

Federal Court



Cour fédérale

**Date: 20211209**

**Docket: IMM-3609-21**

**Citation: 2021 FC 1392**

**Vancouver, British Columbia, December 9, 2021**

**PRESENT: Mr. Justice Diner**

**BETWEEN:**

**HELEN XIOMARA HERNANDEZ CORTEZ**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] This case concerns an application for judicial review, made pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], of a decision (the Decision) of the Refugee Appeal Division (the RAD or the member), dated May 11, 2021. In the Decision, the RAD rejected the Applicant's appeal of the Refugee Protection Division's (RPD) decision,

dated November 29, 2019, which itself rejected the claim for refugee protection on the basis that there was a viable internal flight alternative in Guatemala.

[2] For the reasons that follow, I find the Decision unreasonable and would grant the application and remit the matter to a new panel of the RAD for redetermination.

## II. Background

[3] Helen Cortez (the Applicant), a citizen of Guatemala, applied for refugee protection in Canada after having been subjected to extortion, intimidation, and threats of violence and death by two unknown individuals who demanded she provide information about wealthy clients at the bank where she worked in Pedro de Alvarado in December of 2016.

[4] After she refused and reported the demands to her manager at the bank, she continued to receive calls, informing her that they knew where she lived, that they were tracking her movements, and that they would kill her if she failed to comply with their demands.

[5] The Applicant complained to the police and the public prosecutor, who informed her they could not investigate the complaint without more evidence.

[6] The Applicant began to notice that men in a black pickup truck were following her home at lunch and after work. One night in January of 2017, the truck attempted to block her from crossing the street as she left work. She recognized the men from the days before. She drove her motorcycle home and lost sight of the truck. Late that night, men approached her home and

demanded she open the door. She and her mother were able to scare them off with their cries for help. Helen's mother collapsed that night and was brought to the hospital, where she died two months later on March 31, 2017.

[7] In May of 2017 the Applicant received another death threat on her phone. The caller informed her they knew she had denounced them to police, that she would pay, and that they knew her partner's name (José) and where he lived.

[8] The Applicant and José fled to the United States in October of 2017 before being deported back to Guatemala in December of that year.

[9] Upon their return, they settled in Nueva Concepcion, a town around three hours by car from Pedro de Alvarado. After around two months, the Applicant recognized the same two men and their black pickup truck in the municipal market. Out of fear, she and José relocated immediately to the capital, Guatemala City, where they lived without incident for several months.

[10] Seeking work and still fearing retribution, they left Guatemala in September of 2018, making their way to Mexico, before returning to the United States in January of 2019, where border agents apprehended them. José was deported back to Guatemala. The Applicant, who was pregnant at the time, was allowed to remain and she decided to seek refuge in Canada in February 2019.

[11] The Applicant remained in contact with José, who, following his return to Guatemala, settled in El Progreso, Jutiapa, around three hours from the Applicant's hometown. In August of 2019, José was found dead, having been killed by a gunshot wound to the head. The circumstances of his death remain unknown. The Applicant believes his death was retribution in connection with the extortion demands she faced in Guatemala.

[12] The RPD denied the Applicant's claim for refugee protection in a decision dated November 29, 2019. No adverse credibility findings were made, despite intervention of the Minister on the issue. Instead, the determinative issue was the availability of internal flight alternatives (IFA) in Guatemala City and Quetzaltenango.

[13] The RPD based its conclusion in part on the Applicant's failure to prove there would be a serious possibility of persecution, or that she was in danger of torture or a risk to her life in the IFAs. The RPD noted that the identity of the men the Applicant feared had not been established, nor was there evidence to establish their reach or influence, their connection to the death of José, or their ability or motivation to locate and harm her in the proposed IFAs.

### III. Decision under review

[14] On appeal, the RAD concluded that the Applicant had failed to establish that her agents of harm were members of a criminal organization, that they or any associated organization have a political connection and that the RPD correctly concluded that the determinative issue was whether the Applicant had a viable IFA.

[15] The RAD concluded that the agents of persecution did not have the means or motivation to locate the Applicant in the IFA locations and that it was not unreasonable for the Applicant to relocate. To reach this conclusion, the RAD canvassed the factual determinations of the RPD, including: that during the seven months spent in Guatemala City, the Applicant did not see or hear from her agents of harm; that the Applicant did not provide sufficient evidence to establish a link between the death of her partner and her agents of harm; and, that the Applicant had not worked for the bank for over two years, and was therefore no longer able to access information that would motivate her agents of harm to continue targeting her. The RAD agreed with these conclusions.

[16] In its own reasons, the RAD also noted that José's cause of death was unknown and, at paragraph 24 explained: "Given the lack of evidence establishing this was a murder or any connection between this death and the agents of harm, I agree that the [Applicant] had not established that her agents of harm were responsible for her partner's death".

[17] The RAD also accepted country condition evidence establishing that criminal organizations and gangs are prevalent in Guatemala, could be violent, and are heavily engaged in extortion, but stated that the same evidence indicated that criminals generally also engaged in this behaviour. The RAD found there was nothing to suggest that the agents of harm in the Applicant's case were linked to any particular organization and that she had failed to show such a gang or organization was behind the attempted extortion in her case.

[18] The RAD also acknowledged the Applicant's testimony that her agents of harm were aware that she reported the attempted extortion to the police, but nonetheless concluded that since the police refused to take a report or follow up, there was nothing to motivate the agents of harm to target the Applicant. The RAD concluded that even if a connection or link to local police were accepted, this was insufficient to establish that her agents of harm had significant influence or connections with law enforcement that would allow them to locate her in the IFA locations.

[19] Given these findings, the RAD concluded the Applicant had not established it would be unreasonable for her to relocate to the IFA locations. The RAD accordingly dismissed the Applicant's appeal and confirmed the decision of the RPD that the Applicant is neither a Convention Refugee nor a person in need of protection.

#### IV. Standard of review

[20] The parties agree that the applicable standard of review for the decision of the RAD is reasonableness.

[21] A court conducting reasonableness review scrutinizes the decision maker's decision in search of the hallmarks of reasonableness – justification, transparency and intelligibility – to determine whether it is justified in relation to the relevant factual and legal constraints that brought the decision to bear (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] at para 99). Both the outcome and the reasoning process must be reasonable and the decision as a whole must be based on an internally coherent and rational chain of analysis (*Vavilov*, at paras 83-85).

V. Analysis

[22] The Applicant argues that the Decision was unreasonable on two grounds. First, it was unreasonable for the RAD to conclude that the agents of harm were not connected to a criminal organization. Second, and relatedly, it was unreasonable for the RAD to conclude that there was a valid IFA available to the Applicant in Guatemala.

[23] By contrast, the Respondent submits that the RAD reasonably found there to be no evidence that the agents of harm were members of a gang or criminal organization, and that it was reasonable to conclude that they would not have the means or motivation to locate the Applicant in the proposed IFAs.

[24] For the reasons that follow, I would grant the application and remit the decision to the RAD for redetermination.

A. *The RAD's conclusion that the Applicant had not proven her agents of harm were connected to a criminal organization was not justified*

[25] In support of her argument that the RAD unreasonably concluded there was no evidentiary basis to support that her agents of harm were connected to a criminal organization, the Applicant submits that the RAD i) missed evidence regarding José's death; ii) misconstrued evidence about the agents' connection to the authorities; and, iii) mischaracterized and ignored country condition evidence.

(1) José's death

[26] First, the Respondent does not deny that the RAD failed to refer to José's death certificate, but submits that decision makers are not required to refer to each and every piece of evidence, citing *Florea v. Canada (MEI)*, [1993] FCJ No 598 [*Florea*], 1993 CarswellNat 3983, in support. The Respondent contends that the RAD's finding was justified and logical, since it found there was no evidence linking José's death to the agents of harm. I disagree.

[27] The problem with the RAD's reasoning regarding José's violent death is that the RAD not only failed to mention the death certificate, it did not acknowledge that José was killed by a gunshot wound to the head. Instead, as reproduced in the extract above, it found a lack of evidence establishing a murder or any connection between this death and the agents of harm.

[28] However, considering there was indeed disturbing evidence strongly suggesting José was murdered, this finding demonstrates that the RAD failed to engage with important evidence central to the claim. Here, in my view, there was no more compelling evidence in the record, of the potentially violent consequences that await the Applicant, and potentially her child, should she return. Had this central evidence of José's killing been addressed, namely the graphic evidence of his death the Applicant provided in (i) the death certificate and (ii) the Facebook media report, it may well have had an impact on the conclusion reached. After all, there was no one closer to the Applicant, who twice fled the country with her before he was killed.

[29] Summing up this error, it is not for me to reweigh the evidence regarding the killing, but only to ensure that the important evidence was considered and weighed in the outcome. The RAD must properly weigh all key evidence. Where it fails to do so, as it did in this case, the



Court may infer the evidence was ignored. As noted at paragraph 25 of *Varatharajah v. Canada (Immigration, Refugees and Citizenship)*, 2019 FC 149:

When directly relevant evidence is not considered or analyzed by a decision-maker, the door is opened to an inference that the decision-maker made an erroneous finding of fact without regard to the evidence or ignored contradictory evidence (*Cezair v Canada (Citizenship and Immigration)*, 2018 FC 886 at para 27). Of course, it is trite law that while the Board need not address all evidence, it must be alive to contradictory evidence (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8667 (FC)). Silence on evidence pointing to the opposite conclusion supports an inference that such evidence was overlooked (*Jalili v Canada (Citizenship and Immigration)*, 2018 FC 1267 at para 11).

[30] This error is sufficient on its own to send the matter back for determination. However, for the benefit of the redetermination of this claim, I will address the remaining arguments presented to the Court.

(2) Police connections and rational agents of persecution

[31] Second, the Respondent submits that it was not unreasonable, in light of the Applicant's testimony that her agents of harm had connections to local police and were aware of her complaint, for the RAD to nonetheless conclude there was insufficient evidence of an influence or connection that would permit them to locate her in the proposed IFAs. Once again I disagree.

[32] By accepting the Applicant's testimony, the RAD had no choice but to grapple with the fact that the Applicant had been the target of extortion, and that when she refused to cooperate, and reported them to the police, her extortionists revealed that they were aware of her complaint. The RAD came to its conclusion because the police and public prosecutor decided not to file any

report or take any subsequent action, from which the RAD inferred that there was no ongoing interest by the police that might motivate the Applicant's agents of harm to target her in the IFAs. This, despite the fact that it was months after the complaint that the extortionists revealed they were aware the Applicant had gone to the police. The RAD went on to draw inferences as to the ongoing motivation of the agents of harm based on their decision not to make contact with the Applicant's family and the time elapsed since the Applicant worked at the bank.

[33] There are two major problems with the RAD's logic with respect to these circumstances.

[34] First, the RAD failed to grapple with the question of how the agents of persecution learned about the police complaint, and what this might suggest with respect to their connections to organized crime and their influence and motivation to inflict retribution on the Applicant, which was of central importance to the RAD's decision. Instead, the RAD deflected any association between the alleged agents of persecution and law enforcement by finding there was insufficient evidence of any connection. While admittedly one easy way to dismiss the evidence, this approach is problematic because both the subjective and objective documentation addressed the complicity between organized crime and law enforcement in Guatemala.

[35] In short, I find it unreasonable for the Board to find that there was no evidence her agents of persecution were connected to organized crime or that they lacked influence or motivation to pursue her, when threatening behaviour in relation to the extortion increased in the immediate aftermath of the report that the Applicant made to the police and prosecutor, which the extortionists were somehow aware of. This led directly to her internal relocation (where she saw

the extortionists again), and ultimately to her flight from the country. José's sudden and violent death followed shortly after his return to Guatemala, where he had sought out seclusion on a farm. Simply chalking up the totality of these events to insufficient proof amounted to overlooking significant facts from which critical inferences could be drawn, and which needed to be meaningfully addressed in the reasons, even if the tribunal was ultimately to find they were not determinative.

[36] The second problem with the tribunal's logic is the converse of the first problem discussed in the paragraph above: rather than addressing the potential inferences raised by the evidence, the RAD drew unreasonable findings from that evidence. Specifically, the Tribunal speculated as to the rational actions of reasonable agents of persecution, an error that has been repeatedly cautioned against by this Court (*Senadheerage v. Canada (Citizenship and Immigration)*, 2020 FC 968 at para 18-19; *Soos v. Canada (Citizenship and Immigration)*, 2019 FC 455 at paras 12-14; *Builes v. Canada (Citizenship and Immigration)*, 2016 FC 215 at para 16-17).

(3) The country condition evidence

[37] Third, the Respondent answers the alleged mischaracterization and ignorance of country condition evidence with the same principle cited in *Florea*, namely that decision makers are presumed to have considered all the evidence and need not refer to every piece. The Respondent submits that the RAD explicitly acknowledged that gangs and criminal organizations engage in extortion and retribution but that it was nonetheless reasonable on the facts to conclude there was no evidence linking the Applicant's agents of persecution to organized crime.

[38] With respect to the country condition evidence that the tribunal did not address, I agree with the Respondent. It is to be presumed that the RAD took into consideration the salient facts cited by the Applicant in her written submissions detailing the wide reach of criminal organizations, their ties to law enforcement, and the pervasiveness of extortion, particularly of public sector workers in Guatemala, which are drawn from, among others, the 2020 Human Rights Watch report and the United Nations High Commissioner for Refugees Report on Guatemala.

[39] However, the issue that arises with the Decision is in relation to evidence that the RAD did address, rather than that which it did not. Specifically, the tribunal relied on a 2017 International Crisis Group report to conclude that: “While I accept that the objective evidence suggests that gangs and criminal organizations engage in extortion, there is also an indication in the objective country evidence that criminals generally also engage in this type of behavior” (Decision at paragraph 25). The problem with this statement is the report in question says nothing of the sort; rather, it states that both gang *and* non-gang related criminal organizations engage in extortion.

[40] The RAD thus relied on a mischaracterization of the country condition evidence in forming a central, albeit flawed justification, to support its conclusion that the Applicant’s agents of persecution were not necessarily connected to a criminal organization. In so doing, the Tribunal implied instead that they may have been individuals acting alone. It is unclear what conclusion the RAD would have reached had it not mischaracterized this 2017 evidence.

[41] Taken alone, such an error may not have been sufficiently serious to reverse an otherwise reasonable decision.

[42] However, when considered alongside the other errors identified above, I cannot agree with the Respondent that the RAD's decision was logical or justified with respect to whether the agents of harm were connected to a criminal organization. *Vavilov* holds that reasonable decisions must be sensitive and responsive to the perspective of and potential consequences for the affected person. The reasons must reflect the stakes (at para 133). The stakes could not be higher for this Applicant. The consequences could be life and death for her and her daughter, as they were for her partner José. The RAD's Decision comes up short in its justification, and it must therefore reconsider its conclusion on whether the agents of persecution had ties to organized crime.

B. *The RAD erred in concluding there were valid Internal Flight Alternatives*

[43] The second ground of judicial review follows from the first, since it takes issue with the finding that the agents of harm were not associated with a gang or criminal organization. The availability of IFAs within Guatemala is necessarily dependant in large part on a finding of whether the Applicant's agents of persecution are associated with a gang or criminal organization. In light of this, and considering the country condition evidence that was presented and to which I refer in paragraph 38 of these Reasons, the RAD will need to reconsider whether there are indeed IFAs for the Applicant and her daughter in Guatemala.

[44] Having found the first conclusion to be unreasonable, I have no choice but to conclude that the RAD's decision was insufficiently justified to reach a determination on the second.

VI. Conclusion

[45] For the reasons detailed above. I would grant the judicial review and remit the matter to the RAD for redetermination.

**JUDGMENT in IMM-3609-21**

**THIS COURT'S JUDGMENT is that:**

1. The application for judicial review is granted.
2. The matter is to be sent back for redetermination by a differently constituted panel.
3. There is no question for certification.

"Alan S. Diner"

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Judge

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

**DOCKET:** IMM-3609-21

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