

Federal Court



Cour fédérale

Date: 20190911

Docket: IMM-6230-18

Citation: 2019 FC 1167

Ottawa, Ontario, September 11, 2019

PRESENT: The Honourable Mr. Justice Southcott

BETWEEN:

**YESSICA ROXANA ZETINO TOBIAS
JONATHAN ALEXANDER ORTIZ ZETINO**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are a mother [the Applicant] and her minor son [the Minor Applicant], both citizens of El Salvador. They allege fear of persecution by the Mara 18 gang due to an incident involving the gang in 2016 in which the Applicant states she was held captive for a period, raped, and threatened before being released. They also allege fear of persecution at the

hands of the Applicant's former common-law partner [Former Partner]. In a decision dated November 21, 2018 [the Decision], the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada found that the Applicants are not Convention refugees or persons in need of protection, with the determinative issue being credibility. The Applicants now seek judicial review of that Decision.

[2] As explained in more detail below, this application is allowed, because the RPD arrived at an adverse credibility determination based on an inconsistency between the Applicant's testimony and the notes of an earlier interview, without considering her explanation that the notes had not been translated or read back to her to confirm their accuracy in capturing her statements during the interview. This conclusion was therefore unreasonable.

II. **Background**

[3] The Applicant is a former resident of El Salvador, where she was in a common law relationship with her Former Partner from 2007 until October 2013. She says that in 2009 he lost his job and became unstable, drinking to excess and acting in a violent manner towards her. The Applicant became the sole provider for the family by operating a stall in the marketplace, where she says she received threats from, and was subjected to extortion by, members of Mara 18. The Applicant also alleges that her Former Partner began to associate with the members of the Mara 18 gang but did not join the gang until after the Applicants had fled El Salvador.

[4] The Applicant says that her decision to flee El Salvador resulted from an incident that occurred on March 17, 2016. She states that, around 11:00pm, when she was in her bedroom and

her brother Kevin was downstairs watching television, she heard banging on the door. She went downstairs and saw that her brother had let into the house a man who was bloody and beaten. Shortly thereafter, Mara 18 gang members demanded entry to the house and accused the Applicant and her brother of harbouring a rival gang member. They denied this allegation, and the man the gang members had been pursuing was taken away along with the Applicant's brother.

[5] The Applicant alleges that she was confined in a room by one of the Mara 18 gang members for 5 hours, during which she was sexually assaulted and beaten. She also says the gang member threatened her to kill her and the Minor Applicant, who was sleeping in another room. Eventually, two gang members returned with her brother, who had been badly beaten. The gang members told them to disappear and that this was their last warning.

[6] The Applicant states that she then called another brother, Walter, to pick them up. Walter arrived and took the Applicants and Kevin to his house, which was outside the Mara 18 gang's territory. They stayed there for a week, before moving to the Applicant's mother's house and subsequently leaving El Salvador.

[7] The Applicants left El Salvador on April 25, 2016 with the assistance of a smuggler. On May 26, 2016, they entered the United States [US], where they remained in custody until June 16, 2016 as asylum seekers. The Applicant alleges that, after arriving in the US, she received threats from her Former Partner, who had by then become a member of the Mara 18. She and her son arrived in Canada on January 27, 2017 and subsequently claimed refugee protection, alleging

that they would be in serious danger from the Applicant's Former Partner and the Mara 18 gang if they were to return to El Salvador.

[8] The Applicants' claims were initially denied by the RPD in a decision dated May 19, 2017. However, that decision was set aside in *Tobias v Canada (Citizenship and Immigration)*, 2017 FC 1087, based on the Court's conclusion that the RPD failed to apply the *Chairperson's Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* [the Gender Guidelines] in its consideration of inconsistencies in the Applicant's evidence.

[9] The Applicants were afforded a hearing *de novo* before the RPD. In the Decision that is the subject of this application for judicial review, the RPD again denied their claim, concluding that the Applicants were neither Convention refugees nor persons in need of protection. Based on inconsistencies and omissions, the RPD found that the Applicant's evidence regarding the alleged sexual assault by the Mara 18 gang member was not credible. It also found that the Applicant's Former Partner was not a member of the Mara 18 gang, based largely on its consideration of evidence surrounding the Former Partner's tattoos. It held that there was no credible evidence that he wanted to harm the Applicant or her son, or that that he would recruit her son into the gang. The RPD rejected the Applicants' claims under both s 96 and 97 of the *Immigration and Refugee Protection Act, SC 2001, c 27*.

III. Analysis

[10] The Applicants raise a large number of issues in support of their position that the RPD's Decision demonstrates reviewable errors. My decision to allow this application for judicial

review turns on one particular issue, involving the RPD's treatment of an inconsistency between the Applicant's evidence surrounding the alleged March 17, 2016 incident and a statement made by her related to that incident during a credible fear interview conducted by the United States Department of Homeland Security [USHS] on June 1, 2016.

[11] Specifically, the Applicant testified before the RPD that her brother Kevin was present in the house on the evening of the alleged March 17 incident. She has consistently provided Kevin's name in other documentation completed since arriving in Canada. However, the notes from her USHS credible fear interview indicate that she identified a different brother, named Jose Luis, when asked who was at the house when the Mara 18 arrived. The RPD drew a negative inference with respect to this inconsistency and found that her evidence in this respect was not credible. As I read the Decision, this inconsistency was one of the principal bases for the RPD doubting that the March 17 incident occurred and therefore rejecting the refugee claim.

[12] One of the Applicant's main arguments is that the RPD erred by again failing to apply the Gender Guidelines in its analysis of her claim. In particular, the Applicant submits that the Decision does not demonstrate the sensitivity mandated by the Gender Guidelines, in that the RPD failed to engage with the Applicant's explanation surrounding the inconsistency arising from the notes of her US credible fear interview. The Applicant refers in particular to the explanation provided in the Amended Narrative which she submitted for her *de novo* hearing.

[13] The Decision demonstrates that that the RPD was aware of the Amended Narrative, as it refers to this document and provides the following analysis:

The panel also considered the claimant's explanation regarding this inconsistency stated in the Amended Narrative, paragraphs 4 to 14, proffered at the hearing De Novo. However, the panel does not find the claimant's following explanations in the amendment regarding naming Jose at the USHS, as being the brother as persuasive. The claimant explained in part that: because she and her son were held in a room that was overcrowded; it had no chairs only cement benches; its temperature was cold; there was no privacy for the washroom; it lacked a window; or the claimant's impression that the officer was accustomed to conduct the interviews quickly; the interpretation conducted via telephone; or that the officer's "note were not an exact transcript"; the claimant did not know that the person she spoke to [from FACE] was not a lawyer; and finally because, "I was describing such a traumatic assault I may have made an error." The panel finds that on a balance of probabilities it is implausible for anyone in error to indicate Jose Luis Tobias Escobar instead of Kevin, a name that could only be provided by the claimant.

[14] However, this analysis fails to engage with an important aspect of the Applicant's explanation. While the RPD accurately notes that the explanation acknowledges the possibility that the Applicant may have made an error in response to the USHS officer's questioning, the amended portion of the Amended Narrative expresses the Applicant's confidence that she would have said her brother's name correctly. Importantly, she also explains that the notes were never read or interpreted back to her in the US. The RPD's analysis omits any consideration of this aspect of the Applicant's explanation.

[15] The Applicants rely on *Sadeghi v Canada (Citizenship and Immigration)*, 2011 FC 1236 [*Sadeghi*], which found that it was unreasonable for the RPD to rely upon inconsistencies between a refugee claimant's evidence and an immigration form completed by an interviewing officer upon the claimant's arrival in Canada. The Court's decision turned on the fact that the contents of the completed form had not been translated back to the claimant to provide her with

an opportunity to confirm that the document was reflective of what she had said to the interviewer. *Sadeghi* relied on *Xu v Canada (Citizenship and Immigration)*, 2007 FC 274 [*Xu*], which allowed a judicial review in part based on a similar analysis.

[16] In the case at hand, it appears to be uncontested that the notes of the US credible fear interview were not translated back to the Applicant to permit her to confirm their accuracy. I would not conclude that it was necessarily unreasonable for the RPD to rely upon the inconsistency with the Applicant's credible fear interview as a basis for an adverse credibility finding. Indeed, Justice Phelan noted at paragraph 14 of *Xu* that he was not concluding that there was an absolute obligation to read back interview notes to ensure accuracy. However, in my view, it was clearly necessary for the RPD to give consideration to the Applicant's explanation, that the notes were not read or interpreted back to her, in considering whether the notes represented a reliable basis to impugn her credibility. Regardless of whether this concern represents a failure to apply the Gender Guidelines as the Applicant submits, I find it to be a reviewable error which requires that this application for judicial review be allowed.

[17] Neither party proposed any question for certification for appeal, and none is stated.

JUDGMENT IN IMM-6230-18

THIS COURT'S JUDGMENT is that this application for judicial review is allowed and this matter is returned to a differently constituted panel of the Refugee Protection Division for redetermination. No question is certified for appeal.

“Richard F. Southcott”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6230-18

STYLE OF CAUSE: YESSICA ROXANA ZETINO TOBIAS
JONATHAN ALEXANDER ORTIZ ZETINO
V THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: AUGUST 21, 2019

JUDGMENT AND REASONS SOUTHCOTT, J.

DATED: SEPTEMBER 11, 2019

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