Federal Court  Cour fédérale

Date: 20170630

Docket: IMM-4297-16

Citation: 2017 FC 643

Ottawa, Ontario, June 30, 2017

PRESENT: THE CHIEF JUSTICE

BETWEEN:

BILAL HAMDAN, HIAM HAZIME DE HAMDAN, AND YASMIN HAMDAN HAZIME, FATME HAMDAN HAZIME, AMINA AMNE HAMDAN HAZIME, GHADIR HAMDAN HAZIME, BY WAY OF THEIR LITIGATION GUARDIAN, HIAM HAZIME DE HAMDAN

Applicants

and

THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants are four minor children and their parents. The Principal Applicant is the children's mother, Hiam Hazime de Hamdan. They are all citizens of Venezuela and are

Muslims of Arab ethnicity. Upon their arrival in Canada in July 2016, they claimed refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, [IRPA].

[2] The principal basis of their claim for refugee protection was that, if they were required to return to Venezuela, they would face more than a mere possibility of severe discrimination on the basis of their Muslim religion and Arab ethnicity and they would face a risk of harm at the hands of criminals who had targeted them in the past, when they lived in Juan Griego. They also claimed that they would face a risk of harm at the hands of criminals in general, including vigilantes and gangs who target religious minorities, particularly Muslims of Arab origin.

[3] Their request for refugee protection was denied by the Refugee Protection Division [RPD] of the Immigration and Refugee Board on the basis that they have a viable internal flight alternative [IFA] in Maracaibo, Venezuela. The RPD described Maracaibo as being "on the other side of the country, hundreds of kilometres away from" Juan Griego.

II. **Issues**

[4] The Applicants have raised two principal issues on this Application.

[5] First, they submit that the RPD's finding that they have a viable IFA in Maracaibo is wrong in fact and in law. With respect to the facts, they allege that the RPD failed to consider the severe discrimination to which they expected to be exposed in Maracaibo. They also allege that the RPD failed to consider highly relevant evidence indicating that there was no Muslim

population in Maracaibo. In addition, they maintain that the RPD erred in law in applying the second prong of the test for an IFA, when it observed that the generalized criminal violence in Venezuela was not a relevant factor to be considered, even though "crime of that nature could be a serious risk for the claimants in Maracaibo."

[6] The second principal issue the Applicants have raised is with respect to the fairness of their hearing before the RPD. They submit that it was compromised by the ineffective assistance that they received from their former immigration consultant [the Consultant].

[7] For the reasons that follow, this Application will be dismissed.

III. **Standard of Review**

[8] The RPD's application of the IFA test to the facts of the Applicants' case is reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, at paras 51–54 [*Dunsmuir*]). With respect to the RPD's understanding of the IFA test itself, I have some sympathy for the Applicants' position that the RPD's interpretation of a legal test that has been finely honed by the jurisprudence should be reviewable on a standard of correctness (see *Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004). However, that position is not consistent with the Supreme Court's teachings in recent years (see, e.g., *Commission scolaire de Laval v Syndicat de l'enseignement de la région de Laval*, 2016 SCC 8, at para 34). Nothing turns on this, as I have found that the error that the RPD is alleged to have made with respect to its understanding of the test for an IFA was not material.

[9] The issue that the Applicants have raised regarding the competency of the Consultant is an issue of procedural fairness that is reviewable on a standard of correctness (*Dunsmuir*, above at paras 79 and 87; and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 43).

IV. **Analysis**

A. *The Two-Prong Test for an IFA*

[10] There are two parts to the test for an IFA.

[11] First, in the context of section 96 of the IRPA, the RPD must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country to which an IFA exists (*Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589, at 593 (FCA) [*Thirunavukkarasu*]). In the context of section 97, the corresponding test is that the RPD must be satisfied that the claimant would not be personally subjected to a danger described in paragraph 97(1)(a), or to a risk described in paragraph 97(1)(b).

