

Federal Court



Cour fédérale

Date: 20250715

Docket: IMM-9604-24

Citation: 2025 FC 1245

Toronto, Ontario, July 15, 2025

PRESENT: Mr. Justice Brouwer

BETWEEN:

**JOSE ROBERTO DELGADO CEA
AIDA MARISOL HERNANDEZ DE DELGADO
DANA FIORELLA DELGADO HERNANDEZ
ARIELLA CELESTE DELGADO HERNANDEZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicants, a family of four, are refugee claimants from El Salvador. They seek judicial review of the decision of a Member of the Refugee Appeal Division [RAD] of the Immigration and Refugee Board [IRB] dismissing their appeal and denying them protection. For

the reasons set out below I grant their application, quash the RAD's decision, and remit their appeal back to the RAD for redetermination.

I. BACKGROUND

[2] The Applicants, spouses Jose Roberto Delgado Cea and Aida Marisol Hernandez De Delgado and their minor daughters Dana Fiorella Delgado Hernandez and Ariella Celeste Delgado Hernandez, are citizens of El Salvador. Mr. Delgado was a member and active supporter of a political opposition party in El Salvador called *Alianza Republicana Nacionalista*, or *ARENA*, and managed production at a printing shop that produced promotional materials for the party.

[3] In August 2020 Mr. Delgado began receiving threatening phone calls from members of *Mara Salvatrucha*, or MS-13, a violent international criminal gang with roots in the USA. The threats escalated, and after media reports of a pact between the government of President Bukele and MS-13 as well as another criminal gang, Mr. Delgado's employer shut down the printing shop. He and Mr. Delgado believed they were being targeted because of the role they played for *ARENA*. Months after it had closed, Mr. Delgado was again threatened, this time at gunpoint, by a tattooed MS-13 member. The assailant also indirectly threatened Mr. Delgado's spouse.

[4] The Applicants filed a complaint to police about the incident and went to stay with Mr. Delgado's in-laws, also varying their work route to avoid further encounters with the gang.

[5] Meanwhile, the Bukele government passed a number of major reforms to the judicial system, which the Applicants – like many others – believed was an illegitimate attempt to secure executive control over the judiciary. The Applicants joined a march protesting the reforms and calling for protection of the rule of law. On October 2, 2021, two days after the protest, Mr. Delgado was again confronted by gun-wielding MS-13 members, this time outside of his in-laws' residence where he was staying with his family. He was violently assaulted. The attacker called him an "*Arenero* son of a bitch", referring to his *ARENA* membership, and said: "we saw you at the march." The attacker told Mr. Delgado that he knew his wife and children were inside the home, and said he was about to kill him. However, when a siren sounded unexpectedly the attacker's partner, who was waiting on a motorcycle, yelled at him and the two fled the scene. Mr. Delgado was left lying on the ground in shock.

[6] Mr. Delgado made another complaint to the police and the family returned to live at their own home. However, they began seeing strangers lingering near their home and following them when they were out. After learning that a friend and fellow government opponent who was a prominent judge had experienced harassment by police, and amid increasing reports of disappearances of government opponents, the Applicants decided to flee El Salvador. They entered the USA on December 21, 2021, as they had entry visas for that country, and crossed into Canada six days later to claim refugee protection.

[7] The Applicants' refugee claims were refused by a Member of the Refugee Protection Division [RPD] of the Immigration and Refugee Board. While the RPD accepted as facts Mr. Delgado's political profile as an *ARENA* supporter, his work as the printer of *ARENA*'s

promotional materials, the contents of the threats he received from MS-13 members and the details of the violent assault by a gun-toting member of MS-13, he rejected the claim on the basis, inter alia, that:

- The allegation that the gang was supporting or acting the Bukele government when directing threats at the Print Shop was speculative and the Member drew a negative inference against Mr. Delgado for this speculative testimony;
- The applicants' delay in departing El Salvador and failure to claim asylum in the USA "without credible excuse" were "grossly inconsistent with a subjective fear of persecution";
- The applicants were not impeded in their exercise of their political opinion and suffered no repercussions as a result of their participation from the government of El Salvador; and
- Current conditions in El Salvador – notably a "state of exception" that has resulted in a large number of arrests of gang members – make El Salvador "very different" from when the Applicants fled, and there is no objective basis for the Applicants' fear of persecution from gangs or from the Bukele government.

[8] The Applicants appealed the refusal to the IRB's Refugee Appeal Division [RAD].

II. RAD DECISION

[9] The RAD Member accepted into the record documents that had been filed with the RPD after the hearing but had not been addressed in the RPD's reasons, but upheld the RPD's refusal of the claim.

[10] The RAD Member confirmed the RPD's finding that the Applicants had "not established with sufficient evidence that threats directed at the Principal Appellant and the Principal Appellant's former boss were directed by the government of El Salvador" and deemed that "the RPD was correct in drawing an adverse inference against the Appellants for their speculative testimony."

[11] With respect to the Applicants' subjective fear, the RAD Member again provided full-throated support for the RPD's determination that the timing of the Applicants' departure from El Salvador and their failure to claim asylum in the USA before coming to Canada undermined the credibility of their claim to be afraid of persecution and mistreatment in El Salvador.

[12] The RAD Member determined further that the incidents in 2020 and 2021 did not amount to persecution, given that the telephone threats did not reference any political activities, and although the "threats" in April and October 2021 were tied to Mr. Delgado's pro-ARENA protest activity, "he was unable to identify the persons making the threats." The Member concluded:

I recognize that there are challenges in assessing on what constitutes persecution as opposed to discrimination. However, the Courts have held that what distinguishes persecution from discrimination is that the mistreatment suffered or anticipated must be serious in the sense that the persecutory mistreatment is equated with a key denial of core human rights, that is, "[s]ustained or systemic violation of basic human rights demonstrative of a failure of state protection." In the present appeal, the Appellants fear gang extortion, however, as I have found, the Principal Appellant no longer works for the print shop, as the print shop is closed. The Principal Appellant was confronted twice about his political participation, however, he has not provided sufficient, credible, and trustworthy evidence that such harassment leads to his inability to participate in El Salvador's political processes, such as to systemically deprive him any basic human rights. I find that the

Appellants have not provided sufficient evidence to establish harassment amounting to persecution.

[13] With respect to the Applicants' argument that the RPD had erred by failing to conduct a separate s. 97 analysis, the Member determined that while the RPD "could have made a clearer distinction between its sections 96 and 97 in their analysis [sic]," there was no error. The Member then proceeded to conduct its own s. 97 analysis, finding that "the Appellants may face a personal risk should they return to El Salvador, however, the harm they fear falls under the generalized risk exception."

III. ISSUES

[14] The Applicants challenge three aspects of the RAD's decision:

- A. The finding that the Applicant's allegations were largely speculative;
- B. The treatment of subjective fear; and
- C. The assessment of prospective risk as a perceived opponent of the Bukele government.

[15] It is common ground that the standard of review applicable to the RAD Member's decision is reasonableness.

[16] A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law bearing upon it (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85 [*Vavilov*]). The hallmarks of reasonableness are justification, intelligibility and transparency (*Vavilov* at paras 15, 100), and

the principle at the heart of this standard is “responsive justification” (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21, at para 10). Administrative decision makers need not respond to every argument or line of possible analysis, but the failure to meaningfully grapple with key issues or central arguments may call into question whether the decision-maker was actually alert and sensitive to the matter before it (*Vavilov* at para 128). As the Supreme Court of Canada reminded us in *Vavilov*, “Where the impact of a decision on an individual’s rights and interests is severe, the reasons provided to that individual must reflect the stakes” (*Vavilov* at para 133).

[17] The RAD’s decisions have potentially life and death consequences for the people that come before it. A final decision by the RAD rejecting a refugee claim clears the path for the person’s removal from Canada with no further statutory risk assessment if the removal takes place within 12 months (*Immigration and Refugee Protection Act*, SC 2001, c 2, s 112(2) (b.1)). The RAD must therefore render every decision it makes as if it is giving the final word on risk. The stakes are very high.

IV. ANALYSIS

A. *The RAD’s finding that the claim is speculative*

[18] The Applicants challenge the RAD’s rejection of their evidence regarding the connection between the MS-13 gang members who threatened and assaulted Mr. Delgado and the Bukele government as speculative, and its decision to apply a “negative inference” as a result. I agree that the findings are unreasonable.

[19] First, while the telephone threats alone certainly did not provide a basis for drawing a link between the MS-13 extortion threats and the government, the final incident in October 2021 arguably shed new light on the targeting of Mr. Delgado. During this incident, in which Mr. Delgado was assaulted at gunpoint by an apparent member of MS-13, his assailant denounced him as an *Arenero* who had participated in a protest against the government, and referenced the threats made six months earlier at the closed printing shop. To be sure, the assailant did not state that he was acting for the government, and as the RAD noted the objective evidence regarding an alleged pact between the government and the gangs was “mixed.” But at the very least, the RAD was obliged to acknowledge the appearance of a political motivation behind the final assault and explain how it nevertheless reached the conclusion that any link between the government and the MS-13 threats and assault was merely “speculative.”

[20] Given the evidence that was accepted by the RPD and left undisturbed by RAD, it is unclear on what basis the RAD drew a “negative inference” against the Applicants for their assertion that they believed such a link existed. While I accept the Respondent’s argument that the RAD was under no obligation to accept the Applicants’ belief as fact, the problem here is that the RAD failed to explain the basis upon which it determined that a negative inference could legitimately be drawn. I find the RAD’s reasoning to be unintelligible and unjustified. There is a break in the rational chain of analysis and the RAD’s finding is therefore unreasonable.

B. *The RAD’s findings regarding subjective fear*

[21] The RAD Member found that the Applicants’ delay in leaving El Salvador and their failure to claim asylum in the USA undermined their claim that they feared persecution. The Applicants maintain that the RAD’s findings were unreasonable, and I agree.

(1) Delay in leaving

[22] The evidence accepted by the RAD is that Mr. Delgado received multiple threats first by telephone in August and September 2020 and then in person in April 2021. The Applicant testified that his family was afraid by this point in time and had US visas in hand. However, they testified that the pandemic-related travel restrictions at that time had interfered with their ability to leave, and they did not actually flee until after Mr. Delgado was physically assaulted outside of the family residence six months later.

[23] The RAD Member accepted that there “may have been complications from the pandemic” but found that they “took no action” and the resulting delay in departing undermined their claim to subjective fear. As noted by the Applicants, in making this finding the RAD Member failed to account for the action the Applicants did take after the April 2021 threats: the undisputed evidence is that they relocated to Mr. Delgado’s in-laws’ home and varied their routines in order to avoid detection by the gang. The RAD further failed to explain what additional action it believed the Applicants reasonably could and should have taken to flee El Salvador when the borders were closed.

[24] In addition, the RAD failed to explain how it reached this conclusion in the face of the uncontradicted evidence that the culminating event that allowed the Applicants to understand the political motivation behind the threats took place six months later, in October 2021, and the Applicants departed just weeks later (*Ramirez Rodas v Canada (Citizenship and Immigration)*, 2015 FC 250, at para 31). The RAD’s reasoning on this point falls well short of the standard of responsive justification expected of it.

(2) Failure to claim in the USA

[25] The RAD also upheld the RPD's determination that the Applicants' failure to claim asylum in the USA because of their fear that the MS-13 would be able to track them down there was unreasonable and further undermined their subjective fear. Although I accept that the documentary evidence may not support a finding that the Applicants' concern about the gangs' reach in the USA was objectively well-founded, that was not the threshold to be met. The question the RAD should have been focused on, rather, is whether the Applicants' explanation for coming to Canada to seek protection rather than claiming in the USA was so unreasonable that it warranted a finding that they were not actually, subjectively, afraid of persecution in El Salvador. The RAD's finding with respect to the Applicants' failure to claim in the USA was therefore unintelligible and unjustified.

C. *The RAD's section 97 analysis*

[26] Although my finding that the RAD's s. 96 analysis was unreasonable is a sufficient basis upon which to set the whole decision aside and order a redetermination by a different panel, to avoid any confusion on redetermination I also find that the s. 97 analysis was unreasonable and must be redetermined.

[27] The Applicants submit that the RAD failed to engage in a forward-looking assessment of the risks they face in El Salvador as *ARENA* supporters and perceived opponents of the regime.

[28] Noting that the RPD had found the Applicants' allegations of being threatened with death to be credible, the Member determined that "the nature of the Appellants' risk is that of a risk to their life, and/or a risk of cruel and unusual treatment or punishment." The Member further found that "the basis of the risk relates to the Principal Appellant's boss's business interests and their opposition to the government." However, according to the Member, the Applicants had failed to establish that the phone threats were directed at Mr. Delgado rather at his boss, or that "the confrontations concerning their political involvement were directed from any government entity or from any particular gang." While the Member found that the evidence is "mixed as to the situation today in El Salvador with respect to the expression of political opinion", the RAD found that to succeed the Applicants were required to establish "with sufficient credible and trustworthy evidence as to who made the threats so as to establish that they were personally targeted, as opposed to a generalized risk." Finding that the Applicants had not met this burden, the Member determined that "the risk they face is of a generalized nature." The Member observed that the Applicants had not been contacted or threatened since they left the country in 2021 and that therefore "the number of incidents has decreased in number and severity since that time, reducing the degree of risk since October 2021."

[29] The Member concluded that "the degree of risk is low and ... this degree of risk therefore is not above that of that generally faced by other individuals in or from El Salvador. I find the Appellants' risk of harm is that of generalized risk, and not an elevated risk as required under section 97 of the IRPA."

[30] With respect, the RAD's s. 97 reasoning is internally inconsistent and frankly incoherent. The RAD accepted that Mr. Delgado was a member of *ARENA*, participated in an anti-government protest, and was "targeted" for not just his work with the printing company used by *ARENA* but also for his political activity. This targeting clearly takes the risks asserted out of the category of "generalized risk." It was open to the RAD to find the Applicants had not proved on a balance of probabilities that the MS-13 gang members who targeted Mr. Delgado were acting on instructions from the Bukele government, but this does not rationally lead to the RAD's conclusion that Mr. Delgado was therefore not personally targeted, or that the risks he and his family face in El Salvador as *ARENA* supporters are no different from what is faced by the population generally. To characterize the RAD's reasoning on this point as unreasonable is an understatement.

D. *Conclusion*

[31] The decision of the RAD dismissing the Applicants' appeal is unreasonable and must be set aside.

JUDGMENT in IMM-9604-24

THIS COURT'S JUDGMENT is that:

1. The application is granted.
2. The decision of the Refugee Appeal Division dated May 6, 2024, is set aside and the matter is returned for redetermination by a different panel in accordance with these reasons.
3. No question is general importance is certified.

"Andrew J. Brouwer"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-9604-24

STYLE OF CAUSE: JOSE ROBERTO DELGADO CEA, AIDA MARISOL
HERNANDEZ DE DELGADO, DANA FIORELLA
DELGADO HERNANDEZ, ARIELLA CELESTE
DELGADO HERNANDEZ v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

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