Federal Court Cour fédérale

Date: 20211122

Docket: IMM-3261-20

Citation: 2021 FC 1281

Ottawa, Ontario, November 22, 2021

PRESENT: Mr. Justice Norris

BETWEEN:

MARILYN POULETT LOPEZ SANTOS
HEIDY ALEJO LOPEZ
MARIA JOSE ALEJO LOPEZ (BY THEIR LITIGATION GUARDIAN
MARILYN POULETT LOPEZ SANTOS)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] The principal applicant, Marilyn Poulett Lopez Santos, and her two minor children are citizens of Mexico. They applied for refugee protection in Canada, claiming a well-founded fear of persecution in Mexico by Ms. Lopez Santos's ex-husband, the father of the minor applicants.

[2] The Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada ("IRB") rejected the claims on the basis that the applicants have a viable internal flight alternative ("IFA") in Mexico City. The applicants appealed this decision to the Refugee Appeal Division ("RAD") of the IRB. In a decision dated March 4, 2020, the RAD dismissed the appeal and confirmed the determination of the RPD that the applicants are neither Convention refugees nor persons in need of protection.

[3] The applicants now apply for judicial review of the RAD's decision under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). They challenge the RAD's decision on a number of grounds but it is only necessary to address two. As I will explain in the reasons that follow, I agree with the applicants that the RAD did not comply with the requirements of procedural fairness when it raised new concerns about Ms. Lopez Santos's credibility that she had no reason to think would be in issue and, as a result, did not have an opportunity to address. I also agree that the RAD's adverse credibility determination is unreasonable because, among other things, the RAD overlooked the fact that Ms. Lopez Santos had filed an amended Basis of Claim ("BOC") narrative at the RPD. Together, these shortcomings call the fairness and reasonableness of the decision into question. The RAD found the existence of a viable IFA to be determinative in dismissing the appeal and Ms. Lopez Santos's lack of credibility was a material consideration in the RAD's analysis. This application must, therefore, be allowed and the matter remitted for reconsideration by a different decision maker.

II. BACKGROUND

[4] Ms. Lopez Santos was born in Macuspana, Tabasco, Mexico in March 1988. She grew up in a violent home. She, her brother and her mother suffered physical and psychological abuse at the hands of her father.

[5] When she was 15 years old, Ms. Lopez Santos met someone who I will refer to simply as Juan Carlos. The two started dating. When she was 19 years old, Ms. Lopez Santos discovered she was pregnant. She and Juan Carlos were married in September 2007. The two lived together in an apartment in Macuspana paid for by Juan Carlos's mother. In January 2008, their daughter Heidy was born. A second daughter, Maria Jose, was born in June 2010.

[6] Throughout their relationship, but especially after they were married, Juan Carlos was physically, emotionally, sexually and verbally abusive towards Ms. Lopez Santos. He was jealous and controlling. He was particularly prone to become violent when he had been drinking, which he did frequently and often to excess. Juan Carlos was never violent towards their daughters but they witnessed his abuse of Ms. Lopez Santos.

[7] Ms. Lopez Santos and Juan Carlos would separate and reconcile from time to time. They first separated in June 2008. Ms. Lopez Santos left with Heidy (then still an infant) and returned to her parents' home in Macuspana because of fears for her own safety. Later, the two reconciled and Juan Carlos joined Ms. Lopez Santos and their daughter in her parents' home.

They separated again in August 2010, shortly after Maria Jose was born, when Juan Carlos was told to leave the home after Ms. Lopez Santos learned he had been seeing another woman.

[8] Ms. Lopez Santos eventually filed for divorce in January 2011. The divorce was granted in November 2011. Ms. Lopez Santos was given custody of the daughters but Juan Carlos had rights of access to them. Ms. Lopez Santos and her daughters continued to live at her parents' home.

[9] When they were separated and after they were divorced, Juan Carlos would constantly threaten and harass Ms. Lopez Santos. He would come to her work or her home. He would follow her on the street.

