Federal Court  Cour fédérale

Date: 20120210

Docket: IMM-5126-11

Citation: 2012 FC 200

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, February 10, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ALBERTO ABRAHAM REYES PINO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I Introduction

1. The allegation of apprehension of bias should not be invoked without serious grounds. In the case at bar, the administrative tribunal's routine interventions with these two parties do not lead to a finding of bias.

2. The presence of a witness in a manner that fully complies with the process put in place by the RPD to test unsolicited information also cannot be used to support the applicant's apprehension of bias submission.

3. A review of the case also shows that the applicant's subjective fear was analyzed in a reasonable manner.

II Judicial procedure

4. This is an application for judicial review in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), of a decision by the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB), dated June 20, 2011, that the applicant is not a Convention refugee as defined in section 96 of the IRPA or a person in need of protection under section 97 of the IRPA.

III Facts

5. The applicant, Alberto Abraham Reyes Pino, is a citizen of Cuba who was born in and spent his life in Holguin. He worked as a cultural promoter for the Ministry of Culture in Holguin.

6. Mr. Reyes Pino is alleging a fear of persecution based on his sexual orientation and his imputed political opinion.

7. He alleges that he had to, in his country, hide his homosexuality and that he was a victim of harassment from the authorities of the country. He was also purportedly required to pretend that he was a supporter of the Cuban revolution, which was against his actual beliefs.

8. In 2008, Mr. Reyes Pino met Christopher Pattichis (the witness) in Cuba. The latter apparently invited him to his wedding ceremony and, upon his arrival, made him an offer of employment.

9. Mr. Reyes Pino arrived in Canada on August 31, 2008. A conflict and altercations ensued between the applicant and the witness, who refused to continue with the steps to obtain a work permit for Mr. Reyes Pino. Consequently, the applicant filed a refugee protection claim on March 24, 2009.

IV Decision under review

10. The RPD rejected the refugee claim by finding, first, that the applicant did not have a well-founded fear of persecution in Cuba based on his homosexuality. The RPD came to this conclusion on the grounds that the applicant was a in a public service position and his supervisor knew that he was a homosexual. He had also apparently lived in a common-law relationship with a partner for close to eight years. The RPD also noted that the documentary evidence shows that homosexuality is not illegal in Cuba. Attitudes have apparently changed, even if homosexuals are purportedly still sometimes the victims of discrimination.

11. Second, the RPD found that the refugee claimant is not a political activist. The fact that he disagrees with the regime does not make him a target. In fact, despite those outside activities, he held an important position.

12. During the hearing, the witness testified on the content of his affidavit. The RPD mainly noted from the witness's testimony and affidavit that he, in verifying the educational qualifications of the refugee claimant in Cuba, apparently did not inform the Cuban authorities of his situation like the applicant claimed he did.

V Issues

13. The issues are as follows:

1) Was there a breach of the principles of natural justice?

2) Was the RPD's decision reasonable?

VI Relevant statutory provisions

14. The following provisions of the IRPA apply in this case:

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	*b*) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence

fear, unwilling to return to that country.

Person in need of protection

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,

(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

habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

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) 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

caused by the inability of that country to provide adequate health or medical care.

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

(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.

Personne à protéger

(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.

15. The following provisions of the *Refugee Protection Division Rules*, SOR/2002-228 (Rules) are relevant:

Disclosure of documents by a party

29. (1) If a party wants to use a document at a hearing, the party must provide one copy to any other party and two copies to the Division, unless these Rules require a different number of copies.

Communication de documents par une partie

29. (1) Pour utiliser un document à l'audience, la partie en transmet une copie à l'autre partie, le cas échéant, et deux copies à la Section, sauf si les présentes règles exigent un nombre différent de copies.

Disclosure of documents by the Division

(2) If the Division wants to use a document at a hearing, the Division must provide a copy to each party.

Communication de documents par la Section

(2) Pour utiliser un document à l'audience, la Section en transmet une copie aux parties.

