

Federal Court



Cour fédérale

**Date: 20180206**

**Docket: IMM-3451-17**

**Citation: 2018 FC 130**

**Toronto, Ontario, February 6, 2018**

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

**BETWEEN:**

**ESPERANZA MARIA ISABEL ALVAREZ  
MIRANDA**

**Applicant**

**and**

**THE MINISTER OF IMMIGRATION,  
REFUGEES AND CITIZENSHIP**

**Respondent**

**JUDGMENT AND REASONS**

[1] The present Application challenges the Refugee Protection Division's (RPD) decision dated July 7, 2017 in which the Applicant's claim for protection against return to Guatemala pursuant to both s. 96 and s. 97 of the *Immigration and Refugee Protection Act (IRPA)* was rejected. Counsel for the Applicant argues that the rejection of the Applicant's claim pursuant to s. 97 was delivered in serious error of law because lack of subjective fear was introduced as a

consideration in the analysis leading to the rejection. Counsel for the Applicant's argument is based in well established jurisprudence:

I note that s. 97 requires a separate analysis when the claim under s. 96 is rejected simply because a subjective fear has not been established given that such fear is not an essential element of a claim under s. 97. (*Ustaoglu v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1009, at para. 11).

[2] Counsel for the Respondent argues that by reading the RPD's decision as a whole there is no support for Counsel for the Applicant's argument.

[3] Thus, the issue for determination is whether, in reaching the s. 97 rejection, the RPD introduced subjective fear as a consideration. In my view, the issue is best addressed by following the RPD's line of reasoning disclosed not only in the substance of the decision under review, but also in the manner of the delivery of the decision. Throughout the quotations that follow, footnotes are omitted, and emphasis by underlining is added.

[4] At paragraphs 2 to 9, the RPD accepted the basic facts at the base of the Applicant's claim for protection as follows:

The story alleging the basis of the claimant's fear in Guatemala is found in her Basis of Claim Form (BoC). The following outlines her allegations.

The claimant is a 31 year old high school graduate who lived and worked in Guatemala City, the capital of Guatemala. The claimant's maternal grandfather lived in the small town of Coaltepeque in the Quetzaltenango Department, in the western highlands of Guatemala. He was a businessman, but never became involved with politics or the drug business, although invited.

He was shot at and wounded in 2008 by unknown assailants. He told the family not to come to Coaltepeque, as it was too

dangerous. His son received death threats and left Guatemala for Canada and successfully claimed protection here.

The claimant's grandfather was killed by unknown persons in 2010. The claimant's mother was warned not to attend her father's funeral or ever return to Coaltepeque, or she would be buried with him. The murder remains unresolved. The calls kept coming and were of a threatening nature.

In January 2011, while driving, the claimant, her mother, a sister and her two children were robbed at gunpoint at a traffic light. One of the thieves allegedly told the claimant's mother that they had been watching her. The claimant and other family members reported the incident to the authorities, but they warned them not to pursue this line of enquiry. The claimant's putative uncle, Pablo Miranda, who had, allegedly, been making enquiries into the death of the claimant's grandfather, was also shot and killed in Coaltepeque, in January 2011.

The claimant's mother left Guatemala in June 2011 and is now a permanent resident of Canada. The claimant remained behind to be with her two sisters in Guatemala City. She lived with her Spanish boyfriend. During July and August of that year, unknown persons threatened the claimant with rape and death, but indicated that they were somehow connected to the death of her grandfather. Out of fear for her safety, the claimant fled Guatemala for Spain in August 2011.

The claimant lived in Spain for over a year and returned to Guatemala in September 2012, and stayed at her sisters' homes. Threats continued throughout her time in Guatemala until she left for North America in March 2017. The claimant entered the United States of America (US) on a valid visitor's visa on March 1 and entered Canada at Niagara, and claimed protection at the port of entry, as an exception to the safe third country protocol, as she has her mother and brother here.

[Emphasis added]

(Decision, paras. 2 to 9)

[5] Early in the decision, as a conclusion to an evaluation under the heading “Nexus”, at paragraphs 21 and 22, the RPD made the following finding:

For these reasons, I determine that the claimant is not a Convention refugee, under section 96. In the alternative, if the claimant has a nexus to the Refugee Convention, I would find that she has not shown the requisite subjective fear, and I would dismiss her claim on that basis.

The balance of these reasons is an analysis to the claim under section 97.

[6] Thus, with respect to s. 96, the RPD properly considered the Applicant's subjective fear. Having done so, the RPD then proceeded to conduct a separate s. 97 analysis. Under the heading "Credibility, Subjective Fear, and the Claim under Section 97", at paragraph 24 the RPD addresses the Applicant's actions and her credibility:

I have found reasons to doubt the truthfulness of the claimant's allegations that she faces risk to life and other serious harm at the hands of criminals who threatened not only this claimant, but her whole family. These doubts arise from the nature or the limitation of the threats, the fact that nothing serious happened to the claimant since January 2011, the fact the claimant remained in her home most of the time over the last seven years, the claimant's staying in Guatemala for many years, the fact that the claimant left for Spain (allegedly out of fear) yet failed to claim protection in Europe, the fact that the claimant returned to Guatemala and lived in the same area (if not the same house) for another five years, and the fact that two of the claimant's sisters and their families continue to live in their same houses in Guatemala City without anything happening to them.

[Emphasis added]

[7] At paragraph 33, the RPD repeats the s. 96 evaluation and then makes the following statement:

As alluded to earlier in this decision, I have determined that the claimant is not a Convention refugee, under section 96, because there is no nexus, or, even if there is, she has failed to demonstrate the requisite subjective fear, as analyzed below. I have also determined that the claimant is not a person in need of protection

as her claim of risk to life and other serious harm, personally, is not credible in light of her egregious delay, her failure to claim in Spain for over a year, and her return to the very home and city from which she says she fled, and remaining there for another five years without incident. Furthermore, I find that the situation of this claimant is more akin to that of her sisters, who remain in Guatemala, than to that of her brother or her mother who left Guatemala in 2011 and claimed protection in Canada that year.

[8] Thus, at this stage of the s. 97 analysis, the lack of the Applicant's subjective fear was still in play, and by the words "as analysed below" further consideration of subjective fear is warranted.

[9] Moving forward in the decision-making on s. 97, under the heading "Subjective Fear", the following statement is made at paragraph 36:

The subjective fear relates to the existence of a fear of harm in the mind of the claimant. The objective basis requires there be a valid basis for the fear. Both subjective fear and an objective basis for it are crucial elements for a claim to succeed.

[10] Then at paragraph 37, the s. 96 concept of failure to claim is addressed:

Failure to see the protection of another country which is also a signatory to the Convention may be a significant factor to consider but is not in itself determinative. Voluntarily leaving a country where the claimant could safely live is another example of behaviour that can cast doubt on the claimant's subjective fear.

[11] And at paragraph 39 the Applicant's failure to claim is addressed:

It is not the delay in claiming by failing to claim in Spain and returning to Guatemala that is decisive in her claim, it is the claimant's explanation of lack thereof that is decisive.

[12] At paragraph 42, the RPD draws a connection between failure to claim and lack of subjective fear by citing a decision in which failure to claim was found to be evidence that “the subjective component had not been met”. Further, at paragraph 43, a decision is cited in which failure to claim “showed an absence of a subjective fear of persecution”.

[13] And finally, in paragraph 45 the RPD states a conclusion arising from the analysis as quoted above:

The conclusion that I have arrived at is that the claimant lacks the requisite subjective fear, and her claim fails under section 96. On this same reasoning, the delays in leaving, the failure to claim in Spain without a persuasive explanation, and her return to Guatemala, means to me that the claimant is not credible with respect to her fear of returning to Guatemala for the reasons she alleged, and her claim fails under section 97 (1) as well.

[Emphasis added]

[14] The RPD again mentions the s. 97 evaluation that subjective fear is a critical consideration of reaching a determination under s. 96. Having done so, the RPD then uses the words: “on the same reasoning...” which can fairly lead to the conclusion that subjective fear is a consideration in reaching a conclusion on the Applicant’s s. 97 claim. Indeed, the final words of the paragraph go to confirm this intention: “her claim fails under section 97(1) as well”.

[15] Arising from the RPD’s s. 97 analysis on the issue for determination, in my opinion there are three possible outcomes. First, particularly by the words used in paragraph 45, the RPD erred in law by deciding that subjective fear is required for an applicant to succeed in making a claim for protection pursuant to both s. 96 and s. 97. Or second, the constant reference to s. 96 and subjective fear in the course of the s. 97 analysis is for another purpose. Counsel for the

Respondent argues that the references to subjective fear go only to the finding of the Applicant's negative credibility, for example, with respect to her action of failure to claim. The third possible outcome is that no credible and supportable choice can be made between the first and second options because the RPD's decision is unintelligible.

[16] Despite careful consideration, because I cannot make a credible and supportable choice between the first and second outcomes, I find that the RPD's decision is unintelligible. As a result, I find that the decision under review is unreasonable.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the decision under review is set aside and the matter is referred back for redetermination by a differently constituted panel.

There is no question to certify.

“Douglas R. Campbell”

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Judge



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

**DOCKET:** IMM-3451-17

**STYLE OF CAUSE:** ESPERANZA MARIA ISABEL ALVAREZ MIRANDA  
V THE MINISTER OF IMMIGRATION, REFUGEES  
AND CITIZENSHIP

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** JANUARY 30, 2018

**JUDGMENT AND REASONS:** CAMPBELL J.

**DATED:** FEBRUARY 6, 2018

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