Federal Court  Cour fédérale

Date: 20231114

Docket: IMM-1438-22

Citation: 2023 FC 1504

Ottawa, Ontario, November 14, 2023

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

ALI NAVILA RIVERO MARIN
JORGE ALBERTO RIVERO MARIN
JOSE DAIMO CARMONA CAMANO
REGINA SOFIA CARMONA RIVERO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] This is a judicial review of a decision by the Refugee Appeal Division of the Immigration and Refugee Board [RAD] dated February 3, 2022 [Decision], dismissing an appeal from the Refugee Protection Division [RPD] rejecting the Applicants' claim for refugee protection under

sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The RAD held that the RPD was correct in finding the Applicants were neither Convention refugees nor persons in need of protection, and that the Applicants have a viable Internal Flight Alternative [IFA] elsewhere in Mexico.

II. Facts

[2] The Applicants are family members and citizens of Mexico. They allege they are at risk of harm by a specific cartel and local police who had extorted them. They fled elsewhere for a brief period then came to Canada where they applied for refugee protection. The RPD dismissed their refugee claims and found they had a viable IFA. The Applicants appealed this decision to the RAD. In 2022, the RAD dismissed their appeal, and reaffirmed the RPD's finding the Applicants had a viable IFA.

III. Issues

[3] The Applicants' raise the following issues:

1. The Standard of Review.
2. The RAD factually erred in finding that the Applicants failed to establish the identity of the agents of persecution.
3. The RAD erred in law by finding that an IFA existed in light of the multiple agents of persecution, namely, the police, and
4. The RAD's analysis of IFA is fundamentally flawed, incorrect, and ignored material evidence including evidence in the NDP, rendering the decision unreasonable.

[4] Respectfully, the issue is whether the Decision is reasonable.

[5] The RAD concluded the RPD was correct in finding the Applicants have a viable IFA. They had been given notice by the RPD that an IFA was proposed. There is no dispute that the RAD and RPD set out the correct two prong test for an IFA:

> [8] The Federal Court has explained the general principles for an IFA, and has indicated that to determine if a viable IFA exists, the Refugee Appeal Division (RAD) must be satisfied, on a balance of probabilities, that:
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> > a. 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
> >
> > b. 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.
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> [9] Both above "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 claimant's life and safety in travelling or temporarily relocating to a safe area. Once the potential for an IFA is raised, the claimant bears the onus of establishing it is not viable.

[6] With respect to the first prong of the test, the RAD held the Applicants' allegations did not establish a nexus to a Convention ground as referred to in section 96 of IRPA. I note section 96 was not the focus of either the RPD or the RAD.

[7] Turning to section 97, the RAD held the Applicants' failed to establish they face a risk of torture or a risk to their lives or of cruel and unusual punishment in the IFA.

[8] The RAD re-visited the findings of the RPD that the Applicants' faced extortion by several individuals and a local police officer, resulting in fear. Notably, the RPD did not accept

the extortionists were members of a specific or any cartel as alleged by the Applicants, or that the individuals had either the means or motivations to locate the Applicants in the proposed IFA. The RAD after its independent review cane to the same conclusions.

[9] The Applicants argued the RPD erred because it was not a requirement for the Applicants to identify the agent of harm, because the RPD ignored country condition evidence of extortion, and the RPD did not adduce evidence that the IFA was safe. The RAD rejected all three submissions.

[10] With respect to the first prong of the IFA test, the RAD held the Applicants did not establish the identity of the agents of harm, or their means and motivations to locate the Applicants in the IFA. Paragraphs 18-19 of the Decision state:

> [18] The Principal Appellant testified that the perpetrators were the [omitted] through the policemen. She testified that she knew it was the [omitted] because they are everywhere. When the RPD member asked her whether it was another cartel or other criminals involved with the police, the Principal Appellant testified that they are the main cartel in [omitted] and work in conjunction with the policemen.
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> [19] The Principal Appellant's belief that the agents of harm are the [omitted] is insufficient evidence to establish that they are in fact the [omitted]. Justice Brown of the Federal Court commented that, "The Respondent submits, and I agree, the Applicant's belief, however sincere, was not a replacement for sufficient reliable evidence as to the identity of the agents of persecution."

[11] The RAD decided the Applicants failed to provide sufficient evidence to support a finding the agents of harm were as claimed. The RAD instructed itself to consider the country condition evidence, and concluded it is insufficient to support a finding that the agents of harm was as alleged. At paragraph 23 of the Decision:

> [23] I find that the country condition documents do not support a finding that the agents of harm are the [omitted]. The fact that the Appellants were extorted in [omitted] does not establish that the agents of harm are members of the [omitted]. The evidence in the National Documentation Package (NDP) indicates that a multitude of groups, ranging from transnational criminal organizations, drug trafficking organizations, and opportunistic criminals are involved in extortive activity. Extortion is commonly committed by small gangs in order to generate income, and "… extortion becomes generalized because even smaller criminal groups and individuals can hide behind the cloak of a large criminal group and appear credible in their threats."

