

**Date: 20071219**

**Docket: IMM-6022-06**

**Citation: 2007 FC 1335**

**Toronto, Ontario, December 19, 2007**

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

**BETWEEN:**

**JAVIER DIAZ PUENTES  
LIZ RAQUEL URDANETA GIL  
JAVIER A DIAZ URDANETA  
GABRIELA A DIAZ URDANETA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] The Applicants are citizens of Venezuela who challenge the decision of the Refugee Protection Division of the Immigration and Refugee Board (RPD), dated October 10, 2006, which rejected their claim for refugee protection under s. 96 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, made on the ground of the principal Applicant's political opinion. In coming to its decision the RPD made several implausibility findings that, in my opinion, lack an evidentiary base. As these findings led the RPD to conclude that the Applicants had not suffered the past persecution they claim and, therefore, their fear of persecution on return to Venezuela is not well founded, the RPD's decision must be set aside.

## **I. The Claim of Persecution**

### **A. Original PIF**

[2] The original personal information form (PIF) of the principal Applicant states that he is a former employee of the Venezuelan Petroleum Company (PDVSA). In January 2003, his employment was terminated as a result of his participation in a national oil strike against the policies of Venezuelan President Hugo Chavez. This termination prompted the principal Applicant to involve himself in anti-Chavez political activities. He joined the anti-Chavez First Justice Party and participated in political events.

[3] In the spring of 2003, as the result of his political involvement, he began to receive threatening telephone calls. The callers said they would make the principal Applicant “disappear” if he continued in his anti-Chavez activity.

[4] Some of these calls were anonymous, but over time these callers identified themselves as members of the pro-Chavez Bolivarian Circles. The Applicants moved to another city in Venezuela, Merida, to try to avoid these threats; however, the threats did not stop. The principal Applicant continued to be politically involved and volunteered his time to encourage people to sign a petition for the recall referendum of President Chavez.

[5] In 2004, a list of the people who had signed the recall petition was published on the internet. Included on this list were the names of the principal Applicant and his wife. The threatening phone

calls continued. In addition to the Bolivarian Circles, some of the callers identified themselves as members of the Armed Revolutionary Forces of Colombia (FARC).

[6] In March of 2004, three incidents occurred which led to the Applicants' decision to leave Venezuela: they received a threatening letter; while the principal Applicant was away on business some men threatened his wife with a gun as she was returning home from picking up their son from school; and the principal Applicant was intercepted by men in a pick-up truck who yelled that he was going to be executed and that they had orders to kidnap him and his family. When the principal Applicant and his wife went to report these incidents they found that they had no meaningful way of doing this as all of the officials were supporters of President Chavez and corrupt. Therefore, the Applicants felt that they had no choice except to leave Venezuela. In April of 2004 they arrived in Canada and claimed refugee status.

***B. The first RPD hearing***

[7] The Applicants' original RPD hearing resulted in a negative refugee determination. The RPD disbelieved the principal Applicant's testimony as his original PIF did not contain all of the detail that he testified to in the hearing. A judicial review of the original RPD decision was granted on January 26, 2006.

[8] In preparation for the new hearing, the principal Applicant amended his PIF. Such amendments are allowed under s.6(4) of *Refugee Protection Division Rules* (SOR 2002-228).

***C. The amended PIF***

[9] The amended PIF contains the same story as the original PIF but with more detail regarding the principal Applicant's political activities and specific threats that he received. For example, one of the allegations in the amended PIF is that the principal Applicant gave a radio interview and received a threatening phone call as a result. The amended PIF specifies dates of other phone calls and provides more specifics as to the threats that they contained. It also states that the principal Applicant was not simply a First Justice Party member, but a delegate for his area.

[10] At the second hearing before the RPD, resulting in the decision under review, the principal Applicant explained that the reason that the additional details had not been included in his first PIF is that he had submitted only a general draft to his original lawyer, who he had not yet met, and did not have the opportunity to revise it before it was filed. The principal Applicant expressed dissatisfaction with his old lawyer and submitted to the RPD a copy of the letter that he had written to the Law Society of Upper Canada stating that his lawyer had negligently handled his claim.

**II. The RPD's Decision**

[11] The RPD released its decision on October 10, 2006. Although the RPD accepted that the principal Applicant and his wife were politically active, it rejected their claim because it held that their fear of persecution was not well founded.

[12] A key issue for the RPD was the principal Applicant's credibility:

The determinative issues for me in the claimants' refugee protection claims were the principal claimant's credibility and whether the

claimants' fear of persecution at the hands of supporters of the current government of President Chavez, such as the Bolivarian Circles, and the FARC is subjectively and objectively well-founded. I did not find the principal claimant to be a credible and trustworthy witness respecting his and the remaining claimants' refugee protection claims.

[RPD Decision, pp. 4-5]

This negative credibility finding is based on the following implausibility factors:

1. that it was unreasonable that the principal Applicant would not have included the details that were in his amended PIF in his original PIF;
2. that the principal Applicant failed to supply documentary evidence that he had participated in the radio interview alleged in his amended PIF;
3. it was unreasonable that the principal Applicant did not mention FARC at his port of entry interview; and,
4. because the Applicants had valid visas to the United States, it was unreasonable that they did not leave Venezuela until April, 2004 if they had subjective fear of persecution.

[13] As a result the RPD found as follows:

In summary, given the foregoing negative findings respecting the principal claimant's credibility, I do not believe the allegations that are set out in the principal claimant's addendum to his PIF narrative of July 17, 2006 respecting he [sic] and his family's problems at the hands of members of the Bolivarian Circles or that the principal claimant and his family members were targeted by members of the FARC operating in Venezuela as is alleged. I find all of these allegations to be an attempt by the principal claimant to embellish his and the remaining claimants' refugee protection claims. I also find

the claimants' delay in leaving Venezuela to be inconsistent with a subjective fear of persecution in Venezuela.

[RPD Decision pp.9-10]

[14] Therefore, as the RPD decision is based on implausibilities in the principal Applicant's story, the question that must be answered in the present Application is as follows: Did the RPD make the contested implausibility findings according to law?

### **III. The Standard of Review for Credibility and Implausibility Findings**

[15] It is generally accepted that the standard of review to be applied to RPD credibility findings is patent unreasonableness (*Aguebor v. Canada* (M.E.I.), [1993] F.C.J. No. 732). Similarly, when the RPD makes adverse credibility findings based on the implausibility of an applicant's story, it is entitled to be accorded deference on these findings. However, despite this deferential standard, the RPD must take care in making its credibility findings. In *Hilo v. Canada*, (1991) 130 N.R. 236 the Federal Court of Appeal stated at para. 6:

In my view, the board was under a duty to give its reasons for casting doubt upon the appellant's credibility in clear and unmistakable terms. The board's credibility assessment, quoted supra, is defective because it is couched in vague and general terms.

[16] In addition, before making any credibility or implausibility findings, it must be remembered that a refugee claimant is presumed to be telling the truth. Justice Muldoon in *Valtchev v. Canada* (*Minister of Citizenship and Immigration*), [2001] F.C.J. No. 1131 at paras. 6- 8, provides a clear outline of the rigor that is necessary in reaching negative credibility and implausibility findings:

[6] The tribunal adverts to the principle from *Maldonado v. M.E.I.*, [1980] 2 F.C 302 (C.A.) at 305, that when a refugee claimant swears to the truth of certain allegations, a presumption is created that those allegations are true unless there are reasons to doubt their truthfulness.

....

[7] A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. [see L. Waldman, *Immigration Law and Practice* (Markham, ON: Butterworths, 1992) at 8.22]

[8] In *Leung v. M.E.I.* (1994), 81 F.T.R. 303 (T.D.), Associate Chief Justice Jerome stated at page 307:

[14] ...Nevertheless, the Board is under a very clear duty to justify its credibility findings with specific and clear reference to the evidence.

[15] This duty becomes particularly important in cases such as this one where the Board has based its non-credibility finding on perceived "implausibilities" in the claimants' stories rather than on internal inconsistencies and contradictions in their narratives or their demeanour while testifying. **Findings of implausibility are inherently subjective assessments which are largely dependant on the individual Board member's perceptions of what constitutes rational behaviour. The appropriateness of a particular finding can therefore only be assessed if the Board's decision clearly identifies all of the facts which form the basis for their conclusions. The Board will therefore err when it fails to refer to relevant evidence which could potentially refute their conclusions of implausibility...**

[Emphasis in original]

#### **IV. Application of the Legal Standard to the RPD's Implausibility Findings**

##### ***A. The amended PIF***

[17] As pointed out by the Respondent, the RPD is entitled to compare a PIF to an applicant's testimony and to make credibility findings based on inconsistencies and omissions (*Khalifa v. Canada (Minister of Citizenship and Immigration)* 2004 FC 36). However, in my opinion, a distinction must be made between a situation where a PIF has been amended to add statements that are different than the ones contained in the original PIF and the present one, where the PIF has been amended to add more detail. In this latter instance, before concluding that a claim is fabricated, the RPD must look at the entirety of the evidence on the record to assess whether there is evidence to support such a conclusion (*Ameir v. Canada (Minister of Citizenship and Immigration)* 2005 FC 876 .

[18] When PIF amendments do not in any way change an applicant's story, but simply provide more detail to information that is already on the record, this alone does not undermine the presumption that the testimony of the witness is true. In the present case, the principal Applicant's original PIF stated that he had received threatening phone calls, as a result of his political activities, from the Bolivarian Circles and from FARC. In his amended PIF the same story was told, albeit with more detail. The principal Applicant also explained why his first PIF was general: because he did not have support from his original lawyer.



[19] Without any evidence that contradicts the principal Applicant's story, it is presumed to be true. Nevertheless, the RPD found it to be implausible and rejected it on this basis. To make this finding according to law, it was necessary for the RPD to explain why the facts that the principal Applicant presented were outside the realm of what could reasonably be expected. It did not do this. The RPD found that the claims in the amended PIF were "of a serious nature" and "central" to the claim for protection, that the principal Applicant had legal representation when completing his PIF, and that the PIF instructions tells claimants to include all of the significant events that lead them to claim refugee protection. Therefore, the RPD concluded that it was unreasonable that the additional detail was not included in the original PIF. The RPD then devoted over two pages of its decision to a discussion of whether the Applicants' original lawyer was, in fact, negligent. It concluded that he was not and, therefore, the explanation for the PIF omissions was "unreasonable".

[20] This reasoning process is deficient because it does not address "why" the principal Applicant's story is outside the realm of what could reasonably be expected. Instead, it bypasses any analysis of the principal Applicant's story and focuses on whether the original lawyer was negligent, which I find to be an irrelevant consideration.

***B. Failure to supply supporting documentation***

[21] The RPD disbelieved the principal Applicant's statement that he had participated in a radio interview and, as a result, received a threat by phone. The reason given for disbelieving this statement was that the principal Applicant was unable to provide evidence confirming the occurrence of the interview.

[22] Given that the presumption that the principal Applicant's testimony is true, the RPD cannot find that his story lacks credibility simply because he does not provide collaborating documentation (*Ahortor v. Canada (Minister of Employment and Immigration)* [1993] F.C.J. No. 705). The principal Applicant testified, and provided documentation, verifying the radio program's existence and the existence of the person who interviewed him. However, the principal Applicant testified that, although he had contacted the radio station, the personnel there were unable to provide him with a copy of the program. In the absence of any evidence suggesting that the interview did not take place, and in the absence of any cogent reason to doubt the Applicant's story, in my opinion, it was not open to the RPD to use the lack of corroborating evidence of the interview as a basis for doubting the credibility of the Applicant.

### *C. Omissions at port of entry interview*

[23] At his port of entry interview the principal Applicant was asked to list his persecutors. In response, the Applicant mentioned the Bolivarian Circles but not FARC, because he was told to be brief and because the Bolivarian Circles was the group he feared most. It is open to the RPD to note omissions from port of entry notes and to use them to decide how much weight to accord an applicant's testimony. However, any omission must be reviewed in context, and be assessed in light of the totality of the evidence. In the present case, the RPD did not accept the principal Applicant's explanation, and found, in essence, that since he did not mention FARC his whole story about FARC was a concoction. In failing to provide reasons for this finding and in failing to view the port of entry evidence in context, I find the RPD's conclusion is patently unreasonable.

**D. *Lack of subjective fear***

[24] The RPD also did not believe the principal Applicant had a subjective fear of persecution. This was because the RPD found it implausible that the Applicants did not leave Venezuela earlier, since the persecution had been going on for some time and all of the Applicants had visas which enabled them to go to the United States.

[25] The RPD provided no reasons for its conclusion that this course of action was implausible; rather, this finding is based on a subjective assessment which is totally unrelated to the principal Applicant's story. Indeed, there is no critical analysis of the evidence. The principal Applicant's evidence, in both of his PIFs and in his oral testimony, is that the Applicants left Venezuela when they did as a result of the three incidents that took place in March 2004, which are detailed above. These incidents were much more serious and, according to the principal Applicant, made the Applicants realize that they would never be free from persecution should they remain in Venezuela. The RPD provided no reasons as to why, in light of this explanation, that the delay in leaving the country was implausible. Therefore, I find that this finding is patently unreasonable.

**V. Conclusion**

[26] The issue for determination is: Did the RPD make the contested implausibility findings according to law? My answer is "no". As a result, I find that the decision under review is patently unreasonable.

**ORDER**

Accordingly, the RPD's decision is set aside and the matter is referred back to a differently constituted panel for redetermination.

\_\_\_\_\_  
"Douglas R. Campbell"

Judge

**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-6022-06

**STYLE OF CAUSE:** JAVIER DIAZ PUENTES ET AL v. THE MINISTER  
OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

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**REASONS FOR ORDER  
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