Proof that document was provided

Preuve de transmission

(3) Together with the copies provided to the Division, the party must provide a written statement of how and when a copy was provided to any other party.	(3) En même temps qu'elle transmet les copies à la Section, la partie lui transmet également une déclaration écrite indiquant à quel moment et de quelle façon elle en a transmis une copie à l'autre partie, le cas échéant.
Time limit	Délai
(4) Documents provided under this rule must be received by the Division or a party, as the case may be, no later than	(4) Tout document transmis selon la présente règle doit être reçu par son destinataire au plus tard :
(*a*) 20 days before the hearing; or	*a*) soit vingt jours avant l'audience;
(*b*) five days before the hearing if the document is provided to respond to another document provided by a party or the Division.	*b*) soit, dans le cas où il s'agit d'un document transmis en réponse à un document reçu de l'autre partie ou de la Section, cinq jours avant l'audience.

VII Position of the parties

16. The applicant states, first, that the hearing was not conducted in accordance with the rules of natural justice and procedural fairness. First, the hearing was unduly delayed by the witness's late arrival, his questioning and the break taken during the hearing, leaving only one hour for the applicant to be heard. Second, the applicant raises an apprehension of bias by the RPD. In fact, the applicant claims that the panel and the tribunal officer prevented his counsel from cross-examining the witness, even though unsolicited information must be tested before it is deemed admissible in evidence. The RPD also apparently relied heavily on the witness's testimony, which contradicted his affidavit with respect to the fact that he admitted that he had contacted the Cuban authorities

regarding the applicant's employment history. Furthermore, in its decision, the RPD wrote that the applicant was a "Mexican" homosexual, which confirms that the RPD was negligent in processing the applicant's refugee claim.

17. The RPD also breached procedural fairness by informing the applicant of the witness's presence in 2011, when it had been informed of this in 2009. The witness is also a supporter of the regime currently in place in Cuba and is, consequently, according to the applicant, an accomplice of the his agent of persecution. For this reason, the RPD should not have allowed his testimony in the presence of the applicant. Furthermore, the testimony should not have been accepted because the witness was not subject to an obligation of confidentiality and was therefore entitled to discuss the applicant's refugee claim with anyone. This purportedly exposed the applicant to danger because, in Cuba, a refugee claim is considered an anti-revolutionary act. The RPD had the necessary latitude to make arrangements to ensure that the witness's testimony be held on a date that was different from that of the applicant's hearing.

18. The applicant submits, in the alternative, that the RPD's decision is unreasonable. First, the RPD used the witness's affidavit to find that he did not inform the Cuban authorities of the applicant's refugee claim, but that he had contacted them to verify his employment history. The applicant contends that this finding is unreasonable because the RPD knowingly refused to question the witness on this point.

19. He also claims that the implausibility findings by the RPD are without merit and do not rely on the evidence. The RPD apparently erred in its assessment of the applicant's political activities

and by finding that the applicant had lived in Cuba in a common-law relationship with a partner for eight years. Thus, the applicant would like to, in support of his claim, submit a piece of evidence that confirms that he lived with his parents, but one that was not included in the RPD record.

20. Second, the RPD erred in its assessment of the fear based on sexual orientation. The applicant claims that the RPD questioned the witness on the situation of homosexuals in Cuba, even though he was not an expert, instead of relying on the documentary evidence submitted by the applicant.

21. Third, the RPD erred by finding that the applicant was not persecuted by reason of his political opinion. The RPD apparently did not consider the fact that he had refused to perform his military service and had been arrested by police for his nocturnal political activities. Furthermore, he faces imprisonment if required to return to his country of origin because he failed to renew his resident permit abroad. If the Cuban authorities were to learn that the applicant claimed refugee protection in Canada, he would also be subject to danger. It claims that the applicant was a Cuban public servant who left Cuba under the false claim that he had to attend a wedding.

