Federal Court  Cour fédérale

**Date: 20240626**

**Docket: IMM-9701-23**

**Citation: 2024 FC 993**

**Ottawa, Ontario, June 26, 2024**

**PRESENT: Madam Justice Azmudeh**

**BETWEEN:**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Applicant**

**and**

**J LUIS TORRES PANTOJA**

**Respondent**

# JUDGMENT AND REASONS

## I. Overview

[1] Under section 72(1) of the *Immigration and Refugee Protection Act* [IRPA], the Minister of Citizenship and Immigration, as the Applicant, is seeking a Judicial Review of a decision by the Refugee Appeal Division ("RAD") of the Immigration and Refugee Board of Canada ("IRB"). The Judicial Review is granted for the following reasons.

[2] This is an unusual case in the sense that both parties agreed that the RAD's decision was unreasonable, but for different reasons, each requiring a different remedy. The Applicant argued that the RAD erred in sending the case back to the Refugee Protection Division ("RPD") without identifying an error in contravention of s. 111(1) of IRPA. The Applicant therefore requested the case to be sent back to the RAD for redetermination.

[3] The Respondent argued that the RAD was unresponsive to their arguments and ignored the relevant documents available in the National Documentation Package on the unavailability of internal flight alternative (IFA) anywhere in Mexico, including in Mérida or Campeche that the RPD had found, for victims of Los Zetas. Both parties also argued that the RAD was non-responsive to their respective arguments on the new evidence filed by the Respondent that contributed to the further unintelligibility of the decision.

[4] Despite their arguments at the judicial review hearing, the Respondent asked the Court to maintain the ultimate decision of the RAD that the case should be returned to the RPD. The Respondent did not rely on any authorities for why I would in effect uphold an unreasonable decision.

[5] In effect, the RAD's inconclusive and indecisive decision to return the case to the RPD was silent on why the RAD could not engage with the record to either make clear findings to confirm or set aside the determination of the RPD or explain why the case needed to return to the RPD, in accordance with s. 111 (1) of the IRPA:

> [18] I am unable to reach a final determination in this appeal without hearing evidence that was presented to the RPD. The Appellant's credibility remains at issue, in particular the credibility

> of his forward-facing risk of harm. Potential internal flight alternatives in Mérida and Campeche need to be thoroughly examined. Unless the Minister expressly decides not to participate in the proceedings, the Minister should be notified of all new information related to this claim. All parties should be provided with the transcript of the previous RPD hearing.

## II. Decision

[6] I grant the Applicant's judicial review application because I find the decision made by the RAD to be unreasonable.

## III. Standard of Review

[7] The parties submit, and I agree with them, that the standard of review in this case is that of reasonableness (*Vavilov v Canada (Citizenship and Immigration)*, 2017 FCA 132 (CanLII), [2018] 3 FCR 75 [*Vavilov*]).

## IV. Analysis

### A. *The RAD decision is unreasonable*

[8] As stated above, there is little disagreement with the parties as to how unintelligible and unreasonable the RAD decision is.

[9] The RAD member did not identify a clear error on the part of the RPD for which the case needed to be returned for a re-hearing. Despite the Minister's intervention before the RPD for credibility, the RPD had found the Respondent to be largely credible and rejected his claim on the availability of IFA. Before the RAD, the Minister was also a party but had argued that the RPD's decision should be upheld.

[10] The leading case on the RAD's jurisdiction is the Federal Court of appeal case of *Huruglica v Canada (Citizenship and Immigration)*, 2016 FCA 93 (CanLII), [2016] 4 FCR 157 [*Huruglica*]. There is no suggestion in *Huruglica* that the RAD cannot, as a matter of jurisdiction, substitute its own determination of the merits of the refugee claim on a basis that was not addressed by the RPD in its decision. It bears noting that both *Jianzhu v Canada (Citizenship and Immigration)*, 2015 FC 551 and *Ojarikre v Canada (Citizenship and Immigration)*, 2015 FC 896 (cases where the Court found the RAD did not have jurisdiction), were decided before *Huruglica*.

