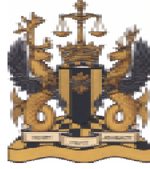
Federal Court  Cour fédérale

Date: 20120224

Docket: IMM-2819-11

Citation: 2012 FC 258

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 24, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

CRISTIAN DANILO PULIDO RUIZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

<u>REASONS FOR JUDGMENT AND JUDGMENT</u>

I. Introduction

[1] This is an application for judicial review submitted pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 (IRPA) of the decision by the Immigration and Refugee Board (IRB) dated March 28, 2011, that Cristian Danilo Pulido Ruiz

(C. Ruiz) is not a Convention refugee or a person in need of protection under sections 96 and 97 of the IRPA.

[2] For the following reasons, this application for judicial review of the IRB's decision is allowed.

II. Facts

[3] C. Ruiz is a 20-year-old citizen of Colombia.

[4] On September 7, 2006, when he was returning from school, two young men invited him to participate in sports and cultural events.

[5] In mid-September, C. Ruiz participated in those events. However, they quickly turned political, which he did not like. He also states that the event organizers were recruiters for the Revolutionary Armed Forces of Colombia (FARC).

[6] C. Ruiz therefore decided to no longer participate. His absence was noted and, one week later, the FARC recruiters intercepted him to find out why he was absent. C. Ruiz replied that he would attend the meetings again for fear of repercussions, but never did so.

[7] On October 5, 2006, two men intercepted C. Ruiz and pushed him against a wall, injuring him. They questioned him further on his absence and ordered him to attend the next meeting or they would force him to attend it. They also prohibited him from telling anyone about it.

[8] On October 23, 2006, the same men intercepted C. Ruiz and dragged him around telling him that if he did not join the FARC, they would attack his family members. He went home very scared.

[9] A few days passed and C. Ruiz's mother noticed that her son was troubled. She therefore consulted Dr. Guevara, a medical specialist, about her son's health. He found that C. Ruiz was suffering from anxiety (see Exhibit B at page 27 of the Applicant's record). It was after the second meeting with Dr. Guevara that C. Ruiz decided to confide in his mother about the FARC's forced recruitment attempts.

[10] After receiving threatening telephone calls from the FARC, C. Ruiz's parents made the decision to send their son to New York to stay with a friend for a few months. On November 21, 2006, C. Ruiz left Columbia for New York. He obtained a six-month visitor's visa.

[11] During his stay in the United States, C. Ruiz's family continued to receive threatening phone calls. Consequently, C. Ruiz's parents decided that he should stay in the United States, but moved him to his aunt and uncle's house in Jacksonville, Florida.

[12] In September 2008, C. Ruiz left his aunt's house at the request of his uncle. He returned to New York (Queens more specifically) where he obtained advice from a priest and two immigration counsellors. C. Ruiz then decided to call the "Viva la casa" organization.

[13] On November 21, 2008, C. Ruiz went to the organization's office to obtain information on refugee protection claims in Canada.

[14] On April 23, 2009, C. Ruiz went to Fort Erie, in Canada, and claimed refugee protection there.

III. Legislation

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

Convention refugee	**Définition de « réfugié »**
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,	**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*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself 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

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

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

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(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,

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

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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.
(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. Issue

[16] The Court must respond to the following question:

- ***Did the IRB err by not considering all of the evidence submitted before it, which would have distorted its assessment of C. Ruiz's credibility?***

B. Standard of review

[17] The parties disagree on the applicable standard of review.

[18] C. Ruiz submits that the standard of review applicable in this case is correctness. He alleges that the IRB imposed a disproportionate burden of proof on him by finding that he lacks credibility on the ground that, in particular, he did not claim asylum during his stay in the United States. He also claims that the IRB erred by not taking into account the guideline concerning child refugee claimants.

[19] The respondent maintains that the standard or review is reasonableness because is up to the IRB to assess an applicant's credibility (see *Bunema v Canada (Minister of Citizenship and Immigration)*, 2007 FC 774 at paragraph 1; *Singh v Canada (Minister of Citizenship and Immigration)*, 2007 FC 62 at paragraph 28 (*Singh*); *Pinon v Canada (Minister of Citizenship and Immigration)*, 2010 FC 413 at paragraph 10 (*Pinon*)).