[12] Second, for the purposes of both section 96 and section 97 of the IRPA, the RPD must determine that, in all of the circumstances, including the circumstances particular to the claimant, conditions in the part of the country where a potential IFA has been identified are such that it would not be objectively unreasonable for the claimant to seek refuge there, before seeking protection in Canada (*Thirunavukkarasu*, above, at 597). In this regard, the threshold for

objective unreasonableness is "very high" and "requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to" the area where a potential IFA has been identified (*Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164, at para 15 (FCA) [*Ranganathan*]). Stated differently, objective unreasonableness in this context requires a demonstration that the claimant would "encounter great physical danger or […] undergo undue hardship in travelling" to the IFA (*Thirunavukkarasu*, above, at 598). In addition, "actual and concrete evidence of such conditions" must be adduced by the claimant for refugee protection in Canada (*Ranganathan*, above, at para 15).

B. *Was the RPD's Assessment of the Facts Unreasonable?*

[13] The Applicants allege that there were two distinct grounds for their claim for refugee protection, namely (i) their fear of persecution at the hands of criminal gangs, and (ii) their fear of discrimination on the basis of their visible Arab ethnicity and Muslim faith, particularly in the case of the Principal Applicant, who wears a hijab. They submit that, in its assessment of the first prong of the IFA test, the RPD erred by focusing solely on the first of those claims.

[14] However, a fair reading of the Applicants' Basis of Claim [BOC] forms and the transcript of the hearing before the RPD does not support the contention that their applications were based on the two distinct grounds described above.

[15] The BOC forms of each of the Applicants, which were virtually identical in this respect, focused almost entirely on their fear of violence at the hands of the criminals who robbed them in Juan Griego, and at the hands of "vigilantes and gangs" in general, who were alleged to be targeting religious minorities, particularly those of Arab origin. I acknowledge that the BOC forms also alleged that those gangs "are accusing the Arabs of terrorism and demanding that Arabs should be deported to their home countries." However, it was not unreasonable for the RPD to have failed to interpret this single statement in the BOCs as the basis for a distinct claim for protection based on a fear of discrimination, or to have failed to address this issue in greater detail.

[16] Similarly, the evidence given by the Principal Applicant during the hearing was focused entirely on her and her family's fear of violence perpetrated against people who are visibly Muslims or of Arab ethnicity. In her response to several inquiries by the RPD regarding what she feared, she replied that she and her family were "in danger," that gang members and criminals would want to "attack" her if she wore her headscarf, and that she was afraid because she was "assaulted several times" for being perceived to be an Arab or a Muslim. When asked whether there was any other reason why she and her family couldn't live in Maracaibo, she confirmed twice that she and her family were afraid of anti-Muslim violence. When asked again whether there was any other reason why they couldn't live in Maracaibo, she replied "no." The subsequent questioning by the Consultant also focused entirely on the risk of violence that the Applicants faced in Venezuela and the Principal Applicant confirmed again that she is afraid because she wears "the Muslim garb" and "look[s] Arab."

[17] I acknowledge that at one point during her exchanges with the Consultant, the Principal Applicant made the following statement: "I don't know if you understand the situation, but over there there's nothing. And go to — I stand in line to buy something and they say to me, get out, get out of here. You're an Arab. Get out of here." However, that was in the context of an exchange regarding her fear of attacks in Venezuela. It was not unreasonable for the RPD to have failed to construe this as a distinct claim for protection based on a fear of sustained discrimination, or to have failed to then address that issue in greater detail.

[18] I also acknowledge that the Principal Applicant subsequently noted that there is discrimination at her children's school, where people call them "Turks" and tell them to "get out." However, the issue of discrimination at the children's school was specifically addressed by the RPD in its decision.

[19] Accordingly, I find that it was not unreasonable for the RPD to have failed to further consider, in its treatment of the first prong of the IFA test, the risk of discrimination that the Applicants now claim they would likely face if they were required to move to Maracaibo.

[20] I will now turn to the Applicants' submission that the RPD failed, in its assessment of the second prong of the IFA test, to consider that they would essentially be the only Arab Muslims in Maracaibo.

[21] In my view, this is something that the RPD should have considered in its assessment of the second prong of the IFA test. However, that factor carries little weight unless it meets the very high threshold of that prong of the test (*Ranganathan*, above, at para 18). In other words, as with the absence of friends or family in an IFA area, it is not sufficient for a claimant to simply state that there are no other persons of their religious group in the IFA area. If it is objectively reasonable for the claimant to live in that area, without fear of persecution or a risk identified in section 97 of the IRPA, then the IFA exists and the claimant is not entitled to refugee protection in Canada (*Thirunavukkarasu*, above, at 598).

[22] As the Applicants acknowledged, "there was little to no documentation regarding Muslims in the RPD's National Documentation Package." In these circumstances, and in the absence of any submissions from the Applicants regarding how the absence of Arab or other Muslims in Maracaibo met the very high threshold of the second prong of the IFA test, the RPD's failure to explicitly discuss this issue did not render its overall assessment of the availability of an IFA in Maracaibo unreasonable. If the absence or virtual absence of other Muslims in Maracaibo was truly a serious concern for the Principal Applicant or the other members of her immediate family, one would have expected one or more of them to raise this issue before the RPD (*Ranganathan*, above, at paras 10–11).

C. *The RPD's Alleged Misunderstanding of the IFA Test*

[23] The Applicants submit that the RPD erred in law when it explicitly declined to consider the generalized criminal risks that they allege exist in Maracaibo. The RPD took that position after acknowledging that "the country documents do indicate that Venezuela does suffer from a

lot of indiscriminate, generalized criminal violence and that crime of that nature could be a serious risk for the claimants in Maracaibo." The explanation the RPD provided for taking this position is that "Canada does not offer protection from indiscriminate, generalized criminal risks under section 96 or subsection 97(1) of the IRPA."

[24] I agree with the Applicants that the generalized criminal risks in Maracaibo were a relevant factor that the RPD should have considered, at least in respect of the Applicants' claim for protection under section 96 of the IRPA. As to section 97, general risks that are also faced by other individuals in or from a country are explicitly excluded, pursuant to subparagraph 97(1)(b)(ii). It would therefore be anomalous if such risks could nevertheless form the basis for an applicant to take the position that it would be objectively unreasonable to require the applicant to move to an IFA, as contemplated by the second prong of the IFA test. Nothing turns on this distinction between sections 96 and 97 in this particular case, as the Applicants made claims for protection under both section 96 and section 97.

[25] Nevertheless, as with the absence or virtual absence of other Muslims in Maracaibo, this is a factor which would have carried relatively little weight unless there was evidence before the RPD of general criminality in Maracaibo that rose to the high threshold required to establish that it would be objectively unreasonable for the Applicants to be required to live there (*Ranganathan*, above, at para 18; *Thirunavukkarasu*, above, at 598). In other words, there would have had to be evidence in the Certified Tribunal Record [CTR], or offered orally by the Applicants, to demonstrate that they would "encounter great physical danger or […] undergo undue hardship" if required to live in Maracaibo.

[26] Unfortunately for the Applicants, no such evidence was before the RPD in respect of the level of general crime in *Maracaibo*. I do not read the sentence from the RPD's decision that is quoted at paragraph 23 above as suggesting otherwise. Rather, the RPD simply referred to the indiscriminate, generalized criminal violence in *Venezuela* that is discussed in the country documentation that was in the CTR, before then observing that crime of that nature *could* be a serious risk for the Applicants in Maracaibo.

[27] In any event, I do not consider that the level of indiscriminate, generalized criminal violence in Venezuela, as described in the country documentation and by the Principal Applicant, rises to the "very high" level contemplated by the second prong of the IFA test, as set forth in the jurisprudence quoted above.

[28] The Applicants note that the documentation that was before the RPD estimates the murder rate in Venezuela in 2015 to have been approximately 90 per 100,000 residents. However, this equates to a risk that has an associated probability of less than 0.001%, for any given individual. In my view, even assuming that this risk is the same in Maracaibo, this does not rise to the level required to exclude a potential IFA from eligibility, under the second prong of the IFA test.

[29] The Applicants note that other information before the RPD reports that "kidnapping remains a major criminal industry in Venezuela." However, no statistics are provided, and this is not a risk that was mentioned even once by the Applicants in their BOC or other information provided to the RPD, orally or in writing.

[30] In brief, on the particular facts of this case, I am satisfied that the RPD's error in failing to consider the level of general criminal violence in Maracaibo was not material, as there was no information before the RPD which indicated that the level of general criminal violence rose to the "very high" threshold set forth in the jurisprudence mentioned above, in relation to the second prong of the IFA.

[31] It bears underscoring that the Applicants' claims before the RPD were solely based upon (i) alleged risks of violence perpetrated against people who are visibly of Arab ethnicity or Muslims; and (ii) discrimination directed towards their children at school, again because of their visible Arab ethnicity or their Muslim faith. In this regard, the Applicants each stated in their BOC that "Venezuelans from Arab origin are the prime target." The RPD specifically assessed those risks, and concluded that "there is, in fact, little or nothing in the country documents […] to indicate that there so much [*sic*] anti-Muslim violence in Venezuela that there is a serious possibility that the claimants could face the same kind of anti-Muslim criminal attacks by different criminals in Maracaibo, or that there is so much anti-Muslim discrimination in Venezuelan schools that there is a serious possibility that the minor claimants would encounter it in schools in Maracaibo." The RPD also concluded that there "is less than a serious possibility that the same criminals who attacked the claimants in Juan Griego would pursue them all the way to Maracaibo." Based on the evidence that was before the RPD, those conclusions were well "within a range of acceptable outcomes which are defensible in respect of the facts and the law" (*Dunsmuir*, above, at para 47).

[32] The burden was on the Applicants to adduce clear and convincing evidence to satisfy the RPD, on a balance of probabilities, that the very high threshold required to demonstrate that it would be objectively unreasonable for them to live in Maracaibo had been met. In this case, it was reasonably open for the RPD to find that the Applicants had failed to discharge that burden.

D. *The Alleged Incompetency of the Applicants' Former Immigration Consultant*

[33] The Applicants submit that their rights to procedural fairness were breached because the Consultant failed to:

i. ask the Principal Applicant questions relevant to the determination of whether it was objectively reasonable for her to reside in Maracaibo;

ii. ask the Principal Applicant's spouse to testify as to the objective unreasonableness of an IFA in Maracaibo;

iii. address the two-part test for an IFA, or to refer to any testimonial or documentary evidence;

iv. make any arguments as to why the proposed IFA was not viable; and

v. request an opportunity to make post-hearing submissions with respect to the issue of an IFA in Maracaibo.

[34] In addition, the Applicants note that the submissions made by the Consultant that could be construed as being relevant to the IFA issue were grossly inadequate, largely incomprehensible and partially erroneous.

[35] As a result of the foregoing, the Applicants maintain that the Consultant was incompetent and negligent. In addition, they submit that they were clearly prejudiced by the various failures identified above.

[36] In *R v GDB*, 2000 SCC 22, at para 26 [*GDB*], the Supreme Court of Canada stated that for this ground of challenge to succeed, "it must be established, first, that counsel's acts or omissions constituted incompetence and second, that a miscarriage of justice resulted." The Court elaborated as follows:

> **27** Incompetence is determined by a reasonableness standard. The analysis proceeds upon a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance. The onus is on the appellant to establish the acts or omissions of counsel that are alleged not to have been the result of reasonable professional judgment. The wisdom of hindsight has no place in this assessment.
>
> **28** Miscarriages of justice may take many forms in this context. In some instances, counsel's performance may have resulted in procedural unfairness. In others, the reliability of the trial's result may have been compromised.
>
> **29** In those cases where it is apparent that no prejudice has occurred, it will usually be undesirable for appellate courts to consider the performance component of the analysis. The object of an ineffectiveness claim is not to grade counsel's performance or professional conduct. The latter is left to the profession's self governing body.

[37] Although *GDB*, above, was a criminal case, the principles set forth above have been applied to matters arising under the IRPA, see e.g., *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196, at para 34.