[12] With respect to the probable means and motivation of the agents of harm locating the Applicants in the IFA, the RAD determined the scale of the extortion does not support that finding. There was no evidence presented to support a finding that the agents of harm have pursued them since leaving Mexico some two years before.

[13] Second, the RAD held while extortion is a common issue in Mexico, it does not forego the viability of the proposed IFA for the Applicants. The RAD refers to NDP evidence, stating:

> [32] The NDP indicates that, "Extortion is endemic in Mexico, with reported incidents eclipsing kidnapping incidents over the last decade," and, "Extortion is prevalent countrywide; however, there are a number of states which are disproportionately affected." The NDP explains that in 2016, incidence levels were elevated in several states, including [omitted], the state where the Appellants were living when they received the extortion demand. The article did not identify the state of [omitted], where the proposed IFA of [omitted] is located, as one of the states with higher incidence levels.

[14] Lastly, the RAD states there was no onus on the RPD to establish the IFA is safe. It is for the Applicants, once an IFA is proposed, to establish that relocation is not viable. I should say this is well settled and I agree: *Elusme v Canada (Citizenship and Immigration),* 2020 FC 225

[*Elusme*] [per Justice LeBlanc as he then was]; *Jean Baptiste v Canada (Citizenship and Immigration)*, 2019 FC 1106 [*Jean Baptiste*] [per Associate Chief Justice Gagné]; *Pineda v Canada (Citizenship and Immigration)*, 2019 FC 1446 [*Pineda*] [per Justice Roussel as she then was].

[15] With respect to the second prong of the test, the RAD held in all of the circumstances, relocating to the IFA was not unreasonable, and the Applicants had not met their onus of demonstrating it is not viable to relocate. Specifically, the RAD notes the high threshold of actual and concrete evidence of conditions that would jeopardize their lives and safety was not met. The RAD explains its finding:

> [36] The Principal Appellant testified that the food and cost of living is expensive in [omitted], and that their family names and accents are different. These are not circumstances that rise to the high threshold of jeopardizing the Appellants' lives and safety.
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> [37] The Principal Appellant testified that both she, as a [omitted], and Associate Appellant #1, as a [omitted], could find jobs. She testified that Associate Appellant #2 is also a [omitted], but he only has a primary education. The Principal Appellant testified that the problem with finding a job is that as [omitted] and [omitted] their information would appear in a database, and that they could then be located through that database.
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> [38] I find that these circumstances are not ones that rise to the high threshold of jeopardizing the Appellants' lives and safety in relocating to [omitted]. First, as I have indicated previously, claimants cannot just claim, without supporting evidence, that they could be found anywhere in Mexico using databases, because of the corruption in their country and the crimes of their agents of persecution. Second, while it may be difficult to find a new job, the Federal Court has recently held that, "The law is clear that having to start over and having difficulty finding a job are not significant barriers which make an IFA unreasonable." The Federal Court also commented, "Additionally, humanitarian and compassionate reasons, such as the loss of a job, a reduction in the quality of life or the loss of aspiration do not suffice to conclude that there is no IFA." Refugee protection in Canada cannot be given simply

> because one might be better off physically, economically and emotionally here than in a safe place in their own country.

[16] The RAD confirmed while starting over and having difficulty finding a new job is a barrier, that was not sufficient to make the IFA unreasonable.

IV. Standard of Review

[17] The standard of review in terms of an IFA is reasonableness. With regard to reasonableness, in *Canada Post Corp v Canadian Union of Postal Workers*, 2019 SCC 67 [*Canada Post Corp*] the majority per Justice Rowe explains what is required for a reasonable decision, and what is required of a court reviewing on the reasonableness standard. Justice Rowe concludes at paragraph 32, the reviewing court "must ask '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.'"

[18] In addition, as the Supreme Court in Canada Post Corp determined:

> [33] Under reasonableness review, "[t]he burden is on the party challenging the decision to show that it is unreasonable" (*Vavilov*, at para. 100). The challenging party must satisfy the court "that any shortcomings or flaws relied on ... are sufficiently central or significant to render the decision unreasonable" (*Vavilov*, at para. 100).

[19] Furthermore, *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 makes it clear the role of this Court is not to reweigh and reassess the evidence unless there are "exceptional circumstances". The Supreme Court of Canada instructs:

> [125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from "reweighing and reassessing the evidence considered by the decision maker": *CHRC*, at para. 55; see also *Khosa*, at para. 64; *Dr. Q*, at paras. 41-42. Indeed, many of the same reasons that support an appellate court's deferring to a lower court's factual findings, including the need for judicial efficiency, the importance of preserving certainty and public confidence, and the relatively advantageous position of the first instance decision maker, apply equally in the context of judicial review: see *Housen*, at paras. 15-18; *Dr. Q*, at para. 38; *Dunsmuir*, at para. 53.
>
> [Emphasis added]

[20] The Federal Court of Appeal recently reiterated in *Doyle v Canada (Attorney General)*, 2021 FCA 237 that the role of this Court is generally not to reweigh and reassess evidence:

> [3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role. Sticking to its role, the Federal Court did not find any fundamental errors.
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> [4] On appeal, in essence, the appellant invites us in his written and oral submissions to reweigh and second-guess the evidence. We decline the invitation.

[21] This Court has determined that a review of the RAD's determination of the availability of an IFA is entitled to deference and there is a high onus to demonstrate unreasonableness: *Pidhorna v Canada (Minister of Citizenship and Immigration)*, 2016 FC 1 at paragraph 39 per Kane J: "[t]he test for an IFA is well established. There is a high onus on the applicant to

demonstrate that a proposed IFA is unreasonable (*Ranganathan v Canada (Minister of Citizenship and Immigration*), [2001] 2 FC 164, [2000] FCJ No 2118 (FCA)) [*Ranganathan*].”

V. Analysis

[22] The Applicants submit the RAD erred by accepting that the allegations of extortion were credible and conducted with the assistance of the police, yet failed to assess the IFA in accordance with this finding. The Applicants submit the RAD’s analysis is unreasonable, as it focused exclusively on the alleged cartel members extorting the Applicants, and did not account for the police and their role as agents of persecution.

[23] The Applicants further contend that the RAD makes a contradictory finding, stating that the Applicants fail to establish the identity of the agents of persecution, while also accepting the role of the police in the extortion. By making this finding, the IFA analysis is flawed, as the Applicants assert the RAD accepted the police as agents of persecution and then omitted the state from the IFA analysis. The Applicants rely on *Maruthapillai v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 761 where it was held an IFA is illogical where the state is accepted as an agent of persecution at paragraph 6:

> [6] An IFA implies effective state protection. However, when the agent of persecution is the state or a branch of the state such as the armed forces, how can one talk about effective state protection within its borders when the state itself is involved in the persecution?

[24] I am not persuaded there is reviewable error in this connection. Contrary to the Applicants’ allegation, the RAD expressly considered the role of police in this matter and found

as a fact it was only a local police officer. This is a critical and in my view quite central finding of fact that I am not prepared to overlook, and am unable to find unreasonable.

[25] Notably also, the related authorities relied upon here and elsewhere by the Applicants involved authorities with national connections and reach such as the National Police: such is not the case here.

[26] The RAD also rejected the allegation extortion was carried out by a cartel, finding while the Applicants had submitted the agents of harm are members of a specific cartel, "the evidence does not demonstrate that the agents of harm are anything other than the actual individuals involved in the extortion." This is likewise a central and reasonable conclusion.

[27] The RAD's finding the Applicants were not targeted by a cartel is difficult for the Applicants to surmount. That said, the RAD went further to review whether the alleged cartel was active in the IFA. In this connection, the Applicants were not able to point to any country condition evidence implicating the alleged cartel in the IFA.

[28] While I do not doubt the sincerity of the witness in terms of their belief the extortion involved a specific cartel where they lived, this evidence, limited as it was, unsupported by country condition information, was considered and assessed. Both the RPD and RAD in concurrent findings found otherwise. Both were entitled to make the determinations they made on this record, including country condition documentation. I should add this is an area where considerable deference is owed to these decision makers. Further, one should not confuse testimony with the weight and assessment that testimony might be given. These are very

different: *Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 [per Justice Pamel] at paragraphs 21-35.

[29] The Applicants submit the RAD erred in its assessment of a viable IFA because it found the police were agents of persecution, but then did not state the means or motivations the police have to locate the Applicants throughout Mexico. The Applicants' submit the RAD failed to assess the evidence provided demonstrating risk of harm from the police, which are separate risks from the cartel.

[30] The Applicants submit the RAD erred by rejecting the Applicants' testimony that they could not live anywhere in Mexico given the ease to which they can be tracked using the national database, without assessing the objective, NDP evidence on this issue. In my respectful view this argument was reasonably dealt with at paragraph 38 of the Decision where the RAD concluded:

> [38] …First, as I have indicated previously, claimants cannot just claim, without supporting evidence, that they could be found anywhere in Mexico using databases, because of the corruption in their country and the crimes of their agents of persecution…

[31] With respect to the legal test for an IFA on the first prong, many of the Applicants submissions relate to the RAD erring by grounding its analysis on the premise that the agents of persecution would not have the means or motivation to locate the Applicants in the IFA. In my view, this submission was reasonably assessed and determined against the Applicants by the RAD in its findings that: the evidence in the NDP indicates that a multitude of groups, ranging from transnational criminal organizations, drug trafficking organizations, and opportunistic criminals are involved in extortive activity; extortion is commonly committed by small gangs in

order to generate income and becomes generalized because even smaller criminal groups and individuals can hide behind the cloak of a large criminal group and appear credible in their threats; and that extortionists target a broad range of businesses and institutions, including family-owned businesses, insurance companies, banks, other financial institutions, mining companies, retail shops, refuelling stations, transportation services, manufacturers, hotels, and ranches.

[32] These country condition findings led the RAD, on the evidence at bar, to reasonably conclude in this case that the scale of the extortion did not support a finding the perpetrators would be motivated to pursue the Applicants from where they lived to the IFA. As noted above, the RAD agreed with the RPD and found, as in my view it was entitled to on the record before it, "… on a balance of probabilities, it is unlikely that the perpetrators, that include a local police officer, would be interested and motivated to search nationwide and spend time, resources, and energy on pursuing the claimants throughout Mexico, in the future, for failing to pay extortion fees, in light of the fact that they can pursue other local individuals and businesspersons for funds."

[33] The RAD concluded:

> [27] The evidence does not establish that the agents of harm have the means to locate the Appellants. Since the identity of the agents of harm is not established, there is no evidence on the financial means or connections available to them to pursue the Appellants. While the Appellants submit that the agents of harm are members of the [omitted], the evidence does not demonstrate that the agents of harm are anything other than the actual individuals involved in the extortion.

[34] In my view, the RAD also reasonably considered subsequent contact with the Applicants, noting testimony including that the last time the Applicants heard from the perpetrators was two years previously. The RAD reasonably concluded:

> [30]… When the RPD member indicated that that was two years ago, and asked why they would still be interested in the Appellants, the Principal Appellant testified it was because they have access to everything and can find them because they are policemen. The Principal Appellant made numerous references during the RPD hearing to the Appellants' information being located in national databases. However, the Federal Court has stated that claimants cannot just claim, without supporting evidence, that they could be found anywhere in Mexico using databases, because of the corruption in their country and the crimes of their agents of persecution.
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> [Footnotes omitted]

[35] I am not persuaded to interfere with these assessments and conclusions because they are based on the weighing and assessing of the evidence in this case.

[36] In terms of the second prong of the test for an IFA, the Applicants assert there was no evidence before the RAD that the agents of persecution had lost interest in them. I agree there was not such direct evidence in this case. But in my view this submission is a red herring.With respect it ignores well established law that Applicants bore the onus to establish the unreasonableness of the IFA to the satisfaction of the RAD, not the reverse. The Applicants' argument is also contrary to governing law that once an IFA is proposed, the onus shifts to the Applicants to rebut it: *Elusme*; *Jean Baptiste*; *Pineda*.

[37] The RAD was not satisfied on the material before it and found against the Applicants on the second prong of its IFA analysis. Notably, the agents of persecution were local individuals

and a local police officer, not a cartel as unsuccessfully alleged. As with the two tribunals below, I am also not persuaded.

[38] I should note the Applicants raised concerns including the cost of food and living in the IFA, and that their family names and accents would be different from those in the IFA. While those may be new and challenging circumstances, I agree they do not constitute "actual and concrete evidence" of conditions that would jeopardize the Applicants' lives and safety in travelling to or relocating to the IFA: *Ranganathan* at paragraph 15.

[39] In this part of the analysis as well, the RAD considered the impact of their testimony and the country condition evidence on the availability of information in national databases. This was a concern in their testimony, yet no supporting evidence was presented for the RAD to consider. Given this, the RAD reasonably determined the Applicants did not meet their onus to show it was unreasonable for the Applicants to relocate.

[40] Specifically, and with respect, I cannot but conclude the Applicants failed to meet the high threshold of presenting actual and concrete evidence of conditions that would jeopardize their lives and safety upon relocating to the IFA.

VI. Conclusion

[41] The RAD's decision is reasonable, justifiable, and intelligent. Therefore this application will be dismissed.

VII. Certified Question

[42] The parties do not propose a question, and I agree, none arises.

JUDGMENT in IMM-1438-22

THIS COURT'S JUDGMENT is that this application for judicial review is dismissed, no question of general interest is certified and there is no order as to costs.

"Henry S. Brown"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1438-22
STYLE OF CAUSE:	ALI NAVILA RIVERO MARIN, JORGE ALBERTO RIVERO MARIN, JOSE DAIMO CARMONA CAMANO, REGINA SOFIA CARMONA RIVERO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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