

Federal Court



Cour fédérale

**Date: 20120620**

**Docket: IMM-8876-11**

**Citation: 2012 FC 785**

**[UNREVISED ENGLISH CERTIFIED TRANSLATION]**

**Montréal, Quebec, June 20, 2012**

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

**BETWEEN:**

**J JESUS HERNANDEZ GUTIERREZ**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Introduction**

[1] The burden of demonstrating the non-viability of an internal flight alternative (IFA) is on the applicant. In this case, it has not been demonstrated that the evidence not referred to by the Refugee Protection Division (RPD) was relevant to the viability of the proposed IFAs.

## II. Judicial procedure

[2] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), of a decision by the RPD dated November 10, 2011, determining that the applicant is not a Convention refugee within the meaning of section 96 of the IRPA or a person in need of protection under section 97 of the IRPA.

## III. Facts

[3] J Jesus Hernandez Gutierrez is a Mexican citizen.

[4] The applicant alleges that he was persecuted in Querétaro, in the State of Querétaro, by Jose Luis Alvarado Tapia, an entrepreneur by whom he was employed as a taxi driver for two years.

[5] In November 2008, the applicant purportedly signed a contract to purchase a taxi with Jose Luis Alvarado Tapia, the terms of which provided for a six-month warranty for the vehicle. Under the terms of this purchase contract, the applicant was to comply with a payment schedule.

[6] In March 2009, after having mechanical problems with the vehicle, the applicant met with Jose Luis Alvarado Tapia to avail himself of the warranty. A quarrel between the two men ensued.

[7] On March 16, 2009, the applicant retained the services of a lawyer and commenced legal proceedings against Jose Luis Alvarado Tapia. The applicant claims that the authorities refused to take any action due to Jose Luis Alvarado Tapia's influence.

[8] On March 19, 2009, the applicant alleges that he was physically assaulted at his home by Jose Luis Alvarado Tapia and the latter's bodyguards, who demanded the balance of payment or they would kill him. The applicant was apparently hospitalized.

[9] The applicant took refuge at his mother's in Salamanca, an hour away from Querétaro, where he claims to have been tracked down by Jose Luis Alvarado Tapia. In fact, he purports to have seen a vehicle driving slowly by the house on March 30, 2009.

[10] On May 3, 2009, the applicant took refuge at his in-laws' home in Caderyta, in the State of Querétaro.

[11] On May 14, 2009, the applicant flew to Canada, without his wife and child, where he claimed refugee protection.

#### IV. Decision under review

[12] The RPD determined that the applicant had an IFA in cities that were further afield, such as Monterrey, Oaxaca or Veracruz.

[13] The RPD came to this conclusion because it felt that his persecutor had no motivation to track him down. It noted that the occupants of the vehicle that had driven by his mother's house had not seen him.

[14] Relying on the documentary evidence, the RPD was of the view that it was unlikely that the persecutor would be able to locate the applicant using his personal information because Mexico has taken measures to combat corruption.

[15] The RPD further noted that the applicant's wife and child had remained in Mexico, with his in-laws, and had not been harassed by the persecutor.

#### V. Issue

[16] Did the RPD err in finding that there was a viable IFA?

#### VI. Relevant statutory provisions

[17] The following provisions of the IRPA are relevant in this case:

##### **Convention refugee**

**96.** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(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

(b) not having a country of nationality, is outside the country of their former habitual residence and is

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

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) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle,

unable or, by reason of that fear, unwilling to return to that country.

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

(i) elle ne peut ou, de ce 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,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes

and 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**

**Persone 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

**VII. Parties' positions**

[18] The applicant contends that the RPD did not take into account the documentary evidence that was before it and the fact that the agent of persecution was his employer. Thus, the latter had access to all of his personal information, which would allow him to locate the applicant anywhere in Mexico. The applicant would therefore have been forced to live in hiding. The applicant argues that the RPD ought to have discussed the evidence that was contrary to its findings.

[19] The respondent maintains that the RPD reasonably found that there was an IFA given that it did not think that the applicant would have been located. The respondent also submits that the RPD took into consideration all of the evidence to which it was not required to refer. Furthermore, the respondent argues that the evidence that was not cited does not challenge the IFA or the persecutor's motivation to locate the applicant.

VIII. Analysis

[20] In this case, the applicable standard of review is that of reasonableness. A significant degree of deference is owed to the RPD's assessment of the evidence (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708); *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 703).

[21] The Court, in *Kumar v Canada (Minister of Citizenship and Immigration)*, 2004 FC 601, summed up the applicable test for the finding of an IFA as follows:

[20] In order for the Board to find that a viable and safe IFA exists for the applicant, the following two-pronged test, as established and applied in *Rasaratnam v. Canada (Minister of Employment and Immigration)*, [1992] 1 F.C. 706 (C.A.), and *Thirunavukkarasu, supra*, must be applied:

(1) the Board must be satisfied, on a balance of probabilities, that there is no serious possibility of the claimant being persecuted in the proposed IFA; and

(2) conditions in the proposed IFA must be such that it would not be unreasonable, upon consideration of all the circumstances, including consideration of a claimant's personal circumstances, for the claimant to seek refuge there. [Emphasis added.]

[22] The RPD applied the aforementioned test taking into account the circumstances of the case, including the fact that the persecutor, Jose Luis Alvarado Tapia, the applicant's employer, had access to his personal information (RPD's decision at paragraph 25).

