

Federal Court



Cour fédérale

Date: 20170510

Docket: IMM-4299-16

Citation: 2017 FC 485

Ottawa, Ontario, May 10, 2017

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

YUNAURYS TERRERO FUENTES

Applicant

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP CANADA**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] Yunaury Terrero Fuentes seeks judicial review of a decision of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB]. The RAD dismissed Mr. Fuentes' appeal of a decision of the Refugee Protection Division [RPD] of the IRB, and confirmed that he is neither a Convention refugee nor a person in need of protection pursuant to ss 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] Having found Mr. Fuentes' oral testimony to be consistent with the documentary evidence, and the documentary evidence to be genuine, the RAD unreasonably rejected Mr. Fuentes' refugee claim on the sole ground that it was not plausible. The application for judicial review is therefore allowed.

II. Background

[3] The complicated series of events underlying Mr. Fuentes' claim for refugee protection was succinctly summarized by the RAD:

[3] In January 2014, the Appellant joined Cobalt Refinery Co. as an accountant and financial analyst, based in Fort Saskatchewan. He transferred from the venture's sister company in Cuba, Moa Nickel.

[4] In Fort Saskatchewan, the Appellant joined a "mission" of Cuban nationals led by Delvia Acosta. One of his colleagues was Esteban Caballero, a close friend and, inadvertently, the alleged cause of the Appellant's subsequent problems.

[5] On April 5, 2015, Caballero traveled back to Cuba per his rotation schedule. He had a meeting with a Commission representing the Company, the Communist Party and state security. They alleged that Caballero had violated procedure by becoming engaged to a woman in Canada whose sister was a Cuban defector. On April 17, 2015, the Mission announced that Caballero was suspended from the Mission and would not be returning to Canada.

[6] On June 21, 2015, the Appellant rotated back to Cuba. He met with Caballero, who told him that he had been transferred from the Mission and demoted.

[7] On June 25, 2015, the Appellant received a call from the leader of the Mission, Delvia Acosta, enquiring about Caballero's bank account in Canada. Apparently, the account had been cleared out, and the funds transported to Cuba without her authorization and in

violation of policy. However, the Appellant denied having any information or participation in that transaction and spoke to Caballero, who stated that bank withdrawals required Acosta's coordination and that his money, as far as he knew, remained in Canada.

[8] The Appellant and Caballero then called Acosta. Caballero spoke of an agreement he had made with Acosta one month previously, wherein his funds would be withdrawn via a debit card, which he had provided to his fiancée's mother prior to her visit to Canada. These funds would then be brought back to Cuba. Acosta acknowledged this arrangement had been made and asked the Appellant to be discreet about it.

[9] On June 26, 2015, Acosta called Caballero and requested that the cash withdrawn from his account by his brother-in-law Adolis, be handed to her rather than brought home, so that she could make deposits into "La Remese", an obligatory accounting, a sum calculated from the salaries paid to Cubans working abroad minus deductions for taxes and expenses, with the balance to be forwarded.

[10] On July 3, 2015, the Appellant was brought to a Commission meeting where he was questioned about violating money transfer protocols and of associating with Cuban defectors in Canada. The Appellant denied wrongdoing. Regarding the money, he explained that the funds were taken by Caballero's in-laws and given to Delvia Acosta.

[11] Regarding visits with politically suspect Cubans, the Appellant acknowledged that he sometimes attended his friend Caballero's social engagements, but merely out of respect. The Commission finished its questioning and said that they would be in touch with the Appellant later.

[12] On July 5, 2015, the Appellant went to the airport for his scheduled flight to Canada and found that his ticket had been cancelled. However, he obtained a rebooking and flew to Toronto, where he found that the hotel for his overnight stay had also been cancelled.

[13] The Appellant reported for work on July 7, 2015 and tried to meet with Acosta, who stated that she was too busy and the following day, she told him she was on her way to Cuba.

[14] The Appellant then contacted Acosta's assistant, who confirmed that Acosta had cancelled both the ticket and the hotel. On July 20, 2015, after her return from Cuba, Acosta met with the Appellant and she told him that everything was fine with the Commission and to forget about it.

[15] On August 5, 2015, however, the Appellant received a letter from Caballero revealing that the Appellant was suspended or about to be suspended, on allegations of improperly withdrawing and transporting Caballero's funds, and for showing "ideological deviation" through socializing with certain Cuban people.

[16] Fearing that his next rotation home would see him being punished for these transgressions, despite his explanations, the Appellant decided to defect from the Mission and seek protection in Canada on August 15, 2015.

[17] The Appellant has subsequently learned that he has been denounced for abandoning the Mission, expelled from the Communist Party, as well as being branded a traitor at a meeting of the Committee for the Defence of the Revolution held in the presence of his neighbours.

III. Decision of the RPD

[4] The RPD heard Mr. Fuentes' application for refugee status on April 20, 2016, and dismissed it on June 6, 2016. The RPD's primary concern was the implausibility of the alleged arrangement between Ms. Acosta and Mr. Caballero regarding the withdrawal of Mr. Caballero's earnings in Canada and their transfer to Cuba. The RPD also found that the signature on the letter purporting to be from Mr. Caballero was inconsistent with the one that appeared on Mr.

Caballero's passport and other documents that were submitted in support of Mr. Fuentes' refugee claim. Finally, the RPD concluded that the term of imprisonment Mr. Fuentes might face if he returned to Cuba would not be persecutory.

[5] Mr. Fuentes appealed the RPD's decision to the RAD.

IV. Decision of the RAD

[6] In a decision dated September 21, 2016, the RAD dismissed Mr. Fuentes' appeal and confirmed the decision of the RPD that he is neither a Convention refugee nor a person in need of protection pursuant to ss 96 and 97 of the IRPA. This is the decision that is challenged in the present application for judicial review.

[7] The RAD agreed with the RPD's implausibility findings, and also noted that there was no evidentiary basis for the alleged withdrawal of funds from Mr. Caballero's bank account. The RAD described this transaction as "the most significant aspect" of the claim. However, the RAD disagreed with the RPD's finding that the documents submitted by Mr. Fuentes in support of his claim were fraudulent. Instead, the RAD characterized the documents as "not helpful". The RAD confirmed that the treatment Mr. Fuentes might face if he returned to Cuba would not amount to persecution.

V. Issues

[8] This application for judicial review raises the following issues:

- A. Did the RAD reasonably reject Mr. Fuentes' refugee claim on the ground that it was not plausible?

- B. Did the RAD reasonably determine that the treatment Mr. Fuentes might face if he returned to Cuba would not amount to persecution?

VI. Analysis

[1] The RAD's assessment of the evidentiary record involves questions of mixed fact and law, and is subject to review by this Court against the standard of reasonableness (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35). The Court will intervene only if the decision falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[2] The RAD's determination of whether a law of general application is persecutory is subject to review by this Court against the standard of correctness (*Gonzalez Salcedo v Canada (Citizenship and Immigration)*, 2014 FC 822 at para 20 [*Gonzalez*]).

A. *Did the RAD reasonably reject Mr. Fuentes' refugee claim on the ground that it was not plausible?*

[3] Mr. Fuentes emphasizes that the RAD found his testimony to be detailed and consistent with the documents he presented. He maintains that a refugee claimant's testimony is presumed to be true unless there is valid reason to doubt its truthfulness (citing *Maldonado v Canada (Employment and Immigration)*, [1980] 2 FC 302 (CA)).

[4] Mr. Fuentes says that a refugee claim may be rejected solely on the ground of implausibility only where it is clear that the events are unlikely to have occurred in the manner alleged (citing *Aguilar Zacarias v Canada (Citizenship and Immigration)*, 2012 FC 1155 at paras 10-11).

[5] According to the RAD:

[32] The most significant concern [...] is the implausibility of the supposed arrangement between Delvia Acosta and Esteban Caballero, which would see earnings withdrawn in Canada by a debit card and then carried to Cuba. This scheme was allegedly confirmed to the claimant over the phone by Acosta herself.

[6] The Minister of Citizenship and Immigration argues that this key finding was reasonable, and was based on inferences that were supported by the record: (a) Cuba has enacted strict financial controls on workers who earn foreign wages; (b) employers, including international businesses and organizations, are generally prohibited from contracting with or paying workers directly; and (c) there was no evidence that transporting cash to Cuba is routinely done by Cuban workers in Canada. The Minister says that all of the RAD's findings were reasonable, rational and based on evidence found in the record, including Mr. Fuentes' failure to provide corroborating evidence of the withdrawal of funds from Mr. Caballero's Canadian bank account.

[7] I agree with Mr. Fuentes that only one of the three inferences underlying the RAD's key finding of implausibility is clearly supported by the record. There is no dispute that Cuba has enacted strict financial controls on workers who earn foreign wages. The basis for the inference that employers, including international businesses and organizations, are generally prohibited

from contracting with or paying workers directly was the U.S. Department of State's *Cuba 2014 Human Rights Report*. However, the passage cited relates to the conduct of foreign companies in Cuba, not Cuban companies in other countries. The absence of evidence that Cuban workers in Canada routinely transport cash to Cuba was inconclusive, and did not contradict Mr. Fuentes' account of the events.

[8] The RAD confirmed the RPD's finding that it made no sense for Mr. Fuentes to continue working at Cobalt after his airline ticket, hotel reservation and rental car booking had allegedly been cancelled. But his evidence was that the Cuban authorities had not yet made a decision regarding his future when he returned to Fort Saskatchewan. Mr. Fuentes notes that Mr. Caballero did not face any consequences for his actions until he was rotated back to Cuba in the normal course. One of the documents Mr. Fuentes presented in support of his claim was a copy of the cancelled airline ticket.

[9] The RAD also confirmed the RPD's finding that Mr. Fuentes was already in Cuba when Ms. Acosta discovered that Mr. Caballero's Canadian bank account had been emptied, and this should have been sufficient to exonerate Mr. Fuentes in the eyes of Cuban authorities. But Ms. Acosta made her discovery in early June 2015, and Mr. Fuentes did not return to Cuba until July 2015.

[10] Another troubling aspect of the RAD's decision was its treatment of the documentary evidence. The RAD held as follows:

[34] The RAD [...] does, however, concur with the Appellant that the documents themselves cannot be said to be fraudulent.

However, it is their probative value, which the RPD was assessing. In this regard, the RAD agrees that they do not establish the material allegations of the claim. Although corroborative evidence is not an absolute requirement, when the allegations are called into question, it is all the more significant to provide some corroboration as the onus is on the Appellant to establish his allegations. The foregoing corroborative evidence is not helpful in doing so.

[11] Mr. Fuentes' documentary evidence included statements from his wife and Mr. Caballero confirming that he was under investigation in Cuba for his alleged involvement in the improper transfer of Mr. Caballero's funds, and that he would be at risk if he returned to that country. It is difficult to understand how the RAD could accept this documentary evidence as genuine, but conclude that it was "not helpful" in establishing Mr. Fuentes' claim.

[12] There are aspects of Mr. Fuentes' narrative that are puzzling, and questions remain regarding the transfer of Mr. Caballero's earnings from Canada to Cuba, Ms. Acosta's role in the transactions, and Mr. Fuentes' continued employment at Cobalt despite being under suspicion by Cuban authorities. However, I am not persuaded that these are sufficient to render Mr. Fuentes' narrative clearly implausible. Having found Mr. Fuentes' oral testimony to be consistent with the documentary evidence, and the documentary evidence to be genuine, the RAD unreasonably rejected Mr. Fuentes' refugee claim on the sole ground that it was not plausible.

B. *Did the RAD reasonably determine that the treatment Mr. Fuentes might face if he returned to Cuba would not amount to persecution?*

[13] In light of the conclusion above, it is not necessary to engage in a detailed analysis of the RAD's determination that the treatment Mr. Fuentes might face if he returned to Cuba would not

amount to persecution. I note, however, that Justice Michael Phelan considered Article 135 of the Cuban Penal Code in *Gonzalez* and held at paragraph 26:

[26] In conclusion, the potential punishment under Article 135 is not persecutory. It cannot be characterized as solely to punish political dissent as it applies to diplomats who fail to return to Cuba for whatever reason. It would be naïve to think that political opinions do not play a role but there are other motives possible for refusal to return (i.e. economic advantage, lifestyles) which are also captured by the law. There is no evidence in this case of disproportionate application of that law to political dissidents.

[14] Mr. Fuentes is not a diplomat. He is an accountant and financial analyst with a Cuban state-owned metal extraction company. This may be a relevant distinction, but it is one best left to the RAD when it reconsiders Mr. Fuentes' appeal of the RPD's decision.

VII. Conclusion

[15] The application for judicial review is allowed, and the matter is remitted to a differently-constituted panel of the RAD for redetermination. Neither party proposed that a question be certified for appeal, and none arises in this case.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed, and the matter is remitted to a differently-constituted panel of the RAD for redetermination. No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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STYLE OF CAUSE: YUNAURYS TERRERO FUENTES v THE MINISTER
OF IMMIGRATION, REFUGEES AND CITIZENSHIP
CANADA

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