22. The respondent maintains, first, that the allegation of bias was not raised before the RPD and that the applicant is now precluded from making that argument. Furthermore, the RPD did not commit an error when it determined from the witness's affidavit that he had contacted the Cuban authorities to confirm the applicant's education level. The RPD's reasons also do not with respect to the applicant.

23. The respondent submits that the presence of the witness was permitted in the Rules, that it complies with the conditions therein and that it is not contrary to the principles of natural justice. Furthermore, the argument that the witness is apparently an accomplice of the agent of persecution cannot be accepted because the witness is a Canadian citizen at the hands of whom the applicant has never been subjected to persecution, having lived with him for close to seven months. By this very fact, the respondent argues that the witness was an interested person in the case and that the hearing was conducted in private without exposing the applicant to danger.

24. Similarly, according to the respondent, the applicant's allegations were provided *ex-post facto* because he was informed of the witness's presence at the hearing with a letter dated February 24, 2011. The applicant also maintains that the right to expedited process is not a guaranteed right.

25. Second, the applicant submits that the applicant has not established the basis for his refugee claim and that the RPD's decision is reasonable. The RPD did not rely on the witness's testimony to find that the applicant's fear is unfounded. It arrived at this conclusion because of the applicant's testimony and in light of the results of its analysis of the documentary evidence.

26. Concerning the prison sentence the applicant faces should he return to Cuba, the respondent argues that the applicant did not establish the persecutory nature of Cuban law or that he was not on a foreign mission as part of his job as a public servant when he left for Canada. Therefore, there was no requirement for the RPD to address this point.

VIII Analysis

1. Was there a breach of the principles of natural justice?

27. The standard of review for this issue is correctness (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

28. It is most important to address the apprehension of bias alleged by the applicant. The following reasoning by the Court in *Fenanir v Canada (Minister of Citizenship and Immigration)*, 2005 FC 150 applies:

> [10] The Supreme Court considered the issue of bias in *Wewaykum Indian Band v. Canada*, [2003] 2 S.C.R. 259 at paragraph 59. It stated as follows:
>
> . . . "[i]mpartiality is the fundamental qualification of a judge and the core attribute of the judiciary" (Canadian Judicial Council, *Ethical Principles for Judges* (1998), at p. 30). It is the key to our judicial process, and must be presumed. As was noted by L'Heureux-Dubé J. and McLachlin J. (as she then was) in *S. (R.D.)*, *supra*, at para. 32, the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus, while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified. (Emphasis added.)
>
> [11] De Grandpré J. also stated in *Committee for Justice and Liberty v. National Energy Board* (1978) 1 S.C.R. 369, at pages 394 and 395:
>
> . . . the apprehension of bias must be a reasonable one held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information.
>
> . . . that test is "what would a informed person, viewing the matter realistically and practically--and having thought the matter through--conclude. Would he think that it is more likely than not that [the

> decision-maker], whether consciously or unconsciously, would not decide fairly."
>
> . . .The grounds for this apprehension must, however, be substantial and I . . . [refuse] to accept the suggestion that the test be related to the "very sensitive or scrupulous conscience".

29. The Court finds that the review of the transcript does not imply that the RPD was unbiased. Counsel for the applicant had every opportunity to cross-examine the witness. The few remarks by the panel did not prevent the applicant from making his arguments. As such, the RPD interrupted the questioning to remind counsel that some of the witness's allegations, namely the conflict in Canada between the two men, were irrelevant to the refugee claim, while leaving counsel, nevertheless, to continue with her cross-examination (TR at pages 162, 163 and 167).

30. Furthermore, the RPD informed the tribunal officer that the witness was not an expert on the human rights situation in Cuba. In fact, the transcript shows that the tribunal officer questioned the witness on his perception of the rights of homosexuals in Cuba:

> [TRANSLATION]
>
> BY THE WITNESS (to the protection officer)
>
> - . . .
>
> - If you are asking me if one of my friends would have a problem with the simple fact that he is gay, that he is a homosexual, I would tell you, categorically, no.
>
> BY THE PRESIDING MEMBER (to the protection officer)
>
> - Maybe we will deal with the facts because, in fact, the man is not an expert.
>
> . . .
>
> BY THE PROTECTION OFFICER (to the presiding member)

> - . . . For me this is about the only fact in the affidavit that interests me; it is his homosexuality that which Mr. Patice being there at paragraph 41. For the rest, what happened between the two men here in Canada, I do not have any questions about that.
>
> - . . .
>
> BY THE PRESIDING MEMBER (to the protection officer)
>
> - On this fact. O.k.

(TR at pages 157-158)

31. It is also important to specify, at this stage, that the elements related to the rights of homosexuals in Cuba obtained by the protection officer were not accepted by the RPD in its decision, which relied on the documentary evidence to analyze the objective basis of the claim. Even if it could be cause for concern, upon first reading of the RPD's decision, to read that the applicant is allegedly a homosexual from "Mexico", when he is from Cuba (RPD Decision at paragraph 1), it does not appear, upon review of the decision as a whole, that it was vitiated.

32. The RPD disposed of the refugee claim fairly for the above-mentioned reasons; this error appears only once in the third line of the decision. The applicant is also not challenging the facts accurately repeated by the RPD at paragraph 2 of its decision. The Court must still comment that the RPD must ensure that this type of error is corrected as soon as possible out of respect for refugee claimants.

33. A review of the hearing transcript shows unequivocally that the applicant benefitted from a hearing conducted in all fairness.

34. Then, concerning procedural fairness and the timeline for the submission of hearing exhibits, a review of the record shows that the RPD sent an appearance notice to the witness on February 24, 2011. That same day, the RPD sent a letter to the applicant informing him of the presence of the witness at his hearing (Tribunal Record (TR) at pages 39 and 40). As a result, the applicant was given advance notice of the witness's presence at his hearing on April 7, 2011. The RPD also notified the applicant of the content of the unsolicited information received by the witness by mail on March 7, 2011 (TR at pages 64-72). This is consistent with subsection 29(4) of the Rules.

35. Furthermore, the applicant admitted at the hearing that he had received a copy of the exhibits and did not object to the fact that this information dating back to 2009 was given to him only in 2011, as is demonstrated in the following part of the transcript:

> [TRANSLATION]
>
> BY THE PRESIDING MEMBER (to the applicant)
>
> - . . .
>
> - So, now we will verify the exhibits in the record. First, on behalf of the protection officer, we have Exhibit A-1 and A-2. A-1 is the national package index on Cuba dated May 31, 2010. A-2 is immigration documentation that includes, among other things, the refugee claim forms, excerpts from his passport, and we will add, in a bundle, A-3, which was the package sent on March 7, 2011, including an affidavit and e-mail exchanges, letter exchanges with a Christopher Patice.

> . . .
>
> BY THE PRESIDING MEMBER (to counsel)
>
> - And, did you receive those documents?
>
> BY COUNSEL (to the presiding member)
>
> - Yes.

(TR at pages 146-147)

36. The Court cannot, under these circumstances, find that there was a breach of procedural fairness.

37. Moreover, the presence of the witness at the hearing was required and complies with the conditions of the *Policy on the Treatment of Unsolicited Information in the Refugee Protection Division* (Policy), which states the following:

> **3. Context**
>
> From time to time, the IRB receives unsolicited information in respect of RPD proceedings. It is important that the IRB, as an independent tribunal adjudicating the merits of a claim for refugee protection, not take on an active investigative role with respect to unsolicited information received from anonymous sources or from informants who are unwilling or unable to appear as witnesses at the hearing of the claim.
>
> However, all relevant evidence should be made available to decision-makers of the RPD. Unsolicited information may be taken into consideration in a refugee protection hearing, provided that it can adequately be tested. This policy ensures that unsolicited information received by the IRB enters the decision-making process of the RPD only if it can adequately be tested. The Refugee Protection Division's use of unsolicited information, subject to this policy, is in keeping with the concept of refugee protection determination as a process of inquiry.

> . . .
>
> **5. Policy Statement**
>
> **The Refugee Protection Division treats unsolicited information as potential evidence when**
>
> - **the information concerns an identifiable claim that has not been finalised;**
> - **the information originates from an identifiable informant; and**
> - **<u>the informant agrees to disclosure of the information and to appear as a witness if subsequently requested.</u>**
>
> [Emphasis added.]

38. Thus, unsolicited information must be tested in order to be used as evidence and testimony by the author of such evidence is a means of verification. The argument that the witness, being an accomplice of the applicant's agent of persecution, was required to testify out of the presence of the applicant is problematic. In fact, even though the applicant admits that the RPD has the latitude to adapt the hearing, he did not formulate a request to that effect. The transcript indicates that counsel asked if the applicant had to be present during the witness's testimony, to which the RPD replied in the affirmative (TR, page 149). This conduct by the RPD is not, in and of itself, problematic as the applicant did not establish that the RPD acted contrary to legislation or that the applicant was bothered by the presence of the witness. Once again, the hearing transcript shows that the applicant had ample opportunity to make his arguments. It in no way appears that he was short of time.

39. Similarly, the witness is an interested person and his presence in no way breaches the principle that claims are conducted in private (*Nechiporenko v Canada (Minister of Citizenship and Immigration)*, [1997] FCJ No 1080, [1997] FCJ No 1080).

40. For these reasons, there was no breach of the principles of natural justice.

2. Was the RPD's decision reasonable?

41. The standard of review for the administrative tribunal's findings of fact is reasonableness. This standard is concerned with transparency and intelligibility within the decision-making process and judicial deference is due (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

42. It is settled law that the expertise of an administrative tribunal confers on it the full authority to assess the testimonial evidence. Justice Yvon Pinard explained the following in *Profète v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1165:

> [11] The applicant also claimed that the panel erred in finding that his testimony had been evasive, ambiguous and not credible. This argument cannot warrant this Court's interference, since assessing testimony is at the very heart of the jurisdiction of the panel, which had the benefit of seeing and hearing the applicant. [Emphasis added.]

43. It is also open to the RPD, because of its position, to reject some of the applicant's explanations that it deems insufficient (*Sinan v Canada (Minister of Citizenship and Immigration)*, 2004 FC 87 at paragraph 10).

44. There is also a presumption that the administrative tribunal considered all of the evidence and that it is therefore not required to mention every piece of the evidence submitted (*Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598, [1993] FCJ No 598).

45. The first ground of persecution submitted by the applicant concerns his sexual orientation. The applicant is basically claiming that the panel did not accept his explanation that he lived with his parents. There is nothing unreasonable about this finding. The applicant expressly mentioned in his Personal Information Form (PIF) that he lived in a common-law relationship with a partner for close to eight years. The RPD, as it was open to do, rejected the explanation that he was nevertheless living with his parents.

46. The Court cannot substitute its reasoning for that of the RPD on this factual question that arises from the RPD's authority to assess the probative value of the testimony.

47. By this very fact, the Court cannot accept the new evidence submitted by the applicant establishing that he indeed lived with his parents. Judicial review is not a trial *de novo*, thus caution must be exercised when making a decision on the admission of new evidence. The evidence submitted by the applicant does not comply with the criteria established by this Court to admit evidence that was not submitted to the administrative tribunal. Thus, this evidence does not establish a breach of the principles of natural justice, to the contrary, it is directly connected to the basis for the decision (*McFadyen v Canada (Attorney General)*, 2005 FCA 360; *Vennat v Canada (Attorney General)*, 2006 FC 1008 at paragraphs 44 and 45).

48. The Court notes, however, that the RPD heard the applicant's explanation that he lived with his parents, but rejected it (RPD Decision at paragraph 8). That was, essentially, a credibility finding drawn in a non-arbitrary manner and the Court cannot intervene.

49. With respect to the assessment of the objective evidence regarding the situation of homosexuals in Cuba, it was not established that the RPD erred by referring explicitly to the objective evidence to find that the applicant did not face persecution (RPD Decision at paragraph 8). As explained in the decisions of this Court, the RPD is not required to mention every piece of evidence submitted by the applicant.

50. By this very fact, a review of the record shows that the applicant did not establish a connection between his personal situation and the documentary evidence submitted concerning the alleged persecution for political opinion. Given the information provided by the applicant, the RPD simply did not find it credible that he would be a visible target because he disagrees with the Cuban regime (RPD Decision at paragraph 10). The RPD was therefore entitled to reject some of the applicant's explanations. The documentary evidence cannot permit a reassessment of the applicant's subjective fear (*Alba v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1116).

51. The RPD did not issue any finding on the applicant's fear of return in connection with the violation of Cuban law during his departure. The following reasoning given in *Perez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 833, applies in this case:

> [13] The Federal Court of Appeal decision in *Valentin*, above, is directly applicable to this application. *Valentin* bars self-induced refugee status. It starts from the premise that a claimant has a valid exit visa. It then bars the claimant from overstaying the visa and relying on the self-created overstay as a ground of persecution. In this case, the Applicant held a valid exit visa. She failed to renew her permit, as she could have done. She cannot rely on self-created overstay as a ground of persecution. *Valentin* has been consistently followed in this Court where the facts are similar to those before me; see for example, *Jassi v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 356, [2010] F.C.J No. 412 (QL).

> [14] The jurisprudence is to a similar effect in the context of a s. 97 claim for protection. In *Zandi v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 411, [2004] F.C.J. No. 503 (QL), Justice Kelen considered the situation of an Iranian who defected to Canada while here for an athletic competition. In considering whether the claimant could claim protection on the basis that he would be punished for defecting on his return to Iran, Justice Kelen stated as follows:
> To paraphrase the Federal Court of Appeal in *Valentin*, *supra*, a defector cannot gain legal status in Canada under IRPA by creating a "need for protection" under section 97 of IRPA by freely, of their own accord and with no reason, making themselves liable to punishment by violating a law of general application in their home country about complying with exit visas, i.e. returning.
>
> [15] In short, the jurisprudence is clear that the Applicant, who failed to renew her valid exit visa, cannot rely on the possibility of punishment under Cuba's Criminal Code as grounds for protection under s. 96 or s. 97.
>
> [16] Moreover, it is far from clear that the Applicant will be charged and convicted under the applicable law. The documentary evidence demonstrates that the Applicant could still apply for a special re-entry permit to return to Cuba. There is no evidence that the Applicant would, with such a permit, be the subject of prosecution under Cuban laws. The documentary evidence contains not a single reference to a similarly-situated person being imprisoned pursuant to this law. On the facts before me, the allegation of imprisonment is mere speculation. There is simply insufficient evidence for me to find that the Applicant's fear of imprisonment is well-founded.

52. In this case, the applicant was not on a diplomatic mission and his trip abroad was independent of his job as a public servant in Cuba. The applicant did not submit evidence supporting his claim to the RPD and the debate focused primarily on the applicant's fear based on his sexual orientation and political opinion. The RPD therefore did not err by not addressing this point.

IX Conclusion

53. No breach of the principles of natural justice has been established. A review of the file also shows that the RPD reasonably assessed the applicant's subjective fears.

54. For all of the above-mentioned reasons, the application for judicial review is dismissed.

JUDGMENT

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

"Michel M.J. Shore"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5126-11
STYLE OF CAUSE:	ALBERTO ABRAHAM REYES PINO and MCI
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	February 9, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
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APPEARANCES:

Claudia Andrea Molina	FOR THE APPLICANT
Charles Junior Jean	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Claudia Andrea Molina Montréal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT