

Federal Court



Cour fédérale

Date: 20201116

Docket: IMM-4896-19

Citation: 2020 FC 1060

Ottawa, Ontario, November 16, 2020

PRESENT: The Honourable Mr. Justice Pamel

BETWEEN:

**YOLANY SARAY ORELLANA
HERNANDEZ**

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] In a decision rendered on July 15, 2019, the Refugee Protection Division [RPD] determined that the Applicant is not a Convention refugee nor a person in need of protection. In particular, the RPD disbelieved the Applicant's fear of non-domestic sexual violence stemming from a kidnapping incident conducted by MS-13.

[2] The Applicant submits that the RPD misconstrued her fear of non-domestic sexual violence and was selective in its analysis of the evidence. I agree, and would allow the application for judicial review.

II. Facts and proceedings

[3] The Applicant is from Honduras. At the time of the hearing before the RPD, she was 18 years old. She alleges that MS-13, an international criminal gang with activities in Honduras, wished for her to become a “*jaina de la mara*”, or a type of girlfriend or sex slave for the gang.

[4] The United Nations High Commissioner for Refugees Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Honduras (HCR/EG/HND/16/03) reports that Honduran gangs, including MS-13, are known to commit “sexual and gender-based violence against women and girls living in many gang territories, including forcing girls into prostitution and killing those who resist” with the “vast majority of victims of sexual violence were girls aged 10 to 19 years.”

[5] The Applicant asserts that during the middle of 2016, after living with her mother and then her aunt following her mother’s death, she returned to the neighbourhood where she grew up to live with her father who was suffering from depression. She was 15 years old at the time. MS-13 gang members were prevalent in the neighbourhood, and would often watch the Applicant as she would go to school or the local store. The gang members would not approach her when she was with friends, but she could hear them speaking about her in a sexually suggestive way, calling out to her that she was “pretty” and “hot”.

[6] The Applicant was afraid whenever she would walk by an area where MS-13 gang members were, and even had one of her male classmates pretend to be her boyfriend in an effort to protect herself during her walks to and from school.

[7] On December 31, 2017, members of the MS-13 gang kidnapped the Applicant while she was on her way to buy groceries at a supermarket and took her to a remote warehouse. Letters from neighbours and her father confirm that her family looked for her during her absence. The gang members kept her overnight in a padlocked room. At one point, the gang members told the Applicant that she would be the gang's "*jaina de la mara*". One of the gang members then grabbed her and unzipped her pants, but was ordered to stop by another gang member at the behest of the gang leader, following the Applicant's cries of fear.

[8] The next day, on January 1, 2018, a young member of MS-13 helped the Applicant to escape because they knew each other, having been to school together. Once she escaped, the Applicant went to hide at her cousin's home for a week (on her father's advice), before going back to live with her aunt in another city.

[9] On her father's advice, the Applicant left Honduras and arrived in the United States on April 4, 2018 without a visa. She left the United States because she was afraid of being deported by the Trump administration, and on November 1, 2018, she made her way to Canada and filed for refugee protection.

III. Impugned decision

[10] On July 15, 2019, the RPD determined that the Applicant was not credible because she had failed to provide sufficient credible and trustworthy evidence to support her fear of persecution. This finding was based primarily on three credibility issues, *to wit*, that the evidence of her treatment by the gang members prior to her kidnapping was inconsistent, that her allegations regarding her escape from captivity were vague, implausible and inconsistent, and that her story about remaining in her small town for about a week after escaping the gang members was not credible.

IV. Issue

[11] The sole issue in this case is whether the RPD decision was reasonable.

V. Standard of review

[12] The parties correctly agree that the standard of reasonableness applies in this case (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 23 [*Vavilov*]).

[13] As I explained in *Gomes v Canada (Citizenship and Immigration)*, 2020 FC 506 [*Gomes*], the reasonableness standard of review, as expressed in *Vavilov*, requires administrative decision-makers to provide reasons that are responsive to the facts of the case and the arguments raised by the parties (*Gomes* at paras 61-63; *Vavilov* at para 127).

[14] In evaluating the responsiveness of the reasons given, a reviewing court should be able to trace an “an internally coherent and rational chain of analysis” that is justified on the basis of the facts (*Vavilov* at paras 85, 102; *Gomes* at paras 51-53, 74). This inquiry is attentive to the reasoning process, and not just the outcome of a decision (*Armando v Canada (Citizenship and Immigration)*, 2020 FC 94 at paras 65-67).

VI. Analysis

[15] The Applicant’s refugee claim is based on numerous incidents of sexual harassment, and a targeted kidnapping that involved non-consensual sexual advances accompanied by threats of continued sexual assault emanating from members of MS-13.

[16] However, of the three credibility issues raised by the RPD in rejecting the Applicant’s claim, I need only deal with the first one: the supposed inconsistent evidence regarding the pre-kidnapping threats.

[17] According to the RPD, the Applicant presented contradictory evidence from her father to embellish her claim.

[18] The Applicant confirmed to the RPD that, when she would walk home from school, certain supposed members of the MS-13 would make unsolicited sexual comments about her physical appearance; but that is all they would do. However, in his sworn statement, her father indicated that, “on several occasions they [the supposed gang members] had been bothering her

[the Applicant], trying to force her to leave with them, threatening her that if she did not go with them, they would kill anyone who opposed them” [emphasis added].

[19] At the hearing, when asked by the RPD member whether the gang members would do or say anything else that was inappropriate to her, the Applicant replied no, other than shouting out comments of a sexual nature on numerous occasions. The transcript reads:

MEMBER: Okay. So other than yelling those things at you, did they ever do anything else before they kidnapped you?

CLAIMANT: No.

[20] However, the RPD interpreted the father’s sworn statement to mean that the Applicant herself received death threats prior to the December 31, 2017 kidnapping incident. The RPD member then asked why the Applicant did not bring up the threat earlier:

MEMBER: Right. But your dad says that they had been bothering you and trying to force you to leave with them and threatening you, which is different than you being yelled at or cat called. So can you explain that for me?

CLAIMANT: They were yelling, at me many many things, but I was not paying attention to them. Because if I did pay attention to them, then that would give them the opportunity to speak with me with even – it would open up to give them the opportunity to speak to me more things. I don’t know why my dad said that. Maybe they told him some things.

[Emphasis added.]

[21] In its decision, the RPD concluded as follows:

The claimant alleges, in her Narrative, that, when she walked home from school, members of MS-13 would comment about how beautiful she was. Likewise, in her testimony she stated that members of the MS-13 would tell her that she looked “pretty” and

“hot”. I asked the claimant whether the MS-13 ever did anything else other than shout out these compliments. The claimant testified that they did not. I asked the claimant to give me examples of things they would say to her. The claimant testified that MS-13 said “Mommy, how hot you look”, “you’re so hot” and “you’re so fine.” I asked the claimant whether they ever said anything else. The claimant testified they only said things of a sexual nature.

[...]

I asked the claimant why her father would write that MS-13 threatened **her with death** on several occasions when she alleges that they merely catcalled at her. The claimant testified that she did not know why her father would do that but maybe MS-13 told him these things. I do not accept this explanation as there had been no allegation, prior to the claimant’s attempt to explain this inconsistency, that anyone in her family had been approached by MS-13, prior to her alleged kidnapping. I find that the claimant presented evidence, from her father, that was intended to embellish her claim. I give this letter no weight to establish the allegations the claimant has made.

[Emphasis added.]

[22] First of all, the fact that the RPD member characterized the catcalls as “compliments” was unfortunate.

[23] In any event, it seems to me that what the father actually stated was not that the Applicant herself received death threats, but that she was told that if she did not go with the gang members, those who opposed them would be killed.

[24] On my reading of the transcript, the RPD member was too quick to fault the Applicant, as RPD member’s questioning may have been based on a false premise.

[25] While inconsistencies in the evidence are generally sufficient to draw adverse credibility findings, I do not find that the Applicant provided inconsistent evidence on this point (*Towolawi v Canada (Citizenship and Immigration)*, 2020 FC 245 at para 31; *Okunowo v Canada (Citizenship and Immigration)*, 2020 FC 175 at para 64; *Zhu v Canada (Citizenship and Immigration)*, 2020 FC 318 at para 19; *Louis v Canada (Citizenship and Immigration)*, 2019 FC 355 at para 22).

[26] In light of her father's letter, the RPD found that the Applicant had failed to provide a reasonable explanation for her failure to mention the death threats made against her by the gang members; on this basis, the RPD gave no weight to the father's statement, and drew an adverse credibility finding as regards the Applicant.

[27] I appreciate the father's sworn statement is not clearly worded, however there is a very real risk that the Applicant was presented with a false premise by the RPD member and asked to explain it away, *to wit*, that her father had stated that she had received death threats prior to her kidnapping. If so, it was certainly reasonable for the Applicant to not have known and only speculate as to why her father would have said that she had received death threats when in fact, that is not what her father was saying in his statement.

[28] In the present case, the RPD member's misleading questioning led to the discounting of a key piece of evidence that further went to corroborate the Applicant's claim of kidnapping by MS-13 found in the Applicant's narrative, which also contributed to adverse findings regarding the letters submitted by the Applicant's neighbours.

[29] Misapprehending evidence that may have impacted the outcome of a decision constitutes a reviewable error (*Akram v Canada (Citizenship and Immigration)*, 2020 FC 143; *Tamayo Valencia v Canada*, 2018 FC 1013). The RPD's possible misinterpretation of the father's statement clearly tainted its assessment of both the statement itself, and more importantly the credibility of the Applicant. The issue relating to the father's statement was clearly determinative of the RPD's overall findings, and for this reason alone, the RPD decision must be set aside (*Yahaya v Canada (Citizenship and Immigration)*, 2019 FC 1570).

[30] As such, I need not deal with the RPD's findings regarding the issues of whether the Applicant's allegations regarding her escape from captivity were vague, implausible and inconsistent, or the credibility of her story about remaining in her small town for about a week after escaping the gang members.

VII. Conclusion

[31] Given my findings regarding the possible misapprehension regarding the interpretation of a key piece of evidence, I would grant the application for judicial review and remit the matter back for redetermination.

JUDGMENT in IMM-4896-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is allowed;
2. The decision dated July 15, 2019 is set aside and this matter is returned for redetermination by a different panel of the RPD;
3. There is no question for certification.

"Peter G. Pamel"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4896-19

STYLE OF CAUSE: YOLANY SARAY ORELLANA HERNANDEZ v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

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QUEBEC AND TORONTO, ONTARIO

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