Federal Court  Cour fédérale

Date: 20220527

Docket: IMM-5388-21

Citation: 2022 FC 774

Ottawa, Ontario, May 27, 2022

PRESENT: The Honourable Madam Justice Strickland

BETWEEN:

GEISON IVAN BOHORQUEZ RODRIGUEZ
NICOLAS BOHORQUEZ ROZO
JERONIMO BOHORQUEZ ROZO
LOREIN SOFIA CALDERON ROZO
ANDREA PAOLA ROZO GARCIA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is the application for judicial review of the July 20, 2021 decision of the Refugee Appeal Board [RAD] of the Immigration and Refugee Board of Canada dismissing the Applicants' appeal of the decision of the Refugee Protection Division [RPD].

Background

[2] The Applicants are a family of five who are all citizens of Colombia. The basis of their claim is that they fear persecution or harm at the hands of an armed group that robbed the family's restaurant in Columbia in June 2017. The RPD found the Applicants to be credible but that they had not established a nexus with a Convention ground and, therefore, the Applicants were not Convention refugees under s 96 of the *Immigration and Refugee Protection Act* [IRPA]. The RPD also found that the Applicants are not persons in need of protection under s 97 of the IRPA as they had a viable internal risk alternative [IFA] available to them in Columbia.

[3] On appeal to the RAD, the Applicants alleged that the RPD proceedings were procedurally unfair due to incompetent representation by their former representative. That is also the basis of their application for judicial review.

Decision under review

[4] The RAD accepted as admissible the new evidence submitted by the Applicants pertaining to issue of the procedural fairness of the RPD decision. The new evidence was comprised of an affidavit of Geison Ivan Bohorquez Rodriguez [Principal Applicant], declared on March 8, 2018, and a copy of the Applicants' complaint to the Immigration Consultants of Canada Regulatory Council [ICCRC]. However, because the RAD found that there was no breach of procedural fairness at the RPD hearing, it did not accept the Applicants' further new evidence going to the merits of the case.

[5] The RAD stated that it relied upon the case law regarding allegations of ineffective or incompetent assistance of counsel. In that regard, it found that the Applicants must establish that the impugned representative's acts or omissions constituted incompetence and that a miscarriage of justice resulted. The burden is on the Applicants to establish both the performance and the prejudice components of the test in order to demonstrate a breach of procedural fairness. The incompetence must be sufficiently specific and clearly supported by the evidence. Further, there is also a strong presumption that the representative's conduct fell within the wide range of reasonable professional assistance and incompetence will only result in procedural unfairness in extraordinary circumstances.

[6] The RAD listed the Applicants' allegations concerning the incompetent conduct of their former representative and then set out its observations and findings of fact which it deemed particularly relevant to its determination.

[7] The RAD found that the Applicants and their former representative had essentially agreed to a limited retainer and, while prior to November 2020, the Applicants may have believed that their former representative would be present at the hearing, that belief alone was insufficient to conclude that the former representative was incompetent. On the hearing date, the Applicants were aware that their former representative would not be present. They declined to delay the proceedings, despite the RPD's express invitation to do so. They were also sufficiently sophisticated to raise the need to amend their BOC narrative and, throughout the hearing, they ably responded to the questions asked. The RAD found that, therefore, they were not prejudiced by the former representative not representing them in the RPD hearing.

[8] The RAD found , based on the evidence, that the Applicants had not met their burden. They had not identified clear acts or omissions by their former representative that amounted to incompetence and resulted in a miscarriage of justice. The RAD found that former representative's conduct, as a whole, fell within the wide range of reasonable professional assistance. Accordingly, the RPD proceedings were not procedurally unfair.

[9] The RAD also found that the RPD had erred in finding that there was a viable IFA in Medellin. However, that the Applicants had not established an objective basis to their risk of harm:

> Per the Appellants [Applicants], the objective basis of the risk of harm is entirely contingent on finding that the FR [former representative] was incompetent and on admitting new evidence that addresses the substance of their refugee claims. Having not found a violation of the rules of natural justice in the RPD proceedings, I do not agree with the Appellants' position.

[10] Although the Applicants were credible, they failed to adduce sufficient evidence of an objective basis for a prospective, personal and non-generalized s 97(1) risk of harm. The RAD also found that the presumption of state protection had not been rebutted, as the Applicants had not demonstrated that adequate state protection would not reasonably be forthcoming. Further, there was no nexus to a Convention ground so the Applicants did not qualify as Convention refugees under s 96 of the IRPA.

Issues

[11] The Applicants frame the issues as:

i. The RAD incorrectly determined the procedural fairness issues raised in relation to incompetent and negligent representation by former counsel at the RPD; and

ii. The RAD's assessment of the Applicants' objective risk was flawed because it was based on the deficient record before the RPD.

[12] In my view, the issues raised by the Applicants can be appropriately reframed as follows:

i. Did the RAD err in finding that the RPD hearing was not rendered procedurally unfair due to incompetent representation?

ii. Did the RAD err in its assessment of the Applicants' objective risk by relying on a deficient record?

[13] With respect to the second issue, I note that if the RAD did not err in finding there was no procedural unfairness, then it follows that the evidentiary record before the RAD was not deficient due to incompetent representation.

Standard of review

[14] With respect to the first issue, the Applicants submit that there is no margin for error when reviewing a procedural fairness issue, and that the Court must assess whether procedural

fairness, or the duty of fairness, has been adhered to by a tribunal (citing *Mission Institution v Khela*, 2014 SCC 24 at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canadian Pacific Railway Company v. Canada (Attorney General)*, 2018 FCA 69 at paras 37-56, and others).

[15] The Respondent agrees that breach of procedural fairness is reviewed on the correctness standard.

[16] However, in *Abuzeid v Canada (Citizenship and Immigration)*, 2018 FC 34 at paras 11-12, which pre-dates *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*], Justice Gleeson adopted the reasonableness standard in reviewing the RAD's determination of an applicant's claim that they were prejudiced by incompetent counsel before the RPD. Justice Gleeson found that the Court was being asked to review a decision of the RAD where the RAD concluded there was "insufficient evidence to find that counsel's representation in regard to this claim was incompetent and as a result the claim was denied". Justice Gleeson found that this determination was one of mixed fact and law and was to be reviewed against a standard of reasonableness.

[17] This approach has also been followed by this Court post-*Vavilov*. In *Acosta Rodriguez v Canada (Citizenship and Immigration)*, 2021 FC 1298 (at para 5), Justice Roussel held that the reasonableness standard applied to the RAD's finding that there was no breach of procedural fairness before the RPD: "The issue in the case is not whether the RAD breached procedural fairness, but rather whether there was a breach before the RPD (*Chaudhry v Canada (Citizenship*

and Immigration), 2019 FC 520 at para 24; *Brown v Canada (Citizenship and Immigration)*, 2018 FC 1103 at para 25; *Abuzeid v Canada (Citizenship and Immigration)*, 2018 FC 34 at para 12)". Similarly, in *Muamba v Canada (Citizenship and Immigration)*, 2021 FC 388 at paras 8-10, Justice Rousell noted that in *Vavilov* the Supreme Court of Canada established that reasonableness is presumed to be the applicable standard for decisions of administrative tribunals. She found that the reasonableness standard applied to the RAD's conclusion that there was no breach of procedural fairness before the RPD, noting that the issue in the case before her was not whether the RAD breached procedural fairness but rather whether there was a breach before the RPD.

(See also *Ahmad v. Canada (Citizenship and Immigration)*, 2021 FC 214 at para 13; *Omirigbe v Canada (Citizenship and Immigration*), 2021 FC 787 at paras 25-26; *Ibrahim v Canada (Citizenship and Immigration*), 2020 FC 1148 at paras 11-17).

[18] Before the RAD, the Applicants were required to establish that the impugned representative's acts or omissions constituted incompetence and that the Applicants were prejudiced as a result. This was a question that the RAD was required to determine in reference to the record, the new evidence before it and the applicable law. Only if the Applicants successfully met their burden, thereby establishing their former representative's incompetence, would the RAD have then made the wholly resultant finding that the RPD breached procedural fairness. Accordingly, in effect, this Court is reviewing the RAD's primary, competency determination on the merits. There is no allegation that RAD itself breached procedural fairness and, therefore, this Court is not being asked to review whether such a breach occurred.

[19] When this Court is reviewing the merits of a decision of an administrative decision maker, such as the RAD, there is a presumption that the reasonableness standard will apply *Vavilov* at paras 23, 25). Accordingly, I agree with the jurisprudence above that the reasonableness standard applies to this issue. That standard also applies to the second issue.

[20] When conducting a review applying the reasonableness standard, the Court asks whether the decision bears the hallmarks of reasonableness – justification, transparency and intelligibility – and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision (*Vavilov* at para 99).

Incompetent representation/procedural fairness

Applicants' position

[21] The Applicants submit that the RAD ignored that, while the Applicants may have been aware that their former representative would not be attending the hearing in person, they were under the impression that they were still being represented at the hearing given that their former representative had the ability to represent them via videoconference. Further, that an off-the-record conversation between the RPD member and their former representative is a serious issue which should have been properly addressed by the RAD as it is unclear why the RAD allowed their former representative to withdraw at the last moment.

[22] The Applicants submit that their former representative's competence should be assessed as if they were a lawyer. The Applicants also take issue with many of the RAD's factual

findings, asserting that they are unjustified assumptions. They submit that their former representative's conduct clearly demonstrated incompetence as they failed to communicate the limits of the retainer, failed to prepare the Applicants as to what to expect from the refugee process, and demonstrated through their advice that they had a perfunctory knowledge of how to prepare a claim for refugee protection including failing to advise them of the necessity to provide supporting documentation. The Applicants submit that they were prejudiced by the poor representation they received because, due to the advice or lack of advice they received, they did not present the evidence that they could have in order to substantiate the risk they face in Colombia.

[23] The Applicants further submit that by failing to identify the incompetence of their former representative, the RAD also erred by proceeding to substitute its own findings with respect to the objective basis of risk to the Applicants, pursuant to s 97 of the IRPA, based on a record which was deficient because it was prepared by incompetent counsel.

Respondent's position

[24] The Respondent submits that the RAD reasonably found that the Applicants knew, prior to the RPD hearing, that their former representative would not be there to represent them. While the Applicants now argue that they understood that their representative would not be "present" but would be representing them, this explanation is contradicted by the record. Further, the RPD afforded the Applicants the opportunity to adjourn the hearing, which they declined. The RPD did not need to look beyond their statement that they were ready to proceed with the hearing. The RAD was satisfied that the Applicant's were capable of making that decision and the Applicants

make only generalized assertions of vulnerability to assert that that their decision making was impaired. Nor have the Applicants explained how the fact that their former representative did not appear at the RPD hearing negatively impacted their testimony or the RPD findings.

Analysis

[25] I have previously set out the test to be met with respect to allegations of incompetent counsel, in the context of that allegation being a ground for judicial review, in *Gombos v Canada (Citizenship and Immigration)*, 2017 FC 850 [*Gombos*]:

> [17] The test for addressing allegations of ineffective or incompetent assistance of counsel has been well defined by the jurisprudence (*Zhu v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 626 at paras 39-43). First, the applicant must establish that the impugned counsel's acts or omissions constituted incompetence and, second, that a miscarriage of justice resulted (*R v GDB*, 2000 SCC 22 at para 26 ("*GDB*")). The burden is on the applicant to establish both the performance and the prejudice components of the test to demonstrate a breach of procedural fairness (*Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at para 17). Incompetence of former counsel must be sufficiently specific and clearly supported by the evidence (*Shirwa v Canada (Minister of Employment and Immigration)*, [1994] 2 FC 51 at para 12 (FCA) ("*Shirwa*"); *Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at para 36 ("*Memari*")). There is also a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance (*GDB* at para 27; *Yang v Canada (Citizenship and Immigration)*, 2008 FC 269 at paras 16, 18). Incompetence will only result in procedural unfairness in "extraordinary circumstances" (*Shirwa* at para 13; *Memari* at para 36; *Pathinathar v Canada (Citizenship and Immigration)*, 2013 FC 1225 at para 38; *Nizar v Canada (Citizenship and Immigration)*, 2009 FC 557 at para 24). Further, a procedural protocol of this Court, *Re Allegations Against Counsel or Other Authorized Representative in Citizenship, Immigration and Protected Person Cases before the Federal Court* ("Procedural Protocol"), sets out the procedure applicants must follow when alleging counsel incompetence, which includes giving notice to former counsel.

