

Federal Court



Cour fédérale

**Date: 20210909**

**Docket: IMM-18-20**

**Citation: 2021 FC 935**

**Ottawa, Ontario, September 9, 2021**

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

**BETWEEN:**

**HELEN SORAYDA ESPANA ALVAREZ  
CAMILA GALICIA-ESPANA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] Helen Sorayda Espana Alvarez seeks judicial review of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board [IRB]. The RPD held that neither Ms. Espana Alvarez nor her minor daughter are in need of Canada's protection pursuant to s 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The RPD found

that internal flight alternatives [IFAs] were available within Guatemala, specifically in Solola City, Santa Cruz del Quiche, and Retalhuleu.

[2] The RPD rejected the claim for protection advanced on behalf of Ms. Espana Alvarez's three-year-old daughter, who is a citizen of the United States of America by birth. Her father currently lives in Los Angeles, California. At the hearing of the application for judicial review, counsel for the Applicants confirmed that this aspect of the RPD's decision is not being challenged.

[3] The RPD found that Ms. Espana Alvarez was the victim of credible threats by the Mara Salvatrucha [MS], an organized crime group that operates in Guatemala and elsewhere. The RPD relied upon the National Documentation Package [NDP] for Guatemala, in particular the Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Guatemala published by the United Nations High Commissioner for Refugees in January 2018 [UNHCR Guidelines], for its conclusions regarding the power and influence of the MS in different parts of Guatemala. However, the RPD did not address the clear statement in the UNHCR Guidelines that a viable IFA "is unlikely to be available to individuals at risk of being pursued" by non-state actors such as the MS.

[4] The RPD's conclusion that an IFA was available to Ms. Espana Alvarez within Guatemala was not reasonably supported by its analysis or the evidence adduced in this case. The application for judicial review is therefore allowed.

## II. Background

[5] Between 2015 and 2018, Ms. Espana Alvarez and her brother ran a transport business in Tiquisate, Escuintla department, Guatemala. On August 15, 2018, three armed men who identified themselves as members of the MS demanded that Ms. Espana Alvarez pay them 50,000 quetzal (approximately \$8,000). They threatened her with death if she did not pay or if she approached the police. Ms. Espana Alvarez nevertheless reported the incident to the police, but they only offered to increase patrols in her neighbourhood. The family then hired a private security guard.

[6] On August 22, 2018, a woman who identified herself as a member of the MS came to Ms. Espana Alvarez's home and threatened to kill her if the extortion payment was not made.

[7] On September 11, 2018, the private security guard hired by the family quit after someone he believed to be affiliated with the MS yelled a threat at him from the street.

[8] On September 16, 2018, Ms. Espana Alvarez and her daughter moved to an aunt's house in Villa Nueva, Guatemala district. On October 25, 2018, when Ms. Espana Alvarez was shopping for groceries in Villa Nueva, the taxi in which she was travelling was followed and shot at multiple times. Neither she nor the driver were harmed. Local police chased the assailants, but were unable to apprehend them.

[9] Ms. Espana Alvarez travelled to the United States on November 1, 2018. Her daughter did not have official Guatemalan citizenship, and was unable to leave Guatemala without her father's permission. She joined Ms. Espana Alvarez in the United States on April 24, 2019.

[10] Ms. Espana Alvarez and her daughter arrived in Canada on May 4, 2019. They sought Canada's protection immediately upon arrival.

### III. Issue

[11] The sole issue raised by this application for judicial review is whether the RPD's determination that Ms. Esapana has an IFA within Guatemala was reasonable.

### IV. Analysis

[12] The RPD's decision is subject to review by this Court against the standard of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [Vavilov] at para 10). The Court will intervene only if "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov* at para 100). These criteria are met if the reasons allow the 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 (*Vavilov* at paras 85-86, citing *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[13] The test for a viable IFA is well-established (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 707 (FCA) at paras 5-6, 9-10): first, the IRB must be satisfied on a balance of probabilities that there is no serious possibility of the claimant being persecuted in the part of the country where it finds an IFA to exist; and second, conditions in that part of the country must be such that it would not be unreasonable, in all the circumstances, for the claimant to seek refuge there. Both prongs of the test must be satisfied.

[14] The RPD found Ms. Espana Alvarez to be credible and accepted her assertion that she had been personally threatened by the MS. However, the RPD rejected the inferences that she was repeatedly targeted by the MS, or that the MS had a continuing motivation to harm her.

[15] The crux of the RPD's analysis is found in paragraph 22 of its decision:

[22] There is insufficient credible evidence before me that the alleged MS members are motivated to pursue the claimants in the IFA. In the documentary evidence and testimony before me it was established that the last apparent threat made by the agent of harm was on August 22, 2018 when a female member of MS allegedly threatened the principal claimant. Although the principal claimant alleges that the shooting that took place on October 25, 2018 in Villa Nueva was the responsibility of MS, there is insufficient credible evidence to conclude this beyond a balance of probabilities. Guatemala district, in which Villa Nueva is located, is a high crime area according to a myriad of sources in Section 7 of the NDP, NDP 7.7 is but one example. It is not unreasonable to encounter violent crime in Guatemala district, and without sufficient compelling evidence, it does not follow logically that the shooting on October 25, 2018 was linked to the extortion attempts made on August 15 and 22, 2018. During the principal claimant's testimony, she acknowledged that attacks against motorists by common criminals are frequent and recounted an incident that preceded the issue at hand wherein her sister was shot by assailants while driving a motorcycle.

[16] The RPD noted that Ms. Espana Alvarez's brothers, sister and mother continue to live in Guatemala, and there was no evidence to suggest the perpetrators of the August 2018 incidents had any ongoing interest in the family. Nor was there any evidence that the perpetrators had demonstrated an ongoing interest in Ms. Espana Alvarez since her arrival in Canada.

