Federal Court Cour fédérale

Date: 20230302

Docket: IMM-1479-22

Citation: 2023 FC 292

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 2, 2023

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

CARLOS MARIO CASTELLAR CUBAS
LAURA MARCELA ROCA VALDERRAMA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Laura Marcela Roca Valderrama and Mario Castellar Cubas, citizens of Colombia, are applying for judicial review of a decision of the Refugee Protection Division [RPD] dated January 24, 2022, in which the RPD determined that the applicants were not

refugees within the meaning of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], because they had an internal flight alternative [IFA] in their country of origin.

[2] The applicants claim that the RPD erred when it found that there were IFAs in the cities of Bogota and Neiva, since the evidence on record shows that their agents of persecution have the motivation and ability to find them there. The applicants also claim that a breach of procedural fairness occurred because of professional errors made by their former counsel [former counsel], who apparently incorrectly advised them not to inform the RPD of their daughter's serious illness because it was not relevant to the review of their refugee protection claim and to focus on the risks presented by their agents of persecution. He reportedly also initiated proceedings and billed the applicants for professional fees to appeal the RPD's decision before the Refugee Appeal Division [RAD], when such an appeal was impossible under the Safe Third Country Agreement, since they entered the United States as visitors before arriving in Canada.

[3] For the reasons that follow, I am not satisfied that the RPD's decision was unreasonable or that the actions of the applicants' former counsel violated their right to procedural fairness in their refugee protection claim before the RPD. As a result, the application for judicial review will be dismissed.

II. Background

[4] Between 1998 and 2002, several members of Ms. Valderrama's family were violently persecuted by the paramilitary group Autodefensas Unidas de Colombia [AUC] because of their alleged support for the armed Colombian group Ejército de Liberación Nacional. As these sad

events unfolded, some of them were murdered, while others received refugee status in Canada. Afterwards, from 2002 to 2017, the situation returned to normal for Ms. Valderrama and her family, and Ms. Valderrama was able to live normally, study at university and work freely in Colombia during this time.

[5] The applicants state that their problems resurfaced in February 2017, when Ms. Valderrama's brother was targeted, because of his family's past, by an extreme right-wing group during a student protest against inequality. He was allegedly then threatened and followed on two occasions by individuals from this group. During this time, Ms. Valderrama's brother also saw these same individuals in a black van near the family home, after which he reportedly never left the house again out of fear of reprisal. A few days later, Ms. Valderrama was stopped when returning home, also by individuals driving a black van who threatened her and her brother. Following these incidents, Ms. Valderrama, her brother and her sister moved to a new address, and Mr. Cubas joined them in April 2017.

[6] In December 2017, two men appeared at the applicants' home looking for Ms. Valderrama's brother and her family. They questioned Ms. Valderrama's sister about this, since she had opened the door, and then threatened to kill family members if they did not receive the information they were seeking. She did not answer the questions of the agents of persecution and quickly closed the door. Following these events, the applicants moved in with someone from Mr. Cubas's inner circle in La Paz and remained hidden there until they left for the United States in May 2018. In October 2018, the applicants entered Canada and claimed refugee protection.

III. Impugned decision

[7] The RPD found that the applicants had not established that they were facing a serious possibility of persecution or, on a balance of probabilities, that they would be subjected to a risk to their lives or to a risk of cruel and unusual treatment or punishment throughout Colombia and particularly in the proposed IFAs, those being the cities of Bogota and Neiva, or that it would be unreasonable for them to move there.

[8] Specifically, the RPD concluded that the evidence on record did not demonstrate that the agents of persecution had the motivation and ability to find the applicants in the event they return to Colombia. In fact, when asked about the type of information sought by the two men who appeared at their home in December 2017, the applicants replied that they had heard general questions being asked of Ms. Valderrama's sister. For example, they asked her where to find her brother and members of the Roca Valderrama family but did not specifically identify the applicants. Considering that Ms. Valderrama's sister did not answer their questions and had been able to close the door in their faces without suffering any consequences thereafter, the RPD found that this state of affairs showed an absence of motivation in the agents of persecution to follow through on their threats.

[9] In addition, the RPD accepted that Ms. Valderrama's brother had in fact been threatened over the telephone in January 2020 by the agents of persecution. However, the RPD was of the view that the speaker's words targeted the brother specifically, not the applicants, such that this call was not sufficient to establish, on a balance of probabilities, that the agents of persecution still had the motivation to find the applicants.

[10] Moreover, the RPD pointed out that the city of La Paz is located around 300 kilometres from Barranquilla, while Bogota and Neiva are more than a thousand kilometres from there. The RPD found that, given the lack of incidents during the applicants' time in La Paz, from December 2017 to May 2018, they had not shown, on a balance of probabilities, why and how the agents of persecution would locate them again in the proposed IFAs, which are very far from Barranquilla.

[11] Regarding the agents of persecution, the RPD accepted from the objective documentary evidence that the AUC, the group that had persecuted Ms. Valderrama's family between 1998 and 2002, had started to be dismantled in 2003, a process that was completed in 2006. Consequently, the RPD found that the AUC's abilities were greatly reduced by 2021. It also noted that the Clan del Golfo, the paramilitary group that essentially replaced the AUC as of 2006, exerts control and has a presence along the Pacific and Caribbean coasts of the country, while the proposed IFAs are outside these areas of influence.

[12] The RPD also considered two newspaper articles produced by the applicants about the issue. The purpose of the first one was to show the AUC's ability to locate the applicants anywhere in the country thanks to this group's relationship with the authorities, indicating that an alliance was formed between the AUC and members of an artillery battalion of the Colombian army. Nevertheless, the RPD noted that this article depicted events that occurred from January 2002 to July 2005 and therefore gave it no probative value for determining the state of these relations in 2021. As for the second article, which indicated that the defenders of human rights and social leaders had been murdered by armed groups in Colombia, the RPD determined

that the applicants had not established, on a balance of probabilities, how these particular profiles matched their own. Therefore, it gave no probative value to this document to support the applicants' allegation that they would be targeted if they returned to Colombia.

[13] With respect to the reasonableness of the proposed IFAs, when the RPD asked the applicants whether there were other factors, aside from their fear of the agents of persecution, that made finding them impossible, they replied in the negative. Recalling that the applicants had studied at university in Colombia and had several years of work experience, the RPD found that it would be reasonable for the applicants to relocate in Colombia, particularly to the proposed IFAs.

IV. Issues

[14] This application for judicial review raises two issues:

a) Was the RPD's decision regarding the internal flight alternative unreasonable?

b) Was there a breach of procedural fairness before the RPD because of the professional misconduct of the applicants' former counsel?

V. Standard of review

[15] The applicable standard of review for an RPD decision is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17 [*Vavilov*]). The role of the Court is to examine the administrative decision maker's reasoning and the outcome to determine whether the decision is "based on an internally coherent and rational chain

of analysis and is justified in relation to the facts and law that constrain the decision maker" (*Vavilov* at para 85).

[16] With respect to procedural fairness, the Court is required to ask "whether the procedure was fair having regard to all of the circumstances" (*Canadian Pacific Railroad Limited v Canada (Attorney General)*, 2018 FCA 69 at para 54) and not whether it was reasonable or correct (*Soltani v Canada (Citizenship and Immigration)*, 2021 FC 1135 at para 14).

VI. Analysis

A. *Was the RPD's decision regarding the internal flight alternative unreasonable?*

[17] The two-prong IFA test was described by Justice McHaffie at paragraphs 8 and 9 in *Olusola v Canada (Citizenship and Immigration)*, 2020 FC 799, as follows:

> [8] To determine if a viable IFA exists, the RAD must be satisfied, on a balance of probabilities, that (1) the claimant will not be subject to persecution (on a "serious possibility" standard), or a section 97 danger or risk (on a "more likely than not" standard) in the proposed IFA; and (2) in all the circumstances, including circumstances particular to the claimant, conditions in the IFA are such that it would not be unreasonable for the claimant to seek refuge there: *Thirunavukkarasu* at pp 595–597; *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at paragraphs 10–12.
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> [9] Both of these "prongs" of the test must be satisfied to conclude that a refugee claimant has a viable IFA. The threshold on the second prong of the IFA test is a high one. There must be "actual and concrete evidence" of conditions that would jeopardize the applicants' lives and safety in travelling or temporarily relocating to a safe area: *Ranganathan v. Canada (Minister of Citizenship & Immigration)*, [2001] 2 F.C. 164 (Fed. C.A.) at paragraph 15. …

[18] The applicants claim that the RPD erred in its analysis of the first prong of the test. On the one hand, they state that the RPD erred in its assessment of the evidence and, on the other hand, that their former counsel had not presented the arguments and highlighted the necessary evidence that would have enabled the RPD to find that the agents of persecution had both the ability and motivation to find them again in the proposed IFAs of Bogota and Neiva.

[19] The applicants allege that the threats received in Colombia targeted not only Ms. Valderrama's brother, but also her entire family, and that they would need to continue living in hiding if they returned to Colombia, since the agents of persecution are active in Bogota and Neiva, as clearly indicated by the information found in the National Documentation Package [NDP]. However, even when overlooking the fact that no convincing evidence was presented to demonstrate that the motivation of the agents of persecution extended beyond their desire to neutralize Ms. Valderrama's brother because of his social advocacy, I am of the opinion that the applicants are asking me to reassess the evidence that was before the RPD regarding their agents of persecution.

[20] In fact, although the applicants set forth certain items from the NDP that tend to support their arguments as to the wide-reaching presence of the Clan del Golfo in Colombia, including in the regions where the proposed IFAs are located, these items are of no help to them if they do not directly contradict the RPD's findings as to the motivation and ability of the agents of persecution to find them in Bogota or Neiva. In fact, it is trite law that if a claimant has not discharged his or her burden of establishing that he or she has a well-founded fear of being persecuted or being subjected to a personal risk, it is pointless to ask whether the conditions in

the country can support his or her argument. Thus, the applicants cannot rely only on evidence on the situation in Colombia to support their refugee protection claim without establishing a direct and probative nexus with their situation and demonstrate how these problems will affect them personally (*Sharawi v Canada (Citizenship and Immigration)*, 2019 FC 74 at paras 28–31).

[21] At the hearing, counsel for the applicants claimed that it was impossible for the evidence regarding the Clan del Golfo, found at tabs 7.2 and 7.15 of the NDP, to have been brought to the attention of the RPD by the former counsel because, if such had been the case, it is clear that the RPD would have made the opposite finding. However, the transcript of the hearing reveals that the RPD itself referred to tabs 1.2 and 7.2 to ask the applicants about the presence of agents of persecution in the proposed IFAs and the action currently being taken by the Colombian state against the Clan del Golfo. Furthermore, these items were directly mentioned by their former counsel in his arguments. While he had recognized the veracity of the information in the NDP that was raised by the RPD, including the Clan del Golfo's dominant presence on the Pacific coast and the state's sanctions against paramilitary groups, the former counsel had also argued before the RPD that nuance was required in this respect. He thus stated that, despite the existence of these sanctions, the acts of persecution committed by paramilitary groups against individuals deemed to be troublesome remain regular in Colombia and that the Clan del Golfo was ultimately active across the entire country.

[22] I find that these exchanges directly contradict the applicants' claims, since it appears that their former counsel clearly directed the RPD's attention to the information in the NDP that the RPD had been criticized for not mentioning. Furthermore, it must be remembered that the panel

is presumed to have considered all the information found in the NDP, and its choice to base its decision on some items rather than others, even when they include both favourable and unfavourable information, is central to its jurisdiction and, unless there is a clear error, must receive a great deal of deference from the reviewing court (*Aytac v Canada (Minister of Citizenship and Immigration)*, 2006 FC 560 at para 35).

[23] In any case, the applicants' claims are not found in the [TRANSLATION] "Practice Notice to Former Counsel" dated March 17, 2022, and sent to their former counsel so that they can invoke his breaches before the Court. All that appears in it are the issues of the ill child and the appeal proceedings. However, to be validly invoked in an application for judicial review, the breaches of the former counsel had to be brought to his attention beforehand, which is not the case here.

[24] For all these reasons, I find that the applicants' argument is without merit. The applicants have not persuaded me that the RPD did not have before it all the factual evidence necessary for reasonable decision making or that it improperly assessed the ability and motivation of the agents of persecution to look for the applicants in the proposed IFAs of Bogota and Neiva. In addition, I was not persuaded that it was unreasonable for the RPD to find that the applicants' rare interactions with their agents of persecution and the absence of any reprisals against them did not demonstrate, on a balance of probabilities, that the applicants matched the type of person who would be targeted by the agents of persecution.

