

Federal Court



Cour fédérale

**Date: 20220719**

**Docket: IMM-6757-21**

**Citation: 2022 FC 1066**

[ENGLISH TRANSLATION]

**Ottawa, Ontario, July 19, 2022**

**PRESENT: Mr. Justice Pamel**

**BETWEEN:**

**RENATA ORTIZ ORTIZ  
DANIELA GUADALU PASILLAS ORTIZ  
EMILIANO PASILLAS ORTIZ  
SANTIAGO EMMANU PASILLAS ORTIZ**

**Applicants**

**and**

**MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Overview**

[1] The applicants, Renata Ortiz Ortiz and her three minor children, ages 12, 10, and 6, are citizens of Mexico and are seeking judicial review of an August 31, 2021, Refugee Appeal

Division [RAD] decision confirming the January 6, 2020, Refugee Protection Division [RPD] decision. In her refugee protection claim, Ms. Ortiz alleged fear of members of the Jalisco Nueva Generación cartel [CJNG] because she had twice been the target of extortion by them. The issue to be decided by the RPD and the RAD was the possibility of an internal flight alternative [IFA] in Campeche or in Merida.

[2] After conducting the two-prong analysis necessary to establish the existence of an IFA (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 [*Rasaratnam*]), the RAD found that there was a viable IFA and therefore dismissed the applicants' appeal. Having heard the parties and considered their submissions, I am of the view that the application for judicial review should be dismissed.

## II. Background

[3] Ms. Ortiz was born in Aguascalientes, Mexico, and has been a single mother since 2015. In September 2010, Ms. Ortiz began operating a supermarket with her father and sister. On December 1, 2014, three armed men entered the supermarket while her father was working there and demanded that he pay them money to continue operating the supermarket. They did not identify themselves, but they warned Ms. Ortiz's father that they would come by soon to collect the sum of five thousand pesos. On December 10, 2014, the same three men showed up again at the supermarket to collect the money. When her father refused to comply, the men threatened him with a knife and identified themselves as members of the CJNG. Ms. Ortiz's father gave them five thousand pesos from the supermarket cash register. After this incident, CJNG members showed up at the supermarket at the end of every month to collect money. In April 2017,

Ms. Ortiz and her father were no longer able to pay the monthly amount demanded by the CJNG. They therefore decided to close the supermarket, but CJNG members still continued to extort money from her father, who paid with his income as a cab driver. In January 2019, Ms. Ortiz's father could no longer afford to pay the CJNG, so he moved and operated his cab in another area. On February 4, 2019, Ms. Ortiz was stopped by an aggressive man who threatened to kill her if she did not continue to pay.

[4] On May 5, 2019, Ms. Ortiz decided to leave Mexico and flew to Canada with her children; her father was unable to board the plane because his electronic travel authorization from Canada had been cancelled. On June 15, 2019, a member of the CJNG allegedly threatened her father, who was still in Aguascalientes, to extort money from him. As a result of this incident, Ms. Ortiz's father reportedly moved to San Luis Potosí, which is just over two hours' drive from Aguascalientes. On July 4, 2019, a man showed up at the home of Ms. Ortiz's mother and asked where Ms. Ortiz was, threatening to continue looking for her until they had found her and killed her. After this incident, her mother moved to her other daughter's house, still in Aguascalientes.

[5] The RPD found that the applicants' allegations were credible and that they had demonstrated, on a balance of probabilities, that Ms. Ortiz had owned a supermarket with her father, who also held a cab licence, that they had been victims of extortion by members of the CJNG, that they had closed their business in April 2017 because they could no longer afford to pay the CJNG, that Ms. Ortiz had been threatened with extortion two years later, in February 2019, and that her mother had been visited by a CJNG member who was looking for

Ms. Ortiz. However, the RPD found that Ms. Ortiz had failed to show, on a balance of probabilities, that her father had been found and threatened by the CJNG in his cab in 2019 and that he had had to move to San Luis Potosí, because of a contradiction between Ms. Ortiz's testimony, her refugee protection claim form, and the letter submitted by her father recounting these incidents. This contradiction had an impact on the first part of the *Rasaratnam* test, namely, the serious risk of persecution in the proposed IFAs.

[6] According to the RPD, the CJNG had neither the desire nor even particular ability to track down Ms. Ortiz in the proposed IFAs. Because it gave no weight to the letter from Ms. Ortiz's father recounting the 2019 incidents, the RPD concluded that he had not been threatened or contacted by members of the CJNG. In addition, the RPD noted that Ms. Ortiz continued to work and live with her mother for three months after the February 4, 2019, incident and was never contacted again by members of the CJNG, that Ms. Ortiz's mother was not contacted after she moved in with her other daughter, and that her other daughter was never threatened by members of the CJNG. Regarding the reasonableness of the proposed IFAs, the RPD concluded that relocating the applicants to an IFA would not jeopardize their lives or safety. The RPD noted that Ms. Ortiz had not raised any other factors that would make relocation to the proposed IFAs impossible, other than the difficulty she would face in finding employment. The RPD considered her many years of work experience and her status as a single mother before concluding that it would not be unreasonable for the applicants to relocate to the proposed IFAs.

[7] The RAD denied the applicants' appeal the first time in a decision dated February 23, 2021, which judicially reviewed. The Federal Court allowed the application for judicial review

on consent and ordered that the applicants' case be sent back for reconsideration by another panel of the RAD (*Renata Ortiz Ortiz et al v Minister of Citizenship and Immigration* (May 12, 2021), Ottawa IMM-1816-21 (FC)).

[8] In its decision dated August 31, 2021, the RAD dismissed the applicants' appeal, confirming the RPD's decision. According to the applicants, the RPD had erred in its analysis by not applying the Chairperson's *Guideline 4: Women Refugee Claimants Fearing Gender-Related Persecution* [Guidelines] and by not analyzing the claim under section 96 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. According to the RAD, the applicants did not demonstrate how the RPD had failed to apply the Guidelines. The RAD also found that, in any event, Ms. Ortiz "did not declare her membership in this particular social group as a ground of persecution before the RPD, nor did she do so in her memorandum before the RAD." The RPD had therefore not been required to conduct a section 96 analysis.

[9] Next, the applicants argued that the RPD had erred in finding that the CJNG had not shown an interest in locating Ms. Ortiz because it had not threatened any family members since July 2019. The RAD was not persuaded by this argument. Like the RPD, the RAD concluded that this time period—which, as of the date of the RAD's decision, was more than two years—was long enough to demonstrate the CJNG's lack of interest in the applicants, especially since the applicants had not filed any new evidence showing that the CJNG had shown any interest in their family members still in Mexico since. Furthermore, the RAD did not believe that the CJNG would waste time and money to locate the applicants in distant cities, since the applicants had

not filed a complaint against the cartel and did not owe the cartel any significant amounts of money, and CJNG members could simply extort money from other local merchants.

[10] Regarding the reasonableness of the proposed IFAs, the RAD noted that the applicants had not specifically challenged the RPD's decision on this point in their memorandum and concluded that the RPD had not erred in its analysis.

### III. Issue and standard of review

[11] This application for judicial review raises a single issue: is the RAD's decision reasonable? Specifically, did the RAD err in its analysis of section 96 of the IRPA and the existence of an IFA?

[12] The standard of review applicable to the review of the RAD's decision is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 16–17 [*Vavilov*]). The role of the Court, therefore, is to assess whether the decision as a whole is reasonable, that is, whether the decision is based on “an internally coherent and rational chain of analysis” and whether the decision as a whole is transparent, intelligible and justified (*Vavilov* at paras 85–86).

### IV. Analysis

A. *The RAD did not err in its analysis of the grounds of persecution under section 96 of the IRPA*

[13] The applicants argue that they alleged a section 96 ground of persecution before the RPD and in their submissions to the RAD, namely fear of persecution because of Ms. Ortiz's membership in a social group as a woman, and that the RAD failed to analyze their claim in this light. They further submit that it was not their duty to identify the reasons for the persecution (*Duversin v Canada (Citizenship and Immigration)*, 2018 FC 466 at para 34 [*Duversin*]).

[14] Before the RAD, the applicants argued that the RPD had not applied the Guidelines and that this indicated that it had not analyzed the claim under section 96 of the IRPA. The RAD was not persuaded by this argument:

[23] . . . When analyzing the record as a whole, for my part, I do not see how the RPD allegedly erred on this topic. In particular, I note that, although the appellant is a woman, she did not declare her membership in this particular social group as a ground of persecution before the RPD, nor did she do so in her memorandum before the RAD.

[24] Consequently, the fact that the RPD failed to specifically analyze the refugee protection claim under section 96 of the *Immigration and Refugee Protection Act* does not constitute an error on its part, as the appellants state.

[15] Ms. Ortiz argues that the RAD should have considered the issue under section 96 simply because she is a woman and the violence she is at risk of experiencing because she is a woman is part of the facts underlying their claim, without requiring her to state that she feared persecution because of her membership in that social group. This cannot be right, and Ms. Ortiz has not provided any concrete evidence to support such a claim.

[16] In the *Duversin* decision, cited by the applicants, Justice Gagné stated that “the applicants indicated in question 2(b) of their BOC that they feared being kidnapped, raped and killed by

political adversaries, and they filed reliable documentary evidence showing that Haitian women regularly face sexual violence” (*Duversin* at para 34). For this reason, she held that the RPD was required to analyze the risk of persecution under section 96. In *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 745, the Supreme Court of Canada noted that “[i]t is for the examiner to decide whether the Convention definition is met” even if the grounds are not raised by the claimant during a hearing. However, “[t]his assessment must. . . be made on the facts as asserted by the claimants” (*Aleaf v Canada (Citizenship and Immigration)*, 2015 FC 445 at para 37).

[17] In this case, the applicants did not allege persecution on the basis of Ms. Ortiz’s sex, and the alleged facts do not show that she was targeted by members of the CJNG on the ground that she is a woman. Thus, I find that the RAD did not err in failing to conduct an analysis under section 96 of the IRPA.

B. *RAD did not err in its analysis of the IFA*

[18] To demonstrate a viable IFA, the RAD must be satisfied, on a balance of probabilities, that (1) there is no serious possibility of the claimant being persecuted in the proposed IFA; and (2) it is not unreasonable, given all the circumstances, including the circumstances particular to the applicant, for the applicant to relocate there (*Rasaratnam* at p 710).

[19] The applicants argue that since the RPD and RAD found their allegations to be credible, they are entitled to the presumption of truthfulness (*Maldonado v Minister of Employment and*



*Immigration*), [1980] 2 FC 302 (FC) at 305) and that the objective documentary evidence demonstrates the ability of the CJNG to trace them to the proposed IFAs.

[20] I disagree. First, the fact that the RAD finds the testimony of Ms. Ortiz and her family credible does not automatically mean that assumptions about future risk, for which there is no evidence, should also be found credible and taken for granted.

[21] In addition, the applicants submitted, with their affidavit filed in support of this judicial review, the Immigration and Refugee Board's Response to Information Requests dated September 8, 2021, from the National Documentation Package [NDP] dated September 29, 2021, which postdates the August 31, 2021, RAD decision. This document was added to the NDP only eight days after the RAD decision confirmed, apparently for the first time, that the CJNG is present in the two proposed IFAs.

[22] As a general rule, review of a decision on judicial review can only be conducted in light of the evidence available to the decision-maker at the time the decision was made, except (1) where the new evidence provides general background in circumstances where that information might assist in understanding the issues relevant to the judicial review but does not add new evidence on the merits; (2) where it highlights the complete absence of evidence before the administrative decision-maker on a particular finding; or (3) where it brings to the attention of the judicial review court defects that cannot be found in the evidentiary record of the administrative decision-maker (*Sharma v Canada (Attorney General)*, 2018 FCA 48 at para 8;

*Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19–20).

[23] The applicants are relying on the second exception to the general rule, namely, the complete lack of evidence on the issue of whether the CJNG is present in the proposed IFA areas. According to the applicants, this deficiency should justify setting aside the RAD's decision and referring the matter back for reconsideration in light of the more recent objective evidence regarding the presence of the CJNG in the proposed IFAs. I cannot agree with the applicants since the more recent objective evidence of the CJNG's presence in the proposed IFAs does not relate to a determinative finding of the RAD. The determinative issue for the RAD was not the CJNG's ability to pursue Ms. Ortiz, but rather its interest and motivation to do so, and at no time did the RAD reach the conclusion that the CJNG was not present in the proposed IFAs.

[24] The applicants point to the RPD's finding that there is no evidence of the CJNG being present in the proposed IFAs, and Ms. Ortiz argue that the RAD decision should be interpreted on the basis of this preliminary finding. Again, I cannot agree with the applicants. The issues before the RPD and the first panel of the RAD concerned the cartel's ability and motivation to pursue Ms. Ortiz. The second panel of the RAD did not consider the issue of the cartel's ability and thus did not address whether the CJNG was present in the proposed IFAs. Instead, it focused on the issues of the cartel's interest and motivation to pursue Ms. Ortiz in the proposed IFAs.

[25] A distinction must be made between an agent of persecution's ability to pursue its target and the agent's interest or motivation to do so (*Leon v Canada (Citizenship and Immigration)*,

2020 FC 428 at para 13 [*Leon*]). In these circumstances, I am not persuaded that the uncovering of more recent objective evidence showing the CJNG's activity in the proposed IFAs is linked to a particular finding of the RAD.

[26] In any event, this documentary evidence only establishes that the CJNG has the ability to locate individuals when it has a "very strong motivation" to do so, such as personal rivalries, political motivations, personal vengeance or alleged betrayals. In this case, the applicants failed to demonstrate that the members of the CJNG had the motivation to find them in the proposed IFAs. The absence of evidence that the agents of persecution made any effort to locate the applicants is sufficient to support a finding that the agents of persecution have no ongoing interest in pursuing them in the proposed IFAs (*Leon* at para 16; *Gonzalez Rodriguez v Canada (Citizenship and Immigration)*, 2021 FC 1013 at para 10; *Gutierrez Molina v Canada (Citizenship and Immigration)*, 2021 FC 1404 at paras 33–34). The fact that the members of the CJNG have extorted money from Ms. Ortiz and her father in the past does not demonstrate their motivation to do so in the future in other cities in Mexico. Moreover, contrary to the applicants' claims, the RAD did not speculate as to how the incidents actually unfolded. The RAD accepted Ms. Ortiz's allegations, but they were not sufficient to demonstrate the motivation of CJNG members to look for her in the proposed IFAs.

[27] The applicants argue that the RAD erred in finding that the time that had elapsed since the applicants' family members were last threatened by the CJNG was long enough to demonstrate a lack of interest on the part of the CJNG. According to the applicants, the fact that they were previously persecuted is sufficient to give reason to believe that this situation could

still exist (referring to *Natynczyk v Canada (Minister of Citizenship and Immigration)*, 2004 FC 914 at para 71). However, for the purposes of the IFA analysis, at issue is whether the agent of persecution has the motivation and the means to locate the claimant so that they claimant can establish a prospective risk, and as I have already indicated, the applicants have not established that the CJNG has the desire to locate them.

[28] Regarding the second prong of the test, the applicants argue that the RAD failed to consider the objective documentary evidence that shows the hiring discrimination women living alone face. In their view, the RAD's decision as to whether Ms. Ortiz could find employment in the proposed IFAs is unreasonable.

[29] The Minister of Citizenship and Immigration submits that the applicants did not specifically challenge the RPD's decision on this point in their memorandum to the RAD and that it cannot be a ground for intervention by the Court. In any event, I am not convinced that the RAD's decision is unreasonable. The RAD concluded that it did not see "how the RPD allegedly erred on this topic" since the applicants had not provided any evidence that it would be objectively unreasonable for them to relocate to the cities of Campeche or Merida. The RPD took into consideration the applicant's situation as a single mother before concluding that it would not be unreasonable for the applicants to relocate to the proposed IFAs. In order to determine what constitutes an unreasonable IFA, nothing less than the existence of conditions which would jeopardize the life and safety of a claimant is required (*Ranganathan v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 16789 (FCA) at para 15).

V. Conclusion

[30] In light of the above, I am not satisfied that the RAD made an error in its decision that would justify the Court's intervention. I would therefore dismiss the application for judicial review.

**JUDGMENT in IMM-6757-21**

**THIS COURT'S JUDGMENT is as follows:**

1. The application for judicial review is dismissed.
2. No issue is certified.

“Peter G. Pamel”

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Judge

Certified true translation  
Johanna Kratz

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

**DOCKET:** IMM-6757-21

**STYLE OF CAUSE:** RENATA ORTIZ ORTIZ, DANIELA GUADALU PASILLAS ORTIZ, EMILIANO PASILLAS ORTIZ, SANTIAGO EMMANU PASILLAS ORTIZ v MINISTER OF CITIZENSHIP AND IMMIGRATION

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