

Federal Court



Cour fédérale

Date: 20120209

Docket: IMM-5095-11

Citation: 2012 FC 190

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
Montréal, Quebec, February 9, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

EDUARDO HERNANDEZ CARDOZO

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Preliminary comments

In this case, counsel asked that the submissions be made in writing, stating that she had consulted with her client, who had consented to proceeding on the basis of the record.

I Introduction

1. This case involves an assessment of credibility tainted by contradictions, omissions and implausibilities in the testimonial evidence.

2. A refugee claimant's credibility is a crucial aspect of the claim, particularly in making a proper determination of the claimant's subjective fear. An administrative agency's findings with respect to credibility warrant considerable deference.

3. Although the Refugee Protection Division [RPD] erred in its assessment of the applicant's identity, this error is not determinative and does not affect its finding with respect to the applicant's credibility.

II Judicial procedure

4. This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], for judicial review of a decision by the RPD of the Immigration and Refugee Board [IRB] dated June 13, 2011, which determined that the applicant is neither a Convention refugee as defined in section 96 of the IRPA nor a person in need of protection under section 97 of the IRPA.

III Facts

5. The applicant, Eduardo Hernandez Cardozo, is 26 years old and is a citizen of Mexico.

6. The applicant alleges that he was the victim of a carjacking while in the company of his friend Mauricio Lopez.

7. One of the alleged perpetrators was Angel Talamantes, who attended the same school as Mr. Hernandez Cardozo.

8. Mr. Hernandez Cardozo alleges that after the event, he never saw his friend Mauricio Lopez again, and he was threatened by carjacker Angel Talamantes.

9. Mr. Hernandez Cardozo arrived in Canada on April 11, 2008, and four days later he applied for refugee protection.

IV Decision under review

10. The RPD did not accept the refugee claimant's identity. In fact, the RPD notes that the applicant did not present any documents corroborating his identity except for a Mexican passport issued on February 22, 2008. The RPD pointed to contradictions regarding how the passport was obtained. The applicant was in Mexico City at the time the passport was obtained from the City of San Juan Del Rio. Moreover, according to the RPD, the documentary evidence states that an official piece of identification with photograph is required to obtain a passport, but the applicant claimed that all he had needed was his birth certificate. The RPD was not satisfied with the applicant's explanation that he had it in his possession while he was living in hiding at his grandmother's house because he had wanted to seek employment in December 2007.

11. The RPD also found the applicant not to be credible because parts of his story were implausible and he added details to his account during the hearing. First, the RPD is of the view that the applicant's conduct after the carjacking is inconsistent with that of a person who has

experienced an assault in the company of a close friend. The RPD notes that, among other things, the applicant did not contact his friend's family after the event. No evidence was submitted indicating that this friend existed and was killed. Second, the applicant did not immediately report the carjacking to the police. He allegedly tried to complain two months later, after becoming aware that Angel Talamantes was asking questions about him. Third, the applicant failed to mention in his Personal Information Form (PIF) the threatening telephone calls that his parents had been receiving since the carjacking and that they had even taken steps to move.

V Issue

12. In the circumstances, is the RPD's decision reasonable?

VI Relevant statutory provisions

13. The following provisions of the IRPA apply to this case:

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

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

(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

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

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

(i) the person is unable 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

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

(i) elle ne peut ou, de ce 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

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.

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.

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.

Personne à protéger

(2) A également qualité 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

14. First, the applicant claims that the evidence in the file, in particular, the notes of the immigration officer with whom the applicant had met, indicates that the latter had in his possession a driver's licence and voter's card indicating his citizenship. The documentary evidence also allegedly supports the applicant's explanation that a birth certificate is sufficient to obtain a passport. The applicant argues that the RPD erred in failing to take into account the Mexican passport, which it should have had subjected to expert analysis if it doubted its authenticity. Furthermore, the applicant submits that the RPD erred in its assessment of his credibility by focusing on details of the testimony without taking into account the essential facts of the claim. Moreover, he argues that the RPD did not consider internal flight alternatives [IFA]. The RPD erred in law by failing to assess the risks that the applicant would face upon his return to Mexico.

15. The respondent argues that the finding regarding the applicant's identity was reasonable and that the application for judicial review should be dismissed accordingly. It was open to the RPD to doubt the authenticity of the passport because the applicant was unable to clarify the circumstances of how it was obtained. In fact, the documentary evidence supports the RPD's conclusion in that a birth certificate alone does not suffice to obtain a passport. With respect to credibility, it argues that it was reasonable for the RPD to hold against the applicant the omissions and implausibilities going to the heart of his claim. The implausibilities and omissions relate to the disappearance of the applicant's friend, the carjacking, the attempt to complain and the threats against his parents.

VIII Analysis

16. A high degree of deference is called for when reviewing the factual findings of a trier of facts. The RPD's decision must therefore be analyzed on a standard of reasonableness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

17. The administrative agency is presumed to have reviewed all of the evidence in the file unless it fails to discuss an important element that contradicts its findings (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, [1998] ACF no 1425 (QL/Lexis)).

18. The RPD did not accept the applicant's identity. It states that the applicant did not file any evidence other than his Mexican passport (RPD's decision at paragraph 5). However, an analysis of the file reveals that the applicant also had in his possession his voter's card and his driver's

licence. This is mentioned in the notes dated May 22, 2008, of the immigration officer with whom the applicant met (Tribunal Record [TR] at page 119), and a photocopy of these two pieces of identification appears in the record (TR at page 117).

19. It was open to the RPD to find that the way in which the passport was obtained raised doubts about its authenticity because of the contradictions and omissions in the applicant's testimony, particularly in light of documentary evidence listing the documents required to obtain a passport.

20. However, in assessing the applicant's identity, it was required to take into account all of the evidence, particularly items of evidence as important as an identification card and a driver's licence.

21. The RPD therefore erred in its analysis of the applicant's identity.

22. Although the RPD did not accept the applicant's identity, it nevertheless reviewed the applicant's account, and its analysis was so meticulous that the error with respect to his identity may not be determinative.

23. Because the RPD's analysis did not rely on the issue of identity, it is necessary to determine whether it erred in its assessment of the applicant's credibility.

24. In *Aguebor v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 732, [1993] ACF no 732 (QL/Lexis), the Federal Court of Appeal explained as follows the role of the administrative agency with respect to plausibility:

4 There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review. In *Giron*, the Court merely observed that in the area of plausibility, the unreasonableness of a decision may be more palpable, and so more easily identifiable, since the account appears on the face of the record. In our opinion, *Giron* in no way reduces the burden that rests on an appellant, of showing that the inferences drawn by the Refugee Division could not reasonably have been drawn. In this case, the appellant has not discharged this burden. [Emphasis added].

25. In this case, the RPD noted implausibilities in key aspects of the applicant's account rather than secondary aspects. The RPD considered it unlikely that the applicant would have waited for two days to try to reach his friend's family after the carjacking in which his friend was allegedly killed. The applicant made no attempt to reach his friend's family or go to his home to get news. The applicant's explanation that his friend was not often at home was not accepted by the RPD. It also noted the implausibility of the applicant's conduct after the carjacking. The applicant allegedly waited two months after the traumatic event to make a complaint, despite the fact that he knew the identity of one of the carjackers and had received threats.

26. The RPD also validly noted that the applicant had made no effort to submit evidence corroborating his account (*Ramanathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 862, at paragraph 10).

27. Furthermore, it is well established in the case law that it is open to the RPD to draw a negative inference regarding the applicant's credibility based on his failure to include an important allegation of his claim in his PIF (*Singh v Canada (Minister of Citizenship and Immigration)*, 2006 FC 357, at paragraph 17).

28. The applicant explained at the hearing that his nervousness had made him forget to mention that his parents had been threatened by his alleged persecutor. The RPD did not find this convincing as the applicant had filled out the form with the assistance of counsel and had had plenty of opportunity to make changes.

29. Because the applicant failed to establish subjective fear, it was open to the RPD not to proceed to the IFA analysis. This Court has stated on many occasions that credibility is an essential component of a claim and that an applicant's failure to prove that the RPD's finding in that regard is unreasonable is sufficient to defeat the application for judicial review (*Cienfuegos v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1262, at paragraph 25).

IX Conclusion

30. For all these reasons, the RPD's decision is not unreasonable and the application for judicial review is dismissed.

JUDGMENT

THE COURT ORDERS that the application for judicial review be dismissed. No question of general importance is certified.

“Michel M.J. Shore”

Judge

Certified true translation
Francie Gow, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-5095-11

STYLE OF CAUSE: EDUARDO HERNANDEZ CARDOZO
and MCI

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: February 8, 2012

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

DATED: February 9, 2012

APPEARANCES:

Denisa Chrastinova

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Maria Cristina Marinelli

FOR THE APPLICANT

Myles J. Kirvan
Deputy Attorney General of Canada
Montréal, Quebec

FOR THE RESPONDENT