartel. He agreed, but he did not attend the first meeting arranged with the cartel and instead went into hiding and made his way to Mexico City and eventually traveled to Canada. The Applicant filed a claim for refugee protection in February 2017 on the basis that he fears he will be persecuted by the Sinaloa cartel if he returns to Mexico. He received multiple threatening phone calls from members of the cartel while in hiding before he changed his phone number.

[4] The Applicant has been diagnosed with post-traumatic stress disorder, chronic major depressive disorder and a cognitive impairment including memory loss. He has a history of drug addiction. While the Applicant has been sober for a number of years, his drug use left him with memory and cognitive issues.

[5] Following a hearing in April 2019, the RPD issued a decision, dated August 13, 2019, determining that the Applicant is not a Convention refugee or person in need of protection. The

RPD found the Applicant credible, but it dismissed his refugee claim, because it found that he had IFAs in Tampico and Veracruz.

[6] The Applicant appealed the RPD's decision to the RAD. In the Decision that is the subject of this application for judicial review, the RAD denied the appeal and confirmed the RPD's determination.

III. **Decision Under Review**

[7] IFA was the determinative issue on appeal to the RAD. The RAD upheld the RPD's finding that the Applicant was credible, but it also agreed with the RPD that the Applicant has IFAs in Tampico or Veracruz.

[8] The RAD began by explaining that the RPD applied the correct two-prong approach to an IFA analysis, as described in *Rasaratnam v Canada (Minister of Citizenship and Immigration*), [1992] 1 FC 706 (FCA), 140 NR 138 at paras 5-6 and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (FCA), 109 DLR (4th) 682 at paras 9, 11. This analysis considers: (a) whether there is a serious possibility of the claimant being persecuted in the part of the country proposed as an IFA; and (b) whether the conditions in the part of the country considered to be an IFA are such that it would not be unreasonable in all the circumstances for the claimant to seek refuge there.

[9] Under the first prong of the test, the RAD determined that the Applicant had not demonstrated that there is a serious possibility of persecution in either of the proposed IFAs. In making this determination, the RAD confirmed the following findings made by the RPD:

A. the Sinaloa cartel has regional control along the North and West regions of Mexico, while other competing cartels control the territory surrounding the IFA locations;

B. the Applicant had not established beyond mere speculation that the Sinaloa cartel would use informers to seek him out in the proposed IFA locations;

C. the Applicant was able to take a public inter-city bus from his hometown to Mexico City, indicating that the cartel's attempts to find the Applicant have not been thorough or sophisticated;

D. the Applicant's family is still residing in the town of Sinaloa without any evidence of them being contacted or harmed by the cartel, which the RAD took as evidence that the cartel is not concerned about finding the Applicant or drawing him out of hiding; and

E. the Applicant has not heard from the cartel since he left Mexico and obtained a new cell phone, indicating that the cartel's interest in the Applicant has waned.

[10] The Applicant argued before the RAD that he could not safely live anywhere in Mexico, because he speaks with a Sinaloan accent. The RAD accepted that regional accents exist but found it was unclear how this would result in the Applicant's identity coming to the attention of

the Sinaloa cartel, given that Mexico has freedom of movement and a large number of cosmopolitan cities, including the proposed IFAs, where people of many backgrounds intermingle.

[11] The Applicant also argued that the RPD erred by not considering anecdotal evidence he advanced, related to an individual wanted by a cartel in the South of Mexico, who attempted to escape north and was allegedly found and killed. The RAD accepted that these events occurred, but it determined that the anecdote did not reveal anything useful for making any finding of fact in the Applicant's case, because the Applicant's anecdote appeared to refer to a cartel different from the Sinaloa cartel, which could have a different reach, and the anecdote did not reveal the nature of the vendetta in question, which could be quite different from the present case.

[12] The RAD also dismissed an argument regarding the general homicide rate in Mexico, explaining that it is not relevant to the Applicant's personalized risk in the IFA locations.

[13] Finally, the RAD addressed an analogy, drawn by the Applicant, between the vendetta he has been the target of and other refugee cases regarding political persecution and rank. The RAD indicated that it was unclear what point the Applicant was making with this analogy, explaining that it was already accepted that the Applicant was the target of the Sinaloa cartel's recruitment efforts and that he was the subject of angry telephone calls. The RAD explained that he did not provide evidence as to whether the Sinaloa cartel could find him in the IFA locations.

[14] With respect to the second prong of the test, the RAD found that the proposed IFAs would be reasonable cities for the Applicant to take refuge in, given his personal circumstances. In making this determination, the RAD noted that the RPD found no evidence that the Applicant would not be able to find work in either proposed IFA and there is no evidence that the Applicant would need to travel through Sinaloa cartel territory to reach the proposed IFA locations. The Applicant had not challenged either of these findings on appeal.

