

Federal Court



Cour fédérale

**Date: 20190325**

**Docket: IMM-4726-18**

**Citation: 2019 FC 369**

**Ottawa, Ontario, March 25, 2019**

**PRESENT: The Honourable Madam Justice McVeigh**

**BETWEEN:**

**OSCAR ALEJANDRO DIAZ PENA  
VICTOR NATHAEL DIAZ PENA  
VIVIANA NOEMI HERNANDEZ ARAIZA  
ORLANDO MISSAEL DIAZ PENA  
OSCAR DIAZ LOPEZ  
MARTINA PENA LLAMAS  
OSCAR ARTURO DIAZ HERNANDEZ**

**Applicants**

**and**

**MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

**I. Introduction**

[1] Oscar Alejandro Diaz Pena [“the Principal Applicant”] applies for judicial review of a Refugee Appeal Division [“RAD”] decision, alongside his family members, Viviana Noemi

Hernandez Araiza [“Viviana”] (spouse of the Principal Applicant), Victor Nathael Diaz Pena and Orlando Missael Diaz Pena (brothers of the Principal Applicant), Oscar Diaz Lopez and Martina Pena Llamas (parents of the Principal Applicant), and Oscar Arturo Diaz Hernandez (son of the Principal Applicant) [collectively, “the other Applicants”].

[2] The Applicants seek judicial review of the RAD’s decision of September 4, 2018, which confirmed the finding of the Refugee Protection Division [“RPD”]. The October 23, 2017 decision of the RPD found that the Applicants have an internal flight alternative [“IFA”], and therefore are not Convention refugees or persons in need of protection.

## II. Background

[3] The Applicants are citizens of Mexico who resided in or around Manzanillo, Mexico.

[4] In Manzanillo, the Applicants operated a hardware store and a restaurant, with Victor running a veterinary clinic next door.

[5] From approximately January 2009 to early 2014, the Principal Applicant worked at Trans Kaifal, a trucking company. The Principal Applicant’s work involved administrative duties, including managing payroll and other accounting duties for the company.

[6] The Principal Applicant was directly supervised at Trans Kaifal by an individual named Isrrael Contreras Carillo [“Carillo”] who was also the owner and manager of Trans Kaifal. In the course of his duties, the Principal Applicant realized that an increasing amount of Trans Kaifal’s

money was being used for Carillo and his wife using the company's accounts to pay for personal expenses.

[7] In February of 2014, the Principal Applicant, after being confronted by an accounts manager from one of Trans Kaifal's clients about accounting irregularities at Trans Kaifal, handed in his resignation to Carillo. Carillo accepted this resignation.

[8] Later in 2014, the Principal Applicant began to hear rumours that Carillo was accusing him of fraud. The Principal Applicant called Carillo to confront him about this accusation. Eventually, Carillo told him that he believed that the Principal Applicant had stolen money from him, and used it to open the hardware store.

[9] The Principal Applicant and Carillo had no further contact until May 2016, when the Principal Applicant and his brother Orlando were served with a subpoena accusing them of embezzlement of more than 7 million pesos (roughly half a million dollars) from Trans Kaifal. They attended a meeting at the Office of the Public Prosecutor and provided a statement. Later, the Principal Applicant and his brother returned to the Office of the Public Prosecutor with two witnesses supporting their statement.

[10] The Applicants believed that the matter would be closed but the Principal Applicant received another subpoena at the beginning of January 2017. He was accused of embezzlement of more than two million pesos from the company's account and of Carillo's daughter. The Principal Applicant was summoned on February 27, 2017, to the Office of the Public Prosecutor

to respond to the charge. He was informed that the case would not go ahead and this would be communicated to Carillo and Carillo's daughter.

[11] On March 1, 2017, the Principal Applicant was allegedly kidnapped by Carillo's son. This incident is described in great detail in the BOC narrative. In summary, the Principal Applicant was threatened with death, including repeatedly having guns and knives held to his head and different parts of his body. A long wooden board was used to hit him on his buttocks, which caused significant trauma and bruising. The assault lasted for hours and there were repeated references to killing the Principal Applicant.

[12] The kidnappers eventually dropped him off at a bus station and told the Principal Applicant that if he told anyone what had happened, they would kill him.

[13] The Principal Applicant believed that the local police in Manzanillo collaborated with the perpetrators and were involved in the kidnapping. He did not report the incident to the local police because he was afraid of their involvement.

[14] The Principal Applicant and his family fled the area to Zapopan and then went to Veracruz and Mexico City for brief periods of time, before they eventually left for Canada. The other Applicants flew to Canada in May of 2017. The Principal Applicant and his wife stayed behind in Mexico until June 5, 2017, to wait until they were sure that it was safe to travel to Canada.

A. *RPD Decision*

[15] On September 13, 2017, the RPD heard the Applicants' refugee claim.

[16] The RPD first took issue that the Applicants were convention refugees as they were fleeing from an individual who was targeting them for pecuniary reasons. The RPD noted, as per this Court's holding, that a claimant's exposure of corruption or opposition to crime will not generally place him in a particular targeted social group. While the RPD acknowledged that the local police may have been involved to some extent in targeting the Principal Applicant, the RPD drew on the relevant caselaw to suggest that opposition to criminality should not be considered political opinion unless it can be seen to challenge the state apparatus. Therefore, the RPD held that the Principal Applicant is not a Convention refugee.

[17] The RPD then considered the issue of an IFA, specifically looking at whether Mexico City or Veracruz could be a possible IFA location.

[18] The RPD, while taking issue with some credibility questions, generally accepted the credibility of the Applicants' narrative. The determinative issue in front of the RPD was the question of whether there was a viable IFA, and whether or not the Applicants were therefore Convention refugees.

[19] Having considered the evidence, the RPD determined that Mexico City was a viable IFA for the following reasons:

- i. There was no serious possibility the Applicants would be persecuted on a Convention ground or subjected on a balance of probabilities to a danger of torture, risk to life, or to cruel and unusual punishment or treatment in Mexico City.
- ii. The conditions in Mexico City and the personal circumstances of the Applicants led the RPD to conclude that it was not objectively unreasonable for them to seek refuge there. Specifically, while the RPD accepted the narrative of the Principal Applicant, it was clear that they hid in other parts of Mexico for up to three months without incident, and filed a complaint with the Attorney General while in hiding. While the Principal Applicant was summoned to the Office of the Public Prosecutor, the federal authorities never prosecuted the Principal Applicant or otherwise abused their position.
- iii. The RPD found that the continuing threat posed by Carillo is speculative. The RPD noted that the Applicants referred to how Viviana's brother in law was visited by two men. They also noted that when a family member tried to tow away the Applicants' cars from where they were parked, the family member was stopped by men in a black SUV who threatened the family member. However, all of these incidents were limited to Manzanillo. As well, Viviana herself was not threatened, and there is no other mention outside of the tow truck incident to assume that there was any specific threat. Indeed, the RPD found that even the tow truck incident was possibly unrelated to the allegations at the heart of their claim. The RPD drew a negative inference from the fact that neither Carillo nor anyone with him has even approached the Principal Applicant's in-laws to try to determine his whereabouts.

- iv. While disputing whether Carillo or other agents of harm are still motivated to find the Applicants, the RPD further found that the Applicants had not established that Carillo was significantly connected to the federal police. Therefore, Carillo lacked capacity to find the Applicants in a large city hundreds of kilometers away like Mexico City. As Carillo's company has roughly 35 employees, there is no evidence to suggest that Carillo has the capacity or ability to order these employees to launch an investigation to track down and harm the Applicants, if they were in Mexico City.
- v. The RPD considered the fact that the Applicants themselves admitted that Carillo's motives are a matter of some speculation. The RPD noted the claimants were speculating that Carillo remained interested in them, particularly given that Carillo's ostensible objective had been fulfilled to the extent possible by seizing all of the Applicants' possessions remaining in Manzanillo.
- vi. Drawing on the country condition information, Mexico City is therefore a viable IFA. The RPD, therefore, found that it was unlikely that relocating to the IFA would jeopardize the life or safety of any of the Applicants. The Applicants had not demonstrated on a balance of probabilities that they would face a risk to life or a risk of cruel and unusual treatment or punishment or a danger of torture in Mexico City.

