Federal Court Cour fédérale

**Date: 20121221**

**Docket: IMM-4499-12**

**Citation: 2012 FC 1540**

[UNREVISED ENGLISH CERTIFIED TRANSLATION]
**Montréal, Quebec, December 21, 2012**

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

**BETWEEN:**

**EDGARD EDUARDO ALVARENGA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision by the Refugee Protection Division (the RPD) of the Immigration and Refugee Board dated April 25, 2012, pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the IRPA]. The RPD determined that the applicant is neither a Convention refugee under section 96 of the IRPA nor a person in need of protection under section 97 of the IRPA.

I. Facts

[2] The applicant is a citizen of El Salvador. He owned a television repair shop, and his ex-partner, Nilda Nuryst, had a beauty salon. He is the father of two children, who live in Spain with his ex-wife.

[3] In May 2009, a member of the Maras came to his home to demand that he pay $200 a month as of June. The applicant allegedly paid this sum in June, July and August. He was informed that the amount would be increased to $400 as of September 2009. Since he was threatened by telephone, he disconnected his telephone and decided not to pay the requested amount. He also closed his shop and continued to live at his home for two months, before leaving the country.

[4] In October 2009, his partner, who had a visa for the United States, left El Salvador. The applicant arrived in Texas by land on January 19, 2010. He made his way to Virginia, to his partner's family, where he stayed for a month.

[5] The applicant then left for Canada, where he has family. He arrived in Lacolle on February 21, 2012, and claimed refugee protection on the day of his arrival. The immigration officer at Lacolle denied his partner entry.

[6] On April 16, 2012, four days before the hearing, the RPD issued a decision in which it refused to hear the testimony of the applicant's mother, arguing that more probative evidence

had to be presented to confirm the status of the applicant's children in Spain, such as report cards, official Spanish documents or identity cards.

II. Decision under review

[7] The RPD found that the applicant is neither a Convention refugee nor a person in need of protection under section 97 of the IRPA. The RPD's decision is mainly based on the applicant's lack of credibility.

[8] First, the RPD found that the applicant had been the victim of a crime and that, as such, he could not demonstrate that he was the member of a group that is subject to persecution. Therefore the applicant cannot establish a claim for refugee protection.

[9] Second, the RPD found that the applicant had not established to its satisfaction the factors on which his claim to be recognized as a person in need of protection is based. He did not submit any evidence to establish that he owned a business yet produced evidence to establish the existence of his partner's beauty salon.

[10] Furthermore, the fact that the applicant stopped paying the Maras yet did not suffer retaliation at his home shows that he is not a person of interest to this group. The applicant alleges that the Maras told him that they knew that he had family in Canada who could pay the money being demanded. However, they did not come to his home even though they knew where he lived.

[11] Lastly, the applicant was questioned about his partner's efforts to obtain refugee status. The RPD found that the applicant lacked credibility given that he first claimed not to know whether she had made any such efforts. Second, he claimed that he had not been in touch with his ex-partner since April 2010 and that she was with someone else.

[12] Regarding the applicant's fear of returning to El Salvador, the RPD found that the applicant did not establish that he would be at risk. In fact, given that he failed to prove to the panel's satisfaction that he had been threatened by the Maras before leaving El Salvador, it cannot be established that a return would put him at risk especially as the applicant no longer owns the television repair shop. Moreover, being single and childless, he would be able to move to the capital of El Salvador.

[13] Lastly, the RPD was of the opinion that if the Maras were truly interested in the applicant, which was not clearly established, he would have left El Salvador before November 2009.

## III. Applicant's position

[14] The applicant submits that the panel's refusal to allow the testimony of his mother, Daysi Alvarenga, about his ex-wife's leaving for Spain with their children is incorrect. According to the applicant, this testimony was to establish a fact relevant to the claim, namely that his children are in Spain without legal status and could be returned to El Salvador.

[15] Moreover, the reason provided by the RPD to justify its decision not to hear the testimony, namely that it was not [TRANSLATION] "credible, corroborating evidence" is erroneous since the RPD cannot rule on the credibility of a testimony without hearing it. The applicant had expressed his disagreement with the RPD's decision not to hear his mother's testimony. Consequently, given that this evidence was not examined by the RPD, the RPD erred in its decision.

[16] Second, the applicant submits that the RPD erred because it focused on the examination of the applicant in regard to his ex-wife and children, and his ex-partner, factors that are of no relevance to his claim for refugee protection.

[17] Third, the applicant submits that the panel erred in its assessment of the credibility of his relationship with his partner. In fact, the applicant is of the opinion that the panel did not have full knowledge of his file, including his Personal Information Form (PIF), which was amended to add the fact that the applicant is no longer in a common-law relationship with his ex-partner, and that this is a reviewable error.

[18] Fourth, the applicant submits that the RPD erred in its decision by stating that it had examined the applicant about the possibility of his going to live in the capital, San Salvador, while the applicant was actually questioned about the possibility of his going to live in La Paz, where his ex-mother-in-law lives.

[19] Fifth, the applicant is of the opinion that the RPD erred in finding that the applicant had not provided any evidence as to the existence of his business. In fact, given that his partner's beauty salon was at the same place as his repair shop and his partner had also been threatened, it was unreasonable for the RPD to find that no evidence had been provided to establish the basis of his claim for refugee protection.

[20] Sixth, the RPD erroneously found that the fact that the Maras did not return to his home to threaten him disregarded the fact that he had sold all of his property before leaving quietly and that he had organized his partner's departure in order to protect her.

## IV. Respondent's position

[21] The respondent submits that the RPD's decision is reasonable since the applicant failed to establish that he should be recognized as a Convention refugee or a person in need of protection.

[22] The RPD's finding regarding the applicant's lack of credibility is reasonable, and the RPD correctly found that the applicant would not be at risk if he returned to El Salvador.

[23] Regarding the applicant's allegation that the RPD erred in not allowing him to produce his mother's testimony, it is the respondent's view that the applicant is precluded from submitting such an argument given that this should have been raised before the RPD and the applicant failed to do so when he had the opportunity. Moreover, the testimony of the applicant's mother would have dealt with facts that are irrelevant to the present matter.

[24] Regarding this allegation, the respondent also submits that the member hearing the claim based his decision not to hear the testimony of the applicant on the fact that there was more objective evidence to establish the status of the applicant's ex-wife and children. It was therefore not necessary to hear the applicant's mother.

## V. Issues

(1) Did the RDP err in denying the applicant the right to present his mother's testimony?

(2) Is the decision to deny the applicant refugee status or status as a person in need of protection reasonable?

## VI. Standard of review

[25] The RPD's decision not to hear the testimony of the applicant's mother is reviewable on the correctness standard as this is an issue of procedural fairness (*Baker v Canada (Minister of Citizenship and Immigration)*, 1999] 2 SCR 817 at para 22, 243 NR 22, *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43, [2009] 1 SCR 339). The RPD's decision not to grant the applicant refugee status or the status of a person in need of protection shall be reviewed on a standard of reasonableness since it is a question of mixed fact and law (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paras 164-166, [2008] SCR 190).

## VII. Analysis

(1) *Did the RDP err in denying the applicant the right to present his mother's testimony?*

[26] The applicant cannot demonstrate that the member hearing his claim breached the principles of natural justice by refusing to hear his mother's testimony. In fact, the applicant was first informed of the RPD's refusal to hear his mother's testimony in a decision dated April 16, 2012, informing him that he should submit evidence with probative value instead. At the hearing, the applicant was examined about the status of his children and that of his ex-wife in Spain. Even though this factual element was the subject of questions from the member during the RPD hearing, it is not central to the applicant's claim for refugee protection.

[27] At the hearing before the RPD, it would have been reasonable for the applicant to formally express his opposition to this decision, by stating that, if he was unable to provide more probative evidence, he wished his mother's testimony to be heard. In fact, given that, at the hearing, the RPD questioned him about the status of his ex-wife and that of his children and given that the member considered these facts to be relevant, the applicant should have made a formal request on the basis of the principles of natural justice to ask the member to reconsider his decision.

[28] The applicant is therefore precluded from arguing a breach of the principles of natural justice on judicial review as he did not raise an objection at the first opportunity (*Irving Shipbuilding Inc. v Canada (Attorney General)*, 2009 FCA 116 at para 48, [2010] 2 FCR 488). In fact, in his submissions before the RPD, counsel for the applicant expressed his disagreement

with the RPD's decision not to hear the testimony of the applicant's mother. However, this was not a clear, formal request to the member to reconsider his decision not to hear the testimony.

(2) *Is the decision to deny the applicant refugee status or status as a person in need of protection reasonable?*

[29] The RPD's decision is reasonable, and no intervention is required by this Court. The member rendered a decision on the basis of the evidence before him, and his findings on the applicant's credibility are reasonable.

[30] Regarding the applicant's amendment to his PIF, it is clear from the reading of the hearing transcript that the member simply asked whether the applicant's PIF had been amended to reflect the applicant's change in circumstance. The decision is not incorrect as the decision maker mentioned that the applicant was no longer with his partner. Consequently, the applicant's argument according to which the member did not know the file is unfounded.

[31] Second, the applicant's argument that the RPD took irrelevant factors into consideration when assessing the merit of the applicant's claim cannot be accepted. It is clear from the transcripts of the hearing before the RPD that the member questioned the applicant on all the elements that were relevant to his claim on the basis of sections 96 and 97 of the IRPA. The argument that the member based his findings mainly on irrelevant elements therefore has no merit.

[32] Moreover, the Court noted a contradiction in the arguments made by the applicant related to his criticism of the member for not admitting the testimony of the applicant's mother. In fact, the applicant first criticizes the decision maker for considering factors that, in his opinion, are irrelevant to the claim, namely his relationship with his ex-wife and his children, describing this as an error. He then submits that the RPD should have heard his mother's testimony regarding his ex-wife and his children given that this is pertinent to his refugee claim.

[33] Then, the applicant raises the argument that the RPD erred in stating that it examined the applicant about the possibility of his going to live in the capital while the applicant was actually questioned about the possibility of his going to live in La Paz, where his ex-mother-in-law lives. Upon reading the decision, it seems that the member only erred with regard to the name of the city. In reality, it was therefore the decision maker's intention to mention that the applicant was questioned at the hearing about the possibility of his going to live in La Paz and not in the capital of El Salvador.

[34] Moreover, the RPD's finding that the applicant could have submitted documents to demonstrate the existence of his business is also reasonable. In fact, the applicant has the burden of demonstrating the facts on the basis of which his claim is made. Given therefore that he had a repair shop and that, as a result, the Maras were demanding a monthly payment from him, it was reasonable to require that he supply proof of the existence of his shop.

[35] Lastly, the RPD's finding that the Maras were no longer interested in the applicant has merit. In fact, this negative finding about the applicant's credibility is reasonable in the

circumstances (*Rajaratnam v Canada (Minister of Employment and Immigration)*, 135 NR 300 at para 14, 1991 CarswellNat 851 (FCA)).

[36] The parties were invited to submit a question for certification, but none was submitted.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that** the application for judicial review is dismissed, and no question will be certified.

"Simon Noël"

Judge

Certified true translation
Johanna Kratz, Translator

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-4499-12 |
| **STYLE OF CAUSE:** | EDGARD EDUARDO ALVARENGA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Montréal, Quebec |
| **DATE OF HEARING:** | December 20, 2012 |
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| **DATED:** | December 21, 2012 |

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| Lyne Prince | FOR THE RESPONDENT |

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