[10] In September 2013, Ms. Lopez Santos and Juan Carlos reconciled again and he moved back into the family home. He had convinced Ms. Lopez Santos that he had stopped drinking, that he was attending Alcoholics Anonymous, and that he was going to find work to help support the family. However, he began drinking again and the verbal abuse and jealous behaviour resumed as well. He was asked to leave the house again in December 2015. After they separated again, Juan Carlos continued to stalk and threaten Ms. Lopez Santos.

[11] Ms. Lopez Santos described an incident in June 2016 when she encountered Juan Carlos on the street. He was intoxicated. He yelled at her and threatened her and threw a cell phone at her. The phone hit Ms. Lopez Santos's leg, causing a bruise. Ms. Lopez Santos testified that she

reported this incident to the police and sought measures from the authorities to protect her and her daughters from Juan Carlos. A copy of the police report of the incident was filed at the RPD.

[12] In December 2016, Ms. Lopez Santos was assaulted by her father when she intervened to stop him from assaulting her mother. This incident was also reported to the police.

[13] In February 2017, Ms. Lopez Santos began to see a therapist. The therapist suggested there was a risk she was recreating her parents' abusive relationship in her own life. The therapist recommended removing herself from that environment. In March 2017, Ms. Lopez Santos decided she would leave Mexico with her daughters. On the advice of a cousin, she decided they would go to Canada. However, her daughters did not have passports and Juan Carlos had to co-sign the passport applications, which he refused to do.

[14] Eventually, on the pretext of reconciling with him, Ms. Lopez Santos suggested that Juan Carlos go to Canada with her and their daughters. He agreed. He also agreed to sign the passport applications for his daughters. The daughters' passports were issued in July 2017. In October 2017, Ms. Lopez Santos took a brief trip to Guatemala with her daughters and her mother to visit her elderly grandmother.

[15] On November 5, 2017, Ms. Lopez Santos, Juan Carlos and their daughters left Mexico for Canada. They arrived the same day. Juan Carlos's abusive behaviour continued. A short time after arriving in Canada, Ms. Lopez Santos and her daughters moved into a shelter. Juan Carlos sent messages to Ms. Lopez Santos through third parties looking for her and saying

that if she did not tell him where his daughters were he would find a way to make sure they were all deported to Mexico. She allowed her daughters to meet with him in public places a few times but when Juan Carlos's abusive behaviour continued, she cut off contact with him. Through third parties, Juan Carlos continued to threaten that he would make sure they all had to return to Mexico.

[16] The applicants submitted claims for refugee protection in December 2017.
Ms. Lopez Santos understands that Juan Carlos was eventually deported to Mexico. He has maintained contact with his daughters through social media.

[17] Ms. Lopez Santos stated in her amended BOC narrative that she feared Juan Carlos would harm her if she were to return to Mexico. He had been obsessed with her for 15 years and she feared he still was. He never left her alone, even when she attempted to end the relationship. She feared that, no matter where she went in Mexico, he would be able to find her through their daughters or through her relatives with whom he has remained friends.

[18] The hearing before the RPD took place on February 19 and April 8, 2019. In a decision dated May 2, 2019, the RPD rejected the claims and determined that the applicants are neither Convention refugees nor persons in need of protection.

[19] Ms. Lopez Santos had confirmed that she no longer feared her father. The focus of her claim for protection was her fear of Juan Carlos. The RPD accepted that Ms. Lopez Santos has suffered from family violence and domestic abuse. It accepted that she and Juan Carlos had had

a "volatile" relationship that "may have included some physical violence." The RPD gave "significant weight" to Ms. Lopez Santos's testimony about her relationship with Juan Carlos. It stated: "The panel carefully considered the testimony of [Ms. Lopez Santos], her narrative, and the other supporting evidence and accepts that [Ms. Lopez Santos] was a victim of an abusive marriage, periodically, during her on again, off again relationship with her ex-husband; and that she was raised in a home where she experienced family violence."

[20] However, the RPD found that there is a viable IFA for the applicants in Mexico City. More particularly, the RPD found that there was not a serious possibility of persecution by Juan Carlos in Mexico City and that it was not objectively unreasonable for the applicants to relocate there.

[21] With respect to the question of the threat posed by Juan Carlos, the RPD found that Ms. Lopez Santos had "not established with her evidence that he is determined to seek her out and abuse her, post-divorce." The RPD based this finding on what it termed inconsistencies in Ms. Lopez Santos's evidence about their relationship. For example, Ms. Lopez Santos testified that Juan Carlos would not agree to a divorce and was unable to let her go but the divorce order states that it was on the consent of both parties. Further, Ms. Lopez Santos was assisted by a lawyer in obtaining the divorce yet she never approached her lawyer with any concerns about Juan Carlos's behaviour after the divorce, nor did she seek any form of protective order. The fact that Juan Carlos let Ms. Lopez Santos take their children to Guatemala without him was "inconsistent with a profile of being an extremely controlling and harassing ex-partner, even if he believed that they may reconcile." As well, the pattern of Ms. Lopez Santos "reconciling

voluntarily, and then of forcing her ex-partner to leave the home when she has had enough, without any evidence of having to have him removed forcibly from her home, further reflects that he does not present the level of determination to be with her, no matter what, and danger as she alleged."

[22] The RPD summarized its assessment of the issue of risk in the IFA as follows:

> Given [Ms. Lopez Santos's] travel with her ex-husband to Canada; her ability to take her children to Guatemala without him; her ability to divorce him and remove herself from the volatile relationship at different times; and the failure to seek a protection order or consult with her divorce lawyer about protections, or to report to the police in Mexico or Canada, the panel does not find that there is sufficient reliable evidence to support [Ms. Lopez Santos's] ex-husband, even if continuing a relationship with his daughters, would subject [Ms. Lopez Santos] to violence if living in another locality where protections for women are even stronger. The documentary evidence confirms that if [Ms. Lopez Santos] desired, she could seek a protection order in Mexico City and have him labeled as a "high risk" offender, if he meets the criteria, which would offer her additional protection in Mexico City. The panel finds the claimant has recourse to obtain adequate protection from authorities in Mexico City upon return, and that there are resources for women who are victims of violence.

[23] As just stated, the RPD found that Ms. Lopez Santos did not make any report to the police in Mexico about Juan Carlos or seek any form of protective order. However, as set out above, Ms. Lopez Santos testified that she did make a complaint to the police about the June 2016 incident and that, as part of this complaint, she sought legal protection from Juan Carlos.

[24] Ms. Lopez Santos had filed a copy of the report of her complaint at the RPD. The RPD dealt with this documentary evidence as follows:

> [Ms. Lopez Santos] has provided a copy of a police denunciation, which she made against her ex-husband after he allegedly assaulted her in public with a cell phone, after they were divorced. This is her only police denunciation involving him, according to her evidence. She testified that she was not satisfied with the way the police treated her complaint, nor with their follow up.
>
> A serious problem arises with the supporting police report of the only reported incident by [Ms. Lopez Santos], which is provided and partially translated. The police report in her evidence refers to an event that occurred on Sunday, June 12, 2018; however, June 12, 2018 is a Tuesday on the calendar. More importantly, the event is listed to have occurred in 2018 in the report yet the police report is dated on June 15, 2016, two years prior to the listed event. These inconsistencies were not put to the claimant at the hearing as they were observed subsequently. While the report on its face appears to be fraudulent, this finding does not alter the finding that [Ms. Lopez Santos] was a victim of domestic violence at some time. While the report is given no weight, again this is not dispositive of the claim.
>
> (Footnotes omitted.)

[25] The applicants appealed the RPD's determination to the RAD. They sought the admission of new evidence in support of their appeal. They also raised two broad grounds on which they challenged the RPD's determination: first, that the RPD had erred in assessing Ms. Lopez Santos's well-founded fear of persecution by ignoring or misapprehending evidence and by failing to understand the dynamics of domestic abuse; and, second, that the RPD had erred in assessing the viability of an IFA in Mexico City.

[26] With respect to the specific issue of the RPD's determination that the June 2016 police report would be given no weight, the applicants submitted as follows in their Memorandum of Argument at the RAD:

> Had the Member asked Marilyn about this she could have explained that the date is simply a typographical error and should read "June 12, 2016." June 12, 2016 was a Sunday and is consistent with the report having been written on June 15, 2016. In June 2018, Marilyn was already in Canada and so the incident could not have occurred then. There was no other reason for the Member to find the report was not genuine.
>
> In any event, this was not dispositive of the claim as the Member accepted that Marilyn had been a victim of domestic violence.
>
> (Footnotes omitted.)

[27] In support of their submission concerning what Ms. Lopez Santos would have said about the date in the report had she been asked about it during the RPD hearing, the applicants cited her affidavit filed on their appeal to the RAD, where she stated exactly that. (As will be seen below, the RAD refused to admit this affidavit as new evidence.)

III. <u>DECISION UNDER REVIEW</u>

[28] The RAD confirmed the RPD's determination and concurred with its conclusion that the applicants have a viable IFA in Mexico City.

[29] Before addressing the merits of the applicants' arguments, the RAD considered the admissibility of new evidence submitted by the applicants. It refused to admit the affidavit sworn by Ms. Lopez Santos as it found that it was "a blend of revised facts, some embellishments, re-characterizations of previous evidence, and additions" to what had been

presented to the RPD. It further found that the applicants failed to explain how the affidavit satisfied subsection 110(4) of the *IRPA* to warrant its admission (despite the fact that this was addressed directly and in detail in the applicants' Memorandum of Argument at the RAD). The RAD does not specifically address the part of the affidavit responding to the RPD's concern about the June 2016 police report but it evidently found this was inadmissible along with the rest of the affidavit. On the other hand, the RAD did admit a psychiatric report regarding one of the minor applicants because it arose after the RPD decision and had relevance to the viability of the proposed IFA. Finally, the RAD refused to admit a number of documents relating to violence against women in Mexico because the information they contained was not new or did not post-date the RPD decision.

[30] With respect to the merits of the appeal, the RAD stated that it "is not disputed that [Ms. Lopez Santos] has had a volatile relationship with her ex-husband that has included physical violence." However, the RAD found that the applicants had not demonstrated that the RPD erred in finding that they had a viable IFA in Mexico City.

[31] The RAD understood the applicants to be challenging two principal findings by the RPD: first, that it was not likely that Juan Carlos would seek out and harm Ms. Lopez Santos or the children in Mexico City; and second, that they would have reasonable access to supports (including state protection) in Mexico City. The RAD rejected the applicants' arguments on both of these issues.

[32] With respect to the threat posed by Juan Carlos, as set out above, the RPD had found that, because of inconsistencies in the evidence, Ms. Lopez Santos failed to establish that Juan Carlos was someone who would be "determined to seek her out and abuse her." Framing this as an issue of Ms. Lopez Santos's credibility, the RAD agreed with the RPD's analysis of the evidence of their relationship. The RAD noted, for example, that Ms. Lopez Santos testified that Juan Carlos would not agree to the divorce and had had only supervised access to his daughters in Mexico but neither claim was not borne out by the divorce order. The RPD had made the same finding.

[33] The RAD then went on to consider "another example of evidence that is unresolved and that undermines [Ms. Lopez Santos's] credibility" – namely, her account of the assault with the cell phone. The following are the key points in the RAD's lengthy discussion of this incident:

- Since the RPD had not put the discrepancy regarding the date of the incident to Ms. Lopez Santos, "the member did not base any findings on that discrepancy." However, "that is not the case on appeal."

- Ms. Lopez Santos states in her appeal that if the discrepancy had been put to her she could have explained that it was a typographical error. As well, her Memorandum of Argument points out that in June 2018 she was already in Canada, so the incident could not have happened then. The RAD agrees with the latter point but goes on to state: "That does not, however, prevent the report from having been made in 2018 or at some other time." The RAD does not address the contention that there was simply a typographical error in the report.

- There is "additional confusion in other evidence about this incident." Ms. Lopez Santos states in her narrative that the incident happened in August 2016 and that she was driving her four-wheel drive at the time. At the RPD hearing, however, Ms. Lopez Santos testified that she was driving her motorcycle and that the incident happened in June 2016. The RAD states the following about this evidence:
    - "It is unusual to refer to a motorcycle as a four-wheel drive or a four-wheel drive as a motorcycle and I find that discrepancy is material and undermines the credibility of the story. The type of detail is not easily relegated to the vagaries of memory with the passage of time, particularly as the event was a critical one given it was the only occasion in her history of victimization that [Ms. Lopez Santos] sought help from the police."
    - "An obvious discrepancy between August and June is also not easily overcome, particularly as the narrative was closer in time to the alleged event and allowed for thoughtful reflection, amendments if necessary, and corroboration with documentary evidence."
- Ms. Lopez Santos had not provided any additional documentary evidence for the appeal that offered "original, first hand corroboration" of the incident or evidence of any efforts "to obtain documents that could independently confirm the event."
- Ms. Lopez Santos has had an "opportunity to review all of the evidence in preparation for this appeal, including the lack of clarity about this event and the date and day discrepancies. The evidence about how it was reported adds additional doubt. The

evidence before me remains unclear and leaves material doubt about whether the alleged incident occurred."

- The detailed account of the incident in the police report "is in notable contrast with the vague narrative and sparse testimony at the hearing, including how she reported the event and what happened afterwards."

- "In the end, [Ms. Lopez Santos's] evidence about an event in June 2016 (or August) is not compelling evidence that her ex-husband is likely to seek her out or stalk and harm her in Mexico City. Nor is it reliable evidence suggesting there is police ineffectiveness applicable to Mexico City. In addition to the unreliable details as discussed, it was correctly pointed out by the RPD that the experience in a small town in southern Mexico is not equivalent to what services and supports are available and how the police are likely to respond in Mexico City."

[34] The RAD considered the applicants' argument that the RPD failed to consider that the police in Mexico do not take the issue of domestic abuse seriously. It found that the RPD gave extensive consideration to the country information, including the inconsistencies in police responses, but determined the police are likely to respond in Mexico City. The RAD also found that the RPD did not err in its understanding of the dynamics of abusive domestic relationships.

[35] The RAD considered the psychiatric report relating to one of the minor applicants but found that it does not alter the RPD's finding that Mexico City offers a viable IFA. The RAD

determined that the evidence does not show that therapy and mental health support will not be available in Mexico City.

[36] In sum, as did the RPD, the RAD concluded that the applicants had not established either that they would be at risk from Juan Carlos in Mexico City or that it would be unreasonable for them to relocate there. Thus, the RAD confirmed the RPD's determination that the applicants are neither Convention refugees nor persons in need of protection.

IV. STANDARD OF REVIEW

[37] As noted above, the applicants challenge both the fairness and the reasonableness of the RAD's decision.

[38] To determine whether the requirements of procedural fairness were met, the reviewing court must conduct its own analysis of the process followed by the decision maker and determine for itself whether that process was fair having regard to all the relevant circumstances, including those identified in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 at paras 21 to 28: see *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 54, and *Elson v Canada (Attorney General)*, 2019 FCA 27 at para 31. This is functionally the same as applying the correctness standard of review: see *Canadian Pacific Railway Co* at paras 49-56 and *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship)*, 2020 FCA 196 at para 35. The burden is on the applicants to demonstrate that the requirements of procedural fairness were not met.

[39] With respect to the substance of the RAD's decision, it is well-established that this is to be reviewed on a reasonableness standard (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35). That this is the appropriate standard of review has been reinforced by *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 10.

[40] 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 para 85). Among other things, a reasonable decision is one that is justified in light of the facts (*Vavilov* at para 126). An administrative decision maker "must take the evidentiary record and the general factual matrix that bears on its decision into account, and its decision must be reasonable in light of them" (*ibid.*). Consequently, "the reasonableness of a decision may be jeopardized where the decision maker has fundamentally misapprehended or failed to account for the evidence before it" (*ibid.*). See also paragraph 18.1(4)(d) of the *Federal Courts Act*, RSC 1985, c F-7, which provides that a reviewing court may grant relief when it is satisfied that an administrative decision maker "based its decision or order on an erroneous finding of fact that it made [. . .] without regard for the material before it."

[41] The burden is on the applicants to demonstrate that the RAD's decision is unreasonable. To set aside a decision on this basis, the reviewing court must be satisfied that "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).

V. ANALYSIS

A. *Did the RAD breach the requirements of procedural fairness?*

[42] Subsection 110(3) of the *IRPA* provides that generally an appeal to the RAD "must proceed without a hearing, on the basis of the record of the proceedings of the Refugee Protection Division." Subsection 110(4), which governs the admission of new evidence from the person who is the subject of the appeal, creates an exception to this general rule. (The Minister is not subject to the same restrictions – see subsection 110(5).) So, too, does subsection 110(6), which permits the RAD to hold a hearing when certain preconditions are met.

[43] Rule 7 of the *Refugee Appeal Division Rules*, SOR/2012-257 provides that, where a hearing is not warranted, the RAD may, "without further notice to the appellant and to the Minister, decide an appeal on the basis of the materials provided." This Court has recognized that, notwithstanding this rule, deciding an appeal on a new basis without first giving notice to the parties that the issue is in play can breach the requirements of procedural fairness. As Justice Hughes held in *Husian v Canada (Citizenship and Immigration)*, 2015 FC 684: "The point is that if the RAD chooses to take a frolic and venture into the record to make further substantive findings, it should give some sort of notice to the parties and give them an opportunity to make submissions" (at para 10).

[44] This principle is commonly invoked when the RAD has confirmed the RPD's determination that the appellant is not a Convention refugee but rests this conclusion on a different basis than the RPD. For example, the RAD may have found an error in the RPD's

analysis of the facts or the law but it is nevertheless satisfied that there is a factually and legally sound basis for coming to the same conclusion as the RPD did. See *Xu v Canada (Citizenship and Immigration)*, 2019 FC 639 at para 33 and cases cited therein; see also *Aghedo v Canada (Citizenship and Immigration)*, 2021 FC 450 at paras 10 to 23. In my view, this principle also applies when the RAD buttresses its agreement with the RPD's analysis and ultimate determination with additional analysis of its own. This is what happened here.

[45] The test for whether procedural fairness required notice and an opportunity to be heard is whether the RAD raised an issue that is new in the sense that it is legally and factually distinct from the grounds of appeal advanced and cannot reasonably be said to stem from the issues raised on appeal: see *Ching v Canada (Citizenship and Immigration)*, 2015 FC 725 at paras 65 to 76, adopting the test in *R v Mian*, 2014 SCC 54 at para 30; see also *Tan v Canada (Citizenship and Immigration)*, 2016 FC 876 at para 40. The test applies equally to grounds relied on by the RAD and to the lines of reasoning it follows in disposing of an appeal: see *Kwakwa v Canada (Citizenship and Immigration)*, 2016 FC 600 at para 25. Thus, while it is open to the RAD to make findings that go beyond those made by the RPD, if they do not reasonably stem from the issues raised on appeal, procedural fairness requires that the appellant be given notice and an opportunity to be heard. Put another way, the RAD may not "make additional findings or analyses on issues unknown to the applicant" (*Kwakwa* para 24).

[46] This Court has extended some latitude to the RAD to raise new issues relating to a claimant's credibility without further notice when the claimant's credibility is "at the heart of"

the RPD's determination or the grounds of appeal advanced at the RAD: see *Corvil v Canada (Citizenship and Immigration)*, 2019 FC 300 at para 13. However, that is not the case here.

