

CANADA / JUDGMENT

VB9-02694

COURT

Refugee Appeal Division

DECIDED

9 September 2020

Research copy typeset by Esheria. Not court-issued or certified. A source URL was not supplied in the case record.

RAD File / Dossier de la SAR : VB9-02694 VB9-02695 Private Proceeding / Huis clos Reasons and decision ? Motifs et décision Persons who are the subject of the appeal XXXX XXXX XXXX XXXX XXXXXXXX XXXX XXXX Personnes en cause Appeal considered / heard at Vancouver, BC Appel instruit / entendu à Date of decision September 9, 2020 Date de la décision Panel Maryanne Kingma Tribunal Counsel for the persons who are the subject of the appeal Tess Acton Barrister and Solicitor Conseil des personnes en cause Designated representative N/A Représentant(e) désigné(e) Counsel for the Minister N/A Conseil du ministre REASONS FOR DECISION
OVERVIEW

- [1] XXXX XXXX XXXX XXXX (Principal Appellant) and XXXX XXXX XXXX (Associate Appellant) are citizens of Mexico. They are appealing against the Refugee Protection Division (RPD) decision that dismissed their claims for refugee protection.
- [2] The RPD decision is set aside and the claims are referred back to the RPD for redetermination.
- [3] As explained in this decision, the Appellants have provided new evidence and raised new issues that should, for fairness, be adjudicated in the first instance by the RPD. DIRECTIONS TO THE RPD
- [4] The claim should be heard by a different panel if possible.
- [5] The referral back is not an instruction to allow or to dismiss the claim. If the Refugee Appeal Division (RAD) could fairly allow or dismiss the appeal on the merits, it would do so.

BACKGROUND

The allegations and RPD decision

- [6] The Appellants lived in the United States of America (USA) from 1993 onward and have three US-born children. In 2013, the Principal Appellant returned to Mexico and in 2014 the Associate Appellant joined him.

- [7] Attempts by the Appellants to re-enter the USA in XXXX and XXXX 2015 were unsuccessful. The Appellants say that, in November 2015, they arranged with some coyotes for travel to the USA but were kidnapped and that the coyotes stole their identity documents. After around five days of confinement, a ransom was paid and the Appellants were released. The Appellants went to the hospital in San Luis Rio Colorado for one day before returning to the home of the Associate Appellant's father in San Vincente.
- [8] According to the Basis of Claim (BOC), between November 2015 and XXXX 2017 when they flew to Canada, the Appellants worked as XXXX XXXX support in Puerto Vallarta. The Principal Appellant also did odd jobs for a woman named XXXX XXXX, who eventually paid for airline tickets for their flights to Canada in XXXX XXXX XXXX 2017.
- [9] The Appellants qualified for legal aid assistance in Canada and filed their claims in November 2017. Their RPD hearing was on January 21, 2019 with a written decision on March 19, 2019. The RPD found that the Appellants have an Internal Flight Alternative (IFA) in Mexico City. The basis for this appeal
- [10] The Appellants allege that their Counsel for the RPD process was incompetent and did not represent them properly. In affidavits submitted with this appeal, they say that their former Counsel did not gather and submit evidence to the RPD about the nature of their mistreatment during the kidnapping, particularly of the Associate Appellant, or about the related trauma that makes a return to Mexico impossible. Evidence for the appeal includes their own affidavit evidence, medical information, and country documents about the nature of such kidnappings.
- [11] The Appellants also say their former Counsel failed to advise them of their appeal rights after the claims were refused.
- [12] The RPD decided the claims pursuant to subsection 97(1) because there was no evidence of a nexus to any section 96 Convention ground. The determinative issue for the RPD was an IFA in Mexico City. Regarding the first prong for IFA, the RPD found that the evidence did not support the allegations that the coyotes would seek out and be able to find the Appellants in Mexico City. Regarding the second prong, the RPD found the Appellants did not show that it would be unreasonable for them to relocate to Mexico City.

ANALYSIS

A new basis of claim

- [13] The RPD decision is set aside and the matter returned to the RPD because the Appellant's have raised a different basis for the claim that should be adjudicated by the RPD in the first instance.
- [14] The RPD assessed the claims under section 97(1) based on the evidence before it that did not give rise to a Convention ground.

- [15] The Appellants have presented arguments that require a different framework for assessing their claims. The arguments and evidence presented on appeal seek a section 96 assessment for fear based on a Convention nexus of gender-based persecution in relation to the Associate Appellant.
- [16] I have not decided but presume the admissibility of new evidence that has been presented in affidavits, medical letters and country documents because, when a matter is referred back to the RPD, the question of the admissibility of evidence at the RAD becomes moot. That evidence can be submitted to the RPD when it rehears the case. Balancing the interests of finality and fairness
- [17] After the RAD sets aside an RPD decision, it must decide between referring a matter back to the RPD for re-determination or substituting its own decision.
- [18] The competing interests between a substantive decision at the RAD and referring a matter back to the RPD are finality and fairness. Interests of finality encourage the RAD to substitute a determination on the merits when possible. Fairness engage concerns about the ability to fully present a claim, which has limits at the RAD in relation to new evidence. In addition, appeal rights are extinguished if the RAD determines a claim.
- [19] In the circumstances of this case, the balance favours interests of fairness. Therefore, I find that the matter should be returned to the RPD for re-determination.
- [20] The main fairness consideration is that the arguments and evidence presented in the appeal raise a new issue that was not adjudicated by the RPD.
- [21] In general, the RAD is well equipped to consider and make its own findings about evidence. The nature of an appellate scheme including the RAD is to consider arguments about how evidence was weighed by the prior decision maker and to confirm or set aside the RPD's evidentiary findings and make new findings of its own.
- [22] Even when new evidence is admitted by the RAD, the matter of fairness can be accommodated because the RAD may convene an oral hearing to assist in the proper assessment of evidence and give parties a fair opportunity to present their case before making a final determination. However, there is a material difference between the issues that were decided by the RPD and the issue raised on appeal. The section 96 issue requires an adjudication in the first instance, which is most appropriately handled at the RPD. The RPD is well-equipped to enquire about the new allegations and to weigh the relevant evidence, including to examine why it was not previously tendered. There is increased complexity that enlarges the scope for error and, accordingly, makes appellate oversight more important. RAD oral hearings

- [23] I have considered the RAD's oral hearing authority carefully but find it does not mitigate the fairness concerns that favour a referral back to the RPD. The combined limits of sections 110(6)1 and 111(2)(b) of the Immigration and Refugee Protection Act (IRPA) 2 support the view that when the RAD conducts an oral hearing, the scope of that hearing is limited to the issues that were raised at the RPD.
- [24] In this case, the Appellants are not just presenting new evidence but have raised new issues for adjudication. Distinguishing between issues and evidence is critical in any adjudication: issues are the questions that must be addressed while evidence is the vehicle by which those questions are answered. The RAD can consider and address new evidence fairly, but when a new issue is presented, the interests of fairness may favour returning the matter to the RPD for determination, as in this case. The Appellants are now alleging a materially different claim based on section 96 that engages a new issue and more complex analysis, including the application of Chairperson's guidelines.
- [25] The final decision on the claims may or may not be different from what was previously decided - the issues and evidence have not been examined yet. Fairness favours returning the matter to the RPD for that re-determination. The request for a return to the RPD because of Counsel incompetence is denied
- [26] The only remedy requested on appeal was for the matter be returned to the RPD for re-determination based on arguments about procedural fairness.
- [27] A finding of breach of procedural fairness does not necessarily mean that a matter must be returned to the RPD. The RAD is not a judicial review: it conducts an appeal on the merits and can substitute a determination that ought to have been made. Thus, breaches of natural justice can be cured at the RAD.
- [28] The appeal arguments are based on and include evidence about a complaint that was filed with the relevant law society against the Appellants' former Counsel. The chronology of events is as follows:
- a. The RPD decision was issued on March 19, 2019.
 - b. A complaint (undated) was made to the Law Society, in the Appellant Record at pp. 185-186.
 - c. The Appeal Record was filed on May 30, 2019, with affidavits from the Appellants alleging the Counsel's incompetence, and providing additional evidence for the claims.
 - d. Since perfecting their appeal, the Law Society issued its decision, on March 5, 2020, regarding the complaint. The law society confirms that the complaint concerning the failure to advise the Appellants about their appeal rights after the RPD decision had merit but that the other complaints about inadequate representation were not supported by the evidence.

- [29] A failure to provide information about appeal rights would reasonably support a procedural concern such as an extension of time to file the appeal but that is now moot because the Appeal Record was filed and accepted without issue.
- [30] The law society concluded that allegations of inadequate representation were not supported. That undermines the argument that Counsel incompetence led to a breach of procedural fairness at the RPD.
- [31] I have, however, decided that the matter should be referred back to the RPD in the interests of fairness, for reasons not related to the argument about former Counsel's alleged incompetence.

CONCLUSION

- [32] For the reasons provided, the matter is returned to the RPD for re-determination, with directions provided at the beginning of this decision. (signed) Maryanne Kingma Maryanne Kingma September 9, 2020 Date 1 Immigration and Refugee Protection Act (IRPA), SC 2001, c.27, section 110(6).
- (6) The Refugee Appeal Division may hold a hearing if, in its opinion, there is documentary evidence referred to in subsection (3)
- (a) that raises a serious issue with respect to the credibility of the person who is the subject of the appeal;
- (b) that is central to the decision with respect to the refugee protection claim; and
- (c) that, if accepted, would justify allowing or rejecting the refugee protection claim. 2 IRPA; section 111(2). 111(2) The Refugee Appeal Division may make the referral described in paragraph (1)(c) only if it is of the opinion that
- (a) the decision of the Refugee Protection Division is wrong in law, in fact or in mixed law and fact; and
- (b) it cannot make a decision under paragraph 111(1)(a) or (b) without hearing evidence that was presented to the Refugee Protection Division.
-
-

RAD File / Dossier de la SAR : VB9-02694 VB9-02695 RAD.25.02 (January, 2020) Disponible en français 2 Immigration and Refugee Board of Canada Refugee Appeal Division Commission de l'immigration et du statut de réfugié du Canada Section d'appel des réfugiés RAD.25.02 (January, 2020) Disponible en français

Source & reproduction note

Judgment wording, source notices and original paragraph numbers are retained. Esheria supplies the layout and this PDF's page numbers; these are not the source pagination. This is a research copy, not an official or certified court document. Check quotations, citations and publication restrictions against the original source before relying on it.

CASE PAGE <https://chat.esheria.ai/case-law/canada/InternalFlightAlternativeIFA-refugee-appeal-division-2020--6a40c3b64cf2c72690fb2edc>

A source URL was not supplied in the case record. Consult the court's original record before reliance.

Prepared on 29 October 2026 · Esheria