

Federal Court



Cour fédérale

Date: 20160530

Docket: IMM-3818-15

Citation: 2016 FC 598

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, May 30, 2016

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

**JENNY MARCELA TOVAR MORA
SARA SIERRA TOVAR**

Applicants

And

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicants, Jenny Tovar Mora and her daughter Sara Sierra Tovar, are Colombian citizens. They are applying for judicial review of a decision rendered in July 2015 by the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (IRB)

refusing to grant them refugee status or protected person status under sections 96 and 97 of the *Immigration and Refugee Protection Act* (IRPA), S.C. 2001, chapter 27, on the ground that Ms. Tovar's account is not credible.

[2] Ms. Tovar argues that the RPD, in rendering its decision, did not have sufficient reasons to question her credibility and that the RPD did not comply with the *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution* (Guidelines) issued by the IRB. Ms. Tovar and her daughter therefore ask that the Court set aside the RPD's decision and refer the matter back for redetermination before a differently constituted tribunal, in light of all the evidence submitted.

[3] The issues raised in this application for judicial review are as follows:

- Did the RPD commit an error by concluding that Ms. Tovar was not credible?
- Did the RPD commit an error by not referring to the Guidelines in its decision?

[4] For the following reasons, Ms. Tovar's and her daughter's application for judicial review must be rejected. I cannot find any error in the RPD's decision that would justify the Court's intervention. I find the RPD's conclusions regarding Ms. Tovar's account lacking credibility to be reasonable and to clearly fall within the possible, acceptable outcomes in the circumstances. Moreover, I conclude that the RPD complied with the principles established by the Guidelines in its handling of Ms. Tovar's claim.

I. Background

A. *The Facts*

[5] Ms. Tovar was a storekeeper in the cities of Vista Hermosa and Puerto Gaitan in Colombia. In April 2013, a man known as “Le Singe” approached Ms. Tovar several times on behalf of another person called “Le Monsieur.” Le Singe told Ms. Tovar that Le Monsieur wanted to meet with her in an isolated location and that he would take care of her by buying all of her business’s merchandise. Ms. Tovar did not respond to these advances. She investigated the identity of the two individuals and learned that they were affiliated with the Revolutionary Armed Forces of Colombia (FARC).

[6] On April 13, 2013, Ms. Tovar again refused Le Singe’s invitation to meet with Le Monsieur, after which Le Singe threatened her with a firearm and insulted her. Ms. Tovar hastily left Vista Hermosa and went to Bogota, the capital of Colombia. She moved in with her mother there and stopped all her commercial activities, but did not file a complaint with the Colombian police.

[7] Two years went by without incident; then, in April 2015, Ms. Tovar received a threatening text message on her personal cellphone, directed at her and her daughter Sara. Ms. Tovar called back the number and found that it came from a public telephone in Vista Hermosa. Ms. Tovar believed that the call came from Le Singe and took steps to leave Colombia. She also reported the incident to the Attorney General’s office, which advised her to change her address and seek police protection.

[8] Ms. Tovar quickly left Colombia and came to Canada with her daughter in May 2015, via the United States. She then filed a claim for refugee protection with Canadian authorities.

B. *The RPD's decision*

[9] In the decision rendered in July 2015, the RPD concluded that the story told by Ms. Tovar and her daughter is not credible. In particular, the RPD pointed to two major contradictions between the Basis of Claim (BOC) Form completed by Ms. Tovar and her testimony during the hearing before the tribunal. In her BOC Form, Ms. Tovar said that she was persecuted because she had refused a business proposal from Le Monsieur and that residents of Vista Hermosa had told her about Le Singe's and Le Monsieur's affiliation with FARC. At the hearing, on the other hand, Ms. Tovar said that she had refused sexual advances from Le Monsieur and that she had been informed of the two individuals' affiliation with FARC through one of her customers.

[10] According to the RPD, Ms. Tovar also failed to mention in her BOC Form that several women had apparently disappeared under similar circumstances. In addition, the RPD did not find it credible that Le Singe and Le Monsieur were still looking for Ms. Tovar, as she claimed, two years after she had refused Le Monsieur's alleged advances even though nothing had happened in the intervening time. The RPD also finds confusing Ms. Tovar's testimony concerning public cellphones and concludes that Ms. Tovar's actions were inconsistent in that she did not file a complaint with Colombian authorities following the first series of incidents in 2013, but did so immediately following the incident in 2015, only a few days after she decided to leave Colombia.

C. *Standard of review*

[11] It is well established that, with regard to the credibility or plausibility of a refugee protection claimant, the RPD's conclusions are factual and command a high degree of judicial deference, considering the role of the trier of fact in the administrative tribunal (*Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12 [*Khosa*] at paragraph 59; *Lawal v. Canada (Citizenship and Immigration)*, 2015 FC 155 at paragraph 9; *Martinez Giron v. Canada (Citizenship and Immigration)*, 2013 FC 7 at paragraph 14; *Dong v. Canada (Citizenship and Immigration)*, 2010 FC 55 at paragraph 17).

[12] Assessing credibility is the very core of the RPD's expertise and is intimately linked to the facts of a given case (*Pepaj v. Canada (Citizenship and Immigration)*, 2014 FC 938 at paragraph 13; *Lubana v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116 at paragraphs 7–8). The RPD is therefore better positioned to assess the credibility of a refugee claimant, since it can see the claimant in a hearing, observe the claimant's manner, and hear the claimant's testimony. The tribunal thus has the opportunity and the capacity to judge the claimant's testimony, behaviour, candidness, and spontaneity of response, as well as the coherence and uniformity of the claimant's statements. Moreover, the RPD benefits from the specialized knowledge of its members in assessing evidence that deals with facts related to their field of expertise (*El-Khatib v. Canada (Citizenship and Immigration)*, 2016 FC 471 at paragraph 6).

[13] Since it is a mixed issue of fact and law, the applicable standard of review for questions of credibility and assessment of evidence by the RPD is therefore that of reasonableness (*Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] FCJ No. 732 (FCA) [*Aguebor*] at paragraph 4; *Bikoko v. Canada (Citizenship and Immigration)*, 2015 FC 1313 at paragraph 8). In such questions of credibility and assessment of evidence, the Court must not substitute its point of view for that of the administrative tribunal, even if that point of view could, in the Court's eyes, lead to a better result (*Khosa* at paragraph 59). The Court must only intervene if the decision-making process fails to be transparent and intelligible, and if the decision does not "fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v. New Brunswick*, 2008 SCC 9 [*Dunsmuir*] at paragraph 47).

[14] The reasons for a decision are considered to be reasonable "if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes" (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62 [*Newfoundland Nurses*] at paragraph 16). In this context, the Court must exercise deference toward the tribunal's decision. Its mission is not to weigh the case's evidence once again or to interfere with the tribunal's conclusions of fact; instead, it should limit itself to determining whether a conclusion is irrational or arbitrary (*Mikhno v. Canada (Citizenship and Immigration)*, 2010 FC 385 at paragraphs 32–33; *Diallo v. Canada (Citizenship and Immigration)*, 2007 FC 1062 at paragraph 30).

[15] To assess reasonableness, the Court must review the RPD's reasons, but it can also examine the case itself, if necessary, to assess the reasonableness of the decision (*Newfoundland Nurses* at paragraph 15). That said, judicial review is not a "line-by-line treasure hunt for error" (*Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34 at paragraph 54).

[16] The RPD's assessment of a refugee protection claimant's credibility must be transparent and intelligible (*Hilo v. Canada (Employment and Immigration)* (1991), 130 NR 236 (FCA) [*Hilo*] at paragraph 6). Thus, the tribunal's reasons must constitute an assessment of the applicant's credibility expressed "in clear and unmistakable terms." Conversely, a vague and general analysis would remain insufficient, since a tribunal cannot be satisfied with drawing conclusions on credibility without explaining why or how that credibility is disputed or appears unsatisfactory.

II. Analysis

A. *Did the RPD commit an error by concluding that Ms. Tovar was not credible?*

[17] Ms. Tovar and her daughter submit that the RPD was overzealous in trying to find contradictions and implausibilities in their story. They claim that the RPD did not take the cultural aspect into account when considering the sexual advances Ms. Tovar experienced. Moreover, they claim that the RPD did not understand their explanations regarding public cellphones used in Colombia. They also say the RPD did not grasp the fact that, as required, Ms. Tovar first sought refuge in her own country, following the incidents that occurred in

April 2013. Ms. Tovar argues that the testimony of a refugee claimant is assumed to be true (*Adu v. Canada (Minister of Employment and Immigration)*, [1995] FCJ No. 114 (FCA) at paragraph 1; *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA) [*Maldonado*] at paragraph 5), and that the RPD decision must be based on a balance of probabilities.

[18] I cannot accept the arguments put forward by Ms. Tovar and her daughter. Rather, I share the Minister's opinion that all the evidence in the record was considered by the RPD and amply supports the RPD's findings regarding Ms. Tovar's lack of credibility. The assessment of the evidence and Ms. Tovar's credibility is a matter of the RPD's discretion, and it is not up to the Court to substitute its own interpretation.

[19] The principles governing the manner in which an administrative tribunal must assess the credibility and plausibility of a refugee protection claimant's account can be summarized as follows. From the outset, the Court must clarify that the presumption of truthfulness mentioned in *Maldonado* is not unchallengeable, and the refugee protection claimant's lack of credibility suffices to rebut it. Furthermore, even though they may be insufficient when taken individually or in isolation, the accumulation of contradictions, inconsistencies and omissions regarding crucial elements of a refugee protection claimant's account can support a negative conclusion about his credibility (*Sary v. Canada (Citizenship and Immigration)*, 2016 FC 178 at paragraph 20; *Quintero Cienfuegos v. Canada (Citizenship and Immigration)*, 2009 FC 1262 at paragraph 1).

[20] Of course, the RPD cannot base its findings regarding the claimant's lack of credibility on minor contradictions arising in evidence that is secondary or peripheral to the refugee protection claim. The tribunal must therefore not delve too deeply in its approach or conduct a "microscopic" analysis of the evidence. In other words, not all inconsistencies or implausibilities will support a negative finding of credibility; such findings should not be based on microscopic examination of issues irrelevant or peripheral to the claim (*Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 NR 168 (FCA) at paragraph 9; *Cooper v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 118 [*Cooper*] at paragraph 4; *Akhigbe v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 249 at paragraph 16).

[21] However, a lack of credibility concerning the central elements of a claim could extend to other elements of the refugee protection claim (*Sheikh v. Canada (Minister of Employment and Immigration)*, [1990] FCJ No. 604 (FCA) at paragraphs 7–9) and generalized to all of the documentary evidence presented to corroborate a version of the facts.

[22] The RPD is also entitled to draw conclusions concerning the credibility of a refugee protection claimant based on implausibilities, common sense and rationality, and to reject evidence if it is inconsistent with the probabilities affecting the case as a whole (*Hilo* at paragraph 4; *Shahamati v. Canada (Employment and Immigration)*, [1994] FCJ No. 415 (FCA) at paragraph 2; *Yin v. Canada (Citizenship and Immigration)*, 2010 FC 544 at paragraph 59; *Hernandez Utrera v. Canada (Citizenship and Immigration)*, 2007 FC 1212 at paragraph 61). Nonetheless, the RPD's conclusions and inferences must always remain reasonable and be formulated in clear and unmistakable terms (*Cooper* at paragraph 4).

[23] The RPD's findings on Ms. Tovar's lack of credibility in this case are based on several valid grounds. First, it should be noted that Ms. Tovar gave a different version of her story at the hearing and enhanced her testimony by alleging that Le Monsieur made sexual advances toward her, which she had not previously mentioned in her refugee protection claim. Since this was far from peripheral to her claim, it is difficult to imagine that Ms. Tovar did not describe this matter in her initial story, as she was required to do.

[24] Moreover, the RPD found several other implausibilities and inconsistencies in Ms. Tovar's testimony, which undermined her credibility. Among these was her omission of the fact that Le Singe was apparently responsible for the disappearance of several other women, a significant element for establishing an objective fear of persecution. The RPD was also right to focus on Ms. Tovar's failure to contact the Colombian authorities after she received physical threats from Le Singe in 2013, when she planned to stay in Colombia. It was not logical that she did not seek protection at that time when two years later, in 2015, she quickly filed a report just a few days after the incident when she had already decided to leave the country. The RPD also found it unlikely that Ms. Tovar was suddenly threatened two years after the original incident when she had been living in Bogota during that period without being bothered by Le Singe or Le Monsieur. According to Ms. Tovar, Le Singe had been fairly insistent in April 2013 and had contacted her repeatedly over a very short period of time. Under these circumstances, it is certainly not unreasonable for the RPD to conclude that any reprisals Ms. Tovar was going to experience would have occurred well before April 2015.

[25] The Court definitively finds that the RPD's analysis of Ms. Tovar's credibility is not tainted by any reviewable error. It is well established that the Court must show significant

deference to the RPD with respect to the assessment of refugee claimants' credibility, since these credibility issues are the very core of the RPD's authority (*Dunsmuir* at paragraph 53; *Aguebor* at paragraph 4; *Rahal v. Canada (Citizenship and Immigration)*, 2012 FC 319 at paragraph 22). All of the RPD's determinations that provide the basis for its finding that Ms. Tovar is not credible are reasonable and there is no doubt that they fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

[26] Moreover, the fact that a piece of evidence is not expressly dealt with in a decision does not render it unreasonable when there are sufficient grounds to assess the tribunal's reasoning (*Corzas Monjaras v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 771 at paragraph 20; *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No. 1425 [*Cepeda-Gutierrez*] at paragraph 16). The RPD is presumed to have weighed and examined all the evidence submitted to it, unless it is demonstrated not to have done so (*Newfoundland Nurses* at paragraph 16; *Florea v. Canada (Employment and Immigration)*, [1993] FCJ No. 598 (FCA) at paragraph 1). In this case, I am satisfied that the RPD considered all the evidence, even if it does not refer directly to all its components. It is only when a tribunal is silent on evidence clearly pointing to the opposite conclusion that the Court can intervene and infer that the tribunal overlooked the contradictory evidence when making its finding of fact (*Cepeda-Gutierrez* at paragraph 17). This is not the case here.

[27] The Court's mission is not to reassess pieces of evidence in the docket; rather, it must limit itself to finding whether a conclusion is irrational or arbitrary. According to the reasonableness standard, it is sufficient that the process and the outcome fit comfortably with the

principles of justification, transparency and intelligibility, and the Court must not substitute its own opinion for that of the tribunal. The arguments put forward by Ms. Tovar simply express her disagreement with the RPD's assessment of the evidence and in fact ask the Court to prefer its own assessment and reading to that of the tribunal. However, this is not the Court's role in matters of judicial review (*Kanthasamy v. Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 at paragraph 99; *Cina v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 635 at paragraph 67). The reasons for the RPD's decision on Ms. Tovar's lack of credibility have the qualities of justification, transparency and intelligibility, and allow it to be determined that the conclusion falls within the range of possible, acceptable outcomes. There is therefore no reason for the Court to intervene.

B. *Did the RPD commit an error by not referring to the Guidelines in its decision?*

[28] Ms. Tovar and her daughter also claim that the RPD failed to take the Guidelines into account when making its decision, thereby committing an error that would justify intervention by the Court. Indeed, the Guidelines are not mentioned anywhere in the RPD's reasons, although Ms. Tovar alleges that she faced gender-related persecution following sexual advances from Le Monsieur.

[29] I do not share Ms. Tovar's opinion.

[30] In *Boluka v. Canada (Citizenship and Immigration)*, 2015 FC 37, Mr. Justice Gagné summarized the application of the Guidelines in the context of judicial review at paragraph 16:

[16] The applicant is required to demonstrate a lack of understanding or insensitivity on the RPD's part to convince the

Court that the Guidelines have not been applied (*Sandoval Mares v Canada (Minister of Citizenship and Immigration)*, 2013 FC 297 (CanLII) at para 43). Further, this Court has found that the RPD's failure to specifically refer to the Guidelines in its reasons does not, in and of itself, demonstrate insensitivity (*Akinbinu v Canada (Minister of Citizenship and Immigration)*, 2014 FC 581 (CanLII)) and mere failure to consider the Guidelines is not fatal to a decision (*Higbogun*, above at para 65).

[31] It must therefore be determined whether, in spite of the silence on the issue in the reasons, the RPD should have considered the Guidelines in this case and whether the tribunal applied the Guidelines in this case.

[32] Jurisprudence has established that the Guidelines only need to be considered by the RPD in appropriate situations (*Higbogun v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 445 at paragraph 57). This is the case, for example, when refugee claimants allege that they have been victims of violence because of their gender (*Khon v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 143 [*Khon*] at paragraph 20). In her submissions, Ms. Tovar frequently referred to *Khon*, in which the administrative tribunal refused a refugee protection claim, concluding that the claimant had not sought protection from the State and that an internal flight alternative existed. In that case, the decision maker did not assess the Guidelines, but also did not doubt the truth of the claimant's allegations regarding her repeated harassment and assault at the hands of her ex-spouse. The tribunal's decision was deemed unreasonable because of the failure to take into account and apply the Guidelines.

[33] However, *Khon* is not of much help to Ms. Tovar because it clearly differs from the case before us because of the RPD's conclusions regarding Ms. Tovar's lack of credibility. The fact

that the RPD did not refer to the Guidelines in its decision is not a determinative error when the tribunal is faced with an account that is not considered credible and there is sufficient evidence to support the tribunal's conclusion regarding a refugee protection claimant's lack of credibility (*Diallo v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1450 at paragraph 36; *Kaur v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1066 at paragraph 12). In Ms. Tovar's case, there was no credible allegation related to the persecution of a sexual nature of which she claimed to be a victim. In its reasons, the RPD clearly, unmistakably, and intelligibly explained the valid reasons for which it questioned the truthfulness of Ms. Tovar's allegations and, under the circumstances, the RPD was not required to apply the Guidelines (*Munoz v. Canada (Citizenship and Immigration)*, 2006 FC 1273 at paragraph 33).

[34] In any event, the fact that the Guidelines were not mentioned in the reasons for the decision does not mean that they were not considered or that the RPD ignored the principles established by the Guidelines. Simply reading the decision and the record clearly shows that the RPD did not act inappropriately or demonstrate a lack of sensitivity toward Ms. Tovar. Given the nature of the allegations made by Ms. Tovar during the hearing before the RPD, it may have been preferable and more transparent for the RPD to have explicitly mentioned the Guidelines in its reasons. However, even though the RPD did not do so, there is nothing to indicate that the Guidelines were not taken into account in its decision. On the contrary, the transcript of the hearing reveals the compassion and sensitivity shown to Ms. Tovar by the RPD. The Guidelines are intended to ensure that gender-based claims are heard with compassion and sensitivity and, although the RPD concluded that Ms. Tovar lacked credibility, I am satisfied that it fully complied with the letter and spirit of the Guidelines in this case.

III. Conclusion

[35] For the above reasons, Ms. Tovar's and her daughter's application for judicial review is dismissed. The RPD's decision refusing their refugee protection claim is transparent and intelligible, and its conclusions regarding Ms. Tovar's lack of credibility fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law. Furthermore, at no time did the RPD fail to fulfil its obligations to apply the Guidelines.

[36] The parties did not raise any serious questions of general importance for certification in their submissions, and I agree that there are none in this case.

JUDGMENT

THE COURT ORDERS that:

1. The application for judicial review is dismissed, without costs;
2. No serious questions of general importance will be certified.

“Denis Gascon”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-3818-15

STYLE OF CAUSE: JENNY MARCELA TOVAR MORA,
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