Federal Court  Cour fédérale

Date: 20120302

Docket: IMM-3611-11

Citation: 2012 FC 285

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, March 2, 2012

PRESENT: The Honourable Mr. Justice de Montigny

BETWEEN:

ROGELIO MILIAN PELAEZ

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board (the panel) dated April 12, 2011, that the applicant is not a refugee under the *United Nations' Convention relating to the Status of Refugees* or a person in need of protection as these expressions are defined in sections 96 and 97 of the *Immigration and Refugee Protection Act* (the Act).

[2] For the reasons described below, the Court finds that this application must be allowed.

I. Facts

[3] The applicant, Rogelio Milian Pelaez, was born on September 8, 1975, and holds Guatemalan citizenship. He alleges that he worked as a bodyguard for Maegli Novella, a businesswoman, from 2001 to 2003.

[4] One of his bodyguard colleagues told him that a gang of kidnappers was preparing to kidnap Ms. Novella. Despite the fact that he had been threatened with death if he did not participate, he chose to tell Ms. Novella what was brewing. She apparently then complained to the police, which led to the imprisonment of one of the members of the kidnappers' gang, nicknamed El Cachorro.

[5] After conducting her own investigation, Ms. Novella suggested that the applicant flee the country because his life was in danger. The applicant alleged that, before leaving Guatemala, he drove his family to a small community located a hundred kilometres from Guatemala City so that they would be safe.

[6] The applicant then went to the United States, where he lived between March 2003 and April 2005.

[7] On his return to Guatemala, the applicant did not return to live in Guatemala City but chose to move to Santa Cruz El Chol, where he worked as a minibus driver.

[8] At the end of May 2008, he was apparently found by El Cachorro while he was driving his minibus. El Cachorro, accompanied by three other people, allegedly hit him with his revolver after putting it in the applicant's mouth. His attackers fled when the passengers started yelling, but first told him that they would kill him if they saw him again.

[9] The applicant then complained to the police. The police officer to whom he complained called him two weeks later to advise him to leave the country, having himself been the target of gunfire and having lost a child following the altercation.

[10] The applicant again fled Guatemala on June 20, 2008, and went to the Canadian border where he made a claim for refugee status on July 18, 2008.

II. Impugned decision

[11] The panel found that the applicant's testimony contained implausibilities, inconsistencies and contradictions that seriously compromised his credibility. Thus, in a short decision, it denied the refugee claim on the following grounds:

> [TRANSLATION]
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> a. The applicant states that he left Guatemala for the United States in April 2003 because he feared for his life, but he never thought of filing a claim for asylum with the American authorities.

b. The applicant claims that he returned to Guatemala in March 2005 because he missed his family, but fled the country alone again in July 2008. What is more, his voluntary return to Guatemala is inconsistent with his allegations of fear for his life.

c. At the hearing, the applicant alleged that he was threatened and physically assaulted in May 2008 at the wheel of the minibus he was driving. Yet, at the interview with an immigration officer on September 2, 2008, less than two months after he arrived in Canada, he stated that he had a not been threatened because he was driving. Moreover, the applicant was not able to explain why he would be threatening to his alleged attackers and why they would not have killed him immediately instead of continuing to threaten him.

III. Issue

[12] The only issue in this case is whether the panel erred in finding that the applicant lacked credibility.

IV. Analysis

[13] In matters of credibility, it is well established that this Court cannot substitute its opinion for that of the panel, unless the applicant can show that the panel's decision was based on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it: see *Federal Courts Act*, RSC 1985, c F-7, paragraph 18.1(4); *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190.

[14] In this case, I find that the applicant has succeeded in demonstrating this. Dealing first with the fact that he did not claim asylum in the United States, the applicant explained that he never intended to live in the United States and that he wanted only to temporarily flee his country so that he would be forgotten. He also maintained that a claim for asylum would have been illusory in the United States anyway, since legislation in that country does not recognize risks arising from crime, as was the case in Canada before section 97 was introduced in the Act. There is nothing ridiculous in these explanations and they warranted at least being considered by the panel.

[15] As to the fact that the applicant returned to live in Guatemala in 2005, I find that two factors must be taken into consideration. First, and contrary to what the panel stated, the applicant did not return where the people that he feared were, but rather went to a town located more than 100 kilometres and three hours' drive from Guatemala City where he lived before. Second, the applicant chose to work in another field. The panel seems to have not taken into account these explanations.

[16] Further, it seems illogical to criticize the applicant for attempting to relocate within his own country. It is well established that a refugee claimant must prove that he could not find refuge in his own country before claiming that status in another country. The internal flight alternative is an integral part of the notion of a refugee. With these principles in mind, it would be at the very least paradoxical to hold against the applicant his attempt to flee from the threats that he believed he was exposed to in another part of his country where he thought he was safe.

[17] It is true that the applicant told the immigration officer that his attackers had not threatened him because he was driving the minibus. However, it appears risky to me to attach too much importance to these words. It is not a faithful transcript of what the applicant said, but the summary of what the officer understood from the applicant's answers as translated by an interpreter. The applicant also did not have the luxury of expanding on this topic because the officer immediately changed the subject. Finally, this answer should have been considered in taking into account the testimony of the applicant before the panel and the documentary evidence he submitted.

[18] This is precisely where the problem lies. The applicant had filed several pieces of evidence that corroborated his story, including a letter from the police officer to whom he had made the complaint following the attack while he was driving the minibus and a letter written by one passenger of the minibus who had witnessed this attack. These two people had no personal interest in the applicant's claim.

[19] The respondent is correct in noting that the panel is presumed to have considered all the evidence before it. The fact remains that, as expressed by Justice Evans in *Cepeda-Gutierrez v Canada* (*Minister of Citizenship and Immigration*) (1998), 157 FTR 35, at para 17, 83 ACWS (3d) 264 (FCTD), that ". . . the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact . . .".

[20] The above-noted letters, as well as the medical note given to the applicant by the hospital where he had received care following the attack, were very relevant to the disputed facts. The panel

should not have overlooked this evidence and ought to have explained why it considered it to be insufficient to corroborate the applicant's story. In neglecting to discuss it, the panel drew conclusions without taking into account all the evidence before it.

[21] For all of the foregoing reasons, the application for judicial review must be allowed. No question will be certified.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review is allowed. No question is certified.

"Yves de Montigny"
Judge

Certified true translation
Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3611-11
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APPEARANCES:

Noel Saint-Pierre	FOR THE APPLICANT
Margarita Tzavelakos	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Saint-Pierre, Perron, Leroux Avocats Inc. Montréal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT