



Date: 20230719

Docket: IMM-447-21

Citation: 2023 FC 976

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 19, 2023

PRESENT: Madam Justice St-Louis

BETWEEN:

**LESLY MACIAS GARCIA
VALENTINO MENDEZ MACIAS**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] On March 28, 2017, the applicants, Lesly Macias Garcia and her son Valentino Macias Mendez, citizens of Mexico, arrived in Canada with her former common-law partner, and on April 11, 2017, they claimed refugee protection in Canada.

[2] The hearing for the applicants' refugee protection claims before the Refugee Protection Division [RPD] was initially scheduled for a date in September 2018, but the hearing was postponed, essentially because of Ms. Macias Garcia's separation and the withdrawal of her counsel at the time.

[3] On April 26, 2019, the applicants were summoned to a hearing on July 23, 2019, but they did not appear and also did not appear at the special hearing on July 30, 2019. Thus, on July 30, 2019, the RPD found that the applicants had abandoned their refugee protection claims because they did not appear at either the hearing for their claims on July 23, 2019, or at the special hearing on July 30, 2019, to explain their absence.

[4] On May 14, 2020, the applicants applied to have their claims reopened before the RPD as permitted by section 62 of the *Refugee Protection Division Rules*, SOR/2012-256 [Rules]. In support of this application to reopen, Ms. Macias Garcia presented an affidavit sworn on May 12, 2020. In it, she states that she gave birth and separated from her partner in August 2018. She also alleges that she moved, that her former counsel did not change her address with the RPD as required, such that Ms. Macias Garcia did not receive the notice to appear from the RPD, and that counsel also did not inform her of the new date for the hearing before the RPD, July 23, 2019.

[5] In the affidavit, which she swore in support of her application to reopen before the RPD, Ms. Macias Garcia states in particular at paragraphs 10 to 13:

[TRANSLATION]

- I found a lawyer, Angelica Pantiru, to represent me and my son, Valentino Mendez Macias.
- Afterwards, I realized that my hearing had been scheduled for July 23, 2019, but I did not receive any notice to appear, and my lawyer, Angelica Pantiru, did not tell me anything.
- When I realized that Angelica Pantiru was not interested in my case, I looked for someone else to represent me.
- I found Carlos Hoyos-Tello to represent me. I started the case with him on November 21, 2019.

[6] And she adds in particular that:

[TRANSLATION]

- The officer checked my case and noted that, on August 14, 2019, the abandonment notice had been sent to 2440 Chambly Street, Apt. 1, Montréal, Quebec, H1W 3J5, but in fact, the notice had been returned because I did not live there.
- Carlos Hoyos-Tello explained to the officer that I had notified my former counsel, Angelica Pantiru, of my change of address, but the change of address had not been done before the IRB.
- Therefore, I am applying to have my refugee protection case reopened because there are sufficient grounds to do so, especially since I did not receive either the notice to appear or the abandonment decision, despite the fact that I had a lawyer whom I informed of my change of address.

[7] Thus, before the RPD, Ms. Macias Garcia essentially stated that she had retained counsel in September 2018, that this counsel had allegedly failed to properly monitor her case and make the necessary change of address, and that as a result, she never received the notice to appear.

Ms. Macias Garcia also does not give any details about said move, not even the date.

[8] On October 7, 2020, the RPD dismissed the applicants' application to reopen, a decision that is the subject of this application for judicial review. In particular, the RPD found that Ms. Macias Garcia had not demonstrated, on a balance of probabilities, that counsel was

representing her for her refugee protection claim, that she had given her address to this counsel, and that she had not received the notice to appear. The RPD found that Ms. Macias Garcia had not established, on a balance of probabilities, that she had not received the notice to appear for her hearing on July 23, 2019, since her counsel had allegedly not sent her new address to the panel.

[9] At paragraph 11 of its decision, the RPD notes the lack of evidence on the record to support Ms. Macias Garcia's arguments that counsel had failed to inform the RPD and the allegation that she had moved before the notice to appear was sent in April 2019. The RPD notes that:

[11] The female applicant filed no evidence that she retained Ms. Pantiru as counsel. In her affidavit, she did not state that she made efforts to obtain her file from Ms. Pantiru so that, along with her application to reopen, she could file the retainer that she supposedly gave to Ms. Pantiru to represent her in her refugee protection claim. In her affidavit, she did not specify the date on which she supposedly retained Ms. Pantiru, the date on which counsel's mandate ended or the date on which she gave her new address to Ms. Pantiru to update her file before the panel. Lastly, she also did not specify the date on which she moved, which is what resulted in her not receiving the notice to appear.

[10] The RPD also noted, at paragraph 13 of its decision, that "[f]urthermore, although the female applicant retained new counsel on November 21, 2019, the panel did not receive her new address until February 12, 2020". In short, the RPD was of the view that Ms. Macias Garcia did not establish, on a balance of probabilities, the facts that she alleges in support of her application to reopen and therefore found that Ms. Macias Garcia has not demonstrated that there was a violation of a principle of natural justice in her case.

[11] On November 25, 2020, the applicants, through their counsel, sent a letter to the person Ms. Macias Garcia presented to the RPD as her former counsel. They then informed said former counsel that an application for judicial review would be filed against the RPD's decision refusing the reopening and that they intended to demonstrate to the Court that she had failed, avoided or neglected to submit a notice of representation indicating that she was their new counsel and supporting the details of their claims in this regard.

[12] On December 3, 2020, the lawyer replied. Essentially, she pointed out that she had never received a retainer from the applicants and had never been counsel for Ms. Macias Garcia.

[13] Before the Court, the applicants argue that the RPD decision must be reviewed using the standard of correctness, because decisions on reopening, when there has been no hearing, are issues of procedural fairness. Before the Court, the applicants have abandoned the argument that Ms. Macias Garcia had been misrepresented by former counsel. The applicants also maintain that they were put in a situation where justice was denied and did not have the opportunity to be heard and present their case before the RPD.

[14] The applicants allege that the RPD, in its decision to deny reopening, wrongly focused on the issue of whether Ms. Macias Garcia was or was not represented by counsel. The RPD in fact decided that it was up to Ms. Macias Garcia to follow up with counsel to see whether or not she was keeping track of her case. The applicants submit that this was a palpable error in applicable law, since in their view, the RPD instead should have considered whether Ms. Macias Garcia had been duly summoned to the hearings on June 23 and 30, 2019. The applicants add that

Ms. Macias Garcia should not lose her right to be heard because of an error or confusion as to whether or not she had retained counsel.

[15] In their reply, the applicants challenge the argument of the respondent, the Minister of Citizenship and Immigration, that their reopening proceedings are in fact a disguised attack on the abandonment decision. They maintain that the application to reopen is the appropriate remedy, since Ms. Macias Garcia wanted to explain why she did not appear at her hearings. In addition, they maintain that the law contemplates the possibility of reopening when there has been a miscarriage of justice and that Ms. Macias Garcia has no legal obligation to seek judicial review of the abandonment decision before applying for reopening. The applicants argue that they understand that the application to reopen is not an appeal *de novo* of the abandonment decision and that they are rightly alleging a breach of natural justice.

[16] The applicants also challenge the Minister's argument that no valid explanation was provided to the RPD to justify the delay between the declaration of abandonment and the filing of the application to reopen. They allege that Ms. Macias Garcia is a vulnerable person who, like most vulnerable refugee protection claimants, relied entirely on Ms. Pantiru to represent her appropriately. Ms. Macias Garcia specified in her affidavit that she separated from her partner because of domestic violence and that she remained convinced that she should have a hearing eventually, since she never had one. The applicants argue that immigration lawyers generally carry out changes of addresses for their clients and that the legal profession stresses the importance of clearly notifying a client when a retainer is not accepted or refused. In the absence of clear notice that the retainer has been refused, clients such as Ms. Macias Garcia believe they

are represented. Moreover, the applicants argue that refugee protection claimants often must wait 30 months to get a date for a hearing before the Board. The applicants allege that in this context, the RPD cannot criticize Ms. Macias Garcia for not being surprised that she had not received a notice for 13 months.

[17] The Minister responds that there was no breach of natural justice that led to the applicants' abandonment, which instead resulted from their own negligence, and that the RPD had no choice but to dismiss their application to reopen. The Minister adds that the RPD reasonably found that Ms. Macias Garcia had not demonstrated, on a balance of probabilities, that she had not received the notice to appear for her hearing on July 23, 2019. The Minister also argues that the reopening proceedings are merely a disguised attack on the abandonment decision. In summary, the Minister submits that the standard of reasonableness applies and that, given the case, the decision is reasonable.

II. Decision

[18] The only issue is to determine whether the applicants have established the reasonableness of the RPD's finding that Ms. Garcia did not demonstrate, on a balance of probabilities, the facts that she alleges in support of her application to reopen and consequently did not demonstrate that there was a breach of a principle of natural justice that would justify reopening their refugee protection claims.

[19] First, none of the exemptions to the presumptive reasonableness standard of review apply in this case, and the RPD's decision not to allow the case to be reopened must be reviewed

against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 25 [*Vavilov*]; *Hegedus v Canada (Citizenship and Immigration)*, 2019 FC 428 at para 16 [*Hegedus*]; *Driss v Canada (Minister of Citizenship and Immigration)*, 2020 FC 254 at para 18).

[20] When analyzing the reasonableness of a decision, a reviewing court “must begin its inquiry into the reasonableness of a decision by examining the reasons provided with ‘respectful attention’ and seeking to understand the reasoning process followed by the decision maker to arrive at its conclusion” (*Vavilov* at para 83). 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).

[21] The framework within which the RPD considered her application to reopen the refugee protection claim is established under section 62 of the Rules. Under subsection 62(6) of the Rules, the RPD’s power to reopen a refugee protection claim is very limited. It can only do so when there has been a failure to observe a principle of natural justice or a breach of procedural fairness for the claimant, considering all relevant factors.

[22] The claimant bears the burden of proof (section 62 of the Rules; *Hegedus* at para 23; *Perez v Canada (Citizenship and Immigration)*, 2020 FC 1171).

[23] In accordance with subsection 62(7) of the Rules, when determining whether a refugee protection claim must be reopened, the RPD must consider “any relevant factors”, including whether the application was made in a timely manner and the justification for any delay.

[24] As the Minister points out, Ms. Macias Garcia never challenged the abandonment decision through judicial review. Several months after that decision, she instead chose to apply to have her refugee protection claim reopened. It was only then that she provided explanations for the first time that, in her opinion, justified her absences from the two hearings set by the RPD. The explanations rely heavily on the allegation that Ms. Macias Garcia moved before the notice to appear was sent to her in April 2019 and on the alleged misrepresentation by her former counsel, who did not carry out the necessary change of address. First, it should be noted that reopening proceedings cannot be a disguised attack on an abandonment decision (*Vranici v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1417).

[25] A careful review of the Certified Tribunal Record reveals that Ms. Macias Garcia did not present any evidence before the RPD that she had retained counsel and no evidence or details about a move before the notice to appear was sent in April 2019. The affidavit that Ms. Macias Garcia filed before the RPD contains no details as to the retainer given to counsel or any information as to the date or destination of Ms. Macias Garcia’s move; her affidavit before the Court also contains no details. The RPD did not receive Ms. Garcia’s new address until February 12, 2020.

[26] Ms. Macias Garcia applied to the RPD to reopen her case, alleging that she had moved and that she had given a retainer to a lawyer who did not perform her task of informing the RPD, with the result that she never received the notice to appear.

[27] However, she did not submit any evidence or information related to a retainer given to a lawyer or any evidence or information to identify when she allegedly moved. Given the complete lack of evidence and information on the allegations made, the RPD could reasonably conclude that Ms. Macias Garcia had not established, on a balance of probabilities, the facts in support of her application to reopen and that she had not established a violation of a principle of natural justice in the abandonment decision.

[28] The RPD considered all the evidence presented before it, and before the Court, Ms. Macias Garcia also did not argue that the RPD had ignored the evidence. The RPD detailed the reasons why it found that this evidence was insufficient to demonstrate that there was a breach of a principle of natural justice; this is not a case where “the decision maker has fundamentally misapprehended or failed to account for the evidence before it” (*Vavilov* at para 126).

[29] In particular, the applicants state that Ms. Macias Garcia suffered domestic violence during the process. In the Gender Guidelines, as cited by the RPD, the Board “recognizes the importance of taking a trauma-informed approach to the adjudication of proceedings involving gender considerations” (s 5.2.1). However, the issue before the RPD was not whether Ms. Macias Garcia had experienced conflict with her spouse or domestic violence, but whether

her ability to keep track of her case “was compromised . . . such that there was a breach of natural justice” (*Anni v Canada (Citizenship and Immigration)*, 2017 FC 134 in para 18).

However, Ms. Macias Garcia did not present any evidence or even mention before the RPD that her ability had been compromised in this way.

[30] Ms. Macias Garcia provided the following details with respect to the impact of her ex-spouse’s actions on her ability to keep track of her case:

[TRANSLATION]

My hearing had been scheduled for September 2018, but my lawyer, Nancy Cristina Munoz Ramirez, told me that she could not represent me, since there was a conflict of interest (due to conflicts with my spouse and father of my children, Florentino Mendez).

Since my lawyer, Nancy Cristina Munoz Ramirez, has drastically withdrawn from my case, this has caused me a lot of emotional stress. I had just recently given birth and separated from my spouse at the time, Florentino Mendez, and having to find a new representative under these circumstances was not easy.
[Emphasis added.]

(Applicant’s affidavit at para 8, CTR at p 54)

[31] Contrary to the applicants’ submissions, the RPD expressly considered these circumstances in August 2018 (Decision at paras 5, 15).

[32] Similarly, the RPD addressed the circumstances described by Ms. Macias Garcia in her affidavit.

[33] Given the evidence before it, the RPD's decision is reasonable; it is based on "an internally coherent and rational chain of analysis" and is "is justified in relation to the facts and law that constrain" the RPD (*Vavilov* at para 85).

III. Conclusion

[34] For these reasons given above, the application for judicial review will be dismissed. The applicants have not established that there are "sufficiently serious shortcomings in the [RPD's] decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). The RPD reasonably found that the applicants simply did not demonstrate to the RPD that there was a breach of natural justice when they were declared to have abandoned their case, an essential condition to grant their application to reopen. The RPD considered all the relevant evidence and Ms. Macias Garcia's circumstances. It explained why, in the particular context of this case, it was not persuaded that a principle of natural justice had been violated. The decision is transparent, intelligible and justified.

JUDGMENT in IMM-447-21

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.
2. No question is certified.
3. No costs are awarded.

“Martine St-Louis”

Judge

Certified true translation
Michael Palles

FEDERAL COURT
SOLICITORS OF RECORD

FILE: IMM-447-21

STYLE OF CAUSE: LESLY MACIAS GARCIA VALENTINO MENDEZ
MACIAS v THE MINISTER OF CITIZENSHIP AND
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