Federal Court Cour fédérale

Date: 20150420

Docket: IMM-6335-13

Citation: 2015 FC 502

Ottawa, Ontario, April 20, 2015

PRESENT: The Honourable Mr. Justice Boswell

BETWEEN:

JULIO ANGELO BARRAGAN GONZALEZ
LIZA CAROLL LARA NUNEZ
JULIANA BARRAGAN PENUELA
GABRIELA BARRAGAN LARA
ISABELA BARRAGAN LARA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Nature of the Matter and Background

[1] The Applicants are a married couple and their three daughters, all of whom are citizens of Colombia. They left that country on March 30, 2013, and traveled through the United States of America before coming to Canada on April 5, 2013. Upon arrival, they all asked for Canada's

protection pursuant to section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. Each of them relied on the narrative of Mr. Barragan Gonzalez [Principal Applicant], who alleged that he had been beaten up by the *Fuerzas Armadas Revolucionarias de Colombia* [FARC] in late February, 2013, after he interfered with their drug-trafficking activities in his neighbourhood. The Principal Applicant also alleged that the FARC agents demanded that he pay 500,000 pesos within a week of his being beaten and further amounts of 250,000 pesos each week thereafter, and they threatened to kill him and his family if he refused or if he complained to the police.

[2] The Applicants' claims for protection were rejected by the Refugee Protection Division [RPD] of the Immigration and Refugee Board on September 10, 2013. They now apply for judicial review pursuant to subsection 72(1) of the *IRPA*, asking this Court to set aside the RPD's decision and return the matter to another member of the RPD for re-determination.

II. Decision under Review

[3] The RPD decided that none of the Applicants were entitled to protection under either section 96 or subsection 97(1) of the *IRPA*. The RPD gave a number of reasons for doubting the Applicants' credibility, but ultimately decided to assess their claims assuming that they had told the truth. It therefore noted that the determinative issues were nexus to a Convention ground, generalized risk, the existence of state protection, and the availability of an internal flight alternative [IFA].

[4] The Principal Applicant had contended that the attack was tied to his perceived political opinion, but the RPD rejected that argument. While the FARC's activities have some political underpinning, the RPD determined that it acted mainly as a criminal organization and that the Applicants were not political targets. Rather, the Principal Applicant had been attacked because he and his friends had interfered with plans to sell drugs in his neighbourhood, and those drug dealers were just extorting him to make up for the lost income. That was a purely financial motive and the RPD found there was insufficient evidence that the FARC or whoever was behind the attack was interested in the Applicants beyond their perceived ability to pay the funds demanded from them. Merely being a victim of crime is not enough to establish a link to a Convention ground, so the RPD determined that the Applicants' section 96 claims failed.

[5] So too did their claim under paragraph 97(1)(b) of the *IRPA*, since the RPD determined that the risk facing the Applicants was one faced generally by many persons in Colombia. Extortion by the FARC and other criminals is common in Colombia, and the RPD found that most of the people targeted simply comply with the demands. The risk was therefore excluded from the scope of paragraph 97(1)(b) by subparagraph 97(1)(b)(ii) of the *IRPA*.

[6] Although that was sufficient to dispose of the claim, the RPD went on to consider whether state protection was adequate, and it decided that the Applicants had not supplied clear and convincing evidence to rebut the presumption that Colombia could protect its citizens. Rather, the Principal Applicant never called the police nor asked anyone for protection, not before initially approaching the drug dealers and not even after he had been attacked and threatened. Having never given the police the chance to protect him or his family, the RPD was

unconvinced by the Principal Applicant's subjective belief that they would not be willing or able to help. The RPD also noted that Colombia has been taking significant steps to reduce corruption within its justice system and security forces.

[7] The RPD further determined that the FARC had been severely weakened by the Colombian government's increasingly successful military counter-measures, and its sphere of influence has been reduced. While the FARC still resists and has not yet been defeated, the RPD was satisfied that the state was making serious efforts to protect its citizens, and that was enough. The RPD therefore rejected the Applicants' assertion that state protection was inadequate.

[8] Even if that was not the case, the RPD went on to determine that the Applicants (who had lived in Bogotá) could live peacefully in Cali or Cartagena where there would be an IFA. In its view, the Principal Applicant was a low-value target and there was little evidence that the FARC or its criminal partners still pursued him or his family. Furthermore, the RPD considered it reasonable for the Applicants to seek refuge in either of these two cities, as they were accustomed to the language and culture and familiar with adjusting to life in new places. As either city was a viable IFA, the RPD would have dismissed the claim for this reason too, had it been necessary.

III. The Parties' Submissions

A. *The Applicants' Arguments*

[9] The Applicants say that the RPD made ambiguous statements and embarked upon faulty reasoning concerning the credibility of the Principal Applicant, and it never came to terms one way or the other with respect to the drug dealers' ties to the FARC. According to the Applicants, this was an error because the RPD did not make its credibility findings in "clear and unmistakable terms" (*Hilo v Canada (Minister of Employment and Immigration)* (1991), 130 NR 236 at paragraph 6, 15 Imm LR (2d) 199 (CA)).

[10] As for a nexus to a Convention ground, the Applicants state that the RPD ignored the Principal Applicant's testimony that he believed the FARC would follow up on their demands because he "was not in agreement with their ideology." According to the Applicants, the RPD made its decision without regard to this evidence and erred in finding that the threats were not politically motivated. This is confirmed, the Applicants say, by a 2005 report from the United Nations High Commissioner for Refugees [UNHCR] which said that "refusal or inability to pay [extortion demands] is viewed as an act or indication of political opposition, resulting in persecution and violence" (UNHCR, "International Protection Considerations Regarding Colombian Asylum-Seekers and Refugees" (March 2005) [UNHCR Report (2005)]).

[11] In addition, the Applicants emphasize that the Principal Applicant was not targeted at random by the FARC, but had attracted the FARC's attention by approaching the drug dealers. According to the Applicants, not everyone is targeted like that by the FARC in Colombia. The

Applicants say that the Principal Applicant therefore has a personalized risk and a specific fear, but the RPD failed to recognize this and wrongly trivialized the follow-up threat the Principal Applicant received in a condolence card from the FARC (citing *Munoz v Canada (Minister of Citizenship and Immigration)*, 2010 FC 238 at paragraph 32; and *Michael v Canada (Minister of Citizenship and Immigration)*, 2010 FC 159 at paragraphs 32-36).

[12] As to the issue of state protection, the Applicants distinguish the decision in *Herrera Andrade v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1490 at paragraph 2 [*Herrera Andrade*], upon which the Respondent relies, on the basis that the applicants in that case were not credible. They instead rely upon *Hernandez Montoya v Canada (Citizenship and Immigration)*, 2014 FC 808 at paragraphs 43-44, 49-52 [*Hernandez Montoya*], which they submit is a better view of the country conditions in Colombia. The Applicants argue that the RPD misstated the test for state protection by saying that "it is sufficient that the state is making a serious effort to protect its citizens" and that it was wrong to look repeatedly at the "serious efforts" by the state to combat the FARC. This error, the Applicants say, is reviewable on a standard of correctness; but even if it is not reviewable on this standard, the RPD's decision that state protection was or would be available for the Principal Applicant is not reasonable.

[13] The Applicants rely on *Ortiz Rincon v Canada (Citizenship and Immigration)*, 2011 FC 1339 at paragraphs 15-17, and argue that the RPD inexplicably never looked at the more recent country condition documentation from 2012 and 2013 which shows increasing FARC activities. The Applicants state that the RPD did not properly balance the evidence as to country conditions but, rather, reviewed irrelevant evidence as to the existence of state protection.

[14] Furthermore, the Applicants submit, in view of *Callejas v Canada (Minister of Employment and Immigration)* (1994), 73 FTR 311 at paragraphs 11 and 16, 23 Imm LR (2d) 253 (TD), that it was not necessary for the Principal Applicant to go to the police merely to prove the death threat. According to the Applicants, the Principal Applicant's fear is not that of some general criminal attack. The Applicants argue that the RPD should have looked at the matter from the Principal Applicant's perspective (citing *Sandoval Salamanca v Canada (Citizenship and Immigration)*, 2012 FC 780 at paragraph 17).

[15] Lastly, the Applicants state that the FARC is both willing and able to carry out its threats anywhere in Colombia since it needs to uphold its credibility. The Applicants point to a report produced by the UNHCR Report (2005), which concludes that there is no IFA in Colombia for anyone who is targeted. In view of that, the Applicants say it was unreasonable for the RPD to find that there are two cities in Colombia where they would be safe.

B. *The Respondent's Arguments*

[16] The Respondent says that the RPD had some doubts about the Principal Applicant's credibility, but overall made no finding in that regard and conducted its analysis assuming that the Principal Applicant was credible.

[17] The Respondent states that this case is therefore all about state protection. Accordingly, if the RPD's decision in this regard is reasonable, all of the Applicants' other arguments must fail. For this point, the Respondent relies upon *Herrera Andrade* at paragraph 2.

[18] While the RPD did say that "it is sufficient that the state is making a serious effort to protect its citizens," the Respondent argues that the Applicants have taken that quotation out of context. The passage in which that statement appeared was about the reduction of the FARC's influence at the national level. When the RPD assessed the Applicants' fear of crime, the Respondent says that it was clearly aware that protection needed to be operationally adequate and specifically decided that "the police are both willing and able to protect victims." In any event, the Respondent says that one misstatement is not fatal, especially where the Applicants made no effort to ask the state for any help at all (citing *Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at paragraphs 28 and 49, 440 FTR 106 [*Ruszo*]).

[19] According to the Respondent, the Principal Applicant cannot provide personalized evidence of any absence of state protection, and so the RPD could only assess whether the Principal Applicant objectively faces any personalized risk. Furthermore, since the Principal Applicant failed to seek state protection, it was reasonable for the RPD to look for compelling or persuasive evidence in the objective documentary evidence of country conditions in Colombia (citing *Ruszo* at paragraphs 49-51). The Respondent further submits that the RPD made a thorough and balanced review of the documentary country condition evidence, and thus reasonably concluded that there would be state protection for the Principal Applicant.

[20] The Respondent states that the decision in *Hernandez Montoya* needs to be contrasted with that in *Herrera Andrade*, the latter of which should be determinative of the case at hand. The Respondent points out that *Hernandez Montoya* is factually dissimilar and distinguishable from this case since the applicant in that case had approached the police several times.

[21] The Respondent rejects the Applicants' argument that the RPD failed to consider up-to-date country condition evidence. It says that the RPD had before it the most recent version of the national documentation package and was not required to explicitly refer to every piece of evidence contained therein (citing *Construction Labour Relations v Driver Iron Inc*, 2012 SCC 65 at paragraph 3, [2012] 3 SCR 405). Moreover, according to the Respondent, the principle permitting an inference that evidence was overlooked does not apply to country conditions documentation (citing e.g. *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35 at paragraphs 15-17 (TD); *Salazar v Canada (Citizenship and Immigration)*, 2013 FC 466 at paragraphs 59-60 [*Salazar*]).

[22] As to an IFA, the Respondent states that this was a reasonable determination by the RPD. The Applicants had the burden to show it would be unreasonable to move to Cali or Cartagena, and they relied on nothing but two outdated documents. Given the Principal Applicant's profile, the Respondent says that it is doubtful that the FARC would seek out the Applicants in Cali or Cartagena.

[23] As to the issue of a nexus, the Respondent says that the RPD reasonably concluded that there was no nexus to a Convention ground. While the FARC might have political interests, the Respondent argues that it was reasonable for the RPD to find that the FARC only targeted the Principal Applicant because he attacked its drug dealers.

[24] The Respondent submits that the RPD reasonably found that the risk faced by the Applicants was generalized. Although there are some cases supporting the Applicants' position,

there are also many where being specifically targeted by a gang was reasonably held to be generalized even when repeated and retaliatory (citing, amongst others, *Baires Sanchez v Canada (Citizenship and Immigration)*, 2011 FC 993 at paragraph 23; *De Munguia v Canada (Citizenship and Immigration)*, 2012 FC 912 at paragraphs 5 and 36). On the facts of this case, the Respondent urges that the latter approach should be preferred as extortion is extremely commonplace in Colombia, and it is only the nature of the risk that matters, not its cause.

IV. Issues and Analysis

A. *Issues*

[25] This application raises six issues:

1. What is the standard of review?
2. Did the RPD err in assessing the Applicants' credibility?
3. Did the RPD err by finding that the risk faced by the Applicants was generalized?
4. Was the RPD's analysis of state protection erroneous?
5. Was the RPD's analysis of internal flight alternatives unreasonable?
6. Did the RPD err by finding that there was no nexus to a Convention ground?

B. *Standard of Review*

[26] The Applicants allege that the RPD misunderstood the test for state protection. For the most part, this Court typically reviews questions regarding the interpretation of sections 96 and 97(1) of the *IRPA* on the correctness standard (*Sakthivel v Canada (Citizenship and Immigration)*, 2015 FC 292 at paragraphs 26-28; *Ruszo* at paragraphs 17-22; *Portillo v Canada*

(Citizenship and Immigration), 2012 FC 678 at paragraph 26, [2014] 1 FCR 295 [*Portillo*]). However, most of the Applicants' arguments attack not the RPD's understanding of the tests for state protection or an IFA but its application of those tests to the facts, for which the appropriate standard of review is reasonableness (*Ruszo* at paragraphs 21-22; *Juhasz v Canada (Citizenship and Immigration)*, 2015 FC 300 at paragraph 25).

[27] Similarly, the applicable standard of review for issues of generalized risk is reasonableness since it involves questions of mixed fact and law (see, e.g., *Malvaez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1476 at paragraph 10, 423 FTR 210). It is well established that the reasonableness standard is concerned not only with the existence of justification, transparency and intelligibility within the decision-making process, but also with whether the result is defensible in respect of the facts and the law. This Court can neither reweigh the evidence that was before the RPD nor substitute its own view of a preferable outcome (*Dunsmuir v New Brunswick*, 2008 SCC 9 at paragraphs 47-48, [2008] 1 SCR 190; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraphs 59 and 61, [2009] 1 SCR 339).

C. *Did the RPD err in assessing the Applicants' credibility?*

[28] While the RPD undoubtedly had concerns about the Principal Applicant's credibility, it never dismissed his evidence entirely. Rather, I agree with the Respondent that it instead chose to analyze the claim as if the Principal Applicant was telling the truth. As such, any errors with respect to the credibility finding would be immaterial and it is unnecessary to consider the Applicants' arguments on this issue (*Portillo* at paragraphs 28-29).

D. *Did the RPD err by finding that the risk faced by the Applicants was generalized?*

[29] When assessing the Applicants' claims under subsection 97(1) of the *IRPA*, the RPD accepted that the FARC had targeted the Principal Applicant since he had interrupted the drug dealings in his neighbourhood. Nevertheless, the RPD determined that this risk was a generalized one, finding that "extortion for monies is widespread and is faced by those is [*sic*] a similar or the same position as the claimants," and thus concluded as follows:

> [26] Though the panel has identified some credibility concerns, if the panel were to accept that the male claimant was approached by individuals who were from or in partnership with FARC, the individuals approached the male claimant for criminal extortion, to pay monies in lieu of the drug dealing that was taking place. The female claimant and minor claimants alleges fear due to what happened to the male claimant. The panel finds the risk to the claimants to be a generalized risk and one which is faced generally by many other Colombians. Crime unfortunately is prevalent in Colombia. As the male claimant testified drug dealers and drug problems are prevalent throughout Colombia, the panel has considered the jurisprudence relating to generalized risk and in this connection, the panel has considered the case of *Prophète* where it was determined that the risk of all forms of criminality is general and while [*sic*] a specific number of individuals may be targeted more frequently because of their wealth. …
>
> [Footnotes omitted]

[30] However, the RPD failed to follow the guidance offered by *Prophète v Canada (Citizenship and Immigration)*, 2009 FCA 31, 387 NR 149 [*Prophète*], since it did not conduct an individualized inquiry into the Applicants' "present or prospective risk." In *Prophète*, the Court of Appeal stated as follows:

> [6] Unlike section 96 of the Act, section 97 is meant to afford protection to an individual whose claim "is not predicated on the individual demonstrating that he or she is [at risk] … for any of the enumerated grounds of section 96" (*Li v. Canada (Minister of*

> *Citizenship and Immigration)*, 2005 FCA 1, [2005] 3 F.C.R. 239 at paragraph 33).
>
> [7] The examination of a claim under subsection 97(1) of the Act necessitates an individualized inquiry, which is to be conducted on the basis of the evidence adduced by a claimant "in the context of a *present* or *prospective* risk" for him (*Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 99 at paragraph 15) (emphasis in the original)….

[31] The RPD here did not reasonably assess the Principal Applicant's individualized risk for the purposes of section 97. On the one hand, it accepts that the Principal Applicant has a personal risk at the hands of the FARC because he had interfered with the drug dealings in his neighbourhood; but, on the other, after noting that "extortions by FARC and other actors are widespread in Colombia," it concludes that this personalized risk is negated by being "one which is faced generally by many other Colombians."

[32] The RPD's decision cannot be justified because it did not properly conduct the two step inquiry to assess the Applicants' future risk. In this regard, it is instructive to note the Court's decision in *Ortega Arenas v Canada (Citizenship and Immigration)*, 2013 FC 344, 430 FTR 162, where Justice Gleason stated as follows:

> [9] As I held in *Portillo*, section 97 of the IRPA mandates the following inquiry. First, the RPD must correctly characterize the nature of the risk faced by the claimant. This requires the Board to consider whether there is an ongoing future risk, and if so, whether the risk is one of cruel or unusual treatment or punishment. Most importantly, the Board must determine what precisely the risk is. Once this is done, the RPD must next compare the risk faced by the claimant to that faced by a significant group in the country to determine whether the risks are of the same nature and degree.
>
> …

> [14] The focus of the second step in the inquiry is to compare the nature and degree of the risk faced by the claimant to that faced by all or a significant part of the population in the country to determine if they are the same. This is a forward-looking inquiry and is concerned not so much with the cause of the risk but rather with the likelihood of what will happen to the claimant in the future as compared to all or a significant segment of the general population. It is in this sense that in *Portillo* I held that one cannot term a "personalized" risk of death "general" because the entire country is not personally targeted for death or torture in any of these cases. There is in this regard a fundamental difference between being targeted for death and the risk of perhaps being potentially so targeted at some point in the future. Justice Shore provides a useful analogy to explain this difference in *Olvera* [*v Canada (Citizenship and Immigration)*, 2012 FC 1048, 417 FTR 255], where he wrote at para 41, "The risks of those standing in the same vicinity as the gunman cannot be considered the same as the risks of those standing directly in front of him".

[33] In this case, the Principal Applicant was not targeted at random by the FARC. On the contrary, he offended the FARC by interfering with their business and he and his family were specifically threatened with death. While extortions by the FARC may be widespread in Colombia, not everyone who is extorted is unable to pay or is personally targeted and threatened with death. The nature and degree of the risk faced by the Applicants here is not the same as, and in fact cannot be compared to, all or a significant number of other Colombians. The RPD here conflated the specific and individual reason for the Applicants' present and prospective risk with the general risk of criminality faced by all or many others in Colombia. As noted by Mr. Justice James Russell in *Correa v Canada (Citizenship and Immigration)*, 2014 FC 252 at paragraph 83, 23 Imm LR (4th) 193: "It is an error to conflate the reason for the risk with the risk itself or to ignore differences in the individual circumstances of persons who may be targeted for the same reasons."

E. *Was the RPD's analysis of state protection erroneous?*

[34] In order for a claim for protection to succeed under either section 96 or paragraph 97(1)(b)(i), a claimant must prove "that they sought, but were unable to obtain, protection from their home state, or alternatively, that their home state, on an objective basis, could not be expected to provide protection" (*Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at paragraph 37, 282 DLR (4th) 413 [*Hinzman*]).

[35] The Applicants criticize a passage at paragraph 39 of the RPD's decision, wherein it stated that the "FARC has not been defeated in Colombia; however, it is sufficient that the state is making a serious effort to protect its citizens." The Applicants state that misstates the test for state protection. I disagree. On the contrary, that language is borrowed from *Canada (Minister of Employment and Immigration) v Villafranca* (1992), 99 DLR (4th) 334 at 337, 150 NR 232 (FCA). Although it can be an error if the RPD fails to understand that the seriousness of the state's efforts must be evaluated at the operational level (*Toriz Gilvaja v Canada (Citizenship and Immigration)*, 2009 FC 598 at paragraph 39, 81 Imm LR (3d) 165), the RPD cannot be faulted for couching its analysis in the words used by the Federal Court of Appeal.

[36] The Applicants also submit that the presumption that democracies protect their citizens is itself problematic, relying on a passage from James C Hathaway & Michelle Foster, *The Law of Refugee Status*, 2d ed (Cambridge: Cambridge University Press, 2014) at 321-322. However, that argument was not advanced with any particular force and this would not be an appropriate case

to consider an objection to such a central pillar of the Supreme Court's decision in *Ward* at 725-726.

[37] Nevertheless, I agree with the Applicants that the RPD erred in its analysis of state protection. The RPD's central finding with respect to state protection was that "the police were not given the opportunity to provide protection, instead the male claimant testified to an incident whereby there was a street fight and the police arrived late. This is not indicative of the police unwillingness to offer protection." Although corruption and impunity are serious problems in Colombia, the RPD said that "the preponderance of the objective evidence regarding country conditions suggests that, although not perfect, there is an adequate state protection in Colombia for victims of crime, that Colombia is making serious efforts to address the problem of criminality, and that the police are both willing and able to protect victims."

[38] The RPD then went on to assess some of that documentary evidence, but the analysis is focused exclusively on abuses committed by the security forces and the state's military actions against the FARC. That is relevant insofar as it shows that Colombia has control of its territory, but it is not determinative as to the existence of adequate state protection. As this Court observed in *Vargas Bustos v Canada (Citizenship and Immigration)*, 2014 FC 114 at paragraph 40, 24 Imm LR (4th) 81 [*Vargas Bustos*], the "FARC's reduced military capacity does not mean that the state can protect people who have been specifically targeted by FARC for harassment or extortion" (see also *Hernandez Montoya* at paragraph 38).

[39] The RPD's finding that the police are able to protect victims of the FARC's extortion and death threats is entirely unexplained. The RPD never refers to any evidence that could support that finding, despite accepting that "the most serious human rights problems [in Colombia] were impunity and an inefficient judiciary, corruption and societal discrimination." Of course, the RPD was not required to prove that state protection was available; the Applicants had to prove the opposite (*Mudrak v Canada (Citizenship and Immigration)*, 2015 FC 188 at paragraphs 46-71 [*Mudrak*]). However, when a claimant puts forth evidence that state protection is inadequate, the RPD needs to either find fault with that evidence (e.g., that it is not credible or does not prove what the claimants use it to prove) or else find that it is outweighed by other evidence. If the RPD finds that it is outweighed by other evidence but misconstrues the evidence it relies upon, that can constitute a reviewable error (*Hernandez Montoya* at paragraphs 54-57).

[40] In this case, the Applicants did supply evidence that approaching the police would have been futile. Among that evidence was a report from Dr. Marc Chernick, the most important details of which were summarized well in *Hernandez Montoya*:

> [48] The report of Dr. Marc Chernick, a document entitled "Country Conditions in Colombia Relating to Asylum Claims in Canada" (20 August 2009), is one of them. It reports that the FARC "continues to finance activities through massive extortion practices (what it refers to as "revolutionary taxes") and continues to kidnap and assassinate unarmed, civilian "enemies" to further its objectives despite its reduced military capacity". Dr. Chernick asserts in his report that the "FARC still has the capacity to kidnap, torture and kill individuals that it classifies as enemies". He further asserts that it is clear "that the Colombian state is unable to protect those who have been targeted" and that "[a]lmost all human rights violations in Colombia occur with impunity". (Certified Tribunal Record, vol. 3, at p. 500-521)

[41] Although a failure to refer to this report is not, in and of itself, fatal and the Court is typically reluctant to infer that country condition documentation was overlooked (see e.g. *Salazar* at paragraphs 59-60; *Herrera Andrade* at paragraph 21; *Vargas Bustos* at paragraphs 19, 34-39; *Canada (Citizenship and Immigration) v Kornienko*, 2015 FC 85 at paragraphs 16-19), this case is similar to *Hernandez Montoya*, in that "the RPD not only failed to explain why this evidence was rejected but it also misapprehended the evidence upon which it relied for its finding of adequate state protection" (*Hernandez Montoya* at paragraph 51). As in that case, the Court here is left with no way to understand why the RPD was not convinced by the Applicants' evidence that state protection was inadequate.

[42] The RPD's state protection finding cannot be salvaged by the fact that the Applicants left without reporting the crime since "a refugee claimant's failure to approach the state only becomes relevant if he or she cannot show that it would be futile to do so" (*Hernandez Montoya* at paragraph 52; *Ward* at 724; *Hinzman* at paragraph 37). An applicant for refugee protection is only "required to demonstrate that he or she took all <u>objectively reasonable</u> efforts, without success, to exhaust all courses of action reasonably available to them, before seeking refugee protection abroad" (*Ruszo* at paragraph 32 (emphasis added)).

[43] In this case, the Principal Applicant said that he did not approach the police because his assailants "warned me that if I dared to file a denunciation, that even before I had filed it and I had finished filing that denunciation, he would kill my daughters, my wife, and lastly me." The RPD also accepted that there was corruption within the police force such that this threat could be plausible.

[44] Yet, the RPD never asked itself whether that danger would make it objectively reasonable for the Applicants not to approach the state for protection. The RPD mentioned that allegations of corruption are investigated, but the Principal Applicant would only discover that the police officer he spoke to was corrupt if the FARC were to execute the threat and murder him or his family members. As the Supreme Court said in *Ward* at page 724, "it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness." Consequently, the RPD needed to assess whether the Applicants would have been seriously risking their lives by reporting the extortion before it held their failure to approach the police against them (*Mudrak* at paragraph 77).

F. *Was the RPD's analysis of internal flight alternatives unreasonable?*

[45] The existence of an IFA is fatal to a claim for refugee protection. In *Shilongo v Canada (Citizenship and Immigration)*, 2015 FC 86 at paragraph 27, I summarized the test for an IFA in the following words:

> The test to determine whether an IFA is available is set out in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 at 709-710, 140 NR 138 (CA) [*Rasaratnam*]. The decision-maker must be satisfied on a balance of probabilities that: (1) there is no serious possibility that the claimant will be persecuted in the proposed IFA; and (2) conditions in the proposed IFA are such that, in all the circumstances, it would be reasonable for the claimant to seek refuge there.

[46] A similar requirement arises under paragraph 97(1)(b) as well, since a risk faced by a claimant in his or her country of origin can only attract protection if it "would be faced by the person in every part of that country" (*IRPA*, s 97(1)(b)(ii)). While the Federal Court of Appeal

was cautious not to import the IFA test directly into subsection 97(1) in *Sanchez v Canada (Citizenship and Immigration)*, 2007 FCA 99 at paragraph 16, 360 NR 344, it emphasized that "claimants who are able to make reasonable choices and thereby free themselves of a risk of harm must be expected to pursue those options." Given that a higher degree of risk is also required to attract protection under paragraph 97(1)(b) (*Li v Canada (Citizenship and Immigration)*, 2005 FCA 1 at paragraphs 37-39, [2005] 3 FCR 239), an IFA under section 96 would typically preclude protection under paragraph 97(1)(b) where the claims under both sections allege the same source of risk (see e.g. *Chowdhury v Canada (Citizenship and Immigration)*, 2014 FC 1210 at paragraph 21).

[47] In this case, it was reasonable for the RPD to determine that the first requirement of the IFA test was met. The Applicants say that the RPD ignored the UNHCR Report (2005), but the Applicants' reliance on that report is misguided. The situation has changed since 2005, and the UNHCR itself released a new guideline in 2010 which paints a less dire picture for people in the Applicants' circumstances. While the 2010 guideline also opines that "an internal flight or relocation alternative (IFA/IRA) is generally not available in Colombia," it also recognizes that it can be "in certain circumstances" (UNHCR, "UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Colombia" (27 May 2010) at 6 [UNHCR Report (2010)]).

[48] More importantly, the RPD did not deny that the FARC could have sufficient influence to target the Applicants in the proposed IFAs. Rather, it said that "[t]he panel has considered the possible reach and influence of the FARC or its criminal associates in the proposed IFA. The

documentary evidence is mixed, depending on who was consulted. Therefore, the panel relies on the circumstances of this particular case …" (emphasis added). The RPD then went on to find, not that the FARC was unable to assassinate anyone in Cali or Cartagena, but that the Applicants do not have a sufficient profile to attract such attention. This was an appropriate consideration. The UNHCR also notes that the existence of an IFA depends in part on "the profile of the asylum-seeker and the existence of any reasonable grounds to believe that he or she will be traced and targeted" (UNHCR Report (2010) at 26; see also RIR COL104332.E (9 April 2013)). The RPD's further finding that the Applicants would not be a high-profile target was reasonable too, since the Principal Applicant had only ever been targeted because he interrupted the drug dealing in his neighbourhood.

[49] Nevertheless, the RPD did not direct sufficient attention to the second requirement for an IFA. As the Federal Court of Appeal noted in *Ranganathan v Canada (Minister of Citizenship and Immigration)* (2000), [2001] 2 FCR 164 at paragraph 15, 266 NR 380 (CA), the unreasonableness threshold is high and "requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions." At page 26 of the UNHCR Report (2010), the UNHCR says that this aspect of the test will typically depend on four factors in Colombia:

> (i) the ability of the State to effectively protect the displaced population; (ii) the possibility to be hosted by relatives and friends; (iii) the existence of concrete economic opportunities or of the possibility of local settlement for the displaced population, including access to healthcare and availability of accommodation; and (iv) the general security situation, including the assessment of the potential heightened risk of exposure to criminality for the displaced individuals.
>
> [Footnotes omitted]

[50] There is no indication that the RPD considered any of these factors. The RPD did not mention the UNHCR's observation that "big cities such as Barranquilla, Medellín, Cali and Cartagena, have witnessed an increase [*sic*] inflow of displaced persons, many of whom end up in overcrowded slum areas" (UNHCR Report (2010) at 2). Nor did the RPD notice the evidence that "[w]hile the general human rights situation of forcibly displaced Colombians has marginally improved in recent years, social inequalities, ethnic discrimination, corruption, impunity and restricted access to courts continue to <u>deprive displaced persons of the exercise of their fundamental human rights</u>" (UNHCR Report (2010) at 6 (emphasis added)). To similar effect, the United States' Department of State reported the following:

> Despite several government initiatives to enhance IDP [internally displaced persons] access to services and awareness of their rights, <u>many IDPs continued to live in poverty with unhygienic conditions and limited access to health care, education, or employment.</u> In 2004 the Constitutional Court ordered the government to reformulate its IDP programs and policies, including improving the registration system. Since then the court issued more than 250 follow-up decisions, some addressing specific issues such as gender, persons with disabilities, and ethnic minorities, and others analyzing specific policy components such as land and housing.
>
> (United States' Department of State, "Country Reports on Human Rights Practices for 2012: Colombia" (19 April 2013) at section 2 (emphasis added))

[51] Even with those many decisions, the "Constitutional Court confirmed in 2011 the 'persistence of the unconstitutional state of affairs' identified in 2004 regarding forced displacement" (Report of the United Nations High Commissioner for Human Rights on the situation of human rights in Colombia (31 January 2012) at paragraph 5). The RPD also did not refer to the evidence that "in 2009, the Colombian Constitutional Court observed that the State does not have the ability to suitably protect civilians that seek refuge in parts of the country not directly affected by the armed conflict" (UNHCR Report (2010) at 26).

[52] Instead, the RPD limited its analysis to the following paragraph:

> [45] With respect to the second prong of the test, whether it would be unreasonable in all the circumstances, including those particular to the claimants, for the claimants to seek refuge, the panel finds that the IFA suggested meet this test. In the case of the claimants, the panel notes that the claimants had moved to a friend [*sic*] home, then onto Canada and begin [*sic*] to adjust to a life in a new country. The male and female claimants were schooled in Colombia, speak the language and are familiar with the culture. The minor claimants speak the language and are familiar with the culture in Colombia. The male claimant testified to visiting Cali on vacation. There is insufficient evidence before the panel to suggest that the claimants could not adjust to life in Cali or Cartagena. Considering all the evidence in this case, the panel finds that it would not be unreasonable for the claimants to readjust to life in a different locale in their own home country.

[53] Visiting a place on vacation is not the same as moving there to live, and the Applicants would not <u>just</u> be adjusting to life in a different locale. The evidence indicated that they would be joining a population of over 3 million displaced persons within Colombia, many of whom live in overcrowded slums and whose fundamental human rights are routinely violated despite the best efforts of the Colombian government and the Constitutional Court. The RPD did not seem to be aware of the problems faced by internally displaced persons at all, nor did it refer to any

evidence that would paint a different picture of the situation or reasonably permit it to dismiss the evidence presented by the Applicants (*Hernandez Montoya* at paragraphs 35-36, 50-51).

[54] While the threshold under the second branch of the IFA test is high, it still needed to be assessed reasonably. The RPD did not do so in this case and, instead, based its decision on unreasonable findings of fact that it made without regard for the material before it (*Federal Courts Act*, RSC 1985, c F-7, s 18.1(4)(d); *Rahal v Canada (Citizenship and Immigration)*, 2012 FC 319 at paragraphs 38-39). That was an error.

G. *Did the RPD err by finding that there was no nexus to a Convention ground?*

[55] It is unnecessary to decide whether the RPD erred by finding that the Applicants' alleged risk had no nexus to a Convention ground, since that issue cannot affect the result of this application. If the RPD had reasonably determined that state protection was available to the Applicants or that they had IFAs, then the application for judicial review would be dismissed since the Applicants' claim under section 96 would fail (*Canada (AG) v Ward*, [1993] 2 SCR 689 at 712, 104 DLR (4th) 1 [*Ward*]; *Rasaratnam v Canada (Minister of Employment and Immigration)* (1991), [1992] 1 FCR 706 at 710, 140 NR 138 (CA) [*Rasaratnam*]). In the alternative, since those findings were unreasonable, the RPD's errors with respect to paragraph 97(1)(b) would alone demand that the RPD's decision be set aside. I therefore decline to address the nexus issue.

V. Conclusion

[56] The RPD did not reasonably assess the Applicants' personalized risk for purposes of section 97, and its findings of state protection and IFAs were equally problematic and cannot rescue the decision. This being so, the application for judicial review is hereby allowed and the matter is returned to the RPD for re-determination by a different panel member. Neither party suggested a question for certification; so, no such question is certified.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is allowed and the matter returned to the Refugee Protection Division for re-determination by a different panel member. No serious question of general importance is certified.

"Keith M. Boswell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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