Date: 20240425

Docket: IMM-3671-22

Citation: 2024 FC 625

Ottawa, Ontario, April 25, 2024

PRESENT: **Mr. Justice Pentney**

  BETWEEN:

ERICK HERNANDEZ ARMENDARIZ

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

<u>JUDGMENT AND REASONS</u>

[1]   The Applicant, Erik Hernandez Armendariz, is a citizen of Mexico, who fled to Canada

to claim refugee status because he feared corrupt federal and state police as well as drug cartels.

He is a lawyer, who served for a time as Municipal Police Commander in his home city. He

refused to cooperate with a corrupt police official, and says he fled Mexico because he feared

retaliation.

[2]   The Applicant seeks judicial review of the decision of the Refugee Appeal Division [RAD] dismissing his appeal of the decision of the Refugee Protection Division [RPD] that had rejected his refugee claim.

[3]   For the following reasons, the application for judicial review will be dismissed. I find that the RAD decision is reasonable in light of the manner in which the Applicant presented his claim and the evidence in the record. The RAD's credibility findings are supported in the evidence and clearly explained in the decision, and the accumulation of negative credibility findings was reasonably found to undermine his case. There is no basis to overturn the RAD's decision.

I.   Background

[4]   In February and March 2017, during the Applicant's tenure as Police Chief, violence broke out between the two drug cartels; civilians and police officers were attacked and some were killed. Because of the escalation in violence, the state governor ordered that the state police take over. The officer who was in charge of the operation (for ease of reference, this individual will be referred to as "JCJ") took over functional command of policing in the region at the end of March 2017, although the police chiefs remained in their positions.

[5]   The Applicant says that in early April 2017, JCJ told him that he had participated in a "cleansing campaign" in other cities and planned to do the same thing again. The Applicant interpreted this to mean that JCJ planned to use extrajudicial measures to quell the violence. The Applicant said that JCJ told him that he could either accept his methods and work with him or

leave town. JCJ also told him to be careful in what he did or said because he had no idea of the power that JCJ possessed.

[6]   The Applicant resigned from his position as Police Chief on April 5, 2017. On the same day seven other police chiefs chose to leave their positions rather than work with JCJ. Shortly after that, one of the police chiefs who did not resign was kidnapped and later found dead. In June 2017, state authorities detained and charged JCJ in connection with the forced disappearance of persons in another location.

[7]   On October 30, 2017, the Applicant claims that he was confronted by armed thugs while driving his car; they asked him what he was waiting for, and told him to leave the area.   The following month, the Applicant obtained an Electronic Travel Authorization to travel to Canada. He did not do that, however, and instead went to Mexico City to stay with his sister. In February 2018, while he was in Mexico City, the Applicant saw social media posts showing JCJ in uniform, apparently working as a police officer in another state in Mexico. The Applicant presumed that JCJ had escaped prosecution due to corruption in the legal system.

[8]   In May 2018, the Applicant moved back to his home city, hoping that things had calmed down. He initially lived at the home of his mother-in-law, and continued working as a lawyer. He subsequently got a temporary police training job in another location, and when that ended in early October 2018, the Applicant moved back to his own house. In December 2018, he says that some neighbours told him that suspicious persons and vehicles had been seen in the vicinity of his house, and they thought these people "did not have good intentions."

[9]   The Applicant then made the decision to leave Mexico, and he obtained another Electronic Travel Authorization for travel to Canada. He arrived in Canada on January 1, 2019 and claimed refugee status.

[10]   The RPD denied his refugee claim, finding that his evidence was not credible because of inconsistencies and omissions and the lack of corroboration.

[11]   The RAD dismissed his appeal, also on the basis of the Applicant's credibility and the absence of corroborating evidence. The RAD found that the Applicant had failed to establish that he is being sought by JCJ, the police and the cartels, and thus he does not face a risk as defined under section 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 [*IRPA*]. The key findings of the RAD are discussed in detail below and therefore only a brief outline of its decision will be provided here.

[12]   The RAD based its negative credibility finding on a number of factors. It doubted the Applicant's evidence about his move to Mexico City because he gave divergent testimony about when he moved there (his evidence ranged from mid-November to December 2017) and his evidence was inconsistent regarding the legal work he did during that period. The RAD also noted that he could not provide the name of the only company that he said he worked for during the six months he spent in Mexico City.

[13]   In addition, the RAD drew a negative inference from the fact that although the Applicant had confirmed at the outset of his hearing that his Basis of Claim [BOC] narrative was complete,

accurate and true, he added an important element during his testimony. While he was being questioned by the RPD about why Mexico City would not be a safe destination for him, the Applicant testified that he had learned that people had come looking for him at his sister's house in Mexico City on two occasions. He had not mentioned this before, and the RAD found that his failure to add this to his narrative prior to, or at the outset of, his hearing diminished his credibility.

[14]   Furthermore, the RAD found that the Applicant's failure to seek corroborative evidence from his neighbours regarding the suspicious people who had been seen in the vicinity of his house seriously undermined his credibility. On this point and others, the RAD noted that the Applicant is a lawyer and thus better placed than most other refugee claimants to understand the importance of providing all of the essential details and corroborative evidence to bolster his claim.

[15]   Based on these findings, the RAD dismissed the appeal. The Applicant seeks judicial review of this decision.

II.   Issues and Standard of Review

[16]   The issue in this case is whether the RAD decision is reasonable, under the framework set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[17]   In summary, under the *Vavilov* framework, a reasonable decision is "one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts

and law that constrain the decision maker" (*Vavilov* at paragraph 85). An administrative decision-maker's exercise of public power must be "justified, intelligible and transparent" (*Vavilov* at paragraph 95). The onus is on the Applicant to demonstrate flaws in the decision that are "sufficiently central or significant to render the decision unreasonable" (*Vavilov* at paragraph 100).

[18]   The Applicant raises a number of sub-issues:

- Did the RAD err by conflating the analysis required under sections 96 and 97 of *IRPA*, in particular by wrongly importing a "subjective fear" component into the section 97 test?

- Did the RAD err by failing to assess the section 97 risk faced by the Applicant as a former police officer and lawyer?

- Did the RAD fail to assess the objective evidence that demonstrated a forward-looking risk to the Applicant?

- Were the RAD's credibility findings overly microscopic?

III.   Analysis

A.   *The RAD did not conflate the tests under ss. 96 and 97*

[19]   A major focus of the Applicant's argument is that the RAD erred by conflating the tests that apply to assessing claims under sections 96 and 97 of *IRPA*. As proof of this, the Applicant

notes the RAD's discussion of the RPD finding that the Applicant's conduct did not demonstrate a subjective fear of persecution. The RPD based this finding on the fact that the Applicant did not leave Mexico in November 2017, when he first obtained an Electronic Travel Authorization, as well as his decision to return to his home city on two separate occasions. While the RAD did not agree with the RPD's conclusion on the first point, it found that the Applicant's return to his home city after only six months and his choice to openly practice law undermined his claim of risk.

[20]   The Applicant points out that the case-law is consistent in finding that subjective fear is not a component of a section 97 analysis. Instead, as set out in *Sanchez v. Canada (Citizenship and Immigration)*, 2007 FCA 99 at paragraph 15:

> [A] determination of whether a claimant is in need of protection requires an objective assessment of risk, rather than a subjective evaluation of the claimant's concerns.   Evidence of past persecution may be a relevant factor in assessing whether or not a claimant would be a risk of harm if returned to his or her country, but it is not determinative of the matter. Subsection 97(1) is an objective test to be administered in the context of a *present* or *prospective* risk for the claimant.

[21]   The Applicant submits that the RAD erred in law in making a subjective fear finding in the context of a section 97 analysis: *Mamak v Canada (Citizenship and Immigration)*, 2014 FC 730 at paragraph 6 [*Mamak*]. Rather than examining his case in the context of the abundant objective evidence about the risks to police officers in Mexico, the RAD focused on his conduct following the threats. According to the Applicant, this is a sufficiently serious mistake to make the entire decision unreasonable.

[22]   The Respondent argues that the RAD did not improperly conflate the two tests, but rather made a series of reasonable credibility findings which it then reasonably applied to find that the Applicant had failed to establish a risk under section 97. The Respondent submits that the RAD decision makes several references to section 97, and that the RAD specifically upheld the RPD's finding that there was no nexus to a Convention ground. Therefore the RAD was clearly aware that the case involved a section 97 analysis.

[23]   On this point, the Respondent relies on case-law that has established that where the Board makes a general finding that a claimant lacks credibility, that determination is sufficient to dispose of the claim unless there is independent and credible evidence capable of supporting the claim: *Sellan v Canada (Citizenship and Immigration)*, 2008 FCA 381 at paragraph 3. In the view of the Respondent, that is what the RAD did here; it made a series of credibility findings, and based on the cumulative effect of these negative determinations it concluded that the Applicant's claim of risk was not credible. This analysis applied to the section 97 claim.

[24]   I am unable to accept the Applicant's submission that the RAD conflated the analysis under sections 96 and 97 of *IRPA*. The RAD did not wrongly import the notion of "subjective fear" into the analysis of the Applicant's claim under section 97, but rather it focused on whether he had established that he faced a personalized risk in Mexico. While the Applicant's concerns find some support in the wording of a few passages of the RAD's decision, I am not persuaded that these are sufficient to make the entire decision unreasonable.

[25]   The Applicant's argument focuses on the RAD's discussion of whether the Applicant's behaviour following the threats indicated a lack of subjective fear. For example, the RAD examined the Applicant's flight from his home city followed by his return there a mere six months later, as well as the fact that he openly practiced law in that city. Based on this, the RAD concluded that the Applicant's behaviour "indicated a lack of subjective fear and… this does further undermine the credibility of his allegations." (RAD Decision, paragraph 34). The Applicant submits this is an error of law, because subjective fear has no place in a section 97 analysis, citing *Mamak*.

[26]   I am not persuaded that the RAD's discussion of the subjective fear point amounts to an error. Even if I accept that this phrasing of the RAD was misguided, I do not find it sufficiently serious to make the entire decision unreasonable.

[27]   First, the Applicant's submissions to the RAD focused on the RPD's findings regarding his subjective fear; to this extent, the RAD's analysis was simply responsive to the submissions that were made before it. This is not like the situation in *Mamak*, where Justice Michael Phelan found the entirety of the decision turned on the absence of subjective fear. In this case, the RAD found the Applicant's behaviour following the threatening incidents was inconsistent with the conduct of a person who actually faced a risk. This finding is consistent with the way in which the Applicant framed his original refugee claim and also with the manner in which he put forward his appeal.

[28]   There can be no doubt that the analysis of a section 97 claim should not focus solely on the absence of subjective fear; a person may be at risk on return to their country of origin without knowing or fearing it. However, a generalized risk to which the entire population – or a significant sub-section of the population – is exposed will not support a section 97 claim: *Prophète v. Canada (Citizenship and Immigration)*, 2009 FCA 31; *Covarrubias v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365, [2007] 3 FCR 169;.

[29]   In this case, the RAD's decision did not turn on a finding that the Applicant's behaviour demonstrated that he lacked a subjective fear of harm. Rather, the RAD analyzed the Applicant's narrative and evidence and determined that he had not established that he was being sought by those who he claimed to fear (cartels and/or the police) and thus there was no serious possibility of persecution or any risk under section 97. This finding is amply supported by the RAD's analysis of the evidence and is clearly explained in its decision.

[30]   The Applicant submits that the RAD failed to examine his risk from cartel violence by virtue of his profile as a police chief and lawyer. This argument cannot succeed for several reasons. First, I note that the Applicant did not assert that he faced a risk simply by virtue of having been a police officer or lawyer. This claim is not set out in his Basis of Claim form, nor his evidence before the RPD, nor in his appeal submissions to the RAD. His claim was entirely focused on his interactions with JCJ, and the subsequent threat he received from masked men which he linked to the previous threats made by JCJ.

[31]   The next problem with the Applicant's argument is that the RAD explained why it

rejected his claim of risk arising from his interaction with JCJ. Put simply, the RAD found that

the Applicant had complied with JCJ's demands when he resigned his position as Police Chief,

and the evidence did not support a finding that he faced any ongoing threats as a result of his

prior work with the police. The RAD noted that several officers who had not resigned had been

killed, but there was no evidence of harm befalling any of the seven other Police Chiefs who

resigned at the same time as the Applicant.

[32]   Furthermore, the RAD reasonably concluded that the Applicant's behaviour following

the incidents was not consistent with his claim that he faced ongoing threats from JCJ, the cartels

or the police. The Applicant submits that the RAD failed to consider two crucial elements: his

specialized knowledge of how cartels operate and the nature and extent of police corruption, as

well as the general country condition showing the threats faced by police officers in Mexico. He

argues the RAD failed to consider the reasons for his mistrust of Mexican state authorities or the

reasons for his fear of there.

[33]   On this point, it is important to examine the RAD's specific findings, in light of the

Applicant's claim and his appeal submissions. The Applicant's Basis of Claim form explained

the core of his refugee claim as follows:

> I fled from Mexico because the government of my country cannot
> provide me with the protection of harm and risk I fear at the hands
> of the federal police, State Police, criminal organized and drug
> trafficking Cartel Nueva Cartel de Juarez and Cartel de Sinaloa
> that are determined to kill me because I refused to collaborate with
> them.

[34]   He then described the various incidents outlined earlier, before concluding that he fled

Mexico and claimed asylum in Canada "because the government of my country cannot or is not

willing to give me the protection I need because of the fear that I have of being kidnapped,

tortured and murdered by criminal groups. Groups linked to state security colluded as they are

with criminal groups."

[35]   To a similar effect, the Applicant's appeal submissions focused on the alleged errors

made by the RPD in rejecting his claim. None of his arguments were based on any specialized

knowledge that he possessed as a former police chief. This point bears repeating – the Applicant

had resigned his position as a Police Chief, and there was no indication that others who had also

resigned had faced any ongoing risks or threats.

[36]   The RAD specifically addressed the country condition evidence regarding the threats

faced by police officers, but it went on to question how this applied to the Applicant's situation.

This key finding that underpins the RAD's ultimate conclusion is stated in the following way:

> However, I note that beyond his extremely vague allusion that the
> cartels are targeting him, the Appellant has not explained why this
> is or how this is consistent with the core of his claim that CJC, and
> thus the police force, is behind his persecution – much less
> provided any evidence to this effect. Indeed, the Appellant has not
> even indicated why the cartels he claims to fear would have an
> interest in him. While cartels have certainly been known to target
> police officers, his evidence was that he resigned being the police
> chief, as he refused to take part in CJC's unlawful cleansing
> campaign against the cartels. He also never presented any evidence
> as to having had any interactions with the cartels, at all. Given this,
> it is in no way clear why he would have been of any interest to the
> cartels; indeed, from the evidence of the Appellant, it would seem
> to be quite the opposite, as he refused to take part in the (unlawful)
> operation against them. I also note that in neither his Appellant's
> memorandum, nor in his testimony has the Appellant ever spoken

to this or of a link between CJC and the cartels, and again most importantly, he has provided no evidence to this effect.

[37]   The Applicant's arguments provide no basis to question the RAD's conclusion as it is expressed in this passage. This finding is supported in the evidence, clearly explained and responsive to the arguments the Applicant submitted to the RAD. That is all that reasonableness requires, in accordance with the *Vavilov* framework.

[38]   It is not necessary to discuss in detail all of the Applicant's arguments regarding the specific credibility findings made by the RAD. Overall, I find that the RAD conducted a thorough analysis of the various credibility findings made by the RPD, rejecting some of them while agreeing with others. In particular, I find the following findings by the RAD to be supported in the evidence and clearly explained:

- The Applicant's evidence about his time in Mexico City undermined his credibility, because he provided inconsistent descriptions of his work there. He initially described his job as being a clerk working for a lawyer but later stated that he had worked as a lawyer. Further, he could not name the only company he said he worked for during the six months he spent in Mexico City. The RAD found these discrepancies diminished his credibility;

- The RAD concluded that the Applicant's evolving testimony regarding being sought at his sister's home while he took refuge there called his credibility into question. The RAD noted that when the Applicant was questioned about why Mexico City would not be safe, he revealed for the first time that unknown people had been

looking for him at his sister's home in Mexico City. The RAD agreed with the RPD's determination that this late addition of crucial information undermined the Applicant's credibility, in particular noting that he was trained as a lawyer and had testified under oath at the outset of the hearing that his Basis of Claim form was complete and he had nothing to add to it. The RAD concluded that the Applicant's evidence had evolved suspiciously;

- The Applicant's failure to obtain any corroborating evidence from his neighbours to support his claim that they had advised him that suspicious vehicles has been spotted near his house and unsavoury individuals were asking about him. Given that the Applicant had filed other evidence to corroborate different points in his story, the RAD drew a negative inference from his failure to seek evidence from any of his neighbours.

[39]   The RAD's findings on these points is reasonable, and its assessment of the cumulative effect of them warrants considerable deference on review. There is no basis to intervene in regard to the RAD's credibility findings, which in turn support its overall conclusion.

[40]   For the reasons set out above, the application for judicial review will be dismissed.

[41]   There is no question of general importance for certification.

<u>JUDGMENT in IMM-3671-22</u>

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question of general importance for certification.

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"William F. Pentney"

Judge

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