

Federal Court



Cour fédérale

**Date: 20200327**

**Docket: IMM-4409-19**

**Citation: 2020 FC 433**

**Ottawa, Ontario, March 27, 2020**

**PRESENT: The Honourable Mr. Justice Zinn**

**BETWEEN:**

**DONALDO GRIJALVA GODOY**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] Mr. Godoy, a citizen of Guatemala, claimed asylum in Canada in November 2016, based on his fear for his life after witnessing conduct by a senior Guatemalan police official that strongly suggested corruption. The claim was denied by the Refugee Protection Division [RPD] in April 2018, and his appeal was dismissed by the Refugee Appeal Division [RAD]. Both the RPD and RAD found that his account was not credible, based on his inaccurate recollection of dates and his behaviour since the alleged incident.

[2] The Applicant submits the RAD's conclusion that he was not credible was not reasonable, given the explanatory evidence he provided, including a psychological report [Kwa Report] that described signs of cognitive impairments that may have interfered with his ability to recall his memories accurately.

[3] In the following analysis of these issues, I conclude that his challenge to the RAD decision must be dismissed.

[4] Mr. Godoy was a police officer in Guatemala from 2003 to 2010, and while based in Guatemala City, he was assigned to be a bodyguard to the deputy director-general of the Policia Nacional Civil [PNC], Rember Larios Tobar [Larios]. As documented in Guatemalan and international media, gangs attacked a police armoury near Guatemala City on April 24, 2009, killing five police officers. Mr. Godoy was on duty with Larios when they drove to the armoury after the attack, with the police victims still lying on the ground. He saw Larios take a briefcase from a vehicle at the scene [the Armoury Incident].

[5] After taking a previously scheduled vacation, Mr. Godoy was informed that Larios had ordered his transfer to Jutiapa, the Applicant's hometown, to work as an ordinary uniformed police officer. In Jutiapa, he noticed he was being followed, and minimized his contact with his family to protect them. He deposed that he saw in the media that two of his fellow bodyguards had been murdered. Another former colleague, and the ex-wife of Larios, warned him in March 2010 to leave Guatemala immediately because Larios wished to kill him. Larios had been

removed from his position in the police force in June 2009, but remained an advisor to the government.

[6] Mr. Godoy fled to the USA where he lived for about one year, before entering Canada without authorization in March 2011. He remained in Canada until he was detained and issued a one-year exclusion order in January 2015. At that time, he declined a pre-removal risk assessment. He says that he did so because his legal aid counsel told him it would mean remaining in detention. He returned to Jutiapa, Guatemala for approximately 13 months, where he says that he was followed by unmarked vehicles once again. He left Guatemala in February 2016 and re-entered Canada without authorization. He made his claim for refugee protection in November 2016 after he was apprehended by police.

[7] In his Basis of Claim form and the Schedule A supporting narrative he wrote that the Armoury Incident occurred in late 2008, and that he left Guatemala in March 2009. He deposes that these were unintentional errors, and his counsel before the RPD neglected to review his documents. Former counsel sent a letter to the RPD on January 9, 2018, stating that the Applicant had made a mistake in his claim documents, and that “everything starting in 2009 is off by 1 year.”

[8] At the RPD hearing in March 2018, the RPD member and counsel for the Respondent questioned Mr. Godoy about a number of inconsistencies in his account. Among these was the discrepancy between his oral evidence (and the vague implication in the letter from his counsel) that the Armoury Incident happened in November 2009, and a news article in evidence that said

Larios had been removed from his post on suspicion of corruption in June 2009. Mr. Godoy was asked how he could have remained Larios' bodyguard during the Armoury Incident if it happened five months after Larios had been removed from his position. The Applicant stated several times that he was having trouble remembering dates.

[9] The RPD found Mr. Godoy's account of his persecution was not credible because of (1) his uncertainty about the date of the Armoury Incident, (2) his failure to report Larios' conduct under the available police whistle-blower protection measures, (3) his police service making no mention of him ever being stationed in Guatemala City, (4) his brother offering a contradictory reason for why the Applicant was in danger, (5) his delay in fleeing Guatemala, (6) his unauthorized four-year stay in Canada without claiming asylum, and (7) his voluntary return to the site of his alleged persecution in Jutiapa for over a year.

[10] The RPD concluded that there was insufficient evidence to find a serious possibility of persecution, a risk to life or of cruel and unusual treatment or punishment, or a danger of torture; and commented that the Applicant had not tied the evidence together in a credible way.

[11] Following the negative RPD decision, Mr. Godoy retained his present counsel who arranged for him to attend two interviews with Dr. Lydia Kwa, a clinical psychologist who wrote the Kwa Report. Dr. Kwa administered tests for depression and trauma, and wrote that the Mr. Godoy's reported and observed symptoms were consistent with post-traumatic stress disorder [PTSD], which often interfered with "the ability to recall or produce accurate memories verbally."

[12] Before the RAD, Mr. Godoy alleged that the ineffectiveness of his previous counsel had denied him procedural fairness, that the RPD had erred by failing to recognize him as a vulnerable person due to mental health impairments, and that it had erred in its analysis of the evidence. The claim that previous counsel was ineffective was not accepted by the RAD and not pursued in this application.

[13] The RAD denied the request that Mr. Godoy be designated a vulnerable person pursuant to IRB Chairperson's Guideline 8 because the protections associated with that status pertained to oral hearing procedures, and the RAD had declined to hold an oral hearing.

[14] The Applicant sought to introduce various documents as new evidence, including documents supporting the Kwa Report on his psychological state and six media articles on police corruption in Guatemala, which described Larios' dismissal in June 2009 and later appointment as a police advisor. The RAD accepted all except the media articles, as they were reasonably available before RPD hearing, and thus failed the strict new evidence test in subsection 110(4) of the *Immigration and Refugee Protection Act*, SC 2001 c 27.

[15] The RAD assigned low weight to the Kwa Report because of the difficulty reconciling its description of the Applicant's struggle to piece together his memories into a coherent narrative with "the spontaneity exhibited by the Applicant in answering other questions in the recording of his hearing." Moreover, the RAD found that "the report does not accurately reflect the mental state of the Appellant at the time of the RPD hearing as it was produced after the hearing and decision."

[16] The RAD also found that the Applicant's behaviour after the Armoury Incident was inconsistent with a subjective fear of persecution, noting many of the same problems as the RPD: delay in fleeing, failing to claim asylum in the United States or Canada for five years, the voluntary return for over a year, and the insufficient explanations offered for each. The RAD's overall conclusion is that the Applicant's account lacks credibility, and that he has not discharged his onus to prove he is a refugee or a person in need of protection.

[17] Counsel submits that it was unreasonable for the RAD to discount the Kwa Report as it did because it was submitted to address specifically the question of why he had provided inconsistent dates to the RPD regarding the Armoury Incident. It describes him as suffering from PTSD, now and then, which explains his confusion regarding dates.

[18] The Respondent notes that the Kwa Report, in addition to offering the PTSD diagnosis, observes that if Mr. Godoy is provided time and known recalled facts, he should be able to piece together the proper timing of the relevant events. She writes that he did so in the examination, ultimately concluding that the Armoury Incident "must have occurred sometime at the end of April 2009."

[19] If the Applicant's position on the relevance of and weight given to the Kwa Report is accepted, I am not persuaded that the result would differ. The RAD's credibility finding was not based solely on the conflict in testimony about dates. At paragraphs 34, 35 and 38 of its decision, the RAD finds that his credibility, and claim of a subjective fear, is also challenged due to his delay in departing Guatemala, and his failure to claim asylum in the USA and in Canada:

[34] In this case the RPD panel did not, as current counsel suggests, consider only the Appellant's failure to resolve a serious contradiction in the date of the incident that led to his belief that he had to leave the country for his protection. In its reasons for decision the panel acknowledged that the Appellant had "difficulty with dates." In my independent analysis I find that even if the RPD had accepted that the Appellant was simply confused about when the key incident occurred, there were several other credibility issues raised in regard to subjective fear that remain unresolved and I will deal with them below. The RPD noted that there were also unresolved contradictions between the Appellant's testimony and his brother's testimony in regard to why the agent of persecution was interested in harming the Appellant. I agree with the RPD's finding in regard to the testimony of the witness but I do not find this to be on its own determinative of the Applicant's credibility.

[35] I find the Appellant's conduct inconsistent with a person living in fear of persecution in their country. It is to be expected that a genuine Convention refugee would seek protection as soon as is practical, once out of reach of those they fear. I am mindful that one of the significant factors which speaks to subjective fear and credibility is the element of delay. In this case the overall delay in coming forward to seek international refugee protection amounts to nearly a decade.

...

[38] I find that the Appellant is not credible in regard to his subjective fear allegation because of his behaviour in remaining in his village for approximately one year before fleeing to the USA; failing to make an asylum claim in the USA despite living there for nearly a year; in travelling to Canada for several years without making a refugee claim; by willingly returning to his country under a deportation order without seeking the benefit of a pre-removal risk assessment and advising CBSA officers at the time that he had no fear of returning to Guatemala; by returning and residing in the same village in Guatemala where he was allegedly threatened by persons he believed were working for a powerful corrupt senior police official he feared wanted to kill him; and by delaying in making a claim upon return to Canada for nearly a year. I find that the appellant has not demonstrated that he has a subjective fear, which is one of the two components of the definition of refugee.

[20] In light of these findings, I conclude that this claim for asylum would not succeed, even had the Kwa report been assigned the weight counsel suggests.

[21] No question for certification was proposed by the parties.



**JUDGMENT IN IMM-4409-19**

**THIS COURT'S JUDGMENT is that** the application is dismissed and no question is certified.

"Russel W. Zinn"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4409-19

**STYLE OF CAUSE:** DONALDO GRIJALVA GODOY v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** FEBRUARY 12, 2020

**JUDGMENT AND REASONS:** ZINN J.

**DATED:** MARCH 27, 2020

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