[17] The RPD did not question the power and influence of the MS in Guatemala. However, based on the UNHCR Guidelines, the RPD concluded that the MS is not without limits. The RPD observed that the MS has a presence in only two-thirds of the national territory, and appears to be most entrenched in Guatemala City and the surrounding urban centres of Guatemala department. Again citing the UNHCR Guidelines, the RPD found that while the power of the MS to inflict extortion operations is broad, it is nonetheless limited in regions dominated by drug trafficking cartels and informal indigenous justice systems.

[18] There are at least two aspects of the RPD's decision that warrant this Court's intervention. The first is its treatment of the shooting incident in Villa Nueva in October 2018. The second, more serious aspect, is the RPD's selective reliance on the UNHCR Guidelines.

[19] The RPD acknowledged that Villa Nueva is located in Guatemala department, where the MS is "most entrenched". There was nothing about the October 2018 shooting incident to suggest it was an attempted robbery, or that Ms. Espana Alvarez was caught in the cross-fire of a crime that had no personal connection with her. She testified before the RPD that the taxi was followed, and then shot at. When the assailants saw a nearby police vehicle, they performed a U-turn and drove away.

[20] While it was open to the RPD to find that the shooting incident could not definitively be linked to the MS or the prior extortion attempts, the RPD went further, holding that it did not “follow logically” that they could be related. Given the personal nature of the two previous threats made by the MS against Ms. Espana Alvarez, the proximity of Villa Nueva to Tiquisate, and the RPD’s acknowledgment of the MS’ power and influence throughout Guatemala department, it was unreasonable for the RPD to dismiss the relevance of the 2018 shooting incident altogether.

[21] The RPD found Ms. Espana Alvarez to be credible, and accepted that she had been personally extorted and threatened by the MS on two separate occasions. According to the UNHCR Guidelines:

Where the agents of persecution are non-State agents, consideration must be given to whether the persecutor is likely to pursue the claimant in the proposed area of relocation. Considering the small territorial size of Guatemala, and given the ability of the gangs and other organized criminal groups to operate country-wide, and indeed internationally – both independently and as part of international criminal networks, a viable IFA/IRA is unlikely to be available to individuals at risk of being pursued by such actors. It is particularly important to note the operational capacity of certain organized structures, particularly the MS and B-18 and the larger drug-trafficking structures, to carry out attacks in any part of Guatemala, irrespective of territorial control of the specific zone.

[22] The RPD accepted that Ms. Espana Alvarez had been the victim of credible threats by the MS, and relied upon the UNHCR Guidelines for its conclusions regarding the power and influence of the MS in different parts of Guatemala. The RPD could not then disregard the clear statement in the UNHCR Guidelines that a viable IFA “is unlikely to be available to individuals

at risk of being pursued” by non-state actors such as the MS. Its conclusion that the power of the MS to inflict extortion operations is broad but limited was not reasonably supported by its analysis or the evidence adduced in this case.

[23] There may be circumstances where a decision maker may reasonably infer from the passage of time that a criminal gang no longer has the means or motivation to harm a claimant (see, e.g., *Cherednyk v Canada (Citizenship and Immigration)*, 2021 FC 873 at para 28, citing *Vyshnevskyy v Canada (Citizenship and Immigration)*, 2020 FC 881 at paras 30-35). However, a decision maker should be cautious about drawing such an inference where the evidence of a criminal gang’s *modus operandi* is inconclusive, or where no significant period of time has elapsed. In *Mendoza v Canada (Citizenship and Immigration)*, 2014 FC 715, Justice Roger Hughes allowed an application for judicial review where the IRB engaged in unwarranted speculation about whether a criminal gang was “annoyed enough” by the applicants to continue to pursue them (at para 7).

[24] In this case, the RPD acknowledged the power and influence of the MS throughout Guatemala, while expressing reservations about its capacity to engage in extortion outside its usual area of operations. At the time the RPD considered Ms. Espana Alvarez’s claim in December 2019, less than two years had elapsed since she had been credibly threatened with death by the MS. In these circumstances, it was not reasonable for the RPD to draw an adverse inference from the lack of clear evidence of the MS taking active steps to harm her or her family.



V. Conclusion

[25] The application for judicial review, insofar as it concerns Helen Sorayda Espana Alvarez, is allowed and the matter is remitted to a different decision maker for redetermination in accordance with these reasons.

[26] The application for judicial review, insofar as it concerns Camila Galicia-Espana, is dismissed.

[27] None of the parties proposed that a question be certified for appeal.

**JUDGMENT**

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

1. The application for judicial review, insofar as it concerns Helen Sorayda Espana Alvarez, is allowed and the matter is remitted to a different decision maker for redetermination in accordance with these reasons.
  
2. The application for judicial review, insofar as it concerns Camila Galicia-Espana, is dismissed.

**"Simon Fothergill"**

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Judge

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

**DOCKET:** IMM-18-20

**STYLE OF CAUSE:** HELEN SORAYDA ESPANA ALVAREZ AND  
CAMILA GALICIA-ESPANA v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** BY VIDEOCONFERENCE BETWEEN CALGARY,  
ALBERTA AND OTTAWA, ONTARIO

**DATE OF HEARING:** AUGUST 30, 2021

**JUDGMENT AND REASONS:** FOTHERGILL J.

**DATED:** SEPTEMBER 9, 2021

**APPEARANCES:**

Bjorn Harsanyi, Q.C. FOR THE APPLICANTS

Meenu Ahluwalia FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Stewart Sharma Harsanyi FOR THE APPLICANTS  
Barristers and Solicitors  
Calgary, Alberta

Attorney General of Canada FOR THE RESPONDENT  
Calgary, Alberta