

Federal Court



Cour fédérale

Date: 20180427

Docket: IMM-4385-17

Citation: 2018 FC 456

Ottawa, Ontario, April 27, 2018

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

JERONIMO MATEO FRANCISCO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada [RPD or the Board], dated August 22, 2017 [Decision], which refused the Applicant's application to be deemed a Convention refugee or a

person in need of protection under ss 96 and 97 of the Act and found that his claim had no credible basis.

II. BACKGROUND

[2] The Applicant is a citizen of Guatemala. He claims that he is from a small village by the Mexican border. He fled to the United States in 2004 because of alleged threats from guerilla groups against himself and his family that began in the 1980s. The Applicant lived in the United States for 13 years and never made an asylum claim or attained any formal status.

[3] The Applicant's brothers had fled Guatemala years before him and settled in Canada. Concerned with the possibility of being deported to Guatemala because of the new American administration's immigration policies, the Applicant crossed the border into Canada in 2017.

[4] The Applicant says that his family is still in danger in Guatemala. He says that, in recent years, a new group, Los Zetas, has entered Guatemala from Mexico and that the fighting between Los Zetas and the guerillas has made the guerillas desperate to recruit new members. He claims that if he is returned to Guatemala he will either be forced to join a guerilla group or be killed.

III. DECISION UNDER REVIEW

[5] The Board found that the Applicant is neither a Convention refugee nor a person in need of protection because the Applicant was not credible.

[6] The Board notes the lack of documents. In the words of the Board, the Applicant “tendered no documents, no personal documents, no country condition documents, nor original documents of any kind.”

[7] The Board makes a negative credibility finding based on the Applicant changing his answer about how many times he had been arrested while living in the United States. The Applicant initially testified that he had been jailed on two or three occasions. When asked whether it was two or three, he said that he was unsure and claimed that the periods of incarceration were so brief that he did not recall how many times he had been jailed. When asked why, if jail is an exceptional experience, he could not remember whether he had been in jail two or three times, he stated that he had been in jail three times. This was consistent with the information the Applicant provided in his Port of Entry interview. The Board finds that the Applicant’s response to being questioned about why his answer had suddenly changed was incoherent.

[8] The Board also finds that the Applicant presented an inconsistent picture of his father. The Applicant alleged that his father continued to receive letters containing death threats because he was a church leader and activist in their home community in Guatemala. This made his father a high profile target. When asked why he had not submitted documents to support his claim, including the alleged death threats, the Applicant portrayed his father as an elderly man who did not care about the threats and had likely discarded the letters without thinking too much about them. When questioned about this apparent inconsistency in the portrayal of his father, the Applicant provided no explanation.

[9] The Board also makes a negative credibility finding based on the Applicant's inability to either name or provide any substantive information about the agent of persecution he alleged. The Board notes that the guerilla group that has targeted the Applicant's family for years is not named in his Basis of Claim [BOC] form and the Applicant could not name the group when questioned. The Applicant was also unable to describe its political objectives beyond a vague intention to overthrow the government.

[10] When asked about the second group mentioned in his BOC, Los Zetas, the Applicant described them as a criminal group that moved in from Mexico and also suggested that they may have merged with the guerilla groups who threatened his family. The Board points out that, in his BOC, the Applicant claimed that the threats his father received were from the guerilla group, but in his testimony he stated that the threats were anonymous and that he was not sure whether the threats were from the guerilla group or Los Zetas. The Board draws a negative credibility finding from the Applicant's inability to explain this inconsistency.

[11] The Board also finds that the Applicant's explanation for why he did not claim asylum in the United States was inconsistent with his general knowledge about the American judicial system. The Applicant suggested that he did not make a claim in the United States because he did not understand how to do so and because he feared deportation if he approached authorities about his status. But the Applicant had three interactions with the American judicial system when he was jailed for driving without a licence and also reported a mugging to the police on one occasion. When asked why he reported the mugging to police if he was afraid of deportation, the Applicant explained that he learned through the local immigrant community that the police

did not act as agents of American immigration officials. The Board therefore finds that the Applicant knew that he could make a refugee claim during the 13 years he lived in the United States but elected not to. This showed a lack of subjective fear inconsistent with the fear of return to Guatemala that the Applicant alleged, and the Board makes a negative credibility finding on this basis.

[12] The Board notes this Court's decisions in *Kaddoura v Canada (Citizenship and Immigration)*, 2016 FC 1101 and *Ortiz Garzon v Canada (Citizenship and Immigration)*, 2011 FC 299, and finds that the Applicant made no serious effort to inform himself of the refugee process in the United States or to seek refugee protection at the first available opportunity. In doing so, the Applicant put himself at risk of removal to Guatemala and deliberately circumvented American law. The Board finds that this undermines the Applicant's alleged fear of harm, his credibility and the basis of his claim.

[13] These cumulative negative credibility findings lead the Board to conclude that the Applicant is generally not credible and that his story lacks the ring of truth.

[14] The Board accepts, however, that the Applicant established his identity as a citizen of Guatemala from a town by the Mexican border and established his Mayan ethnicity. Considering the Applicant's residual risk profile, the Board finds that there is no persuasive evidence that the conditions in Guatemala mean that every Guatemalan is effectively a refugee. The Board acknowledges the problems with crime in Guatemala but finds that to merely establish an

identity as a Guatemalan or Guatemalan of Mayan ethnicity is insufficient to establish refugee status.

[15] Since the Board finds that the Applicant is not credible, that he fabricated his refugee claim, and that there is no credible or trustworthy evidence to support the claim, the Board concludes that the Applicant's claim has no credible basis within the meaning of s 107(2) of the Act.

IV. ISSUES

[16] The Applicant submits that the following issue arises in this application:

1. Is the RPD's determination that the Applicant is not credible reasonable?

V. STANDARD OF REVIEW

[17] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*], held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[18] The standard of review applicable to the Board's credibility findings is reasonableness. See *Boztas v Canada (Citizenship and Immigration)*, 2016 FC 139 at paras 4-5.

[19] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.” See *Dunsmuir*, above, at para 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

VI. STATUTORY PROVISIONS

[20] The following provisions of the Act are relevant in this application:

Convention refugee

96 A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of

Définition de réfugié

96 A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces

each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

Person in need of protection

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international

pays;

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes

standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

...

No credible basis

107 (2) If the Refugee Protection Division is of the opinion, in rejecting a claim, that there was no credible or trustworthy evidence on which it could have made a favourable decision, it shall state in its reasons for the decision that there is no credible basis for the claim.

internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

...

Preuve

107 (2) Si elle estime, en cas de rejet, qu'il n'a été présenté aucun élément de preuve crédible ou digne de foi sur lequel elle aurait pu fonder une décision favorable, la section doit faire état dans sa décision de l'absence de minimum de fondement de la demande.

VII. ARGUMENT

A. *Applicant*

[21] The Applicant submits that an application for judicial review of a no credible basis finding must be conducted with careful scrutiny by the reviewing court and a lower level of deference within the reasonableness standard. In *Rahaman v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 89 at para 51 [*Rahaman*], the Federal Court of Appeal concluded that “the Board should not routinely state that a claim has ‘no credible basis’ whenever it concludes that the claimant is not a credible witness.” In *Singh v Canada (Citizenship and Immigration)*, 2007 FC 732, the application for judicial review was granted, even though the applicant was found to be not credible, because the Board accepted that the applicant was a Sikh

priest and there was some evidence that Sikhs were a group at risk in India that the Board failed to analyze. The Applicant says that the test to meet on judicial review of a no credible basis is therefore a high one and “if there is any credible or trustworthy evidence that could support a positive determination” of an applicant’s claim the Board cannot make a no credible basis finding even if it finds that the claim has not been established. See *Ramón Levario v Canada (Citizenship and Immigration)*, 2012 FC 314 at paras 18-19 [emphasis in original]. The Applicant says that each of the Board’s credibility findings must be reviewed from this vantage point and that many of those findings are unreasonable.

(1) Lack of Corroborating Documents

[22] The Applicant submits that the Board unreasonably impugns his credibility for failing to submit corroborating documents that he did not, and could not, control. The Federal Court of Appeal has held that failure to produce a document that is outside of Canada and outside a claimant’s control cannot reflect adversely on the claimant’s credibility. See *Owusu-Ansah v Canada (Minister of Employment & Immigration)* (1989), 8 Imm LR (2d) 106 at para 10 (FCA). The Applicant notes that the Board makes no finding about the threatening letters still being in the possession of his father, and says that there was therefore no foundation to conclude that he should have produced the letters. He also says that it is unreasonable for the Board to expect him to know the details of the letters and what happened to them as he has never actually seen them.

(2) Number of Times the Applicant was Jailed

[23] The Applicant submits that the Board's negative credibility finding based on a perceived inconsistency in his responses to questions about how many times he had been in jail in the United States is unintelligible and unreasonable. He says that there is no logical connection between the number of times he was in jail and his refugee claim. He also notes that he volunteered this information at his Port of Entry interview and that, after a temporary lapse of recollection while nervously testifying at the RPD hearing, he confirmed the information he had already provided. And his initial answer of "two or three times" is not inconsistent with the answer of three. He says that the Board's finding that this amounts to an inconsistency is the sort of microscopic hunt for inconsistency criticized in *Attakora v Canada (Minister of Employment & Immigration)* (1989), 99 NR 168 (FCA) [*Attakora*]. Relying on *Attakora*, this Court has held that even where it is not unreasonable for the Board to find a minor inconsistency, such an inconsistency is "insufficient by itself to call into question the applicant's credibility": *Mushtaq v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1066 at para 7.

(3) The Applicant's Father

[24] The Applicant says that the Board completely misunderstands his testimony about his father and that the finding that he presented inconsistent portrayals of his father is irrational and based on the misperception of the evidence. He says that his testimony about what had happened to the letters was a guess that he offered when pressed on the question by the Board. He did not claim to have firsthand knowledge about what his father did with the letters and he says that it is not rational or justifiable for the Board to impugn his credibility based on information he does

not have. He says further that in describing his father's manner of dealing with the threats he was portraying his father's strength and courage, which is the opposite of the Board's suggestion that he portrayed his father as old and weak.

(4) Agent of Persecution

[25] The Applicant submits that the Board unreasonably applies Canadian assumptions about the behaviour of guerilla groups in Guatemala in finding that his inability to name the group and its political agenda impugns his credibility. He says that the Board assumes that such a group would leave its calling card or otherwise identify itself when making threats. The Federal Courts have warned about the dangers of applying Canadian expectations to events occurring in other cultures. See i.e. *Ye v Canada (Minister of Employment & Immigration)*, [1992] FCJ No 584 (QL) (FCA). Because of the diverse contexts that refugee claimants come from, the Board must be careful when making plausibility findings: *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7. The Applicant says that the group that threatened his family never identified themselves when making demands and threats, and that such behaviour is common to armed groups of criminals and other factions outside of Canada. He says the Board's expectation that the group would identify itself is unreasonable.

(5) Failure to Claim

[26] The Applicant submits that the Board's negative credibility finding based on his failure to make a refugee claim during the 13 years he lived in the United States is unreasonable. He says that there is no rational connection between his interactions with American police and his

knowledge about how to make a refugee claim. The interactions related to minor traffic matters and an incident where the Applicant reported a mugging. The RPD provides no explanation about how this is connected to knowledge about refugee claims. He also says that American law barred him from claiming in the United States one year after his arrival there and that his police interactions occurred after the statutory bar contained in s 208(a) of the *American Immigration and Nationality Act*, 8 USC § 1158(a). He says that it is therefore unreasonable for the Board to conclude that he showed a subjective lack of fear based on the length of time he lived in the United States because he could not claim for 12 out of the 13 years he lived there.

(6) Inadequate Reasons

[27] The Applicant also submits that the Decision is unclear about the basis for the Board's negative credibility findings. Since there is a presumption that a claimant's sworn testimony is true, the Board must avoid vague and general terms and "give its reasons for casting doubt upon the [claimant's] credibility in clear and unmistakable terms": *Hilo v Canada (Minister of Employment & Immigration)* (1991), 15 Imm LR (2d) 199 at para 6 (FCA). The Applicant says that the Board never explains the perceived difference between "2 or 3 times" and "3 times," the perceived inconsistency in the portrayal of his father, the assumptions about Guatemalan guerilla groups, or how interactions with American police suggest that he has knowledge of the American asylum process. He says that the Board does not offer clear and unmistakable explanations for its determinations on these issues and that the Decision is therefore unreasonable.

B. *Respondent*

[28] The Respondent submits that credibility findings are pure findings of fact at the “heartland of the Board’s jurisdiction” and that they are therefore entitled to significant deference. See *Abd v Canada (Citizenship and Immigration)*, 2017 FC 374 at para 13, quoting *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at para 7. The Respondent says that the Board provides multiple grounds for its adverse credibility findings and provides a reasonable basis for refusing the Applicant’s claim.

[29] The Respondent says that the Applicant’s failure to claim asylum in the United States detracted from the credibility of his refugee claim because he had ample opportunity to claim in the United States if he feared persecution in Guatemala. It is open to the Board to conclude that a failure to claim protection at the first reasonable opportunity is inconsistent with genuine subjective fear. See i.e. *Badihi v Canada (Citizenship and Immigration)*, 2017 FC 64 at para 12. The Respondent submits that, even if the Applicant would have been unsuccessful in claiming asylum after one year in the United States, the Board’s finding is based on the fact that he never attempted to seek protection or took steps to avoid return to Guatemala. The Respondent says that this behaviour is inconsistent with a genuine fear of persecution.

[30] Regarding the alleged agent of persecution, the Respondent points out that the Applicant was unable to provide any meaningful details about the unnamed guerilla group or the Mexican gang. He was also inconsistent about the source of the threatening letters that were allegedly sent to his family. This Court has held that “[i]f the Court can ascertain any reasonable basis in the

evidence for the Board's adverse credibility findings, or if those findings can be said to be rationaly supported, for example, on the basis of confirmed and important inconsistencies, contradictions or omissions [ICOs] in the evidence, those findings should ordinarily withstand the Court's review": *Kaur v Canada (Citizenship and Immigration)*, 2012 FC 1379 at para 34 [emphasis in original]. The Respondent submits that the Applicant's inconsistency about the name and nature of the agent of persecution is central to his claim. Inconsistency about the number of times he had been in jail is peripheral, but does not assist with the Applicant's credibility.

[31] The Respondent also notes the Applicant's failure to provide any meaningful documentary support for his claim. Once the Board provides valid reasons to doubt a claimant's credibility, it may properly consider a failure to provide corroborating documentation. See *Radics v Canada (Citizenship and Immigration)*, 2014 FC 110 at paras 30-31. The Respondent says that this was the case in the Applicant's claim.

[32] The Respondent submits that the Board's no credible basis finding is reasonable because the Applicant was found to be not credible and failed to support his claim with any supporting documentation. In *Rahaman* at para 29, Justice Evans noted that

the claimant's oral testimony will often be the only evidence linking the claimant to the alleged persecution and, in such cases, if the claimant is not found to be credible, there will be no credible or trustworthy evidence to support the claim. [And because] they are not claimant-specific, country reports alone are normally not a sufficient basis on which the Board can uphold a claim.

[33] The Respondent says that the Decision is therefore within the reasonable range and should not be interfered with by this Court.

VIII. ANALYSIS

[34] The Applicant presented the RPD with a difficult claim to assess. He had lived in the United States for 13 years and had not sought protection there, and he provided no supporting documentation of any kind to substantiate his claim. Nevertheless, the RPD was obliged to assess his claim reasonably on the basis of the documentation outlining the claim and the Applicant's oral testimony. Unfortunately, the RPD failed to do this. I say this because, by and large, I am in agreement with some of the Applicant's grounds for saying the Decision is unreasonable.

[35] In short, those grounds are as follows:

- (a) The RPD impugns the Applicant's failure to produce any documents in support of his claim and, in particular, does not accept his explanation for not producing copies of the threatening letters his father had received on the basis that the Applicant "had portrayed his father in two inconsistent ways" – i.e. high profile activist on the one hand and, on the other, as an elderly man who was probably not moved by the threats and who probably discarded the letters. The Applicant provided no explanation for this perceived inconsistency, but that is not surprising because none exists. The Applicant portrayed his father as a brave, high profile activist who, because he is now elderly pays little attention to threats, would probably have discarded the letters. It has to be borne in mind that the Applicant did not know whether the letters were still in existence. The Applicant's evidence was that he had never seen the letters because he had left the country, and the

RPD makes no finding that the letters are still in the possession of the Applicant's father and would be available to the Applicant;

- (b) There was no real inconsistency in the number of times the Applicant said he was in jail. He at first said it was two or three and when pressed on it, he said it was three. The RPD faults the Applicant for changing his answer from not being sure whether it was two or three to saying it was definitely three times. But there is nothing inconsistent in a hearing from saying two or three and then, upon being pressed, to remember it was definitely three. He had, after all, made clear in the Port of Entry notes that he had been in jail on three occasions. The perceived different answer was far too microscopic to support a negative credibility finding;
- (c) The RPD also makes a negative credibility finding based upon the Applicant's failure to claim in the United States. The Applicant explained that he did not make a claim in the United States at first because he did not understand how to do so and because his fear of deportation was so great that he dared not approach authority figures to make inquiries. The RPD rejects this explanation because he had encounters with American police and the judicial system for driving offences and had reported a mugging to the police. The RPD finds that the Applicant's experiences with the American justice system are inconsistent with his suggestions "that he was unknowledgeable generally about his options and had no idea how to make an asylum claim in the United States...." The RPD fails to explain why there is some connection between not knowing how to make a refugee claim and being involved with the police over driving offences and a mugging. The connection is not readily apparent and, without an explanation, the Decision lacks transparency and intelligibility on this issue.

[36] The Applicant concedes that there is some inconsistency in the evidence he gave about the identity of the agent of persecution and the Respondent invites the Court to see this as the central finding and enough to support the Decision.

[37] Not all of the RPD's findings are unreasonable, but the Board makes it clear that it is the "cumulative negative inferences with regard to the credibility of the claimant's allegations [that] lead the panel to find that the claimant is generally not credible." Had the RPD not made the errors I have referred to, it is not possible for me to say that the panel would have reached the same general negative credibility finding. Hence, this matter must be returned for reconsideration by a differently constituted RPD.

[38] Counsel agree there is no question for certification and I concur.

JUDGMENT IN IMM-4385-17

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a differently constituted RPD.
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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APPEARANCES:

Ronald Poulton FOR THE APPLICANT

Julie Waldman FOR THE RESPONDENT

SOLICITORS OF RECORD:

Poulton Law Office Professional Corporation FOR THE APPLICANT
Toronto, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario