Federal Court Cour fédérale

Date: 20200403

Docket: IMM-2292-19

Citation: 2020 FC 488

Ottawa, Ontario, April 3, 2020

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

JUAN GABRIEL MARTINEZ ZUNIGA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Juan Gabriel Martinez Zuniga is a citizen of Honduras. He claims to have been persecuted and brutally victimized by the Mara 18 street gang.

[2] Mr. Zuniga seeks judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB]. The RAD rejected Mr. Zuniga's refugee claim on the ground that he had a reasonable internal flight alternative [IFA] in Roatán, an island off the northern coast of Honduras. In light of this conclusion, the RAD held that it was unnecessary to consider whether there were "compelling reasons" to grant Mr. Zuniga's refugee claim pursuant to s 108(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[3] The RAD unreasonably assessed the viability of Roatán as an IFA with the benefit of hindsight. It did not assess the viability of Roatán as an IFA in light of the circumstances that prevailed in 2005. If Roatán was not a viable IFA in 2005, then Mr. Zuniga may have been eligible for refugee protection at the time of his persecution.

[4] The RAD's refusal to consider whether there were "compelling reasons" to grant his refugee claim pursuant s 108(4) of the IRPA was premised on its unreasonable assessment of Mr. Zuniga's IFA in 2005. The application for judicial review is therefore allowed.

II. Background

[5] Mr. Zuniga was born and grew up in La Ceiba, Honduras. His older brother was a member of the Mara 18 street gang (also known as Barrio 18, Calle 18, La 18 and the 18th Street Gang, among other names). However, in 2003 the brother abandoned the gang and fled to Roatán. Gang members tried to recruit Mr. Zuniga, but he refused. They then began to extort him for money.

[6] On December 19, 2004, members of the Mara 18 kidnapped Mr. Zuniga, tortured him for three days, beat him almost to death, and cut off his left thumb. While he was recovering in hospital, the gang kidnapped, tortured and killed his younger brother.

[7] On June 18, 2005, Mr. Zuniga left Honduras for the United States of America. He lived in the US for the next 12 years. He says that he did not seek asylum there because he had heard that 90% of claims were denied. He applied to be sponsored by his mother and her husband, but this was refused. In June 2016, Mr. Zuniga was given a year to leave the U.S. voluntarily. He arrived in Canada on June 1, 2017, and made a refugee claim.

[8] Mr. Zuniga alleged before the Refugee Protection Division [RPD] of the IRB that he faced a forward-looking risk in Honduras from the Mara 18. In the alternative, he asserted that there were "compelling reasons" to grant his refugee claim under s 108(4) of the IRPA due to the trauma he had experienced in Honduras.

[9] Section 108 of the IRPA reads in relevant part:

Cessation of Refugee Protection	**Perte de l'asile**
Rejection	Rejet
108 (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:	108 (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :

[…]	[…]
(e) the reasons for which the person sought refugee protection have ceased to exist.	e) les raisons qui lui ont fait demander l'asile n'existent plus.
[…]	[…]
Exception	Exception
(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.	(4) L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

[10] The RPD noted that more than 13 years had passed since the incidents that allegedly gave rise to Mr. Zuniga's refugee claim, and his older brother had been living safely on Roatán for even longer. The RPD found there was insufficient evidence to establish that more recent allegations concerning disappearances and threats involving Mr. Zuniga's family were connected to the Mara 18.

[11] The RPD held that the "compelling reasons" exception in s 108(4) of the IRPA could apply only if a claimant was entitled to refugee protection at the time he left his country of origin. Because the RPD considered Roatán to be a reasonable IFA in both 2005 and 2018, it concluded that no "compelling reasons" analysis was required.

III. Decision under Review

[12] Before the RAD, Mr. Zuniga conceded that Roatán was a reasonable IFA in 2018. However, he challenged the RPD's determination that Roatán was also a reasonable IFA in 2005. Given his recent torture and the murder of his younger brother, and because his older brother had lived safely in Roatán for only a short time, he argued that he did not have a reasonable IFA in 2005, and he was eligible for refugee protection at the time he fled Honduras. It was therefore incumbent on the IRB to consider whether there were "compelling reasons" to grant his refugee claim in Canada.

[13] The RAD confirmed that Mr. Zuniga had a reasonable IFA on Roatán. The RAD observed that Mr. Zuniga's older brother had lived there safely since 2003, and had not encountered any issues with the Mara 18 for 15 years. The RAD surmised that the Mara 18 had likely forgotten about Mr. Zuniga and his brother. The RAD noted that Roatán is many miles away from mainland Honduras, and more than a million tourists visit the island safely every year.

[14] The RAD therefore concluded that it was unnecessary to consider whether there were "compelling reasons" to grant Mr. Zuniga's refugee claim under s 108(4) of the IRPA.

IV. Issue

[15] This application for judicial review raises a single issue: was the RAD's refusal to consider whether there were "compelling reasons" to grant Mr. Zuniga's refugee claim pursuant to s 108(4) of the IRPA reasonable?

V. Analysis

[16] 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 if "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). These criteria 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).

[17] Mr. Zuniga argues that the RAD unreasonably limited its analysis to whether he had a viable IFA on Roatán in 2018, a point he had already conceded. He says that the RAD misapprehended the law, and failed to address his central argument that the RPD's finding of a viable IFA on Roatán in 2005 was unsupported by the evidence. He maintains that the RAD's refusal to consider whether there were "compelling reasons" to grant his refugee claim under s 108(4) of the IRPA was therefore unreasonable.

[18] In *Yamba v Canada (Minister of Citizenship & Immigration)*, [2000] 254 NR 388 (FCA), the Federal Court of Appeal said the following about the legislative provision that was the predecessor to s 108(4) of the IRPA (at para 6).

> In summary, in every case in which the Refugee Division concludes that a claimant has suffered past persecution, but this [*sic*] has been a change of country conditions under paragraph 2(2)(e), the Refugee Division is obligated under subsection 2(3) to consider whether the evidence presented establishes that there are "compelling reasons" as contemplated by that subsection. This obligation arises whether or not the claimant expressly invokes subsection 2(3). That being said the evidentiary burden remains on the claimant to adduce the evidence necessary to establish that he or she is entitled to the benefit of that subsection.

[19] To be eligible for consideration under s 108(4) of the IRPA, a claimant must have been a Convention refugee or person in need of protection at the time of his or her persecution. As Justice John O'Keefe explained in *Salazar v Canada (Citizenship and Immigration)*, 2011 FC 777 (at paras 31-32):

> The jurisprudence on subsection 108(4) is clear that the Board must first find a refugee claimant to be a Convention refugee or person in need of protection at the time of persecution before the compelling reasons exception applies. In *Nadjat v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 302, Mr. Justice James Russell held at paragraph 50 that there must be "... a finding that the claimant has at some point qualified as a refugee, but the reasons for the claim have ceased to exist".
>
> As I held in *John v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 1088 at paragraph 41:

> This requires a clear statement conferring the prior existence of refugee status on the claimant, together with an acknowledgement that the person is no longer a refugee because circumstances have changed.
>
> [Emphasis added.]

[20] A similar analysis was applied more recently by Justice Glennys McVeigh in *Krishan v Canada (Citizenship and Immigration)*, 2018 FC 1203 (at para 76):

> […] for the RPD to embark on a compelling reasons analysis, it must first find that there was a valid refugee (or protected person) claim and that the reasons for the claim have ceased to exist (due to changed country conditions). It is only then that the RPD should consider whether the nature of the claimant's experiences in the former country were so appalling that he or she should not be expected to return and put himself or herself under the protection of that state, as per the holding in Brovina v. Canada (Minister of Citizenship and Immigration), 2004 FC 635 at paragraph 5.

[21] In this case, the RPD made an explicit finding that Mr. Zuniga was not a refugee at the time of his persecution, because he had a viable IFA on Roatán when he fled Honduras in 2005. This is the precise finding that Mr. Zuniga challenged before the RAD.

[22] The RAD provided an adequate summary of the issue it was asked to consider:

> [14] Counsel argues that because the IFA is not viable (as of 2005) then IFA may not be used to dismiss compelling reasons (subsection 108(4) IRPA).
>
> [15] In order for the panel to consider compelling reasons, the claimant (the Appellant) must have experienced persecution and must have had a well-founded fear of persecution when he or she left their country and the reasons for that well-founded fear have ceased to exist and there are "compelling reasons" arising out of

> previous persecution for refusing to avail oneself of the protection of the country he or she is fleeing from.
>
> [16] Accordingly, the panel does not have to consider subsection 108(4) in claims where the claimant was not a Convention Refugee at the time of departure, if the claimant (the Appellant) had no serious possibility of persecution, or if state protection was available or there is a viable IFA.

[23] However, the RAD then considered the viability of the proposed IFA on Roatán with the benefit of hindsight, not from the vantage point of 2005, when Mr. Zuniga fled persecution:

> [17] The Appellant's only argument against the proposed IFA was that his brother lived at the IFA and that brother was the reason that the Appellant had been kidnapped and tortured. Counsel argues that sending the Appellant to live so close to his brother who was the cause of the Appellant's torture is akin to asking someone to "run towards the fire" (as in a burning building).
>
> [18] However, the brother had been living safely at the IFA since 2003. As the IFA is on an island which is about 129 miles away from mainland Honduras, the brother has lived there safely since he fled the Maras 15 years ago. As the panel has written, Roatan Island is very safe with more than a million tourists visiting it every year.
>
> [19] As the panel has stated, it is clear that, after 15 years of living on Roatan without any bother from the Maras, the Maras have, on a balance of probabilities, forgotten entirely about the brother and the Appellant.

[24] The Minister suggests the RAD's statement that Mr. Zuniga's brother "had been living safely at the IFA since 2003" is an indication that the RAD considered the IFA's viability from the perspective of 2005, and not only from the perspective of 2018. I disagree. The RAD twice observed that Mr. Zuniga's brother had lived on Roatán without incident for 15 years, and

concluded that after this length of time the Mara 18 had likely forgotten entirely about them both.

[25] It was incumbent on the RAD to consider whether, seen from the vantage point of 2005, Roatán was a reasonable IFA in all of the prevailing circumstances. These would include the likelihood of the Mara 18's ongoing persecution of Mr. Zuniga on Roatán, viewed without the benefit of hindsight. It would also require consideration of the impact of recent traumatic events on Mr. Zuniga's psychological well-being, and whether it was reasonable to expect that someone in his circumstances should, in 2005, relocate to a place that was easily accessible from mainland Honduras (*Okafor v Canada (Citizenship and Immigration)*, 2011 FC 1002 at paras 14-15).

[26] The RAD did not assess whether it would have been reasonable for Mr. Zuniga to relocate to Roatán, where his older brother had been living only briefly, so soon after Mr. Zuniga had been tortured and his younger brother had been murdered. If the RAD concluded, having regard to all of the circumstances, that it was not reasonable for Mr. Zuniga to relocate to Roatán in 2005, then he was potentially a Convention refugee or person in need of protection at the time he fled Honduras. The RAD would then have to consider whether there were "compelling reasons" to grant his refugee claim under s 108(4) of the IRPA (*Ismail v Canada (Citizenship and Immigration)*, 2016 FC 650 at paras 11-16; *Cabdi v Canada (Citizenship and Immigration)*, 2016 FC 26 at paras 27-35).

[27] The RAD unreasonably assessed the viability of Roatán as an IFA with the benefit of hindsight. It did not assess the viability of Roatán as an IFA in light of the circumstances that

prevailed in 2005. If Roatán was not a viable IFA in 2005, then Mr. Zuniga may have been eligible for refugee protection at the time of his persecution.

[28] The RAD's refusal to consider whether there were "compelling reasons" to grant Mr. Zuniga's refugee claim pursuant s 108(4) of the IRPA was premised on its unreasonable assessment of the IFA in 2005. The matter must therefore be redetermined.

VI. Conclusion

[29] The application for judicial review is allowed, and the matter is remitted to a different member of the RAD for redetermination. No question is certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, and the matter is remitted to a different member of the RAD for redetermination.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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