

PROVINCIAL COURT OF NOVA SCOTIA

Citation: *R. v. Uran Garcia (Martinez)*, 2020 NSPC 4

Date: 2020-01-06

Docket: 8392837, 8392838, 8392839

8392840, 8392841, 8392842

8392843, 8392844

Registry: Dartmouth, Nova Scotia

Between:

Her Majesty the Queen

v.

Efrain Andres Uran Garcia aka Carlos Gutierrez Martinez

DECISION ON SENTENCE

Judge: The Honourable Judge Jean M. Whalen

Heard: December 18, 2019 in Dartmouth, Nova Scotia

Decision: January 6, 2020

Charges: Sections 122(1)(a), 122(1)(b), 127(a), 122(1)(a), 122(1)(b), 124(1)(a) of the *Immigration and Refugee Protection Act* and 57(1)(b)(i) of the *Criminal Code of Canada*

Counsel: Scott Millar, for the Crown
Godfred Chongatera, for the Defence

By the Court:

I INTRODUCTION

[1] On September 19, 2019, Mr. Garcia and Mr. Orcozo travelled from Frankfurt, Germany to Halifax, Nova Scotia. Upon reviewing, their documents, the Border Officer noticed the laminate number on Mr. Orozco's passport was one in a series that had been reported stolen in the INTERPOL. When confronted, Mr. Garcia confessed that he and Mr. Orozco were Columbian Nationals.

[2] Mr. Garcia was charged with eight offences, seven under the *Immigration and Refugee Protection Act* and one under the *Criminal Code*.

[3] On December 11, 2019, Mr. Garcia appeared with counsel and pled guilty to all charges.

II FACTS

[4] Mr. Garcia signed an "Agreed Statement of Facts" which was entered as Exhibit #1;

Pursuant to s.655 of the Criminal Code, Efrain Andres Uran Garcia admits the following facts for the purpose of dispensing with proof at trial:

He is a Colombian national with no status in Canada.

The 2018 offences

On approximately September 4, 2018, Mr. Uran Garcia entered Canada at the Calgary International Airport in Calgary, Alberta. Upon entry to Canada, Mr. Uran Garcia possessed and used a forged Mexican passport (#G30874970) under the alias Carlos Gutierrez Martinez, date of birth June 11, 1985.

On August 28, 2018, Mr. Uran Garcia had used the information in the false passport to apply for and receive an Electronic Travel Authorization (eTA)¹. In that application, he falsely answered ‘no’ to the following questions:

Have you ever been refused a visa or permit, denied entry or ordered to leave Canada or any other country?

Have you ever committed, been arrested for, been charged with, or been convicted of a criminal offence in any country?

Page 12 of Mr. Uran Garcia’s fraudulent Mexican passport (#G30874970) contains a Canada Border Services Agency stamp denoting arrival at the Calgary International Airport on September 4, 2018.

On September 29, 2019, Mr. Uran Garcia stated to border officers in Halifax that he had used his fraudulent passport to enter Canada via Calgary in 2018, and had stayed for three months.

The 2019 offences

On September 29, 2019, Mr. Uran Garcia travelled on Condor flight DE2414 from Frankfurt, Germany, to Halifax, Nova Scotia. He was travelling with Danyelo De Jesus Cardona Orozco, also a Colombian national.

¹ An electronic travel authorization is simple and inexpensive method for people from visa-exempt nations to gain authorization to enter Canada, without the requirement of getting a full visa. Mexico is a visa-exempt country. Colombia is not.

Upon entry to Canada, Mr. Uran Garcia possessed and used a fraudulent Mexican passport (#G30874970) under the alias Carlos Gutierrez Martinez, date of birth June 11, 1985. Mr. Cardona Orozco was also travelling under a false identity, with a fake Mexican passport and supporting false documentation.

Upon landing in Halifax, he proceeded to a Primary Inspection Kiosk to answer the questions and complete the declaration as all travelers are asked to do upon entry. The information he supplied was consistent with the fraudulent passport under the identity of Carlos Gutierrez Martinez. He was issued a receipt reflecting that information.

Border Officer Brunet met with Mr. Cardona Orozco and Mr. Uran Garcia at the Primary Inspection Kiosk. When he reviewed their documents, he noted that the laminate number² on Mr. Mr. Cardona Orozco's passport was one of a series that had been reported stolen on the INTERPOL lost and stolen document database. As a result, both were referred to immigration secondary inspection.

When confronted with evidence that their travel documents were false, Mr. Uran Garcia confessed that he and Mr. Cardona Orozco were in fact Colombian nationals. At that point, both individuals provided the names and dates of birth that we are now using to identify them. They were both arrested under the Immigration and Refugee Protection Act. They were provided with their rights and caution and spoke with a lawyer. The Colombian consulate was notified of their arrests per their request.

In addition to the fraudulent passport, Mr. Uran Garcia was also in possession of the following fraudulent documentation, also under the false identity of Carlos Gutierrez Martinez:

Mexico driver's license,

² The laminate in a passport is a thin film covering the biographical data page. They are often embossed with holograms as an added security feature. Laminates are created and printed separately from passports, and each has its own serial number, separate from the number of the passport it is later attached to.

Work identification fraudulently identifying him as a graphic reporter for the newspaper, "Heart of Mexico",

Santander Select Mastercard,

Readycard pre-paid Mastercard.

Border Officers searched their internal databases and ran Mr. Uran Garcia's fingerprints. The results were as follows:

On February 25, 2017, he arrived in Canada at Montreal International Airport using a fraudulent Mexican passport under the alias Jose Luis Salas Rosales, date of birth October 11, 1982. He was travelling with Mr. Cardona Orozco, who was also travelling under an alias.

He was convicted in Brampton Ontario on June 13, 2017 on one count of dangerous driving and one count of break and enter. He was sentenced on joint recommendation to 45 days in jail, plus 12 months' probation. These convictions arose out of a series of break and enters in Toronto for which he and Mr. Cardona Orozco were arrested and charged, that occurred between April 21 and May 18, 2017.

A Removal Order (deportation) was issued against him on July 26, 2017, on the ground of serious criminality committed in Canada. The Order states that in order to return to Canada following the enforcement of the order, he must obtain written authorization of a designated officer. Mr. Uran Garcia signed that order once it had been interpreted for him in Spanish.

He was deported from Canada on September 27, 2017, using Colombian passport #AQ891768 in the name Efrain Andres Uran Garcia.

He had entered Canada again on September 4, 2018 using the same fraudulent passport that is the subject of the 2019 charges.

Four weeks prior to the arrival in Halifax of Mr. Cardona Orozco and Mr. Uran Garcia, another individual, Jose Luis Marin Suarez, also arrived in Halifax, in the following circumstances:

He is a Colombian national,

He was travelling under an alias,

He was travelling with a forged Mexican passport,

His passport laminate was from the same series of stolen laminates that had been found in Mr. Cardona Orozco's passport,

He was travelling from Frankfurt, Germany, on Condor flight DE2414,

He had an international driver's license card and an international driver's license booklet, both in the name of the alias on his fraudulent passport,

He had entered Canada illegally in the past,

He has used several aliases both in Canada and in other countries.

III CROWN'S POSITION ON SENTENCE

[5] The Crown is seeking a sentence of 30 months in jail plus a DNA order pursuant to s. 487.051(3)(b) of the *Criminal Code*. Counsel argues;

The principles of sentencing in the border context

The principles of sentencing at ss. 718-718.1 of the Criminal Code are well known. The Crown highlights the following;

- *The relevant objectives of sentencing in this are to denounce unlawful conduct, to deter the offender and others from committing these offences, to assist in rehabilitation, and to promote a sense of responsibility;*

- *An offender must be sentenced proportionate to the gravity of the offence and to his degree of responsibility;*
- *A sentence should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances;*
- *An offender should not be deprived of liberty, if less restrictive sanctions may be appropriate in the circumstances.*

*The objectives of the **Immigration and Refugee Protection Act** include:*

- *To maintain, through the establishment of fair and efficient procedures, the integrity of the Canadian immigration system;*
- *To protect the public health and safety and to maintain the security of Canadian society; and,*
- *To promote international justice and security by fostering respect for human rights and by denying access to Canadian territory to persons who are criminals or security risks.*

On the issue of the control of our borders, Justice Doherty of the Ontario Court of Appeal write:

I also have no hesitation in describing Canada's effective control over its borders as a social interest of sufficient importance to be characterized as a principle of fundamental justice. Nothing is more fundamental to nationhood and national sovereignty than the ability to control national borders. Effective border control serves a myriad of crucial social interests ranging from national self-defence to public health, to the enforcement of Canada's fiscal policies and its penal statutes.

It is principally for this reason that denunciation and deterrence are the primary factors to consider in cases of immigration fraud.

The heightened requirement for deterrence in the circumstances of this case

On December 1, 2016, the government of Canada made a significant change to the immigration requirements for Mexican nationals. As of that date, a visa was no longer required for Mexican nationals to enter Canada. All that is required is an Electronic Travel Authorization: a simple, inexpensive process that takes minutes to acquire online.

The purpose of the change was to strengthen ties between two long-time political allies. It has had that effect, but there has been a collateral effect as well. Mr. Uran Garcia has taken advantage of Canada's generosity here, and he is not alone. There is mounting evidence that Canada's new policy is being abused in a systematic way. That evidence includes:

- Leonardo Marcel Navarro Perez (case cited below) is a Columbian National who entered Canada last December on a forged Mexican passport and fraudulent Mexican ID. He had previously entered Canada in 2018 on a different passport and fraudulent passport under a difference name and committed a break and enter.*
- In January 2019, a series of blank passport laminates, each with a unique identifier, was reported stolen to Mexican authorities.*
- As outlines in our agreed statement of fact, two more Columbian nationals have recently entered Canada via Halifax on forged Mexican passports. Each of them used a passport containing one of the laminates stolen in January.*

As noted above, denunciation and deterrence are the paramount consideration in immigration fraud. But the particular circumstances of this and other cases demands an even greater reliance on the principle of both specific and general deterrence.

IV DEFENCE POSITION

[6] Mr. Chongatera seeks a short period of custody between six to eight months, stating it will still achieve deterrence.

[7] He asked me to consider the following;

- 1) The immigration consequences, that is Mr. Uran Garcia will be deported to Columbia;
- 2) The case of *R. v. Jiang*, where in the lower court can still be persuasive; parity is important.
- 3) He distinguishes *R. v. John Doe* by stating the offences were far more serious and so was *R. v. Zaylaya* who had previous convictions in Canada.
- 4) That Mr. Uran Garcia changed his plea to guilty; he is remorseful and cooperated with law enforcement. He has no intention of coming back to Canada illegally.
- 5) The parity principle, the totality principle and the jump principles found in *R. v. Lacasse*, and *R v. Anthony Cook* respectively.
- 6) The Kienapple principle and that the included offence of section 122(1)(a) should be stayed.

V MITIGATING FACTORS

[8] Change of plea.

VI AGGRAVATING FACTORS

[9] Sophisticated and well planned. The defendant obtained a Mexican passport under a false name then used it to get numerous pieces of supporting documents, all fraudulent. He then used these to get travel documents.

[10] The defendant entered Canada in 2017 and committed a crime. He was deported. This record is not an aggravating factor, but a lack of record would have been a mitigating factor. He also entered in 2018 and 2019.

[11] The defendant has used four different names (aliases).

VII CIRCUMSTANCES OF THE DEFENDANT

[12] There was no pre-sentence report prepared. I rely on the submissions of counsel to provide information about Mr. Garcia.

[13] He is approximately 41 years old and he is a Columbian national. He has an 11-year-old son. Mr. Garcia's father was a prisoner of war and he was killed when the defendant was two years old. This has shaped his world view.

[14] Mr. Uran Garcia's grandmother passed away while he was here in Canada and his mother is sick. He wants to return home because he needs someone to protect her. He is scared something will happen to her.

[15] Mr. Uran Garcia says he has no intention of coming back to Canada illegally.

[16] When given an opportunity to address the court, Mr. Uran Garcia said the criminals are those selling the passports. He is not a bad man.

