

Federal Court



Cour fédérale

Date: 20191119

Docket: IMM-4256-18

Citation: 2019 FC 1447

Ottawa, Ontario, November 19, 2019

PRESENT: The Honourable Madam Justice Elliott

BETWEEN:

RAUL LOPEZ CALDERON

Applicant

And

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview and Background

[1] This is an application for judicial review of a decision made on August 8, 2018 by the Refugee Appeal Division [RAD]. It confirmed the decision of the Refugee Protection Division [RPD] that dismissed the appeal of the Applicant [Mr. Calderon] and found that he is neither a Convention refugee nor a person in need of protection [Decision].

[2] Mr. Calderon is a citizen of Mexico. He and his cousin, Miguel, operated a restaurant in Mexico City. When the restaurant became successful, they were financially extorted by two corrupt federal police officers in exchange for “protection”.

[3] After a year of monthly payments equal to approximately 30% of the net revenue of the restaurant, the two officers increased the amount required. Mr. Calderon and his cousin refused to pay. When Miguel was on his way to denouncing the extortion to officials, he was attacked and hospitalized. Subsequently, Miguel, along with his wife and child, fled Mexico to live in Latin America.

[4] Mr. Calderon testified that he received three or four death threats, by telephone, from one of the police officers who said that what happened to Miguel would happen to him. As a result, Mr. Calderon fears returning to Mexico.

[5] The RPD found that the determinative issues were credibility and generalized risk. It noted that Mr. Calderon conceded that his claim fell within subsection 97(1) of the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]*.

[6] The RAD found the risk to Mr. Calderon of extortion by corrupt authority figures was a generalized one, not a personal risk. The RAD also determined there was a viable internal flight alternative [IFA] available to Mr. Calderon. As a result, he did not need protection.

[7] For the reasons that follow, this application is dismissed.

II. **Issue and Standard of Review**

[8] The sole issue in this application is whether the Decision is reasonable.

[9] Mr. Calderon states that the reasons provided in the Decision are unintelligible as there is no clear reasoning process. He also says that the RAD failed to identify the evidence upon which it relied to reach certain conclusions. Critically, he alleges that when assessing the IFA, the RAD failed to properly identify or consider his personal risk.

[10] This Court reviews decisions of the RAD, when sitting on appeal from the RPD, on the standard of reasonableness: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35 [*Huruglica*]. Similarly, the IFA finding by the RAD is reviewable on a standard of reasonableness: *Louis v Canada (Citizenship and Immigration)*, 2016 FC 923 at para 13.

[11] The reasonableness of a decision is determined by examining whether the decision-making process was justifiable, intelligible and transparent as well as whether it falls within the range of possible, acceptable outcomes defensible on the facts and law. Under the reasonableness standard, this Court owes deference to the expertise of the decision-making tribunal. Deference requires that the Court pay respectful attention to the reasons offered or that could have been offered: *Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 47 and 48 [*Dunsmuir*].

[12] If the decision falls within the range of reasonable outcomes, then the fact that a different outcome is possible does not lead to a finding that a decision is unreasonable. When the reasons allow a reviewing court to understand why the tribunal made its decision and permit the court to

determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met: *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 at paras 16 and 17 [*Nfld Nurses*].

III. Decision under Review

[13] The RAD correctly identified that the standard of review to apply to the RPD decision is found in *Huruglica*. It agreed with the parties that Mr. Calderon's claim fell only under section 97 of the *IRPA*.

[14] The Minister put Mr. Calderon's credibility concerning a discrepancy between his BOC and info in his Notice of Arrest at issue before the RPD. The RAD determined it would be unfair to consider this issue because the RPD had not addressed it. The RAD decided that the RPD must have been satisfied with any explanation it had received from Mr. Calderon about the Minister's concerns.

[15] The RAD identified two determinative issues. The first was the availability of an IFA in Tuxtla Gutierrez, Chiapas, Mexico [Tuxtla]. The second was whether Mr. Calderon's section 97 risk was personal to him or a generalized risk.

[16] The RAD found that the RPD incorrectly assessed a medical report that addressed the discharge of Mr. Calderon's cousin from a private hospital. It determined that Mr. Calderon's explanation was "totally plausible".

[17] The RAD also determined that the RPD should not have made a negative inference against Mr. Calderon about when his cousin was attacked because that was a minor issue. The RAD found the important fact was simply that his cousin was attacked. The RAD observed that there was sufficient evidence to prove that the cousin was attacked.

[18] In assessing the viability of the IFA, the RAD referred to the relevant jurisprudence of this Court concerning the two-pronged test and the description of the factors considered under each prong.

[19] In selecting Tuxtla as the IFA, the RAD noted that it is a city with a complete infrastructure to make a pleasant and safe life. Specifically the RAD noted that:

- it was the largest city in and the capital of Chiapas State;
- it has a metropolitan population of almost 750,000 people;
- it offers many different cultural and gastronomic options;
- it has a myriad of educational facilities from grade school to world-class universities;
- it was the first city in Mexico to be designated a safe city by the Karolinska Institute in Stockholm due to its very low crime rate;
- it offers parks, museums and full-service hospitals.

[20] Turning to the possibility of Mr. Calderon being persecuted in Tuxtla, the RAD examined the nature of the persecutors and the likelihood of them pursuing him in the IFA.

[21] The RAD found that the alleged persecutors were two corrupt police officers in Mexico City and it noted that Tuxtla is more than 700 km away from Mexico City.

[22] The RAD noted that Mr. Calderon no longer owned a business so the corrupt police could not extort him for money. It found that it would make more sense for those police officers to hunt for another businessperson to extort instead of Mr. Calderon who had no source of income.

[23] The RAD considered an argument by Mr. Calderon that the police officers were officers of the state thereby making the state itself his persecutor. The RAD found that the police officers were not acting in their capacity as agents of the state. Their actions were criminal acts of extortion perpetrated by rogue police officers acting on behalf of themselves and not on behalf of the state.

IV. Analysis

A. *Assessing an IFA*

[24] When assessing the viability of a proposed IFA, the RAD must be satisfied on a balance of probabilities that there is no serious possibility of persecution of a claimant in the proposed IFA.

[25] Once the RAD determined that Tuxtla was a viable IFA, Mr. Calderon had the onus to adduce evidence to demonstrate that it would be unreasonable for him to live there. Failure to

meet that onus means the IFA is determinative of the claim for refugee protection: *Figueroa v Canada (Citizenship and Immigration)*, 2016 FC 521 at para 20.

[26] Whether a proposed IFA is reasonable or not is determined objectively. The threshold for proving objective unreasonableness is very high. Actual and concrete evidence of the existence of conditions that would jeopardize the life and safety of Mr. Calderon in travelling or temporarily relocating to Tuxtla was required: *Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 [FCA] at paras 13 and 15.

B. *Mr. Calderon's submissions to the RAD*

[27] In his written submissions to the RAD, Mr. Calderon began by noting that the RPD found it credible that he operated a restaurant with his cousin in Mexico City and that he was extorted by two corrupt PGR officials. He noted that the RPD did not accept his evidence that Miguel was attacked by the police officers and that Mr. Calderon himself was threatened after that attack.

[28] Mr. Calderon took issue with the RPD's findings about his cousin's hospitalization and the timing of the attack on him. He submitted that the RPD had engaged in unreasonable speculation and drew an inference that was not supported by the evidence. The RAD specifically agreed with Mr. Calderon on these issues.

[29] Mr. Calderon also submitted that the RPD erred in its assessment of whether one or both of the police officers made death threats to him. He alleged that the RPD focused on one

response he made without considering the other evidence he provided. It either misapprehended the evidence or ignored relevant evidence.

[30] In arguing that the risk he faced was personal, not general, Mr. Calderon referred to an Immigration and Refugee Board document from May 2002 that deals with the risk to life and the risk of cruel and unusual treatment or punishment under paragraph 97(1)(b) of the *IRPA*.

[31] Mr. Calderon pointed to a section in that document explaining when a risk under paragraph 97(1)(b) is generalized and when it may be personalized:

A claim based on natural catastrophes such as drought, famine, earthquakes, etc. will not satisfy the definition as the risk is generalized. However, claims based on personal threats, vendettas, etc. may be able to satisfy the definition (provided that all the elements of s. 97(1)(b) are met) as the risk is not indiscriminate or random.

[32] Mr. Calderon submitted that RPD erred in its credibility determination and that based on the definition of personal risk, he would have fallen into the category of being found to be subject to a risk that is personal and not general, given his circumstances of personal targeting by what he termed corrupt members of the PGR.

C. *Submissions in this application*

[33] Mr. Calderon alleges that the RAD failed to identify the evidence it relied upon to conclude that he was not a person in need of protection. He states that the RAD failed to consider his personal circumstances when assessing the IFA. He argues that the RAD's statement that he would not be extorted because he no longer owned a business was analogous to a determination

that he would be safe as long as he was in hiding. He points out that hiding in an IFA location is something this court has previously determined is not reasonable.

[34] The Minister counters that the RAD finding was reasonable. The conclusion that Mr. Calderon would not be at risk from the two police officers was clearly explained. Without a business to produce money, there was no motivation for the police officers to seek him out and there was no point in doing so.

[35] I agree with the Minister that the analysis by the RAD was reasonable.

[36] Mr. Calderon says that the RAD did not consider his total risk profile. The motivation to seek him out was not just money; it included retaliation for Miguel reporting the police officers to officials for sanction. Mr. Calderon stressed that this also made his risk personal, not generalized.

[37] In the Decision, the RAD set out a portion of the transcript of the RPD hearing and found it was clear that Mr. Calderon was not sure whether or not Miguel had actually made the denunciation. While this uncertainty did not prevent the RAD from finding that Miguel had been attacked, the uncertainty is relevant to the presence of an IFA in Tuxtla. Without evidence that the denunciation was made, there was no evidence to support Mr. Calderon's theory that retaliation would be a motive to pursue him in the IFA.

[38] I do not read the RAD as saying that Mr. Calderon had to hide in Tuxtla and not operate a business. The discussion that he did not own a business was made in the context of whether or not the police officers would pursue Mr. Calderon in Tuxtla. As just stated, since there was no evidence of denunciation of the police officers there was no motive for retaliation.

[39] Mr. Calderon had testified that the police extorted him because they wanted money from his successful business. His evidence was that a lot of area businesses were being extorted as long as they were successful. It was a logical and reasonable conclusion for the RAD to find that without a source of money, attempts to extort Mr. Calderon would prove fruitless but other businesses would pay.

[40] The RAD accepted that the attack on Miguel had occurred. However, without evidence that Miguel had made the denunciation that allegedly prompted the attack, the risk is a generalized one applying to successful businesses. It is not a personalized risk.

[41] Mr. Calderon submitted the RAD failed to explain how it determined that the police officers were not acting as officers of the state and that there was no persecution. He says the RAD ignored the attack on Miguel in arriving at those findings.

[42] The RAD considered the attack on Miguel at several points in the Decision. The most important consideration is the one already reviewed – there was no evidence that Miguel made a denunciation of the police officers to officials.

[43] In terms of persecution, one basis for the RAD saying that there was no persecution is the agreement of the parties that Mr. Calderon's claim fell only under section 97 and not section 96 of the *IRPA*.

[44] There was no actual and concrete evidence before the RAD other than speculation by Mr. Calderon that the two police officers were acting on behalf of the state. Without such evidence, the RAD finding easily falls within the possible, acceptable outcomes defensible on the facts and law.

V. **Summary and Conclusion**

[45] In summary, the RAD reasonably found that Tuxtla provided an IFA for Mr. Calderon and he failed to discharge the onus he bore to show he would be at personal risk of retaliation in Tuxtla.

[46] The RAD reasonably found that the extortion of Mr. Calderon was perpetrated by rogue police officers acting on behalf of themselves and not on behalf of the state.

[47] Mr. Calderon submitted that the reasons provided by the RAD were not sufficient. It is important to keep in mind that deference is a key component to the review of any decision by an administrative tribunal. In *Nfld Nurses*, Madam Justice Abella instructed a court to approach reviewing a tribunal's decision as follows:

When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons

are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties’ submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive.

Nfld Nurses at para 18.

[48] The reasons set out by the RAD permit the Court, considering the underlying record and taking the decision as a whole, to understand why it made the critical findings it did about the viability and reasonableness of Tuxtla as an IFA.

[49] The Decision meets the *Dunsmuir* criteria. It is reasonable.

[50] The application is dismissed.

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

JUDGMENT in IMM-4256-18

THIS COURT'S JUDGMENT is that:

1. The application is dismissed.
2. There is no serious question of general importance for certification.

"E. Susan Elliott"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4256-18

STYLE OF CAUSE: RAUL LOPEZ CALDERON v THE MINISTER OF
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