

Federal Court



Cour fédérale

Date: 20120203

Docket: IMM-2728-11

Citation: 2012 FC 150

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 3, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

**RODRIGO OCAMPO AGUILAR
IRMA GORDILLO ENCISO
VICTOR MANUEL OCAMPO GORDILLO
CARLOS ALBERTO OCAMPO GORDILLO
JOSE SALVADOR OCAMPO GORDILLO
RODRIGO OCAMPO GORDILLO**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is an application for judicial review, submitted in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), of the decision by the Immigration and Refugee Board (panel), dated April 4, 2011, that Rodrigo Ocampo Aguilar (principal applicant), his spouse, Irma Gordillo Enciso, and their four children, Victor Manuel, Carlos Alberto, both minors, and Jose Salvador and Rodrigo Ocampo Gordillo, both the age of majority (applicants), are not Convention refugees or persons in need of protection under section 96 and subsection 97(1) of the IRPA.

[2] For the following reasons, this application for judicial review is dismissed.

II. Facts

[3] The applicants are all citizens of Mexico.

[4] The principal applicant was a taxi driver in Mexico City. He alleges that he had several problems with two drug traffickers, El Pelon and El Cejon, who live close to his house.

[5] On March 21, 2008, the principal applicant returned from work and noticed El Pelon and El Cejon doing business in front of his house. He asked them to leave the premises, but the two individuals refused. An argument ensued and escalated into a fight. The principal applicant's children as well as other neighbours intervened and made the individuals leave.

[6] The principal applicant did not file a complaint with the police against the two men because he feared the consequences for him and his family. Furthermore, he alleges that his neighbour Francisco already experienced problems with them and mysteriously disappeared in November 2007. His body was found one month later.

[7] The principal applicant and his parents went to see El Pelon and El Cejon the day after their fight to ask them to stop. The two men refused and threatened to kill them if they decided to file a complaint with the authorities.

[8] On April 15, 2008, the principal applicant returned home in his taxi. He again noticed the two men blocking his driveway. A new argument ensued. One hour later, one of them rang the principal applicant's doorbell and asked him to step outside, but the principal applicant refused. The man threatened to kill him, alleging that he was interfering with their business. The principal applicant and his son Rodrigo tried to restrain him, but he managed to break loose and run away. The man climbed into a Volkswagen vehicle and fired some shots. The principal applicant and his son avoided being hit.

[9] The principal applicant still did not file a complaint with the police because he believes that the authorities are in collusion with traffickers.

[10] The applicants left Mexico on July 3, 2008.

III. Legislation

[11] Sections 96 and 97 of the IRPA read as follows:

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 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

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 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) 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 or, because of that risk, unwilling to avail themselves of the protection of that country,

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

(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,

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

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

(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

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as

2) A également qualifié de personne à protéger la personne qui se trouve au Canada et fait

being in need of protection is also a person in need of protection.

partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

IV. Issues and standard of review

A. Issues

[12] *This application for judicial review raises two issues:*

1. Did the panel breach its duty of procedural fairness by failing to share its concerns about the contradictions it identified between the applicants' account and their testimony at the hearing?

2. Did the panel err by finding that the applicants' factual story was not credible?

B. Standard of review

[13] The panel's obligation to allow the principal applicant to respond to its concerns about the contradictions is a question of procedural fairness to be assessed on the standard of correctness (see *Azali v Canada (Minister of Citizenship and Immigration)*, 2008 FC 517 at paragraph 12 (Azali)).

[14] The Court also finds, in *Mejia v Canada (Minister of Citizenship and Immigration)*, 2009 FC 354, [2009] FCJ No 438 at paragraph 26, that the standard of review applicable to

assessing credibility is reasonableness (see also *Zarza v Canada (Minister of Citizenship and Immigration)*, 2011 FC 139, [2011] FCJ No 196 at paragraph 16).

V. Positions of the parties

A. Position of the applicants

[15] The principal applicant maintains that the panel’s findings surrounding the events of March 21, 2008, are unreasonable. He claims that the panel erred by stating that it is implausible that the altercation with his attackers occurred inside his taxi. The principal applicant emphasizes that he has only nine years of education and that it is possible that he failed to specifically mention getting out of his taxi on March 21, 2008, when he replied to the questionnaire in his Personal Information Form (PIF).

[16] The principal applicant also argues that the panel never informed him of its concerns with respect to the events on March 21, 2008, and thus breached its duty of procedural fairness (see *Tanase v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 32).

[17] The principal applicant alleges that the panel drew an unreasonable inference from his failure to include background on the events of March 22, 2008 in his PIF. The panel wrote, at paragraph 20 of its decision, “[that it] does not believe that the claimant went to the home of these two drug dealers . . . he does not mention in his narrative that they accompanied him”. The principal applicant contends that this finding is perverse because this was an innocent omission, as the Court

explains in *Basseghi v Canada (Minister of Citizenship and Immigration)*, [1994] FCJ No 1867 (QL) (*Basseghi*).

[18] The principal applicant also submits that the panel erred by finding that there was an apparent contradiction between his PIF and his testimony at the hearing. The panel wrote the following at paragraph 18 of its decision: “. . . On that topic, the panel asked whether, on March 22, these men had said anything else to him, and he replied [translation] ‘not that I remember’ The panel noted that it is stated in his narrative that he received death threats on that day, and the claimant stated emphatically that he did not receive death threats, which surprised the panel”. The principal applicant points out that he provided a reasonable explanation by stating that he received, instead, implicit threats by the two drug traffickers.

[19] Furthermore, the principal applicant characterizes the contradiction between his testimony and that of his son concerning the incident of April 15, 2008, as minor. Contrary to what the panel wrote in its decision, the principal applicant’s son did not mention that two men came to the family home to have a discussion with his father. Rather, he explained the situation to the immigration officer in general terms.

[20] The panel did not consider the facts surrounding the murder of Jose Ocampo Aguilar, the principal applicant’s brother. The principal applicant emphasizes the importance of this omission because the panel must examine the risks the applicants would face if they were to return to Mexico. According to the principal applicant, the panel made a fundamental error by excluding this important piece of evidence from its analysis.

[21] The principal applicant argues that the accumulation of material errors committed by the panel warrants the intervention of this Court.

B. Position of the respondent

[22] In reply, the respondent argues the contrary. The panel made a reasonable finding that there was a major contradiction between the principal applicant's PIF and his testimony on the altercation of March 21, 2008. The principal applicant provided an exhaustive description of the March 21 events in his PIF and did not mention the fact that the traffickers forced him to get out of his car before physically attacking him. The respondent emphasizes that it is recognized in case law that omissions from a PIF may be a basis for negative conclusions as to credibility (see *Navaratnam v Canada (Minister of Citizenship and Immigration)*, 2011 FC 856 at paragraph 17; *Chavez v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 738; *Kabengele v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1866).

[23] Furthermore, the respondent claims that the principal applicant's education level is of no relevance in this case. All applicants have an obligation to submit a reliable application, especially when they received legal advice. Thus, when there is a major difference between an applicant's PIF and his or her testimony at the hearing, the panel may draw negative inferences and make a finding of lack of credibility.

[24] According to the respondent, the panel was entitled to think that it was implausible that the principal applicant met with El Pelon and El Cejon the day after the altercation. Furthermore, the principal applicant adjusted his testimony to make it conform to the account in his PIF. He initially talked about death threats uttered against him and his family and then about insults and then went back to his earlier version. The respondent emphasizes that given such variations in a testimony, it becomes entirely open to the panel to make a finding of lack of credibility for the applicant.

[25] Regarding the sequence of events on April 15, 2008, the panel noted a major contradiction between the principal applicant's statements and those of his son, Rodrigo. The principal applicant claims that a man came to his house to threaten him. The principal applicant's son provided a different version during his interview with the immigration officer on August 4, 2008. The principal applicant's son claimed that two men came to their home instead of one. However, he tried to adjust his testimony during the hearing stating that one of them arrived later and did not enter the principal applicant's home.

[26] The respondent notes that it is settled law that answers provided to an immigration officer and a contradictory testimony or account before the Immigration and Refugee Board of Canada (IRB) may undermine an applicant's credibility (see *Carranza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 914 at paragraph 20; *Cienfuegos v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1262 at paragraph 1). The respondent argues that it was open to the panel to find that the refugee claim was unfounded.

[27] The respondent also maintains that the principal applicant was unable to establish a connection between his brother's murder and the problems with his two neighbours.

[28] The respondent alleges that the panel based its lack of credibility finding on the accumulation of omissions, contradictions and implausibilities surrounding the key elements of the principal applicant's account. The panel heard the applicants orally and was therefore able to adequately assess their credibility (see *Berhane v Canada (Minister of Citizenship and Immigration)*, 2011 FC 510 at paragraph 45; *Asashi c Canada (Minister of Citizenship and Immigration)*, 2005 FC 102 at paragraph 8).

[29] Finally, the respondent points out that a reviewing Court must not usurp the role conferred on the panel and carry out its own assessment of the evidence (see *Nanton v Canada (Minister of Citizenship and Immigration)*, 2011 FC 266 at paragraph 7; *Garas v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1247 at paragraph 22).

VI. Analysis

1. Did the panel breach its duty of procedural fairness by failing to share its concerns about the contradictions it identified between the applicants' account and their testimony at the hearing?

[30] The panel did not breach its duty of procedural fairness to the principal applicant in this case.

[31] “Their duty of fairness does not require that the applicants be confronted with information which they themselves supplied” (see *Mahdoon v Canada (Minister of Citizenship and Immigration)*, 2011 FC 284 at paragraph 22; *Azali*, above, at paragraph 26).

[32] Justice Tremblay-Lamer addressed a similar issue in *Ngongo v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1627. She wrote the following at paragraph 16 of her decision:

[16] In my view, regard should be had in each case to the fact situation, the applicable legislation and the nature of the contradictions noted. The following factors may serve as guidelines:

1. Was the contradiction found after a careful analysis of the transcript or recording of the hearing, or was it obvious?
2. Was it in answer to a direct question from the panel?
3. Was it an actual contradiction or just a slip?
4. Was the applicant represented by counsel, in which case counsel could have questioned him on any contradiction?
5. Was the applicant communicating through an interpreter? Using an interpreter makes misunderstandings due to interpretation (and thus, contradictions) more likely.
6. Is the panel’s decision based on a single contradiction or on a number of contradictions or implausibilities?

[33] The case law cited above applies for determining whether the Court is faced with a breach of procedural fairness. In this case, we are of the opinion that the panel correctly communicated to the principal applicant its concerns on the plausibility of his account.

[34] At page 472 of the IRB file, the panel reminded the principal applicant of the following:

[TRANSLATION] “Sir, you stated in your account that, on March 21, you returned home from work and saw them selling drugs in front of your house. And seeing this you stated: ‘I went to see them to tell them to go elsewhere to conduct their business’. And then you tell us today that they forced you to get out of the car”. It is clear and unequivocal that the panel communicated its concerns clearly to the principal applicant with respect to his version of the events of March 21, 2008. There was no breach of procedural fairness.

2. *Did the panel err by finding that the applicants’ factual story was not credible?*

[35] Assessing an applicant’s credibility is a question of fact. Thus, it is within the expertise of the panel and is to be reviewed on the standard of reasonableness (see *Benmaran v Canada (Minister of Citizenship and Immigration)*, 2011 FC 755 at paragraph 5 (*Benmaran*)). The Supreme Court in *Dusmuir v New Brunswick*, 2008 SCC 9 at paragraph 47, reminds us that it must be determined whether the decision “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”. The Court must show deference towards the panel in regards to credibility findings as long as these are reasonable and find basis in the elements of the evidence submitted (see *Benmaran*, above, at paragraph 5).

[36] In this case, the panel looked at three critical events of the refugee claim and identified several contradictions or omissions between the principal applicant’s PIF and his testimony at the hearing.

[37] First, the panel made an implausibility finding regarding the events of March 21, 2008, because it identified significant contradictions with respect to the confrontation between the principal applicant and the two drug traffickers. In his PIF, the principal applicant wrote the following:

[TRANSLATION]

. . . I returned from work and noticed that El Cejon and El Pelon were selling drugs in front of my house. Seeing this, I went to see them to tell them to go elsewhere to do their business. They replied that they were on public property, that they could do what they wanted and that they would not go away

When they refused to leave the front of my house, I kept insisting that they go in front of their house to do their dirty work Because they would not listen, voices escalated and insults started flying all over the place. The situation deteriorated into an fist fight

[38] The panel may “make reasonable findings based on implausibilities, common sense and rationality and may also reject uncontradicted evidence if it is not consistent with the probabilities affecting the case as a whole” (see *Osornio v Canada (Minister of Citizenship and Immigration)*, 2011 FC 684 at paragraph 16). In this case, the panel noted a major contradiction on an essential element of the applicants’ refugee claim.

[39] The principal applicant recognizes his omission regarding the sequence of events on March 22, 2008. In his PIF, he does not mention going to the traffickers’ house with his parents. The principal applicant refers to *Basseghi*. In that case, the Court stated the following: “It is not incorrect to say that answers given in a PIF should be brief but it is incorrect to say that the answers should not be complete with all of the relevant facts. It is not enough for an applicant to say that what he said in oral testimony was an elaboration. All relevant and important facts should be

included in one's PIF. The oral evidence should go on to explain the information contained in the PIF." (see *Basseghi* at paragraph 33).

[40] In the Court's opinion, the panel had reason to find that this omission undermined the credibility of the applicants.

[41] The principal applicant also notes that the panel erred by stating that he failed to mention in his testimony the death threats uttered against him by the drug traffickers. At the hearing, the principal applicant maintained this position. Nevertheless, the panel noted that the principal applicant wrote the following at lines 61 to 63 of his PIF: [TRANSLATION] "they told us that if we made the mistake of filing a complaint against them, a member of my family would pay very dearly for it (they even went as far as telling us that they were going to kill us)" (see page 33 of the Tribunal Record). The Court recognizes the correctness of the respondent's position emphasizing, at paragraph 15 of his supplementary memorandum, that [TRANSLATION] "the words 'were going to kill us' are explicit and are not implied, but clearly stated". This is an apparent contradiction and the panel correctly identified it.

[42] The Court agrees with the principal applicant's position that the contradiction between his testimony and that of his son is minor. Nevertheless, the panel was entitled to find that this contradiction diminishes his credibility because it is in addition to other deficiencies. The panel wrote the following at paragraph 25 of its decision: "Because of these omissions and contradictions, the panel does not believe that the events of March 21 and 22 and of April 15 took place". The

accumulation of contradictions was fatal to the applicants' credibility. This finding falls within the possible outcomes in this case.

[43] Finally, it is important to note that the panel reasonably concluded that the murder of Jose Ocampo Aguilar, the principal applicant's brother, has nothing to do with the applicants' refugee claim. The principal applicant was not successful in establishing the connection between his brother's death and his refugee claim in Canada.

VII. Conclusion

[44] The panel reasonably found that the applicants are not credible and that they are not Convention refugees or persons in need of protection under section 96 and subsection 97(1) of the IRPA. The Court also wishes to emphasize that there was no breach of procedural fairness by the panel.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that

1. The application for judicial review is dismissed; and
2. There is no question of general importance to certify.

“André F.J. Scott”

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2728-11

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v
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: November 29, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** SCOTT J.

DATED: February 3, 2012

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