

Federal Court



Cour fédérale

**Date: 20231208**

**Docket: IMM-260-22**

**Citation: 2023 FC 1659**

**Toronto, Ontario, December 8, 2023**

**PRESENT: Madam Justice Go**

**BETWEEN:**

**Irene Magaly SERPA RAMOS  
Yadhira Yamile CARTAGENA SERPA  
Liam Sefano CARTAGENA SERPA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The Applicants, Irene Magaly Serpa Ramos [Irene] and her minor children Yadhira Yamile Cartagena Serpa and Liam Sefano Cartagena Serpa, are citizens of Peru. They, along with Irene's common law husband and children's father, Jhonny Carlos Cartagena Salazar [Jhonny], and their adult son, Patrick Fabian Cartagena Serpa [Patrick] filed a refugee claim

based on their fear of persecution from the Los Malditos de Huascar [LMH] gang. Jhonny was a business owner in Lima, where the whole family used to live. In their claim, the Applicants recounted a history of threats and physical violence at the hands of the LMH gang who allegedly extorted them for money from their business.

[2] The Refugee Protection Division [RPD] rejected the Applicants' refugee claim in a decision dated December 21, 2022 [Decision], finding that the Applicants were neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The determinative issue for the RPD was that the Applicants had two Internal Flight Alternatives [IFA] in Chiclayo and Arequipa.

[3] The Applicants seek judicial review of the Decision. As Jhonny and Patrick had a right of appeal, and have filed their appeals with the Refugee Appeal Division, their claims are not included in this judicial review.

[4] For the reasons set out below, I dismiss the application as I find the Decision reasonable.

## II. Issues and Standard of Review

[5] The Applicants raise several issues with respect to the Decision's reasonableness:

- a. The RPD misapplied the test in the first prong of the IFA test;
- b. The RPD erred in its finding on the Applicants' address history and SIM card purchase;

- c. The RPD erred in its finding on the LMH gang's means and motivation;
- d. The RPD committed factual errors, including a number of "typos;" and
- e. The RPD's second prong analysis of the IFAs was wrong because it failed to consider that running a business is what led to their extortion in the first place.

[6] The parties agree the standard of review in this case is reasonableness, per *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65.

[7] Reasonableness is a deferential, but robust, standard of review: *Vavilov* at paras 12-13. The reviewing court must determine whether the decision under review, including both its rationale and outcome, is transparent, intelligible and justified: *Vavilov* at para 15. 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 that constrain the decision-maker: *Vavilov* at para 85. Whether a decision is reasonable depends on the relevant administrative setting, the record before the decision-maker, and the impact of the decision on those affected by its consequences: *Vavilov* at paras 88-90, 94 and 133-135.

[8] For a decision to be unreasonable, the Applicants must establish the decision contains flaws that are sufficiently central or significant: *Vavilov* at para 100. Not all errors or concerns about a decision will warrant intervention. A reviewing court must refrain from reweighing evidence before the decision-maker, and it should not interfere with factual findings absent exceptional circumstances: *Vavilov* at para 125. Flaws or shortcomings must be more than superficial or peripheral to the merits of the decision, or a "minor misstep:" *Vavilov* at para 100.

### III. Analysis

[9] The two-pronged test for finding a viable IFA is well-established. The decision-maker 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) the conditions in the proposed IFA are such that it would not be unreasonable, in all the circumstances, for the claimant to seek refuge in the IFA: *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA) [*Rasaratnam*] at 711 and *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (C.A.), 1993 CanLII 3011 (FCA), [1994] 1 FC 589 at 592-593.

[10] I pause here to note that the Court in *Rasaratnam* developed the formulation of the IFA test in the context of determining whether the claimant was a Convention refugee, hence the reference to the “serious possibility” of persecution. At issue before me is whether in adopting this formulation with respect to a section 97 claim, the RAD erred. I will come back to this issue later in my decision.

[11] The first prong will not be met if an applicant shows that the agent of persecution would have the means and motivation to search for and locate the applicant: *Singh v Canada (Citizenship and Immigration)*, 2023 FC 996 [*Singh*] at para 8, *Adeleye v Canada (Citizenship and Immigration)*, 2022 FC 81 at para 21, and *Vartia v Canada (Citizenship and Immigration)*, 2023 FC 1426 at para 29.

