

Federal Court



Cour fédérale

**Date: 20160331**

**Docket: IMM-4414-15**

**Citation: 2016 FC 360**

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

**Montréal, Quebec, March 31, 2016**

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

**BETWEEN:**

**CARLOS ANTONIO ESCOBAR  
MONTALVAN**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] This is an application for judicial review in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act) of a final decision of the Refugee Appeal Division (RAD) of the Immigration and Refugee Board of Canada to reject the applicant's appeal and thereby his application for refugee protection. In this case, the RAD confirmed the merit of the previous decision of the Refugee Protection Division (RPD) and

concluded that the applicant is not a refugee within the meaning of the Convention, nor is he a person in need of protection under sections 96 and 97 of the Act.

[2] The applicant is a citizen of Cuba. He was a choir member and singer with the *Opera de la Calle* troupe. Apparently, some of the troupe's songs criticize the Cuban authorities and its government. In July 2012, the government revoked the operating license of the *El Cabildo* theatre for two years. The troupe performed most of its shows there. Although the establishment was closed because the owner was profiting from the operation by charging a \$2 entrance fee—which apparently violates Cuban legislation or the applicable policy of the Cuban government—the troupe continued to perform in other public locations in Cuba and abroad. However, in November 2013, the applicant was intercepted by police as he walked by a police station on his way to the theatre. He was carrying theatre costumes in his backpack and was accused of being in possession of suspicious merchandise.

[3] In addition to being a choir member and singer with the *Opera de la Calle* troupe, the applicant had opened a bakery, but never managed to obtain the proper licences. Because he increased the bakery's production and was operating without a licence, the bakery was inspected and searched several times. In June 2013, police notified the applicant that his activities were under surveillance. The applicant states that in October 2013, his home was searched. Police found nothing, but fined him for overconsumption of electricity. The applicant complained to the Committee for the Defense of the Revolution. In March 2014, the applicant states that he was arrested by police for unauthorized production of food (operating his bakery). His equipment was seized and his bakery permanently closed. He was allegedly detained for 72 hours.

[4] In July 2014, the applicant accompanied the troupe on a tour of Canada. That same month, police sent his sister three notices to appear in relation to the incident in May 2014. On November 3, 2014, the applicant applied for refugee protection in Canada, saying that he was afraid of being arrested by authorities when he returned to his country because he was seen as a “counter-revolutionary.”

[5] Neither the RAD nor the RPD retained the fundamental elements of the applicant’s statements, which were not deemed credible, and the evidence in the record does not show that the applicant’s fundamental rights were seriously violated. In the opinion of the RAD, the evidence that the applicant’s business was closed in May 2014 and that he was summoned in October 2014 was not convincing. Although the documentary evidence shows that freedom of expression is restricted in Cuba, the applicant’s problems with Cuban authorities related to the operation of his business did not factor among the reasons for persecution listed in the Convention; rather, they were connected to the fact that he was operating it without a valid license.

[6] The applicable standard in the RAD’s review of the application of law to the facts of this case and the decision it made on the RPD’s conclusions concerning the applicant’s credibility is the standard of reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraphs 53-54; *Ching v. Canada (MCI)*, 2015 FC 725, at paragraph 45). We must therefore determine whether the RAD’s conclusion that the applicant’s testimony is not credible and that the evidence fails to show that he was persecuted for his political opinion, as alleged, is one of the acceptable issues based on the evidence in the record and the applicable legislation.

[7] In essence, the objections that the applicant makes today with respect to the reasonableness of the decision being challenged can be summarized as follows: the RAD did not truly exercise the duties of its role as a specialized appeal tribunal and arbitrarily rejected his grounds for appeal. The applicant reiterates that the RPD's analysis of the evidence in the record was erroneous and that it mistakenly determined that his statements regarding his alleged arrest in November 2013 were not credible. The RAD should also have analyzed the quality of the documentary evidence in the record and concluded that the bakery-related incidents described by the applicant were related to the complaint he filed against government officers. The RAD erred in failing to connect the notices to appear with the applicant's expression of his political opinion. Furthermore, in terms of the risks involved in returning to Cuba, the RAD did not consider the fact that the applicant's potential punishment might be disproportionate to the offence committed.

[8] The applicant has not convinced me that the RAD's decision to confirm the RPD's decision and reject his appeal was unreasonable. I agree with the respondent that the RAD did not commit a reviewable error of law or fact. The RAD referred to the case law of the Court regarding the scope of the appeal and held that [TRANSLATION] "the RAD will consider all of the evidence in its analysis, including the applicant's testimony, and will conduct its own analysis, showing deference to the RPD in issues relating to credibility." This approach is reasonable (*Alyafi v. Canada (Citizenship and Immigration)*, 2014 FC 952, at paragraphs 16, 32 and 51). Moreover, a simple reading of the grounds for the dismissal of the appeal confirms that the RAD indeed considered all of the key elements of the evidence in the record, whereas the applicant's arguments that the RAD did not consider the evidence in the record are unfounded. The grounds

for the dismissal of the appeal are not only intelligible and transparent, they are based on logic and rational thinking.

[9] After having reviewed the record, particularly the recording of the hearing before the RPD, the RAD concluded that the RPD “made the correct decision,” which could reasonably be justified based on the credibility issues with the applicant’s statements. Specifically, the RPD did not believe that the applicant was arrested by police in November 2013. The arrest is a key component of the applicant’s fear of being persecuted, which is linked to political beliefs. However, the arrest is not listed on the *Basis of Claim* (BOC) form, or on the amended BOC. The RAD did not accept the applicant’s explanations with respect to this fundamental omission. Furthermore, in another form, he indicated that he had never been detained. Given that the notices to appear did not indicate the reason for which the applicant was summoned to the police station, and considering his credibility issues, the RAD could not give them any probative value. Moreover, in terms of believability and from an objective standpoint, with respect to the applicant’s allegations that he is afraid of being persecuted and of the risk of returning to Cuba, the RAD also notes that following the theatre’s closure, his troupe continued its activities with the Cuban government’s approval. It also allowed the troupe members to leave the country. If the applicant was indeed perceived as a counter-revolutionary, the documentary evidence shows that he would not have been able to leave Cuba. The RAD also concluded that the fines for the overconsumption of electricity and any issues the applicant might have had with the authorities were not related to his political opinions, whether real or imputed.

[10] In conclusion, although another RPD or RAD panel might have interpreted the evidence in the record differently or granted the applicant's application for refugee protection, this is not the applicable standard for judicial review. This court does not sit in appeal and is not required to review all of the evidence. The decision-maker's reasoning and conclusions must simply be intelligible and transparent, and the dismissal must take into account the applicable legislation and be based on the evidence in the record, which is the case here.

[11] For these reasons, the application for judicial review is dismissed. Counsel for the parties agree that there are no serious questions of general importance in this case.

**JUDGMENT**

**THE COURT ORDERS that** the application for judicial review be dismissed. No question is certified.

“Luc Martineau”

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Judge

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

**DOCKET:** IMM-4414-15

**STYLE OF CAUSE:** CARLOS ANTONIO ESCOBAR MONTALVAN v.  
THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** MONTRÉAL, QUEBEC

**DATE OF HEARING:** MARCH 11, 2016

**JUDGMENT AND REASONS:** MARTINEAU J.

**DATED:** MARCH 31, 2016

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