

Federal Court



Cour fédérale

**Date: 20160920**

**Docket: IMM-1391-16**

**Citation: 2016 FC 1068**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, September 20, 2016**

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

**BETWEEN:**

**MOISES ABRAHAM SEGOVIA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Background

[1] There was a breach of procedural fairness during the Refugee Protection Division (RPD) hearing, not because the member accepted the applicant's choice to proceed without legal representation, but because, without an interpreter, he was unable to fully understand the

questions he was asked at the hearing or provide complete answers. As set out by the Supreme Court of Canada in *R. v. Tran*, [1994] 2 SCR 951 [*Tran*] :

First, it must be clear that the accused was actually in need of interpreter assistance -- i.e., that he or she did not understand or speak the language being used in court. Although the ultimate burden of proof in establishing the required level of need rests, of course, on the party asserting that he or she has suffered a violation of his or her s. 14 rights, it is important to appreciate that the right to interpreter assistance is not one which must necessarily have been invoked or asserted in order to be enjoyed. As part of their control over their own proceedings, courts have an independent responsibility to ensure that those who are not conversant in the language being used in court understand and are understood. Accordingly, unless the issue of interpretation is only being raised for the first time on appeal and/or there is some question as to whether the right is being asserted in bad faith, establishing "need" will not normally be an onerous step. [Emphasis of the Court]

## II. Nature of the matter

[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 the decision dated February 22, 2016 by the RPD of the Immigration and Refugee Board, to deny the applicant's claim for refugee protection under section 96 and subsection 97(1) of the IRPA.

## III. Facts

[3] The applicant, age 40, is a citizen of the Republic of El Salvador.

[4] According to the applicant, the Maras-13 criminal group threatened him and attempted extortion in June 1996, and Salvadoran police could not intervene to ensure his safety. Therefore, he allegedly left El Salvador in September 1996 and went to the United States, where he lived under a Temporary Protected Status (TPS) that he renewed every 12 or 18 months until 2012.

[5] In 2012, the applicant's TPS renewal was denied because of an impaired driving conviction.

[6] The applicant entered Canada on November 30, 2015 and filed a claim for refugee protection on or around December 12, 2015.

[7] The applicant did not retain counsel and came to the RPD hearing alone on January 28, 2016.

#### IV. Decision

[8] On February 22, 2016, the RPD refused the applicant's claim for refugee protection on the grounds that he is not a Convention refugee or a person in need of protection.

[9] From a procedural perspective, the RPD pointed out that the applicant chose not to retain counsel, as he felt he could present his claim for refugee protection on his own.

[10] During the applicant's testimony at the hearing, the RPD identified a significant omission in his story, as presented on the Basis of Claim Form (BOC), which considerably weakened his credibility.

[11] The RPD found that the applicant's claim for refugee protection stemmed from a fear related to criminality and not to Convention grounds under section 96 of the IRPA and that therefore, it fell under paragraph 97(1)(b) of the IRPA.

[12] The RPD found that the applicant did not meet the exceptional criteria in subparagraph 97(1)(b)(ii) of the IRPA, in that he did not face a personalized risk from the Maras-13 in El Salvador, but rather a generalized risk shared by the entire Salvadoran population.

V. Parties' representations

[13] The applicant is contesting the RPD's decision, maintaining that the member committed an error of law by allowing the applicant to represent himself because he could not participate meaningfully in the hearing. Alternatively, the applicant contests the RPD's adverse findings regarding his credibility following the omission of a major incident involving the criminal group.

[14] The respondent submits that the RPD's decision in this case is reasonable because the assessment of the applicant's credibility is within the RPD's discretion and the presumption of truthfulness of the applicant's allegations was displaced by the omission of a major incident in his story. Moreover, the respondent maintains that the RPD's decision is reasonable considering that the applicant did not show that his current and prospective risk differed from the generalized risk experienced by all citizens of El Salvador. Finally, the respondent submits that the RPD's decision to proceed after the applicant stated that he was able to represent himself was correct because the right is not absolute.

## VI. Issues

[15] There are three issues:

- 1) Did the RPD's decision constitute a breach of procedural fairness?
- 2) Did the RPD err in fact by rejecting the applicant's claim for refugee protection on the grounds that he was not credible?
- 3) Did the RPD err in fact and in law by finding that the applicant was exposed to a generalized rather than personalized risk?

[16] The first issue must be addressed based on the standard of correctness because it deals with natural justice.

[17] The second is a question of fact, subject to the standard of reasonableness. The Court must show deference to the findings of the RPD, a specialized tribunal, regarding the applicant's credibility.

[18] The third issue is one of mixed fact and law, and is subject to the standard of reasonableness.

## VII. Analysis

[19] In its decision, the RPD correctly notes that the right to counsel is not absolute. The applicant indicated to the RPD that he was able to represent himself and ready to proceed. In this regard, the Court adopts the statements made by Mr. Justice Fothergill in *Singh v. Canada (Citizenship and Immigration)*, 2015 FC 1055 at paragraph 19:

[19] I am unable to accept Ms. Singh's argument. The letter from the IAD that requested written submissions regarding the application of *res judicata* clearly indicated that Ms. Singh had the right to be represented by counsel at her own expense. . . . While she was not required to seek the assistance of a lawyer, Ms. Singh must accept the consequences of not doing so (*Wagg v R*, 2003 FCA 303, [2004] 1 FCR 206 at para 25). An administrative tribunal is not required to act as counsel for a self-represented litigant (*Thompson v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 808 at para 15).

[20] Nonetheless, on reading the applicant's BOC form, the Court finds that he has only a rudimentary command of written English. Moreover, the hearing transcripts reveal, beyond the shadow of a doubt, that the applicant is not sufficiently fluent in English and does not understand spoken English well enough for a hearing to be held without the assistance of an interpreter, at least.

[21] The Court notes that the member had to repeat questions several times for the applicant to understand. In spite of considerable efforts on the part of the member, the Court notes that the applicant had difficulty providing intelligible answers to the questions he was asked.

[22] Consequently, there was a breach of procedural fairness during the Refugee Protection Division hearing, not because the member accepted the applicant's choice to proceed without legal representation, but because, without an interpreter, he was unable to fully understand the questions he was asked at the hearing or provide complete answers. As the Supreme Court of Canada sets out in *Tran*:

First, it must be clear that the accused was actually in need of interpreter assistance -- i.e., that he or she did not understand or speak the language being used in court. Although the ultimate burden of proof in establishing the required level of need rests, of

course, on the party asserting that he or she has suffered a violation of his or her s. 14 rights, it is important to appreciate that the right to interpreter assistance is not one which must necessarily have been invoked or asserted in order to be enjoyed. As part of their control over their own proceedings, courts have an independent responsibility to ensure that those who are not conversant in the language being used in court understand and are understood. Accordingly, unless the issue of interpretation is only being raised for the first time on appeal and/or there is some question as to whether the right is being asserted in bad faith, establishing "need" will not normally be an onerous step. [Emphasis of the Court]

[23] In this case, the correct decision would have been to suspend the hearing and obtain an interpreter, so that the applicant could understand the RPD hearing and more easily answer the questions asked of him.

#### VIII. Conclusion

[24] For these reasons, the application for judicial review is allowed and the case is returned for redetermination by a different RPD panel.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the application for judicial review is allowed and the case is returned for redetermination by a different RPD panel. There is no question of importance to certify.

"Michel M.J. Shore"

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Judge



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

**DOCKET:** IMM-1391-16

**STYLE OF CAUSE:** MOISES ABRAHAM SEGOVIA v. THE MINISTER  
OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** MONTRÉAL, QUEBEC

**DATE OF HEARING:** SEPTEMBER 13, 2016

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