

Federal Court



Cour fédérale

**Date: 20221019**

**Docket: IMM-1804-20**

**Citation: 2022 FC 1429**

**Ottawa, Ontario, October 19, 2022**

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

**BETWEEN:**

**ILIA ALBERTO LEMUS OLIVA  
FATIMA PAMELA LEMUS RODRIGUEZ  
KATHERINE STEPHANIE LEMUS RODRIGUEZ  
ALBERTO ALEXANDER LEMUS  
RODRIGUEZ**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Nature of the Matter**

[1] Ilia Alberto Lemus Oliva [Principal Applicant or PA] seeks judicial review of the Refugee Appeal Division's [RAD] February 6, 2020 decision wherein the RAD agreed with the

Refugee Protection Division [RPD] that the applicants are neither Convention refugees nor persons in need of protection [Decision]. The determinative issue for the RAD was credibility.

[2] The application for judicial review is allowed.

## II. Background

[3] The PA and his three adult children [collectively, the Applicants] are citizens of El Salvador. The Applicants received Canadian visitor visas in March 2016. On April 23, 2016, they came to Canada and submitted refugee claims. The Applicants claim to fear various gangs in El Salvador, including the Apopas Locos Salvatruchos and the Mara Salvatrucha.

[4] The PA and his oldest daughter owned a funeral parlour in a town outside San Salvador. The Applicants all contributed to the operation of the business. In November 2015, the PA went to San Salvador to collect a payment from one of his clients, Mrs. Diaz. Some gang members approached the PA and asked him why he was there. They took the PA's business invoices and the \$35 that Mrs. Diaz gave him. They also examined his identification.

[5] Approximately one month after the PA's first interaction with the gang, the PA received a call from someone claiming to be a spokesperson for one of the gangs. Later that day, four gang members came to the PA's business and demanded monthly payments of \$500. The PA explained he could not afford that. In response, the members threatened to harm the PA and his family. The PA never paid the monthly extortion. The PA, his family and the PA's employees received phone calls from people asking for the PA and his family members.

[6] On January 9, 2016, the PA went to the police. The PA says that the police refused to help him and advised him not to file a report. The Respondent notes that the police report states that the police offered to protect the PA, but the PA refused. At this time, the PA began recording the phone calls that they were receiving.

[7] On January 21, 2016, the PA recorded a telephone call with Mrs. Diaz's sister, who notified him that Mrs. Diaz had disappeared. Mrs. Diaz's sister explained that Mrs. Diaz's nephew was involved with one of the gangs and "handed her over".

[8] The Applicants applied for and received Canadian visas on March 14, 2016, and they purchased tickets with a departure date of April 23, 2016.

[9] On April 16, 2016, two gang members abducted the PA's daughter, Fatima, as she was getting into her car. Fatima was forced at gunpoint to drive these men around and they demanded that the PA pay them \$2000. The gang members left without providing further instruction and the money was never paid.

[10] On April 17, 2016, someone left a handwritten note at the PA's business demanding \$1000. The note was signed "MS". The PA did not pay the \$1000.

[11] On April 18, 2016, the PA went to the police station and made a "denunciation". The police did not provide the PA with a copy. The police advised the Applicants to keep going to their business in order to assist the police in their investigation.

[12] On April 23, 2016, the Applicants left for Canada and applied for refugee status.

[13] The RPD denied the Applicants' refugee claim, finding that the Applicants' risk was generalized. The RPD disbelieved the Applicants because they "did not present any documentary evidence relating to [Mrs. Diaz]." The RPD also found that the Applicants' phone recordings of the threatening calls were fraudulent.

### III. The Decision

[14] The RAD refused to admit business records establishing the existence of the business relationship with Mrs. Diaz because the records did not meet the requirements of subsection 110(4) of the *Immigration and Refugee Protection Act, SC 2001, c 27 [IRPA]*. The RAD found that the business records existed before the RPD decision, were reasonably available and that it was reasonable to expect the Applicants to provide the new evidence to the RPD since their relationship with Mrs. Diaz went to the heart of their claim. The RAD also refused to admit an affidavit sworn by the Applicants' employee.

[15] Next, the RAD considered the RPD's credibility findings. The RAD agreed that the initial interaction with the gang was not credible since the Applicants failed to provide business records establishing their relationship with Mrs. Diaz. The RAD held that the police report and the transcript of the conversation between the PA and Mrs. Diaz's sister were "insufficient to redress the unsatisfactory explanation for the absence of a fundamental element of the claim".

