

Federal Court



Cour fédérale

Date: 20110329

Docket: IMM-4758-10

Citation: 2011 FC 385

Toronto, Ontario, March 29, 2011

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

JOSE HECTOR AYALA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application concerns a negative decision of the Refugee Protection Division (RPD) with respect to the Applicant's claim for s. 97 protection from the El Salvadorian criminal organization known as the "maras".

[2] In his PIF, the Applicant outlines his conduct, experiences and reasons for leaving El Salvador which date back to 1982, and includes the most recent flight which is the subject matter of his claim. The RPD describes the “allegations” of this history as follows:

The claimant alleged that in 1982 when he was 23 years old, fearing the civil war in El Salvador, he left the country, travelling through Guatemala and Mexico and entered the US. After a month in the US working illegally, he was arrested and deported back to El Salvador.

In 2003 there was news of violence committed by the maras. As a result he became afraid again and entered the US illegally. But hearing that that the authorities were cracking down on illegal immigrants, he returned to El Salvador. He alleged to do farming with the money he had saved working in the US.

In March 2007 he was approached by three members of the maras who demanded money from him. Not having the money to give them, they kicked and hit him leaving him completely helpless.

The last week of that same month he was again approached by three members of the maras. They demanded he pay them \$4,000. He didn't have the money to pay and he was again beaten. Fearing the maras, he again left and went to the US and came to Canada on June 25, 2008 where he has a brother and sister, filing for refugee protection on the same day. The claimant did not seek state protection.

(Decision, paragraphs 2 to 5)

[3] In evaluating the evidence of the Applicant's conduct, the RPD concluded that, with respect to his leaving El Salvador in 1982 and 2003, he did so, not to flee risk, but rather as an economic migrant. In reaching this conclusion, the RPD made negative findings of credibility with respect to the Applicant's evidence. Indeed, the negative findings were used to deny the Applicant's claim which is the subject of this judicial review.

[4] With respect to the 1982 leaving of El Salvador, these statements are made by the RPD in the decision:

The panel does not believe that the claimant have been approached, threatened, beaten or asked to come up with extortion payments. In arriving at this decision, the panel examined the evidence before it. For example, in 1982 the claimant said he left El Salvador because of the civil war. He said he feared being killed because there were dead people everywhere and people were being shot. He went to the US to escape the violence. But he was deported back to El Salvador only after a month of being in the US.

[...]

As such, the panel believes that the claimant went to the US for financial gain, to work, not because he feared anyone or anything in El Salvador. If he had feared the civil war, as he said he did, he would have filed for asylum. By not filing for asylum, bear in mind he didn't say that he was unaware of the system and/or process of filing for asylum, but that he needed money to file. The panel does not believe he intended to file for asylum and finds that his explanation that he didn't have the chance to file because he was deported so soon further undermines his credibility. Therefore, the panel finds that the claimant has a serious problem with telling the truth and his claim that he feared for his life was really the beginning of a string of false allegations of a well-founded fear that has found its way in this particular claim before this panel.

(Decision, paragraphs 9 and 12)

[5] And with respect to the 2003 leaving of El Salvador, this statement is made in the decision:

The panel does not believe that the claimant feared any violence from the maras when he left El Salvador in 2002 or 2003. If he did he would not have returned to the country while the maras that caused him to leave was still in operation. The panel finds that the allegation that he feared the violence from the maras to undermine his credibility. The panel also finds that the allegations of the claimant fearing first the civil war, then the news of the violence associated with the maras, were exaggerations and embellishments to justify his trips to the US, which the panel finds were for economic reasons, not because of a well-founded fear. For example, the claimant was asked why he went back to the US. He said to get some money together to return to his land, money to buy animals, cows, pigs and chicken and to farm the land.

(Decision, paragraph 15)

[6] There is no question that the negative credibility findings with respect to the Applicant's 1982 and 2003 conduct resulted in the following negative credibility finding with respect to his 2008 leaving of El Salvador:

The claimant testified that he left El Salvador again for the US in 2008. As in all the other times he went to the US, he went through Guatemala, Mexico and then to the US. He was asked why he didn't file for asylum in Guatemala. He said that the maras are in Guatemala too. Asked how long he stayed in Guatemala; he said one day. He was asked again why he didn't file for asylum. He said his idea was to come to Canada. Asked how long he stayed in Mexico; he said one month. He also testified that he worked while he was in Mexico. Asked how long he remained in the US; he said a month. The panel notes that the claimant didn't file for asylum in Guatemala or Mexico because the maras have connections in these countries and he was in transit to Canada. When he was asked why he didn't file for asylum in the US, he said because he was previously deported from the US. Again, the panel knows that the claimant is very verse on the requirements for asylum in the US, but he never filed for asylum which the panel believes was because he didn't have a well-founded fear then as he does not have now [sic].

The panel notes that failure to claim refugee protection from a country within which the claimant resided or even sojourned or travelled before coming to Canada, when that country is a signatory to the *Convention Relating to the Status of Refugees*; can be seen to negate the claimant's fear. The Federal Court has ruled that the claimant must subjectively fear persecution, and this fear must be well-founded in an objective sense. The panel believes if the claimant had a well-founded fear and was not an economic migrant, he would have sought asylum in one of the countries he sojourned.

(Decision, paragraphs 20 and 21)

[7] With respect to the present Application, I have no difficulty differentiating the findings on the three separate events of the Applicant leaving El Salvador. In the 1982 and 2003 events, the Applicant had no personal targeting evidence to offer and, after leaving El Salvador, he did not claim asylum anywhere. I find that there is a sharp contrast between the evidence respecting those

events and the evidence that grounds the claim presently under review. In the present case, the Applicant gave evidence of personal targeting, and reasons as to why he did not claim asylum on his way to Canada, and why he wanted to claim in Canada: his brother lives in Canada. Upon his arrival in Canada, the Applicant immediately claimed protection. Given this differentiation, in my opinion it was unfair for the RPD to use the negative credibility findings with respect to 1982 and 2003 leavings to make a negative credibility finding on the present claim. In my opinion, the present claim must be evaluated on its own merits, untainted by any credibility opinion with respect to the Applicant's past history of movements from El Salvador.

[8] As a result, I find the RPD's decision to be indefensible in respect of the facts and law and is, therefore, unreasonable.

ORDER

Accordingly, the decision under review is set aside and the matter is referred back for redetermination before a differently constituted panel.

There is no question to certify.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4758-10

STYLE OF CAUSE: JOSE HECTOR AYALA
v.
THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MARCH 29, 2011

**REASONS FOR ORDER
AND ORDER BY:** CAMPBELL J.

DATED: MARCH 29, 2011

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