[20] The Court recognizes the correctness of the respondent's position because it is settled law that it is up to the Board to assess an applicant's credibility. The Court must show deference to an IRB decision based on an applicant's credibility (see *Pinon* at paragraph 10 and *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration*) (1998), 157 FTR 35 (FCTD), 83 ACWS (3d) 264 at paragraph 14 (*Cepeda-Gutierrez*)).

[21] The IRB decision must therefore fall within the range of possible, acceptable outcomes which are defensible in respect of the facts and law (see *Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraph 47).

V. Position of the parties

A. Position of C. Ruiz

[22] C. Ruiz maintains that the IRB findings with respect to his credibility are not directly related to his refugee claim. His refugee claim was based on forced recruitment by the FARC, not his conduct. C. Ruiz states that he did not contradict himself in his testimony before the IRB.

[23] C. Ruiz emphasizes that the IRB wrote in its reasons that his "behaviour was not consistent with that of someone who alleges a risk of persecution should he return to his country" (see paragraph 11 of the IRB decision) because he did not claim asylum during his stay in the United States.

[24] In that respect, C. Ruiz recalls that the IRB rejected his explanations that his parents initially wanted him to stay in the United States for a two-month period only. However, he had to extend his stay in the United States because of the constant FARC threat in Colombia.

[25] He also submits that his young age during his stay in the United States explains his failure to claim asylum there.

[26] C. Ruiz alleges that no evidence was submitted before the IRB to establish that he had been in contact with people who had allegedly gone through the same problems as him in Colombia. According to him, the IRB finding that he failed to claim asylum in the United States despite the fact that he knew people familiar with the procedures for doing so is therefore unreasonable.

[27] Furthermore, C. Ruiz notes that he asked his aunt and uncle to help him regularize his status in the United States. They purportedly never responded to his requests.

[28] C. Ruiz states that he did not have the requisite maturity to initiate immigration procedures at that time. He cites by analogy *R v DB*, [2008] 2 SCR 3, 2008 SCC 25 at paragraph 41 (*DB*) by the Supreme Court of Canada, which specifies that "because of their [young] age, young people have heightened vulnerability, less maturity and a reduced capacity for moral judgment". Furthermore, C. Ruiz argues that the preamble to the *Convention on the Rights of the Child* protects the rights of children by specifying that they need special safeguards by reason of their physical and mental immaturity (see *DB*, above).

[29] C. Ruiz also bases an argument on the fact that the Canadian *Criminal Code*, RSC (1985), c C-46, stipulates in subsection 150.1(1) that it is not a defence that an adolescent under 16 years of age would have validly consented to sexual relations with an adult, but one can hold against him his failure to claim asylum in the United States at the earliest opportunity when he was not even 16 years of age.

[30] C. Ruiz acknowledged in his memorandum that he had a duty to explain his failure to claim asylum in the United States (see *Bobic v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1488 at paragraph 6). He maintains that the IRB disregarded the explanations provided at the hearing.

[31] Regarding the regularization of his refugee status in the United States, C. Ruiz submits that there was no contradiction concerning sending his passport to Colombia.

[32] C. Ruiz recalls his testimony that he asked his mother to help regularize his refugee status in the United States because his visitor's visa was going to expire. He then summarized the facts explaining why there was an entry stamp in his passport and points out his mother's affidavit in the record (see the statement given by C. Ruiz's mother at pages 30 and 31 of the Applicant's Record).

[33] With respect to that, the IRB wrote that the action by C. Ruiz's mother "has no connection with the original reason for sending the passport to Colombia" (see paragraph 16 of the IRB's decision). The IRB also wrote the following at paragraph 20 of its decision: "In that context, the panel relies on the evidence submitted (his passport with a stamp confirming that he entered Colombia) and concludes that the claimant returned to his country in 2007". C. Ruiz maintains that the IRB disregarded important evidence that explains the entry stamp in his passport and committed an error in that respect.

[34] C. Ruiz also emphasizes that the evidence present in the record clearly establishes that there is passport control both when exiting and entering Colombia. C. Ruiz points out that he also produced education certificates that prove his presence in the United States in 2007 and 2008.

[35] It is therefore clear, according to C. Ruiz, that the IRB erred because it did not consider certain essential evidence. The Court must therefore review the IRB decision (see *Cepeda-Gutierrez*, above). Furthermore, C. Ruiz reminds us of the case law of the Court that inconsistencies found by the IRB must be significant and central to the refugee claimant's claim (see *Sheikh v Canada (Minister of Citizenship and Immigration)*, 2000 FCJ No 568 at paragraph 24).

B. Position of the respondent

[36] The respondent maintains that it is well established that when a refugee claimant is passing through a country that signed the *Convention relating to the Status of Refugees*, he or she must, barring a reasonable explanation, claim refugee protection there at the earliest possible opportunity (*Ilie v Canada (Minister of Citizenship and Immigration)*, 88 FTR 220; *Singh*, above, at paragraph 24; see also *Huerta v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 271 (*Huerta*); *Sainnéus v Canada (Minister of Citizenship and Immigration)*, 2007 FC 249 at paragraph 12; *Leul v Canada (Secretary of State)*, [1994] FCJ No 833).

[37] The respondent emphasizes that C. Ruiz arrived in the United States in November 2006 and stayed there until April 2009 without claiming asylum there. Therefore, the IRB would have

reasonably found that C. Ruiz's failure to file a claim with the American authorities constituted conduct that was inconsistent with that of a person fearing persecution at the hands of the FARC.

[38] According to the respondent, the IRB was entitled to, by application of *Guideline No. 3 of the Chairperson of the Immigration and Refugee Board concerning Child Refugee Claimants*, reject C. Ruiz's explanations that he was unaware of the steps for submitting an asylum claim in the United States. The guideline specifies that consideration must be given to the age and development of the child at the time of the events about which they might have the requested information.

[39] In this case, the evidence in the record demonstrates the following:

(1) When he was 14 years of age, C. Ruiz left Colombia alone to go to his father's friend's house in New York;

(2) C. Ruiz stayed in New York for nearly three months before going to stay with his aunt in Florida;

(3) In September 2008, when he was 16 years old, C. Ruiz left Florida to return to New York, where he purportedly survived by working in various jobs until he came to Canada in April 2009; and

(4) C. Ruiz allegedly researched Canadian refugee protection procedures online.

[40] The respondent also points out that, in 2007, C. Ruiz asked his mother to regularize his status in the United States, thereby demonstrating a certain understanding of how immigration procedures in the United States work.

[41] He emphasizes that C. Ruiz lived with people, including his aunt, who apparently had experienced difficulties in Colombia.

[42] Consequently, according to the respondent, C. Ruiz has a certain level of maturity and the IRB was entitled to draw negative inferences from his failure to claim asylum with the American authorities.

[43] Furthermore, the respondent notes that the IRB found that C. Ruiz had returned to Colombia in 2007 because of an entry stamp to the country in his passport. C. Ruiz maintains that he sent his passport in order to regularize his status. The evidence in the record, in particular the letter of support from his parents, does not mention certain essential facts that could corroborate C. Ruiz's version of events.

[44] Therefore, according to the respondent, C. Ruiz's failure to provide a logical and plausible explanation allowed the IRB to find that his parents had not actually taken the steps alleged and to attach no probative value to the documents submitted before it.

[45] The respondent points out that, in *Sheikh v Canada (Minister of Employment and Immigration),* [1990] FCJ No 604, the Federal Court of Appeal established that a general finding of a lack of credibility on the part of the applicant may conceivably extend to all relevant evidence emanating from his or her testimony (see also *Touré v Canada (Minister of Citizenship and*

Immigration), 2005 FC 964 at paragraph 5; *Long v Canada (Minister of Citizenship and Immigration)*, 2007 FC 494 at paragraph 24).

[46] Furthermore, according to the respondent, this Court's decisions have held that documents issued by a foreign government, such as passports, are presumed to be valid. The statement by C. Ruiz's parents cannot question the validity of the entries in C. Ruiz's passport (see *Rasheed v Canada (Minister of Citizenship and Immigration)*, 2004 FC 587 at paragraph 20).

[47] Finally, the respondent maintains that the IRB does not have to analyze the issue of state protection and an internal flight alternative if it decides that the applicant is not credible.

VI. Analysis

- ***Did the IRB err by not considering all of the evidence submitted before it, which would have skewed its assessment of C. Ruiz's credibility?***

[48] The IRB's decision was essentially based on an assessment of C. Ruiz's credibility, an issue that is within the Board's expertise (see *Neupane v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1237 at paragraph 21).

[49] On judicial review, the Court must respect certain principles that are well established in the jurisprudence when assessing the reasonableness of the decision (*Sun v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1255, [2008] FCJ No 1570 (*Sun*)). Thus, a "lack of

credibility finding can be [clearly] based on implausibilities, contradictions, irrationality and common sense" (see *Sun* at paragraph 5).

[50] However, "[t]he Court should not interfere with the findings of fact and the conclusions drawn by the [IRB] unless the Court is satisfied that the [IRB] 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 paragraph 7; see also *Miranda v Canada (Minister of Citizenship and Immigration)*, [1993] FCJ No 437). The case law is consistent that assessing the evidence and the testimony, as well as attaching probative value to them, is up to the IRB (see *Romhaine v Canada (Minister of Citizenship and Immigration)*, 2011 FC 534, [2011] FCJ No 693 at paragraph 21).

[51] In this case, the IRB made two findings that resulted in the claim being rejected: C. Ruiz did not claim asylum during his stay in the United States when he should have, and C. Ruiz's explanations regarding sending his passport to Colombia in 2007 are not credible.

(1) C. Ruiz's failure to claim asylum in the United States.

[52] The IRB wrote the following at paragraphs 9 and 10 of its decision:

> [9] The [IRB] does not accept the claimant's explanations for his failure to seek protection from the American authorities. In both of the locations in question, the claimant lived with people who had left their country, who, in one way or another, had directly or indirectly experienced problems similar to the claimant's and who, according to his testimony, knew other people who were in the United States illegally. Moreover, the claimant testified that he had talked to his aunt in Florida about the problems he had experienced in Colombia

> before he left. In addition, the claimant, who stated that he did research on the refugee protection process in Canada, did not conduct similar research when he was in the United States.
>
> [10] The claimant also testified that he was too young to take these steps. However, his young age did not stop him from leaving his aunt's home in Florida and returning to New York City when he was only 16 years old and researching how to enter Canada.

[53] C. Ruiz submits that he explained why he did not claim asylum when he arrived in the United States. He notes, first, that his stay in the United States was initially supposed to be temporary, but that the FARC threats forced him to extend his stay there.

[54] C. Ruiz argues that his young age prevented him from claiming asylum and that even his uncle and aunt did not offer him assistance despite his requests.

[55] The respondent argues that C. Ruiz had to, at the earliest opportunity, claim asylum with the American authorities. His failure to do so demonstrates that he had no subjective fear of persecution in Colombia.

[56] In that respect, "[t]here is a well-established principle to the effect that any person having a well-founded fear of persecution should claim refugee protection in Canada as soon as he or she arrives in the country, if that is his or her intent" (see *Singh*, above, at paragraph 24). The Federal Court of Appeal also specified, at paragraph 4 of *Huerta*, above, "[that] [t]he delay in making a claim to refugee status is not a decisive factor in itself. It is, however, a relevant element which the tribunal may take into account in assessing both the statements and the actions and deeds of a claimant".

[57] The case law of the Court also teaches that the tribunal must consider the explanations offered by the respondent for the delay in filing a refugee claim (see *Correira v Canada (Minister of Citizenship and Immigration),* 2005 FCJ No 1310 at paragraph 28; see also *Hue v Canada (Minister of Employment and Immigration)*, [1988] FCJ No 283 at paragraph 4).

[58] The Court takes into account, as appears in the hearing transcript (see pages 498 to 500 of the Tribunal Record), that C. Ruiz held a valid visitor's visa in the United States for a six-month period, that is, from November 2006 to May 2007.

[59] When his visa expired, C. Ruiz asked his mother and his relatives in the United States to help him regularize his situation. He contends that he had neither the knowledge nor the tools to claim asylum in the United States, especially since he was only 15 or 16 years old at the time.

[60] In *Kim v Canada (Minister of Citizenship and Immigration)*, 2010 FC 149 (*Kim*), the Court analyzed the effects of the *Convention on the Rights of the Child* on the IRPA. It specified the following at paragraph 61 of its decision:

> . . . "[t]he [CRC] does not change the definition on the standard by which a child can be found to be a Convention refugee"; however, the Court finds that the CRC and the Guidelines add nuances to the determination of whether a child fits the definition of a refugee under section 96. These nuances are based on an appreciation that children have distinct rights, are in need of special protection, and can be persecuted in ways that would not amount to persecution of an adult.

[61] It goes without saying that a child does not have the same abilities as an adult. Even though the IRB seemed to have taken C. Ruiz's age into account in its decision, it found that he should have

behaved like an adult and claimed asylum at the earliest opportunity. However, C. Ruiz was just 15 years old. It seems unlikely to us that an adolescent would know the complexities and subtleties of the administrative apparatus with respect to asylum and be able to gauge the rough waters of the immigration process in the United States without an adult's help. Imposing such a burden on an adolescent seems unreasonable to us.

(2) C. Ruiz's arguments regarding sending his passport to Colombia in 2007 are not credible.

[62] The IRB was of the following opinion with respect to the explanations on sending his passport to Colombia: "none of this makes sense, it is beyond comprehension, and it is not a logical argument" (see paragraph 15 of the IRB's decision). The IRB found in its decision that C. Ruiz returned to Colombia in July 2007.

[63] The Court dismisses this finding by the IRB because it disregarded important evidence in the record. The academic study certificates submitted as evidence by C. Ruiz demonstrate that he remained in the United States. The IRB's finding that C. Ruiz left the United States in 2007 to return and resume his studies there in 2008 is not reasonable and cannot be justified. In fact, the record also contains a piece of evidence that establishes that Colombia has controls at the entries to and exits from the country. In light of this element, which goes to the very heart of the issue, the Board had to explain why it relied on the existence of the stamp in 2007 to take the position that C. Ruiz is not credible but was silent on the absence of the stamp in 2008 that would explain his return to complete his studies. The Board's finding is not reasonable. Surely the burden of proving

the essential elements of a claim is on the applicant. Starting from the time when the applicant offers plausible evidence and explanations, it is up to the IRB, if it rejects those elements, to provide justification for its decision that falls within a range of possible outcomes in respect of the facts and law, like the Supreme Court has directed. In C. Ruiz's case, the IRB's explanations are unreasonable because they disregard certain evidence and were silent on others that could contradict its reasoning. Consequently, the IRB was not reasonably entitled to find that C. Ruiz has no subjective fear of persecution if he were to return to Colombia.

VII. Conclusion

[64] The IRB's findings in their entirety are unreasonable. "[The Court] cannot safely [conclude] that the Board would have come to the same conclusion, had it not made the impugned findings." (see *Qalawi v Canada (Minister of Citizenship and Immigration)*, 2007 FC 662 at paragraph 18).

[65] The application for judicial review is therefore allowed.

VIII. Question for certification

[66] Counsel for C. Ruiz is asking the Court to certify the following question:

- Can a minor child be required to adopt the conduct of an adult regarding commencing immigration procedures in a foreign country when the child's immediate family members are not present there?

[67] Relying on *Canada (Minister of Citizenship and Immigration) v Liyanagamage*, [1994] FCJ No 1637, the applicant maintains that the question he is presenting is one of general interest that satisfies the tests stated therein.

[68] The respondent is opposed to the certification of the question on the ground that the IRB Chairperson's *Guideline No. 3: Child Refugee Claimants* is clear.

[69] Finally, *Kim*, cited by counsel for the applicant, *Bema v Canada (Minister of Citizenship and Immigration)*, 2007 FC 845, and *Gebremichael v Canada (Minister of Citizenship and Immigration)*, 2006 FC 547 at paragraph 48, answer the question raised.

[70] The Court therefore agrees with the respondent and dismisses the certification request.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be allowed and refers the matter back to a differently constituted panel for redetermination. There is no question of general interest to certify.

"André F.J. Scott"
Judge

Certified true translation,
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Noel Saint-Pierre Olivier Perron	FOR THE APPLICANT
Lyne Prince	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Saint-Pierre, Perron, Leroux Avocats Inc. Montréal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT