Federal Court  Cour fédérale

Date: 20101210

Docket: IMM-1649-10

Citation: 2010 FC 1275

Ottawa, Ontario, December 10, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

JOSE SANTOS GARCIA PEREZ
JUANA SOLANO NUNEZ
DIEGO SANTOS GARCIA SOLANO
JUAN EDUARDO GARCIA SOLANO
GERMAN ANTONIO GARCIA SOLANO
PAOLA CAROLINA GARCIA SOLANO

Applicants

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 2 March 2010 (Decision), which

refused the Applicants' application to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicants are citizens of Mexico. Jose Santos Garcia Perez (Principal Applicant) and his wife and minor children (Applicants) resided in the city of Celaya in the state of Guanajuato. On 17 September 2008 the Principal Applicant was backing out of a parking space at a hardware store when he accidentally struck a young man with his car. The Principal Applicant recognized the young man as one of a gang that habitually loitered outside the hardware store. The young man was not injured, but he and two of his friends attacked the Principal Applicant. A friend of the Principal Applicant, Gabriela, and her husband saw the altercation from inside the hardware store and rushed to break it up.

[3] The Principal Applicant claims that about a month later, on 15 October 2008, he returned to the same hardware store and was attacked by two of the three young men involved in the earlier altercation, as well as by three adult men. He suffered a head wound and was taken by his wife to a hospital for stitches. A police officer on duty at the hospital took him to the local police station where he made a statement about the beating. As instructed, he returned to the local police station two days later to get a copy of the statement but, upon arriving, was told that there was no record of his complaint and that, since 48 hours had passed since the incident, it was now too late for him to report it.

[4] The Principal Applicant then went to the judicial police to report the incident and complain about the service he had received at the local police station. A staff person there informed him that it was too late for him to make a complaint but that an officer would visit the hardware store to investigate. The manager of the hardware store told the Principal Applicant that he wanted no trouble with the police and he refused to discuss the parking lot altercation. The Principal Applicant heard nothing more regarding the police investigation of the altercation.

[5] Two or three weeks later, the Principal Applicant's friend Gabriela told him that she had seen some of the young men from the first hardware store beating, drinking with adults whom she knew to be judicial police officers as they were her neighbours. This led the Principal Applicant to suspect that the three adult men who had participated in his second beating were judicial police officers, not only because such officers had been seen associating with the young men but also because the adult men were well-dressed and had a distinctive manner of speaking. Consequently, the Principal Applicant became too fearful to continue pursuing his complaint with the police.

[6] The Principal Applicant claims that, a few weeks later, a group of men gathered outside his family home in the middle of the night, breaking bottles, calling to the Principal Applicant by name and taunting him with comments such as "You see, it was useless to go to the police." They returned on three other nights. The Principal Applicant reported the harassment to the police and, twice, the police came to investigate; however, on both occasions, the men disappeared before the police arrived and returned when they left. The police accused the Principal Applicant of making false reports and refused to attend any more.

[7] In December 2008 the Principal Applicant and his family moved temporarily to the home of his parents in Apaseo el Alto to escape the harassment. However, in mid-January 2009 he saw one of the young men from the hardware store and an adult (who appeared to be a judicial police officer) hanging around and watching his parents' house. The Principal Applicant says that he and his wife left the children in the care of his parents and returned to their own home for fear of endangering the other family members. One week after their return, they were approaching their house by car when people in a police vehicle waiting near the family home shouted to the Principal Applicant that he was going to die and then began shooting at his car. The Principal Applicant sped away.

[8] After more threats and intimidation the Principal Applicant left Mexico, intending to stay away for 3-6 months until the problem died down. However, his wife told him that the men had returned and were making threats against him, and it was decided that the whole family would leave Mexico. The Principal Applicant speculated that the police were targeting him because they mistakenly believed that he had information regarding their criminal involvement with the young men and that he had reported it to the authorities.

[9] The Principal Applicant arrived in Canada on 26 February 2009 and made a refugee claim on 6 March 2009. The rest of the family arrived on 24 April 2009 and made refugee claims on the same day. The Principal Applicant was assisted in preparing his Personal Information Form (PIF) by the FCJ Refugee Centre in Toronto.

[10] By letter dated 4 November 2009 the Applicants were advised that the RPD hearing had been scheduled for 7 December 2009. They could not afford to retain counsel. By 18 November 2009, however, the Principal Applicant had arranged to be represented by law students from the Community and Legal Aid Services Program at York University (CLASP). The students could not work or attend a hearing during December because of exams and vacation, and they needed time in January to prepare for the Applicants' hearing.

