

Federal Court



Cour fédérale

**Date: 20171205**

**Docket: IMM-2570-17**

**Citation: 2017 FC 1087**

**Toronto, Ontario, December 5, 2017**

**PRESENT: The Honourable Mr. Justice Campbell**

**BETWEEN:**

**YESSICA ROXANA ZETINO TOBIAS  
JONATHAN ALEXANDER ORTIZ ZETINO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] The present Application challenges a decision of a Member of the Refugee Protection Division (Member) who, by a decision dated May 19, 2017, rejected a claim for refugee protection advanced by a mother (Applicant) and her child against their return to El Salvador.

The Member set the stage for reaching a determination on the Applicants' claim by the following statement:

Yessica Roxanf:l Zetino Tobias (the principal claimant) and Jonathan Alexander Ortiz Zetino (the minor claimant) are respectively, mother and son (collectively the "claimants"), and citizens of El Salvador who are seeking refugee protection pursuant to sections 96 and 97(1) of the *Immigration and Refugee Protection Act* as they fear the Maras gang as well as the ex-common law spouse of the principal claimant.

[...]

In considering this matter, the panel has taken into account the Chairperson's Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution (the "Guidelines"), given the allegations that the claimant is a victim of rape at the hands of Mara 18.

[...]

The principal claimant alleges that she had experienced extortion on a regular basis from the Mara 18 gang when she was working at her stall at the market, however, the claimants allege that their personalized problems with the Mara18 gang arose as a result of a particular incident on the night of March 17, 2016. The claimants were in their home along with one of the principal claimant's brothers, Kevin, when they let a young man into the house who was bloody and seeking help. Shortly after the young man was admitted into their home, Mara 18 members also came to her door and demanded entry. It is alleged that the young man must have been a rival gang member and the Mara 18 members were furious that the principal claimant and her brother were hiding the boy. The principal claimant and Kevin were hit several times and the principal claimant was sexually assaulted (the "Attack"). They were threatened with death, but ultimately told to leave and to never let the Mara's [sic] see them again. This incident motivated the claimants to flee El Salvador and they started their journey on April 25, 2016, with the permission of the principal claimant's ex-common-law partner and father to the minor claimant, Geovanny Alexander Ortiz ("Geovanny"). However, since then, it is alleged that Geovanny has become a member of the Mara 18 and told the principal claimant that he would kill her in order to move up the ranks of the Maras. The claimants fear returning to El Salvador due both to the gangs and Geovanny's threats.

The claimants were caught at the border between the United States and Mexico on May 26, 2016. The claimants claimed asylum during their detention and were released on or about June 11, 2016. The claimant had an ankle monitoring bracelet affixed which was removed on or about December 22, 2016. The claimants then left the United States and entered Canada on or about January 27, 2016 [sic] at the Fort Erie border crossing and made claims as refugees at that time.

[Emphasis added]

(Decision, paras. 1, 4, 6 and 7)

## **II. The Member's Analysis of the Evidence**

[2] The Member rejected the claim principally on the basis of a global negative credibility finding with respect to the Applicant's evidence. The Member's analysis of the evidence is as follows [emphasis added and footnotes deleted]:

The determinative issue in this case is credibility.

### **Nexus**

The claimants testified that they fear gang violence in El Salvador. As such, the panel finds that the claimants are victims of crime or of a personal vendetta. The Federal Court has held that victims of crime, corruption or vendettas generally fail to establish a link between their fear of persecution and one of the Convention grounds in the definition of Convention refugee.

However, the principal claimant has also alleged gender based violence from both the Mara 18 and Geovanny. As such and pursuant to the *Guidelines*, the panel will consider the claimants' claims under both s. 96 and s. 97(1) of the *IRPA*.

(Decision, paras. 8 to 10)

### **Credibility**

Evidence given under oath or affirmation is presumed to be true, unless there is valid reason to find otherwise.

I find that the presumption of truth of the principal claimant's affirmed evidence is rebutted by the following material credibility concerns which the principal claimant did not satisfactorily resolve. I find that the credibility concerns demonstrate on a balance of probabilities that: her account of having been sexually assaulted by a member of the Mara's [sic] is not true and further, that Geovanny does not pose a threat to the claimants.

(Decision, paras. 11 and 12)

### **Inconsistencies regarding the Mara 18 and Geovanny**

The panel finds that the inconsistencies between the evidence provided in the principal claimant's June 1, 2016 Credible Fear Interview in the United States and the evidence provided in her BOC, personal disclosure and testimony, materially undermine the credibility of the claimants and the credibility of their allegations.

The principal claimant alleged in her BOC and testimony that she started a common law relationship with Geovanny in May 2007 and that he started to become violent towards her in February 2009 after he lost his job. She further alleged that he beat her and sexually abused her whenever he felt like it. However, the panel notes that in the Credible Fear Interview, the principal claimant was asked about Geovanny and the length of their relationship, to which the principal claimant indicated that they lived together from " ... around 2009 .... ". The panel notes that this answer is inconsistent with the principal claimant testimony and BOC which alleges that they started living together in 2007. When asked to explain the discrepancy, she testified that she had been in a cold room they called the "freezer" for the first four days after the claimants were first detained on May 26, 2016 and that because of this, she sometimes didn't know what was being asked of her. The panel finds that this explanation does not adequately explain the discrepancy because it was the claimants [sic] evidence that she was transferred from the first facility to a shelter after four days of detention. The panel finds that this means that when the Credible Fear Interview took place on June 1, 2016 she had not been in the cold room for between 1-2 days. The panel therefore finds on a balance of probabilities that the principal claimant's stay in the cold room did not impact her sworn evidence during the June 1, 2016 credible fear interview. As such, the panel finds that this discrepancy undermines the credibility of the principal claimant's allegations pertaining to her relationship with Geovanny.

The claimant alleged that in October 2013, after Geovanny became violent and pushed her down the stairs with the minor claimant in her arms, she testified that she had enough and she moved out along with the minor claimant to live on her own. The panel expressly asked the principal claimant if there was any other reason why she left Geovanny, to which she responded that his violence was the main reason, along with him becoming involved with gang members. This information was also contained in the claimant's Family Application filed in the Ontario Superior Court of Justice on or about March 20, 2017. The panel notes that in the credible fear interview, the principal claimant was asked about Geovanny and she advised that their relationship ended in December 2012, when they separated. The panel notes that this answer is inconsistent with the principal claimant testimony and BOC which alleges that they started living together in 2007 and separated in October 2013. When this discrepancy was put to the principal claimant she testified that she does not know how that date got there and that maybe because of the pressure she was under, she answered without thinking. The panel does not accept this explanation as the principal claimant was facing potential deportation. The panel finds on a balance of probabilities that the principle claimant would have reasonably known that her answers in the credible fear interview were very important and she would not have "... answered without thinking". As such, the panel finds that this discrepancy undermines the claimant's allegations pertaining to her relationship with Geovanny.

Additionally, when asked in the Credible Fear Interview why they separated, the principal claimant responded that "[H]e had another woman and that's why we separated." The panel notes that the claimant testified that the only reasons she separated from Geovanny was because of his violence and that he was associating with gangs. When these inconsistencies were put to the principal claimant she confirmed that Geovanny did have another woman, but explained that she wasn't given time to expand on her answer in that interview (and presumably mention Geovanny's violence). The panel pointed out that during the interview with the US agent, she was able to expand on other questions. For example, when Officer Daniel asked for the name of the minor claimant's father, the principal claimant provided his full name, but then went on to expand upon the answer and provided the additional information regarding the length of the relationship as noted above. The panel asked why she could expand on the previous question but not on the question about why she left Geovanny. The principal claimant then explained that it was difficult to not speak face to face with someone as she was behind a screen with a telephone. The panel finds that her explanation does not adequately explain the

inconsistencies between the principal claimants BOC/testimony and her credible fear interview because her explanation does not address how she was able to expand, unprompted, on one answer, but not another, particularly where further allegations of violence had the potential to assist her asylum claim. Likewise, the panel does not accept the explanation that not being face to face with someone impacted her answers as she was able to provide detailed and extensive answers elsewhere in her credible fear interview. As a result, the panel finds that this discrepancy undermines the claimant's allegations that Geovanny was a violent person and that he was associating with gangs.

(Decision, paras. 13 to 16)

[...]

The panel acknowledges that principal [sic] claimant had no lawyer present during the interview, however, she did indicate during the interview that she spoke to an attorney prior to the interview and was prepared to proceed without an attorney being present. The interview indicates that the principal claimant was given information on May 31, 2016 that she was going to have the Credible Fear Interview the following day. The panel therefore finds on a balance of probabilities that the claimant had time to think about and mentally prepare for the interview if she wished to do so. Further, at the conclusion of the credible fear interview, the principal claimant was asked how she and the minor claimant were being treated at the facility, to which she responded "very good." The principal claimant had alleged that they had been in a cold room she described as like a freezer for the first four days after the claimants were first detained on May 26, 2016, however, the claimants had been moved to a shelter in the day or two prior to the Credible Fear Interview. In conjunction with the principal claimant's positive response regarding the claimants' treatment at the facility, the panel finds on a balance of probabilities that there were no immediate external issues that would have impacted her sworn evidence on June 1, 2016.

During the principal claimant's hearing before the panel, the principal claimant also testified to having some confusion about the order of interviews and the precise order of events during her detention in the US. The principal claimant also testified that she did not remember providing some of the answers contained in the transcribed interview notes or otherwise testified that she did not give the answers written down at all. The panel finds on a balance of probabilities that the information contained in the credible fear interview transcription was accurate because the principal claimant

was well aware of the importance of the interview and that she had been cautioned prior to the interview. Further, as the evidence given by the principal claimant was provided more contemporaneously in time to the alleged events which form the basis of the claimants' claims the panel finds that her memory would more be reliable as to the details of her allegations. Therefore, given the principal claimant's credibility issues arising from the discrepancies noted above the panel prefers the evidence given during the credible fear interview where it conflicts with the evidence provided in her BOC and the hearing.

(Decision, paras. 19 and 20)

### III. The Guidelines

[3] As mentioned twice in the decision, the Member found the *Guidelines* were necessary to engage in reaching a determination on the Applicants' claim for protection.

[4] As to contextual knowledge, under the heading "Special Problems at Determination Hearings" the *Guidelines* state that "women refugee claimants who have suffered sexual violence may exhibit a pattern of symptoms referred to as Rape Trauma Syndrome and may require extremely sensitive handling". Further, footnote 30 of the *Guidelines* states that "[t]he UNHCR Executive Committee Guidelines on the Protection of Refugee Women, supra, footnote 10, at p. 27, discuss the symptoms of Rape Trauma Syndrome as including 'persistent fear, a loss of self-confidence and self-esteem, difficulty in concentration, an attitude of self-blame, a pervasive feeling of loss of control, and memory loss or distortion.' "

[5] Paragraph 72 of the *UNHCR Executive Committee Guidelines on the Protection of Refugee Women*, EC/SCP/67 (July 22, 1991) elaborates:

It may be necessary to use a variety of gender-sensitive techniques to obtain information from women during the status-determination process. The recruitment and training of female interpreters is a precondition for the most effective interviewing: - Study the training module that has been developed on interviewing refugees.

- Be aware of gender differences in communication, particularly regarding non-verbal communications. As an interviewer, avoid intimidating gestures that inhibit responses. In assessing the credibility of the female applicant, for example, do not judge it on the basis of such Western cultural values as the ability to maintain eye contact.
- Be patient with female applicants to overcome inhibitions, particularly regarding sexual abuse. Questions may need to be asked in a number of different ways before victims of rape and other abuses feel able to tell their stories. Enough time should be allowed during the interviewing process to permit the female applicant to build a rapport with the interviewer so she is able to recount her experiences. Do not ask for details of sexual abuse; the important thing in establishing a well-founded fear of persecution is to establish that some form of it has occurred.
- Recognize that women who have been sexually assaulted exhibit a pattern of symptoms that are described as Rape Trauma Syndrome. These symptoms include persistent fear, a loss of self confidence and self esteem, difficulty in concentration, an attitude of self-blame, a pervasive feeling of loss of control, and memory loss or distortion. These symptoms will influence how a woman applicant responds during the interview. If misunderstood, they may be seen wrongly as discrediting her testimony.
- Understand that women in many societies do not have specific information about the activities of the men in their families. Gaps in their knowledge should not be construed as lack of credibility unless there is other evidence of such lack of credibility.
- Provide women the opportunity to be questioned by themselves, out of the hearing of other members of their family. Victims of sexual abuse may not feel comfortable recounting their experiences in front of their fathers, husbands, brothers or children.

[Emphasis added]



#### IV. Conclusion

[6] In my opinion, the Member utterly failed to apply the *Guidelines*. The content of the *Guidelines* is not mentioned in the decision, and there is no understanding expressed that the Applicant's evidence was required to be viewed through the lens of the *Guidelines*. As recognized by the Member, the critical feature of the Applicant's evidence that required the *Guidelines* to be engaged was the "Attack". The details are described in the Applicant's BIOC at paragraphs 8 and 9:

Four men came in very angry. They were obviously gang members, judging by their appearances and I also recognized them from the area. They asked us all to kneel on the ground and why we were hiding the boy and if we knew who he was. My brother said no and they punched both my brother and the boy. My brother was punched in his face and when he fell to the ground, they began kicking him. I moved back so I could close the door of the bedroom where my son was sleeping. One of the men grabbed me by my hair and hit me on the face. They asked us again who the boy was and my brother told them we did not know him. They asked us again and we told them we did not know him. They asked us again who he is and I told them that it was true that we did not know who he was. They became even angrier and they punched us both and called someone on their phone. They pulled me by my hair also. Then three of the men grabbed my brother and the other young man and left the home, leaving me with a man called El Grenas. Once they left, El Grenas, who had tattoos all over his body, continued asking who the boy was. I told him that we did not know and he told me You [sic] are stupid and that's why you're going to die.

I was very scared and I began to cry while I was kneeled on the floor. "El Grenas" began smoking and asking me questions about the boy. After he was done smoking he began touching me in a sexual way. I was terrified and crying more. I suddenly heard my son wake up, and he told me to open the door' (I had closed his door when the gang members entered the home) that he needed to go to the bathroom. I did not open the door, he began to cry as he was not able to hold it and he cried that he had pee his pants. While my son was crying the man sexually abused me that night, he raped me twice. He forced me to perform oral sex on him, as well,

he hit me on my face several times. When he was done, he started smoking again. I could no longer hear my son crying and I assumed that he fell asleep. El Grenas asked me who I wanted to be killed first, me or my son. I really thought that we would both be murdered that night.

[7] According to the *Guidelines*, the details of a sexual assault can be a critical feature to understanding the potential impact of the assault on the survivor's statements that follow. In the present case, the details of the Attack are not mentioned in the decision under review, and there is no evidence that the Member appreciated the potential impact of the Attack on the Applicant's evidence.

[8] I find that, before the conclusion was reached on the inconsistencies in the Applicant's evidence, the Member was required to consider the potential impact of the Attack according to the *Guidelines*, and, in particular, the passage emphasised above. Given the failure to meet this imperative, pursuant to s. 18.1(4)(d) of the *Federal Courts Act*, I find that the Member's findings of negative credibility quoted above in the section "The Member's Analysis of the Evidence" are made in a perverse and capricious manner without regard to evidence on the record.

[9] Accordingly, I find that the decision under review is made in reviewable error, and, thus, is unreasonable.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the decision under review is set aside, and the matter is referred back for redetermination by a differently constituted panel.

There is no question to certify.

“Douglas R. Campbell”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-2570-17

**STYLE OF CAUSE:** YESSICA ROXANA ZETINO TOBIAS, JONATHAN  
ALEXANDER ORTIZ ZETINO v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

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