

Federal Court



Cour fédérale

**Date: 20131008**

**Docket: IMM-810-13**

**Citation: 2013 FC 1019**

**[UNREVISED ENGLISH CERTIFIED TRANSLATION]**

**Montréal, Quebec, October 8, 2013**

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

**BETWEEN:**

**NICANOR GUILLERMO SIVIPAUCAR  
AYQUIPA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Introduction**

[1] This is an application for judicial review of a decision of the Immigration and Refugee Board, Refugee Protection Division (RPD), rendered on December 17, 2012, in which the RPD determined that the applicant was neither a Convention refugee nor a person in need of protection under the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

## II. Facts

[2] The applicant, Nicanor Guillermo Sivipaucar Ayquipa, is a citizen of Peru, born in (Rimac) Lima, in 1955.

[3] In his Personal Information Form, the information showed that he was in the United States in November 1999 and lived in the United States illegally until August 2008. In August 2008, the American authorities deported him to Peru (but in reality, according to the complete history, he was in the United States for 25 years).

[4] On his return to Peru, the applicant attested that he went to live with his father in Lima.

[5] After one month in the country, the applicant stated that he began to be targeted by two criminal gangs (Los 28 and Los Destruedores). These two gangs allegedly extorted money from the applicant on five occasions from September 2008 to September 2009.

[6] The applicant stated that he complained to the police on two occasions in July and August 2009, but the authorities did nothing for him.

[7] The applicant was found guilty of crimes that he committed on three occasions in the United States for which he was required to pay fines and be under probation two times.

[8] Before coming to Canada, he went through Ecuador, Venezuela, Syria and Jordan. On September 30, 2009, the applicant arrived in Canada. He made a refugee claim the same day.

### III. Decision under judicial review

[9] After an analysis of all the evidence, the RPD found that the applicant was not a refugee or a person in need of protection. The RPD found that the applicant was not a credible witness on the essential facts of his refugee claim and, thus, had not established that there was a [TRANSLATION] "serious possibility" that he would be persecuted.

[10] In particular, the Board based its negative credibility finding concerning the applicant on the following:

- a) the applicant's lack of spontaneity during the hearing, specifically as regards his problems with the criminal gangs;
- b) the addition of new facts regarding the friendship between the police and the criminal gangs that was not in his Personal Information Form (PIF);
- c) contradictions in his testimony in relation to the statement that he allegedly filled out for his complaint with the police;
- d) an implausibility in his testimony that he would allegedly be found by the criminal gangs because he had lighter skin after living in the United States for 10 years.

### IV. Issue

[11] Did the RPD err in basing its decision on erroneous findings of fact, made in a perverse or capricious manner or without regard to the evidence before it?

V. Relevant legislative provisions

[12] Sections 96 and 97 of the IRPA apply in this case:

<b>Convention refugee</b>	<b>Définition de « réfugié »</b>
<p><b>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,</b></p> <p style="padding-left: 40px;"><b>(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></p> <p style="padding-left: 40px;"><b>(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></p>	<p><b>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 :</b></p> <p style="padding-left: 40px;"><b>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></p> <p style="padding-left: 40px;"><b>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.</b></p>
<p><b>Person in need of protection</b></p> <p><b>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</b></p>	<p><b>Personne à protéger</b></p> <p><b>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</b></p>

**(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 themselves 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,**

**(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and**

**(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.**

**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) 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) 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**

<b>(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.</b>	<b>Personne à protéger</b>
	<b>(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.</b>

VI. Standard of review

[13] The standard of review that applies to credibility findings is reasonableness (*Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, [1993] FCJ No 732 (QL/Lexis) (FCA); *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

VII. Positions of the parties

[14] In his memorandum, the applicant stated that his testimony was [TRANSLATION] "short and spontaneous, without any contradictions" and that the RPD erred in fact and in law, by basing its decision on erroneous findings of fact, made in a perverse or capricious manner or without regard to the evidence before it. Further, he argues that his life is still in danger and that he cannot return to Peru.

[15] The respondent submits that the RPD's decision is reasonable. The respondent stated that the applicant's testimony contained implausibilities, contradictions and omissions, which seriously undermined his credibility.

[16] Further, the applicant submitted that it is well established that the RPD's role is to assess the credibility and evidence of a refugee claimant and the explanations relating to the implausibilities, contradictions and omissions in his application (*Mugesera v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 40, [2005] 2 SCR 100; *Cortes v Canada (Minister of Citizenship and Immigration)*, 2009 FC 583). Therefore, the RPD, as a specialized tribunal and decision-maker, is in a better position to determine these issues; and it is not up to the Court to intervene in these circumstances.

#### VIII. Analysis

[17] It is well established that credibility findings demand a high level of judicial deference and should only be overturned in the clearest of cases (*Khan v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1330, at para 30).

[18] The Court should not substitute its opinion for that of the decision-maker unless it finds that the decision was based on erroneous findings of fact made in a perverse or capricious manner or without regard for the material before it (*Bobic v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1488, at para 30).

[19] In this case, it was up to the RPD, as a specialized tribunal, to assess the applicant's credibility and evidence and the explanations provided by the applicant with respect to the implausibilities, omissions and contradictions that appear in the evidence. It was also up to the RPD to draw negative inferences with respect to the contradictions between the PIF and the testimony.

[20] The Court finds that the RPD's reasons are sufficient to allow the Court to understand the reasoning that led to its decision as to the applicant's credibility. While the decision is relatively brief, it clearly describes the applicant's responses at the hearing and the specific factors that led to its negative finding that the applicant was not credible.

[21] The RPD did not consider to be satisfactory the reasons given by the applicant to explain why he was targeted by criminal gangs, or his explanations of the inconsistencies in his complaint to the police (i.e. the addition of a new fact central to the claim and the contradictions in his testimony). This Court confirmed at several occasions that the contradictions and omissions with respect to the central elements in a PIF may affect the credibility of a party or all of a testimony. The Court considers that the analysis was not unreasonable. It was clear and unequivocal, given the evidence on the record.

[22] On the applicant's spontaneity, the Court felt that the RPD also drew reasonable negative findings as to the applicant's credibility. In his testimony, the applicant was very late in mentioning his problems with the Los 28 and Los Destruedores gangs. The RPD asked him several times why he could not return to Lima, Peru, and each time he declared that he could not return for economic reasons; specifically a lack of work (transcripts at pp 24, 26 and 27). The applicant also explained that he could also not return to Cusco, Peru, because there were [TRANSLATION] "many guerrillas" (transcripts at p 25), or to Chiclayo, Peru, because there would be no [TRANSLATION] "friendship there" (transcripts at p 26). It was only after his counsel asked him to speak more specifically about his problems in Lima that the applicant mentioned the criminal gangs (transcripts at p 28). The Court considered that the applicant's lack of spontaneity seriously affects his credibility.



[23] Although the Court feels that the RPD may have conducted a very detailed analysis of the applicant's testimony regarding the signature of her statement to the police (Decision at para 13 and 14), the Court does not consider that it is a sufficiently important reason to amend the decision. The applicant's testimony contained other contradictions, omissions and implausibilities on essential points of the refugee claim.

[24] On the whole, the Court found that the RPD's reasons were transparent, intelligible and based on the evidence in the record.

#### IX. Conclusion

[25] For all the above reasons, 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

Catherine Jones, Translator

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

**DOCKET:** IMM-810-13

**STYLE OF CAUSE:** NICANOR GUILLERMO SIVIPAUCAR AYQUIPA v  
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**APPEARANCES:**

Odette Desjardins FOR THE APPLICANT

Salima Djerroud FOR THE RESPONDENT

**AVOCATS INSCRITS AU DOSSIER :**

Odette Desjardins FOR THE APPLICANT  
Counsel  
Montréal, Quebec

William F. Pentney FOR THE RESPONDENT  
Deputy Attorney General of Canada  
Montréal, Quebec