

Federal Court



Cour fédérale

Date: 20250417

Docket: IMM-13215-23

Citation: 2025 FC 710

Ottawa, Ontario, April 17, 2025

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

**MAYLEN BAHENA BARRERA
ALEJANDRO GARCIA BAHENA
SOFIA DE MANCERA GARCIA BAHENA
DIEGO DE JESUS CORTES BAHENA**

Applicants

and

**MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The Applicants are a family: Maylen Bahena Barrera (the Principal Applicant) and her three children -- two minors and one adult son. The Applicants applied for refugee protection in Canada based on their fear of a particular gang member, “ES”, and his criminal associates in

Mexico. The Refugee Protection Division (“RPD”) dismissed their claims on the basis that Ms. Bahena and her adult son were not credible. The Applicants appealed this decision. The Refugee Appeal Division (“RAD”) agreed with the RPD’s credibility determinations, except with respect to Ms. Bahena’s adult son.

[2] The key issue on judicial review is the RAD’s credibility findings. The parties agree, as do I, that I ought to review the RAD’s credibility findings on a reasonableness standard. I agree with the Applicants that the RAD’s credibility determinations, like those of the RPD, are principally based on weak implausibility findings and a microscopic focus on a minor inconsistency and omissions without an explanation as to their relevance to Ms. Bahena’s overall claim for protection. As Ms. Bahena’s credibility was the determinative issue, I find the decision to be unreasonable and requiring redetermination.

II. Background Facts and Procedural History

[3] Ms. Bahena is a citizen of Mexico. Over 25 years ago, Ms. Bahena’s sister, who was a minor at the time, was abused by a man, ES. Ms. Bahena and her mother filed a missing persons report with the police and ES was identified as a suspect. Ms. Bahena’s sister later returned home.

[4] Over the next 17 years, Ms. Bahena would occasionally encounter ES on the street where he would speak to her in a threatening manner. At some point, she saw him at the Attorney General’s office when she was working there as an assistant. During this time Ms. Bahena learned that ES is part of a gang in Mexico and had been convicted of numerous serious crimes.

[5] Sometime in 2017, Ms. Bahena received a call from a man who identified himself as ES, calling her a vulgar name. In April 2018, Ms. Bahena received a call from someone associated with ES, threatening her and blaming her for ES's incarceration. Later that same day, in the middle of the night, men came to her home, shook the door, and threatened to kill her. Ms. Bahena called the father of her children, who called the police. The men left by the time the police arrived. That night, Ms. Bahena and her children went to stay at the children's father's home, where his mother and uncle also lived. This home is not far from her own and she occasionally returned to her own home as well.

[6] Approximately four months later, in September 2018, Ms. Bahena was in a serious car accident and was hospitalized. She received a threatening phone call the night after her release from the hospital. The caller stated that this is what she should expect when "you deal with ES" and threatened to kill her and her daughter. This call prompted Ms. Bahena to permanently move into the home of the father of her children.

[7] In October 2018, after Ms. Bahena had parked her car, a man pulled up beside her in his car, pointed a gun at her, and drove off. After this incident, she quit her job and remained in the home of her children's father. She considered moving to Cancun. The father of her children thought it best that she leave the country and told her that he would have enough money with his Christmas bonus for the cost of the passports and tickets. Ms. Bahena obtained the passports and Electronic Travel Authorizations on February 18, 2019 and came to Canada on March 5, 2019.

[8] Ms. Bahena's adult son remained in Mexico. The following month, April 2019, two men came to his home looking for Ms. Bahena. In June 2019, he was pulled off the street by two men, forced in a taxi, and threatened with a taser. He was told that they would kill him if his mother did not return to Mexico. He was then hit in the head with a gun and let go. Ms. Bahena's adult son came to Canada in August 2019 and also made a refugee claim. His claim was joined to that of Ms. Bahena and her other children.

[9] The Applicants' claim was first dismissed in March 2020 by the RPD on the basis of the availability of an internal flight alternative ("IFA"). The RAD allowed the appeal of this decision, finding the RPD had erred on IFA but remitted it for the RPD to address credibility. The RPD held hearings on January 5, 2023 and March 17, 2023. On May 5, 2023, the RPD refused the claim, finding Ms. Bahena and her adult son not credible. The RAD, in a decision dated September 28, 2023, upheld the RPD's credibility findings in relation to Ms. Bahena and dismissed the appeal on this basis.

III. Analysis

A. *Focus on Microscopic Omissions and Inconsistencies*

[10] The RAD agreed with the RPD that there were "numerous inconsistencies, omissions and occasions of evolving testimony" that negatively affected Ms. Bahena's credibility. The RAD only focused on three issues in the evidence: i) discrepancies in how Ms. Bahena got to the hospital following the car accident; ii) an omission in the refugee narrative ("BOC narrative")

relating to Ms. Bahena seeing ES at her workplace; and iii) omissions in the complaint filed with the police.

[11] I find the RAD, like the RPD, undertook an overzealous search for contradictions in the evidence, and failed to consider how these findings were materially relevant to its evaluation of Ms. Bahena's claim for protection. As stated by this Court in *Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 [*Lawani*] at paragraphs 20-26:

...The decision-maker must not conduct a too granular or overzealous analysis of the evidence. In other words, not all inconsistencies or implausibilities will support a negative finding of credibility; such findings should not be based on a microscopic examination of issues irrelevant to the case or peripheral to the claim.

(*Lawani* at para 23; see also *Abou Loh v Canada (Citizenship and Immigration)*, 2019 FC 1084 at para 36; *Alex-Alake v. Canada (Citizenship and Immigration)*, 2021 FC 208 at paras 12-14)

[12] I have significant concerns that the inconsistencies in the evidence identified by the RAD are peripheral to the claim and are not a reasonable basis on which to ground an overall negative credibility determination. I will address each inconsistency.

[13] With respect to how she arrived at the hospital, Ms. Bahena explained that the police complaint and the BOC narrative mistakenly stated that the police had taken her to the hospital. In fact, the police had provided a document to the taxi driver for them to take her to the hospital from the scene of the accident. She further explained that the father of her children came to the accident scene but did not ride the taxi with her but instead took his own vehicle and met her at the hospital. Ms. Bahena speculated that there may have been a translation error with respect to

the concepts of “assisting” and “helping” her – meaning facilitating getting her to the hospital versus physically taking her there.

[14] The RAD, like the RPD, does not accept this explanation. Further, the RAD asserts that this discrepancy is important and not minor because it relates to a “serious car accident allegedly caused by [ES].” There was, however, other evidence about the accident, including: Ms. Bahena’s testimony about the accident, the nature of her injuries, and the phone call she received after the accident. Ms. Bahena also provided a hospital report from that day that set out her injuries from a car accident. In light of her explanation, that the evidence throughout the refugee process was provided through interpretation and translation, and that the hospital report indicating that she had been in a car accident was in evidence, I find the inconsistency about whether she had been accompanied to the hospital is a minor issue. I find the RAD’s focus on this one inconsistency on a peripheral point to be an example of a microscopic examination of the evidence. The RAD’s reliance on this to ground a negative credibility finding is unreasonable (*Attakora v Canada (Minister of Employment and Immigration)* (1989), 99 NR 168 (FCA) at para 9; *Cooper v Canada (Citizenship and Immigration)*, 2012 FC 118 at para 4; *Lawani* at para 23).

[15] The RAD also finds it was significant that Ms. Bahena did not include in her BOC narrative that she saw ES at the Attorney General’s office when she was working as an assistant. When prompted by the RPD to speculate on ES’s motive to threaten her, Ms. Bahena testified that it may be that he believed her to be responsible for his incarceration, having seen her in the Attorney General’s office. ES did not approach her at that time. Ms. Bahena does not remember

when this occurred but estimated that it was sometime between 15-20 years ago. The RAD further inquired about how Ms. Bahena came to be aware that ES had been convicted of other serious crimes. Ms. Bahena explained that she had seen a few files while she had been working at the Attorney General's office. When asked whether she had ever worked on a file involving ES, Ms. Bahena testified that she had sometime in 2005.

[16] The RAD found it to be a significant omission to not include these details in the BOC narrative. Ms. Bahena explained that her testimony about ES's motivation was only a speculation and therefore she did not consider it essential to provide in the BOC narrative.

[17] This Court has repeatedly found that an "omission should not be used to impugn [a claimant's] credibility unless it was material and significant to the claim" (*Nwabueze v Canada (Citizenship and Immigration)*, 2019 FC 1577 at para 11; *Aliserro v Canada (Minister of Citizenship and Immigration)*, 2022 FC 412 at para 26; *Feradov v Canada (Citizenship and Immigration)*, 2007 FC 101 [*Feradov*] at paras 18-19). As Justice Barnes aptly observed in *Feradov*: "It is well understood that these documents [refugee claim forms] are often prepared by representatives or on the advice of representatives with different views of materiality" (*Feradov* at para 18).

[18] These details about seeing ES at the Attorney General's office were not so significant to Ms. Bahena's claim that its omission is a basis to draw a negative inference, particularly in light of numerous details already provided about her encounters with ES. The RAD finds it material because it goes to ES's motivation to target Ms. Bahena. As explained by Ms. Bahena, she was

asked to speculate about ES's motives. The encounter in the Attorney General's office was not the only time she saw ES over the years. The other incidents, which she recounted in the BOC narrative, involved ES making threats toward her.

[19] Further, it is not clear what the RAD deduces from this omission. Does the RAD believe that ES is motivated to harm Ms. Bahena because he saw her at the Attorney General's office? How does this fact factor into the overall analysis of Ms. Bahena's risk? Or does the RAD not believe that Ms. Bahena saw ES at the Attorney General's office? The RAD does not explain how it treats this testimony that it found to reveal a significant omission; instead the omission itself is relied upon as a demerit against Ms. Bahena's general credibility.

[20] The RAD also agreed with the RPD's finding that there were two significant omissions in the police complaint filed just prior to Ms. Bahena coming to Canada. The first omission is the same as discussed above, relating to seeing ES at the Attorney General's office when she worked there as an assistant. For the aforementioned reasons, I also do not find this to be a significant omission from the police complaint. The second omission is that Ms. Bahena did not set out that, between 2003-2017, she occasionally encountered ES on the street and he spoke to her in a threatening manner. Given that the complaint is addressing her fears of ES since the threats escalated in 2017, I do not find this to be a significant omission. It is a minor point. Moreover, as Ms. Bahena explained in her addendum to her BOC narrative, an officer had instructed her to describe the latest events and there was a line behind her at the office. While the RAD acknowledges that the RPD did not address this explanation, the RAD states it does not have to deal with it because it is "not sufficient to overcome the numerous credibility concerns." In

addition to relying on minor omissions in the police complaint, the RAD also failed to justify why Ms. Bahena's explanation for the omission was "not sufficient". This too was unreasonable.

B. *Delay in Leaving and Lack of Subjective Fear*

[21] In *Shanmugarajah v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 583 (QL), the Federal Court of Appeal explained that "it is almost always foolhardy for a Board in a refugee case, where there is no general issue as to credibility, to make the assertion that the claimants had no subjective element in their fear". Given that I have found the RAD's credibility findings on the inconsistencies and omissions in the record to be unreasonable, its findings on Ms. Bahena's lack of subjective fear must also be reconsidered. I am, nonetheless, providing comments on the RAD's subjective fear analysis that may assist on redetermination.

[22] While it was open to the RAD to consider the delay in leaving, the jurisprudence requires that this issue not be a determinative finding (*Huerta v. Canada (Minister of Employment and Immigration)* (1993), 157 N.R. 225 (F.C.A.), at para 4). The RAD, like the RPD, rejected Ms. Bahena's claim that her children's grandmother did not have the funds to assist her for passports and airline tickets and, moreover, that she could not make such a request because of her belief that it was not her children's grandmother's obligation to provide in this way. I also note that, though not acknowledged by the RAD, Ms. Bahena testified that her children's grandmother believed it to be risky to move to another country.

[23] The RAD did not accept a person in Ms. Bahena's position would not ask her children's grandmother for monetary assistance to immediately leave when faced with the types of threats

she was facing. Further, the RAD accepted the RPD's finding, that Ms. Bahena's actions "defied logic" by: (i) not asking her children's grandmother for money; (ii) occasionally staying at her own home after the first incident in April 2017; (iii) moving only 500 metres away from her home to stay at the home of her children's father, and; (iv) not telling her mother and sister that ES was behind the threats she was receiving. The RAD agreed with the RPD that Ms. Bahena's behaviour was indicative of a lack of subjective fear.

[24] The RAD's findings are predicated on its judgment, using common sense, of how a person who was genuinely afraid would act. This is an implausibility finding. These types of findings are open to decision-makers to make, but the jurisprudence, particularly in the refugee context, require that these determinations be made cautiously. This Court has repeatedly held that implausibility findings in the refugee context must only be made in "the clearest of cases" where "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" (*Al Dya v Canada (Citizenship and Immigration)*, 2020 FC 901 at paras 27- 32; *Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at para 7).

[25] In my view, the RAD's findings about Ms. Bahena's lack of genuine fear were not made with caution. These findings do not consider the totality of Ms. Bahena's circumstances. For example, in its evaluation of her lack of subjective fear, the RAD does not consider the various steps Ms. Bahena *did* take because of her fear, including: moving homes, quitting her job, not

taking her children to school, not taking public transit or walking outside, and then eventually not leaving the home in which she was staying.

IV. Conclusion

[26] Overall, the RAD's decision must be set aside because I have serious concerns with its credibility determinations. I find that the RAD's negative credibility determination is based on microscopic inconsistencies and weak implausibility findings. Neither party raised a question for certification and I agree none arises.

JUDGMENT in IMM-13215-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is allowed;
2. The RAD decision dated September 28, 2023 is set aside and sent to a new decision-maker for redetermination; and
3. No serious question of general importance is certified.

"Lobat Sadrehashemi"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-13215-23

STYLE OF CAUSE: MAYLEN BAHENA BARRERA, ALEJANDRO
GARCIA BAHENA, SOFIA DE MANCERA GARCIA
BAHENA, AND DIEGO DE JESUS CORTES BAHENA
v MINISTER OF CITIZENSHIP AND IMMIGRATION

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DATED: APRIL 17, 2025

APPEARANCES:

Terry Guerriero	FOR THE APPLICANTS
Saudia Samad	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Terry S. Guerriero Barrister and Solicitor London, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT