

Federal Court



Cour fédérale

Date: 20140821

Docket: IMM-7165-13

Citation: 2014 FC 817

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, August 21, 2014

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**REYNA JOHANA LOYO DE XICARA
EILYN FERNANDA XICARA LOYO
HILLARY ANDREA XICARA LOYO**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Preliminary remarks

[1] A court is not bound by its reasons or by its conclusions in a decision when a new hearing is held. A hearing *de novo* is a new hearing, from start to finish, including the eventual decision

after the case has been considered (*Hernandez Rodriguez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1331 at para 4).

[2] This means that a new hearing must be considered as a complete whole, in its context as fully set out again by a new hearing.

[3] The record as a whole reveals major inconsistencies and gaps, as well as a lack of credibility on the part of the principal applicant. The panel's decision is based on the evidence in the record. This initial decision, by how it was analyzed, shows that the panel came to a reasonable decision within a range of outcomes which are defensible in respect of the facts and law, and that the decision maker's conduct was acceptable.

II. Introduction

[4] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for judicial review of decision dated October 15, 2013, of the Refugee Protection Division of the Immigration and Refugee Board [RPD] rejecting the applicants' claim for protection as refugees or persons in need of protection within the meaning of section 96 and 97 of the IRPA.

III. Facts

[5] The principal applicant, Reyna Johana Loyo de Xicara, and her two minor daughters, Eilyn and Hillary, are citizens of Guatemala.

[6] She alleges that in September 2008, members of Mara Salvatrucha [Maras] demanded that her husband pay them 15,000 quetzals. Her husband allegedly paid this amount to avoid putting his family in danger.

[7] That same day, the Maras allegedly demanded another payment of 150,000 quetzals, threatening to kill the family if the money was not paid.

[8] On November 3, 2008, the applicant's husband allegedly filed a complaint with the police. It is alleged that three days later, he was beaten and taken to hospital.

[9] Four months later, on February 27, 2009, the applicant's husband left the country and came to Canada, where he claimed refugee protection on March 7, 2009. The applicant allegedly continued to live at her home with her daughters, even though she had obtained a visa for the United States, valid until 2018.

[10] In June 2009, the applicant's husband returned to Guatemala because one of his daughters was seriously ill.

[11] On June 1, 2010, a year after her husband returned, the applicant allegedly received a call from the Maras telling her that they knew that her husband was back. She claims that she filed a complaint with the police. A few days later, the Maras allegedly fired on her home while the family was out.

[12] On June 7, 2010, the applicant claims to have contacted the Public Prosecutor to ask that her house be placed under surveillance. The applicant, her husband and her children left Guatemala for the United States the next day.

[13] On July 11, 2010, the applicant and her children entered Canada illegally, without seeking asylum in the United States. It is alleged that her husband did not seek asylum in the United States either and to this day continues to live there illegally.

IV. Decision under review

[14] The RPD rejected the applicants' claim for refugee protection because it found it not to be credible.

[15] The RPD found that there were several significant omissions in the principal applicant's narrative and that she added significant facts, particularly that she did not in fact remain at home after her husband left for Canada and instead went to live with her husband's grandmother. The RPD did not accept the applicant's explanation that she did not know that her Personal Information Form [PIF] had to be as detailed as that. The RPD noted that this detail was central to the issue of the risk that the Maras posed to the family. The RPD did not find this part of her narrative to be credible. In addition, the RPD did not give any weight to the allegations relating to her complaint to the Public Prosecutor, nor did it give any weight to allegations that the Maras were now extorting money from her parents and had taken over the applicant's house, the latter facts not having been raised before the date of the hearing.

[16] The RPD also did not believe the applicant when she stated that the Maras were watching her house and had fired on her residence, as they nevertheless stayed there until June 8, 2010.

This behaviour, in the RPD's view, did not show that she genuinely feared for her life.

Moreover, the allegation that the Maras were watching her house did not appear anywhere in her PIF. This second omission further undermined the applicant's credibility.

[17] Furthermore, the RPD concluded that the applicant and her daughters were not personally subjected to a risk as described in section 97 of the IRPA. The risk that the applicants faced was the same as the general risk faced by other Guatemalans.

[18] The RPD noted that the applicant's husband was targeted by the Maras because he was perceived as being rich. They therefore extorted money from him twice in 2008 on this basis. No one in Guatemala is safe from extortion, or from the extortion-related violence committed by the Maras.

V. Issue

[19] Did the RPD err in finding that the applicants were not credible?

VI. Relevant legislative provisions

[20] Sections 96 and 97 of the IRPA apply in this case:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui,

persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

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) 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 each of those countries; or

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 pays;

(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.

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.

Person in need of protection

Personne à protéger

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

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

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

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

(i) the person is unable

(i) elle ne peut ou, de ce

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 standards, and

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

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 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.

Person in need of protection

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

Personne à protéger

(2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VII. Positions of the parties

[21] The applicants make three key arguments in their submissions to the Court:

- (a) The RPD rendered an unreasonable decision in finding that the principal applicant was not credible, when a previous panel had found that she was credible;

- (b) The RPD rendered an unreasonable decision in finding that there are significant omissions in the record, when a previous panel found that the narrative was plausible and contained no omissions;
- (c) The RPD rendered an unreasonable decision in failing to assess the applicant's personal situation in relation to the general situation in the country.

[22] Regarding the first and second arguments, the respondent submits that the applicant behaved in a manner that was inconsistent with a genuine fear for her life. Similarly, the applicant's narrative contained significant omissions that she could not satisfactorily explain. The RPD also noted inconsistencies in the applicant's testimony. These factors were sufficient to conclude that the applicant was not credible.

[23] Regarding the third argument, the respondent submits that the burden of proof was on the applicant to establish the truth of her allegations. She did not succeed in establishing that the alleged facts had indeed taken place, for example, the death threats. The applicant did not behave like someone who feared the Maras when she returned to live in her home 19 months after receiving death threats.

VIII. Analysis

[24] The issues will be addressed together.

[25] The credibility problems are dispositive of this case. Here, there are simply too many omissions for the story to be credible. Moreover, over the years, the principal applicant did not at all act as if she feared for her life. She remained at her house after her husband left, despite the fact that she could have left for the United States on a visa that was valid until 2018. When the principal applicant finally left for the United States, she did not seek asylum there for herself or her children. Regarding the principal applicant's allegation that the previous panel found her to be credible, the case law confirms that RPD members are not bound by the previous decisions of other members (*Hernandez Rodriguez*, above).

[26] The principal applicant presented new facts that were not in her previous file (*Loyo de Xicara v Canada (Minister of Citizenship and Immigration)*, 2013 FC 593, 433 FTR 263).

[27] In addition, the principal applicant did not raise an apprehension of bias in a timely manner; rather, she did not show any blameworthy conduct in this regard (*Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369).

IX. Conclusion

[28] For all the above reasons, the applicants' application for judicial review is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the applicants' application for judicial review be dismissed, with no question of general importance to be certified.

“Michel M.J. Shore”

Judge

Certified true translation
Michael Palles

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7165-13

STYLE OF CAUSE: REYNA JOHANA LOYO DE XICARA, EILYN
FERNANDA XICARA LOYO, HILLARY ANDREA
XICARA LOYO v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: AUGUST 21, 2014

JUDGMENT AND REASONS: SHORE J.

DATED: AUGUST 21, 2014

APPEARANCES:

Oscar Rodas FOR THE APPLICANTS

Alain Langlois FOR THE RESPONDENT

SOLICITORS OF RECORD:

Oscar Rodas FOR THE APPLICANTS
Advocate
Montréal, Quebec

William F. Pentney FOR THE RESPONDENT
Deputy Attorney General of Canada
Montréal, Quebec