

Federal Court



Cour fédérale

Date: 20211207

Docket: IMM-2327-21

Citation: 2021 FC 1363

[ENGLISH TRANSLATION]

Ottawa, Ontario, December 7, 2021

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

**OMAR ERNESTO HERRERA SALAS
ANA CECILIA MAGDALENO JIMENEZ
DOMINIK YANDEL MAGDALENO JIMENEZ
AUSTIN NEYMAR MAGDALENO JIMENEZ
ANTVVAN ELIEN MAGDALENO JIMENEZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Omar Ernesto Herrera Salas, his spouse, Ana Cecilia Magdaleno Jimenez, and their three children, all citizens of Mexico, are seeking judicial review of a decision

by the Refugee Appeal Division [RAD], which concluded that they had not demonstrated that they would be exposed to prospective risk or that Mr. Salas's political involvement was likely to endanger their lives if they were to return to Mexico.

[2] For the reasons set out below, I will allow the application for judicial review. I find that the RAD breached its duty of procedural fairness; the issue of prospective risk was a "new issue" that was a new basis for the RAD's decision. As such, the RAD was required to notify the parties.

II. Facts

[3] Mr. Salas worked in construction for 10 years until 2015, when his construction contract ended and he decided to work for the Institutional Revolutionary Party [PRI] during the 2018 federal election campaign as an employee, rather than as an activist. He stopped working for the PRI in early 2018, a few months before the election was held.

[4] In March 2017, Mr. Salas started receiving threats related to his employment with the PRI. The individuals who made the threats went to his workplace and threatened the employees that if the PRI won its elections in 2018, they would all pay with their own lives.

[5] Mr. Salas began to fear for his life around September 2017 when some of his colleagues began to disappear or be found dead. Still, he continued to work for the PRI after being reassured by his employer. However, after receiving a call on March 20, 2018, from an unidentified man who threatened him with retaliation if he continued to work for the PRI, Mr. Salas decided to

leave his job and his home and hide out at his mother-in-law's house with his spouse and their children.

[6] On May 10, 2018, Mr. Salas left Mexico alone and arrived in Canada on May 11, 2018. Ms. Jimenez remained with the children in Mexico. Subsequently, she received two anonymous messages in late May and mid-June 2018 asking for the whereabouts of Mr. Salas and demanding that she stop protecting her spouse. After unknown individuals showed up at her work, Ms. Jimenez quit her job and removed the children from their school. They then left Mexico on August 18, 2018, and arrived in Canada on August 19, 2018.

III. Lower court decisions

[7] The RPD rejected the refugee protection claims after finding several contradictions in Mr. Salas's written account and testimony that undermined the credibility of his allegations, and after giving no weight to the letter submitted that corroborated his account. The RPD was not satisfied with the answers Mr. Salas gave at the hearing and drew negative inferences from these contradictions that undermined his credibility. The RPD therefore did not believe, on a balance of probabilities, that Mr. Salas worked in politics or was politically active; the evidence showed that Mr. Salas worked for the PRI as an employee, not as a party activist.

[8] Ms. Jimenez was considered credible by the RPD, however, she was unable to demonstrate, on a balance of probabilities, that the anonymous messages and visits by the unknown men were related to her spouse's political work.

[9] The RAD came to a different conclusion than the RPD; it acknowledged that there may have been errors in the documents that Mr. Salas submitted and in the allegations that he was in fact targeted by threats because of his involvement with the PRI. Having dismissed any concerns about Mr. Salas's credibility, the RAD continued the analysis and instead concluded that the applicants had not demonstrated that Mr. Salas's political involvement was likely to endanger their lives if they were to return to Mexico. The RAD concluded that since Mr. Salas had ended his political involvement and the PRI did not win the 2018 elections, agents of persecution would have no incentive to continue targeting Mr. Salas and his family. Furthermore, the RAD agreed with the RPD regarding the events described by Ms. Jimenez; she failed to demonstrate that the incidents were related to her spouse's political activities.

IV. Issues

[10] This application for judicial review raises two issues:

- a) Did the RAD comply with principles of procedural fairness by continuing the prospective risk analysis in Mexico without notifying the applicant?
- b) Is the RAD's conclusion that the applicants have not shown that there is a serious possibility that they will be persecuted if returned to Mexico reasonable?

V. Standard of review

[11] In the context of a procedural fairness issue, the question is whether the proceedings were fair in all the circumstances (*Canadian Pacific Railway v Canada (Attorney General)*, 2018 FCA 69 at paras 32–56).

[12] In addition, the RAD's decision must be reviewed on the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 170 [Vavilov]; *Majebi v Canada (Citizenship and Immigration)*, 2016 FCA 274 at paras 5–6). The Court's role is therefore to review the RAD's decision and determine whether it is based on “an internally coherent and rational chain of analysis” and whether the decision as a whole is transparent, intelligible and justified (*Vavilov* at paras 85–86).

VI. Analysis

A. *RAD breached principles of procedural fairness*

[13] The applicants contend that the RAD's analysis of the issue of prospective risk in Mexico was a new issue, and that the RAD breached the principles of procedural fairness when it allegedly raised this issue after dismissing concerns about Mr. Salas's credibility, without allowing the applicants to make submissions.

[14] In the RPD's opinion, the determinative issue was Mr. Salas's credibility. Accordingly, the applicants only made submissions in relation to Mr. Salas's credibility and did not consider that they had the opportunity to make submissions on the issue of their prospective risk in Mexico. The applicants relied on a Federal Court decision, *Bouchra v Canada (Citizenship and Immigration)*, 2020 FC 1063 [*Bouchra*], to support their argument that any new issue cannot be considered by the RAD without giving notice to a person seeking refugee protection or person in need of protection status.

[15] The measure of procedural fairness is based on the five criteria originally set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817:

- (1) the nature of the decision being made and process followed in making it;
- (2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;
- (3) the importance of the decision to the individual or individuals affected;
- (4) the legitimate expectations of the person challenging the decision;
- (5) the choices of procedure made by the agency itself.

[16] In refugee protection cases, the importance of the decision and the legitimate expectations of the parties work in favour of a greater degree of procedural fairness. As Justice Roy noted in *Bouchra* at paragraph 34:

The statutory scheme does not in any way preclude notice to the appellant. A litigant's expectation is that their appeal will be considered for what it is: a challenge of the reasons supporting the decision. No one doubts the importance of the decision regarding a claim for refugee protection. As the Court of Appeals for the Second Circuit commented in *Lennon v Immigration and Naturalization Service*, 527 F.2d 187 (1975), deportation is not, of course, a penal sanction, but in severity it surpasses all but the most Draconian criminal penalties. I believe it therefore calls for a greater measure of procedural fairness. In *Baker* (above), the Court provided a solid explanation of the rationale for deportation:

22 Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the

duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

[Emphasis added.]

[17] Moreover, the fact that the RAD acts, with some exceptions, without a hearing based on the record before the RPD does not preclude compliance with the rules relating to the principle of procedural fairness (*Bouchra* at para 36; *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 at para 19 [*Kwakwa*]).

[18] Where a new issue is raised by the RAD in support of its decision, it must generally give notice to the parties and an opportunity to make submissions on the issue (*Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at paras 66–67). The Supreme Court defined what constitutes a new issue *R v Mian*, 2014 SCC 54 at para 30:

[30] An issue is new when it raises a new basis for potentially finding error in the decision under appeal beyond the grounds of appeal as framed by the parties. Genuinely new issues are legally and factually distinct from the grounds of appeal raised by the parties (see *Quan v. Cusson*, 2009 SCC 62, [2009] 3 S.C.R. 712, at para. 39) and cannot reasonably be said to stem from the issues as framed by the parties. It follows from this definition that a new issue will require notifying the parties in advance so that they are able to address it adequately.

[19] The Minister of Citizenship and Immigration cited the decision in *Baez De La Cruz v Canada (Citizenship and Immigration)*, 2021 FC 457 [*Baez De La Cruz*], in support of his

argument that prospective risk is an inherent step in any refugee claim and that applicants had the burden of proof to demonstrate the existence of that risk. Therefore, prospective risk was not a new issue, but rather a central element of the claim for refugee protection that the RAD was required to analyze in light of the evidence already before the RPD.

[20] In *Baez De La Cruz*, Justice Martineau stated the following at paragraph 10:

Second, the RAD had jurisdiction to consider the issue of prospective risk. In this case, the RAD did not breach procedural fairness in determining that, even if it believed the applicant regarding all of the information provided as evidence, it would still conclude that the applicant had not established, on a balance of probabilities, that he faced a prospective risk (RAD decision at para 69). This is not a new issue, as the applicant claims; the existence of a prospective risk is always central to the right to protection under section 97 of the IRPA (*Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678 at para 40).

[Emphasis added.]

[21] I cannot accept the Minister's arguments. First, in *Baez De La Cruz*, the RAD accepted the RPD's findings on credibility issues, but the issue of prospective risk had in fact been assessed by the RPD. Although it concluded that the determinative issue was credibility, the RPD had nevertheless addressed the issue of prospective risk in its decision. The RAD expanded the determinative issues to include prospective risk. In that context, I strongly agree with Justice Martineau that prospective risk was not a new issue that was first raised in the RAD decision.

[22] In this case, on the contrary, the RAD disagreed with the RPD on issues of credibility, so it cannot be said, as it was in *Baez De La Cruz*, that the RAD should have dismissed the appeal in this case simply on the basis of its credibility findings. Moreover, while I accept that

prospective risk is an inherent step in any refugee protection claim, nowhere in the RPD's decision is the applicants' prospective risk raised, much less assessed.

[23] I do not agree with the Minister that new issues cannot be linked to a core element of refugee protection claims; credibility issues are also cornerstones of refugee claims, and if a credibility finding cannot constitute a new issue, this would be inconsistent with the decisions in *Bouchra* and *Kwakwa*, to name but a few.

[24] In *Kwakwa*, Justice Gascon summarized the issue as follows at paragraph 25:

A “new question” is a question which constitutes a new ground or reasoning on which a decision-maker relies, other than the grounds of appeal raised by the applicant, to support the valid or erroneous nature of the decision appealed from.

[25] In this case, the issue of prospective risk to the applicants in Mexico was a new ground, or rationale, on which the RAD relied to support the validity of the decision under appeal, and for that reason a letter of procedural fairness should have been sent to the applicants.

[26] It is entirely possible that the RAD's findings are justified, and that there is no evidence that Mr. Salas's political involvement would be likely to endanger the applicants' lives if they were to return to Mexico; however, I agree with Justice Gascon in *Kwakwa*, that it is essential that the applicants at least have an opportunity to address the issue in order to have the full right of appeal to which they are entitled under the *Immigration and Refugee Protection Act*, SC 2001, c 27.

VII. Conclusion

[27] In light of the fact that the RAD breached procedural fairness, I must allow this application for judicial review. Given my findings on the issue of procedural fairness, I need not address whether the RAD's decision was reasonable.

JUDGMENT in IMM-2327-21

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed.
2. The Refugee Appeal Division's decision is set aside and sent back for reconsideration by another panel.
3. No question of general importance is certified.

"Peter G. Pamel"

Judge

Certified true translation
Sebastian Desbarats

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2327-21

STYLE OF CAUSE: OMAR ERNESTO HERRERA SALAS, ANA
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NEYMAR MAGDALENO JIMENEZ, ANTVVAN
ELIEN MAGDALENO JIMENEZ v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HEARD VIA VIDEOCONFERENCE

DATE OF HEARING: NOVEMBER 30, 2021

JUDGMENT AND REASONS: PAMEL J.

DATED: DECEMBER 7, 2021

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