VIII SENTENCING PRECEDENTS TO ESTABLISH RANGE

[17] Judge Tax in *R. v. Lazar*, 2019 NSPC at paragraph 41 states;

As I indicated previously, the parity principle found in section 718.2(b) of the Criminal Code requires the Court to consider that a sentence imposed should be similar to sentences imposed on similar offenders for similar offences committed in similar circumstances. A review of those sentencing precedents provided by counsel or reviewed by the court may be considered to establish a range, as a guideline for trial judges. It does not create a hard and fast rule, nor does the establishment of a range of sentence preclude a greater sentence on grounds of denunciation, deterrence and the gravity of the offence, or a lesser sentence because of special or significant mitigating circumstances.

[18] Crown counsel submitted the following synopsis of a number of cases;

R. v. John Doe, 2004 BCCA 143 23 months' jail

IRPA s.122(1)(b) (use of a fraudulent document)

IRPA s.127 (Misrepresentation)

CC s.57 (use of a forged passport)

The appellant called himself Mr. Kahan, but the Court was not satisfied he was being truthful. He pled guilty to three counts under indictment.⁶ He was described as an “international fraud artist” who used multiple aliases. He had convictions in Canada, the United Kingdom, Germany, and Bermuda, and had attempted to enter Canada illegally more than once.

7 He was sentenced to 23 months in jail. In denying his appeal, the BC Court of Appeal opined that if the sentence could be faulted at all, it “would be because it is at the low end of the range.”⁸

R. v. Navarro Perez, 2019 ABPC 69 1 year’ jail

IRPA s.122(1)(b) (use of a fraudulent document)

IRPA s.52(1) (returning to Canada without authorization)

CC s.57(3) (possession of a forged passport)

Mr. Navarro Perez was a Columbian national, travelling on a forged Mexican passport, with a fraudulent Mexican driver’s license in the name of his alias. He had previously entered Canada under another alias with a different fraudulent Mexican passport. Following that entry, he was convicted of break and enter and deported. He had seven criminal convictions in the United States, had used 13 different aliases there, and had been deported from there in 2010. Judge Barley saw “no reason to differ from the other Alberta cases referred to,” and sentenced Mr. Navarro Perez to one year in jail.

R. v. Farhan, 2013 ONCJ 768 2 years’ jail, 12 months’ probation

368(1)(b) (Use of a forged document – maximum sentence 5 years)

351(2) (using a disguise with intent – maximum sentence 5 years)

CC s.57(1)(b)(i) (use of a forged passport)

Mr. Farhan entered early guilty pleas to the above offences. He obtained a number of false identification documents and used them to obtain up to 8 false passports for himself and for his children, who were living in Kuwait with their mother, his estranged wife. Aggravating circumstances included the complexity and sophistication of the scheme, the potential for harm to the integrity of Canada's passport system, the fact he was attempting to bring his children unlawfully to Canada, and the fact that he had lied under oath to the Court in support of his attempts. Mitigating factors included no prior criminal convictions, the strong support of his family, a positive pre-sentence report, a number of serious medical conditions including a kidney transplant, and the fact that he "committed these offences not for monetary gain or to support terrorist activity, but because he was consumed by love for his children and as he was concerned for their safety". He was sentenced to an effective sentence of two years in jail, followed by 12 months' probation.

R. v. Fernandes, [2013] N.J. No. 377 (NFLD PC) 18 months' jail

IRPA s.122(1)(b) (use of a fraudulent document)

CC s.57(1)(b)(i) (use of a forged passport)

Mr. Fernandez pled guilty to the above offences, following his arrest attempting to enter Canada via cruise ship. He had been removed from Canada on five previous occasions. The reason for his repeated attempts to enter Canada was that his family lives in Canada, including his mother, five sisters, two children and a number of grandchildren. He had a prior criminal record, but no convictions other than the attempts to enter Canada since 1993. The Court found that Mr. Fernandez was not a danger and did not present a threat to Canadians, and sentenced him to 18 months in jail. The Court held that "given the rather unique situation of the accused in this case it seems unlikely that a substantially longer period of imprisonment would provide any greater level of deterrence".

R. v. Fawaz, 2010 BCSC 384 10 months' jail

CC s.57(3) (possession of a forged passport)

Mr. Fawaz was convicted of a single count of simple possession of a forged passport, a charge that carries a maximum sentence of 5 years in prison. He had a prior conviction for GST fraud, the weight of which was “awkward to assess” given that the underlying conduct was “roughly contemporaneous” to the conduct giving rise to the charge before the Court. Mr. Fawaz was in the process of applying for permanent residency. He acknowledged that he had left and re-entered Canada on the false passport several times, for the purpose of seeing his children and other family members, and for vacations. He presented several letters of support from friends and supporters to demonstrate that he was “a personable man who often puts the interests of others above his own”. Mr. Fawaz was sentenced to 10 months in jail.

R. v. Guifaro Zelaya, 2009 ABPC 7 1 year’ jail

IRPA s.122(1)(a) (possession of a fraudulent document)

IRPA s.122(1)(b) (use of a fraudulent document)

IRPA s.127 (Misrepresentation)

IRPA s.52(1) (returning to Canada without authorization)

Mr. Guifaro Zelaya, a Honduran national, pled guilty to these offences on the following facts: He had been removed from Canada following a failed refugee claim. He obtained a fraudulent Mexican passport on false pretenses, flew from Mexico to Calgary, used the passport to enter Canada, and lied about his identity. He had convictions for numerous offences in Canada and elsewhere, including uttering threats, drug possession, false use of a credit card, possession of an illegal firearm with ammunition, and careless use of a firearm. The accused had been shot in the stomach while in Honduras, under uncertain circumstances. He had two children in Canada, and a wife with whom he was separated. His early guilty plea was a mitigating factor. In describing the crime, Judge Grieve said “the reward was great, the risk of being caught

small, and deportation is merely a free trip back to where family awaits”. He was sentenced to one year in jail.

R. v. Daskalov, 2011 BCCA 169 4 months’ jail

IRPA s.122(1)(a) (possession of a fraudulent document)

Mr. Daskalov wished to immigrate to Canada and attempted to enter through lawful means, but was denied. He chose to acquire a fraudulent passport. He successfully entered Canada, but was soon discovered and charged. He eventually pled guilty. He had no criminal record. A conditional discharge and 6 months’ probation was set aside by the British Columbia Court of Appeal as being unfit. The Court substituted an effective sentence of four months in prison. They identified the appropriate range of sentence for mere possession of a fraudulent passport, for people in similar circumstances to Mr. Daskalov, at 4 months to 2 years in prison.

R. v. Beltran, 2010 ABPC 113 5 months’ jail

IRPA s.52(1) (returning to Canada without authorization)

Mr. Beltran was arrested as part of a lengthy drug investigation in Calgary. Those charges were eventually stayed, but his identity and unlawful entry to Canada were discovered. He had been deported from Canada on two separate occasions following failed refugee claims. He was married to a Canadian citizen and had two Canadian children. He hoped to attempt to gain lawful entry into Canada to be with his family. He was sentenced to an effective sentence of five months in jail.

R. v. Lazar, 2019 NSPC 31 4.5 months’ jail

IRPA s.52(1) (returning to Canada without authorization)

IRPA s.127 (Misrepresentation)

Mr. Lazar attempted to enter Canada in 2018 and was deported. He made a second attempt later in the year, from Budapest, but was discovered and not permitted to board the plane. A third attempt was made in March of this year. He was apprehended at the

Halifax International Airport and eventually arrested on the above charges (only for the 2019 attempt). On each attempt to enter Canada he used a different version of his name. In 2019, he was using a validly-issued Romanian passport in his legal name. Mr. Lazar had no criminal record. His common-law partner and three of his children were living in Canada at the time and he stated he was “desperate” to get into Canada to be reunited with them. The Crown proceeded summarily. He was given a global sentence of 4.5 months in jail.

IX ANALYSIS AND DISPOSITION

[19] Sentencing is not an easy process. It’s not a “one size fits all”, there is no formula to assist in determining a sentence. The court is guided by the principles set out in the *Criminal Code* s. 718.1 and 718.2. A sentence must be constructed with these principles.

[20] Mr. Uran Garcia has pled guilty to all eight offences as noted earlier.

[21] It is apparent from the agreed statement of facts that these offences took planning and were sophisticated. The crown describes Mr. Uran Garcia as a “seasoned” fraudster at our borders. I agree, here’s why;

- 1) Mr. Uran Garcia entered Canada in February 2017 using the name of ROSIALES (on a Mexican passport). Mr. Orozco was with him. In April 2017 Mr. Uran Garcia was charged with dangerous driving and break and

enter. He was convicted in June of 2017 and sentenced to 45 days in jail with probation. He was deported September 27, 2017.

- 2) Mr. Uran Garcia entered again in 2018 under the name of Martinez with a different Mexican passport. He entered and left Canada undetected.
- 3) He returned to Canada September 29, 2019 under the name Martinez and was caught by Canada Border Services Agency (CBSA).
- 4) There is a clear pattern of behavior and similar crimes, techniques and strategies.

[22] There is no pre-sentence report. All I know is based on what defence counsel tells the court. Why did the defendant commit these offences in 2019 (and 2017 and 2018)? There is no evidence he did it for monetary gain, terrorist activity or drug activity. Nor is there any evidence he did it to see his family or get his family into Canada.

[23] On the contrary, counsel says the defendant wants to return to Columbia to care for his ailing mother and protect her. Mr. Uran Garcia says he is not a bad man, however, I find this was a “dishonest, manipulative and a premeditated attack by the accused on the safety and security of the Canadian people.”

[24] Mr. Uran Garcia took advantage of Canada's generosity to immigrants. In 2016 this change in entry requirements made it easier for Mexican citizens to come to Canada. But the defendant took advantage of this change causing damages to the integrity of the Mexican passport system and to the Canadian border system and immigration process.

[25] In arriving at an appropriate sentence defence counsel asks me to consider the immigration consequence, ie: Mr. Uran Garcia will be deported.

[26] However, as the court stated in *R. v. Daskalov*, 2011 BCCA 169, at paragraph 25:

Therefore, while immigration consequences may be an appropriate consideration in crafting a fit sentence for an offender who has been lawfully admitted into Canada, they are not, in my view, a relevant consideration for an offender who is without legal status in the country and subject to a removal order. ...

[27] Later at paragraph 30:

...The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in Canada: Chiarelli v. Canada (Minister of Employment and Immigration), 1992 CanLII 87 (SCC), [1992] 1 S.C.R. 711, at p. 733. Thus the deportation of a non-citizen in itself cannot implicate the liberty and security interests protected by s. 7 of the Canadian Charter of Rights and Freedoms.

[28] Mr. Uran Garcia was deported from Canada on September 27, 2017 on the ground of “serious criminality committed in Canada”. It was obvious that did not deter him as he returned in 2018 and again in 2019. His offending in 2017 was not confined to attempts to enter the country. He served a jail sentence for dangerous driving and break and enter.

[29] This pattern shows a clear intention to ignore all rules and regulations under our Canadian laws. Specific deterrence is undeniably required and so is a sentence that takes general deterrence into consideration.

[30] A message must be sent to like minded people that we will not allow individuals to compromise our border and immigration system because it poses a real risk to public safety.

[31] Based on the above I impose the following disposition;

- 1) Count 1 *IRPA* 122(1)(a): 6 months consecutive
- 2) Count 2 *IRPA* 122(1)(b): 6 months concurrent
- 3) Count 3 *IRPA* 127(a): 6 months concurrent
- 4) Count 4 *IRPA* 122(1)(a): 12 months consecutive

5) Count 5 *IRPA* 122(1)(b): 12 months concurrent

6) Court 6 *IRPA* 124(1)(a): 12 months concurrent

7) Court 7 *IRPA* 127(a): 12 months concurrent

8) Count 8 *CC* 57(1)(b)(i): 6 months consecutive

[32] Total of 24 months less remand credit of 5 months (150 days at 1.5), total sentence going forward of 19 months. There will also be a DNA order on the section 57(1)(b)(i) *Criminal Code*. Victim fine surcharge is waived.

Jean M. Whalen, JPC.