

Federal Court



Cour fédérale

**Date: 20150205**

**Docket: IMM-5615-14**

**Citation: 2015 FC 152**

**Vancouver, British Columbia, February 5, 2015**

**PRESENT: The Honourable Mr. Justice S. Noël**

**BETWEEN:**

**EVER ADONAY LUCERO ECHEGOYEN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] This is an application for leave to commence an application for judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] of a decision of Lucinda Bruin of the Refugee Protection Division [RPD] dated July 7, 2014, which held that Ever Adonay Lucero Echeгойen's [the Applicant] application to reopen the refugee

claim is denied pursuant to rule 62 of the *Refuge Protection Division Rules* (SOR/2012-256) [RPD Rules].

## II. Facts

[2] The Applicant is a citizen of El Salvador. He arrived in Canada on March 4, 2009 and claimed refugee protection on the same day.

[3] The Applicant moved in September or October 2009 from Burnaby, British Columbia to an apartment in Surrey, British Columbia. The Canadian Border Service Agency [CBSA] knew of the Applicant's new address.

[4] On April 8, 2010, a Notice to Appear for a hearing on May 21, 2010 for the Applicant's refugee claim was sent by the RPD to the Applicant's former address in Burnaby. He therefore did not receive the Notice.

[5] The RPD knew of the Applicant's current address in Surrey by May 2010, as it was informed of the address in email exchanges with CBSA employees. A letter sent by the RPD to the Applicant to his current address, regarding a Notice to Appear for an abandonment hearing, was returned by Canada Post on May 12, 2010, because of an incomplete address. The Applicant therefore did not present himself to his hearing and his claim was declared abandoned on May 26, 2010. The Applicant also did not receive the Notice of Decision, again because the RPD failed to write a complete address on the mailing envelope.

[6] The Applicant learned of the RPD's decision on June 3, 2010, when he reported to the CBSA.

[7] The Applicant's counsel at the time, Mr. Costantino, wrote to the RPD on July 6, 2010 to inform them that he had been retained. He informed the RPD that he intended to make an application to reopen the Applicant's refugee claim. No reopening application was however received from Mr. Costantino.

[8] The Applicant was arrested on July 24, 2010, and detained for extradition until March 3, 2014. After March 3, 2014, the Applicant was detained by CBSA until May 5, 2014.

[9] The Applicant's current counsel, Mr. Huzel, made an application to reopen the May 26, 2010 decision declaring the refugee claim abandoned on June 5, 2014.

[10] The RPD dismissed the Applicant's application for the reopening of his refugee claim on July 9, 2014. This is the decision under review.

### III. Contested Decision

[11] The RPD states that it considered rule 62 of the RPD Rules and the *Chairperson's Guideline 6* in making its decision.

[12] The RPD explains that the Board secured an updated and accurate address for the Applicant from the CBSA about two weeks before the hearing date of May 21, 2010. The RPD

recognizes that due to a clerical error, the follow-up mailings intended for the Applicant were sent to an incomplete address. The Applicant did however become aware of this situation when he reported to the CBSA on June 3, 2010. On that same day, the Applicant retained a lawyer to file an application to have his refugee file reopened. This process was however terminated when the Applicant was unable to pay the balance owed and was arrested and detained on an extradition matter.

[13] The Applicant was refused Legal Services Society [LSS] coverage while the extradition matter was pending. The RPD writes that the Applicant did not ask for a lawyer to file a reopening application until May 2014 because he assumed LSS would not provide him with a lawyer because of the extradition proceedings. According to the RPD, the Applicant's actions do not address the question as to why he did not take any steps on his own to pursue a reopening application over the four years after his claim was abandoned.

[14] The RPD notes the delay in the timing of the reopening application and relies on *Tepordei v Canada (Minister of Citizenship and Immigration)*, 2013 FC 108, to dismiss the Applicant's application on delay alone. The Applicant's request for the reopening of his claim is thus denied.

#### IV. Parties' Submissions

[15] The Applicant submits that the version of section 55 of the RPD Rules that was in force from 2006 to 2012 differs from the current version of section 62 of the RPD Rules since it does not require consideration of delay in filing a reopening application. In response, the Respondent

explains that section 62 of the RPD rules states that a refugee claim can be reopened only when a decision was unfairly rendered or when there is a breach of the principles of natural justice.

[16] The Applicant also submits that there is an implied failure to observe a principle of natural justice because the RPD failed to inform the Applicant of the hearing date due to a clerical error of the Applicant's address. The Respondent replies by stating that the RPD did not just look at the delay but also the reasons for the delay in coming to its decision.

[17] The Applicant further argues that the RPD failed in not recognizing that an application to reopen his refugee claim includes an affidavit or a statutory declaration attaching the evidence to be relied upon. Since the Applicant had no money to afford legal representation, the Applicant would not have had money to have a lawyer or a notary public administer his affidavit or his statutory declaration while in detention. The Respondent replies by saying that there is no absolute right to counsel.

[18] Alternatively, the Applicant submits that while he was detained, it was impossible for him to obtain copies of the RPD files' contents and it would have been difficult to send the original Motion documents and serve a copy to the Minister. The Applicant further submits that the RPD's reliance on the *Chairperson's Guideline 6* has no relevance to an application to reopen a refugee file.

V. Applicant's Reply

[19] In his reply, the Applicant explains that even if the RPD did not expressly state that there was a breach to observe a principle of natural justice with regards to the RPD notices being mailed with an incomplete address on the mailing envelopes due to a clerical error, the RPD's acknowledgment that it obtained and updated the Applicant's accurate address two weeks before the hearing date but failed to inform the Applicant because of omitting the Applicant's unit number on the mailing envelope implies a breach of procedural fairness. Also, contrary to what the Respondent states in its memorandum of argument, it is clear from the RPD decision that the RPD denied the reopening of the Applicant's refugee file based on delay alone.

VI. Issue

[20] I have reviewed the parties' submissions and the issues presented and I state the issue as follows:

- Is the RPD decision to deny the Applicant's request for the reopening of his refugee claim reasonable?

VII. Standard of Review

[21] The issue presented above raises questions of mixed fact and law and is to be reviewed on a reasonableness standard (*Posada Arcila v Canada (Minister of Citizenship and Immigration)*, 2013 FC 210 at para 15 [Arcila]; *De Lourdes Diaz Ordaz Castillo v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1185 at para 3 [Castillo]; *Yin v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1270 at para 21 [Yin]). The Court shall

only intervene if it concludes that the decision is unreasonable, and falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9 at para 47).

### VIII. Analysis

[22] The Applicant’s first argument concerns the difference between section 55 of the RPD rules, which was in force from 2006 to 2012, and section 62 of the current version of the RPD rules, in force since 2012. The Applicant never argued before the RPD that section 55 was applicable to this case, but rather stated that section 62 of the RPD rules applied (AR, page 44, para 14 and page 47, para 23). There is thus no need to address this argument in the present judicial review.

[23] That being said, I agree with the Applicant that the RPD rendered an unreasonable decision when it refused to reopen the Applicant’s claim. The Applicant’s actions indicate that he maintained his intention of having his refugee file reopened. He provided evidence of three notifications to the RPD of a change in address. The Applicant further stated in his affidavit that he believes he informed the RPD of his new address in Surrey (AR pages 25-27). His credibility is not at issue. The Applicant never received the notice of abandonment hearing because it was sent to the wrong address due to a clerical error, which resulted in the Applicant having his refugee claim declared abandoned. Within two weeks of learning of the RPD decision declaring his refugee claim abandoned on June 3, 2010 when reporting to the CBSA, the Applicant retained counsel to file a reopening application. The Applicant was however arrested on July 24, 2010 and detained for extradition until March 3, 2014. After March 3, 2014, the Applicant was

detained by CBSA until May 5, 2014. The Applicant explains that due to his arrest, his detention for extradition until March 3, 2014, and not obtaining coverage from the LSS, he could not file and serve the motion to reopen his refugee application before June 27, 2014 (AR, pages 12-13 at paras 11 to 13). The Applicant thus acted to have his file reopened as soon as he was released.

[24] Therefore, this chain of events, combined with the Applicant's actions, demonstrate that he maintained his intention of having his refugee file reopened and he provided a reasonable explanation for the delay in submitting his application; events outside of his control prevented him from applying for the reopening of his refugee application sooner. It was argued, as the RPD wrote in its decision, that the Applicant could have filed his motion to reopen on his own and that the right to counsel, when dealing with the RPD, is not absolute. It was however unreasonable to put on him the burden to apply for a motion to reopen his refugee claim on his own, while he was subject to extradition proceedings. Indeed, he does not speak English, requires translation and has no knowledge of our immigration laws. In light of the present exceptional circumstances, to expect the Applicant to enquire with the RPD, while jailed, on how to proceed to have his refugee file reopened was unreasonable. The Applicant did seek LSS while in jail, but was refused because of the extradition proceedings. As soon as he was able to obtain such representation, he, through counsel, filed his motion to reopen. From June 3, 2010, to June 5, 2014, the Applicant showed a clear intent to file a motion to reopen. On his own, he could not actualize it. He needed some representation.

[25] Additionally, contrary to the facts in *Tepordei* upon which the RPD relies to reject the Applicant's reopening application based on delay alone, the Applicant first acted within two



weeks after learning of the abandonment proceeding of May 26, 2010 to have his file reopened and subsequently in June 2014, as soon as he received LSS coverage. In *Tepordei*, the Applicants only filed an application to have their refugee file reopened after being served with a Direction to Report for Removal, two years after the application for judicial review of their refugee decision was denied. The facts in *Tepordei* make this decision inapplicable to the Applicant's case. The intervention of this Court is warranted.

IX. Conclusion

[26] The RPD decision is unreasonable. No question of general importance was submitted therefore none will be certified.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review of the decision of Lucinda Bruin, dated July 7, 2014, is granted and the matter shall be sent back to a new panel before the RPD so that a new decision can be made;
2. There is no serious question of general importance to be certified.

“Simon Noël”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-5615-14

**STYLE OF CAUSE:** EVER ADONAY LUCERO ECHEGOYEN v THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** FEBRUARY 2, 2015

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**DATED:** FEBRUARY 5, 2015

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