Federal Court  Cour fédérale

Date: 20220323

Docket: IMM-864-21

Citation: 2022 FC 404

Ottawa, Ontario, March 23, 2022

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

FAUVETTE SYLVAIN-PIERRE
RHIANTHE CASSAN PIERRE
SADE FERGINA J PIERRE

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board on January 12, 2021, confirming the findings of

the Refugee Protection Division [RPD] that the Applicants do not qualify for protection under section 96 or section 97 of the *Immigration and Refugee Protection Act,* SC 2001, c 27 [IRPA]. The RPD accepted the Applicants' testimony and evidence, but dismissed their claim because they had not established sufficient risk of harm on either section 96 or section 97 grounds. The RAD confirmed these findings.

[2] For the reasons that follow I find that the decision was unreasonable and the application will, therefore, be granted.

II. **Background**

[3] Ms. Fauvette Sylvain-Pierre [Principal Applicant] is a Bahamian citizen of Haitian descent. Her daughters are Rhianthe Cassan Pierre and Sade Fergina J Pierre [the Accompanying Applicants]. The Accompanying Applicants at the time of the RAD decision were 20 and 16 years old respectively. Their claim was initially joined with that of the Principal Applicant's former spouse and the Accompanying Applicants' father, Mr. Ferguins Pierre. It was rejected but sent back for redetermination on appeal to the RAD. Before the redetermination the spouses separated and the claim was disjoined from that of Mr. Pierre.

[4] The Applicants claim that they are at risk of persecution and fear for their lives because two of Mr. Pierre's cousins were involved in gang activity in the Bahamas which involved a series of killings that began in 2002. The Principal Applicant described two incidents between April and May 2013 in which she received direct threats from two gang members, and a number

of incidents in which innocent relatives and family members were also killed during violent exchanges between the gangs.

[5] The family attempted to relocate in the United States in May 2013 but were refused entry. They came to Canada a month later. A third child of the marriage was born in Canada. Further gang-related killings cited by the Applicants occurred in the Bahamas between 2014 and 2015. The first negative RPD decision was issued in March 2015, the first RAD decision in November 2015 and the second negative RPD decision in November 2019.

[6] In the second RPD decision, the Panel noted that the Applicants had delayed for a year before claiming protection but accepted the application despite the delay. The Principal Applicant was found to be a credible witness overall and a citizen of The Bahamas but not Haiti. Her claim was assessed against The Bahamas as her country of citizenship, and in the case of the Accompanying Applicants, as their former habitual country of residence.

[7] The claims were found to be solely related to criminal acts and not to any Convention ground or risk of persecution under *IRPA* s 96. Moreover, one of the two alleged agents of persecution had been killed and the other had been arrested for the murder as of the date of the hearing. The RPD found that the Applicants failed to establish a personalized risk of harm in The Bahamas. Discrimination against persons of Haitian origin in The Bahamas was not found to amount to persecution.

[8] The second RAD decision, which is the subject of this application, confirmed each of the RPD's findings. Specifically, the RAD found that only two gang members had been involved in the threats against the Applicants and that the second, who was facing charges at the time of the RPD hearing for the killing of the first, had also been murdered in December 2020. In arriving at that finding the RAD relied on an Internet search which turned up a number of media reports about the arrest of the gang member, his release on bail and murder.

[9] The RAD found that the threats against the Principal Applicant were concerned with her cousin and not with the Applicants. The killings of other persons by various gang members were not found to be associated with a serious risk to the Applicants. It was unclear whether the Accompanying Applicants had Bahamian citizenship, as did their mother, but the RAD was satisfied that they qualified for a "belonger permit" to allow them to work and have access to education and social services in The Bahamas.

[10] Contrary to submissions from the Applicants on the appeal, the RAD determined that the threats and deaths of some members of their extended family did not make out a case for the application of a compelling reasons exception.

III. **Issues and Standard of Review**

[11] As noted in the Introduction, I am satisfied that the decision is unreasonable and the application must be granted for that reason. I will also address the issue of procedural fairness raised by the Applicants.

[12] There is no dispute between the parties and the Court agrees that the substance of the decision, that is, the tribunal's application of the law to the evidence, is reviewable on a standard of reasonableness: *Canada v Vavilov,* 2019 SCC 65 at paras 12-14 [*Vavilov*]. As a result of *Vavilov*, reasonableness is the presumptive standard of review of administrative decisions on their merits. There is no basis for departure from that presumption in this matter.

[13] However, the Respondent submits that the Court ought to apply the standard of "palpable and overriding error," given in *Housen v Nikolaisen,* 2002 SCC 33 at paras 10-25 [*Housen*], when examining individual inferences that make up the chain of analysis. In support of that proposition, counsel relies on *Xiao v Canada,* 2021 FC 386 at paras 7-9, in which he made the same argument. In that case, Justice McHaffie simply noted that the *Housen* principles were subsumed in the Supreme Court's description of the reasonableness analysis as given in *Vavilov,* paras 125-126. And, as a matter of *stare decisis,* the Court is bound to apply the standard of reasonableness as described by *Vavilov.*

[14] In *Osoja v. Canada (Citizenship and Immigration)*, 2022 FC 314 at para 14 I suggested that there may be some merit to counsel's contention but did not find it necessary to consider whether the appellate standard should apply in that case.

[15] Justice Norris subsequently had occasion to comment on this argument. In *Mburu v Canada (Minister of Citizenship and Immigration)* 2022 FC 316 at para 22, he wrote as follows:

> Relying on the pre-*Vavilov* case of *Aldarwish v Canada (Citizenship and Immigration),* 2019 FC 1265, the respondent submits that the appellate standard of palpable and overriding error applies to the RAD's factual inferences and resulting findings of

> fact. Post-*Vavilov*, the application of this standard in the judicial review context has been rejected repeatedly by this Court: see *Liao v Canada (Citizenship and Immigration)*, 2021 FC 857 at paras 21-22 and the cases cited therein; see also *Gurung v Canada (Citizenship and Immigration)*, 2021 FC 1472 at paras 6-10; *Jackson v Canada (Citizenship and Immigration)*, 2022 FC 83 at para 6; and *Peshlikoski v Canada (Citizenship and Immigration)*, 2022 FC 154 at paras 13-16. The respondent's position is without merit.

[16] Having given the question further consideration, I agree with Justice Norris.

[17] To determine whether the decision is reasonable, the reviewing court must ask "whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov* at paras 86 and 99). Thus, a decision maker's findings should not be disturbed as long as the decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47).

[18] The procedural fairness issue is reviewable on a standard of correctness per *Canada v Khosa*, 2009 SCC 12 at para 43 [*Khosa*]. While "correctness" is the accepted term used to refer to the standard for questions of procedural fairness, the question the Court must ask is whether, with regard to all the circumstances, the process followed by the decision maker was fair and just: *Canadian Pacific Railway Company v Canada*, 2018 FCA 69 at para 54 and *Carroll v Canada*, 2022 FCA 5 at para 25.

IV. **Analysis**

A. *Was the RAD's reliance on extrinsic evidence a breach of procedural fairness?*

[19] This issue arises from the RAD Member's Internet search which turned up nine online news articles in respect of the deceased gang member's arrest, release on bail and subsequent murder. This research was not disclosed to the Applicants. The Member explained that the gang member's "ultimate death is an absolute fact that simply brought the context of his direct personal danger to the Appellants back to where the RPD and the Appellants assumed it to be, only now permanently so." The reference to what the RPD and the Applicants assumed is to the fact that the agent of persecution was in police custody at the time of the RPD hearing and decision and thus, no longer a source of danger to the Applicants.

[20] The Applicants argue that they deserved an opportunity to test the authenticity and reliability of the news articles citing *Dervishi v Canada (Minister of Citizenship and Immigration)*, 1996 CanLII 3894 (FC) [*Dervishi*].

[21] The Respondent contends that the Internet articles do not amount to extrinsic evidence, relying on the test set out in *Mancia v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9066 (FCA) [*Mancia*].

[22] According to *Mancia*, a decision maker is required to provide notice of their reliance on material that is (1) generally unavailable to the public or (2) novel and significant information that may affect the disposition of a case.

[23] I note that *Dervishi* was a case involving country condition reports published after the applicant had made his submissions in support of his refugee claim. Such reports were not available at that time over easily accessible mass media as in the present case. Accordingly, the applicant could not have been expected to conduct a search for the information before the decision was rendered.

[24] The "novel and significant" test in *Mancia* continues to be applied. See, for example: *Adefule v Canada (Minister of Citizenship and Immigration)*, 2021 FC 1227 at para 19 and *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2018 FC 471 at para 27. In *Ashiru v Canada (Minister of Citizenship and Immigration)*, 2021 FC 1313 at paras 47-48, Justice Kane noted that in the recent application of the test courts have adopted a more contextual approach which includes consideration of the nature of the decision and the possible impact of the evidence on the decision.

[25] In *Pizarro Guiterrez v Canada (Minister of Citizenship and Immigration)*, 2013 FC 623, at para 46, the Court commented on Internet sources of information as follows:

> Second, public documents available on the Internet about the situation in a country that originate from credible and known sources are not extrinsic evidence. These documents were easily accessible on the Internet, and the fact that the officer consulted them and referred to them without advising the applicant is not a breach of the duty of procedural fairness: *Mansuri v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 22 at para 52 (available on CanLII).
>
> [other citations omitted]

[26] At the hearing of this application, counsel argued that had the Applicants known of the death of the gang member they would have made other submissions. It was conceded that they could easily have discovered this fact for themselves as six of the articles had been published online before the appeal was filed. As such they were reasonably available to the Applicants. No evidence was submitted that the news articles are unreliable or inauthentic. Indeed the Applicants had relied on three of the same websites in their submissions on appeal.

[27] The explanation provided by the RAD for the failure to disclose the Internet search results is not very clear. However, the fact remains, as the RAD found, that the death of the agent of persecution removed him from consideration as a possible source of risk to the Applicants, as the RPD had found because he was then in custody.

[28] In the result, while it may have been preferable for the Member to have disclosed the results of the Internet search and to invite further submissions, I am satisfied that the failure to do so did not amount to a breach of procedural fairness.

B. *Is the decision unreasonable?*

[29] In addition to their claimed fear of persecution and risk of harm due to their membership in a family associated with a gang, the Applicants claimed that they feared persecution in The Bahamas because of their gender. They made extensive submissions about this in their memorandum of argument and tendered evidence in support, including the National Documentation Package [NDP], showing that gender-based violence and under-reporting of gender-based crimes, is endemic in the Bahamas. They argue that the RAD failed to consider

their submissions and evidence and provided inadequate reasons on this aspect of their claim. The Respondent contends that the RAD dealt with it in the course of concluding that the Applicants did not face a well-founded fear of persecution at all.

[30] The difficulty with the Respondent's position is that there is no indication on the face of the RAD Member's reasons that the explanation proffered is in response to the gender aspect of the claim. The Member's conclusion was that the Applicants' failed to establish more than a "mere possibility of persecution for any reason." But the nexus analysis portion of the Member's reasons was limited to whether or not the claim met the protected ground of membership in a particular social group, namely, as family members of gang members and as Haitian migrants to The Bahamas. There is no indication that the Member addressed the question of whether they faced risk under s 96 because of their gender.

[31] Under the reasonableness standard, as explained by *Vavilov* at paras 127-128, justification requires that the decision maker meaningfully account for the central issues and concerns raised by the parties. That was not done by the RAD Member in the decision under review.

[32] The Member also erred, in my view, in concluding that the Applicants faced no continuing or prospective risk because the two primary agents of persecution were no longer alive. They were agents of the gang as a whole. The Principal Applicant is related to members of another gang which required consideration of whether, as a result of this, she faced a prospective risk of harm.

V. **Conclusion**

[33] In the result, this matter must be remitted to the RAD for reconsideration by a differently constituted panel.

[34] No serious questions of general importance were proposed and none will be certified.

JUDGMENT IN IMM-864-21

THIS COURT'S JUDGMENT is that the application is granted and the matter is remitted to the RAD for reconsideration by a different panel. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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