

Federal Court



Cour fédérale

Date: 20130708

Docket: IMM-9181-12

Citation: 2013 FC 758

Ottawa, Ontario, July 8, 2013

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

MIGUEL DANIEL ROJAS LUNA

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] This is a judicial review of a decision by a member [Member] of the Refugee Protection Division [RPD] determining that the Applicant is neither a refugee nor a person in need of protection.

II. BACKGROUND

[2] The Applicant, a citizen of Mexico, was a student, an activist and radio announcer. He was part of a group of six friends who set up a local newspaper in his city. The newspaper was critical of local government, police and their respective involvement in criminal activities and connections to organized crime. The newspaper published 1,000 free weekly copies.

[3] The Applicant's troubles began in May 2005 when he was robbed and assaulted at gunpoint while distributing newspapers. He complained to the police.

[4] In early 2006 uniformed police officers came to the Applicant's house, seized the publishing equipment and took the Applicant and his friends in handcuffs to a warehouse where they were beaten. The Applicant filed a complaint with the Federal Agency of Investigation but was told that no investigation would be conducted and to stop badmouthing police.

[5] Six months later, after publishing another article critical of government and its "dirty money", one of the newspaper group members was shot by men identifying themselves as being part of the Gulf Cartel. The cousin was denied the opportunity to file a complaint as the police said that they could not help and that the group members should change their identities and flee.

[6] Towards the end of 2006, after publishing a special article accusing the Gulf Cartel of the shooting, the group received a threatening telephone call from a person identifying himself as a federal police officer.

[7] After a group member was shot and killed by unknown men and another member was arrested for the murder, the Applicant went “on the run” hiding at relatives. However, he managed to publish an article with a local newspaper where he was staying in which he attributes corruption in the area to the Juarez Cartel and local government. He then had to leave that area.

[8] Due to his mother’s illness, the Applicant returned home, where he was kidnapped, taken to a warehouse, tortured, beaten and left for dead. He made a fourth complaint to police naming the Gulf Cartel as his kidnapper.

[9] In February 2008 the Applicant arrived in Canada, overstayed his visa and ultimately filed his refugee claim in 2010. He had some initial assistance with the claim but when he finally retained a lawyer, a more fulsome claim was made.

[10] While the refugee claim was proceeding, the Applicant was informed that his parents were being held by the Juarez Cartel in exchange for his return to Mexico.

[11] The Member concluded that the fatal flaw in the Applicant’s claim was the lack of evidence going to the subjective element of the claim. The principal reasons for the finding were the delay between the first threat in 2005 and the Applicant leaving in 2008, combined with his delay in claiming in Canada and the absence of detail in his PIF.

[12] The Member also found the Applicant not credible as he was never targeted by criminals. That fact was not raised in his original narrative nor was his work in journalism. The Member

observed that the Applicant was not a brave or bold person (qualities that the Member expected of a person who had the profile the Applicant painted). The psychological report indicating PTSD, depression and anxiety was acknowledged but not accepted as an explanation.

[13] The Member further found no nexus to a s 96 ground and no personalized risk required under s 97. There is a brief state protection analysis which finds adequacy based on serious and genuine efforts by Mexicans to deal with issues of crimes and drugs.

III. ANALYSIS

[14] There is well-established precedent that in cases such as this, which turn on credibility, that the standard of review is reasonableness (*Aguebor v Canada (Minister of Employment and Immigration)*, 160 NR 315, 1993 CarswellNat 303 (FCA)).

[15] There are three interconnected major issues:

- whether the Applicant was a journalist;
- whether he had been targeted; and
- whether subjective fear was established.

[16] I find the Member's comments about the Applicant's journalism activities to be very problematic. The comments turn on demeanour, the nature of his journalism, how he conducted his reporting and the absence of journalistic evidence in his original PIF.

[17] What is missing is a finding that the Applicant was not a journalist, that he never published critical articles or that his narrative on this aspect of his life was fabricated. It is critical to this case that there be a specific finding on this aspect of his narrative. If the Applicant was a journalist, and if he and his friends published the articles produced in evidence, then there is arguably a nexus to s 96 – political opinion.

[18] The Member seems to draw a negative inference from the Applicant's claim that he interviewed witnesses at a crime scene and did not have press credentials. The actual evidence was that the interviewing took place in a public area – it is difficult to imagine police allowing the press into a crime scene. There is no evidence that a person needs press credentials in Mexico to qualify as a journalist. The Member does not address the Applicant's role in writing for or producing a newspaper.

[19] In discussing whether the Applicant was targeted, the Member seems to dismiss the newspaper as irrelevant because it was publishing articles on crime and corruption that other larger national newspapers were also doing. The Member does not address that the Applicant's paper was focused on local corruption. There was no basis advanced that somehow local stories of corruption were not likely to spark a more local, immediate and violent response.

[20] The Member dismisses the Applicant because his demeanour was not consistent with the Member's image of a brave person. Demeanour can be an important factor in assessing credibility, but in this case it was used unreasonably. The very features which the Member looked for were addressed in the psychologist's report. The Member is not bound to accept the report but, in this

case, to do so required an explanation of the basis for rejection other than a comment that despite the report, these qualities should have come through somehow.

[21] In holding that the Applicant was not targeted by criminals, the Member relied on the absence in the PIF about the Applicant's journalism work. The Applicant provided an explanation that a community centre advisor told him to put in a bare-bones PIF and expand on it when he had a lawyer.

[22] It is open to the Member to reject the explanation but in so doing the Member must explain away the actual evidence of the Applicant writing articles and the publication of the newspaper articles. This was not done.

[23] The Court's conclusions above are sufficient to justify granting the judicial review but there are other aspects of the decision which are troublesome. The Member appears to conclude that because the criminals who attacked the Applicant did not kill him, the attacks, beatings, etc. did not occur. That is an unreasonable basis upon which to conclude that the Applicant had not been persecuted.

[24] In the Member's "targeted/persecution" analysis and in the state protection analysis, the Member does not address the Applicant's four attempts to engage state protection through complaints to both local and federal police authorities. If the evidence is true, it is corroborative of persecution and of the absence of state protection for this individual whatever the efforts of the government may be.

[25] Lastly, the Member does not comment upon the kidnapping of the parents. If true, the kidnapping could be corroborative of the Applicant's core narrative; if untrue, and particularly if knowingly untrue, that would reinforce a negative credibility finding. In either event, the allegation of kidnapping is material to the claim.

IV. CONCLUSION

[26] Therefore, this judicial review will be granted, the decision quashed, and the matter remitted back to a different member for a new determination.

[27] There is no question for certification.

JUDGMENT

THIS COURT’S JUDGMENT is that the application for judicial review is granted, the decision is quashed, and the matter is to be remitted back to a different member for a new determination.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-9181-12

STYLE OF CAUSE: MIGUEL DANIEL ROJAS LUNA
and
THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: June 26, 2013

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

DATED: July 8, 2013

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