[12] To refute the second prong, an applicant must show that the conditions in the IFA would jeopardize their life and safety: *Ranganathan v Canada (Minister of Citizenship and Immigration)* (C.A.), 2000 CanLII 16789 (FCA), [2001] 2 FC 164 [*Ranganathan*] at para 15.

A. *Did the RPD misapply the first prong of the IFA test?*

[13] The RPD found the Applicants were not Convention refugees after concluding that there was insufficient evidence the Applicants' resistance to the LMH gang amounted to an expression of political opinion. The RPD assessed the Applicants' risk under a section 97 analysis, and found there was no generalized risk exception, as the determinative issue was the availability of the IFAs.

[14] The RPD noted under the first prong of the IFA test, "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" [emphasis added]. In so finding, the Applicants submit the RPD erred by using a section 96 analysis, even though it should have conducted its assessment under section 97 of the *IRPA*, which the Applicants submit is a lower threshold. Under a section 97 analysis, the Applicants argue that they would have to prove a risk of mistreatment, as opposed to a serious possibility of persecution, which, they submit to have already proven through their account of the threats, harassment, and beatings from the LMH gang.

[15] The Respondent submits that the RPD's impugned wording is a "typographical error" and the Applicants have not demonstrated elsewhere in the Decision that the RPD had applied the wrong threshold.

[16] I reject the Applicants' submission. But I also disagree with the Respondent that the RPD made a typographical error. The RPD was merely applying the first prong of the IFA test as laid down by the FCA in *Rasaratnam*. I note that Justice McHaffie applied the same formulation of the first prong of the IFA test in a section 97 claim in *Singh* at para 8. Further, in *Sadiq v Canada (Citizenship and Immigration)*, 2021 FC 430 at para 40, Justice Norris observed that the first prong of the IFA test "tracks closely" to paragraph 97(1)(b)(ii) of the *IRPA*; which, among other things, requires that a person in need of protection is personally at risk in every part of the country they are removed to.

[17] I also note that, whether the Applicants' claim is assessed under section 96 or 97, the standard of proof imposed on the Applicants is one of a balance of probabilities: *Nageem v Canada (Citizenship and Immigration)* 2012 FC 867 at paras 24-27 and *El Achkar v Canada (Citizenship and Immigration)*, 2013 FC 472 at para 28.

[18] Finally, I find that the RPD made its determination under the first prong based on the lack of evidence regarding LMH gang's means to locate the Applicants in the proposed IFAs. This finding was dispositive of the first prong of the IFA test, irrespective of whether the Applicants could establish a serious possibility of persecution under section 96 or a personalized risk under

section 97. The RPD's first prong analysis would have been the same, regardless of the test applied.

[19] As such, I find no reviewable error arising from the RPD reciting the IFA test using the same wording set out in *Rasaratnam*.

B. *Did the RPD err in its finding on the Applicants' address history and SIM card purchase?*

[20] The Applicants claimed that in or around April 2019, they decided to leave for the jungle to hide with Irene's cousin, Miguel. However, shortly after, the LMH gang called and threatened Miguel for sheltering the Applicants. At the hearing, the Applicants said they could not safely relocate to either IFAs because they believed the LMH gang could locate them. They pointed to the threats posed on Miguel when they tried moving to the jungle. The Applicants alleged they were located through Jhonny's Peruvian national identity card [DNI], as he had to use it to buy a new SIM card.

[21] The RPD found that there was no evidence in the Applicants' address history in the immigration documents indicating a move to the jungle, and the Applicants could not explain this omission. Based on the Interpreter Declaration, the RPD determined it would have been reasonable to expect the jungle to be recorded in the Applicants' address history. The RPD also noted that there was no witness statement from Miguel regarding the threatening phone call.

[22] Additionally, the RPD took issue with the Applicants' allegation that Jhonny was located via his SIM card. While the RPD recognized that the DNI is used to acquire a bank account, mobile phone, or internet service, it found there was insufficient evidence that the DNI is publicly accessible. The RPD also found there was no evidence that Jhonny purchased a new SIM card and no evidence that the LMH gang tracked people through their DNIs. The RPD determined it was speculative of the Applicants to assert that the LMH gang had found them because of Jhonny's SIM card purchase.

[23] The Applicants submit the RPD erred in its finding that the absence of a jungle address hurt their credibility. The Applicants note that there was mention of them having lived in the jungle during their Port of Entry interview. The Applicants also submit that it is not very clear whether or not the RPD rejected the evidence that they moved to the jungle, but only "cast doubt," and this in itself is an error.

[24] The Applicants reiterate that they did not include their jungle address in the immigration forms because they did not complete the forms themselves and it was unclear whether they had to include the jungle address, as it was not an official address.

[25] I reject the Applicants' arguments.

[26] I agree with the Respondent that the RPD was not merely casting doubt on whether the Applicants moved to the jungle and whether the LMH gang could locate them there. Under the



heading “Credibility,” the RPD stated upfront that “there were some issues in the [Applicants’] testimony that impacted negatively on their credibility.”

[27] The RPD went on to find, explicitly, “if the [Applicants] did indeed move to the jungle as alleged, it is reasonable to expect [*sic*] to have been recorded in their address history” in light of Jhonny’s testimony that it was intended to be a permanent move. The RPD also noted that the Applicants did not submit any witness statement from Miguel, who allegedly received the call from the LMH gang, before reaching its conclusion.

[28] Read as a whole, it is clear that the RPD made a negative credibility finding with respect to these aspects of Jhonny’s testimonies. Further, I see no reviewable error arising from the RPD’s credibility finding, given the evidence, or lack thereof, before the RPD.

[29] With respect to the SIM card, the RPD found that it was speculation to suggest that the LMH gang located the Applicants through their SIM card. The RPD noted that while Jhonny may have had to present his DNI to buy a SIM card, he did not explain how that would then lead to his location or how anyone would know he bought a SIM card. This finding was, in my view, reasonable, in light of the evidence before the RPD, including the Applicants’ testimonies, and the objective country conditions evidence, which makes no mention of how the public could access individuals’ DNI.

C. *Did the RPD err in its finding on the LMH gang’s means and motivation?*

[30] The Applicants submit the RPD erred in its means and motivation finding, as it did not consider the Applicants' evidence that the LMH gang had to punish the Applicants, or else the gang would be humiliated if the Applicants successfully defy them. The Applicants also submit that mistreatment is an indication of motivation, and overlooking this is unreasonable, citing *Marimuthu v Canada (Minister of Citizenship and Immigration)*, 2022 FC 1694 [*Marimuthu*].

[31] The Applicants submit the RPD failed to consider the problem of corruption in Peru. The Applicants refer to the United States Department of State Country Report on Peru, titled "Peru 2021 Human Rights Report." The report finds prevalence in corruption among Peru's government officials and in its judiciary. The report also highlights that the government has taken steps to address, investigate, and in some instances prosecute corrupt government and high-level officials. The RPD also cited the report in its finding on Peru's law regarding freedom of movement.

[32] Last, the Applicants take issue with the RPD's finding that the LMH gang is not highly structured, which the Applicants argue should not be a prerequisite to find that the gang operates outside Lima or can enlist others to find the Applicants. The Applicants submit that "[t]he RPD should have asked if there is more than a serious possibility that the agents of persecution would locate them through [their] family members."

[33] I note the Applicants appear to be adopting the language under section 96, although they argue that the RPD ought to have applied the section 97 test under the IFA analysis. In any event, I am not persuaded by the Applicants' submissions.

[34] While the RPD did note it has not been established that the LMH gang has the means and motivation to locate the Applicants, the Decision read as a whole demonstrates that the RPD focused its analysis on the means as opposed to the gang's motivation to locate the Applicants. The Court's finding in *Marimuthu* with respect to the mistreatment of the applicant as a factor in determining the motivation of the agent of persecution is thus distinguishable.

[35] On corruption in Peru, I agree with the Respondent that the Applicants did not point to any evidence to indicate that gangs can exploit the situation of corruption in Peru to track down targets throughout the country. Further, the Applicants did not identify any references of the LMH gang in the country conditions reports with respect to corruption. Ultimately, the mere fact that corruption exists in Peru does not undermine the Decision.

[36] With respect to the RPD's finding concerning the LMH gang's lack of "ability" or means because it is not highly structured, it is helpful to set out the RPD's reasons in full:

[26] The [Applicants] have not presented sufficient evidence to establish on a balance that the [LMH gang] have the means to locate the [Applicants]. There is insufficient evidence to establish on a balance they are connected with any other criminal group or that their organization is so highly structured they would enlist the help of another group to locate the [Applicants].

