

Federal Court



Cour fédérale

Date: 20190618

Docket: IMM-4020-18

Citation: 2019 FC 825

Ottawa, Ontario, June 18, 2019

PRESENT: Mr. Justice Manson

BETWEEN:

**FIDEL ANGEL JURADO BARILLAS
SILVIA CAROLINA PERDOMO DE JURADO
CESIA CAROLINA JURADO PERDOMO
JOSE ANGEL JURADO PERDOMO**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] The Applicants are a husband [the Principal Applicant] and wife, with two minor children. They are citizens of El Salvador. They came to Canada in January of 2018 and claimed refugee protection, fearing persecution at the hands of an international criminal organization.

[2] Their claim was rejected by a panel of the Refugee Protection Division of the Immigration and Refugee Board [the RPD] in a decision dated July 26, 2018 [the Decision]. They now seek judicial review.

[3] The Decision rests on credibility findings which are both procedurally unfair and unreasonable.

II. Background

[4] The Applicants fled El Salvador in January 2018 and came to Canada, asking for refugee protection due to a fear of persecution by an international criminal organization [the Gang]. In their Basis of Claim Form, the Principal Applicant described the circumstances surrounding the family's decision to flee El Salvador, which can be summarized as follows:

- (i) The Principal Applicant began his career as an accountant in 1992;
- (ii) In April 2016, the Principal Applicant began working at a large company that imports and exports to numerous countries, including countries around Central America [the Company];
- (iii) The Principal Applicant soon noticed financial irregularities and disorderly bookkeeping with the Company, and wrote various reports to his superiors. He began to suspect that the Company was engaged in money laundering;
- (iv) In June 2016, the bank closed all of the Company's bank accounts, and the Company began to conduct their transactions entirely in cash. These transactions averaged 5 million United States dollars per month;
- (v) In July 2016, the Company's president created shell corporations by providing money to several of the Company's employees and establishing the employees as shareholders of the shell corporations;
- (vi) In December 2016, the Principal Applicant conducted a year-end audit of the Company's cash holdings, and found that the Company's cash holdings did not match their monthly accounting balances;

(vii) In February 2017, the Principal Applicant initiated anti-money laundering training sessions for the employees who had been made shareholders of the shell corporations;

(viii) In March 2017, the Principal Applicant alerted the Company's board of directors that the names listed on the company's export papers did not match the names on their invoices, suggesting that the Company may be moving drugs across national borders. The president of the Company told the Principal Applicant that he should not be doing this sort of review;

(ix) The Principal Applicant alerted the Company's internal compliance officer, who was statutorily mandated to alert the Salvadoran Attorney General's office;

(x) On April 4, 2017, the Attorney General's office arrived at the Company and began investigating. This investigation lasted about two weeks, and the Principal Applicant was interviewed and provided a statutory declaration detailing his concerns;

(xi) On April 5, 2017, the owners of the Company did not show up to work, and the media reported that the company and its owners were implicated in a money laundering scheme run by the Gang;

(xii) A Salvadoran government agency responsible for the temporary administration of illegally-obtained assets took over administration of the Company [the Government Agency];

(xiii) The Principal Applicant prepared a report for the Government Agency, dated December 4, 2017, which outlined the Company's financials and made recommendations about how to better structure the Company's audit department. The Principal Applicant was subsequently told by a director of the Company that the company's exiled owners did not approve of his recommendations;

(xiv) The Principal Applicant was told by the Government Agency that he would be called as a witness before the Attorney General's office. He was told that his life was in danger, and he should leave El Salvador;

(xv) On December 13, 2017, there was a robbery at the Company, and approximately 53,000 United States dollars were stolen. The Principal Applicant informed the Government Agency, who determined that the robbery had been organized by the Company's exiled owners;

(xvi) In late December 2017, the Principal Applicant applied for and received United States tourist visas for his family;

(xvii) On December 27, 2017, the Principal Applicant received an email from Mr. X, a director of the Company, instructing him to attend a meeting with the Government Agency on January 5, 2018 [the January 5 meeting], and advising that he would receive further instructions by phone. In a subsequent phone call, Mr. X informed the Principal Applicant that the meeting would actually be with the Attorney General's office, and that he would be called as a witness to testify about the Company's financial dealings;

(xviii) The Principal Applicant attended a meeting on January 4, 2018 with Mr. X, two other directors of the Company, and the assistant director of the Government Agency. The Principal Applicant secretly recorded this meeting. He was told not to disclose to the Attorney General's office that he had provided financial reports to the Government Agency, and to contradict what was in his December 2017 report to the Government Agency. One of the directors of the Company said that if he did not do these things, everyone would be put in prison, and it would be the Principal Applicant's fault;

(xix) The Principal Applicant slept at a hotel that night with his family, because he was receiving non-stop phone calls from Mr. X. The next day, January 5, the family fled the country. The Principal Applicant did not attend the meeting with the Attorney General's office; and

(xx) On January 9, 2018, all of the Company's assets were confiscated and transferred to the government of El Salvador.

III. Decision Under Review

[5] The Applicants had a hearing before the RPD on July 19, 2018, and the Principal Applicant testified using an interpreter [the Hearing].

[6] The Applicants' refugee claims were refused in a decision dated July 26, 2018. The RPD first found that the Applicants were not Convention refugees, as opposition to gangs could not be construed as a political opinion, or any other Convention ground. The Applicants do not dispute this finding.

[7] As such, the Applicants' claims were considered under subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA], to determine whether they were persons in need of protection.

[8] The RPD found that there was insufficient credible evidence to establish that the Applicants faced a risk in El Salvador, and therefore the Applicants were not persons in need of protection within the meaning of subsection 97(1) of the IRPA.

IV. Issues

[9] The issues are:

- (i) Did the RPD breach procedural fairness by failing to give the Principal Applicant notice of credibility concerns?
- (ii) Did the RPD conduct an unreasonable assessment of the evidence?

V. Standard of Review

[10] Questions of procedural fairness are reviewed on the standard of correctness, and the RPD's assessment of the evidence is reviewed on the standard of reasonableness (*Teweldebrhan v Canada (Citizenship and Immigration)*, 2015 FC 418 at para 5, Crampton CJ).

VI. Analysis

A. *Did the RPD breach procedural fairness by failing to give the Principal Applicant notice of credibility concerns?*

[11] The RPD made several adverse credibility findings based on the Principal Applicant's testimony at the Hearing, generally on the basis that he failed to provide sufficiently detailed answers.

[12] The Respondent states that the Applicants were not denied procedural fairness because (1) at the commencement of the Hearing the RPD made a general statement that the Applicants' credibility was in issue, and (2) the RPD was not required to advise the Principal Applicant of the deficiencies in his answers prior to finding that his answers were not credible. The Respondent provides no case law in support of their argument.

[13] The Applicants argue that the RPD breached procedural fairness by not notifying the Principal Applicant of credibility concerns before making the following findings:

- (i) The Principal Applicant embellished his claim by representing that the email he received on December 27, 2017 was a summons to testify at an investigation by the Attorney General's office;
- (ii) It was not credible that the Principal Applicant could not explain the relationship between the Company and its shell companies with more clarity and detail;
- (iii) It was not credible that the Principal Applicant could not provide detailed knowledge of the nature of the shell companies and why they were indicative of money laundering; and
- (iv) It was not credible that the Principal Applicant could not explain in more detail why the fact that he was assigned new tasks upon raising concerns, and the fact that the Company's books were kept in disorder, were indicative of money laundering.