[47] I am satisfied that the applicants would have had no reason to think that the RAD would approach the cell phone incident as it did. The RAD's broad attack on Ms. Lopez Santos's credibility in relation to that incident is distinct from and cannot reasonably be said to stem from the RPD's finding regarding the police report or the narrow issue the applicants raised in that regard in their appeal (or from any other grounds of appeal that were advanced, for that matter). The RPD was careful not to impugn Ms. Lopez Santos's credibility on the basis of the discrepant date in the report because it was not put to her at the hearing. The applicants' sole complaint at the RAD concerning the RPD's determination that the report was entitled to no weight was that the RPD had erred by relying entirely on what must have been a typographical error. According to the applicants, someone had typed "June 12, 2018" when they should have typed "June 12, 2016". Significantly, the 2016 date is consistent with the date of the report itself – June 15, 2016. It is also consistent with the context of the sentence in which it appears. The sentence refers to the day in question as a Sunday. June 12, 2016, was a Sunday. June 12, 2018, was not.

[48] The RAD never resolves the narrow issue of whether the RPD erred by relying on a typographical error to impugn the police report. Instead, the RAD raised several new reasons for doubting Ms. Lopez Santos's credibility concerning the cell phone incident: the discrepancy between a four-wheel drive vehicle and a motorcycle; the discrepancy between June and August; the vagueness and lack of detail in her testimony about the incident compared to the police

report; and the absence of other corroborative evidence. None of these were mentioned by the RPD. In the circumstances of this case, the RAD was required to give the applicants notice that it was considering broader issues regarding the cell phone incident than the RPD had addressed and that did not arise from the grounds of appeal the applicants had advanced.

[49] That the applicants were prejudiced by how the RAD proceeded is demonstrated by the RAD's reliance on an alleged discrepancy in how Ms. Lopez Santos referred to the vehicle she was driving at the time of the incident. The RPD had not raised any issue in this regard so, not surprisingly, the applicants do not address it in their appeal. The RAD, however, found that there was a material discrepancy between referring to the vehicle as, on the one hand, a four-wheel drive and, on the other, as a motorcycle.

[50] In response to this new finding by the RAD, on this application for judicial review, Ms. Lopez Santos provided evidence that the Spanish word she used to refer to the vehicle she was driving – *cuatrimoto* – can be translated as "four-wheel drive" (as was done in her narrative), as quad bike or ATV, or as "motorcycle" (as was done at the RPD hearing). (At another point in the RPD hearing, Ms. Lopez Santos referred to the vehicle simply as a *moto* – short for *motocicleta* (motorcycle or motorbike).) Of course, she could not explain this to the RAD or describe the vehicle in more detail because she had no notice that this would be an issue.

[51] While not conceding that there was a breach of procedural fairness, the respondent does accept that the RAD erred in finding that there was a discrepancy in Ms. Lopez Santos's

accounts when there was none. (That being said, the respondent does not concede the materiality of the error. I address this question below.)

[52] The applicants also had no reason to think that the RAD would assess the cell phone incident on the basis of Ms. Lopez Santos's original narrative and not her amended narrative. This raises the question of the reasonableness of the RAD's assessment in light of the record. I turn to this now.

B. *Is the RAD's assessment of the cell phone incident unreasonable?*

[53] As set out above, the RAD found that there was another material discrepancy in Ms. Lopez Santos's account of the cell phone incident: in her narrative she described the incident as having occurred in August 2016 while she testified that it occurred in June 2016. The problem is that Ms. Lopez Santos filed an amended narrative at the RPD in which, among other things, she corrected the date from August 2016 to June 2016. There was no inconsistency between the amended narrative and Ms. Lopez Santos's testimony. The RAD appears to have completely overlooked the fact that there was an amended narrative in the record. The RAD's adverse credibility determination is unreasonable because it fails to account for the evidence before it on a material point: see *Vavilov* at para 126. The respondent concedes that this adverse determination was also an error (although, again, does not concede that it was material).