B. *RAD Decision*

[20] The Applicants did not present new evidence to the RAD under section 110(4) of the *Immigration and Refugee Protection Act, S.C. 2001, c. 27 [IRPA]*.

[21] After reciting the facts in this case, the RAD held that there is one simple ground of appeal. That is: Did the RPD panel member err in the IFA analysis?

[22] At the RAD, the Applicants argued that the RPD member erred by concluding that the agents of harm were no longer interested in harming their family. The Applicants submit that the RPD member essentially engaged in speculative reasoning, based on the evidence that the remaining family members were not asked about the Applicants' whereabouts.

[23] The RAD confirmed the RPD's finding that there was inadequate evidence to show that the agents of harm had an ongoing interest or motivation in locating the Applicants if they were to relocate to Mexico City (or to Veracruz). The RAD rejected the Applicants' arguments that the reason the agents of harm have not asked the other family members is that the immediate family has fled Mexico with the Principal Applicant, or in the alternative, that Carillo may have been tipped off that the Applicants have fled the country and is therefore not pursuing them at the moment. The RAD found that the Applicants' arguments around motivation are ultimately speculative.

[24] The RAD also considered the issue of whether the agents of persecution had the capacity to find the Applicants. In agreement with the RPD, the RAD accepted that Carillo did not have the influence of all of the police nor was there sufficient evidence to show that they had the capability of influencing all local and state officials outside of Manzanillo. To the contrary, the RPD and RAD both note that the Applicants also had influence with the police and that was a clear indication that the agents of harm do not have all of the influence of the police as alleged.



[25] The RAD further dismissed the argument that because there was a possibility that Carillo and the agents of harm could purchase personal data on the black market, that they have capacity to harm the Applicants.

[26] The RAD therefore surmised that there was no forward-looking or ongoing risk to the Applicants if they were to relocate to an IFA. The RAD found that the Applicants had not discharged the onus of establishing that the IFA was unreasonable. In fact, the RAD found that the Applicants did not bring forward any arguments as to why they could not live safely in the proposed IFA locations, or that it would be unduly harsh for them to live in Mexico City or Veracruz.

[27] On the basis of the above, the RAD confirmed the RPD's finding that the Applicants have an IFA in Mexico City or Veracruz, and are therefore not Convention refugees or persons in need of protection.

### III. Issue

[28] The only issue is whether the decision of the RAD with respect to the availability of an IFA was reasonable.

### IV. Standard of Review

[29] In *Salazar v Canada (Citizenship and Immigration)*, 2018 FC 83, Justice Kane was examining a judicial review application in respect of an applicant who was seeking review of a

decision from the RAD. In that case, at paragraph 22, Justice Kane held that questions of mixed fact and law arising from the RAD are reviewed on the reasonableness standard.

V. Analysis

A. *Whether the decision of the RAD with respect to the availability of an IFA was reasonable?*

(1) Finding is Inherently Speculative

[30] The Applicants submit that the reason that the RAD and the RPD found that the Applicants have a viable IFA is based on the fact that the persecutors were no longer interested in locating the Applicants. The Applicants argue that this finding is a reviewable error and is purely speculative.

[31] The Applicants assert that there is no basis for a lack of motivation finding. The Applicants argue that the RAD is entirely speculative as to whether the agents of harm are motivated, and err by speculating how the agents of harm would behave. The Applicants submit that they and the decision maker cannot know what is in the mind of the agents of persecution.