[14] I find that the RPD erred by not alerting the Principal Applicant to credibility concerns and allowing the Principal Applicant an opportunity to address these concerns. While the RPD is not required to put every deficiency to an applicant, when a deficiency is central to the RPD's determination, the RPD's failure to put the matter to an applicant may be a violation of procedural fairness (*Ananda Kumara v Canada (Citizenship and Immigration)*, 2010 FC 1172 at paras 3-5, [*Kumara*]).

[15] As Justice Russell wrote in *Shaiq v Canada (Citizenship and Immigration)*, 2009 FC 149 at paragraph 77:

[77] Although the RPD is not required to raise all concerns with an applicant that are related to the Act and the regulations, procedural fairness does require that an applicant be afforded an opportunity to address issues arising from the credibility, accuracy or genuine nature of information submitted. See, for example, *Kuhathasan v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 587 at paragraph 37. Consequently, I think the RPD in the present case should have provided the Applicant with an opportunity to address an issue that was central to its negative credibility finding.

[Emphasis added]

[16] In this matter, as Justice Hughes stated in *Kumara*, the RPD “simply lay in the weeds, waited till the hearing is over, then pulled out apparent contradictions and used them as the basis for disbelieving the Applicants’ claim” (*Kumara*, above at para 3).

[17] The RPD went beyond relying upon alleged contradictions, and faulted the Principal Applicant for a perceived lack of detail in his testimony. The transcript of the Hearing shows that the Principal Applicant provided detailed testimony regarding the business activities of the Company and its corporate subsidiaries, their relationships, and his concerns about money laundering and the triggers for these concerns. This testimony is also largely consistent with the narrative in the Principal Applicant’s Basis of Claim Form, as well as the documentary evidence.

[18] These adverse credibility findings were central to the RPD’s rejection of the Applicants’ claim. If the RPD required even more detail than the Principal Applicant provided, it should have

alerted him and allowed him the opportunity to address such concerns. The RPD's failure to do so denied the Applicants procedural fairness.

B. *Did the RPD conduct an unreasonable assessment of the evidence?*

[19] The RPD made the following findings based on the evidence and the Principal

Applicant's testimony:

- (i) That the Principal Applicant did not work in a high-level accounting position at the Company;
- (ii) That the Principal Applicant had not identified financial irregularities indicative of money laundering; and
- (iii) That the Principal Applicant would not face reprisals from the Gang.

[20] In support of his testimony and Basis of Claim form narrative, the Principal Applicant also put several pieces of evidence before the RPD, including:

- (i) Employment letters dated January 4, 2018, confirming that the Principal Applicant had been employed with the Company since April 2016;
- (ii) A copy of the December 4, 2017 report prepared by the Principal Applicant for the Company;
- (iii) A copy of the email from Mr. X, director at the Company, dated December 27, 2017, advising the Principal Applicant of a meeting with "the Council" on January 5, 2018;
- (iv) A transcript of the recording of the January 4, 2018 meeting where the Principal Applicant is asked to doctor his testimony at the January 5 meeting; and
- (v) News reports on the Attorney General's investigation, naming various owners of the Company as suspects, as well as reports on the influence and danger of the Gang.

[21] Given that the finding regarding the Principal Applicant's work as an auditor is addressed above in my consideration of procedural fairness, I would only add that the RPD's dismissal of the Principal Applicant's letters of employment is highly questionable.

[22] Turning to the finding that the Principal Applicant had failed to provide evidence indicative of money laundering, the Respondent argues that this finding was reasonable because (1) the Principal Applicant had only evidence of "mere suspicions" of money laundering, and (2) there is no clear evidence that the Principal Applicant would be required to serve as a witness for the Attorney General's office.

[23] The very objective of money laundering is to make it difficult, if not impossible, to trace funds back to their illegal or fraudulent source (*Bank of China v Fan*, 2015 BCSC 590 at para 160). The relevant question before the RPD was not whether the Principal Applicant could put forward conclusive evidence that the Company was engaged in money laundering - that is a question for the law enforcement authorities in El Salvador - but rather whether the Attorney General's office and/or the Gang thought that the Principal Applicant had evidence of interest regarding such money laundering. The RPD failed to properly address this issue, and held the Principal Applicant to an unreasonably high evidentiary burden, discounting the significant evidence he did provide for what it fails to show, rather than recognizing what it does show.

[24] The Principal Applicant provided a significant amount of evidence regarding money laundering and the concerns he had raised with his superiors and the authorities. This evidence clearly suggests that he had consistently raised money laundering concerns with his superiors

since beginning work at the Company in April 2016, that he had been repeatedly told to stop and been threatened for raising these concerns, and that he was to attend a meeting on January 5, 2018 with individuals from the Salvadoran Attorney General's office.

[25] At several instances the RPD misquoted and mischaracterized the Principal Applicant's testimony, and then faulted him for this testimony. These findings are unreasonable. As one example, the RPD discounted the December 27, 2017 email from Mr. X, which advised the Principal Applicant of a meeting on January 5, on the basis that the Principal Applicant had mischaracterized it as a "formal summons". The RPD then made an adverse credibility finding against the Principal Applicant on this basis. The Principal Applicant never termed the email a "summons" - the RPD did this. The Principal Applicant clearly described this email in his Basis of Claim Form narrative, and did not indicate that it was a summons. The Principal Applicant even corrected the RPD at the Hearing when the RPD termed it a "summons", clarifying that it was an email and not a summons.

[26] The RPD also discounted the transcript of the January 4, 2018 meeting on the basis that it contained no apparent threats. I find that, contrary to the RPD's finding, the only reasonable conclusion from a review of this transcript is that the Principal Applicant was directed to lie to officials from the Attorney General's office and obstruct their investigation into the Company. The RPD's disregard for this transcript is unreasonable.

[27] I find that the RPD repeatedly erred unreasonably when assessing the evidence of money laundering and the Principal Applicant's role in the ongoing investigation by the Attorney General's office.

[28] Finally, with respect to the finding that the Principal Applicant did not have the kind of information that would put him at risk from the Gang, the Respondent argues that this finding was reasonable because:

- (i) The Principal Applicant had already provided the Attorney General's office with his December 4, 2017 report;
- (ii) By January 2018, the Principal Applicant's evidence would have been known to law enforcement officials and others, and was therefore no reason for the Gang to target the Principal Applicant;
- (iii) The Principal Applicant's evidence does not reasonably suggest that he had information over which the owners of the Company or the Gang would harm him; and
- (iv) There is no clear evidence that the Principal Applicant was ever threatened.

[29] I disagree. First, the Principal Applicant gave clear, credible, and convincing testimony, and provided numerous documents in support, which all suggest that he had information that the Gang would want to suppress. To the extent the RPD failed to appreciate this evidence, the RPD was unreasonable.

[30] Second, it defies logic that the RPD could not recognize that an individual who was to be a witness for the Attorney General's office in an investigation regarding the money laundering activities of the Gang would have information that the Gang would be interested in suppressing. The fact that the Principal Applicant had previously disclosed his concerns in the December 4, 2017 report does not diminish this fact.

[31] Lastly, the RPD was also unreasonable in failing to address the documentary evidence which corroborates key points in the Applicants' version of events, including that:

- (i) One of the exiled owners of the Company is the alleged leader of the Gang, "a criminal group dedicated to drug trafficking and money laundering";
- (ii) The former owners of the Company were arrested by the Attorney General's office on April 4, 2017, and are accused of using dozens of shell companies to launder roughly \$215 million United States dollars;
- (iii) The Gang has extensive links to Salvadoran politicians, police, and government officials; and
- (iv) There are numerous examples of opponents of the Gang being assassinated.

[32] For all of the above reasons, the RPD was unreasonable in assessing the Applicants' evidence.

JUDGMENT in IMM-4020-18

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the matter is remitted to a differently constituted panel for reconsideration.
2. There is no question for certification.

“Michael D. Manson”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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