

Federal Court



Cour fédérale

Date: 20190808

Docket: IMM-3832-18

Citation: 2019 FC 1059

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, August 8, 2019

PRESENT: The Honourable Madam Justice Roussel

BETWEEN:

**LESTER SANTELIZ OBANDO AND
LUISA OBANDO**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Background

[1] The applicant, Lester Santeliz Obando, is a citizen of Nicaragua. On February 27, 2017, he entered Canada from the United States accompanied by his mother, Luisa Obando. They filed a refugee protection claim in which they alleged a fear of persecution by political groups in Nicaragua.

[2] On May 26, 2017, the Refugee Protection Division [RPD] informed the applicant's mother that her refugee protection claim was ineligible because she had already been granted refugee status and this status had not been revoked. However, the applicant continued to be represented by his mother before the RPD on account of his being a minor at 17 years old.

[3] On February 22, 2018, the RPD held a hearing. Both the applicant and his mother testified. The applicant was represented by counsel. On March 10, 2018, the applicant sent written submissions to the RPD.

[4] On April 13, 2018, the RPD rejected the refugee protection claim on the basis of credibility. After noting that an applicant benefits from the presumption of truthfulness, the RPD found that the applicant's and his mother's accounts lacked details on the alleged incidents of harassment and violence and that they embellished the refugee protection claim. The RPD was also of the view that the applicant's testimony concerning one of the alleged incidents of violence was contradictory and lacked spontaneity. While it accepted that the applicant had suffered verbal and physical violence, the RPD found that the applicant failed to establish that this violence was linked to the applicant's refusal to join pro-government political groups. The RPD added that objective documents also failed to confirm the existence of political violence against individuals who are not actively involved in the political debate. The RPD therefore rejected the applicant's allegation that he would be considered to be "an enemy" of the state. After reviewing allegations of fear specific to the applicant's mother, the RPD found that the applicant had failed to establish a serious possibility of persecution on the grounds of his real or imputed political opinions.

[5] The RPD also concluded that the applicant is not a person in need of protection within the meaning of section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27. It reiterated that the applicant failed to demonstrate that the violence that he had suffered was related to his political opinions or that similar violence was likely to reoccur in the future. It pointed out that the three incidents of violence did not involve the same individuals and did not reoccur. It also noted that there was limited risk of such incidents reoccurring since the applicant had indicated that he wanted to focus solely on his studies, did not intend to get politically involved in Nicaragua and had not reported the individuals who allegedly attacked him to the authorities.

[6] The applicant is seeking judicial review of this decision. He criticizes the RPD for (1) breaching procedural fairness by failing to consider the applicant's affidavit and the affidavit of another witness; (2) demonstrating bias by making disparaging comments to counsel for the applicant during the hearing; (3) unreasonably concluding that there were contradictions and inconsistencies in the applicant's file; and (4) failing to consider Chairperson's *Guideline 3: Child Refugee Claimants—Procedural and Evidentiary Issues* [Guideline].

II. Analysis

[7] It is trite law that an RPD decision based on credibility issues is highly factual and is reviewable on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53 [*Dunsmuir*]; *Doualeh v Canada (Citizenship and Immigration)*, 2018 FC 531 at para 16; *Kanziga v Canada (Citizenship and Immigration)*, 2017 FC 1014 at para 21; *Rahal v Canada (Citizenship*

and Immigration), 2012 FC 319 at para 22; *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732 (QL) at para 4).

[8] Where the standard of reasonableness applies, the Court's role is to determine whether the decision falls within a "range of possible, acceptable outcomes which are defensible in respect of the facts and law". If "the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility", it is not for this Court to substitute its own view of a preferred outcome (*Dunsmuir* at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]).

[9] Regarding the alleged breach of procedural fairness, the Federal Court of Appeal recently clarified that questions of procedural fairness do not necessarily lend themselves to a standard of review analysis. Instead, the role of this Court is to determine whether the procedure was fair having regard to all of the circumstances (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 54; *Dunsmuir* at para 79).

[10] The Court finds that the RPD's decision is reasonable and that the applicant's arguments concerning a breach of procedural fairness are without merit.

A. *Breach of procedural fairness*

[11] The applicant first maintains that the RPD could not reject the affidavits of the applicant and a witness, which clearly mentioned that the applicant had been beaten. He alleges that the

fact that little probative value was ascribed to this evidence constitutes a violation of procedural fairness.

[12] The Court cannot accept this argument for the following reasons.

[13] First, this is not a question of procedural fairness, but a question relating to the assessment of evidence.

[14] Second, the presumption of truthfulness established in *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (CA) (QL) [*Maldonado*] can be rebutted on the basis of conflicting evidence. In this case, the RPD found that there was sufficient evidence to cast doubt on the veracity of the applicant's testimony, thereby rebutting the presumption set out in *Maldonado*.

[15] Third, the RPD did not contest the fact that the applicant was beaten up. However, it found that this violence was not politically motivated.

[16] Fourth, the RPD is presumed to have considered all of the evidence. In this case, it explicitly mentioned the witness's evidence. However, it found that the applicant's testimony concerning the incident described by the witness in the affidavit and the failure to mention the existence of this witness in the original Basis of Claim Form [BOC Form] and the amended BOC Form undermined the applicant's credibility.

[17] Counsel for the applicant also submitted that the RPD member demonstrated bias by making disparaging comments about him. Among other things, he alleges that the member asked him the following questions about his ethnic origin: [TRANSLATION] “What country does he come from? What does he eat in his country? He eats foo foo; is he able to make submissions in English, etc.” In support of this allegation, counsel for the applicant referred to notes that he had prepared and which appeared to serve as a transcript.

[18] The Court does not ascribe any value to this transcript. First, it is not signed or dated. Moreover, it is not consistent with the certified transcript included in the file sent by the RPD in compliance with section 17 of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules* (SOR/93-22).

[19] While it is true that the RPD member asked counsel for the applicant whether he was comfortable in English and French, this question was asked in the context of a discussion about the submissions that would be made by counsel for the applicant. With respect to the other questions alleged by the applicant, they do not appear in the transcript in the tribunal record.

[20] The applicant also alleges that the RPD member made inappropriate comments about the applicant and his mother prior to the hearing. Once again, the applicant’s allegations are quite simply not supported by the evidence.

B. *Reasonableness of the credibility findings*

[21] The applicant submits that it was unreasonable for the RPD to conclude that there were contradictions and inconsistencies in the file.

[22] After reviewing the file and the RPD's decision, it is the Court's opinion that this argument is without merit. The inconsistencies and omissions identified in the testimony and the documents submitted in support of the refugee protection claim gave the RPD reason to question the applicant's credibility and his allegations.

[23] For example, the RPD highlighted the following factors:

[TRANSLATION]

- a. In response to question 2(a) of her BOC Form (which served as the basis for the applicant's form), which seeks to determine whether the person has ever been harmed, mistreated or threatened by any person or group in the past, the applicant's mother indicated that she had personally been mistreated by a pro-government group. Next, in response to question 2(b) of the BOC Form, which seeks a detailed explanation of the harm, mistreatment or threats that the person would suffer if he or she were to return to his or her country of origin, the applicant's mother stated that the criminals *might* break the windows of her home since they had done so to others. Then, in paragraph 17 of her affidavit dated January 30, 2018, the applicant's mother stated that the windows of her home *were broken* in March 2016. When asked to explain this inconsistency in her testimony, the applicant's mother stated that she was not sure who had broken her windows and that she had been nervous when she had completed her BOC Form. The RPD rejected this explanation because, in its view, if the windows had been

broken, the female applicant would have provided this information in her BOC Form. The addition of this element nine months later was merely intended to embellish the refugee protection claim.

- b. With respect to the third incident of violence alleged by the applicant, the applicant stated at the hearing that after the physical assault, he had continued to walk home because there was no one around to help him. After taking a break, the applicant adjusted his testimony to explain that an unidentified man allegedly came to his assistance and drove off his assailants. This adjustment reflects the affidavit of the witness discussed above. When the RPD questioned the applicant about the inconsistency in his testimony, the applicant simply repeated the adjusted description of the incident. The RPD noted that the unidentified man was not mentioned in either the applicant's original BOC Form or the amended one.
- c. In her BOC Form, the applicant's mother mentioned two incidents, on July 19, 2014, and in October 2014. The applicant's amended BOC Form, signed by his mother, refers to three incidents, on July 19, 2014, in October 2014 and prior to leaving Nicaragua. Elsewhere in his amended BOC Form, the applicant also mentions incidents that occurred in March 2016 and October 2016, which he described as being the last incident. In turn, his mother's affidavit refers to three incidents, on July 19, 2014, in March 2016 and in October 2016. The applicant explained that this was an error and that the correct information was in his mother's affidavit. While recognizing that erring is human, particularly when the error is made by a minor, the RPD pointed out that the applicant's mother made the errors on two separate occasions.

[24] Since these inconsistencies and omissions concern key elements of the refugee protection claim, it was quite reasonable for the RPD to conclude that the applicant's credibility had been undermined.

[25] While the applicant may not agree with the RPD's findings, it is not up to this Court to reassess and reweigh the evidence to reach a conclusion that is favourable to the applicant (*Khosa* at para 59).

C. *Failure to consider the Guideline*

[26] In this regard, the applicant contends that it is not enough to mention in the reasons for the decision that the Guideline was taken into consideration. He criticizes the RPD for failing to consider the Guideline in its assessment of the applicant's credibility and for [TRANSLATION] "spending all its time conducting a vigorous and rigorous cross-examination of the minor alone, from the beginning to the end of the hearing".

[27] This argument cannot succeed.

[28] First, it has already been demonstrated that the RPD's findings concerning the applicant's credibility were reasonable in light of the record.

[29] Moreover, the applicant was 17 years old at the time of the hearing. He was the only person who was able to testify about the incidents of violence that he suffered. If the RPD had rejected his refugee protection claim without questioning him, the applicant would undoubtedly

have argued that the RPD had an obligation to question him so that he could provide his version of the alleged incidents.

[30] Furthermore, as mentioned above, the applicant's mother also testified at the hearing.

[31] Lastly, while the applicant or his mother could have filed a sworn statement concerning the proceedings before the RPD, there is no evidence on the record to support the applicant's allegations, and even less so the allegation that he cried at the hearing.

III. Conclusion

[32] For these reasons, the Court finds that the RPD's decision falls within a "range of possible, acceptable outcomes which are defensible in respect of the facts and law" and that it is justified in a manner that meets the test of transparency and intelligibility of the decision-making process (*Dunsmuir* at para 47).

[33] Accordingly, the application for judicial review is dismissed. No question of general importance was submitted for certification, and the Court is of the opinion that this case does not raise any.

JUDGMENT in IMM-3832-18

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is dismissed;
2. No question of general importance is certified.

“Sylvie E. Roussel”

Judge

Certified true translation
This 4th day of September 2019.

Johanna Kratz, Reviser

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3832-18

STYLE OF CAUSE: LESTER SANTELIZ OBANDO ET AL v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: FEBRUARY 20, 2019

JUDGMENT AND REASONS: ROUSSEL J.

DATED: AUGUST 8, 2019

APPEARANCES:

Tshiombo Achille Kabongo

FOR THE APPLICANTS

Sarah Jiwan

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Achille Kabongo Law Office
Ottawa , Ontario

FOR THE APPLICANTS

Attorney General of Canada
Ottawa, Ontario

FOR THE RESPONDENT