

Federal Court



Cour fédérale

Date: 20241031

Docket: IMM-11675-23

Citation: 2024 FC 1740

Toronto, Ontario, October 31, 2024

PRESENT: The Honourable Mr. Justice A. Grant

BETWEEN:

MARTHA AMALIA DIAZ RIVERA

Applicant

and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. OVERVIEW

[1] For the following brief reasons, I will grant this application for judicial review.

II. BACKGROUND

A. *Facts*

[2] The Applicant – Martha Amalia Diaz Rivera – is a citizen of Colombia. She alleges a well-founded fear of persecution from the right-wing paramilitary group Aguilas Negras or Black Eagles, based on her advocacy for the LGBTQ+ community.

[3] Ms. Rivera’s older son, Nicolas Vargaz Diaz, is a gay man who fled Colombia in October 2019 due to persecution based on his sexual orientation and activism. He was granted refugee status in Canada in 2021.

[4] As a result of Mr. Diaz’s treatment, Ms. Rivera became active as an LGBTQ+ ally, joining different groups dedicated to supporting and educating the public on LGBTQ+ issues and becoming a vocal advocate for the community.

[5] On April 12, 2022, the Applicant witnessed an assault against a gay couple by two young men. She intervened and attempted to help, but the assailants shouted profanities at her and tried to hit her. She called the police and reported the incident. Although the police never came, the couple was able to flee. The attackers also fled.

[6] Five days later, the Applicant began receiving threatening phone calls from an individual who identified himself as a member of the Black Eagles. He insulted her and threatened that the Black Eagles would shut her up. Ms. Rivera reported this first incident to the police, but they declined to start an investigation.

[7] On April 12, 2022, Ms. Rivera received another threatening phone call from an individual also identifying himself as a member of the Black Eagles, ordering her to “disappear” under

“pain of death” for being a “faggot.” She again reported the phone call to the police, but was told they could not do much. As a result, the Applicant left her hometown of Bogota and moved in with her sister in Tunja.

[8] On May 21, 2022, the Applicant received another threatening phone call, at her sister’s house. The caller once again identified himself as a member of the Black Eagles, and yelled obscenities and told Ms. Rivera that they knew she was in Tunja. She once again reported the incident to the police. She then relocated to a friend’s house in Bucaramanga.

[9] On July 18, 2022, the Applicant received her last phone call, at her friend’s house in Bucaramanga. She alleges that she stopped going out or using her cell phone. She waited two months and received no response from the police about her case. As a result, she left Colombia on her sons’ advice, on September 12, 2022.

[10] Ms. Rivera first went to the US on a visitor visa. On September 13, 2022, she made a refugee claim at the Canadian border. Because her older son is a Convention refugee and her younger son is a Canadian permanent resident, she was exempt from the Canada-US Safe Third Country Agreement [STCA] and allowed to claim refugee protection in Canada.

B. *Decision Under Review*

[11] The Refugee Protection Division [RPD] of the Immigration and Refugee Board refused Ms. Rivera’s claim for refugee protection. The determinative issue was the availability of an internal flight alternative [IFA] within Colombia. The RPD Panel found that Ms. Rivera could

safely relocate to Santa Marta, and therefore she was not a Convention refugee nor a person in need of protection.

[12] The Panel found that the Black Eagles is a now-defunct paramilitary group that was last active in 2014. The Panel determined that, as of 2023, it is “merely a name deployed by disparate, reactionary individuals to give weight to threats they utter.” It noted that the Black Eagles name is often used, according to police, by criminals and a variety of right-wing, military, and paramilitary groups to threaten their opponents from behind the mask of a defunct, non-existent organization. Therefore, it concluded, the calls were from a lone individual claiming to be from the Black Eagles.

[13] The RPD further noted that country conditions evidence indicates that the Black Eagles is most likely nothing more substantive than a brand, used by different parties with different agendas, to intimidate, but lacking in membership structure, or leadership. As a result, the Panel determined that the Black Eagles do not have the organization, structure, and means to pursue the Applicant to the IFA.

[14] On the second prong of the IFA test, the RPD Panel found that it would not be unreasonable for the Applicant to relocate to Santa Marta.

[15] Due to the operation of the STCA, the Applicant could not appeal this decision to the Refugee Appeal Division. As a result, she brings this application for judicial review of the RPD decision. While not relevant to the determination of this matter, I note that the Applicant was removed from Canada in January 2024.

III. ISSUES and STANDARD OF REVIEW

[16] This matter raises the following issues:

1. Did the RPD breach procedural fairness principles by failing to provide notice of determinative issues?
2. Was the RPD's decision reasonable?

[17] For reasons set out in greater detail below, I find that the decision under review lacks justification on a central issue and, as such, is unreasonable. Because of this finding, I decline to consider the fairness issue.

IV. ANALYSIS

[18] It is well established that the consideration of whether an individual has a viable IFA within their country involves a two-pronged test:

1. First, the Board must be satisfied, on a balance of probabilities, that there is no serious possibility of the claimant being persecuted or subject personally to a risk to their life or a risk of cruel and unusual treatment or punishment or to a danger of torture, in the proposed IFA location.
2. Second, taking into consideration all of the circumstances of the IFA location, it must not be unreasonable for the individual to seek refuge there: *Rasaratnam v Canada (Minister of Employment and Immigration)*, 1991 CanLII 13517 (FCA), [1992] 1 FC 706 (CA).

[19] This decision turns entirely on the first part of the above test.

[20] As noted above, the RPD found that the Applicant had a viable IFA in Santa Marta, because: i) the Black Eagles is a defunct entity with no defined leadership or permanent structure; ii) because the individual harassing her was likely a lone individual; and iii) because there was no evidence of a presence of the Black Eagles in Santa Marta. Specifically on this last point, the RPD stated:

The country condition evidence for Colombia indicates that the Black Eagles, also known as Aguilas Negras, “do not seem to have a visible leadership or hold any territory” and shows that groups using the name of Black Eagles have been known to make an appearance in Nurino, Santander, Sucre, and a few other departments, but there is no mention of the group in Santa Marta.

[21] In support of this finding, the RPD cited to an IRB report contained within its National Documentation Package for Colombia. The report states as follows:

[G]roups using the name of the Black Eagles have appeared in at least 20 of Colombia’s 32 departments including Nariño, Cauca, Casanare, Guajira, Magdalena, Bolívar, Norte de Santander, Santander, Sucre and Cordoba” (emphasis added). The city of Santa Marta is located in the Department of Magdalena

[22] The problem with the RPD finding is that the city of Santa Marta is located in the Department of Magdalena, which *is* listed as one of the locations in which groups operating as the Black Eagles have been active.

[23] Moreover, other documents within the National Documentation Package specifically reference Magdalena department as one of the primary locations where paramilitary groups have targeted social leaders and human rights defenders.

[24] This is not a situation where the Applicant is simply disagreeing with the weight that the RPD attributed to the evidence. On the contrary, on this issue, the RPD simply misconstrued the evidence on a key question it was obliged to consider, namely whether the alleged agent of persecution was present and active in the proposed IFA location.

[25] Given the centrality of this error to the larger IFA issue, I find that it renders the decision unreasonable. Indeed, in *Vargas Perez v Canada (Citizenship and Immigration)*, 2023 FC 1144, my colleague Justice Manson recently came to the same conclusion on a very similar kind of error: see para 22.

[26] As this matter will be reconsidered by the RPD, I need not assess the other alleged errors in the decision.

JUDGMENT in IMM-11675-23

THIS COURT'S JUDGMENT is that:

1. The application for judicial review is granted.
2. The matter is remitted to a different decision-maker for reconsideration.
3. No question is certified for appeal.

"Angus G. Grant"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-11675-23

STYLE OF CAUSE: MARTHA AMALIA DIAZ RIVERA v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: SEPTEMBER 25, 2024

JUDGMENT AND REASONS: GRANT J.

DATED: OCTOBER 31, 2024

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