

Federal Court



Cour fédérale

Date: 20120517

Docket: IMM-7907-11

Citation: 2012 FC 599

Toronto, Ontario, May 17, 2012

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

**ANGEL UGUSTO ANZOLA BARRAGAN
CLARA LUZ BOHORQUEZ
KATHERINE ANZOLA BOHORQUEZ
LUZ ANGELA ANZOLA BOHORQUEZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application concerns a decision of the Refugee Protection Division (RPD), dated October 17, 2011, determining that the Applicants, Angel Augusto Anzola Barragan (the Applicant), his wife and two daughters, are not Convention refugees or persons in need of protection. Each of the Applicants is a citizen of Colombia and claimed refugee protection fearing the FARC-EP.

[2] A fundamental element of the Applicants' s. 97 claim is proof of threats made by FARC.

The evidence tendered as proof is composed of the Applicant's testimony that he received two threatening letters, and a threatening phone call. The letters and a tape recording, including a translation from Spanish to English, were tendered into evidence before the RPD. The RPD rejected the evidence on a finding that, in my opinion, constitutes a breach of the duty of fairness owed to the Applicant.

[3] The focus of the RPD in rejecting the evidence was the manner in which the Applicant recorded the telephone threat. The RPD's finding at this point is as follows:

[...] Even more problematic was a recording that the claimant presented which purported to be an audio recording of a threatening call from the FARC-EP. He stated that the authorities had advised him that he would need proof of the threats for them to act so he had prepared a recorder in advance. Once he received a call wherein he recognized the caller as being from FARC-EP, he intentionally hung up and prepared the recording device. The claimant repeatedly described both verbally and physical [*sic*] how he took the headphones from the recorder sitting on the desk and held them up to his cell phone, which he held near his ear. However, as noted at the hearing, the claimant described using an ordinary pair of headphones to do the recording and that ordinary headphones only play back sound, they do not record it and do not have a microphone. The claimant stated that this was simply what he did. I do not find the claimant's explanation satisfactory. In order to prepare to record an expected threatening call, the claimant would have had to learn how to work the recording device in advance. The claimant was alone at the time of the alleged threatening call so there was no one there to help him. It was simply not possible for the claimant to record a phone conversation by holding common headphones up to a cell phone that he was holding near his head. Even if he had somehow pushed record while the recorder was on the desk in front of him, it makes no sense that a desk based microphone would pick-up the conversation from a cell phone held up to the claimant's head in the fairly clear fashion as the physical recording demonstrates. I find on a balance of probabilities, that the recording presented by the

claimant is a forgery. This not only calls into question the authenticity of the documents presented by the claimant, but also that his reliance on it undermines his credibility.

[Emphasis added]

(Decision, para. 7)

[4] Thus, it seems that because the RPD could not understand the description given of how the recording was conducted, the RPD came to the conclusion that, not only was the recording a fraud, but the independent threatening letters were a fraud, and, indeed, the Applicant is a fraud. The law with respect to making such a serious global finding of negative credibility is expressed in *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA); a reason must be found to rebut the presumption that a claimant is telling the truth in giving sworn testimony. The reason provided by the RPD for rejecting the evidence is that the presiding Member and the Applicant could not arrive at a common understanding of how the recording was conducted. This is not surprising based on the fact that the Applicant provided his evidence in Spanish, and through the translator, the evidence which reached the RPD member was not made at all clear as demonstrated by the following excerpt from the transcript of the hearing:

MEMBER: Now, I should have asked you this a moment ago. You have an audio recording of one of those phone calls. How did you come to have an audio recording of one of the phone calls?

CLAIMANT 1: When I went ... when I went to the Immediate Reaction Unit of the police they gave me the advice to get proof, and if I could get a recording it would be a lot better. I bought a small recording device, like a pocket recorder with earphones that you can put it here in your ears. I bought the cassette, and I checked out that everything worked perfectly well and that it did indeed record. I always had it in my jacket ... or my jacket pocket. On the 21st of August ... sorry, on the day ... August the 1st around 11:00 am I was getting some moulds ... some leather moulds in order to prepare them to send them to Miss ... to the Posa L ... L.C. Company in the United States ... the United States. When the hone

rang I was here at the table working. I said, "Hello?" and she said ... and the person ... and sorry, the call ... and they said, "Would Angel Anzola." I immediately recognized the voice. And I said, "Hello? Hello?", like as if I couldn't hear, and I hung up. I went to my jacket. It was ... the jacket ... my jacket was underneath the table. I took out the recording ... the tape recorder and I put the ... a lever of the head phones up to the cell phone, yeah, the headphones, the speakers to the cell phone. The ... yeah, the ear phone, whatever ... the ear phone, head phones, I put it up to the cell phone, and when I was replacing it ... when I was placing the headphones or ear phones onto the cell, it rang again. I pressed the recording device and said, "Hello?"

[...]

CLAIMANT 1: The tape recorder has some kind of headphones that one normally would put here, and the Claimant is pointing to his ears. Like the ones that you use to listen like a Discman, to listen to music. I had that connected to the tape recorder. This little cable I put.

[...]

MEMBER: All right sir. Maybe we'll try to clarify a bit. Most sets of headphones, there's essentially two ends. On one end you've got a couple of pieces for your ears, and you usually put those in your ears or over top of your ears.

CLAIMANT 1: Yeah, in your ears. Yeah.

[...]

CLAIMANT 1: I put it on my hand and I pressed the cell phone like this. This is the headphones in my hand and I had put the cell phone to it like this.

MEMBER: So you put the pieces that go in your ears next to the cell phone?

CLAIMANT 1: Correct.

(Certified Tribunal Record, pp. 540 – 543)

[5] The use of the term “headphones” in the translation, and the Member’s technological understanding of the design of “common headphones” on the market, played an important role in the result. In my opinion, to be fair to the Applicant, the Member was required to pause before rushing to the conclusion that fraud existed; a more careful effort was required to understand the Applicant’s evidence. If after such an effort the Member was still not satisfied with the verifiability of the recording taken, the tape could have been found to be inadmissible as evidence. However, the failure to reach a common understanding about how the recording was taken was not so appropriately limited: it had the profound effect of extinguishing the Applicant’s s. 97 claim. In my opinion, this result is not sustainable given the breach of the duty of fairness owed to the Applicant.

[6] As a result, I find that the decision under review was rendered in reviewable error.

ORDER

THIS COURT ORDERS that:

1. The decision under review is set aside and the matter is referred back to a differently constituted panel for redetermination;
2. There is no question to certify.

“Douglas R. Campbell”

Judge

Federal Court



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FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-7907-11

STYLE OF CAUSE: ANGEL UGUSTO ANZOLA BARRAGAN, CLARA LUZ BOHORQUEZ, KATHERINE ANZOLA BOHORQUEZ, LUZ ANGELA ANZOLA BOHORQUEZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

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REASONS FOR ORDER AND ORDER BY: CAMPBELL J.

DATED: MAY 17, 2012

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