[37] The use of the term "highly structured" should be read, in my view, in the context of the RPD's assessment of the means of the LMH gang to locate the Applicants in the IFAs. I do not see the use of this language to be imposing an additional test for the first prong of the IFA test.

[38] Once an IFA is identified, the Applicants bear the onus of showing that the IFA is unavailable to them. In this case, the Applicants have not pointed to any evidence to undermine the RPD's main conclusion that the LMH gang lacks the means to locate the Applicants in the IFAs.

D. *Did the RPD commit factual errors, including a number of "typos?"*

[39] The Applicants cite a number of factual errors in the Decision as indicative of its unreasonableness. The first error the Applicants point to is at para 25 of the Decision, where the RPD wrote that the Applicants had left Peru "33 months" before. The Applicants submit that they left Peru on April 27, 2022, which was under six months before the RPD hearing. They argue this implies the RPD may not have been aware of Irene's account of the LMH gang members harassing her after she returned to Lima from the jungle – during the period between Jhonny and Patrick's departure and the Applicants' own departure.

[40] The Applicants point to a second error at para 28 of the Decision, where RPD writes:

[28] I find on a balance of probabilities that anyone in the Los Malditos de Huascar gang have the means or motivation to locate the claimants in the proposed IFA cities. Accordingly, on a balance of probabilities, the claimants have not rebutted the first prong of the IFA test.

[Emphasis added]

[41] The Applicants take issue with the use of the word "anyone," arguing that had the RPD used the word "no one," "one could say the RPD meant that there was not anyone in the gang

who could find them.” However, the use of the word “anyone,” according to the Applicants, constituted a grammatical error, as well as an error in the RPD’s reasoning.

[42] I am not convinced that these “errors” have any bearing on the reasonableness of the Decision. The RPD’s Decision did not turn on when the Applicants left Peru. Rather, it rested on the RPD’s analysis of the means of the LMH gang to locate the Applicants in the proposed IFAs. As such, whether the Applicants were still facing harassment from the LMH gang in Lima after they left the jungle was not relevant to the IFA analysis. Moreover, at the time of the hearing, Jhonny and Patrick, who were part of the Applicants’ refugee claims, had left Peru 33 months before.

[43] As to the use of the word “anyone,” I am mindful of the Supreme Court of Canada’s teaching that “the written reasons given by an administrative body must not be assessed against a standard of perfection:” *Vavilov* at para 91. Irrespective of whether this is a typographical error, the paragraph read as a whole, in conjunction with the rest of the Decision, indicates the RPD was consistent in finding that the LMH gang does not have the ability to locate the Applicants in the proposed IFAs. I am not persuaded that this one error alone rendered the entire Decision unreasonable.

E. *Did the RPD fail to consider the extortion of the Applicants’ business in the second prong analysis of the IFAs?*

[44] On the second prong, the RPD found the Applicants failed to demonstrate that it would be objectively unreasonable for them to relocate in the IFAs, particularly since they have

operated a business in the past. The RPD also found that the Applicants had not demonstrated that relocating would jeopardize their life or safety.

[45] The Applicants submit that the RPD erred in failing to consider that being small business owners is what led to their troubles with the LMH gang in the first place, as they were extorted for money and punished when they could not pay. The Applicants suggest that starting another business would mean that the threat of extortion would begin again.

[46] I reject this argument. The threshold for overcoming the second prong of the IFA test is high. A claimant must show that the conditions in the IFA would jeopardize their life and safety: *Ranganathan* at para 15.

[47] In this case, the RPD already determined that there was insufficient evidence that the LMH gang could find the Applicants in the proposed IFAs. In addition, the Applicants have not provided any evidence to indicate that the mere fact of owning a business in the IFAs would jeopardize their life and safety. As such, it is not unreasonable for the RPD to conclude that the Applicants have not provided evidence that relocating to the IFAs would jeopardize their life and safety.

#### IV. Conclusion

[48] The application for judicial review is dismissed.

[49] There is no question for certification.

**JUDGMENT in IMM-260-22**

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

1. The application for judicial review is dismissed.
2. There is no question for certification.

"Avvy Yao-Yao Go"

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-260-22

**STYLE OF CAUSE:** IRENE MAGALY SERPA RAMOS, YADHIRA  
YAMILE CARTAGENA SERPA, LIAM SEFANO  
CARTAGENA SERPA v THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** NOVEMBER 21, 2023

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**DATED:** DECEMBER 8, 2023

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