[38] However, in proceedings under the IRPA, the alleged incompetence of counsel will only constitute a breach of natural justice in "extraordinary" circumstances (*Huynh v Canada (Minister of Employment and Immigration)* (1993), 65 FTR 11 at 15 TD)). With respect to the prejudice component, the Court must be satisfied that a miscarriage of justice resulted. Consistent with the extraordinary nature of this ground of challenge, the performance component must be exceptional and the miscarriage of justice component must be manifested in procedural unfairness, the reliability of the trial result having been compromised, or another readily apparent form.

[39] In my view, the performance component of the test for incompetence has not been established on the particular facts of this case. In brief, although it is readily apparent that the Consultant's performance fell well short of what the Applicants or anyone in their position would reasonably have expected, it did not meet the stringent test for establishing incompetence.

[40] Towards the end of the short hearing before the RPD, the Consultant posed several questions to the Principal Applicant. Those questions enabled the Principal Applicant to confirm that she feared being attacked by the thieves who had robbed her and her spouse in Juan Griego, and that she believed they would kill her daughters if the family was to return to Venezuela. The questions also enabled the Principal Applicant to explain that she feared being attacked because she wears "the Muslim garb" and looks Arab.

[41] The Consultant also addressed how the Principal Applicant's complaint was treated by the police, and whether she believed the police or the authorities in Venezuela would provide protection to her if she returned to Venezuela.

[42] In addition, the Consultant addressed the general issue of whether the Principal Applicant believed that Venezuela would be safe for her and her children as well as the issue of the discrimination faced by her children at school.

[43] When invited to specifically address the issue of an IFA in Maracaibo, the Consultant submitted that Venezuela is one of the most dangerous countries in the world, and that there is discrimination everywhere, "mainly against anti-Muslim people." I am satisfied that the RPD understood this to mean "mainly by anti-Muslim people." The Consultant then submitted that these submissions were corroborated by the record before the RPD. He added that "there is no government to protect their citizen" [*sic*]. In his concluding remarks, he reiterated that "it's very dangerous for my client and her children to return to Venezuela."

[44] I am satisfied that notwithstanding the shortcomings identified by the Applicants, the Consultant did in fact address the key aspects of the basis for their claim for refugee protection, and why they feared returning to Venezuela. In his response to the RPD's request for submissions on the issue of an IFA in Maracaibo, he explicitly submitted that the country in general is very dangerous and that there is discrimination everywhere, particularly against what the RPD would have understood to be Muslim people.

[45] Given my conclusion above, it is unnecessary to address the prejudice component of the test. However, I will simply reiterate in passing that there was nothing in country documentation or elsewhere in the record before the RPD that suggested that the Consultant likely would have been able to demonstrate that it would be objectively unreasonable for the Applicants to live in Maracaibo, had he done a better job. That said, I recognize that the Applicants' position is that the Consultant should have adduced additional evidence, including through the Principal Applicant and her spouse.

V. **Conclusion**

[46] For the reasons set forth above, this Application is dismissed.

[47] As counsel to the Applicants and the Minister each acknowledged, a serious question of general importance does not arise from this issues in this case. In my view, the outcome in this matter turns largely upon the application of settled law to the particular facts at issue.

JUDGMENT
(IMM-4297-16)

THIS COURT'S JUDGMENT is that this Application is dismissed.

"Paul S. Crampton"
Chief Justice

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4297-16
STYLE OF CAUSE:	BILAL HAMDAN, HIAM HAZIME DE HAMDAN, AND YASMIN HAMDAN HAZIME, FATME HAMDAN HAZIME, AMINA AMNE HAMDAN HAZIME, GHADIR HAMDAN HAZIME, BY WAY OF THEIR LITIGATION GUARDIAN, HIAM HAZIME DE HAMDAN V. THE MINISTER OF IMMIGRATION, REFUGEES AND CITIZENSHIP
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	JUNE 26, 2017
ORDER AND REASONS:	CRAMPTON C.J.
DATED:	JUNE 30, 2017

APPEARANCES:

Katherine Ramsey	FOR THE APPLICANTS
Nicole Paduraru	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Katherine Ramsey	FOR THE APPLICANTS
Deputy Attorney General Department of Justice Ontario Regional Office 130 King Street West Suite 3400, Box 36 Toronto, ON M5X 1K6	FOR THE RESPONDENT