[32] The Applicants further argue that the IFA analysis is devoid of any relevant context and based on speculation because:

- i. The Attorney General of Mexico has not acted on the detailed complaint about the role of local police;

- ii. All of the immediate family members have fled abroad, leaving no one directly for the agents of harm to target;
- iii. The RPD and RAD accepted the narrative of the Principal Applicant, and therefore that local police were likely involved;
- iv. It is impossible to know whether the agents of persecution are in fact monitoring the homes and businesses of the Applicants without detection.
- v. It is in error to assume that the persecutor would behave in a particular way (*Gad v Canada (Citizenship and Immigration)*, 2011 FC 303 [*Gad*]).

[33] The Applicants submit that the RAD, in asserting that the persecutors no longer are motivated, are engaging in speculation. The Respondent submits, in contrast, that the Applicants are engaging in speculation by assuming that if they return to Mexico, that there is both motivation and capacity on the part of the agents to locate and harm them.

[34] To begin the analysis, then, I turn to the IFA test. The IFA test has developed in the caselaw since *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA) at 710 and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, 1993 CanLII 3011 (FCA).

[35] The IFA test requires that the Board 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 to which it finds an IFA exists.

[36] Secondly, conditions in the part of the country considered to be an IFA must be such that it would not be unreasonable, in all the circumstances, including those particular to the claimant, for him to seek refuge there. To paraphrase Chief Justice Crampton in *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 [*“Hamdan”*], as he set out the test at paragraph 10, there is a very high threshold for objective unreasonableness, and the threshold is nothing less than actual evidence and concrete evidence of conditions that would jeopardize the life and physical danger of an applicant if they relocated to the IFA. The onus is on the applicant to provide that evidence.

[37] I find that the RAD did not engage in speculation and based their decision on the evidence that was before them and the RPD. The onus is on the Applicants, and not providing concrete evidence is not a license to say that the RAD or the RPD engaged in speculation. In my view, they did not engage in speculation.

[38] I do not agree that the Applicants have established that the agents of harm possess capacity simply because there is evidence of corruption and there is the ability to purchase personal information on the black market.

[39] In fact, the RPD and RAD spend significant time canvassing how Carillo and his associates specifically lack capacity. It seems a reasonable finding that Carillo’s small business is not capable of conducting a nation-wide manhunt, even if they were able to purchase personal information from the black market.

[40] The RAD pays particular attention to the heavily localized nature of Carillo's influence. Also, it is a matter of fact that the Applicants lived without harassment for months in other parts of Mexico. Therefore, I agree in this regard that the Applicants are the party that is speculating around Carillo having capacity to hunt them down, rather than the RAD that was speculating.

[41] As well, there is no evidence to suggest that the federal police have been "bought" by Carillo. In fact, there is evidence that the Applicants themselves attempted to avail themselves of help from the federal police, but left the country shortly after. In fact, when questioned about a response to their complaint to the federal police, the Applicants admitted that they only waited 10 days before they left Mexico, despite the fact that the Applicants knew that it would take the police at least 10 days to get back to them. When asked, the Applicants did admit that they received an email response from the Mexican Federal Police, but the Principal Applicant stated that the email response came when they were applying for refugee status in Canada. Therefore, they never did respond to the Mexican Federal Police or call the phone number that they were given.

[42] I do not find that the RAD engaged in speculation that the Mexican Federal Police may be of assistance to the Applicants. The evidence is that the police responded when the complaint was made and the Applicants did not respond, or further engage the police. This self-created void of evidence cannot result in finding that the RAD was speculating that the Mexican Federal Police would assist.

[43] I agree that there is evidence of corruption in Mexico, as can be demonstrated from the country condition information. However, the country condition information also clearly demonstrates that Mexican citizens, facing extortion from private citizens/gangs, flee to safer locations in order to escape the effect of the extortion.