[11] On 18 November 2009, the Applicant wrote to the RPD, requesting that the hearing be rescheduled for February to accommodate the representatives' needs. This request was denied.

[12] The hearing commenced on 7 December 2009. An interpreter was present. At this hearing, the Applicants again requested a postponement. The RPD denied the request on the ground that the Applicants had had sufficient time to retain counsel, and the hearing proceeded with the Applicants unrepresented. The hearing did not finish on that date and was adjourned until 29 January 2010, at which time the Applicants advised the RPD that the student representatives were requesting a postponement. The RPD refused, again ruling that the Applicants had had sufficient time to retain counsel.

[13] The RPD rejected the Principal Applicant's refugee claim on two grounds: he was not credible generally; and he had failed to produce any credible or trustworthy evidence on which a favourable decision could be made. In the absence of a credible basis for the claim, the RPD found that the Principal Applicant was neither a Convention refugee nor a person in need of protection.

The claims of the remaining Applicants were found to be derivative of the Principal Applicant's claim and were similarly refused. This is the Decision under review.

DECISION UNDER REVIEW

[14] The RPD affirmed its determination, made upon the two different hearing days, that the hearing should proceed without representation for the Applicants. The RPD held that the Applicants had been advised of the hearing process and had had sufficient time to retain counsel.

[15] The RPD found that the Principal Applicant was generally not credible. While it believed that the initial altercation in the parking lot had occurred, it concluded that the Applicants had fabricated the remainder of the story, exaggerating and extemporizing on the initial altercation to bolster the refugee claims.

[16] The RPD based its credibility findings on what it identified as problems in the Principal Applicant's evidence. For example, his explanations regarding how he knew the adults involved in the second and subsequent attacks and harassment were police officers, and how many times and by whom he was attacked, were, in the RPD's view, "vague, confusing, incoherent, and inconsistent with common sense and rationality." His claim that the adult men were police officers was "at best" mere speculation and "at worst he was making up the story." The RPD did not believe that the police told the Principal Applicant that they had no record of his statement being taken because "it

was the police that took him to the police station in the first place." Moreover, there would at least have been a hospital record of the Principal Applicant's injuries "which could be referenced if needed in support of the facts of his allegation."

[17] The RPD found no reliable evidence that the youths who attacked the Principal Applicant were linked with the police or that the young men and the police were harassing the Principal Applicant because they suspected that he had information on their criminal activities.

[18] The RPD also found that the Principal Applicant had "serious problems with speaking the truth," citing as an example his response when asked at the hearing if his family had lived with him when he lived in the U.S. from 2002-2007. The Principal Applicant first said no, then later explained that he had begun living in the U.S. in 2002 but his family did not join him until 2004. This discrepancy, though perhaps immaterial to the central elements of the claim, went to the "general trustworthiness" of the Principal Applicant's oral evidence and his overall credibility. The RPD relied on *Amaniampong v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 443 (F.C.A.) (*Amaniampong*) in concluding that, where a claimant lacks credibility, the RPD can find that there is no subjective fear to ground the claim.

[19] Having found, on a balance of probabilities, that the Principal Applicant had fabricated all of the significant events of his claim, the RPD refused his section 96 and section 97 claims as well as the derivative claims of the other Applicants.

ISSUES

[20] The Applicants raise the following issues:

a. Whether the RPD erred in its credibility findings;

b. Whether the RPD breached the principles of natural justice and procedural fairness in failing to allow the Applicants to have counsel present at the hearing.

STATUTORY PROVISIONS

[21] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :
(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

country.

Person in need of protection

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to

Personne à protéger

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du

provide adequate health or medical care.	pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	**Personne à protéger**
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.
[…]	[…]
Procedure	**Fonctionnement**
162. (2) Each Division shall deal with all proceedings before it as informally and quickly as the circumstances and the considerations of fairness and natural justice permit.	162. (2) Chacune des sections fonctionne, dans la mesure où les circonstances et les considérations d'équité et de justice naturelle le permettent, sans formalisme et avec célérité.

[22] The following provisions of the *Refugee Protection Division Rules* (SOR/2002-228) are applicable in these proceedings:

Application to change the date or time of a proceeding	**Demande de changement de la date ou de l'heure d'une procédure**
48. (1) A party may make an application to the Division to change the date or time of a proceeding.	**48.** (1) Toute partie peut demander à la Section de changer la date ou l'heure d'une procédure.
Form and content of application	**Forme et contenu de la demande**
(2) The party must	(2) La partie :
(*a*) follow rule 44, but is not	*a*) fait sa demande selon la

required to give evidence in an affidavit or statutory declaration; and

règle 44, mais n’a pas à y joindre d’affidavit ou de déclaration solennelle;

(*b*) give at least six dates, within the period specified by the Division, on which the party is available to start or continue the proceeding.

b) indique dans sa demande au moins six dates, comprises dans la période fixée par la Section, auxquelles elle est disponible pour commencer ou poursuivre la procédure.

If proceeding is two working days or less away

Procédure dans deux jours ouvrables ou moins

(3) If the party wants to make an application two working days or less before the proceeding, the party must appear at the proceeding and make the application orally.

(3) Si la partie veut faire sa demande deux jours ouvrables ou moins avant la procédure, elle se présente à la procédure et fait sa demande oralement.

Factors

Éléments à considérer

(4) In deciding the application, the Division must consider any relevant factors, including

(4) Pour statuer sur la demande, la Section prend en considération tout élément pertinent. Elle examine notamment :

(*a*) in the case of a date and time that was fixed after the Division consulted or tried to consult the party, any exceptional circumstances for allowing the application;

a) dans le cas où elle a fixé la date et l’heure de la procédure après avoir consulté ou tenté de consulter la partie, toute circonstance exceptionnelle qui justifie le changement;

(*b*) when the party made the application;

b) le moment auquel la demande a été faite;

(*c*) the time the party has had to prepare for the proceeding;

c) le temps dont la partie a disposé pour se préparer;

(*d*) the efforts made by the party to be ready to start or continue the proceeding;

d) les efforts qu’elle a faits pour être prête à commencer ou à poursuivre la procédure;

(*e*) in the case of a party who

e) dans le cas où la partie a

wants more time to obtain information in support of the party's arguments, the ability of the Division to proceed in the absence of that information without causing an injustice;	besoin d'un délai supplémentaire pour obtenir des renseignements appuyant ses arguments, la possibilité d'aller de l'avant en l'absence de ces renseignements sans causer une injustice;
(*f*) whether the party has counsel;	*f*) si la partie est représentée;
(*g*) the knowledge and experience of any counsel who represents the party;	*g*) dans le cas où la partie est représentée, les connaissances et l'expérience de son conseil;
(*h*) any previous delays and the reasons for them;	*h*) tout report antérieur et sa justification;
(*i*) whether the date and time fixed were peremptory;	*i*) si la date et l'heure qui avaient été fixées étaient péremptoires;
(*j*) whether allowing the application would unreasonably delay the proceedings or likely cause an injustice; and	*j*) si le fait d'accueillir la demande ralentirait l'affaire de manière déraisonnable ou causerait vraisemblablement une injustice;
(*k*) the nature and complexity of the matter to be heard.	*k*) la nature et la complexité de l'affaire.
Duty to appear at the proceeding	**Obligation de se présenter aux date et heure fixées**
(5) Unless a party receives a decision from the Division allowing the application, the party must appear for the proceeding at the date and time fixed and be ready to start or continue the proceeding.	(5) Sauf si elle reçoit une décision accueillant sa demande, la partie doit se présenter à la date et à l'heure qui avaient été fixées et être prête à commencer ou à poursuivre la procédure.

STANDARD OF REVIEW

[23] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[24] The first issue concerns the credibility findings. Credibility is a matter within the RPD's expertise. It is reviewable on a standard of reasonableness. See *Aguirre v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 571 at paragraph 14.

[25] The second issue concerns the Applicants' right to natural justice and procedural fairness, for which the standard of review is correctness. See *Sketchley v. Canad (Attorney General)*, 2005 FCA 404 at paragraph 111..

ARGUMENT

The Applicants

Applicants Denied Their Right to Counsel

[26] By letter dated 4 November 2009, the RPD advised the Applicants that their hearing was scheduled for 7 December 2009. The Applicants secured a commitment of assistance from CLASP and immediately advised the RPD by letter dated 18 November 2009 that the student representatives were not available until February. They requested a postponement to

accommodate counsel. The RPD denied the request, stating that the Applicants had "had sufficient time to retain counsel."

[27] The hearing began on 7 December 2009 without counsel for the Applicants being present. Even when a resumption date was required, the RPD choose 29 January 2010 although the Applicants again requested a date in February so that they could have representation on the second hearing day.

[28] The Applicants argue that their request for a hearing date that would allow counsel to be present was refused simply to accommodate the RPD's administrative needs, and that this does not justify violation of the Applicants' right to fairness and natural justice.

[29] Rule 48 of the *Refugee Protection Division Rules* allows the RPD to grant requests for postponement, taking into consideration "any previous delays and the reasons for them" and "whether allowing the application would unreasonably delay the proceedings." Neither of these considerations was at play here.

[30] The Applicants further argue that the RPD may have mistakenly believed that the Applicants were requesting a postponement in order to retain counsel, rather than to accommodate the counsel they already had. They contend that the RPD's decision on postponement might well have been different had it correctly understood the situation. Moreover, with counsel present, some of the evidentiary problems that later arose during the hearing, and which are discussed below, could have been avoided. The Applicant, at paragraph 7 of his

affidavit dated 22 April 2010, particularly noted the problems related to the interpretation from Spanish to English, problems he did not notice during the hearing because counsel was not present to alert him to them and because his understanding of English is limited.

Credibility Findings Based on Errors of Fact

[31] The Applicants state that the Decision was based entirely on the RPD's negative credibility findings. The RPD failed to address state protection or internal flight alternative (IFA).

[32] They further argue that the RPD based its credibility findings on errors of fact and ignored relevant evidence. It viewed the Principal Applicant with unwarranted suspicion and undue scepticism, expressing doubt about his testimony even on the most basic points, such as what the federal police force is called in Mexico and whether 066 is that country's emergency telephone number.

[33] The RPD based its negative credibility finding in part on its conclusion that the Principal Applicant lied about whether his family was with him in the U.S. The RPD's understanding here was incorrect. The Principal Applicant indicated in his PIF that his family was with him in the U.S. That was the truth and he had no reason to hide it. The interpreter at the hearing asked him in Spanish whether his wife and children had gone with him to the U.S., not whether they lived with him in the U.S. He therefore answered "no" because that was the truthful answer: he had gone to the U.S. alone first and the family joined him later. Given that this was the example

chosen by the RPD to illustrate the Principal Applicant's "serious problems with speaking the truth," and given that it was based on a mistake of interpretation, the RPD's negative credibility finding should not stand.

[34] The Applicants argue that the RPD placed undue weight on apparent contradictions that have reasonable explanations. The Principal Applicant testified that he was attacked on one occasion but later said that it was on two occasions, a contradiction described by the RPD as "vague, confusing, incoherent and inconsistent with common sense and rationality." The Principal Applicant has stated that he was not frightened by the first attack, namely the altercation in the parking lot. It was only the second attack, when the adults became involved, that was significant to the claim. Moreover, the Principal Applicant swears in his affidavit that when he answered that he had been attacked once, he was responding to the question "How many times were you attacked by adult men?" He answered truthfully—once.

[35] Similarly, the RPD rejected as "speculation" the Principal Applicant's evidence that the adult men who persecuted him were federal police officers, even though this was based on known facts: that Gabriela had seen the very youths who had attacked him the first time drinking with men she knew to be police officers because they were her long-time neighbours; that the police officers were visually identifiable as such to the Principal Applicant; and that a vehicle known to be the kind of vehicle driven by police officers was used to attack him. This was not speculation but rather a reasonable assumption, and it should not have been used as grounds to impugn the Principal Applicant's overall credibility.

[36] The Principal Applicant further argues that the RPD ignored corroborating documentary evidence, including a photograph of the Principal Applicant's head injuries, and reports confirming police corruption in Mexico generally and in the city of Celaya specifically. The latter evidence was supported by the National Documentation Package and by the 2008 United States Department of State (U.S. DOS) Report. The country conditions evidence shows that alliances between criminals and police are common in Mexico and that there is nothing implausible about the Applicants' claim. Consideration of such evidence would have affected the RPD's credibility findings.

[37] The Principal Applicant's wife also gave oral evidence regarding the persecution of the family. This was ignored by the RPD, and no finding of any sort was made as to the wife's credibility. The wife's evidence, if it had been assessed, could have affected and even rehabilitated the RPD's assessment of the Principal Applicant's credibility, but no mention was made of it, or even of the fact that she testified. The only mention of the wife's story in the Decision was taken from the Principal Applicant's PIF and was not a reference to the wife's oral evidence. The RPD also ignored the wife's PIF, which went into some detail about incidents that happened to her independently and her attempts to seek state protection.

The Respondent

Proceeding Without Applicants' Counsel Not a Breach of Natural Justice

[38] The Respondent argues that the right to counsel in immigration proceedings is not absolute. The "lengthy" adjournment sought by the Applicants was due to a desire to delay, to indifference or to inattention.

[39] Under section 162(2) of the Act, the RPD is required to deal with proceedings as informally and quickly as circumstances and fairness and natural justice permit. The Respondent argues that the Applicants were provided with sufficient time to contact and retain counsel: "The RPD is not obliged to withhold the scheduling of refugee claims to accommodate with [*sic*] the schedule of students at the student legal clinic at Osgoode Hall Law School."

[40] The Respondent submits that it is unclear whether the Applicants had actually retained the student advocates, or whether they had simply made inquiries and been told that the students would not be available until February. It is "odd," the Respondent argues, that if the students or other counsel were actually retained that there is no affidavit evidence to this effect. There is also no evidence that the Applicants attempted to retain any other counsel after learning that the students would be unavailable for the scheduled date.

RPD's Assessment of the Principal Applicant's Credibility Was Reasonable

[41] The Respondent argues that the RPD's assessment of facts, and particularly credibility findings based on plausibility concerns, are within the "heartland" of the RPD's jurisdiction. See *Aguebor v. Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 (F.C.A.). The

RPD, as the trier of fact, does not have to accept a claimant's uncontradicted evidence and may reject evidence that is improbable. See *Faryna v. Chorny* (1951), [1952] 2 D.L.R. 354 (B.C.C.A.).

[42] The Respondent submits that the RPD's negative credibility finding based on the Principal Applicant's oral evidence concerning the time he and his family spent living in the U.S. is reasonable. The Applicants' after-the-fact challenge based on poor translation is unsupported by any independent assessment.

[43] Ultimately, the Respondent contends that the Applicants simply take issue with the manner in which the RPD weighed the oral and documentary evidence, particularly the photograph offered as evidence of the Principal Applicant's head injury, the connection between the young men who assaulted him and the police officers, and the documentary evidence of police corruption in his home city. The Applicants have no specific documentary evidence corroborating their alleged experiences; they rely entirely on evidence of general country conditions to support their claims. The Respondent relies on *Mathews v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1387 at paragraph 8, to argue that, in these circumstances, the RPD was not obliged to consider the documentary evidence if it disbelieved the claimant's oral evidence. Having no belief in the Principal Applicant's oral evidence, the RPD found that he had no subjective fear of persecution, notwithstanding the documentary evidence of police corruption and criminality in Mexico.

Applicants' Reply

[44] The Applicants contend that the adjournment they sought was not "lengthy," contrary to the Respondent's submissions. When, on 7 December 2009, the RPD was required to continue the

hearing for a second day, the first available date was at the end of January, which was very near the date the Applicants originally requested. It is evident from the RPD's own scheduling timetable that a delay of two months is normal, not "lengthy." Moreover, the Applicants had never sought an adjournment before.

[45] The Respondent has no evidence to support its statement that the request for adjournment was "made for the purpose of delay or by reason of indifference or inattention." On the contrary, the Applicants acted diligently to find counsel, and they communicated with the RPD in a timely and respectful manner to explain their circumstances, even though their command of English is limited. The Respondent has no reason to impugn the Applicants' motives. Even if the RPD did believe the delay was unwarranted, it still could have protected the Applicants' right to counsel by granting an adjournment with conditions and making it peremptory.

[46] Had the Applicants had access to counsel, they might have been able to present medical evidence of the Principal Applicant's head injury, rather than just a photograph.

[47] The Applicants argue that the RPD failed to assess this refugee claim in a quasi-judicial manner, particularly with respect to the credibility findings. As the Principal Applicant states in his affidavit, the RPD displayed a lack of attention to his story and a scepticism regarding uncontroversial matters, such as the emergency telephone number for Mexico. In *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 at page 200, Justice James Hugesson of the Federal Court of Appeal warned the board against being "over-vigilant in its microscopic examination of the evidence of persons who … testify through an interpreter."

[48] The Applicant also submits that the Respondent's reliance on *Amaniampong*, above, is misplaced. In that case, the board took careful notice of the country conditions evidence and its usefulness to the board's deliberations. That is distinguishable from the instant case in which the RPD failed to make a single mention of country conditions.

ANALYSIS

[49] Counsel for the Respondent has done a thorough job in alerting the Court to those aspects of the record which show that the Applicants were given full notification of the process they faced and the need to have counsel ready to proceed on the 7 December 2009 date set for the hearing. However, in my view, that is not really the issue before the Court.

[50] When I review the Decision and the record, I cannot be satisfied that the RPD appropriately considered the adjournment request. The reasons in the Decision are clear that the request was refused because "the claimant has had sufficient time to retain counsel." There is no indication that the RPD considered the factors enumerated in section 48(4) of the *Refugee Protection Division Rules* or the applicable case law.

[51] Justice O'Keefe had the following to say on point in *Sandy v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1468 at paragraph 54:

> **54** I have reviewed the transcript of the hearing and I cannot determine that the Board member gave consideration to all of the

> factors listed above. Further, there are no written reasons or notes to show how the Board member came to a decision to deny the adjournment. The only factors considered by the Board were that the hearing date was set on a peremptory basis and the conduct of counsel. The Board did not consider the other factors. Based on the facts of this case, this was an error on the part of the Board. I am of the view that this error constituted a breach of the duty of procedural fairness owed to the applicant (see *Dias v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 125 (QL) F.C.).

[52] The same point has been made in numerous other cases of this Court. For example, in *Modeste v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1027, Justice Kelen had the following to say at paragraph 21:

> **21** In my decision *Antypov v. Canada (Minister of Citizenship and Immigration)* (2004), [2004] F.C.J. No. 1931, 135 A.C.W.S. (3d) 300, (F.C.), I considered whether the denial of an adjournment by the Board so that the Applicant could obtain counsel constituted a breach of the rules of natural justice. In that case, and in much of the jurisprudence where the denial of an adjournment for this purpose was not considered a breach of the rules of natural justice, the Applicant had demonstrated a pattern of delaying the proceedings and had already been granted adjournments on previous occasions. In the case at bar, this is the first time the Applicant has sought an adjournment. While the Applicant had ample time to make arrangements for counsel and was negligent in doing so the Board is still obliged to consider and weigh these other factors.

[53] In the recent case of *Golbom v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 640, Justice Mosley provided a helpful summary of the jurisprudence on this issue at paragraphs 11 and 13:

> **11** While the right to counsel is not absolute in immigration matters and tribunals are masters of their own procedures, administrative tribunals have to respect procedural fairness when deciding an adjournment request based on the absence of counsel: *Austria v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 423, [2006] F.C.J. No. 597, at para. 6; *Siloch v. Canada*

> *(Minister of Employment and Immigration)*, (1993) A.C.W.S. (3d) 570, [1993] F.C.J. No. 10 (F.C.A.); *Prassad v. Canada (Minister of Employment and Immigration),* [1989] 1 S.C.R. 560, [1989] S.C.J. No. 25, at 568-269.
>
> […]
>
> **13** In addition to these factors, other considerations have been identified as relevant in the jurisprudence, such as the effort made by an applicant to be represented and whether the applicant can be faulted for not being ready: *Siloch, supra*; *Modeste v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1027, [2007] F.C.J. No. 1290, at para.15; *Sandy v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1468, [2004] F.C.J. No. 1770, at para.52. The failure to regard all of the relevant factors, whether negative or positive, in deciding upon an adjournment in the absence of counsel has been held to constitute a breach of natural justice: *Sandy, supra*, at para. 54; *Modeste, supra*, at paras.18-19; *Siloch, supra.*

[54] In the present case, there had been no previous request for an adjournment and no delays, and the RPD does not seem to have concerned itself with fairness and justice issues. This is particularly apparent when it is borne in mind that the RPD re-scheduled a second hearing day on January 30, 2010 for other reasons. An adjournment to a day early in February 2010, as the Applicants requested, could have had little impact on timing, quite apart from the other factors that were not taken into account.

[55] The refusal has resulted in a procedural unfairness in this case. The matter must be returned for this reason alone. There is no need to consider other issues raised by the Applicants.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a different RPD member.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-1649-10
STYLE OF CAUSE:	JOSE SANTOS GARCIA PEREZ et al. Applicants - and - MINISTER OF CITIZENSHIP AND IMMIGRATION Respondent
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	November 30, 2010
REASONS FOR JUDGMENT AND JUDGMENT:	HON. MR. JUSTICE RUSSELL
DATED:	December 10, 2010

APPEARANCES:

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