[54] Another basis for the RAD's impugning of Ms. Lopez Santos's credibility in relation to the cell phone incident was the vagueness and lack of detail in her testimony about the incident as compared to the police report. In my view, this finding is also unreasonable. First, it is

unreasonable to characterize her testimony on this point as vague; on the contrary, it is quite clear. Further, while her testimony did not go into all the details found in the police report, it is unreasonable to find fault with Ms. Lopez Santos on this basis. The RPD member had advised Ms. Lopez Santos's counsel that she was "not as concerned about the details of the abuse." The member explained that while "basic credibility always has to be established with the facts [. . .] you don't need details, I don't need to hear every detail of the situation." Counsel for Ms. Lopez Santos questioned her first. She elicited the basic facts of the cell phone incident, among other incidents. The RPD member did not ask any follow up questions seeking further details about the cell phone incident. However, the RAD never acknowledges this understanding about the lack of need for details about the history of abuse. Against this backdrop, it is unreasonable for the RAD to find that Ms. Lopez Santos is not credible because she did not give a detailed account of the cell phone incident in her testimony.

[55] Finally, the RAD drew an adverse inference from the fact that "no additional documentary evidence was provided for this appeal that offers original, first hand corroboration or indications that efforts have been made to obtain documents that could independently confirm the event." This finding is also unreasonable. Ms. Lopez Santos provided the entirety of the police file that she was able to obtain. There was no basis for simply disregarding all of these documents, including the report of a medical examination of Ms. Lopez Santos on June 17, 2016, as the RAD evidently did (albeit without any explanation). Nor was there a basis in the evidence to think that there was other corroborative documentary evidence that Ms. Lopez Santos had failed to seek out or obtain.

C. *Do these flaws warrant setting aside the RAD's decision?*

[56] To warrant setting aside an administrative decision, any flaws established on judicial review must be more than superficial or peripheral to the merits of the decision. Minor missteps by the decision maker will not suffice. The reviewing court "must be satisfied that any shortcomings or flaws relied on by the party challenging the decision are sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100).

[57] The respondent contends that any flaws in the RAD's decision do not rise to this level because the determinative issue for the RAD was the existence of an IFA in Mexico City. According to the respondent, the overall reasonableness of that determination is unaffected by any procedural or substantive deficiencies in the RAD's assessment of Ms. Lopez Santos's credibility.

[58] I do not agree. Once the issue of an IFA was engaged, the burden was on the applicants to establish either that they would be at risk in the IFA or that it would be unreasonable for them to relocate there: see *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 (CA) at paras 594-95; see also *Aigbe v Canada (Citizenship and Immigration)*, 2020 FC 895 at para 9, and *Obotuke v Canada (Citizenship and Immigration)*, 2021 FC 407 at para 16. The ability of the applicants to discharge their burden with respect to the first branch of the test – the question of risk in the IFA – depended on the credibility of Ms. Lopez Santos's account of Juan Carlos's character and behaviour over the course of their relationship – in short, his profile. The cell phone incident on which the RAD focused was only one part of the story

but it was not a minor incident. As the RAD itself pointed out, "the event was a critical one given it was the only occasion in her history of victimization that [Ms. Lopez Santos] sought help from the police." Moreover, the RAD's adverse credibility finding was not limited to this incident alone. Rather, the RAD cited this incident as an "example of evidence that is unresolved and that undermines [Ms. Lopez Santos's] credibility." This adverse finding extended to Ms. Lopez Santos's account of her relationship with Juan Carlos generally, which in turn necessarily informed the assessment of the threat he would pose to Ms. Lopez Santos in the future.

[59] Given the centrality of Juan Carlos's profile to the question of risk in the IFA, and given the centrality of Ms. Lopez Santos's credibility to the determination of that issue, I am satisfied that the procedural and substantive flaws in the RAD's decision are neither superficial nor peripheral. Rather, they are sufficiently serious that they call into question both the fairness and the reasonableness of the RAD's decision. Consequently, the decision must be set aside and the matter reconsidered by a different decision maker.

VI. CONCLUSION

[60] For these reasons, this application for judicial review is allowed. The decision of the Refugee Appeal Division dated March 4, 2020, is set aside and the matter is remitted for redetermination by a different decision maker.

[61] The parties did not suggest any serious questions of general importance for certification under paragraph 74(d) of the *IRPA*. I agree that none arise.

JUDGMENT IN IMM-3261-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review is allowed.
2. The decision of the Refugee Appeal Division dated March 4, 2020, is set aside and the matter is remitted for redetermination by a different decision maker.
3. No question of general importance is stated.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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