Federal Court  Cour fédérale

Date: 20230414

Docket: IMM-4633-22

Citation: 2023 FC 554

Ottawa, Ontario, April 14, 2023

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

MARCO ANTONIO CHAIREZ MOLINA
ALICIA AGUAYO LOPEZ

Applicants

and

MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Marco Antonio Chairez Molina and his wife Alicia Aguayo Lopez [collectively the Applicants] are citizens of Mexico. They seek judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB]. The RAD confirmed the

determination of the Refugee Protection Division [RPD] of the IRB that the Applicants are neither Convention refugees nor persons in need of protection pursuant to ss 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] The Applicants claim to fear unknown agents of persecution who kidnapped and severely abused them during their unsuccessful attempt to cross the border between Mexico and the United States of America [USA]. The RPD found that the Applicants were not in need Canada's protection, because they had internal flight alternative [IFAs] in Merida and Mexico City.

[3] The RAD found that an IFA analysis was not required, because the Applicants' forward-looking risk in their home area of Nayarit was not objectively well-founded. For the reasons that follow, the RAD's decision was reasonable. The application for judicial review is dismissed.

II. Background

[4] The Applicants left Mexico and moved to the USA in 1992. They lived there for more than 20 years. They have three American-born children.

[5] Mr. Molina initially had permits to work in the USA. He remained there without status after the permits expired in 2007. Ms. Lopez never had legal status in the USA.

[6] In November 2013, Mr. Molina travelled to Mexico to take care of his ailing father. He attempted to return to the USA two weeks later, but was refused entry. Having no home in

Mexico, he stayed with Ms. Lopez's father in Nayarit. Ms. Lopez returned to Mexico in March 2015.

[7] The Applicants twice attempted to re-enter the USA illegally, in March and October 2015, but they were arrested and returned to Mexico. They were homeless for a time, staying in a park in Mexicali.

[8] In November 2015, the Applicants sought to re-enter the USA irregularly with the assistance of a human smuggler, also known as a "coyote". Instead of helping them to cross the US border, the coyote and his associates kidnapped the Applicants and held them for five days in a house in or around San Luis Rio Colorado in Sonora State. The Applicants were severely abused. Their mobile phones and documents, including their birth certificates, passports, and driver's licences, were taken from them.

[9] The Applicants were released after their son paid a ransom of $800. The Applicants informed the police in San Luis Rio Colorado of their ordeal, but they were offered no assistance and told they "shouldn't do anything about it". The Applicants were treated for their injuries, and retuned to Ms. Lopez's father's home in Nayarit.

[10] From February to August 2016, Mr. Molina lived in Mexicali, where he looked after his father. He returned to Nayarit in August 2016.

[11] While in Nayarit, the Applicants took numerous precautions to avoid further risk. They stayed mostly at home for five months after their release, never leaving the house alone or after dark. They paid for necessities in cash, and avoided an online presence.

[12] In April 2017, the Applicants fled to Canada and subsequently made a refugee claim. They are currently under the care of doctors and counsellors for a variety of medical conditions.

[13] The RPD heard the Applicants' claims on October 27, 2021 and rejected them on November 18, 2021. The RPD found the Applicants to be credible and accepted they had been kidnapped in November 2015. However, the RPD concluded that the Applicants had viable IFAs in Merida and Mexico City, because their agents of persecution did not have the means or motivation to pursue them in either city, and it was reasonable for them to relocate there.

[14] The Applicants appealed to the RAD. The RAD dismissed their appeal on April 29, 2022.

III. Decision under Review

[15] On April 1, 2022, the RAD gave the Applicants notice that it would consider whether their fear of future persecution or harm in Nayarit was objectively well-founded. The Applicants responded that Nayarit was not a reasonable IFA, and submitted new documentary evidence regarding the presence of criminal organizations there. The RAD refused to admit the new evidence, because it was not "new or relevant evidence related to the determinative issue".

[16] The RAD agreed with the RPD that the Applicants were credible. While the RAD accepted that they had a subjective fear, it found that their fear of future risk in their "home area" of Nayarit was not objectively well-founded. The RAD therefore held that an IFA analysis was not required, because the Applicants would not need to relocate from Nayarit to avoid future harm in Mexico.

[17] The RAD also rejected the Applicants' contention that there were compelling reasons to grant them protection pursuant to s 108(4) of the IRPA, because there was no objective basis for their claims at the time they left Mexico in April 2017.

IV. Issues

[18] This application for judicial review raises the following issues:

A. Did the RAD reasonably reject the Applicants' new evidence?

B. Was the RAD's decision reasonable?

V. Analysis

[19] The RAD's decision is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 10). The Court will intervene only where "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).

[20] The criteria of "justification, intelligibility and transparency" are met if the reasons allow the Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

A. *Did the RAD reasonably reject the Applicants' new evidence?*

[21] The RAD may consider new evidence on appeal only if it arose after the RPD's rejection of the claim, it was not reasonably available before or, if reasonably available before, it could not reasonably have been presented at the time of the claim's rejection (IRPA, s 110(4)). Even if these conditions are met, the RAD may still refuse to admit new evidence if it is not credible, relevant, or material (*Singh v Canada (Citizenship and Immigration)*, 2016 FCA 96, citing *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385).

[22] The Applicants submitted nine articles demonstrating "a recent increase in criminal activity in Nayarit, that various criminal organizations are operating in both Sonora and Nayarit, that there is a high level of corruption in Nayarit, and that there is a lack of adequate medical services available to the Applicants in Nayarit". The RAD rejected the new evidence because there was "already ample evidence about this in the record". The Applicants say this amounted to

a breach of procedural fairness, because the new evidence specifically addressed their risk in Nayarit, and this issue was not raised before the RPD.

[23] The RAD rejected the Applicants' appeal on the ground that the unidentified agents of persecution did not have the motivation to harm them in Nayarit. Their capacity to harm the Applicants was not in issue. The new evidence proposed by the Applicants related only to the means of criminal organizations to locate their targets, not their motivation.

[24] The determinative issue was whether the agents of persecution were motivated to target the Applicants in the future. It was therefore open to the RAD to conclude that further evidence concerning the criminal organizations' means of targeting them was not relevant. The RAD's decision to reject the new evidence was reasonable.

B. *Was the RAD's decision reasonable?*

[25] The Applicants say the RAD unreasonably found that (1) Nayarit was not an IFA and (2) they had no objectively well-founded fear in Nayarit.

(1) Nayarit as an IFA

[26] The Applicants were harmed in Sonora State. They therefore maintain that the RAD should have assessed Nayarit as an IFA. This would in turn have necessitated an analysis of whether it was reasonable, in all of the circumstances, for them to seek refuge there (*Rasaratnam*

v Canada (Minister of Employment and Immigration), [1992] 1 FC 706 (FCA) at paras 5-6, 9-10).

[27] The RAD observed that an IFA analysis is concerned with "persecution in the claimant's part of the country", and whether it is objectively reasonable to seek safety "in a different part of that country" (citing *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (FCA) [*Thirunavukkarasu*] at 598). The RAD found that Nayarit was not an IFA, because this was the place where the Applicants lived before they came to Canada. The Applicants never resided in Sonora State.

[28] The Applicants deny that Nayarit was their "part of the country". They do not own a home in Mexico, and they consider their home to be in the USA. They say they were only temporarily resident in Nayarit, first because they had nowhere else to live in Mexico, and later because that was where they hid and recovered from their kidnappers:

> […] They lived, worked, raised children, and built a life in the US for more than twenty years, between 1992 and 2013, for Marco, and 2014, for Alicia. At all times when they were in Mexico after that, they intended to and tried to return to the US, which was their home. From 2014 to 2015, Alicia explained that they spent time in Mexicali and with her father in Nayarit. In October 2015, the Applicants resided in a park in Mexicali. Following the kidnapping, the Applicants spent time with Alicia's father at his house in Nayarit, and with Marco's father in Mexicali. These were temporary stays while they were stuck in Mexico. If they had to return to Mexico now, Marco explained that they would be living on the streets.

[29] The Applicants are citizens of Mexico. They have no legal status in the USA. The RAD reasonably held that Nayarit was the Applicants' "part of the country", because that is where they spent the majority of their time after Mr. Molina returned to Mexico in 2013.

[30] The Applicants' reliance on *Thirunavukkarasu, Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 and *Bhandal v Canada (Minister of Citizenship and Immigration)*, 2006 FC 426 is misplaced. In all of these cases, the claimants fled from their agents of persecution to a new location within their countries of origin, and these new locations were properly assessed as IFAs by the IRB.

[31] As the Federal Court of Appeal explained in *Thirunavukkarasu* (at 598):

> […] Rather, 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]

[32] Inherent in the concept of an IFA is the expectation that a claimant will relocate to a different part of the same country in order to escape the agents of persecution. Here, it was unnecessary for the Applicants to "flee" from Nayarit. Nor was Nayarit an "alternative" place for them to seek refuge. It was the area where they habitually resided in Mexico before they left for Canada.

[33] The RAD's determination that Nayarit should not be assessed as an IFA was reasonable.

(2) Objectively Well-Founded Fear in Nayarit

[34] The RAD held that the Applicants lacked an objectively well-founded future risk in Nayarit. The RAD accepted that the agents of persecution had the means to locate them, but found they lacked the motivation to do so. There was nothing to indicate the agents of persecution had continued to pursue the Applicants after the kidnapping.

[35] The Applicants say that the RAD failed to consider the mitigating effects of the precautions they took after the kidnapping. This led the RAD to unreasonably infer that the agents of persecution lacked motivation to abduct them again, or seek further ransom payments. They note that the kidnappers retained all of their personal documentation, and know how to contact their son in the USA.

[36] The Applicants are inviting this Court to reweigh the evidence and substitute its view for that of the RAD. However, that is not the role of the Court on judicial review (*Vavilov* at para 125). The RAD reasonably concluded that the Applicants' agents of persecution were no longer interested in pursuing them.

[37] The RAD acknowledged that the Applicants had taken some precautions to mitigate their risk, but noted that their home address in Nayarit and their son's contact information were known to the agents of persecution during this period. The kidnappers had the ability to locate the Applicants and their family members. The Applicants' precautions, while no doubt

understandable given their subjective fear, would not objectively have protected them if the agents of harm were actually motivated to pursue them at their known address in Nayarit.

[38] The RAD's determination that the Applicants' agents of persecution lack an ongoing motivation to harm them was reasonable.

[39] The Applicants do not take issue with the RAD's determination that the "compelling reasons" exception in s 108(4) of the IRPA does not apply where a claimant never had a well-founded, objective fear of persecution. Presumably, one of the reasons the Applicants wish to have Nayarit assessed as an IFA is that this entails a consideration of the second prong of the test: whether it would be reasonable, in all of the circumstances, to expect them to seek refuge there.

[40] The circumstances surrounding the Applicants' kidnapping and the severe abuse they suffered are horrific. If either the "compelling reasons" exception or the second prong of the IFA analysis applied to their situation, it is possible they would benefit from them. However, as a matter of law, they do not.

[41] As the RAD wrote at the conclusion of its decision:

> While I recognize that the Appellants have highlighted humanitarian and compassionate factors with respect to their health situations and post-traumatic stress, it is not within the jurisdiction of the RAD or the RPD to consider such factors in the refugee determination process. However, there is a separate and distinct process available to them to make an application for permanent

> residence based on humanitarian and compassionate factors, pursuant to section 25 of the IRPA.

VI. Conclusion

[42] The application for judicial review is dismissed. None of the parties proposed that a question be certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

"Simon Fothergill"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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