[11] I am aware of *Angwah v Canada (Minister of Citizenship and Immigration)*, 2016 FC 654, a case decided a few months after *Huruglica*, where at paragraph 16 this Court took the view that the RAD's failure to make a finding that the RPD erred before making its own determination on a new ground was not in keeping with the Court's decision in *Huruglica*, and therefore, unreasonable. However, there are other cases that have disagreed. For example, in *Okechukwu v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1142 [*Okechukwu*], the RAD had concluded that the restrictions on returning claims to the RPD for redetermination under subsection 111(2) of the IRPA suggests that Parliament's intent was to have the RAD finalize refugee protection claims where it can do so fairly, including by confirming a determination on alternative grounds. Justice Mosley agreed and at paragraph 30 stated that it was not necessary for the RAD to find the RPD erred before the RAD can consider an alternate ground on which to uphold a decision dismissing the claim:

> [30] I appreciate that the paragraphs cited from the Court of Appeal's decision in *Huruglica* can be read as requiring a predicate finding by the RAD that the RPD has erred before the RAD may consider an alternate ground on which to uphold the decision

> dismissing the claim. I am not convinced, however, that it was the intent of the legislators or of the Court of Appeal to impose such a limitation on the jurisdiction of the RAD. That would, in my view, be contrary to the evident intent of Parliament that matters heard by the RAD not be referred back to the RPD for redetermination unless it is clear that: (a) the RPD had erred in law or in fact or mixed fact and law; or (b) the RAD cannot make a decision without hearing evidence as set out in subsection 111 (2) of the IRPA.

[12] I agree with the line of cases that interpret s. 111(2) of the IRPA in a consistent manner with the role of the RAD as an appellate administrative tribunal where it needs to be decisive, fair and efficient. In *Okechukwu*, the RAD reasoned that it could decide on an alternate ground because paragraphs 111(1)(a) and 111(1)(b) of the IRPA gave it the power to confirm or substitute the "determination" of the RPD, and as such, it is not bound by the reasoning in the RPD's decision. Furthermore, the RAD concluded, the restrictions on returning claims to the RPD for redetermination under subsection 111(2) of the IRPA suggests that Parliament's intent was to have the RAD finalize refugee protection claims where it can do so fairly, including by confirming a determination on alternative grounds. The Court had agreed and I find Justice Mosley's reasoning persuasive.

[13] However, in this case, the RAD did not make an expressed finding, on either an error or why the RPD record was insufficient to make findings of fact and law. The RAD did not meaningfully engage with the RPD record in any way.

[14] Even if one interprets the RAD's comments on the unresolved credibility issues raised by the Minister before the RPD as an implied error, it is still hard to understand why the RAD, whose role as an appellant body is to hear the appeal, did not deal with it more decisively.

[15] In implying that the RPD should have dealt with the credibility concerns raised by the Minister, it appears that the RAD member had no appreciation for the RPD's findings on the legal determinative issue of IFA. One way of reading the RAD decision was that it was sent back to the RPD because the rejection of the claim on IFA had resulted in a negative decision that was not negative enough!

[16] The Respondent argued that it appears that the RAD member found their arguments on the unavailability of IFA convincing, but chose not to deal with it because the Minister was a party, and that the RAD member had probably wished no to render an unfavourable decision to them. Instead, they chose to send it back to the RPD with further instructions. I disagree that the RAD gives partial treatment to one of the adversarial parties, especially when there is no evidence of such partiality. In any event, the Respondent agreed that the RAD was unresponsive to the record before them, which renders the decision to be non-transparent, unjustifiable and arbitrary. Further, the very definition of an unintelligible decision is for everyone reading it having to speculate as to the state of mind of the decision-maker.

## V. Conclusion

[17] The Application for Judicial Review is therefore granted.

[18] There is no question to be certified.

**JUDGMENT IN IMM-9701-23**

**THIS COURT'S JUDGMENT is that**

1. The application for Judicial Review is granted. This matter is referred back to the RAD to be decided by a differently constituted panel.

2. There is no question for certification.

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"Negar Azmudeh"

blank Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET**: | IMM-9701-23 |
| **STYLE OF CAUSE**: | THE MINISTER OF CITIZENSHIP AND IMMIGRATION v.J LUIS TORRES PANTOJA |
| **PLACE OF HEARING**: | VIDEOCONFERENCE |
| **DATE OF HEARING**: | JUNE 17, 2024 |
| **REASONS FOR JUDGMENT AND JUDGMENT**: | AZMUDEH J. |
| **DATED**: | JUNE 26, 2024 |

**APPEARANCES:**

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| Suzanne Trudel | FOR THE APPLICANT |
| Stewart Itsvanffy | FOR THE RESPONDENT |

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