

Federal Court



Cour fédérale

**Date: 20111122**

**Docket: IMM-1600-11**

**Citation: 2011 FC 1343**

**[UNREVISED ENGLISH CERTIFIED TRANSLATION]**

**Ottawa, Ontario, November 22, 2011**

**PRESENT: The Honourable Mr. Justice Martineau**

**BETWEEN:**

**FATIMA ELIZABETH RIVAS PONCE**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] The applicant is a citizen of El Salvador. She is challenging the lawfulness of the decision of the Refugee Protection Division of the Immigration and Refugee Board (panel) to reject her refugee protection claim, despite the sympathy the panel felt towards the applicant, who was born in 1987 and who, for many years, was the victim of spousal abuse at the hands of her former spouse, who is also from El Salvador.

[2] While the panel accepted the applicant's allegations of spousal abuse as well as her explanations for the delay in claiming refugee protection, it nevertheless was of the opinion that the applicant's former spouse has no reason to return to El Salvador to harm her, given that his family lives in Canada and he has built a new life with another woman. The only reason why he might return to El Salvador is to take his son, which is precisely what the applicant fears. However, according to the panel, there is "little chance" that the applicant would leave Canada with her son "[g]iven that the child's custody has not been stipulated in the divorce documents and that her son has Canadian citizenship".

[3] The applicant submits that the panel's decision is unreasonable because it is pure speculation based on an erroneous finding of fact made in a perverse or capricious manner concerning the issue of the child's custody. The respondent contends that the panel's finding is reasonable because the divorce decree does not specify the custody arrangements or access rights and the arrangements for parents travelling with the child, and because under article 605 of the *Civil Code of Québec*, SQ 1991, c 64, as long as the non-custodial parent has not been deprived of parental authority, he or she retains the right to supervise the maintenance and education of the child (see *C(G) v VF(T)*, [1987] 2 SCR 244 and *LP v X*, 2009 QCCA 623).

[4] The Court finds that the panel acted arbitrarily by speculating that it is unlikely that the child's father would go to El Salvador to get him because he now has a girlfriend in Canada. The panel also unreasonably tried to justify its refusal by the hypothetical fact that there would be "little chance" that the applicant could leave Canada with her son. The panel speculated that, because the child is allegedly a Canadian citizen (he is not yet one according to the evidence), the child's father

will be able to prevent his mother from taking him with her to El Salvador if she is deported by the Canadian authorities. On the contrary, the divorce decree did award custody of the minor child to the applicant and it is dangerous at this stage to claim that she will not be able to take him to El Salvador.

[5] In passing, while we take no position on any specific rights of the father here, it should be noted that the case law (see in particular the leading decision *Gordon v. Goertz*, [1996] 2 SCR 27) clearly states that, in both common law and civil law, the power to choose where the child will live, which is part of the notion of custody, belongs to the custodial parent, subject to the right of the non-custodial parent to go before the competent court to oppose the custodial parent's choice and seek a variation order of the custody or access arrangements after the child is moved.

[6] Given the almost total lack of serious analysis of the alleged risk, the panel's finding is not a possible, acceptable outcome, having regard to all of the evidence in the record. This application for judicial review must therefore be allowed and the matter returned to a differently constituted panel for redetermination. No question of general importance arises in this case.

**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES that:**

1. This application for judicial review is allowed;
2. The panel's decision dated February 16, 2011, is set aside. The matter is returned to the Immigration and Refugee Bureau for redetermination of the applicant's refugee protection claim and for a new hearing to be held before another member of the Refugee Protection Division;
3. No question is certified.

“Luc Martineau”

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Judge

Certified true translation  
Susan Deichert, LLB

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

**DOCKET:** IMM-1600-11

**STYLE OF CAUSE:** **FATIMA ELIZABETH RIVAS PONCE v.  
THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** November 15, 2011

**REASONS FOR JUDGMENT:** MARTINEAU J.

**DATED:** November 22, 2011

**APPEARANCES:**

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