

Federal Court



Cour fédérale

Date: 20150313

Docket: IMM-7821-13

Citation: 2015 FC 318

Ottawa, Ontario, March 13, 2015

PRESENT: The Honourable Mr. Justice Rennie

BETWEEN:

OLVIN JESUS YANES TURCIOS

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter

[1] The applicant brings judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board of Canada (the Board), dated November 14, 2013, which found that he was neither a Convention refugee nor a person in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). For the reasons that follow, the application is granted.

II. Facts

[2] The applicant, Olvin Jesus Yanes Turcios, is a 25 year old citizen of El Salvador. He claimed that he was targeted and threatened by members of the Mara Salvatrucha (MS), a criminal gang that operates in El Salvador. Specifically, the applicant claimed that in June 2010 his brother was kidnapped by the MS. His family reported the kidnapping to the police and paid a ransom, after which the applicant's brother was released. The applicant and his mother assisted the police in locating one of the kidnappers, which resulted in the arrest and incarceration of some of the kidnappers. As a result of his cooperation with police the applicant was threatened by MS in August 2010.

[3] In March 2011, the applicant's brother and mother were to testify in regards to the case; however, they were contacted the evening before their court date and told by the prosecutor not to testify as their lives were at risk and the prosecutor could not provide protection if they decided to testify.

[4] In June 2011, the last kidnapper remaining in jail was released. Later that month the applicant's brother disappeared and has not been heard from since. The applicant believes that his brother has been killed by the MS.

[5] In the months that followed the release of the last kidnapper, the applicant's family continued to receive threats for having assisted the police. The applicant feared for his life and fled El Salvador on February 2, 2012, and arrived in Canada claiming refugee status at the port of entry on March 29, 2012.

[6] On November 14, 2013, the Board dismissed the applicant's section 96 claim on the grounds that there was no nexus to one of the five Convention refugee grounds. The Board dismissed the section 97 claim on the grounds that the applicant was not credible.

III. Issues

[7] The applicant submits there are two issues in this proceeding: (1) whether the Board erred in its credibility findings; and (2) whether the Board's treatment of the documentary evidence was perverse. The respondent submits the sole issue before the Court is whether the Board's credibility findings were reasonable. I believe this matter raises the following issues:

1. Whether the Board's adverse credibility finding was reasonable; and
2. Whether the Board's treatment of the documentary evidence was reasonable.

I. Decision

[8] The Board first concluded that as the claimant was a victim of crime, there was no nexus to one of the five Convention refugee grounds. The Board explained that in the present case, the applicant fears MS, a criminal gang and their criminal acts. The applicant's fear was not linked to race, religion, nationality, political opinion, or membership in a particular social group; instead his fear was linked to crime. As there was no nexus to a Convention ground, his section 96 claim failed.

[9] The Board then provided a separate analysis pursuant to section 97 of *IRPA*; however, the Board determined that the applicant was not credible and his section 97 claim was also dismissed.

[10] In reaching this conclusion, the Board explained that the applicant was inconsistent in testimony as to whether his brother knew his kidnappers. The applicant stated that his brother went out with his alleged kidnapper the day before he was kidnapped; however, earlier the Board had asked the applicant if his brother knew the perpetrators who kidnapped him and the applicant said he did not. When this inconsistency was put to the applicant, he explained that he misunderstood the question to be whether his brother knew “*all* of his kidnappers”.

[11] The Board also pointed to the applicant’s inconsistent testimony as to the night his brother disappeared. The applicant stated that the night his brother disappeared, his brother was going to sleep separately at a neighbour’s house; however, earlier in testimony the Board asked the applicant whether the family all stayed together at the neighbour’s house, the applicant answered they did stay together. When this inconsistency was put to the applicant, he explained that he misunderstood the question to be if “we all left from our house together”.

[12] The Board also drew a negative inference from the fact that the applicant could not remember the date of his brother’s disappearance. The Board noted that it was cognizant of a medical report which stated that the applicant may experience difficulty testifying at his refugee hearing as his anxiety condition will likely intensify and make it more difficult for the applicant to focus and retrieve information from memory efficiently; however, the Board reasoned that the

applicant was able to provide detailed testimony with regard to the remainder of his story and therefore a negative inference was drawn.

[13] The Board also drew a negative inference in regards to the applicant omitting from his Personal Information Form (PIF) three pieces of information: (1) the allegation that a neighbour had seen one of the kidnapper's looking for the applicant and his brother in August 2011; (2) the circumstances regarding the day that his brother disappeared (e.g., the fact that the brother slept separately from the family and that his family thought he slept at the neighbour's house but not until morning did they realize he had not reached the neighbour's house and he was therefore missing); and (3) that the applicant did not include in his narrative that gang members were asking for him in April or May of 2013.

[14] Finally, the Board found that the corroborating documents provided by the applicant were not credible in that some of the information contained in the documents were redacted. The Board also determined that although the applicant's sister testified as a witness at the hearing, her testimony was given little weight as she was not in El Salvador when the events occurred, and there were inconsistencies in her evidence.

II. Analysis

A. *The standard of review*

[15] Questions of credibility are reviewable on a standard of reasonableness. When reviewing the reasonableness of a decision, the analysis is concerned with "the existence of justification, transparency and intelligibility within the decision-making process" : *Dunsmuir v New*

Brunswick, 2008 SCC 9 at para 47. In my view, the reasons of the Board in this case do not meet the *Dunsmuir* criteria.

B. *The Board's adverse credibility findings were unreasonable*

[16] In the present case, the Board committed two fundamental errors. First, the Board's conclusions regarding the applicant's credibility were unreasonable. Second, the Board rejected summarily all corroborating documents simply because pseudonyms were used, although there was otherwise consistency within the two narratives presented.

[17] First, credibility findings, although afforded deference, are not immune from review. Intervention from the Court may be justified where the Board misapprehends the evidence: *Madelat v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 49 at para 1 (CA); *Isangulov v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1197 at para 13.

[18] Here, the Board relied on six "inconsistencies" or "omissions" to arrive at a finding that the applicant, overall, was not credible. However, these findings were trivial and explainable through the applicant's evidence, and did not form a sufficient foundation upon which the applicant's overall credibility could be impugned: *Alekozai v Canada (Minister of Citizenship and Immigration)*, 2015 FC 158.

[19] For example, the Board relied on two inconsistencies in the applicant's evidence to draw a negative credibility inference. The Board first found that the applicant was inconsistent regarding whether his brother knew his kidnappers. In early testimony, the Board had asked the

applicant whether his brother knew “the perpetrators”. The applicant answered “no”; however, further on the applicant confirmed that his brother knew one of the three kidnappers. The Board refused to accept the applicant’s explanation for the inconsistency, namely that he misunderstood the question to be whether his brother knew all of the kidnappers. The negative inference drawn by the Board in this regard was unreasonable given the plural phrasing of the Board’s question. Testimony given through interpreters is fraught with the possibility of innocent misunderstanding: *Owusu-Ansah v Canada (MEI)*, [1989] FCJ No 442 (FCA).

[20] The Board then pointed to a discrepancy in regards to the night the applicant’s brother disappeared. Earlier in testimony, the applicant stated that the family had “slept over at our neighbour’s or my grandmother that was closer”. Later in his testimony, the applicant stated that his brother had slept in a separate residence the night prior to his disappearance. The Board found these answers did not align and questioned the applicant on the inconsistency. The applicant explained that he understood the Board’s initial question to be “whether the family had all left the house together”. However, the Board again rejected the applicant’s explanation for the discrepancy, noting that the applicant had been told to advise the Board if it did not understand any questions so that the question could be rephrased to him. This response did not properly reply to the applicant’s explanation. The applicant did not say he did not “understand” the question, for which it would make sense to ask that the question be restated, but instead explained that he thought a different question was being asked. That is, he misunderstood the question being asked of him.

[21] Similarly, the applicant could not recall whether his brother disappeared on July 5 or July 6. The difference of one day is consistent with an honest or mistaken recollection: *Alekozai* at para 8. The applicant also provided an explanation for his inability to recall the exact date, stating that no court or police documents were prepared confirming the date of disappearance, and therefore he was unsure as to the exact date. The Board rejected this explanation, essentially finding that it was not plausible. Credibility findings that rest on plausibility determinations should only be made in the clearest of cases, if the facts are outside of the realm of what could reasonably be expected: *Aguilar Zacarias v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1155 at para 10. In my view, this is not the “clearest of cases”.

[22] The Board’s negative credibility findings in regards to the applicant’s failure to include specific details in his PIF were also unreasonable. First, the applicant provided a medical report from a psychologist indicating that the applicant was clinically assessed as suffering from mild levels of depression and severe levels of anxiety, and had a certified diagnosis of Post-Traumatic Stress Disorder (PTSD). According to the medical report, as a result of his condition, the applicant provides “brief” and “anxious” accounts of the events. The Board failed to assess the applicant’s written account in the context of this medical report. Second, the applicant is entitled to add details during testimony to explain the circumstances surrounding an incident: *Selvakumaran v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 623 (TD).

C. *The Board’s treatment of the documentary evidence was perverse*

[23] The next ground on which the application is granted concerns the Board’s treatment of the documentary evidence. The Board disregarded three separate pieces of documentary

evidence for different reasons: (1) numerous police reports because of their use of pseudonyms; (2) a newspaper article because the applicant's brother was not named although the alleged kidnappers were named; and (3) a document from the General Prosecutor's Office of the Republic, which confirmed that a file was opened for the crime of kidnapping the applicant's brother but did not establish the material elements of the applicant's claim.

[24] However, the Board failed to have regard of the totality of the evidence. If the Board had viewed the documents cumulatively, the redacted information would have been corroborated on the whole of the evidence.

[25] In sum, the Board focused on a microscopic examination of the applicant's evidence, failed to have regard that the applicant was giving evidence through an interpreter, and unreasonably gave no weight to corroborating documents.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is granted.

There is no question for certification.

"Donald J. Rennie"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-7821-13

STYLE OF CAUSE: OLVIN JESUS YANES TURCIOS v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: JANUARY 15, 2015

JUDGMENT AND REASONS: RENNIE J.

DATED: MARCH 13, 2015

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