Federal Court  Cour fédérale

Date: 20240108

Docket: IMM-5011-20

Citation: 2024 FC 3

Ottawa, Ontario, January 08, 2024

PRESENT: Mr. Justice Pentney

BETWEEN:

LUCIO VIDAL FERNANDEZ
GABRIELA RODRIGUEZ MONARREZ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] The Applicants in this case are Lucio Vidal Fernandez ("Principal Applicant") and Gabriela Rodriguez Monarrez ("Associate Applicant"). They are a married couple who are citizens of Mexico. They claimed refugee status in Canada based on a fear of Mexican drug cartels.

[2] Their claim was refused by both the Refugee Protection Division (RPD) and the Refugee Appeal Division (RAD). The Applicants seek judicial review of the RAD's decision.

[3] For the reasons that follow, this application for judicial review will be dismissed.

I. Background

[4] The Applicants' refugee claim was based on the following narrative. They say that they left Mexico and moved to the United States in 1994, to escape from the rampant crime, poor living conditions and lack of job opportunities. They did not obtain status in the United States.

[5] In 2011, the Principal Applicant learned that his nephew in Mexico was missing and presumed dead. Six months later, his sister was found raped and murdered on the side of a highway in Mexico. Shortly afterwards a man visited his mother, warning her not to press for an investigation into the homicide. The police did not bring charges in either of these cases.

[6] As a result of political developments in the United States, the Applicants decided to return to Mexico in May 2017. Soon after arriving in Mexico, the Principal Applicant went to the police station to inquire into the status of the investigations of the incidents involving his sister and nephew. The police did not provide him with any information and instead began to question him. The Applicant began to fear that the police were somehow involved and that he had drawn attention to himself by inquiring about the investigations.

[7] A few weeks later, the Principal Applicant learned that his niece was addicted to crystal meth and that her 5-year old daughter was living with her. The Applicants went to visit the niece to ask her to let the family take care of the daughter while she dealt with her addiction. Although the niece became angry, she eventually agreed. The Applicants say she also threatened them, saying: “fine, take my daughter, but you will regret it since I am backed up (by the cartel).” Shortly after that, three men forced their way into the Principal Applicant’s mother’s house and threatened the family, saying “[the niece] is now with us so don’t ever interfere with her again or we will find and kill every member of your family.” The Applicants believe that these men were linked to a drug cartel.

[8] The Associate Applicant visited the police station the following day to file a police report about this incident. The police took her statement, which she signed without reading. She later discovered that the police had left out important details of the event including the threats from the three men. The Applicants believe this is another indication that the police are corrupt.

[9] Because of their fear that drug cartels would discover the police reports they had filed, the Applicants decided to leave Mexico. They came to Canada in June 2017 and filed their refugee claims in July 2017.

[10] In the fall of 2018, the Principal Applicant learned that two of his cousins in Mexico had been murdered. They had been shot and the Applicants assert that a “narco message” had been left behind on their bodies.

[11] The Applicants' refugee claim was refused by the Refugee Protection Division [RPD]. The RPD found that the Applicants were not credible and did not display a subjective fear of persecution based on several adverse findings about their evidence and their failure to seek asylum in the United Statues during their 23-year stay. The RPD accepted that the Applicants' family members had experienced some violent incidents, but found that this was a generalized risk that many Mexicans face. The RPD found that the Applicants' allegations did not establish a nexus to a Convention ground, and so assessed their claim under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Based on its findings, the RPD rejected the Applicants' refugee claim.

II. Decision under Review

[12] The Applicants filed an appeal with the RAD, arguing that the RPD erred in its finding that there was no nexus to any of the Convention grounds and that it completely disregarded the Associate Applicant's gender claim. They also claimed the RPD erred in assessing their credibility and when determining that the Applicants experienced generalized risk under the section 97 analysis. Finally, they asserted that the RPD Member demonstrated a reasonable apprehension of bias towards the Applicants.

[13] The RAD agreed with the conclusion reached by the RPD but not its analysis of the issues. The RAD did not accept the RPD's negative credibility findings. Instead, it found that even if it accepted the Applicants' narrative as true, the evidence was still insufficient to

establish that they are Convention refugees or persons in need of protection. The RAD did not find any evidence to support the apprehension of bias claim.

[14] The RAD's decision is based on the following three key findings:

- The Applicants do not face a forward-looking risk of persecution or harm arising from the 2017 incident because the evidence does not show that the three men who threatened them are members of a cartel or that they have a continuing interest in pursuing them;

- The Applicants do not face a risk of harm relating to the various incidents their family experienced, because the evidence does not demonstrate that the unknown perpetrators of those violent acts have any interest in personally targeting them;

- The Associate Applicant's individual circumstances do not support a finding that she faces more than a mere possibility of persecution by the cartels or organized crime in Mexico, based on the country condition evidence about gender-based violence.

[15] As a result of its analysis of these issues, the RAD dismissed the appeal. The Applicants seek judicial review of the RAD's decision.

III. Issues and Standard of Review

[16] The only issue is whether the RAD decision is reasonable, when assessed under the framework set out in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[17] In summary, under the *Vavilov* framework, 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). An administrative decision-maker's exercise of public power must be "justified, intelligible and transparent" (*Vavilov* at para 95).

[18] The onus is on the Applicant to demonstrate flaws in the decision that are "sufficiently central or significant to render the decision unreasonable" (*Vavilov* at para 100). The decision must be assessed in light of the history and context of the proceedings, including the evidence and submissions made to the decision-maker (*Vavilov* at para 94). However, "absent exceptional circumstances, a reviewing court will not interfere with [the decision maker's] factual findings" (*Vavilov* at para 125).

[19] The Applicants submit that the RAD decision is unreasonable for three reasons:

A. The RAD erred by not making a specific finding on their credibility, because this was a central issue in their appeal;

B. The RAD's finding that they did not face a personalized risk under section 97 of the *IRPA* is flawed because it failed to apply the proper legal test; and

C. The RAD unreasonably disregarded country condition evidence regarding the Associate Applicant's risk of gender-based violence.

IV. Analysis

A. *The RAD was not required to make a credibility finding*

[20] The Applicants submit that the RAD erred by failing to make a specific finding on their credibility in the context of its assessment of their forward-looking risk. The Applicants' argument on this issue centres on the following statement by the RAD:

> Even if I accept all of the allegations in the [Applicants'] claims as true, they do not face a prospective risk of persecution or harm because the evidence does not establish that the three men who threatened them are members of a cartel, or that they have a continued interest in pursuing them. Nor do the [Applicants] face a personalized risk of harm based on the various incidents that their family members allegedly experienced. Lastly, the associate [Applicant's] individual circumstances, when considered in light of the objective evidence in the National Documentation Package (NDP), do not support a finding that she faces persecution based on the overall gender-based violence against women in Mexico.

[21] Since the RPD decision was largely based on an adverse credibility finding – and the Applicants' appeal submissions made extensive arguments about why the RPD finding should be overturned – the Applicants submit that the RAD was legally required to make a specific

credibility finding. They say the RAD's failure to address their arguments means that the decision falls short of the responsive justification that *Vavilov* requires.

[22] The RAD is an error-correcting body; it must make an independent assessment of a claim and determine whether the RPD decision is marred by a reversible error: *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799 at para 47; *Rozas Del Solar v Canada (Citizenship and Immigration)*, 2018 FC 1145 at paras 122-125. The RAD applies a correctness standard of review: *Ibid*. In conducting its independent assessment, the RAD can make findings that differ from those reached by the RPD and its decision can be based on a different analysis than that of the RPD.

[23] Two questions arise if the RAD bases its decision on a new issue. The first question is whether the RAD breached procedural fairness by failing to provide the applicant with notice and an opportunity to respond to the new issue: *Etienne v Canada (Citizenship and Immigration)*, 2019 FC 1461 [*Etienne*] at para 13. A second question is whether the RAD provided sufficient justification for its conclusion based on the facts and the law, and related to that is whether it adequately responded to the submissions put forward by the parties: *Gomes v Canada (Citizenship and Immigration)*, 2020 FC 506 [*Gomes*] at paras 48 and 62. The requirement for the RAD to address the issues raised by the parties is emphasized in *Green v Canada (Citizenship and Immigration)*, 2016 FC 698 [*Green*] at para 33.

[24] The Applicants do not claim a denial of procedural fairness; instead, their submissions focus on the RAD's failure to respond to their extensive submissions on credibility. The

Applicants assert that this is a fatal flaw, because the RAD was required to assess the credibility of their evidence regarding their forward-looking risk. The RPD found that their claim was "a fabrication or at best a carefully planned scenario in Mexico when they returned in 2017." The Applicants challenged this in their written submissions to the RAD, and they argue this triggered a duty on the RAD to respond to their arguments.

[25] The Applicants submit that the RAD cannot side-step its duty by claiming to accept all of their evidence as credible. They also assert that the RAD's decision is based on a veiled credibility finding because if it accepted their narrative as true, the RAD was bound to find they had established a forward-looking risk of persecution by Mexican drug cartels.

[26] I am not persuaded. The RAD's decision clearly explains its reasoning, and it made specific finding that support its conclusion. The RAD was not compelled to make specific credibility findings because it concluded that the Applicants' evidence, even if believed in its entirety, was not sufficient to establish that they faced a risk on return to Mexico.

[27] The Applicants rely on the decisions in *Gomes* and *Green* in support of their argument on this point. In *Gomes*, the Court found that the very brief RAD decision was unreasonable, given the lengthy and detailed RPD decision and the similarly elaborate submissions made by the Applicants. The key finding in *Gomes* is that the RAD "failed to make explicit findings on any of the key elements of the case: it simply stated that the RPD had committed no errors" (at para 22). Applying the *Vavilov* framework, the Court concluded that the RAD's decision was unreasonable because it failed to "meaningfully grapple with the issues" (*Gomes* at para 48).

[28] In *Green*, the Court found that the fact that the applicants in that case had argued that the RPD's credibility findings on a particular issue were flawed "triggered the obligation on the RAD to consider the alleged errors on redetermination" (*Green* at para 30). The Court found the RAD decision in that case to be unreasonable, because it failed to address the central issues raised by the applicants on appeal.

[29] The Applicants argue that these decisions apply here: they submitted specific and detailed arguments about the RPD's credibility findings, but the RAD failed to meet its obligation to respond to their submissions.

[30] I find that *Gomes* and *Green* must be distinguished from the case at bar. In *Gomes*, the RAD failed to make or explain any of its key findings on the merits of the case. In *Green*, the RAD disagreed with the RPD's credibility findings but relied on its state protection analysis which itself was based on credibility. This inconsistency made the RAD's decision unreasonable: see the discussion of this specific point in *El- Hadi v Canada (Citizenship and Immigration)*, 2021 FC 1323 [*El-Hadi*] at para 51.

[31] In my view, the RAD decision in this case is not based on similarly flawed reasoning. The RAD decision summarizes the Applicants' submissions and explains its disagreement with an important element of the RPD's analysis regarding the nexus to a Convention ground relating to the gender-based claim (discussed below). The RAD applied a correctness test and engaged in an independent analysis of the Applicant's refugee claim based on the evidence in the record. It

explained why it was unnecessary to consider the Applicants' credibility, and this finding is supported by the case-law: see *Etienne* at para 15.

[32] There is a wealth of jurisprudence that supports the proposition that the RPD and the RAD do not need to make credibility findings if the evidence adduced by the applicant is not sufficient to support their refugee claim: see, for example, *Ferguson v Canada (Citizenship and Immigration)*, 2008 FC 1067 at paras 25- 27, and the discussion in *El-Hadi* at para 53 and the cases cited there. As stated by Justice Catherine Kane in *El-Hadi*:

> [43] The RAD was not required to assess and make a determination about Mr. El-Hadi's credibility. The RAD reasonably found that Mr. El-Hadi had simply not established his claims with sufficient reliable evidence. The RPD had made the same essential findings.
>
> [44] Contrary to Mr. El-Hadi's argument, the decision-maker is not required to assess an applicant's credibility if their evidence, whether credible or not, would not establish their claim.

[33] These decisions confirm that it may be reasonable for a decision-maker to state that they accept a claimant's evidence as credible, but nevertheless dismiss the claim because the evidence, even if believed, is not sufficient to establish more than a mere possibility of persecution under section 96 or a risk of harm under section 97 of the *IRPA*. That is what the RAD did here, and for the reasons discussed in the next section, I can find no basis to find its analysis to be unreasonable.

[34] Finally on this issue, I am not persuaded that the RAD made any veiled credibility finding. Although its use of the term "alleged" to describe the incidents that support the

Applicants' claim may have given rise to their concern that the RAD was doubting the veracity of their narrative, I do not find any meaningful indication of that in the RAD's analysis. Its wording may not have been perfect, but that does not make its decision unreasonable. In substance, the RAD accepted the Applicants' narrative as true but found that they had not established a risk of harm. That finding is based on a careful examination of the evidence rather than any veiled credibility finding.

[35] For these reasons, I am not persuaded that the RAD erred by failing to make a specific credibility finding. The credibility of an applicant's narrative lies at the heart of most refugee claims, and therefore the RAD will often be required to make a specific determination on that point. However, I am not persuaded that this is a mandatory element in all RAD decisions, even if the point is raised by the applicant's RAD submissions.

[36] Under *Vavilov*, the RAD is required to provide a responsive justification for its analysis, which involves demonstrating that it took the parties' submissions into account. In my view, that is what the RAD did here, and the RAD's explanation for why it was not necessary to address the Applicants' credibility arguments is consistent with the case-law on this point.

B. *The RAD's analysis of the Applicants' forward-looking risk is reasonable*

[37] The RAD found that the Applicants had not established a forward-looking risk of persecution upon their return to Mexico. Although it accepted that the Principal Applicants' family had experienced a series of tragic incidents, and that the Applicants themselves had been

threatened by three men in 2017, the RAD found that the evidence did not establish that they faced any personalized risk from the perpetrators of these incidents. It noted there was no evidence about who killed the nephews or the Principal Applicant's sister, nor any indication that the three men who threatened them in 2017 continued to be interested in pursuing them. On this point, the RAD found that the threats had proven hollow, noting that the Principal Applicant's "parents have not experienced any incidents since [the Applicants' departure from Mexico] despite the fact that they were present and involved in the incident, and subsequently took [the niece] after [the Applicants] left Mexico."

[38] The Applicants submit that the RAD required them to conclusively establish that the three men were members of a cartel, which is wrong in law because they only had to establish their claim on a balance of probabilities: *Nageem v Canada (Citizenship and Immigration)*, 2012 FC 867 at paras 24-25. They argue that the evidence clearly shows that their family has been repeatedly targeted by the cartels, and this is sufficient to establish a personalized risk of harm.

[39] The Applicants rely on *Correa v Canada (Citizenship and Immigration)*, 2014 FC 252 at para 46, which recognized that personal targeting "distinguishes an individualized risk from a generalized risk, resulting in protection under paragraph 97(1)(b) [of the IRPA]." They say that the evidence demonstrates that they and their family have been personally targeted by Mexican cartels, and the RAD erred in failing to find that they deserved protection.

[40] In addition, the Applicants argue that the text of section 97 makes clear that Parliament intended the three elements of the provision to be read together. Under their approach, section 97

protects individuals whose removal to their country of risk "would subject them personally… to a risk to their life or a risk of cruel and unusual treatment or punishment if… the risk would be faced by the person in every part of that country and is not a risk faced generally by other individuals in or from that country." The Applicants submit that the use of the connector "if" means that a decision-maker cannot stop at the personal risk element and must go on to assess a claimant's specific circumstances within a broader country context. They submit that their evidence meets this test, because they and their family had caught the attention of the cartels and they had faced – and continued to face – personalized risk of harm.

[41] I am not persuaded by the Applicants' argument that the RAD misunderstood or misapplied the test under subparagraph 97(1)(b)(ii) of the *IRPA*. The RAD applied the test as set out in the often-cited case of *Guerrero v Canada (Citizenship and Immigration)*, 2011 FC 1210 at para 26:

> [I]f a claimant is to be found to be a person in need of protection, then it must be found that:
>
> a. The claimant is in Canada;
>
> b. The claimant would be personally subjected to a risk to their life or to cruel and unusual punishment if returned to their country of nationality;
>
> c. The claimant would face that personal risk in every part of their country; and
>
> d. The personal risk the claimant faces 'is not faced generally by other individuals in or from that country' (followed recently in *Elverna v Canada (Citizenship and Immigration)*, 2020 FC 410 [*Elverna*] at para 15).

[42] The key finding by the RAD in applying this test was that the Applicants failed to demonstrate a personal risk flowing from the incidents they recount in their narrative. Once it came to this conclusion, the RAD was not required to continue to examine the question of generalized risk. The RAD's determination on this point is supported in the record. There is no indication that the three men who threatened the Applicants in 2017 continue to seek them, or are somehow connected to the other attacks on their wider family. The RAD also reasonably found the lack of threats or attacks against the grandparents who had taken in the niece despite the threats, was a relevant consideration.

[43] The RAD reasonably concluded that the incidents involving the other family members do not show that the Applicants themselves face a risk that would satisfy subparagraph 97(1)(b)(ii) of the *IRPA*. The lack of information about who perpetrated these acts of violence against the other family members, or that these individuals or the cartels they were allegedly associated with were seeking the Applicants, were relevant considerations for the RAD. In the absence of any evidence that connected these tragic incidents to the Applicants, the RAD's finding that they had not demonstrated a prospective risk of harm was reasonable. Although the Applicants disagree with the result, they have not pointed to any evidence that the RAD failed to consider.

[44] Based on these reasons, I find the RAD's conclusion that the Applicants had not demonstrated a prospective risk of harm under section 97 to be reasonable.

C. *The RAD's finding on gender-based violence is reasonable*

[45] The Associate Applicant's refugee claim was based, in part, on her fear of returning to Mexico as a woman. She said that she feared being targeted, kidnapped, raped, trafficked and murdered by drug cartels and organized crime groups in Mexico, pointing to the experience of her sister-in-law as well as country condition evidence showing a lack of effective state protection against gender-based violence.

[46] The RAD agreed with the Applicants that the RPD erred in finding that this allegation did not establish a nexus to a Convention ground. The RAD found the Associate Applicant's fears of gender-based violence were sufficient to bring her claim within the Convention, relying on *Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FCJ 250 at para 17. Women have been recognized as constituting a particular social group, and the fear of persecution likely to be committed against women in Mexico was sufficient, because sexual violence constitutes a serious violation of fundamental human rights and a denial of equality for women: *Josile v Canada (Citizenship and Immigration)*, 2011 FC 39 at para 28.

[47] The RAD applied *Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution*, noting it states that "the central factor in such an assessment is… the claimant's personal circumstances in relation to both the general human rights record of her country of origin and the experiences of other similarly situated women." Based on the Associate Applicant's personal circumstances and the objective country condition evidence, the RAD concluded that she had not established more than a mere possibility of persecution based on her

gender. The key finding on this point is that the majority of the evidence on violence against women pertains to spousal assaults and domestic abuse, which falls outside the Associate Applicant's allegation that she faces gender-based persecution from cartels.

[48] The Applicants submit that the RAD unreasonably disregarded the evidence, including the Associate Applicant's testimony about her fears based on her knowledge of Mexico and the experience of her sister-in-law. The fact that a close family member had experienced horrific gender-based violence should have been accorded substantial weight, according to the Applicants. A history of persecution against a close family member can be a basis to predict a future risk of harm: *Fernandopulle v Canada (Citizenship and Immigration)*, 2005 FCA 91 at paras 21-23.

[49] The Applicants argue that the real issue the RAD needed to consider is whether the evidence showed that gender-based violence in Mexico constituted a serious violation of human rights, given the objective country condition evidence combined with the Associate Applicant's narrative. They submit that it was unreasonable for the RAD to find that she did not face a forward-looking risk of persecution based on her gender.

[50] I am unable to conclude that the RAD's analysis of the risk of gender-based persecution is unreasonable. It applied the proper legal tests to the evidence in the record and concluded that the Associate Applicant had not met the test. The Applicants do not point to evidence that the RAD ignored, but rather they assert that the RAD failed to give certain aspects of the evidence sufficient weight. That is not a basis to find a decision to be unreasonable.

[51] Under the *Vavilov* framework, a reviewing court will interfere with a decision-maker's findings of fact only in exceptional circumstances. The Applicants have not demonstrated that this is such a case. The question is not whether the Court would have reached the same conclusion as the decision-maker. Instead, under *Vavilov* the question is whether the analysis and outcome are justified based on an explanation that is transparent and intelligible, in light of the evidence. In my view, the RAD's analysis of the gender-based persecution claim advanced by the Associate Applicant is reasonable because the analysis is clear, based on the evidence in the record, and it explains the outcome reached. That is all that reasonableness requires.

[52] For these reasons, there is no basis to interfere with the RAD's finding that the Applicants had failed to establish more than a mere possibility of gender-based persecution on a return to Mexico.

D. *Conclusion*

[53] For the reasons set out above, the application for judicial review will be dismissed.

[54] There is no question of general importance for certification.

JUDGMENT in IMM-5011-20

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is dismissed.

2. There is no question of general importance for certification.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5011-20
STYLE OF CAUSE:	LUCIO VIDAL FERNANDEZ ET Al. v MCI
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	JUNE 15, 2022
REASONS FOR JUDGMENT AND JUDGMENT:	JUSTICE PENTNEY
DATED:	JANUARY 8, 2024

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