[25] With respect to the second prong of the IFA test, I subscribe to the observations of Justice Zinn in *Atta Fosu v Canada (Citizenship and Immigration)*, 2008 FC 1135 at para 15, according to which it would not be reasonable for the applicants to live in hiding in the IFA. In this regard, it is clear that the applicants' living in hiding would argue against the reasonability of the IFAs. However, since I did not find any reviewable error in the RPD's finding that the agents of persecution did not have the motivation or ability to follow the applicants to Bogota or Neiva, it follows that once there, they would not have to live in hiding, contrary to what they argue before me.

B. *Was there a breach of procedural fairness before the RPD because of the professional misconduct of the applicants' former counsel?*

[26] The applicants claim that they were prevented from presenting a key item regarding their situation to the RPD, that being the precarious medical condition of their child, a Canadian citizen, again because of the advice that their former counsel gave when preparing their application and the instructions that he gave prior to the hearing. They were thus deprived of the right to argue this aspect, which they deem to be determinative, for the analysis of the second prong of the test. This misconduct by their former counsel, combined with proceedings that were needlessly initiated by him to appeal the RPD decision before the RAD, shows his incompetence and is equivalent to a violation of the applicants' procedural rights, which would warrant a new hearing on their claim.

[27] The criteria for demonstrating the incompetence of former counsel were developed by Justice Diner in *Rendon Segovia v Canada (Citizenship and Immigration)*, 2020 FC 99 [*Rendon Segovia*]:

> [22] This Court has stated that in proceedings under the Act, the incompetence of counsel will only constitute a breach of natural justice in "extraordinary circumstances" (*Memari v Canada (Citizenship and Immigration)*, 2010 FC 1196 at paragraph 36 [*Memari*]). To demonstrate that the incompetence of counsel amounted to a breach of procedural fairness, applicants must establish that each element of a tripartite test is met, namely that (i) prior counsel's acts or omissions constituted incompetence; (ii) a miscarriage of justice resulted in the sense that, but for the alleged conduct, there is a reasonable probability that the result would have been different; and (iii) the representative was given a reasonable opportunity to respond (*Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092 at paragraph 11 [*Guadron*]). However, one begins with a strong presumption that counsel's conduct fell within the wide range of reasonable professional assistance (*R v GDB*, 2000 SCC 22 at paragraphs 26–27 [*GDB*]).
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> [Emphasis added.]

[28] First, it is important to specify that the misconduct committed by their former counsel in needlessly initiating appeal proceedings is ultimately without legal consequence for the applicants, since they quite simply had no legal right to bring an appeal before the RAD, in accordance with paragraph 110(2)(d) of the Act. Indeed, it is regrettable that when the applicants informed their former counsel that they wanted to change counsel, he refused to give them a copy of the record on the grounds that he was owed fees for the notice of appeal that he had filed. In that regard, the applicants are not without recourse and may, if they want, file a professional conduct or liability complaint. However, the error by their former counsel cannot constitute an extraordinary circumstance that is a breach of natural justice, since there is no reasonable probability that the outcome of the RPD's decision would have been different were it not for this error.

[29] Now, with respect to the approach chosen by their former counsel not to argue the health condition of the applicants' child before the RPD during the assessment of the second prong of the IFA test, it appears from the evidence on record that the applicants did not make any submissions in this regard. For the purposes of this application, it is sufficient to state that the applicants' daughter suffers from an illness, the severity of which requires close medical monitoring and daily medication. Without prevention or regular treatment, she is at risk of experiencing consequences that could have a serious impact on her health and her life.

[30] However, even if I did find that this was an error by their former counsel, I must also be satisfied that this error is determinative. The respondent in this case, the Attorney General of Canada [AGC], argues that the bar is high regarding the applicants' burden of demonstrating the determinative character of this error. In fact, he argues that the applicants must satisfy the Court that pleading their child's medical condition would have, on its own, swung the RPD's assessment of the second prong of the test in their favour, which is also a high bar, as is recognized in case law (*Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164 (FCA) at paragraph 15).

[31] The applicants argue that the state of their daughter's health is a factor that could be considered in assessing the viability of an IFA, citing *Rendon Segovia* at paragraph 20 and *Guadron* at paragraph 18. On the basis of these same decisions, they argue that the failure to present crucial medical evidence is a type of circumstance that helps demonstrate incompetence. For his part, the AGC stresses that the applicants' child is a Canadian citizen, born in Canada, and not part of their refugee protection claim. He alleges that, in the context of the second prong

of the IFA test, the assessment of risk only concerns the risk to which the applicants themselves would be exposed and that it cannot consider the potential impact on their daughter in the event of a return to Colombia.

[32] I find that *Rendon Segovia* and *Guadron* are of little help to the applicants' arguments. In *Rendon Segovia*, the absence of medical evidence was only one factor among many errors made by the former counsel, and the damage that resulted had been considered by the Court to be cumulatively exceptional to the point that it constituted unreasonable or inadequate representation. In *Guadron*, the matter concerned an application for humanitarian and compassionate considerations and not an application focused on the existence of a viable IFA. In both decisions, the medical evidence concerned one of the applicants and not one of their family members. At the hearing, counsel for the applicants admitted that she had not found any decision that directly supported the proposal that the health condition of an applicant's minor child who is not a party to the dispute is a determinative factor in the assessment of a viable IFA that may, if not presented to the administrative decision maker, help demonstrate the incompetence of a former counsel of record.

[33] Now, as to the important issue of separating the assessment of a viable IFA's existence and that of the merits of an application for humanitarian and compassionate considerations, it is important to recall the observations of Justice Gascon in *Deb v Canada (Citizenship and Immigration)*, 2015 FC 1069:

> [21] Furthermore, concerns about dislocation and relocation, absence of relatives in the proposed IFA and humanitarian and compassionate considerations do not amount to conditions that would jeopardize one's life and safety (*Ranganathan* at

> paragraph 15; *Thirunavukkarasu* at paragraph 14). Such elements, whether taken alone or in conjunction with other factors, can only amount to a risk of persecution if they establish that, as a result, a claimant's life or safety would be jeopardized. It was therefore reasonable for the RAD not to consider as sufficient considerations the fact that the Deb family does not have any family members in Dhaka, that taking care of their disabled son would be more difficult, and that the family's income might diminish substantially through the relocation in the IFA.
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> [Emphasis added.]

[34] It appears relevant at this stage to specify that the former counsel had based his instructions to the applicants on the premise that their employment situation and the health of their child were not relevant at that stage of their claim before the RPD and that, if it were rejected, other options were open to them. Although the applicants had not specified before me the nature of these options and I do not have their former counsel's version on this topic, as he did not respond to the practice notice sent by the applicants, it is entirely probable that the former counsel in fact left open the possibility for the applicants to file an application based on humanitarian and compassionate considerations in the event that their claim was rejected by the RPD. In fact, it would then be possible for the applicants to argue the health condition of their child during the assessment of the best interests of the child, a central aspect in this type of application. In my view, this finding can only further weaken the applicants' argument as to the incompetence of their former counsel.

[35] Overall, I am satisfied that the health condition of the minor child would only be relevant to the assessment of the second prong of the test if the applicants had, to avoid their agents of persecution, to be discreet in the proposed IFAs even though they would need to go out in broad daylight to ensure that their daughter received the necessary care. However, having determined

that the IFA assessment done by the RPD was reasonable, I cannot conclude that the applicants would be subjected to a risk to their lives and safety because of their obligation to take care of their ill child. Consequently, I am of the opinion that the failure to present medical evidence regarding the child's state of health was not determinative as to the outcome of the RPD's decision.

[36] That said, I can only sympathize with the applicants, since it appears strange at the very least to me that the status of their daughter's health would have been relevant if she had been born in Colombia, since she then would have been part of the refugee protection claim, but since she is a Canadian citizen, her illness cannot be considered. In any case, and as the AGC highlights, the door is not closed to the applicants, as they will be able to present an application based on humanitarian and compassionate considerations, in which the impact of a possible return to Colombia on their daughter will be assessed through the lens of the best interests of the child.

[37] For the above reasons, I find that the applicants did not manage to demonstrate that the RPD's decision regarding the existence of IFAs in the cities of Bogota and Neiva was unreasonable or that Mr. Caza's conduct constituted incompetence that was equivalent to a breach of the principles of natural justice. As a result, this application for judicial review is dismissed in its entirety.

VII. Conclusion

[38] The application for judicial review is dismissed.

JUDGMENT in IMM-1479-22

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. There is no question to certify.

"Peter G. Pamel"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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