[44] In *Saldana v Canada (Citizenship and Immigration)*, 2008 FC 1092, Justice Dawson was considering a case where the RPD held that Mexico City was a viable IFA for a number of the applicants. In that case, the applicants submitted that they were targeted by a gang in Tlaxcala, Mexico, who believed that the applicants had significant money. One of the applicants was kidnapped by a number of men who kept him for days and told him that he had five days in which to pay them off. While it is true that in that case, the claims of the applicants were not found to be entirely credible, Justice Dawson held that Mexico City was still a viable IFA.

[45] Given the size of Mexico City, and its relatively stable condition, as per the country condition information within the record, I agree that the RAD came to a reasonable decision in finding that there is insufficient evidence to suggest that there is a lack of capacity on the part of the agents of harm if the Applicants are returned.

[46] The RAD's finding was reasonable that the agents of harm no longer had any motivation to target the Applicants. This finding was not purely speculative on the part of the RAD.

[47] Firstly, Carillo has effectively pillaged what remains of the Principal Applicant's possessions and property in Manzanillo. There appears to be little else for him to personally gain by continuing to try to target the Principal Applicant.

[48] Secondly, while it is true that the Applicants have escaped, Carillo could have easily visited the in-laws of the Applicants to get information. One would reasonably assume that would be the first step of a motivated person to get such information. Further, on review of the transcript Viviana provided conflicting evidence on this point. While she initially stated that the agents of harm "started bothering my family....they are bothering both sides of the family", Viviana almost immediately afterwards stated that her family is not in danger and there have been no threats since. Given this information, as well as the other evidence in the record, it is not speculative for the RAD to find that the agents of persecution are no longer interested in the Applicants given that they had bothered the family and now no longer do.

[49] I appreciate that the role of the RAD is not to step into the shoes of the persecutor and to speculate on their motivations (*Gad*, above). In *Gad*, Justice Harrington noted at paragraph 11 that, "It is pure speculation on the part of the PRRA officer's part that had Mr. Gad come to the attention of the authorities his family and colleagues in Egypt would have been approached in one way or another by the authorities. How are we to possibly know what is in the mind of the persecutor?"

[50] However, I agree with the Respondent that *Gad* is distinguishable as in there was clear evidence that the applicant had come to the attention of the national authorities in Egypt, which

in any case operated as a military dictatorship. In this case, the evidence put forward by the Applicants was speculative in nature and does not give rise to a finding that the agents of harm continue to seek out the Applicants outside of Manzanillo.

[51] On a final point the Applicants indicated that Veracruz was mentioned as an IFA in the decision and that was in error. The Applicants in their Memorandum of Law had not provided argument on that point other than the statement in the Applicants' Memorandum of Argument dated October 25, 2018. "The RPD did not identify Veracruz as a possible IFA in their decision" (para 29). Though the Applicants did acknowledge nothing turned on what he felt was an error.

[52] In this case, the alleged error was mentioned in the Memorandum of Argument, so I will deal with the issue briefly as it is not developed as a full argument. I do not find that it was in fact an error to mention Veracruz. A review of the transcript of the first hearing has found that both Mexico City and Veracruz were raised as possible IFA's.

[53] The onus is on the Applicants to establish an IFA was not available and in this case they did not meet that onus. As I find the RAD's holding to be reasonable, I will dismiss this application.

[54] No question was presented for certification and none arose. Therefore no question is certified.



**JUDGMENT in IMM-4726-18**

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

1. The application is dismissed;
2. No question is certified.

"Glennys L. McVeigh"

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-4726-18

**STYLE OF CAUSE:** OSCAR ALEJANDRO DIAZ PENA ET AL v THE  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** VANCOUVER, BRITISH COLUMBIA

**DATE OF HEARING:** FEBRUARY 25, 2019

**JUDGMENT AND REASONS:** MCVEIGH J.

**DATED:** MARCH 25, 2019

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