

Federal Court



Cour fédérale

Date: 20151127

Docket: IMM-678-15

Citation: 2015 FC 1326

Ottawa, Ontario, November 27, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

CRUZ ALONSO MENDEZ SANTOS

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicant is a 28 year old Honduran citizen who seeks refugee protection in Canada due to fear of his violent and abusive step-father and the MS-18 gang, of which his step-father is the local leader in Cacahuapa, Comayagua, Honduras. He arrived in Canada on July 31, 2014, after crossing the Ambassador Bridge in Windsor, Ontario, and immediately claimed protection. Because the Applicant has relatives in Canada, his claim was determined to be an exception to

the safe third country rule and, consequently, referred to the Refugee Protection Division [RPD] of the Immigration and Refugee Board.

[2] In its decision dated January 12, 2015, the RPD found the Applicant not to be credible and therefore determined that he was neither a Convention refugee nor a person in need of protection. The Applicant now applies for judicial review of the RPD's decision pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]*. He asks the Court to set the RPD's decision aside and return the matter to the RPD for re-determination by another member of the RPD.

II. Facts

[3] The Applicant is the third of his mother's 11 children. In 1994, his family began living with Gabriel Virgilio Castro Turcios, the Applicant's step-father. One night in 1994, Mr. Turcios came home drunk and violent, and the family hid in the forest for the night; the Applicant, then about seven years old, snuck back into the house for blankets but was caught by Mr. Turcios, who beat him and chased him until the Applicant tripped and hit his head on a rock. The Applicant's mother took him on horseback to the hospital where the Applicant remained in a coma for six days. The Applicant says he experiences flashbacks, nightmares, and sleepwalking as a result of this injury.

[4] When the Applicant was 10, he witnessed Mr. Turcios whipping his mother with a belt. Mr. Turcios would also burn the Applicant's family members with cigarettes and he impregnated the Applicant's half-sister, Delmy, who is Mr. Turcios' daughter. One of the Applicant's

brothers, Leonel, called the police one time when Mr. Turcios beat up the Applicant's mother, but no police response was forthcoming. The Applicant and his siblings would sometimes escape the violence by staying in their uncle's house in a village about an hour away from their house; that place of refuge disappeared when their uncle sold the property and moved to the United States. When the Applicant was 13, he witnessed a murder by gang members of a man he knew. When the Applicant was 14, Mr. Turcios expected the Applicant to join the MS-18 gang.

[5] In 2004 and 2006, two of the Applicant's brothers, Angel and Leonel respectively, fled to the United States. In May 2006, when the Applicant was 19, he too fled to the US after hearing rumors that the MS-18 gang was going to kill him. He entered the US illegally via Mexico in May 2006; he spent two months in Texas, and then went to North Carolina where Angel, his older half-brother, lived. A friend of his mother also lived there. The Applicant did not apply for refugee protection after he arrived in the US because the son of his mother's friend had been deported to Honduras after a failed refugee claim. Also, the Applicant's younger brother, Leonel, had been in immigration detention in January 2006 because he was a minor, and was told by immigration officials it was not in his best interests to apply for refugee protection. The Applicant thus decided to remain illegally in the US.

[6] While in the US without status, the Applicant witnessed the murder of a man called Ricardo Torres in March 2012, and the attempted suicide of his mother's friend, who was later convicted of the murder of Ricardo Torres. In January 2014, the Applicant was robbed and assaulted by a woman with a taser gun; his call to the police resulted in the woman's arrest. The police did not check the Applicant's immigration status during the arrest, but this incident

increased his concern about his undocumented status in the US. Consequently, as a result of his experiences in the US, and because his brothers Angel and Leonel were now in Canada, the Applicant came to Canada in July 2014 and sought protection.

[7] On September 24, 2014, the Applicant appeared for his hearing before the RPD. The Applicant testified that his step-father was still threatening him despite his departure from Honduras; one time when the Applicant called his mother Mr. Turcios grabbed the phone after he found out the Applicant was on the line and said he was “just waiting for the day I return, to kill me.” His testimony overall was such that his legal counsel was afforded time to obtain and subsequently submit psychological reports as to the Applicant’s mental capacity.

[8] On November 3, 2014, the Applicant was seen by Dr. Yawny-Burnett, a psychologist, who found that the Applicant was suffering Post Traumatic Stress Disorder [PTSD], moderate depression, and severe anxiety. On November 24, 2014, the Applicant completed further psychological testing with Dr. William Ross who, after examining and testing the Applicant for about eight hours, found that the Applicant’s Intelligence Quotient fell into the “severely Intellectually Deficient” range (i.e. a full scale IQ of 49 (< 1st percentile) in relation to similarly-aged population), and in other areas the Applicant was found to be “moderately” or “mildly” Intellectually Deficient. Dr. Ross noted the discrepancies in the Applicant’s self-reported history and expressed caution about the accuracy of events as recounted by the Applicant. Dr. Ross concluded that there was little doubt that the Applicant has suffered trauma and diagnosed him as suffering from PTSD and major depressive disorder. These psychological reports were submitted to the RPD which then proceeded to render its decision in reasons dated January 12, 2015.

III. The RPD's Decision

[9] As part of his case before the RPD, the Applicant filed a copy of the personal information form [PIF] filed by his brother Leonel in connection with Leonel's successful claim for Canada's protection; he also filed a copy of the RPD's reasons for its decision in Leonel's case. Because Leonel had not mentioned the Applicant in his PIF or in his narrative, the RPD gave no weight to these documents and drew an adverse inference from the fact the Applicant had filed these documents.

[10] After finding that the Applicant's claim did not have a nexus with a Convention ground, the RPD next assessed the Applicant's credibility. It acknowledged the *Maldonado* presumption that a claimant speaks the truth unless there is reason to doubt a claimant's truthfulness (*Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302). The RPD found, however, that the Applicant presented several credibility problems, the most significant of which was his continuing to live in the family home for five years, from ages 14 to 19, apparently without serious harm coming to him from either the gang or Mr. Turcios. In the RPD's words, this was "not tenable, plausible, reliable or convincing. Instead, I find it is dubious and even absurd."

[11] Other credibility issues included: the "ability of the claimant to think of his feet... contrary to the suggestions made by various reports..."; the Applicant's inability to state whether he was 17 or 19 when he left Honduras, with his vague and inconsistent responses in this regard leading to an adverse inference; Leonel's failure to mention the Applicant was inconsistent with

the Applicant's story, leading to an adverse inference; the Applicant's failure to make an asylum claim during the eight years he was in the US, including his failure to contact an uncle in New York, led to a further adverse inference; the lack of clarity and cogency in the Applicant's testimony as to how often and for how long he was absent from his home in Honduras; the inconsistent dates given by the Applicant to the psychologist about when he left Honduras led the RPD to make another adverse inference; and the Applicant's failure to give satisfactory evidence or corroboration of his problems with the MS-18 also led to an adverse inference.

[12] The RPD determined that, although the Applicant's eight years in the US without making a claim there for asylum was not determinative, it was nonetheless important in assessing his credibility and subjective fear. The RPD found that the Applicant's failure to claim in the US and his failure to explain the delay negated his subjective fear. The RPD stated that, contrary to the Applicant's explanation, it would be unreasonable for a person fleeing for their life to do nothing while facing the prospect of deportation.

[13] With respect to the psychological reports, the RPD found that Dr. Yawny-Burnett's diagnosis of PTSD, moderate depression, and extreme anxiety, was insufficient to offset the negative credibility findings, particularly as there were discrepancies in the Applicant's self-reported history. As for Dr. Ross's report, the RPD said he had not conducted any tests to expose deliberate attempts to fabricate evidence, and also noted that Dr. Ross had wondered whether the Applicant's account had been entirely accurate. The RPD assigned little weight to the psychologists' reports, stating that:

[61] ... It may be that the claimant suffers from depression, anxiety and post-traumatic stress and is of the low end of average

intelligence; however, I find that the claimant was intelligent enough to make his way from Honduras to the US via Mexico alone, live and work illegally in the US for 8 years and make his way to Canada alone. For these reasons, I find that the psychological reports do not offset my credibility findings.

[62] A psychological report “cannot possibly serve as a cure-all for any and all deficiencies in a claimant’s testimony” and where such a report is submitted and there are concerns regarding the claimant’s testimony, “opinion evidence is only as valid as the truth of the facts on which it is based.” I find that I can assign little weight to the psychological reports tendered after the hearing, with respect to the claimant’s credibility. [footnote omitted]

[14] Lastly, the RPD found there were no compelling reasons with respect to the Applicant’s claim. He did not meet the requirement of subsection 108(4) of the *IRPA* because the RPD did not find him to be a Convention refugee or person in need of protection when he left Honduras. Furthermore, the RPD found that the head injury suffered by the Applicant when he was seven years old was not a compelling reason, and that he did not suffer from any psychological trauma that constitutes such a reason.

IV. Analysis

[15] Although the Applicant raises several issues concerning the RPD’s decision, this application for judicial review boils down to just one issue: was the RPD’s decision reasonable?

[16] Although matters of credibility “are at the very heart of the task Parliament has chosen to leave to the RPD” (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 60 (available on CanLII)), and while it is well established that the Court affords significant deference to the RPD’s findings with respect to credibility and the assessment of evidence, the

RPD's assessment of the Applicant's credibility in this case was unreasonable and cannot be justified in the face of the two psychologists' reports. The psychologists' reports before the RPD, notably that of Dr. Ross, belie the RPD's findings that the Applicant was "intelligent enough" to make his way to Canada and that he "is of the low end of average intelligence". These findings fly in the face of Dr. Ross' report which, in the penultimate paragraph, concluded that:

Mr. Mendez Santos presents a confusing history which can be explained, in part, to significant limitations in cognitive ability and mnemonic impairment. Significant deficits in his immediate and short-term recollection of both verbal and visually-present information are noted which could conceivably stem from cranial trauma or from an impoverished, unenriched early environment. In all likelihood, some combination of the two would be most applicable to this man.

[17] I agree with the Applicant that Dr. Ross' report provides reasonable explanations for the lack of coherency in the Applicant's testimony. The RPD's analysis of Dr. Ross' report was selective and downplayed the Applicant's significant cognitive impairments. The RPD failed to appreciate the significance of Dr. Ross' report when it stated that the Applicant "is of the low end of average intelligence." A fair and fulsome reading of this report shows that the Applicant's cognitive abilities are far from the low end of average intelligence; at best, they are those of a child in grade 2 or 3, and the Applicant's capacity to understand verbally-presented information in sentence format is at the level of a child in kindergarten.

[18] In this case, the RPD's adverse credibility finding was not reasonable because the psychological conditions described in the Ross report provide an explanation for why the Applicant's testimony was at times contradictory, vague and lacked clarity and the RPD failed to reasonably weigh this objective and independent evidence against their credibility concerns. This

report was based on independent and objective testing. Dr. Ross conducted an array of tests in order to assess the Applicant's mental capacity, notably, Wechsler Adult Intelligence Scale-IV, Wechsler Memory Scale-IV, Raven's Standard Progressive Matrices, and other visual and verbal tests. The RPD faulted Dr. Ross and his report because "he did not conduct any tests to expose deliberate attempts to fabricate evidence," despite Dr. Ross finding that "the overall effort put forth by Mr. Mendez Santos is viewed to be such that the obtained results are considered a reasonably accurate reflection of his current functioning." Presumably, the RPD may have given more weight than it did to Dr. Ross' report had he conducted a polygraph test as well.

[19] Neither Dr. Yawny-Burnett's report nor that of Dr. Ross is based essentially or only upon the Applicant's story. Each report is based on clinical observations drawn independently of the Applicant's credibility. This uncontradicted psychological evidence suggests that, regardless of whether the Applicant was fabricating his self-history, he nonetheless has serious deficiencies in his cognitive capacities. There was no other evidence before the RPD about the Applicant's intellectual deficiencies beyond the panel member's own observation of the Applicant's testimony and his responses to questions. It was not reasonable for the RPD to discount the psychological evidence in this case when that very evidence provides reasonable explanations for the lack of coherency in the Applicant's testimony. The RPD essentially performed its analysis backwards: instead of using the psychological reports to assess the Applicant's credibility, the RPD drew conclusions about credibility and then used those conclusions to throw away the reports (see: *Belahmar v. Canada (Citizenship and Immigration)*, 2015 FC 812, at paras 7 to 9).

V. Conclusion

[20] For the reasons stated above, this application for judicial review is allowed and the matter is returned for re-determination by a different panel member of the RPD. Neither party suggested a question for certification; so, no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that: the application for judicial review is allowed and the matter returned for re-determination by a different panel member of the Refugee Protection Division of the Immigration and Refugee Board; and no serious question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-678-15

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