



RPD File No. / N° de dossier de la SPR TB2-14734/TB3-00122

*Private Proceeding / Huis clos*

## Reasons and Decision – Motifs et Décision

<b>Claimant(s)</b>	XXXX XXXX XXXX XXXX XXXXXXXXX XXXX XXXX XXXX	<b>Demandeur(e)(s) d'asile</b>
<b>Date(s) of Hearing</b>	April 30, 2019	<b>Date(s) de l'audience</b>
<b>Place of Hearing</b>	Heard by videoconference in Vancouver, BC and Toronto, ON	<b>Lieu de l'audience</b>
<b>Date of Decision and reasons</b>	July 12, 2019	<b>Date de la décision et des motifs</b>
<b>Panel</b>	Craig Costantino	<b>Tribunal</b>
<b>Counsel for the Claimant(s)</b>	Amedeo Clivio Barrister and Solicitor	<b>Conseil(s) du (de la/des) demandeur(e)(s) d'asile</b>
<b>Designated Representative(s)</b>	N/A	<b>Représentant(e)(s) désigné(e)(s)</b>
<b>Counsel for the Minister</b>	Patrick Klauss In Writing	<b>Conseil du (de la) ministre</b>

2019 CanLII 146640 (CA IRB)

## REASONS FOR DECISION

### INTRODUCTION

[1] XXXX XXXX XXXX XXXX (the “Male Claimant”), and his common-law partner XXXX XXXX XXXX XXXX (the “Female Claimant”), claim refugee protection against Guatemala pursuant to Sections 96 and 97 of the *Immigration and Refugee Protection Act* (“Act”)<sup>1</sup>.

### BACKGROUND / ALLEGATIONS

[2] The Male claimant was born in Jutiapa province of Guatemala in 1985, and the Female claimant was born in a different county of Jutiapa in 1990. The two claimants met while in the United States (U.S.) while both of them were without status. They began living together in 2009. They have one son who was born in the U.S. in April 2010, and another child who was born in Canada.

[3] Although the claims were joined due to their relationship, the Claimants did not know each other when they were in Guatemala, and each claim has an entirely different basis. The following is a summary of each Claimants allegations.

#### The Male Claimant

[4] The Male Claimant’s allegations were initially set out in a narrative attached to his Personal Information Forms (PIF) submitted on December 27, 2012.<sup>2</sup> He significantly

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<sup>1</sup> *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

<sup>2</sup> Exhibit 2.1

augmented and amended that narrative in January 2019 through three different written statements with the assistance of his new counsel.<sup>3</sup>

[5] The Male Claimant entered the U.S. illegally in 2001 and was added to his father's refugee claim in 2002. In June 2006, the Male Claimant and his brother were both criminally charged in connection to an incident in the U.S. with their cousin XXXX XXXX XXXX XXXX XXXX XXXX XXXX The Male Claimant pled guilty and was convicted of reckless endangerment over the incident, and was deported to Guatemala in XXXX 2008.

[6] Before the Male Claimant returned to Guatemala, XXXX threatened to kill him after he went back to Guatemala. In addition to the 2006 incident, XXXX allegedly also targeted the male Claimant due to a longstanding family dispute. Other family members have been murdered, and the male Claimant suggests that XXXX could be responsible for the murders due to the same family dispute that has caused friction with the Male Claimant and his brother. The Male Claimant avoided his hometown out of fear that XXXX would look for him there, and learned that XXXX had returned to Guatemala about one month after the Claimant was deported there, and was looking for him. The Male Claimant then re-entered the U.S. illegally in XXXX 2008.

[7] The Male Claimant was arrested by American immigration officers in June 2010, at which time he made an asylum claim. He was held in detention until the final determination of his asylum claim. His claim was refused in August 2011, his appeal was dismissed in November 2011, and he was again deported to Guatemala.

[8] Upon removal to Guatemala, the Male Claimant and his brother went and stayed with their grandmother in Escuintla, several hours away from their hometown. Their grandmother is also XXXX grandmother. XXXX located the Claimant and his brother with three other armed men in March 2012, fired shots at them, and the Claimant was wounded in his leg. He reported the incident to police, and received medical attention for his wound.

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<sup>3</sup> Exhibit 14.

[9] The Male Claimant spent some time in Coban, and Guatemala City, then spent two to three weeks in Peten in the northern part of Guatemala 15 hours from his hometown, until he was able to make arrangements with a smuggler to return to the United States in XXXX of XXXX of 2012. He then crossed into Canada illegally with his brother and the Female Claimant in XXXX 2012. He initiated his refugee claim at an inland office a short time later.

[10] XXXX cousin is the mayor of Moyuta, and XXXX works for him. The Male Claimant alleges that both XXXX and his cousin are involved in organized crime involving drug trafficking. XXXX is a dangerous person with power and influence with the authorities, and he would have the ability to locate and kill the Male Claimant anywhere in Guatemala through his network.

### **The Female Claimant**

[11] The Female Claimants allegations are set out in a narrative attached to her Personal Information Forms (PIF) submitted in January 2013,<sup>4</sup> and a subsequent amendment in January 2019.<sup>5</sup>

[12] The Female Claimant began a relationship with a man named XXXX XXXX when she was only fourteen or fifteen years old. She moved in with him and he became physically and sexually abusive. She reported the abuse to police but he continued to abuse her. After a second very serious violent incident leading to hospitalization in late November 2005, she moved in with an aunt in Peten far from her hometown, and started going to school there. Then in December 2008, they were accosted by XXXX XXXX as they were going to church. She entered illegally into the U.S. in XXXX 2009 but never claimed refugee protection there. She initiated her claim in Canada inland approximately three weeks after the Male Claimant in XXXX 2012.

### **Minister's Submissions**

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<sup>4</sup> Exhibit 2.2.

<sup>5</sup> Exhibit 13.

[13] The Minister intervened in the claims and made submissions that both Claimants lack credibility.<sup>6</sup> The Minister argued that the failure of the Female Claimant to seek protection in the U.S. signified a lack of subjective fear. Likewise, the Minister argued that the Male Claimant's criminal behaviour in the U.S., while not amounting to serious criminality such that he should be excluded from protection, was inconsistent with someone who was afraid of being returned to a risk in his country of nationality. The Male Claimant's criminal record includes a conviction for driving while suspend in 2006, a conviction for reckless endangerment in 2007 (which was quashed when he withdrew his guilty plea in 2010 and substituted a guilty plea for "malicious destruction of property" which I find would be equivalent to mischief under the Canada Criminal Code), and a conviction for possession of fraudulent documents in 2011. The Minister argued that the Male Claimant was attempting to downplay his criminal record when making his claim.

## **DETERMINATION**

[14] I find that the Claimants are neither Convention<sup>7</sup> refugees, nor persons in need of protection, as defined in Sections 96 and 97 of the *Act*<sup>8</sup>. I find that the Female Claimant's claim has a nexus to protection on a Convention ground but that the claim of the Male Claimant does not. The determinative issue in both claims is the availability of a safe Internal Flight Alternative ("IFA") in Guatemala City.

## **ANALYSIS**

### **Identity**

[15] I find that both Claimants have established their identities as citizens of Guatemala.

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<sup>6</sup> Exhibits 7 and 8.

<sup>7</sup> 1951 Convention Relating to the Status of Refugees: Office of the United Nations High Commissioner for Refugees, "Handbook on Procedures and Criteria for Determining Refugee Status", under the 1951 Convention.

<sup>8</sup> Immigration and Refugee Protection Act, S.C. 2001, c. 27, as amended, sections 96 and 97(1).

## Credibility

[16] The claimants' PIFs and sworn testimony have a presumption of truthfulness.<sup>9</sup> However, when assessing credibility the panel is entitled to rely on its rationality and common sense<sup>10</sup>. I find that there are material credibility issues with both claims.

[17] In the Female Claimant's case, I find that her allegations about being the victim of serious domestic abuse as a teenager are well-documented and highly credible. I also accept that the agent of persecution tracked her down in Peten in 2008. However, I do not find her testimony that he went to her aunt's house in Peten looking for her within the past two years to be credible. The Claimant's aunt provided a sworn statement in January 2019 for the express purpose of corroborating the female Claimant's allegations.<sup>11</sup> I find that if XXXX XXXX had come to her house looking for the Female Claimant within the last two years, that her aunt would have mentioned it in her statement.

[18] In the Male Claimant's case, I find that he is credible with respect to the agent of harm having an ongoing grudge against him and his brother. However, I find that there were a number of changes to his allegations over time, and significant omissions in his earlier statements that are not adequately explained by his claims that his PIF was mistranslated, and obtaining new counsel. I find that he added to his allegations after he obtained his U.S. asylum file which contained numerous allegations that he had not mentioned in the preceding seven years.

[19] I also find that the Male Claimant downplayed not his own criminality as well as his brother's conviction. His brother was found ineligible to make a refugee claim in Canada due to a sexual assault conviction. The Male Claimant blamed both the convictions of himself and his brother on poor legal representation, and claimed that they had both been charged in 2006 because XXXX had given a false report. I find that the problems between the Male Claimant and

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<sup>9</sup> *Maldonado v. M.E.I.*, [1980] 2 F.C. 302, 31 N.R. 34 (C.A.).

<sup>10</sup> *Shahamati, Hasan v. M.E.I.* (F.C.A., no. A-388-92), Pratte, Hugessen, McDonald, March 24, 1994.

<sup>11</sup> Exhibit 10 pp. 25-28.

his brother with XXXX stem from the incident in 2006, but I do not find that the Claimant has given an honest account of what happened in that incident, and why XXXX holds a grudge against him and his brother. The Male Claimant was not able to provide a cogent explanation of how the allocation of his grandfather's lands between his father, XXXX father and their other siblings many decades ago related to his quarrel with XXXX. Rather, he testified that they had good relations as cousins until the 2006 incident. Likewise, while I accept that relatives of the Male Claimant were murdered in 2007 and 2010, I find that there is no evidentiary foundation linking their deaths to a family dispute, to XXXX, or the Claimant's problems with XXXX. Even the Male Claimant is unwilling to clearly draw such an inference. Consequently, I find that he has not established even a tangential nexus to refugee protection through membership in a particular social group.

[20] I also find the Male Claimant's testimony that he has no idea where his brother is to be lacking in credibility. The Male Claimant claims to have significant information about XXXX through friends in the hometown where they were both born, and yet has no idea about his brother. The Male Claimant's brother was returned to Guatemala from Canada years ago. I find that the absence of any information on whether his brother has had any further problems with XXXX diminishes the evidence that the Male Claimant would be at risk of harm if he returned as well.

[21] I also do not find that the Male Claimant has credibly established that XXXX is involved in organized crime. He initially indicated that XXXX is involved in the *Mara Salvatrucha* but indicated at his hearing that this was a detail invented in 2012 by his translator. He now asks that I infer from the fact that his cousin is mayor of Moyuta, and that the mayor's brother was arrested for drug trafficking, that both the mayor and XXXX are involved in a highly sophisticated and powerful organized crime organization that gives XXXX the power, influence and means to track down the Male Claimant anywhere in Guatemala. I find that this is highly speculative, and that the Claimant's information and allegations about XXXX criminal activities, and his desire and ability to track him down and harm him are highly unreliable.

[22] Finally, the Male Claimant was highly motivated to leave Guatemala and come to Canada to make his refugee claim so that he could live together with his common-law spouse and their child, as well as his brother. The Male Claimant had been deported twice from the U.S. and had spent over 18 months in detention before his last deportation. He testified that he had already made plans to come to Canada and claim refugee protection here after discussions with fellow detainees before he had even been deported. While I appreciate such candour and it somewhat redeems his credibility, I cannot ignore that the Male Claimant had significant motivations other than fleeing a risk to his life not only to flee Guatemala but to seek a solution outside of the U.S.

[22] Despite all of these concerns, and despite the fact that I find that the Male Claimant has not been forthcoming about the nature of his dispute with XXXX that has led to his strong enmity towards him and his brother, I accept on the basis of the armed attack on the Male Claimant and his brother in March 2010, that the Male Claimant faces a personalized risk from XXXX should they encounter each other again. I find that it is not safe for him to return to either his hometown or his grandmother's hometown.

### **IFA**

[23] The Female Claimant testified that she is no longer in touch with any family members in her hometown. She has not heard any news of XXXX XXXX for many years except for her allegation that he looked for her at her aunt's house in Peten recently, which I find not to be credible. I find that there is no reliable evidence that XXXX XXXX still has the desire or the ability to track down the Female Claimant. She has been outside of Guatemala for over ten years, she has been in a common-law relationship with her partner for ten years, and has two children now. However, given his past behaviour and the trauma she suffered at a very young age, I can understand that the Female Claimant would want to avoid any possibility of encountering her abuser again.

[24] I do not find that there is a serious possibility that the agent of persecution would know that the Claimant had returned to Guatemala if she returned to the proposed IFA of Guatemala



City, or that he would come to know she had established herself there. There is no basis to believe that the agent of persecution is still interested in finding the Female Claimant, or that he would have the means to do so. The Female Claimant has no contact with anyone in the town where she last knew the agent of persecution to be, and consequently, there is no serious possibility that he would learn that she had returned. I find that she would not face more than a mere possibility of persecution in the proposed IFA.

[25] Even giving him the benefit of the doubt that he has established that XXXX poses a serious risk to the Male Claimant's life, I find that the Male Claimant has not established on a balance of probabilities that XXXX would come to know if her returned to Guatemala City with his family. While the Male Claimant may have been far away from his hometown in 2010, he was staying with not only his grandmother but the grandmother of the person he was allegedly hiding from.<sup>12</sup> Despite the claim that he feared for his life and that XXXX was tracking him, the Male Claimant then stayed in Peten for two to three weeks before leaving Guatemala with no further problem. It also came out in evidence that he had stayed in Guatemala City in 2008 and for a while in 2010. The Claimant testified that he did not encounter XXXX there.

[26] I acknowledge that there is some concern that XXXX might come to know that the Male Claimant is back in Guatemala through common relatives or friends back in their hometown; however, I find this to be a remote and speculative possibility. I do not accept that the Male Claimant has credibly established that XXXX is involved in organized crime, or that he ever spends time, or has connections, in Guatemala City. I do not find that it has been established through credible and reliable evidence that XXXX is looking for the Male Claimant or information about the Male Claimant, nor that he would be able to locate and harm him if he did learn that he had returned to Guatemala City.

[27] I find that the Claimants would be able to return directly to Guatemala City from Canada, that it would not be unsafe for the Claimants to go there, and that it would not be unduly harsh

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<sup>12</sup> Exhibit 10 pp. 14-15.

for them to establish themselves there. I understand that it would be very difficult emotionally for the claimants to return to Guatemala given their past experiences and the length of time out of the country in Canada, and it would clearly not be in the best interests of their children who have American and Canadian citizenship. If I were assessing an application on humanitarian and compassionate grounds, I would find that return to Guatemala would cause the claimants and their family hardship. However, even taking into account that they have two children and the Chairperson's Guideline on gender-based claims, and the past trauma faced by the Female Claimant, I find that the Claimants would be able to find housing and employment in Guatemala City, and meet the basic needs of their family, and conclude that Guatemala is a viable IFA for the claimants.

### **Compelling Reasons**

[28] Claimant's counsel asked that I consider whether the Female Claimant's claim could be granted for compelling reasons if I found that she had previously been a refugee but was no longer in need of protection since the agent of persecution no longer poses the same risk of harm to her. I find that there is some merit to this argument. Had I assessed the Female Claimants claim when she first fled Guatemala as an 18-year-old, after the abuse she suffered and recently having been tracked down by the agent of persecution in another part of the country after three years, I would not likely have found that she had a viable IFA.

[29] However, the Claimant did not make a claim until the end of 2012, and the passage of time has diminished the degree of risk she would face on return and diminished the likelihood and possibility that the agent of persecution would attempt to find her or succeed in doing so. She is also not in as vulnerable a position as when she fled the country. She would be returning to Guatemala with her partner and two children, and is considerably more mature. Further to my assessment of the reasonableness of the Claimants availing themselves of an IFA, I find that the significant passage of time, most of which is a result of administrative issues that led to a delay of over six years in the Claimants claims being decided, would create hardship in returning to Guatemala but there is no evidentiary record before me to establish that it would have a

profoundly negative impact on the Female Claimant's mental health, or re-traumatize her. Consequently, I find that there not sufficient compelling reasons to grant her claim.

## CONCLUSION

[30] I find that the Claimants do not meet the criteria to be recognized as Convention refugees or persons in need of protection as described in ss. 96 and 97 of the Act as they have a viable IFA to Guatemala City. I therefore reject their claims.

*(signed)*

**“Craig Costantino”**

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**Craig Costantino**

**July 12, 2019**

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**Date**