(See also *Ibrahim* at paras 29-30; *Yang v Canada (Citizenship and Immigration)*, 2015 FC 1189 at paras 15-16; *Abuzeid v Canada (Citizenship and Immigration)*, 2018 FC 34 at para 21 [*Abuzeid*]; *Arana Del Angel v Canada (Citizenship and Immigration)*, 2020 FC 253 [*Arana Del Angel*] at para 22); *Al-Abayechi v Canada(Citizenship and Immigration)*, 2018 FC 360 at para 22-24 [*Al-Abayechi*]).

[26] As a starting point, I would first note that, by letter of June 23, 2021, the RAD invited the Applicants to respond to two questions, one of which was whether they had received any updated correspondence regarding their allegations of inadequate representation from their former representative. Counsel for the Applicant responded by letter of July 7, 2021 and also attached an email string by which they had advised the former representative of the allegation of incompetence; of the complaint made to the ICCRC; and, that the attached materials were being served on the former representative in accordance with the related Immigration and Refugee Board of Canada's Practice Notice. The March 11, 2021 response received from the former representative is also attached to that email string. There is no evidence before me concerning the status of the ICCRC compliant.

[27] That said, I will now consider the Applicants' submissions against the above legal backdrop, the RAD's reasons and the record.

i. Limited retainer/representation at the hearing

[28] In the affidavit of the Principal Applicant submitted to the RAD in support of the appeal, he states that he had been sent a retainer agreement for signature on July 4, 2019. He states that

he signed it, but that he could not find a copy of the signed agreement. Further, that it "had only now" come to his attention that the retainer agreement that he signed had a different person's name on it. He also states that he was asked to pay a $1500 retainer fee, which he did. The exhibits attached to his affidavit include some correspondence between the Principal Applicant and his former representative, including an email forwarding the retainer agreement which agreement does contain an incorrect client name.

[29] In their letter responding to the allegation of incompetence, the former representative acknowledged that they represented the Principal Applicant in an inland refugee claim. The former representative states that the Principal Applicant never signed the retainer agreement, despite reminders to do so, but acknowledges the error in the client name on the agreement that she sent to him.

[30] The RAD concluded that whether a signed retainer agreement exists was largely irrelevant. This was because it was uncontested that the Applicants had received a written document which detailed their rights and obligations as clients of the former representative, they did not object to those terms, and paid the required fee. The RAD found that the Applicants had not established that the inclusion of another client's name in the retainer agreement was intentional or affected their understanding of the representative-client relationship. Therefore, the RAD found that the Applicants and their former representative agreed, through their conduct, to be bound by the terms of the written retainer agreement, dated July 3, 2019.

[31] Having made this finding, the RAD went on to note that although the retainer agreement states “In Land - Refugee Claim until Hearing Date”, this was ambiguous in that the agreement did not unequivocally state that the Applicants would be self-represented at the RPD hearing. However, about a month after receiving the retainer agreement, the Applicants signed their BOC forms which clearly indicate that the former representative would not be representing them at the hearing. And, at the RPD hearing, the Applicants confirmed that they understood the BOC forms before signing them and that they were complete, true and correct. Further, contrary to the Applicants allegation before the RAD that they were confused, during the RPD hearing when they were given the opportunity to modify the contents of their BOC forms, the Applicants ably informed the RPD of an error in the narrative.

[32] Given this, the RAD found that the Applicants communicated with their former representative prior to the hearing date and that the representative mentioned concerns about the COVID-19 pandemic and distance. However, that the Applicants had failed to establish, on a balance of probabilities, that the former representative ever promised or implied that she would be representing them at the RPD hearing.

[33] The RAD went on to consider the allegation of the Applicants that the RPD had an off the record conversation with the former representative on the day of the hearing concerning the representative’s role at the hearing. However, and conversely, that the former representative stated that they were not contacted by the RPD on behalf of the Principal Applicant on November 23, 2020.

[34] The RAD found that any such conversation did not prejudice the Applicants because they came to the hearing knowing that their former representative would not be there. And, even if the RPD mistakenly believed that the former representative had withdrawn, the RPD gave the Applicants an opportunity to postpone the hearing if they wanted a representative to assist them but that both adult applicants expressed "without hesitation" a desire to continue the hearing without a representative.

[35] Before this Court, the Applicants assert that that the transcript of the RPD hearing contradicts the RAD's findings that the Applicants knew when they came to the hearing that they would not be represented and that they expressed without hesitation a desire to continue. I do not agree with the Applicants. The relevant portion of the transcript states:

> **MEMBER**: Okay. I just want to make sure my understanding is that you had representation, but I am just going to check to see if I have, I don't know if it was a lawyer or an immigration consultant, but my understanding is that that person has withdrawn and will not be representing you today, is that your understanding?
>
> **PERSON CONCERNED 2**: Well, what this person has really told us was that she was not able to attend because of COVID related matters and because of distance, but she was representing our case.
>
> **MEMBER:** So, she is not going to be here today to assist you, and so I want to make sure that the two of you are comfortable proceeding without having any assistance today.
>
> **PERSON CONCERNED 1**: Well, she told us that it was not necessary for her to be here.
>
> **MEMBER:** And it is not you can proceed without counsel, and many people do but if you feel uncomfortable and would prefer having someone here who can assist you and represent you then we would have to postpone the hearing.
>
> **PERSON CONCERNED 1:** No, we feel comfortable.
>
> **PERSON CONCERNED 2**: No, we feel comfortable.

[36] The Applicants now claim that they understood that their former reprehensive would not be attending in person. They assert, given that the hearing took place during the pandemic and that the RPD and interpreter appeared via video conference they "were under the impression that they were still being represented at their hearing given that their representative *had the ability* to represent them via videoconference".

[37] However, the Applicants did not indicate to the RPD that they had any expectation that their former representative would be participating in the hearing virtually. I would add that the Principal Applicant's affidavit filed in support of the appeal confirms that the Applicants knew that the former representative would not be attending the RPD hearing:

> 8. My hearing was scheduled for November 23, 2020. A few days before the date of my hearing, [the former representative] called me to tell me that she swill not be in attendance at the hearing because of the distance, she lived in White Rock, BC and I live in Calgary. She also said that due to Covid-19 she will not be present. However, at no point in our telephone call did [former representative] tell me that she did not represent my case anymore.

[38] To my mind, it is significant that in this affidavit, filed in support of the appeal to the RAD, the Principal Applicant did not depose that his former representative had ever indicated that she would be attending at and participating in the RPD hearing remotely, or at all, or that he understood that she would do so.

[39] Nor can I discern any basis for the Applicants' current submission that the RPD erred in finding that the adult Applicants agreed, without hesitation, to proceed without the assistance of a representative. The transcript speaks for itself. As to the assertion that the Applicants were in "an incredibly vulnerable situation", this is unexplained in the context of the decision to proceed

with the hearing other than the assertion that all foreign nationals involved in claims for refugee protection are vulnerable as they do not know the country or the system. The Applicants also submit that the fact that they said “yes” to proceeding with the hearing does not mean they were comfortable with the situation – yet both adult Applicants explicitly stated that they were comfortable with proceeding.

[40] I also note that the former representative’s letter states that on the day before the hearing she and the Applicants communicated by text message and a phone call and she explained the steps to follow the next day at the hearing. This is not disputed by the Applicants and supports that the Applicants knew that their former representative would not be participating – in person or remotely – in the hearing. The fact that the Applicants identified an error in the BOC and corrected it when afforded the opportunity to do so by the RPD also tends to supports the former consultant’s statement or, at least, that the Applicants understood the hearing process.

[41] I also do not agree with the Applicants’ submission that the RAD placed an inordinate amount of emphasis on the BOCs. They assert that, while they ticked “yes” to the question of whether they had counsel (for example, a lawyer, immigration consultant, family member or other person) helping them with the refugee protection claim before the RPD and “yes” to the question of whether their counsel helped them to complete their BOC for, but “no” to the question of whether their counsel would be representing them at the RPD hearing, this was not sufficient basis for the RAD to infer that they knew they were not being represented at the hearing. They submit that it is “unclear” that the Applicants were aware that the former

representative had made these selections and that the Applicants understood that the former representative would not be representing them at the hearing.

[42] In my view, there is no merit to this argument. First, the Applicants signed their BOCs and confirmed that they understood them and that they were correct. Second, the RAD considered and weighed not just the Applicants' indication in their BOC that they would not be represented at the hearing but also the content of the retainer agreement, the evidence concerning both the retainer agreement and the attendance of the former representative at the hearing, and, the adult Applicants' answers given to the RPD at the hearing. Based on all of this, the RAD reached its finding that the Applicants and their former representative essentially entered into a limited retainer and, while prior to November 2020 the Applicants may have believed that at their former representative would be present at the RPD hearing, that belief alone was insufficient to conclude that the former representative was incompetent.

[43] In my view, the Applicants now try to distance themselves from their own evidence and, in essence, they take issue with the RAD's weighing of the evidence.

[44] Based on the record, the RAD reasonably found that the Applicants had failed to establish, on a balance of probabilities, their former representative ever promised or implied that she would be representing them at the RPD hearing. The RAD also reasonably found, in that regard, that the Applicants had effectively entered into and were bound by a form of limited retainer agreement. I note that the Applicants did not tender any expert or other evidence to demonstrate that such agreements – or representation that excludes appearing before the RPD –

falls below the appropriate standard of conduct that should be imposed upon an immigration consultant (see *Al-Abayechi* at para 24). In the absence of such evidence, the alleged incompetence by the former representative's non-attendance must be obvious.

[45] Given the evidence before the RAD, I am not persuaded that it erred in finding that the former representative's non-attendance was not obviously incompetent.

[46] Nor is proceeding without representation automatically prejudicial. Significantly, in this matter, the RPD offered the Applicants the opportunity to adjourn the hearing so that they could be represented, which they declined. The RAD also noted that the Applicants were able to take the opportunity to correct their BOC at the hearing. This indicates that there had been some preparation for and understanding of the hearing process. Further, the RAD found the Applicants were not prejudiced by proceeding without their former representative, as they are educated, relatively sophisticated, their claims were relatively straightforward and throughout the hearing they ably responded to the questions asked. While the Applicants take issue with these findings, they make no substantive submissions as to how they were hindered in presenting their claim at the hearing. I am not persuaded that this is a situation where the absence of counsel at the hearing destabilized the Applicants and hindered the presentation of their arguments (see: *Ait Elhocine v Canada (Citizenship and Immigration)*, 2020 FC 1068 at para 24).

[47] In my view, the RAD reasonably found that, in these circumstances, it was not obvious that the former representative's lack of attendance at the hearing amounted to incompetence.

ii. Off the record phone call

[48] In the Principal Applicant's affidavit provided to the RAD, he states that on the day of the hearing the RPD introduced themselves and stated their understanding that the Applicants had representation. "She then said that she will call our consultant to confirm. At that moment she stepped away from the camera. She returned after a few minutes and said that she called our consultant and from her understanding our consultant had withdrawn from our case." The Principal Applicant goes on to say that this left the Applicants in a very vulnerable situation – but does not explain why – only that there is now an incomplete record of the hearing.

[49] In my view, the Applicants have not established that the RAD erred in finding that there was no off-the-record phone call during the hearing. Neither the transcript, set out above, nor the audio recording supports that the RPD started the hearing, introduced herself and then suspended the recording and neither makes any reference a phone call or any communications with the former representative.

[50] Further, the RAD concluded that such a phone call, even if one occurred prior to the hearing, did not prejudice the Applicants' ability to present their case, given the evidence indicating that they had known before the hearing that their former representative would not be attending. And, even if the RPD mistakenly believed that the former representative had withdrawn as the Applicant's representative, the RPD had given the Applicants the opportunity to postpone the hearing, which they declined.

[51] In my view, the Applicants' current focus on the reference by the RPD to their counsel withdrawing is a red herring. The question facing the RPD was whether the Applicants' former representative was going to attend and participate in the hearing to represent the Applicants. That was addressed with the Applicants and, regardless of whether the former representative was simply not going to participate or had withdrawn, the Applicants elected to proceed with the hearing. Thus, whether or not the former representative withdrew her representation is not particularly relevant.

[52] And while the Applicants assert that "it is entirely unclear as to why the RPD Member allowed the FR to withdraw as counsel at the last minute", there is no evidence in the record that the RPD made any such determination. The transcript indicates only that the RPD's understanding was that the Applicants representative had withdrawn and would not be representing them at the hearing. There is no evidence as to the basis of the RPD's understanding and, in any event, the RAD reasonably found, for the reasons it set out, that even if the understanding was in error, no prejudice was incurred. While in his affidavit submitted to the RAD the Principal Applicant states that the former representative abandoned his claim at the last minute, this is not supported by the record.

[53] Thus, to the extent that the Applicants are asserting that the RAD erred by failing to find that a breach of procedural fairness arose as a result of the alleged off the record phone call intended to ascertain if the former representative would be attending at the hearing and a last-minute determination by the RPD to allow the former representative to withdraw, I do not agree.

iii. Supporting documents

[54] The Applicants submit that the fact that they did not submit any supporting documents to corroborate their claim is further proof of their former representative's incompetence. Specifically, the representative's failure to provide them with proper instructions and guidance. They assert that their former representative was representing them when they were preparing for their hearing and failed to advise them about the necessity to provide documents to support their allegations. The main thrust of the Applicants' argument is that had they been properly instructed then the evidence that they sought to submit as new evidence before the RAD – but was found to be inadmissible – would instead have been obtained and provided to the RPD in support of their claim. They assert that this documentation is significant as it speaks to the identity of the Applicants' agents of persecution which impacts both objective risk under s 97 and the viability of a IFA.

[55] Before the RAD, the Applicants argued that their former representative had told them that the fact that the Principal Applicant's father had been threatened and extorted by the Ejercito de Liberacion Nacional [ELN] was irrelevant and therefore need not be disclosed to the RPD. Further, that their former representative did not inform them that they could submit documentation to support their claim, other than requesting that they provide proof of the restaurant robbery, and did not properly explain the refugee determination process and failed to prepare them for the hearing.

[56] With respect to the claim of a prior extortion of the Principal Applicant's father, in the referenced text message (as translated), the Principal Applicant stated that his father "had a case of extortion by the guerrilla approximately 20 years ago" and asked if this could still be useful. The representative responded "Unfortunately no, your refugee claim is about your life and your family and it cannot be (vadeado) in facts that happened a long time ago". The RAD found that this response was not outside the scope of reasonable professional assistance and accurately references the personalized nature of the refugee determination process.

[57] When appearing before me the Applicants argued that this was not reasonable and that the former representative should at least have asked more questions about the prior extortion incident to see if there was a connection to their claim. While that may have been a prudent course of action, the subject email from the Principal Applicant to the former representative did not identify his father's extortionist of 20 years ago or suggest that there was any connection to the robbery and threats which were the basis of the Applicants' claim. In the absence of any evidence of such connection being raised with the former consultant, the RAD's finding was reasonable.

[58] It is also significant to note that the transcript of the RPD hearing demonstrates that the Applicants did not know who had robbed the family restaurant and was threatening them. They say only that at some point they had spoken with unspecified persons who used to work in law enforcement and, based on unspecified discussions, reached the belief that their agents of persecution were an organized criminal group. However, they did not identify that group. The

RAD recognized that the Applicants could not identify their agents of persecution when addressing objective harm.

[59] It is reasonable to assume that if the Applicants were not able to identify their agent of persecution when appearing before the RPD then they would also not have been able to do so in their prior interactions with their former representative. They do not suggest that they told their former representative that they believed that their agent of persecution was the ELN. That suggestion arises only by way of new evidence that the Applicants sought to submit to the RAD.

[60] The Principal Applicant states in his affidavit submitted to the RAD that the former representative "discouraged me from including all of the details of my claim on my basis of claim form" and gives as an example of this the email exchange discussed above concerning the an alleged extortion of his father 20 years previously. Later he states that he "was advised to withhold pertinent information" again referring to the same matter. The Principal Applicant provided no other example to support his submission that he "was discouraged" from providing all of the details of his claim nor does he describe what details were omitted.

[61] In these circumstances, and without any evidence that the Applicants identified the ELN as their agent of persecution to their former representative, it is difficult to see how the former representative could be incompetent for not advising them to provide letters of support with respect to that allegation or for not submitting related country conditions evidence. The BOC forms, which the RAD noted the Applicants had confirmed at the RPD hearing that they had read, understood and signed, state that "Self employed people in Colombia are always a target

for armed groups and robbers, doesn't matter the nature of the business, we are always victim of the violence that the country can't control. There is no safety for businessmen and their families in Columbia". This speaks to a generalized risk of criminality.

[62] And, as the RAD noted, these forms also state that "you are responsible for obtaining and providing to the IRB any documentation that may support your claim". In these circumstances, it is not obvious that the Applicants' failure to submit sufficient supporting documents stemmed from counsel's incompetent advice. In other words, the Applicants failed to establish that there was a reasonable probability that "but for" their former representative's incompetence, the result in the proceeding would have been different.

[63] Before concluding, I feel compelled to add that evidence provided by the Applicants to support their claim that their former representative was incompetent – and also the evidence submitted by their former representative in response – was limited. While the Applicants disclose one email and a text message, they did not suggest that these were the totality of the communications between them and their former representative. The response provided by the former representative was also less than comprehensive. It states that since February 7, 2020 emails were sent to the Applicants requesting supporting documents to prepare and submit to the *List of Documents* required by the RPD 10 days in advance of the hearing. Further, that the Applicants were advised and instructed about refugee claims, that the Applicants' fears and the claim were discussed and they understood the role of supporting documentation. On both sides, few specifics were offered.

[64] Ultimately, however, the onus was on the Applicants and I find that, based on the record before it, the RAD did not err in finding that their onus had not been met.

Did the RAD err in its assessment of the Applicants' objective risk by relying on a deficient record?

[65] Having reached the above conclusion, it is not necessary for me to address the second issue being whether the RAD erred in its assessment of the Applicants' objective risk because it relied on a record that was deficient due to the incompetence of their former representative. As the Applicants have not established the incompetence of their former representative, the record before the RPD and the RAD was not deficient.

JUDGMENT IN IMM-5388-21

THIS COURT'S JUDGMENT is that

1. The application for judicial review is dismissed;

2. There shall be no order as to costs; and

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5388-21
STYLE OF CAUSE:	GEISON IVAN BOHORQUEZ RODRIGUEZ, NICOLAS BOHORQUEZ ROZO, JERONIMO BOHORQUEZ ROZO, LOREIN SOFIA CALDERON ROZO, ANDREA PAOLA ROZO GARCIA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE USING ZOOM
DATE OF HEARING:	MAY 3, 2022
JUDGMENT AND REASONS:	STRICKLAND J.
DATED:	MAY 27, 2022

APPEARANCES:

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Meenu Ahluwalia	FOR THE RESPONDENT

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