Federal Court  Cour fédérale

Date: 20141125

Docket: IMM-5378-13

Citation: 2014 FC 1131

Ottawa, Ontario, November 25, 2014

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

OSCAR RENE DIAZ ANGULO,
MARGARITA GONZALES DE DIAZ,
RENE OSCAR DIAZ GONZALES, AND
PADY KARINA DIAZ GONZALES

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] At the conclusion of the hearing, the parties were informed that this application would be allowed, with reasons to follow.

[2] The applicants' claims for refugee protection were rejected by Member Fiorino based on credibility. He wrote: "I am obligated to make a determination on the evidence deemed credible and trustworthy. I find none."

[3] The Court gives no deference to a decision-maker when the findings of credibility are based on errors of law and unreasonable findings of fact. In the decision under review, numerous such errors were made such that it is unsafe to rely on the decision. The refugee claims of these applicants will be sent back for determination by a different Board Member properly instructed in the law.

Background

[4] The applicants are all citizens of Bolivia. Oscar Rene Diaz Angulo [Oscar] is the husband of Margarita Gonzales de Diaz [Margarita], and they are the parents of Rene Oscar Diaz Gonzales [Rene] and Pady Karina Diaz Gonzales [Karina].

[5] In 1998, another daughter of Oscar and Margarita, Marcela Karen Diaz Gonzalez [Marcela], met and later married Anibal Christyan Monte Rey Nunez [Christyan] in the applicants' hometown of Cochambamba. Christyan had previously been affiliated with a professor and political leader, Marcelo Saenz [Saenz]. Saenz was assassinated on May 28, 1998. Christyan had knowledge of that assassination; particularly that it was coordinated by Pablo Ramos, a politician. As a result of that knowledge and his association with Saenz, Christyan fled to Cochambamba. After Marcela's relationship with Christyan, the applicants say that they too were targeted by the Bolivian authorities.

[6] They allege that from September 1998 to May 1999, they were involved in three violent encounters with security officers from the Ministry of the Interior. The incidents were reported to the police, but their denunciations were never acted upon. In 2000, the applicants, Marcela and Christyan, and Christyan's family fled to the United States.

[7] No one claimed refugee protection in the United States, because of what they describe as poor legal advice. While the failure to claim may be relevant to the applicants' and the others' subjective fear, it is not for the present purposes. Christyan and Marcela were married in the United States and over time all of the families traveled to Canada and claimed refugee protection. All of their claims were based on identical facts – alleged persecution by State authorities because of Christyan's knowledge of the circumstances of the murder of Saenz and his association with him.

[8] In 2006, Christyan and Marcela were found to be Convention refugees by Member Mutuma of the Refugee Protection Division [RPD]. In 2008, Christyan's father, mother, and brother were found to be Convention Refugees by Member Short of the RPD.

[9] On April 7, 2009, Oscar, Margarita and Rene entered Canada; Karina entered later. Each immediately made a claim for refugee protection. Without the assistance of counsel, the applicants filed their Personal Information Forms [PIF] on April 23, 2009.

[10] Subsequently, the applicants retained counsel, and he assisted them to prepare an amended PIF [Amended PIF] which was filed almost three years later on January 21, 2012 - just

prior to their first appearance before the RPD on their refugee claims. That hearing was adjourned when it was noted by Member McBean that Katrina had a criminal conviction and the Minister had to be given an opportunity to intervene. The Minister did not.

[11] On June 5, 2012, the applicants appeared again before Member McBean who noted the reference in the material before him to the successful claims of Marcela and Christyan and Christyan's family. He noted that information related to these claims would assist the applicants and could be important evidence. Accordingly, the hearing was again adjourned and Member McBean directed the disclosure of the PIFs of the successful claimants pursuant to Rule 17(1) of the *Refugee Protection Division Rules*, SOR/2002-228 [the *Rules*], then in effect, which provided as follows: "Subject to subsection (4), the Division may disclose to a claimant personal and other information that it wants to use from any other claim if the claims involve similar questions of fact or if the information is otherwise relevant to the determination of the claimant's claim."

[12] In the RPD Hearing Disposition Record, Member McBean wrote: "PIFs of close relatives to be obtained and disclosed (TA4-09990, TA6-05973)." The applicants' lawyer followed up with the RPD case officer who confirmed that the PIFs had been ordered.

[13] On August 27, 2012, the applicants appeared before Member Pasquale Fiorino to continue their hearing. The PIFs were not before Member Fiorino. No explanation has been offered by the respondent as to why they were not obtained and disclosed. Despite counsel making it clear that he wished them to be disclosed and that the family members who had been granted refugee status no longer had copies of their PIFS, and also reinforcing that their

importance was precisely why Member McBean had previously adjourned the hearing and directed their disclosure, Member Fiorino refused to adjourn the hearing. He also refused a request that he commit to making no decision until the PIFs had been disclosed. The only concession he gave to the applicants was to say: "If I find that the other PIFs would be important, then I would postpone again and get a copy of those." His presumed finding that they were not "important" is perverse.

[14] At the conclusion of the hearing on August 27, 2012, Member Fiorino stated that he was primarily concerned with credibility. Counsel for the applicants made brief submissions and made specific reference to Exhibit C-16, two Notices of Decision of the RPD relating to the other family members finding on the same or similar facts that other family members had been found to be refugees.

[15] Ten months later, on June 17, 2013, Member Fiorino "continued" the hearing stating: "there were a number of issues that I wanted to go over in order to clarify with respect to the amended narrative." Member Fiorino issued his decision on July 23, 2013.

[16] In finding that the applicants were not credible, Member Fiorino took issue with the lack of detail in the Original PIF, when compared with the Amended PIF. He was of the view that the new information in the Amended PIF reflected omissions in the Original PIF regarding significant aspects of the narrative going directly to the heart of the principal claimant's claim. On six separate occasions he writes, after noting the additional information in the Amended PIF: "The Board has been upheld when rejecting major evidence which has been omitted from the

PIF" and he cites as authority: *Canada (Minister of Employment and Immigration) v Dan-Ash* (1988), 93 NR 33 (FCA) [*Dan-Ash*] , *Drevenak v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1320 [*Drevenak*] , and *Aragon v Canada (Minister of citizenship and Immigration)*, 2008 FC 144 [*Aragon*].

[17] Member Fiorino also disputed a hospital record filed by the applicants as evidence of the consequences of the violent encounters with the Ministry of the Interior in Bolivia. Member Fiorino concluded on a balance of probabilities that the hospital record had been tampered with because a portion of the record was typed in all capital letters, and the date in a particular section appears to have been typed over.

Reviewable Errors

[18] Member Fiorino made several reviewable errors of law and unreasonable findings, the most serious of which are discussed below.

1. Refusal to await the disclosure of the other PIFs

[19] Member Fiorino failed to await the disclosure of the PIFs of Marcela, Christyan, and Christyan's family, notwithstanding the previous order of his colleague. As such, they were not considered by him prior to reaching his decision. In acting in this manner, he breached the duty of procedural fairness.

[20] These PIFs had already been ruled by his colleague, Mr. McBean, to either "involve similar questions of fact" or to be "otherwise relevant to the determination" of the applicants'

claims pursuant to Subrule 17(1) of the *Rules*. Member McBean, correctly in my view, concluded that the detail in those PIFS would either reinforce the applicants' assertions of fact in their PIFs or would make them suspect. Either way, they were extremely relevant. If they supported the applicants' claims, then that evidence might well be determinative of their claims for status.

[21] I agree with the applicants that in light of Member McBean having ordered the documents to be obtained by the RPD, they had no reason to seek alternative means to obtain them. Specifically, there was no obligation on them, as was implied by Member Fiorino and the respondent to obtain them through an access to information request: *Natt v Canada (Citizenship and Immigration)*, 2009 FC 238.

[22] In failing to adjourn the hearing in order that this evidence, evidence that the RPD had already ruled to be important and perhaps critical, was before the decision-maker, the applicants were denied a fair hearing and the rules of natural justice were breached.

[23] This breach of natural justice, led to one of the unreasonable findings made by Member Fiorino – his perverse finding that notwithstanding the positive refugee determination, Christyan had not been persecuted by Bolivian authorities – an issue squarely before the RPD in Christyan's claim for protection.

2. Finding that Christyan had not been persecuted

[24] Exhibit C-16 contained a letter to the RPF from Christyan, received June 5, 2012. It was this document that prompted Member McBean to order the disclosure of the PIFs. Christyan writes: "I certify that the facts in my claim are similar to Mr. Oscar Diaz claim. I also certify that Mr. Diaz persecution is based on my persecution and that his agents of persecution are the same agents of persecution in my claim and of my parents' and sibling." Before Member Fiorino were the two positive refugee findings of the RPF. Neither was even mentioned by Member Fiorino in his reasons. Christyan's claim would not have been successful unless the RPD found that he had a well-founded fear of persecution in Bolivia. Yet, in this case, Member Fiorino finds, based only on the failure of the Original PIF to mention that Christyan knew that Pablo was involved in the murder – something mentioned in the Amended PIF – that "on the balance of probabilities, that Cristian [*sic*] was not being persecuted by the authorities in 1998." As was noted by applicants' counsel, this finding runs counter to two previous decisions of the RPD.

[25] This is but one example where Member Fiorino relies solely on the fact that the Amended PIF contains information not contained in the Original PIF to discredit the applicants. His use of the stock phrase "The Board has been upheld when rejecting major evidence which has been omitted from the PIF" and his reliance on the three decisions cited above, illustrate why in each instance he reached an unreasonable finding.

3. Examining only additions in the Amended PIF to discredit the applicants

[26] Member Fiorino misunderstands and misapplies the decisions he relies upon. Specifically, he fails to appreciate when omitted evidence in a PIF may properly be said to go to credibility.

[27] The first authority he cites, *Dan-Ash*, has nothing to do with a PIF or the principle at issue here. In *Dan-Ash*, the Immigration Appeal Board had rejected fingerprint evidence that was contradictory to the oral evidence given by the claimant on the basis that it offended the "best-evidence" rule. The Federal Court of Appeal allowed the Crown's appeal on the basis that the *Immigration Act* released the Board from technical rules of evidence and the evidence of the fingerprint ought to have been received. The case has nothing to do with the proposition for which it was cited, six times, by this Member.

[28] In *Drevenak* the applicant testified that he had followed up with the police after making his reports of having been attacked. There was only one PIF submitted, no amended PIF was tendered. The issue was between his oral testimony and his PIF. In the PIF he mentioned only that he had made a report; he made no mention of having followed-up. The Board stated that this omission called his credibility into question. The Court in dismissing the application for review, held that if the omission had been viewed in isolation, it may well have been unreasonable to base a credibility finding on it, but it was not the only thing that went to credibility. With respect to the omission in the PIF, the Court noted that "the omission must not

be considered in isolation" [emphasis added]. A similar observation was made by the Court in *Aragon*.

[29] In *Aragon* there were additions to the PIF in the amended PIF. Again, the Court cautioned that "Not all amendments can justify a negative credibility finding."

[30] I am aware of no decision of this Court, and none was provided by the respondent, holding that the mere fact that a claimant adds facts to an amended PIF alone is sufficient to bring his credibility into question.

[31] In *Chen v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1062 at para 22, Justice Mandamin observed: "Applicants are permitted to amend their PIF statements before a refugee board hearing once they have secured the assistance and advice of counsel knowledgeable about the immigration process. The RPD's approach is problematic as it suggests that amendments may be readily disregarded simply because they are amendments." I would add that an amendment alone cannot automatically lead to an adverse credibility finding; particularly when there is other evidence corroborating the statement included in the amended PIF.

[32] The second and third occasions where Member Fiorino uses the failure to mention a fact in the Original PIF that is in the Amended PIF, relate to the applicants having been attacked in September 1998 and December 1998. In their Amended PIF they mention for the first time that they filed denunciations respecting those attacks. The Member finds that this new information

goes "directly to the heart" of the claim for protection and the failure to first mention it in the Original PIF goes to their credibility. Accordingly, he finds "that the principal claimant and his family were not threatened or assaulted by the agents of persecution in September 1988 [*sic*]" and "that the principal claimant and his family were not threatened or assaulted by the agents of persecution in December 1988 [*sic*]."

[33] Member Fiorino rejects their evidence that they were assaulted because they failed to mention the filing of denunciations in their Original PIF. What he fails to mention or deal with is that copies of the denunciations mentioned in the Amended PIFs are in the record before him. Unless a finding was made, and none was, that these documents are fraudulent, the addition of the reference to having filed denunciations in the Amended PIF is a statement of fact. The failure of a claimant to mention a fact in his first PIF but then to mention it in an amended PIF cannot be a basis to discredit the claimant, when there is documentary corroborating evidence to that fact. In this case, Member Fiorino used the applicants' later true statement to impeach their credibility. Member Fiorino failed to examine all of the material and relevant evidence before him; rather he based a credibility finding on the mere fact that the claimant added something in his Amended PIF. As a result, he made a fundamental error leading to unreasonable and unsupported findings.

[34] In a similar vein, Member Fiorino finds that Oscar's sister-in-law "was not threatened by visited by agents of the Ministry of the Interior, nor was she threatened by them, nor did she file a denunciation with the authorities" because these facts, although included in the Amended PIF

were not in the Original PIF. However, again, those very denunciations were in the evidence before him.

4. Finding that the applicants tendered a false document

[35] One document put into evidence that Member Fiorino does consider is a Forensic Medical Certificate. It states that Oscar was admitted with injuries caused by "Agents of the Public Ministry of the government." Member Fiorino gives it "little weight" because he concludes that it "has been tempered [*sic*] with."

[36] Member Fiorino never put to the applicants at the hearing any of his concerns respecting the authenticity of the document or his view that they had tampered with the document. The failure to do so and then use the suspicion that a fraudulent document has been submitted as a basis to discount it and their evidence as a whole is a breach of procedural fairness. This Court has frequently held this to be the case when documents submitted in support of a visa are being examined: See *Tabungar v Canada (Minister of Citizenship and Immigration)*, 2010 FC 735 and *Rukmangathan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 284. In *Madadi v Canada (Minister of Citizenship and Immigration)*, 2013 FC 716 at para 6, I wrote in the context of a refusal of an economic class application: "The jurisprudence of this Court on procedural fairness in this area is clear: Where … the officer doubts the 'credibility, accuracy or genuine nature of the information provided' and wishes to deny the application based on those concerns, the duty of fairness is invoked." No less is required in the refugee determination context.

[37] Because Member Fiorino failed to provide these applicants with natural justice and procedural fairness, and because he made several unreasonable findings of fact, this decision is set aside and the claims of the applicants must be determined anew by a different Board Member. Neither party proposed a question for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is allowed; the decision is set aside and remitted back to the Board to be determined by a different Member; the PIFs of the applicants' family members in Board files TA4-09990 and TA6-05973 are to be disclosed to the applicants and their counsel prior to such hearing, as previously ordered by Member McBean, or if they are not available, a full explanation is to be provided to the applicants as to why that is the case; and no question is certified.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5378-13
STYLE OF CAUSE:	OSCAR RENE DIAZ ANGULO ET AL v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	NOVEMBER 19, 2014
JUDGMENT AND REASONS:	ZINN J.
DATED:	NOVEMBER 25, 2014

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