

Federal Court



Cour fédérale

**Date: 20201208**

**Docket: IMM-5898-19**

**Citation: 2020 FC 1135**

**Ottawa, Ontario, December 8, 2020**

**PRESENT: Madam Justice Simpson**

**BETWEEN:**

**DINORA ESPERANZA GUZMAN DE PENA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Proceeding**

[1] This is an application for judicial review of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated September 4, 2019, in which the Panel refused the Applicant's refugee claim. The Panel rejected the claim on the basis that the Applicant was not credible, and that she was therefore not a Convention refugee under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA]. Due to the negative

credibility finding, the Panel did not consider whether she was a person in need of protection under section 97(1) of the IRPA.

## II. **Background**

### A. *The Applicant's Background*

[2] Dinora Esperanza Guzman De Pena is a 56-year-old citizen of El Salvador. Prior to coming to Canada, she owned and operated multiple small business ventures. Most recently, she owned a small variety store [the Store] in the city of Ozatlan. The Applicant is not currently married. She has two children: a son, aged 33, who has no children and lives in Canada as a Permanent Resident; and a daughter, aged 36, who has three children and lives in Texas.

[3] The rest of the Applicant's family, namely her elderly mother, two brothers, and three sisters, all live in Canada and hold Canadian citizenship.

### B. *Events leading to departure from El Salvador*

[4] The Applicant says her departure from El Salvador was prompted by a violent encounter at her Store. The details of this incident [the Incident] are summarized as follows in the

Decision:

On Tuesday, January 3, 2012, a man came to the store and called her by name. He said that he was a local leader of the Maras, and warned that nothing would happen to the claimant or her employee, who was present at the time, if they cooperated. He pushed the claimant while he drew a gun and pointed it at the employee, Dilma. The man demanded that the claimant give him all the money from the cash register, so she had to give him the \$1000 which included her store rent for the month. The man warned the claimant that if she kept her mouth shut and continued

cooperating then nothing would happen to her or her employee. He left saying there would be another visit.

[5] After this Incident, the Applicant she says she found gang graffiti painted on the entrance of the store. She was afraid and closed the Store. She opened the Store two months later as it was her only source of income. Her intention was to save money to relocate the business. However, she continued to be afraid because the owner of a nearby business was murdered for refusing to pay the Maras.

[6] On June 2, 2012, when the Applicant was closing her Store for the day, two armed members of the Maras appeared. They threatened her, and demanded money. After this, gang members came weekly to demand and collect money.

[7] The Applicant closed her Store permanently on November 24, 2012 and began to plan her departure from El Salvador.

C. *The Process of arriving in Canada*

[8] On March 24, 2013, the Applicant left El Salvador and arrived at her daughter's home in Texas on a six-month visitor's visa. She discovered that her daughter was experiencing domestic violence and depression. The Applicant extended her visit beyond her visa with the intention of providing support and protection for her daughter and her grandchildren. She ultimately stayed in Texas for three years.

[9] The Applicant wanted to visit her ailing mother in Canada. The hospital where her mother was in intensive care provided letters to support a visa application [the Letters].

[10] The Applicant went to the Port of Entry at Fort Erie on July 22, 2016, where she was interviewed by a CBSA Officer. She produced the Letters and told him that she was coming to visit her ill mother. However, she also claimed refugee status and stated that she planned to stay in Canada permanently. She was then released into Canada under the supervision of her son.

[11] On the same date, a report was made pursuant to section 44(1) of the IRPA. It indicated that there were grounds to believe the Applicant was inadmissible because she came to Canada with an intention to stay permanently, without proper documentation.

[12] A Departure Order was subsequently issued.

### III. **The Decision**

[13] The Panel refused the Applicant's refugee claim and found that she was not a Convention refugee under section 96 of the IRPA. The determinative issue was the credibility of the Applicant.

[14] The Panel found that the Applicant's fear of persecution was not linked to any of the five grounds identified in the definition of a Convention refugee. He noted that the Applicant's submission that she was persecuted for being an "entrepreneur" did not meet the definition of a social group.

[15] The Panel concluded that the Incident on January 3, 2012 had not occurred based on the inconsistencies he identified between the Applicant's evidence and that of her former employee and witness Dilma Flores.

#### IV. Discussion

[16] The inconsistencies were as follows:

Re: Last payment date for Dilma

Applicant: December 31, 2011

Dilma: January 16, 2012

Re: Last day of work for Dilma

Applicant: January 3, 2012

Dilma: January 3 or 1 week later

Re: Last time Applicant and Dilma saw one other

Applicant: January 3, 2012

Dilma: Sometime in the 3<sup>rd</sup> week of January

Re: Subsequent contact between Applicant and Dilma

Applicant: One contact in 2014 when Dilma contacted the Applicant's daughter on Facebook

Dilma: No contact in 2018. The Applicant's daughter contacted Dilma on Facebook in that year but Dilma and the Applicant did not communicate

Re: Store openings and closings

Applicant: The Applicant said she closed her Store for approximately two months after January 3, 2012. She then opened it until its permanent closure in November 2012

Dilma: Dilma had no first-hand knowledge of the Store's openings and closings. The dates she understood from second hand sources were different from those given by the Applicant but they were unreliable. Accordingly, there was no inconsistent evidence on this topic.

[17] In my view, these inconsistencies were minor and did not provide a reasonable basis for concluding that the Incident did not occur. Further, these inconsistencies were relied on to

support a finding that the Applicant submitted a fraudulent document in the form of Dilma's letter. This was also unreasonable.

[18] The Panel was persuaded that the Applicant was not credible because:

- At the POE, she showed interest in a visitor visa and made a refugee claim;
- Her evidence-in-chief lacked spontaneity;
- Her evidence that her daughter needed her protection was belied by the fact that her daughter obtained a protective order against her abusive husband;
- She gasped during Dilma's evidence and the Panel concluded she was trying to influence Dilma's testimony.

[19] In my view, the Panel failed to take a balanced approach when addressing these concerns. For example, he did not refer to the numerous points in the transcript where the Applicant said that her consistent plan was to seek refugee status in Canada.

[20] Further, it is not reasonable to rely on a lack of spontaneity when evidence is being interpreted from Spanish to English.

[21] As well, the daughter's problems involved her mental health as well as concerns about an attack by her husband. The Panel unreasonably failed to appreciate the breadth of the daughter's problems.

[22] Lastly, the Applicant's gasp was undoubtedly a reaction to the evidence Dilma gave which was inconsistent with her own. However, given the minor inconsistencies, this reaction does not suggest that the refugee claim was fabricated.

[23] In my view, even cumulatively, these concerns were not sufficient to justify a negative credibility finding.

[24] However, delay and nexus were also issues. The Applicant failed, during a 2½ year period, to claim refugee status in the United States. Her evidence was that she didn't know how to make a US claim and that US news reported that refugee claims from El Salvador were not successful. However, the Applicant is well-travelled and her family members have experience in securing the advice needed to make refugee claims. I have concluded that the Panel reasonably found that the Applicant's failure to claim in the US for 2½ years when she was subject to deportation meant that she did not have the necessary subjective fear.

[25] As noted above, the Panel also concluded that the Applicant's claim as a member of the entrepreneur social group lacked a nexus to the grounds for which refugee status can be claimed under the UN Convention. This was a reasonable conclusion.

## V. Conclusion

[26] The Panel's adverse findings about the Applicant's credibility were unreasonable but his denial of her refugee claim, based on lack of nexus and lack of subjective fear, was reasonable. However, given that the Panel's negative credibility findings were unreasonable, her claim should have been assessed under section 97 of the IRPA. An Order will therefore be made sending the matter back for that purpose.

VI. **Certification**

[27] No question was posed for certification for appeal.



**JUDGMENT IN IMM-5898-19**

**THIS COURT'S JUDGMENT is that** this application for judicial review is allowed and the matter is to be re-determined by a different Panel of the RPD who is to consider whether the Applicant has a claim under section 97 of the IRPA.

"Sandra J. Simpson"

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Judge

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

**DOCKET:** IMM-5898-19

**STYLE OF CAUSE:** DINORA ESPERANZA GUZMAN DE PENA v THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HELD BY VIDEO CONFERENCE BETWEEN  
MISSISSAUGA, ONTARIO AND TORONTO,  
ONTARIO

**DATE OF HEARING:** NOVEMBER 24, 2020

**JUDGMENT AND REASONS:** SIMPSON J.

**DATED:** DECEMBER 8, 2020

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