



Refugee Protection Division

Section de la protection des réfugiés

**RPD File No. / N° de dossier de la SPR : MB7-04104
MB7-04120**

Client ID No. / No ID client : XXXX XXXXXXXXX

Huis clos / Private Proceeding

Reasons and Decision – Motifs et décision

Claimant(s)

Demandeur(e)(s) d'asile

**XXXX XXXX XXXX XXXX XXXX XXXXXXXXX
XXXX XXXX XXXX**

Date(s) of hearing

Date(s) de l'audience

November 6, 2018

Place of hearing

Lieu de l'audience

Ottawa (Ontario)

**Date of decision
and reasons**

**Date de la décision
et des motifs**

December 3, 2018

Panel

Tribunal

Michel Colin

Counsel for the claimant(s)

**Conseil(s) du (de la/des)
demandeur(e)(s) d'asile**

Karima Karmali

Designated representative

Représentant(e) désigné(e)

N/A

Counsel for the Minister

Conseil du (de la) ministre

N/A

REASONS FOR DECISION

INTRODUCTION

[1] The principal claimant, XXXX XXXX XXXX XXXX XXXX XXXX XXXX, as well as her spouse, XXXX XXXX XXXX XXXX XXXX XXXX (the claimant), both citizens of El Salvador have asked for refugee protection pursuant to Sections 96 and 97(1) of the *Immigration and Refugee Protection Act* (the Act).

[2] Throughout the hearing and in rendering its decision, the tribunal took into account the *Chairperson's Guideline Number 4 relating to women refugee claimants fearing gender-related persecution*¹.

ALLEGATIONS

[3] The allegations of the claimants, as described in their Basis of Claim (BOC) form, may be summarized as follows.

[4] The claimants lived in the capital of San Salvador. However, they also owned a XXXX XXXX outside of the city. Around the year 2000, gang members took over some community land neighbouring their XXXX. The claimants continued to visit the XXXX every Friday as they did not want to abandon their property. One Friday, at the beginning of the year 2003, the claimants noticed a man walking on a path that ran through their XXXX. Though this man was not dressed like a gang member, they felt nervous about the way this man had stopped and stared at them without saying anything. The claimant instructed XXXX XXXX, one of their farm hands who had grown up in that area, to go and offer the man a coconut and try to get a better look at him. XXXX XXXX, then reported that he had never seen this man before and suggested that the claimants be careful, as he suspected that this was a gang member.

[5] The following Friday, the claimants were too apprehensive to return to the XXXX. On the subsequent Monday, XXXX XXXX called the claimants. He reported that the man they had seen

¹ Chairperson Guidelines 4 of Immigration and Refugee Board of Canada: *Women Refugee Claimants Fearing Gender-Related Persecution*, effective November 1996.

the previous week and another individual had waited in front of the entrance to the property. The claimants did not go back to the XXXX for the two following weeks. After that, they felt that they had to return to the XXXX to pay the workers. Upon arrival, XXXX XXXX handed them a note that had been left at the farm. The note indicated that they were to pay the person who had delivered the note the sum of \$XXXX XXXX XXXX US. The exact date and location of the payment would be specified later. It also mentioned that the failure to pay would result in the kidnapping of the claimants.

[6] Two weeks later, the claimants called XXXX XXXX who reported that there had been no further suspicious activity.

[7] On Sunday, XXXX XXXX XXXX 2003, the claimants returned to the XXXX. As they were on their way back home, approximately 20 minutes after having left their XXXX, they were ambushed by people who had blocked the road with the trunk of a banana tree. Two of the gunmen forced the principal claimant towards a coffee plantation while a third guarded the claimant (her husband) who was forced to stay in the car and watch. The gunman, who had tattoos similar to that of gang members, raped the principal claimant. As soon as the assailants left, the claimants drove to a gynecological hospital to get care as the principal claimant as she was pregnant at the time. There she found out that she had lost the baby. They went back to their home in San Salvador.

[8] About a week after the rape incident, the principal claimant received a threatening phone call. She was told not to report the rape to the police and was warned that they know where her husband works. The next day, the principal claimant received another call. The claimants decided that they should move to protect themselves. At the beginning of XXXX 2003, the claimants moved to the town of Armenia to live with the cousin of the principal claimant. Soon thereafter, the principal claimant and her cousin started receiving threatening calls. The claimants spent most of their time in the house as they were afraid to go outside.

[9] After approximately two months, in XXXX 2003, the claimants moved to the city of Santa Ana. They rented a private house and got new cell phones. Nevertheless, the threatening calls continued weekly. When the gang members started describing the clothes that the husband of the principal claimant had worn during the day, they became extremely scared. They paid the gang

members \$XXXX XXXX XXXX on two separate occasions during the month of XXXX 2003. The husband of the principal claimant delivered the money as instructed by placing it on specific tombs at the local cemetery.

[10] At the end of XXXX 2003, the claimants moved to XXXX, approximately XXXX kilometres from San Salvador. The calls continued. They finally decided to leave their country, but after paying the gang members, they no longer had the money to purchase plane tickets. The principal claimant's mother, who lived in the United States was ill and was no longer working. The claimants could not borrow money from her. Finally, they found a friend who offered to pay for the plane tickets.

[11] On XXXX XXXX XXXX 2003, the claimants left their country and went to the United States. They stayed with the principal claimant's mother's house for approximately one month and then got their own apartment. The husband of the principal claimant found a job as a XXXX. Six months later, the principal claimant found a job as a XXXX. The claimants then went on to have numerous other jobs. They never considered making an asylum claim in the U.S. Though they knew it was possible to ask for asylum in Canada, they did not know this was also a possibility in the United States.

[12] After the inauguration of President Donald Trump in January 2017, the claimants learned that authorities were clamping down on illegal immigrants. The employer of the husband of the principal claimant mentioned that all persons who did not have legal work permits were going to lose their jobs. They contacted the aunt of the principal claimant who lives in Canada. The latter instructed the claimants to make their way to a refugee centre called *Vive La Casa* in Buffalo, New York.

[13] On XXXX XXXX XXXX 2017, thirteen and a half years after having left their country, they entered Canada and made an asylum claim.

ANALYSIS

Identity

[14] The identity of the claimants was established by their testimony as well as the documentary evidence entered into the record. This includes photocopies of passports issued by Salvadorian authorities, the originals of which were seized by Canadian immigration authorities². The tribunal is satisfied with the evidence concerning the identity of the claimants.

Credibility and Prospective Fear

[15] The principal claimant testified quite emotionally regarding the fact that she was raped and the horrible emotional toll that this has taken on her, particularly since she lost the baby that she was expecting and that she was never able to conceive after that. The tribunal believes that the principal claimant was likely raped at one point in her life. However, the tribunal does not believe that this incident happened in El Salvador in the context that both claimants described. Indeed, the tribunal finds that the claimants were not credible concerning these incidents.

[16] Considering the XXXX assessment report filed into evidence under C-17 that describes the challenges that the principal claimant may face while testifying, the tribunal questioned her husband whenever possible.

[17] According to the BOC form, the first threat made against the claimants was in the form of a note that was dropped off at their XXXX XXXX. This note indicated that they would have to pay the sum of \$XXXX XXXX XXXX US to the person who had dropped off the note, failing which they would be kidnapped. The note mentioned that more specific instructions would follow at a later date. The testimony of the husband of the principal claimant was substantially different concerning this matter. Indeed, the claimant testified that, when he was handed the note by his farm aid, he immediately crumpled it up and discarded it without ever reading it. Asked how he could describe the contents of the letter in the BOC form if he had never read it, the claimant replied that he was able to know the content of the letter as the gang members referred to its content in the subsequent threatening phone calls.

² Document 2 – Package of information from the referring Canada Border Services Agency (CBSA) or Immigration, Refugees and Citizenship Canada (IRCC).

[18] The tribunal is not satisfied with this answer. The BOC form indicates in three consecutive sentences the words “the note said...”. It makes no reference to the content of the note having been revealed subsequently during telephone threats. Furthermore, this answer is inconsistent with the following sentence which indicates that the claimants did not know what to do about the situation as they did not have “that much money”. The claimants could not possibly know that money was requested and that the amount was beyond their means, unless they had read the note prior to the telephone threats. This undermines the credibility of the claimants.

[19] Regarding the most violent incident described in the BOC form, the evidence is also somewhat contradictory. The XXXX report deposited into evidence as document C-17 indicates that the claimants were on the way to the XXXX XXXX, rather than returning from it, when the incident occurred. The claimants had noticed this inconsistency and immediately identified it at the beginning of the hearing. They believe that the XXXX simply misunderstood the principal claimant. Considering the fact that the report indicates that a mere two hours were spent performing the whole assessment process and that the principal claimant may be disturbed while talking about these events, the tribunal finds that these explanations are quite reasonable.

[20] However, there were further inconsistencies concerning this event. In particular, the husband of the principal claimant repeatedly insisted repeatedly that none of the assailants addressed him personally. Asked to explain why the BOC form indicates, “during this time when XXXX was outside the car with the third gunman who was holding a gun to his head and yelling at him not to move...”, the claimant replied that he was nervous. The tribunal is not satisfied with this answer considering the fact that the claimant was able to recall this at the time when the BOC form was drafted. This once again reduces the claimant’s credibility.

[21] Asked when the first threatening phone calls were received, the claimant spontaneously responded that it was when they were in Armenia. The tribunal was quite surprised by this answer since, according to the BOC form, the claimants only moved to Armenia in XXXX 2003, when they no longer felt safe pursuant to the second threatening call. The claimant swiftly corrected his testimony saying that the first phone call was approximately one week after the rape incident, hence before they moved to Armenia. Asked to explain how he had made this error, the claimant explained that he was trying to gather his thoughts. The tribunal is not satisfied with this answer. The failure of this claimant to spontaneously where he was when he received the first telephone

threat diminishes his credibility, especially when one considers that the couple moved to Armenia because of the second call at least two weeks later.

[22] Asked to explain why they had stayed at their house in the capital until the end of XXXX or the beginning of XXXX XXXX if indeed, one week after the rape incident they had received a phone call in which they were told that the gangs know where they live, the claimant replied that he panicked. The tribunal finds that, while it may be reasonable to expect that the claimant panicked when receiving this phone call, the failure to leave the premises for over two weeks after that, remains inconsistent with what one might reasonably expect from a person whose wife had recently been raped and whose life was now being threatened by people who know where they live. This undermines once again the credibility of the claimants.

[23] The claimant also testified that the couple spent the last three and a half months of their life El Salvador in XXXX XXXX. Asked if he had ever left XXXX for any reason whatsoever during those three and a half months, the claimant insisted that he had never done so. The tribunal asked the claimant to explain why his wife's passport was issued in Soyapango in XXXX 2003. The claimant adjusted his testimony and then stating that they had actually gone to Soyapango and then returned to XXXX as soon as they obtained the passport. This adjustment in testimony further undermines the claimant's credibility.

[24] At the very beginning of the hearing, the tribunal asked the principal claimant if she had ever asked for asylum during the thirteen and a half years that she spent in the United States of America. She replied that she did not know that this was possible. Asked what she did to obtain information as to the possibility of obtaining any kind of permanent status such as refugee status, the principal claimant answered that she did nothing. Later at the hearing while questioned by her counsel, she explained that she had approached a notary public who assisted them with an application for temporary protected status. This person took the money from the claimants and then suggested that they lie about their date of entry into the United States so that they may be eligible for temporary protected status. The temporary protected status application was refused in 2004.

[25] Asked if this notary public had ever discussed with them the possibility of making an asylum claim, the principal claimant answered that it had never been discussed. Later on, while

testifying about why she did not come to Canada earlier, the principal claimant said that she felt safe in the United States until the Trump administration took office.

[26] The tribunal finds that these are not the actions one might reasonably expect from people who fear for their lives should they return to their country. The failure to inquire for thirteen and a half years about any possibility of obtaining permanent status, including refugee status, is not consistent with a fear of being returned to El Salvador. While the principal claimant declares that she felt safe in the United States, both she and her husband worked illegally for all these years in various jobs and in various states. In doing so, they were exposing themselves to the danger of being caught and deported back to El Salvador at any time. The failure to inquire about the possibility of obtaining asylum is not reasonable in such circumstances. The tribunal notes that the claimant knew that refugee status exists in Canada during all this time. The failure to inquire about whether this possibility exists in the United States, particularly when she took the time to consult on other immigration matters, is not reasonable, especially after being denied temporary protected status.

[27] Furthermore, the tribunal finds that the failure of the gangs to attempt to locate the claimants by questioning their family members about their whereabouts tends to indicate, on a balance of probabilities, that these gang members have stopped looking for them in the past thirteen and a half years.

[28] For all these reasons, the tribunal finds that the claimants are generally not credible regarding their fear of gang members that they encountered in the past.

[29] However, the claimants also argued that, after thirteen and a half years away from El Salvador, they would likely be perceived as rich people should they return to their country. They explained that extortion and violence by MS 13 and MS 18 gangs has increased since they left their country and that they would likely be targeted by these gangs should they return today. The tribunal believes that this argument merits further analysis pursuant to sections 96 and 97(1) of the Act.

APPLICATION OF SECTION 96 OF THE ACT

[30] Jurisprudence has clearly established that the allegations of women who fear being raped must be considered with regard to section 96 of the Act. The tribunal has already explained that, in light of the very emotional testimony of the principal claimant, it believes that she was indeed raped at one point in her life. The tribunal does not find that she established that this rape occurred in the circumstances that were alleged. As the tribunal does not know in what circumstances the principal claimant was raped, it finds that she has failed to establish that there exists more than a mere possibility that this would occur once again fourteen years later. Even if the tribunal had believed that the claimant was raped in the circumstances that she alleges, which is not the case, the fact remains that her assailants have not attempted in any way to locate her in the past thirteen and a half years. Even in such circumstances, the claimant has failed to establish that there exists a well-founded fear of persecution today.

[31] As for the allegation of the claimants would be perceived as being rich and thus be targeted by criminal gangs, the jurisprudence has repeatedly found that there exists no nexus to a Convention ground in such circumstances.

[32] Counsel for the claimants argued that the refusal to pay extortion to criminal gangs may qualify as an imputed political opinion. The tribunal notes that it did not believe any past interactions of the claimants with criminal gangs. Even if they returned to their country thirteen and a half years later, it has not been established that they would indeed be approached by criminal gangs and that these would impute political opinions regarding them.

APPLICATION OF SECTION 97(1) OF THE ACT

[33] Pursuant to section 97(1) of the Act, the claimants had the burden of establishing, on a balance of probabilities, that there exists a personal risk to their lives or a personal risk of cruel and unusual punishment should they return to El Salvador today. Considering the fact that the tribunal did not believe the past encounters with criminal gangs and that there have not been any attempts to locate them or threaten them via their family for over thirteen and a half years, the tribunal finds that the claimants have not established, on a balance of probabilities, that they would be personally targeted today, or that any risk that they might have would be different from that of

other Salvadorians who return to their country after a number of years in the United States or are for other reasons perceived as being rich. Under such circumstances, asylum cannot be granted.

CONCLUSION

[34] After examining all the evidence, the tribunal concludes that XXXX XXXX XXXX XXXX XXXX XXXX XXXXand XXXX XXXX XXXX XXXX XXXX XXXX XXXX are neither “Convention refugees” nor “persons in need of protection” and therefore rejects their asylum claims.

Michel Colin

Michel Colin

December 3, 2018

Date

/dl