[23] First of all, with regard to the applicant's fear of being located, which relates to the first prong of the test, the RPD referred to the documentary evidence, specifically, Tab 2.4 of the National Documentation Package from April 20, 2011, entitled: "Mexico: Situation of Witnesses to

Crime and Corruption, Women Victims of Violence and Victims of Discrimination Based on Sexual Orientation” dated February 2007. This document states the following:

### *3.3 Traceability of individuals fleeing violent situations*

Of all the interlocutors interviewed, none was aware of incidents in which witnesses to crime and corruption were located by their aggressors through the use of government databases or registries (CDHFFV 28 Nov. 2006; PGR 21 Nov. 2006; *ibid.* 22 Nov. 2006a; *ibid.* 24 Nov. 2006). In particular, SIEDO's Rosas Garcia, the AFI's Gonzalez Dominguez and the SDHAVSC's Garduno were unaware of any cases in which national registries, such as the Federal Electoral Institute (Instituto Federal Electoral, IFE) database, had been used to track individuals who had relocated to avoid detection by criminal groups (*ibid.* 21 Nov. 2006; *ibid.* 22 Nov. 2006a; *ibid.* 24 Nov. 2006). According to the SFP's Diaz Garcia, although much work has been done to improve the level of content within national registries such as the IFE, a comprehensive personal identification database is still lacking in Mexico (21 Nov. 2006). The two most important national registries are the IFE database, which contains, among other things, the addresses of individuals, and the Population Registry's Single Code (Clave Unica de Registro de Poblacion, CURP) database, which features individuals' dates of birth (SFP 21 Nov. 2006).

Public access to national registries, including the IFE database, is prohibited by law (PGR 21 Nov. 2006; *ibid.* 22 Nov. 2006a). Furthermore, federal police officers can only gain access to the IFE database with a court order and the written permission of the public prosecutor's office (*ibid.* 21 Nov. 2006). In the case of the government's passport database, federal law enforcement agencies such as the AFI can gain access to it, although they must first submit a request in writing to the corresponding public prosecutor's office (*ibid.* 22 Nov. 2006a).

According to SIEDO's Rosas Garcia, it is much easier to locate individuals by seeking information from family members or friends than through government registries (PGR 24 Nov. 2006). In addition, Rosas Garcia and the CDHFFV's Castillo Garcia both noted that the publicly accessible national housing registry may provide another means of tracking individuals, although neither was aware of cases in which the registry had been used in this way (*ibid.*; CDHFFV 28 Nov. 2006). Rosas Garcia noted that it would only be a feasible method if the targeted individual had registered a property in it (PGR 24 Nov. 2006). [Emphasis added.]

[24] The documentary evidence therefore supports the RPD's reasoning that the applicant would not be located in Mexico by means of his personal information. The RPD did not expect the applicant to live in hiding in the proposed IFAs.



[25] The applicant further submits that the RPD overlooked some of the evidence. The reasoning set out in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 applies to the present case:

[15] The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to its finding, and pointed to a different conclusion from that reached by the agency. Just as a court will only defer to an agency's interpretation of its constituent statute if it provides reasons for its conclusion, so a court will be reluctant to defer to an agency's factual determinations in the absence of express findings, and an analysis of the evidence that shows how the agency reached its result. [Emphasis added.]

[26] The Court notes that the following evidence was not mentioned by the RPD:

- (a) Lawyer's letter attesting to the efforts undertaken to file a complaint against Jose Luis Alvarado Tapia;
- (b) Medical evidence attesting to the applicant's injuries;
- (c) Testimonial letters from the applicant's family and from a third party witness of the assault;
- (d) Sales contract and other evidence linking Jose Luis Alvarado Tapia to the applicant.

[27] In order for his application for judicial review to succeed, the applicant must not only point out the adduced evidence that was not referred to by the panel, this evidence must be relevant to the findings, which is not the case here. In fact, a careful review of this evidence shows that it is not contrary to the RPD's findings regarding the viability of an IFA. At most, the evidence corroborates those parts of the applicant's narrative that the RPD had not called into question. In fact, it had not doubted the existence of the persecutor or the assault of the applicant.

[28] Moreover, upon reading the decision and the transcript of the hearing, this Court is satisfied that the RPD did not unduly discount the testimonial evidence. The RPD did, among other things, take into consideration the applicant's attempts to hide from his persecutor in Mexico before he came to Canada. The applicant has not shown that the RPD made findings without regard to the evidence in the record that would affect the viability of the proposed IFAs.

[29] Lastly, the second prong of the IFA test applied by the RPD was reasonable. Moreover, the RPD did not err by finding that it would not be unreasonable for the applicant to seek refuge in one of the proposed cities.

[30] Consequently, the finding of an IFA was reasonable.

#### IX. Conclusion

[31] For the reasons set out above, the Court's intervention is not warranted. The applicant's application for judicial review is dismissed.

**JUDGMENT**

**THE COURT ORDERS** that the applicant's application for judicial review be dismissed.

There is no question of general importance to certify.

"Michel M.J. Shore"

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Judge

Certified true translation  
Sebastian Desbarats, Translator

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-8876-11

**STYLE OF CAUSE:** J JESUS HERNANDEZ GUTIERREZ v  
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