[15] Rather, on his appeal to the RAD, the Applicant challenged the RPD's assessment of the reasonableness of the proposed IFAs, because psychological evidence in the record indicated that he could suffer a significant regression in his mental state if he returned to Mexico. The RAD found, based on its review of the evidence, that the Applicant has been diagnosed with generalized anxiety disorder, moderate post-traumatic stress disorder, moderate major depressive disorder, and cognitive impairment that causes memory loss. The RAD also noted that the Applicant referenced bipolar disorder in the basis of claim narrative in his refugee claim. The RAD observed that the Applicant had a history of illicit drug addiction but had been sober for several years. The RAD agreed with the RPD that all these diagnoses were credible.

[16] However, the RAD determined that the RPD correctly found that the Applicant would be able to access the mental health resources he needs in Mexico. The RAD found that the Applicant's history indicates that he has been quite successful in coping in Mexico, pointing out that before leaving Mexico the Applicant was accessing mental healthcare, was taking medication, and had ended his use of illicit drugs. The RAD also pointed out that there was no evidence that clinics are unavailable or would bar the Applicant in the IFA locations and found

that the Applicant possesses the capacity to advocate for himself and be successful in accessing the healthcare system in the IFA locations.

[17] The RAD observed that the Applicant had argued on appeal that the RPD failed to consider that his previous success accessing mental health resources in Mexico occurred before his experience with the cartel. The RAD accepted that the cartel's recruitment efforts and subsequent telephone calls were traumatizing and that this trauma likely interacts in complex ways with his past traumas and other conditions. However, the RAD found that it remained untold to what extent the Applicant's traumatic experience would be untreatable in the IFA locations. The RAD explained that the test for reasonableness of an IFA is a very high threshold that must jeopardize the life or safety of a claimant in the IFA location. The RAD found that the Applicant's previous success in overcoming significant trauma and abuse was compelling evidence that he would be able to overcome his more recent experiences in a similar fashion.

[18] Therefore, the RAD concluded that the RPD was correct in finding that the proposed IFAs in Tampico and Veracruz are both safe and reasonable for the Applicant, and it dismissed his appeal.

IV. **Issues and Standard of Review**

[19] The Applicant raises the following issues for the Court's consideration:

A. Did the RAD err in finding that there was no serious possibility of the Applicant being persecuted in Veracruz or Tampico?

B. Did the RAD err in finding that it would not be objectively unreasonable for the Applicant to seek refuge in Veracruz or Tampico?

[20] The parties agree, and I concur, that the applicable standard of review for the Decision is reasonableness.

V. **Analysis**

[21] My decision to allow this application for judicial review turns on the Applicant's arguments in relation to the second prong of the IFA test. He submits that the RAD conducted an unreasonable analysis in relation to the impact that moving to the IFA would have upon his mental health. The Applicant argues that, like the RPD, the RAD analysed this impact solely in terms of the Applicant's ability to access mental health services and did not consider the impact of the move itself upon his mental health and risk of suicide.

[22] The evidence adduced by the Applicant included reports prepared by his psychiatrist, Dr. Christopher Kitamura, in April 2017 and February 2019, as well as a May 2019 report by his family doctor, Dr. Vanessa Redditt. Dr. Kitamura's first report explained the Applicant's diagnosis with post-traumatic stress disorder [PTSD], chronic major depressive disorder and a cognitive impairment including memory loss, and spoke to the effect of returning to Mexico upon his conditions. Dr. Kitamura explained that it is medically detrimental for PTSD sufferers if they are placed against their will in situations they deem dangerous and that such individuals can recover with treatment and when they are out of the unsafe situation in the longer term. Dr. Kitamura expressed the following opinion:

> Given that Mr. Vinicio Guerrero Garcia left Mexico because he was traumatized there and did not feel safe there, it is likely that his mental health would worsen, and he would experience increased depressive and PTSD symptoms if he had to return to Mexico. His risk of suicide would also likely increase as a result, due to feeling of hopelessness and helplessness triggered by a return to Mexico. …

[23] Dr. Kitamura's second report is consistent with his previous opinion, describing the Applicant's process of recovery as early and fragile and opining as follows:

> … Now more than ever it is imperative that he continue to reside in a safe and secure setting, and his mental health is likely to significantly worsen if he returned to Mexico, including potential relapse into use of heroin or other drugs and, with that, worsened mental and cognitive, a decline and functioning, and poor physical health.

[24] Dr. Redditt's explanation of the Applicant's psychiatric history and diagnosis is consistent with that of Dr. Kitamura.

[25] Against the backdrop of these medical reports, the Applicant argued before the RAD that the RPD in its IFA analysis failed to meaningfully take into account the effect that returning to Mexico would have upon his mental health. He now argues in this application for judicial review that the RAD made the same error. I agree with this submission.

[26] As the Applicant submits, the relevant portion of the RAD's IFA analysis focuses entirely on the availability of treatment in Mexico and includes no analysis of the medical evidence as to the effect of return upon his mental health or resulting impacts upon his ability to access treatment. I recognize that the RAD acknowledged the Applicant's arguments both that: (a) his

psychological evidence indicated that he would suffer a significant regression in his mental state should he return to Mexico; and (b) he would not know how to approach the healthcare system in a new city. However, the RAD's reasons demonstrate no analysis of those arguments or the related evidence.

[27] The Respondent submits that the Decision demonstrates that the RAD did consider the impact of relocation to the proposed IFA locations upon his mental health, relying upon the following excerpt from the Decision:

> The Appellant has argued that the RPD failed to consider the fact that his previous mental health success in Mexico occurred before his experience with the cartel. I accept that the cartel's recruitment efforts and subsequent angry telephone calls were traumatizing to the Appellant, and I also accept this trauma likely interacts in complex ways with his past traumas and other conditions. What remains untold in the Appellant's argument, however, is to what extent his traumatic experience with the cartel would be untreatable in the IFA locations. The Federal Court has been clear that the test of reasonableness is a very high threshold that must jeopardize the life or safety of the claimant in the IFA location.
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> [Respondent's emphasis.]

[28] I find little support in this excerpt for the Respondent's submission or the reasonableness of the Decision. Rather, as the Applicant suggests, this excerpt from the Decision focuses upon whether the Applicant's mental health challenges would be treatable in the IFA location. It does not disclose an analysis of the evidence related to the effect that the move to those locations would have upon his mental health.

[29] I note that, in advancing his argument that the Decision is unreasonable because of the absence of such an analysis, the Applicant relies on concern expressed by the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*], about decision-makers focusing their analyses exclusively on whether mental health services are available in the country of reference and not assessing the impact of a deportation on an applicant's mental health (at para 48):

> … In her exclusive focus on whether treatment was available to K in Sri Lanka, the Officer ignored what the effect of removal from Canada would be on his mental health. The fact that K's mental health would likely worsen if he were to be removed to Sri Lanka is a relevant consideration that must be identified and weighed regardless of whether there is treatment available in Sri Lanka to help with his condition. …

[30] In response, the Respondent points out that *Kanthasamy* was decided in a very different context, involving a decision on an application for permanent residence on humanitarian and compassionate [H&C] grounds. I agree that the Court must be cautious in extrapolating from the analysis in *Kanthasamy* to the analysis that is required in assessing the viability of an IFA in a refugee protection case. For instance, the analysis to be undertaken by an immigration officer considering an H&C application necessarily engages a comparison between an applicant's circumstances in Canada and the circumstances the applicant would face if returning to the reference country. In contrast, an IFA analysis focuses significantly upon a comparison between the circumstances in the proposed IFA and those in the location at which a claimant experienced persecution. That said, I accept that *Kanthasamy* applies to the case at hand to the extent it raises concern about a decision-maker failing to take into account argument and supporting evidence

relevant to an applicant's mental health, and I agree with the Applicant that the Decision currently under review demonstrates such a failure.

[31] I am also conscious of the Respondent's reliance on *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643, in which Chief Justice Crampton explained that, under the second branch of the IFA test, the threshold for it being objectively unreasonable for a claimant to seek refuge in an IFA is very high. The Chief Justice referenced other authorities requiring the existence of conditions that jeopardize life or safety or present physical danger or undue hardship. However, I have no difficulty concluding that adverse impacts upon the Applicant's mental health including risk of suicide, as identified in the medical evidence in the case at hand, potentially meet this threshold and therefore required analysis by the RAD.

[32] Based on these findings, the Decision is unreasonable, this application for judicial review will be allowed, and it is unnecessary to consider the other issue raised by the Applicant.

[33] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-2610-20

THIS COURT'S JUDGMENT is that this application for judicial review is allowed, the Decision is set aside, and the matter is returned to a different member of the RAD for redetermination, with the Applicant having the right to make updated submissions. No question is certified for appeal.

"Richard F. Southcott"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2610-20
STYLE OF CAUSE:	MARCO VINICIO GUERRERO GARCIA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE VIA TORONTO, ONTARIO
DATE OF HEARING:	SEPTEMBER 20, 2021
JUDGMENT AND REASONS:	SOUTHCOTT J.
DATED:	OCTOBER 7, 2021

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