

Federal Court



Cour fédérale

**Date: 20120126**

**Docket: IMM-2325-11**

**Citation: 2012 FC 104**

**[UNREVISED CERTIFIED ENGLISH TRANSLATION]**

**Ottawa, Ontario, on January 26, 2012**

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

**BETWEEN:**

**FRANCISCO JAVIER AGUILAR MONCADA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Introduction**

[1] Francisco Javier Aguilar Moncada (Applicant) filed this application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), challenging the decision by the Refugee Protection Division of the Immigration and Refugee Board

(IRB) rendered on March 24, 2011, that they were not Convention refugees or persons in need of protection within the meaning of sections 96 and 97 of the IRPA.

[2] For the following reasons, this application for judicial review is dismissed.

## **II. Facts**

[3] The applicant is a Mexican citizen.

[4] He left his family home at a very young age because he was being mistreated by the members of his family. At the age of 17, the applicant immigrated illegally to the United States where he stayed until his removal in May 2007.

[5] When he returned to Mexico, he went to the family residence. However, his sisters and their spouses greeted him in a very bad manner, fearing that he would claim his part of the inheritance left by his deceased parents.

[6] The applicant alleges that his brothers-in-law assaulted him physically. After the assault, the applicant took refuge at the home of one of his childhood friends who allegedly shot at him with a firearm in 1993.

[7] Fearing for his safety, he left Mexico on October 3, 2007. He arrived in Montréal the same day and filed his refugee claim with representatives of the Department of Employment and Immigration at the Pierre-Elliott-Trudeau airport.

[8] The applicant states that he fears persecution in his country because he belongs to a particular social group.

[9] Considering himself to be a person in need of protection, he also claims protection from Canada, first, because of threats against his life and a risk of cruel and unusual treatment or punishment and, second, because of a risk of torture.

[10] In its decision, the IRB indicated that the applicant's lack of credibility is due to new facts added that were not included in his Personal Information Form (PIF) and the implausibility and inconsistency of his story, which is fraught with contradictions. For all these reasons, the IRB found that the Applicant was not a Convention refugee or a person in need of protection pursuant to sections 96 and 97 of the IRPA.

### **III. The legislation**

[11] Sections 96 and 97 of the IRPA read as follows:

Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race,

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du

religion, nationality, membership in a particular social group or political opinion,

fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

#### Person in need of protection

#### Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable

(i) elle ne peut ou, de ce

or, because of that risk, unwilling to avail themselves of the protection of that country,

fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

**IV. Issue and standard of review**

**A. The Issue**

[12] This case raises the following issue:

- *Did the IRB err in finding that the applicant was not credible?*

**B. Standard of review**

[13] Issues of credibility are reviewable on the standard of reasonableness (see *Mejia v Canada (Minister of Citizenship and Immigration)*, 2009 FC 354, [2009] FCJ No 438, at paras 24 and 26; see also *Zarza v Canada (Minister of Citizenship and Immigration)*, 2011 FC 139, [2011] FCJ No 196, at para 16).

**V. Positions of the parties**

**A. Position of the applicant**

[14] The applicant maintained that the panel's finding that he is not credible is unreasonable because he has problems testifying. The panel did not give full weight to his answer for question 31 in his PIF. He wrote the following:

[TRANSLATION]

“My name is Francisco Javier Aguilar Moncada, I was born in San Luis Potosi, Mexico, on September 14, 1978. I would like to point out that I do not know how to read or write. My friend who lives in the same apartment as I do (Martin Bernal) helped me write my story, which is that I was forced to leave my country after being deported from the United States. I also have to say that I have a lot of trouble remembering specific dates and locations where I have lived

in the past 10 years. [My] ex-wife, who currently lives in the United States with my son, helped me provide some of the information that I included in my form”.

[15] He also alleged that the IRB did not take into consideration his difficulties in remembering important dates in his story. For example, he referred to paragraph 12 of the panel’s decision:

[12] This explanation is not credible. As the claimant himself demonstrated at the hearing by pointing to the part of his body where he had been shot, this has nothing to do with having gone to school or not. This is, in fact, a key element, and its omission undermines the claimant’s credibility.

[16] Furthermore, he pointed out that the IRB recognized his difficulties because it wrote in paragraph 7 of its decision:

[7] The claimant’s testimony was arduous. The panel understands that the claimant has a relatively low level of education, as he stated in his response to question 6 on his Personal Information Form (PIF). He attended school for only four years.

[17] The applicant reiterated that his subjective fear is a result of the conduct of the members of his family, specifically his brothers-in-law. The panel was looking for precise answers and concrete evidence. The applicant alleged in his memorandum that the panel’s questions led him to confuse certain events. The IRB addressed this topic in paragraph 24 of its decision:

[24] The panel decided to ask this question once again, because the claimant’s confusing answers did not give the panel an understanding of the reasons he had given for not wanting to return to his country.

[18] The applicant claimed that the IRB failed to consider his level of education and, thus, his ability to provide consistent testimony.

[19] He pointed out several errors of law in the decision. The panel allegedly based its decision on an erroneous finding of fact that was made in a perverse or capricious manner, or according to him, that disregards evidence that was before it. These errors require the intervention of the Court.

**B. Position of the respondent**

[20] The respondent pointed out first that the IRB noted that the applicant's testimony was arduous. His answers were confusing. In addition, he omitted essential elements of his story for the purpose of justifying his refugee claim. Therefore, the panel came to the only possible conclusion that the applicant was not credible.

[21] The respondent stated that the applicant did not directly dispute the numerous findings by the IRB on credibility, but rather argued that it did not consider his level of education in assessing his credibility. The applicant pointed out paragraphs 7, 11 and 12 of the IRB decision in response to this claim by the applicant.

[7] The claimant's testimony was arduous. The panel understands that the claimant has a relatively low level of education, as he stated in his response to question 6 on his Personal Information Form (PIF). He attended school for only four years.

[11] This aspect is not included in his narrative in response to question 31. This is therefore an omission that pertains to a determinative point. The claimant stated that he had not written it down, but that he had evidence, and that if he had not written it down, it was because he had not gone to school and does not understand all the aspects of his claim..

[12] This explanation is not credible. As the claimant himself demonstrated at the hearing by pointing to the part of his body where he had been shot, this has nothing to do with having gone to school



or not. This is, in fact, a key element, and its omission undermines the claimant's credibility.

[22] Therefore, the respondent stated that this criticism has no merit.

[23] The respondent pointed out in its memorandum that the assessment of an applicant's credibility is especially within the panel's expertise (see *Hassan v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1324). A finding on an applicant's credibility must be reviewed with deference and the intervention of this Court is limited to cases where palpable errors are found (see *Bergeron v Canada (Minister of Citizenship and Immigration)*, 2008 FC 456, at para 12) :

[12] Since the Court has not heard the evidence, it does not have the panel's advantage of assessing the credibility of the applicant and Mr. Mansouri. That is why, based on the Supreme Court of Canada decision in *Dunsmuir, supra*, the Court owes great deference to a decision of an administrative tribunal protected by a privative clause and dealing with a question of pure fact, as in this case. This is especially true when the tribunal is acting in "a discrete and special administrative regime in which [as] the decision maker [it] has special expertise" (*Dunsmuir*, at paragraph 55).

[24] The applicant was attempting to show that his illiteracy prevents him from providing testimony without contradictions. In response, the respondent submitted that the applicant's illiteracy does not explain the problems noted by the panel and does not preclude a finding of lack of credibility. In *Rivera v Canada (Minister of Citizenship and Immigration)*, 2007 FC 862, at para 13, the Court explains:

[13] ... While the Board must be alive and sensitive to the reasons why victims of persecution may have problems in testifying, that responsibility does not oblige the Board to abandon reasonable incredulity at the door ...

[25] In light of the foregoing, the respondent asks that this application for judicial review be dismissed.

## VI. Analysis

- *Did the IRB err in finding that the applicant was not credible?*

[26] The Court notes that the IRB did not err in finding that the applicant was not credible.

[27] The Court wishes to point out that "... credibility is central to most, if not all, of the findings that the Board makes when assessing asylum claims" (see *Umubyeyi v Canada (Minister of Citizenship and Immigration)*, 2011 FC 69, [2011] FCJ No 76 at para 11). The IRB may make a negative finding concerning the applicant's credibility if it identifies contradictions between the applicant's testimony and supporting evidence submitted with its application (see *Aguebor v Canada (Minister of Citizenship and Immigration)*, [1993] FCJ No 732 (*Aguebor*)).

[28] Moreover, the case law of this Court has clearly established that "The Court should not interfere with the findings of fact and the conclusions drawn by the Board unless the Court is satisfied that the Board based its conclusion on irrelevant considerations or that it ignored evidence" (see *Kengkarasa v Canada (Minister of Citizenship and Immigration)*, 2007 FC 714, [2007] FCJ No 970 at para 7; see also *Miranda v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 437). Our case law also requires that it is up to the IRB to assess the evidence and the

testimony and to attach probative value to them (see *Aguebor*; and *Romhaine v Canada (Minister of Citizenship and Immigration)*, 2011 FC 534, [2011] FCJ No 693 at para 21).

[29] In this case, the Court first notes that the IRB takes into account the applicant's personal circumstances, namely his illiteracy. Furthermore, the IRB writes, at paragraph 8 of its decision, that the applicant's testimony "...was also confusing at many points and contained numerous omissions in relation to key elements of his claim for refugee protection."

[30] Moreover, the Court would like to point out that counsel for the applicant is in the best position to bring problems of vulnerability to the attention of the panel during the hearing (see *Gilles v Canada (Minister of Citizenship and Immigration)*, 2011 FC 7, at para 17). As the respondent states, counsel for the applicant did not intervene in this matter at the hearing.

[31] Following a close reading of the transcript, we acknowledge that the IRB was particularly sensitive to the applicant's deficiencies. It tried its best to gather as much information as possible. The questions it asked the applicant were justified.

[32] The IRB's observation that there is a major contradiction in the applicant's testimony has merit, since he alleged that the Zetas attack the wealthiest but added that he is a person without financial means.

[33] The IRB's finding on the applicant's lack of credibility is completely reasonable. A lack of credibility can affect the other elements of a refugee claim and allow the IRB to find that there was

no subjective fear of persecution (see *Acevedo v Canada (Minister of Citizenship and Immigration)*, 2006 FC 480, at para 75. As to his fear of the Zetas, the IRB panel pointed out: “the claimant stated that ... they had never done anything to him, but he explained that as soon as a person has money, they are targeted by these people” (see the IRB decision at para 25).

## **VI. Conclusion**

[34] The Court dismisses the applicant’s application for judicial review because the IRB’s decision that the applicant is not credible and that he does not have a subjective fear of persecution in Mexico is reasonable. Accordingly, this application for judicial review must be dismissed.

### **JUDGMENT**

#### **THE COURT ORDERS AND ADJUDGES that**

1. The application for judicial review is dismissed.
2. There is no question of general interest to certify.

“André F.J. Scott”

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Judge

Certified true translation  
Catherine Jones, Translator

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

**DOCKET:** IMM-2325-11

**STYLE OF CAUSE:** FRANCISCO JAVIER AGUILAR MONCADA  
v  
THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** December 1, 2011

**REASONS FOR JUDGMENT  
AND JUDGMENT:** SCOTT J.

**DATED:** January 26, 2012

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