[16] The RAD also agreed with the RPD that the PA's account of the threatening phone calls undermined the Applicants' credibility. The RAD acknowledged the PA's evidence that the gangs called the PA, his daughter or an employee twice per week and that the PA recorded the calls using an application on his phone. The RAD also noted that the PA only recorded two calls.

[17] The RAD further agreed with the RPD that the Applicants' account of gang members harassing their employees was not credible because the Applicants failed to provide affidavit evidence from their employees regarding alleged detentions, extortion, and harassment. The RAD held that the alleged experiences of employee victimization are important elements of the Applicants' claim.

[18] Lastly, the RAD disagreed with the RPD that Fatima's abduction was implausible because the Applicants failed to take certain precautions. However, the RAD disbelieved that the gang members abducted Fatima. The RAD found that, in light of months of unanswered demands, it would be "incredible" for gang members to abduct Fatima without harming her or giving her instructions about when and how to pay the \$2000. The RAD held that the "repeated absence of repercussions for failure to submit to the gangs' demands" undermined the Applicants' credibility.

#### IV. Issues and Standard of Review

[19] The sole issue in this case is whether the Decision was reasonable. The relevant sub-issues are:

1. Did the RAD fail to engage with key arguments and ignore relevant evidence without explanation?
2. Did the RAD unreasonably refuse to admit new evidence?

[20] I agree with the parties that the standard of review is reasonableness. None of the exceptions outlined in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] arise in this matter (at paras 16-17). A reasonableness review requires the Court to examine the decision for intelligibility, transparency, and justification. In conducting a reasonableness review, the reviewing court must look to both the outcome of the decision and the justification of the result (*Vavilov* at para 87). A reasonable decision must be “justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99). However, a reviewing court must refrain from reweighing and reassessing the evidence considered by the decision-maker (*Vavilov* at para 125, citing *Canada (Canadian Human Rights Commission) v Canada (AG)*, 2018 SCC 31 at para 55). If the reasons of the decision-maker allow a reviewing Court to understand why the decision was made and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law, the decision will be reasonable (*Vavilov* at paras 85-86).

V. Analysis

A. *Did the RAD fail to engage with key arguments and ignore relevant evidence without explanation?*

- (1) Applicants’ Position

[21] First, the RAD rejected the Applicants' argument that the RPD failed to consider evidence corroborating the PA's first interaction with the gang. Before the RAD, the Applicants argued that the RPD failed to mention the police report and conflated the phone call with Mrs. Diaz's sister with other recordings the RPD deemed fraudulent. The RAD did not provide any meaningful explanation for rejecting this argument.

[22] Second, the RAD ignored the Applicants' arguments about the phone call between the Applicant and that Mrs. Diaz's sister corroborated how the Applicants' troubles began. The RAD did not reference these arguments.

[23] Third, the RAD ignored evidence that may have changed its finding as to the fraudulent nature of the other phone recordings. The RPD found that these recordings were fraudulent based on the PA's Basis of Claim [BOC] form and testimony at the RPD. On appeal, the PA submitted an affidavit that clarified his technical explanation. The Applicants specifically referenced this explanation in their appeal memorandum and provided additional reasons for why the RAD should overturn the RPD's finding about the recordings. The RAD failed to engage with the PA's affidavit and the Applicants' arguments.

[24] Fourth, the Applicants argued that the RPD should not have impugned the Applicants' credibility on the basis that it was not corroborated (*Dayebga v Canada (Citizenship and Immigration)*, 2013 FC 842 at paras 27-28 [*Dayebga*]; *Ndjavera v Canada (Citizenship and Immigration)*, 2013 FC 452 at para 6). Lack of corroboration is insufficient to rebut the presumption of truthfulness (*Maldonado v Canada (Minister of Employment and Immigration)*),

[1980] 2 FC 302 at 305, [1979] FCJ No 248 (CA) [*Maldonado*]). In the present case, both Fatima and the PA testified at the RPD. The RPD did not make an adverse credibility finding based on their demeanour or any contradictions or inconsistencies. Similarly, neither the RPD nor the RAD took issue with the Applicants' BOC form. Rather, the sole reason for rejecting the Applicants' allegation about how their troubles began was because the Applicants failed to produce a specific piece of corroborating evidence (the business records).

[25] Finally, the RAD unreasonably concluded that Fatima's abduction was not credible because there was a "repeated absence of repercussions for [the Applicants'] failure to submit to the gang's wishes." The RAD ignored country condition evidence indicating that gangs are unpredictable in their responses to uncooperative victims.

(2) Respondent's Position

[26] The RAD did not ignore the police report and reasonably found that it was insufficient to establish the inception of the Applicants' alleged problems. The police report does not independently corroborate the Applicants' claim. It simply puts the PA's allegations into writing, which have not been tested, investigated, or proven. The only thing the police report independently corroborates is that the PA went to the police.

[27] The RAD referenced the transcript of the call with Mrs. Diaz's sister and the Applicants' arguments about that call. The transcript does not corroborate the original interaction with the gang, which the RAD did not believe. Similarly, the transcript does not corroborate the interaction with Mrs. Diaz on the day the gang allegedly robbed the PA, whether the origin of the



threats share a common ground, or why the threats continued based on the alleged originating incident. The RAD disagreed with the Applicants' argument that the transcript was entitled to more weight. The Court cannot intervene on this basis.

[28] The RAD addressed the Applicants' arguments that the RPD misapprehended the evidence about the recorded phone calls. The RAD analyzed these submissions, noting that the Applicants only tendered two threatening calls despite allegedly receiving two calls per week.

[29] Contrary to the Applicants' submissions, the RAD did not dismiss the appeal based on a lack of corroborating evidence alone. Rather, the RAD agreed with the RPD's adverse credibility findings based on various inconsistencies and omissions. The *Maldonado* principle is a rebuttable presumption. When applied in this case, there were reasons to doubt the truthfulness of the Applicants. The RAD reasonably drew a negative inference because the Applicants failed to provide corroborating evidence about Mrs. Diaz's relationship with the PA, the employees' alleged harassment, and recordings of other threatening phone calls. Furthermore, the evidence that the Applicants produced did not actually corroborate the alleged facts. Evidence that is proffered for the purpose of corroboration does not make an unbelievable story true (*Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at para 22, *Alvarez v Canada (Citizenship and Immigration)*, 2012 FC 703 at paras 9-11; *Hou v Canada (Citizenship and Immigration)*, 2012 FC 993 at para 32).

[30] It was open to the RAD to find that Fatima's account was incredible given that the Applicants had not cooperated with the gang members.

[31] Finally, the Applicants have not challenged the RAD's negative credibility findings pertaining to: (1) the lack of evidence from the Applicants' employees; (2) the implausibility of Fatima's abduction; (3) the onset of the gangs' interest in the PA; and (4) the fact that the gangs never pursued the PA or his business before. The Court must accept these findings as reasonable. These findings would fully support the Decision even if this Court agrees with the Applicants that other adverse credibility findings were unreasonable.

(3) Conclusion

[32] I am persuaded by the Applicants' submissions that the RPD failed to grapple with the police report and the transcript. These arguments are central because they could potentially substantiate the initial interaction with the gang, which the RAD found incredible due to lack of corroborating evidence.

[33] The relationship between the police report, the transcript, and the business records is evident from the RAD's analysis. The RAD was unsatisfied with the PA's explanation that he got "hold of whatever receipts he could when they left" given that the Applicants had more than one year to prepare for the hearing, the documents in question were available, and the Applicants provided similar documents to prove they operate their business. The RAD then stated:

[17] Additional evidence submitted in the form of a police report and the transcript of a conversation with Mrs. Diaz's sister are insufficient to redress the unsatisfactory explanation for the absence of a fundamental element of the claim [(the business records)]. Furthermore, the RPD's qualms about the submitted audio recordings correctly explain the reason for its low evidentiary value and therefore, its sufficiency in proving the initial contact with the gang occurred.

[18] The RPD's conclusion that documentary evidence relating to Mrs. Diaz was not presented undermines [the PA's] credibility is correct.

[Emphasis added.]

[34] I agree with the Respondent that it is not this Court's role to reweigh the evidence (*Vavilov* at para 125). However, for a decision to be reasonable, a decision-maker must explain why they reached their conclusion (*Vavilov* at para 86). The RAD's conclusion that the police report is no substitute for the business records is not justified. Based on the RAD's reasons, this Court is unable to comprehend why the police report does not corroborate the Applicants' claims.

[35] The RAD attempts to justify its finding about the phone transcript by pointing to the RPD's "qualms" about other recordings. I agree with the Applicants that the RAD's analysis on this point is unreasonable because the RAD failed to consider the Applicants' argument that the call with Mrs. Diaz can be distinguished from the other calls that the RPD found to be fraudulent. The RAD makes no mention of this submission, raising the question of whether the RAD considered the Applicants' appeal submissions at all (*Vavilov* at paras 127-28).

[36] The Respondent submits that the RAD's treatment of the police report was reasonable because the police report does not establish that the events actually occurred. Likewise, the Respondent states that the RAD's treatment of the transcript was reasonable because the transcript does not corroborate the original interaction with the gang, the interaction with Mrs. Diaz on the day the gang allegedly robbed the PA, whether the origin of the threats share a common ground, or why the threats continued based on the alleged originating incident.

[37] In my view, the Respondent is inviting this Court to buttress the RAD's decision with reasons that the RAD never provided. Even if the outcome of a decision could be reasonable under other circumstances, this Court cannot disregard the fact that the RAD failed to justify its conclusion regarding the police report or respond to the Applicants' submissions (*Vavilov* at para 86).

[38] These errors are sufficiently significant to render the Decision unreasonable. The RAD's errors are not peripheral to the merits of the decision. Rather, they go to the core issue of the initial interaction between the PA and the gang (*Vavilov* at para 100).

B. *Did the RAD unreasonably refuse to admit new evidence?*

(1) Applicants' Position

[39] In his affidavit before the RAD, the PA explained that he did not think the business records were necessary because he submitted the transcript of the telephone conversation with Mrs. Diaz's sister and the police report. The Applicant could not anticipate that the RPD would ignore his best evidence about Mrs. Diaz and fixate on the evidence he did not provide. Had the RAD admitted the business records, it could have convened the requested oral hearing to consider the impact of the new evidence on the Applicants' overall credibility.

(2) Respondent's Position

[40] The evidence in question arose and was reasonably available prior to the RPD's decision. It would have been reasonable to expect the Applicants to submit the business records to the

RPD because the Applicants were represented by counsel, the PA provided business records involving other clients, the business continued to operate after the Applicants arrived in Canada, and the PA's relationship with Mrs. Diaz went to the core of the Applicants' claim. The RAD did consider the PA's explanation but reasonably found it unpersuasive.

(3) Conclusion

[41] In my view, the RAD reasonably refused to admit the business records. The RAD's decisions concerning admissibility of evidence demand deference from this Court (*Khan v Canada (Citizenship and Immigration)*, 2020 FC 438 at para 32 [*Khan*]). Subsection 110(4) of the *IRPA* states that, in an appeal to the RAD, an appellant "may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection."

[42] The RAD must also ensure that the implied conditions of admissibility are fulfilled, including credibility, relevance, newness, and materiality (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at paras 34-38 [*Singh*]; *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 13 [*Raza*]). The RAD noted this requirement and took issue with the fact that the business records were not "new". At paragraph 38 of *Singh*, citing paragraph 13 of *Raza*, the Federal Court of Appeal explained that evidence is "new" if it is capable of:

- (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD; or

(b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing; or

(c) contradicting a finding of fact made by the RPD.

[43] Notably, the Applicants have not made submissions as to whether the new evidence contradicted the RPD's credibility finding about the Applicants' relationship with Mrs. Diaz. Rather, the Applicants state that the Decision was unreasonable because the RAD failed to consider the PA's evidence explaining why he did not tender the evidence before the RPD.

[44] At the RPD hearing, the RPD member asked the PA why he did not bring receipts from Mrs. Diaz. The PA explained, "[b]ecause I brought whatever receipts I could get hold of... When we left, we left almost running". The RAD considered this evidence and concluded that the PA's explanation was inadequate. The RAD noted that the PA had over one year to prepare for the hearing, the receipts were available because the PA was in contact with employees at his business, and the PA submitted similar documents. These findings were reasonable.

[45] I accept that the RAD did not specifically engage with the PA's explanation as contained in his affidavit. However, an appeal to the RAD is not a second chance to submit evidence to address weaknesses identified by the RPD (*Khan* at para 28; *Eshetie v Canada (Citizenship and Immigration)*, 2019 FC 1036 at para 33 [*Eshetie*]; *Abdullahi v Canada (Citizenship and Immigration)*, 2016 FC 260 at para 15). Applicants are expected to put their best foot forward at every stage of the refugee process (*Eshetie* at para 34).

VI. Conclusion

[46] The Decision is not justified nor responsive to the Applicants' submissions on key issues. However, the RAD did not err in refusing to admit new evidence.

[47] The parties do not submit a question for certification and I agree that none arises.

**JUDGMENT in IMM-1804-20**

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

1. The application for judicial review is allowed. The matter is remitted to a different officer for re-determination.
2. There is no question for certification.
3. There is no order as to costs.

"Paul Favel"

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Judge



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

**DOCKET:** IMM-1804-20

**STYLE OF CAUSE:** ILIA ALBERTO LEMUS OLIVA, FATIMA PAMELA LEMUS RODRIGUEZ, KATHERINE STEPHANIE LEMUS RODRIGUEZ, ALBERTO ALEXANDER LEMUS RODRIGUEZ v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** MAY 12, 2022

**JUDGMENT AND REASONS:** FAVEL J.

**DATED:** OCTOBER 19, 2022

**APPEARANCES:**

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