

Federal Court



Cour fédérale

**Date: 20220630**

**Docket: IMM-3818-19**

**Citation: 2022 FC 976**

**Ottawa, Ontario, June 30, 2022**

**PRESENT: The Honourable Mr. Justice Favel**

**BETWEEN:**

**JOHAN BUENO GARCIA  
KRISTEL GINED JULIO ROJAS  
THOMAS BUENO JULIO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Nature of the Matter

[1] The Applicants seek judicial review of a May 29, 2019 decision [Decision] of the Refugee Protection Division [RPD]. The RPD determined that the Applicants are neither Convention refugees nor persons in need of protection pursuant to section 96 and subsection

97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and that they have a viable Internal Flight Alternative [IFA] in Tunja, Colombia.

[2] The application for judicial review is dismissed.

## II. Background Facts

[3] Kristel Gined Julio Rojas [Kristel], Johan Andres Bueno Garcia [Johan], and their minor child [together, Applicants] are all citizens of Columbia.

[4] Kristel claims a fear of persecution from her former employment superior [Former Superior]. The Former Superior's harassing behaviour caused Kristel to quit her job. Kristel made a complaint against the Former Superior to the Ministry of Labour and the Secretariat for Women [Ministry]. The Applicants also claim a fear of persecution from the criminal gang, Los Urabeños, who assaulted Johan on February 26, 2018 as he was leaving work. The Applicants allege that on February 6, 2018, they began receiving threatening phone calls at their home telling them to "stop what they are doing." The existence of these phone calls was an issue for the RPD. On March 15, 2018, the Applicants made a denunciation at the Attorney General's office [Fiscalia] regarding the assault on Johan and left Colombia on March 15, 2018. The Applicants arrived in Canada through the United States of America and made claims for refugee protection.

## III. The Decision

[5] The RPD found that the Applicants have a viable IFA in the city of Tunja and rejected their refugee claim.

[6] The RPD accepted that Johan was a victim of a one-time attack by Los Urabeños but found the Applicants had not established that they were being targeted for their political opinion. Therefore, their fear of Los Urabeños had no nexus to a Convention ground. The RPD held that the Applicants did not receive threatening phone calls. In reaching this conclusion, the RPD noted inconsistencies within the Applicants' testimony and the fact that the threatening phone calls were not mentioned when they reported the assault to the Fiscalía. The RPD also found an inconsistency between Johan's testimony and Kristel's basis of claim [BOC] narrative. Johan testified that Kristel also received phone calls, yet Kristel did not mention this in her BOC.

[7] The RPD found that the Applicants had an IFA in Tunja. While acknowledging that Los Urabeños has the capacity to track people down within Colombia, the RPD found that the Applicants failed to establish that Los Urabeños would be motivated to search for them. Therefore, the RPD found that there was no serious possibility of the group pursuing the Applicants in Tunja, an area where this group is not active.

[8] The RPD found the Applicants were not credible because, during oral testimony, Kristel revealed for the first time that the Former Superior sexually assaulted her. This testimony conflicted with her BOC narrative and corroborating evidence, which described the interactions as sexual harassment in the form of inappropriate comments and unwanted gifts. The RPD also

found that there was no forward-looking risk from the Former Superior because he had not contacted Kristel since she quit her job.

IV. Issue and Standard of Review

[9] The only issue in this application is whether the Decision is reasonable.

[10] The merits of the Decision are to be assessed using the reasonableness standard. This case does not engage one of the exceptions set out by the Supreme Court in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*]. Therefore, the presumption of reasonableness is not rebutted (*Vavilov* at paras 23-25, 53).

[11] A reasonableness review requires the Court to examine the decision for intelligibility, transparency, and justification. In conducting a reasonableness review, the reviewing court must look to both the outcome of the decision and the justification of the result (*Vavilov* at para 87). A reasonable decision must be “justified in relation to the relevant factual and legal constraints that bear on the decision” (*Vavilov* at para 99). However, a reviewing court must refrain from reweighing and reassessing the evidence considered by the decision-maker (*Vavilov* at para 125). If the reasons of the decision maker allow a reviewing Court to understand why the decision was made, and determine whether the decision falls within the range of acceptable outcomes defensible in respect of the facts and law, the decision will be reasonable (*Vavilov* at paras 85-86).

V. Analysis

A. *Is the Decision reasonable?*

(1) Applicants' Position

(a) *Los Urbeños*

[12] The RPD noted that Johan was not able to answer why Los Urabeños was targeting him. Johan was not obligated to identify the reasons for his persecution. Rather, it was the duty of the RPD to decide whether the Convention definition was met (*Duversin v Canada (Minister of Citizenship and Immigration)*, 2018 FC 466 at para 34, citing *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 745, 103 DLR (4th) 1).

[13] The RPD acknowledged that the Applicants provided evidence of involvement in politics yet unreasonably found that they had no nexus to a Convention ground. Moreover, there was country condition evidence in the National Documentation Package [NDP] contradicting the RPD's finding that Los Urabeños are not politically motivated.

[14] Finally, the RPD unreasonably ignored corroborating evidence of the threatening phone calls over minor inconsistencies in the evidence related to these phone calls.

(b) *The Former Superior*

[15] The RPD's failure to accept Kristel's explanation for the omission of sexual assault in her BOC narrative was not in line with the *Chairpersons' Guideline 4: Women Refugee Claimants Fearing Gender Related Persecution [Gender Guidelines]*. The RPD made an unreasonable

plausibility finding that it was unlikely the Ministry would mention inappropriate comments and gifts and not sexual assault (*Valtchev v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776 at paras 5-7).

[16] The RPD also minimized the incidents by finding that sexual harassment can be easily solved by quitting one's job. The fact that Kristel quit her job does not reasonably lead to a finding that there is no forward-looking risk.

(c) *IFA*

[17] If the RPD's determination of nexus is found to be unreasonable, then the RPD's IFA determination must also fail.

(2) Respondent's Position

(a) *Los Urabeños*

[18] The fear of Los Urabeños lacked a nexus because there was no evidence that Los Urabeños targeted Johan for his political views. The RPD found that the country condition evidence described Los Urabeños as a criminal gang, and not a politically motivated actor. The onus was on the Applicants to establish their nexus to a Convention ground with evidence (*Casteneda v Canada (Citizenship and Immigration)*, 2011 FC 1012 at paras 14, 16 [*Casteneda*]).

[19] The RPD reasonably determined that filing a police report weeks after Johan's assault and without mentioning the alleged threatening phone call did not demonstrate that the Applicants had a genuine interest in being protected by the State. The RPD accepted that the single attack occurred but found that there was insufficient evidence that this attack was politically motivated. The RPD reasonably noted that the inconsistencies in the Applicants' versions of events related to whether or not Kristel had received threatening phone calls on her own phone. Johan stated that Kristel did not mention this in her narrative because she immediately hung up the phone.

(b) *The Former Superior*

[20] The RPD discussed and applied the *Gender Guidelines*. The BOC narrative and denunciations did not mention sexual assault. Therefore, the RPD reasonably found this was not a situation of reluctance to disclose traumatic details, but an additional central allegation not found anywhere in the documentation.

[21] The Applicants failed to establish a forward-looking risk from the Former Superior. The RPD noted that on one hand, Kristel's BOC narrative stated that she had not heard from the Former Superior since she had quit her job. On the other hand, her narrative stated that, after quitting her job, the Former Superior called her incessantly. Kristel then explained that she initially thought the phone calls were from him but then later believed that the phone calls came from Los Urabeños. This material inconsistency led the RPD to reasonably find that the Former Superior had not shown interest in Kristel since she left her job.

(c) *IFA*

[22] The IFA determination was also reasonable. The RPD found that neither Los Urabeños nor the Former Superior have shown an interest in the Applicants. Therefore, it was reasonable to conclude that the alleged persecutors would not expend resources to locate the Applicants throughout Colombia. Second, the RPD found that relocating to Tunja would not be unreasonable because the Applicants failed to show the existence of conditions that would jeopardize their life and safety if they relocated there.

(3) Conclusions

(a) *Los Urabeños*

[23] The onus is on the Applicants to establish a nexus to a Convention ground with evidence (*Casteneda* at para 16). I find that the RPD reasonably concluded that the Applicants failed to demonstrate with sufficient credible evidence that the attack committed by Los Urabeños was politically motivated (*Kahumba v Canada (Citizenship and Immigration)*, 2018 FC 551 at para 49). In the record before the Court, I find that the Applicants did not provide clear evidence of persecution for actual or perceived political opinion to support their claim.

[24] The RPD acknowledged the Applicants' political party identification cards. However, Johan could not answer questions as to why Los Urabeños was targeting him. As the RPD noted at paragraph 21 of the Decision, the member asked this question to ascertain whether Johan knew the reason or was just guessing. At paragraph 22 of the Decision the RPD explained that the



purpose of the question was to determine whether the attack was politically motivated. These paragraphs illustrate the basis upon which the RPD found that there was no nexus to a Convention ground. I find that it was reasonable for the RPD to conclude that the single assault against Johan did not establish a nexus. That said, I note that the RPD did not base its conclusion of lack of nexus on this alone.

[25] The RPD considered the country condition evidence at paragraph 25 and 26 of the Decision. The Applicants point to an excerpt from one Response to Information Request (NDP Item 7.15 as of March 6, 2015) to submit that there was country condition evidence to contradict the RPD's finding that Los Urabeños was a criminal gang. With respect, the same document sets out, in detail, clashes between Los Urabeños and police forces and this document does not contain any evidence to conclude that Los Urabeños is a political actor. Rather, this document provides a basis for the Officer's conclusion that Los Urabeños is a criminal gang.

[26] Due to inconsistencies in the Applicants' evidence, it was also reasonable for the RPD to make a negative credibility finding regarding the phone calls. In *Bushati v Canada (Citizenship and Immigration)*, 2018 FC 803 this Court held:

[33] Contradictions, omissions, and discrepancies in the evidence of a refugee claimant has long been recognized as a basis for a finding of lack of credibility (*Rajaratnam v Canada (Minister of Employment & Immigration)* (1991), 135 NR 300, 1991 CarswellNat 851 at para 14 (WL Can) (FCA); *Fang v Canada (Citizenship and Immigration)*, 2013 FC 241 at paras 16-18).

[27] Credibility findings have been described as the "heartland" of the RPD's expertise and thus, the RPD is owed deference when impugned findings relate to credibility of a claimant

(*Lawani v Canada (Citizenship and Immigration)*, 2018 FC 924 at para 15). The Applicant has not pointed to any errors in the assessment of their credibility. They simply disagree with the RPD's determinations.

[28] For all of the above reasons, I find that the RPD's analysis and findings on the lack of a nexus to a Convention ground are reasonable.

(b) *The Former Superior*

[29] I find that the RPD reasonably determined based on the record before them, that the Former Superior did not present a forward-looking risk. The RPD reasonably found that the Former Superior had not show interest in Kristel since she left her job.

[30] The Applicants submit Kristel was reluctant to divulge her experiences of sexual assault and that such an omission was not a last minute attempt to manufacture a story to buttress her refugee claim. The Respondent points out that her BOC and denunciations did not mention that a sexual assault took place. I am persuaded by the Respondent's submissions.

[31] The *Gender Guidelines* are not law but they are meant to guide decision-makers (*Olah v Canada (Citizenship and Immigration)*, 2019 FC 401 at para 27 [*Olah*]). A failure to abide by the *Gender Guidelines* can constitute a reviewable error (*Olah* at para 29). At paragraphs 59 to 67 of the Decision, the RPD explains its approach on the late disclosure of the alleged sexual assault, including the application of the *Gender Guidelines*. The RPD points out that the vast majority of Kristel's BOC narrative discusses the harassment by the Former Superior and that it

was only toward the end of the hearing that, based on some statements by Kristel, the RPD had to ask for more details about the alleged sexual assault. The RPD also noted that none of the corroborating documents, such as the complaint to the Ministry, mentioned a sexual assault. The RPD held that “[g]iven [Kristel’s] Narrative and all of the corroborating documents describe the treatment as sexual harassment and not sexual assault, I find [Kristel] was, more likely than not, sexually harassed in the work place and not sexually assaulted.” I find that this conclusion is reasonable and sensitive and alive to the *Gender Guidelines*.

[32] As conceded by the Respondent’s, the RPD’s finding that sexual harassment can “easily be solved by quitting one’s job” was definitely poorly worded. However, the Decision as a whole reveals that the RPD did consider and discuss the *Gender Guidelines* and that they engaged with the evidence that was before them:

[59] However, during her testimony the female claimant began to imply, or hint, that [the Former Superior] did more than what she wrote in her Narrative. Generally speaking, RPD members are extremely sensitive when asking female claimants questions regarding the sexual trauma they may have suffered. Usually, I try to refrain from asking for any details or specifics in these types of cases, in order to avoid re-traumatizing the claimant. However, in this case, I had no prior knowledge that the female claimant was making this type of allegation. Therefore, I asked the female claimant for more details as she seemed to be suggesting something different than what was in her Narrative; but, I did not know what that was. Eventually, the female claimant testified that Mr. Cabrera sexually assaulted her during their last business trip, while sitting next to her on an airplane. This revelation was both confusing and shocking as there had been no indication, in either the Narrative or the corroborating evidence, that this has occurred.

[60] I asked the female claimant why she omitted this extremely material fact from her Narrative. The female claimant testified that it was too hard for her to talk about. While I acknowledge that some women may be reluctant to disclose their experiences of sexual violence, I would have expected some indication,

somewhere in the evidence, that this was the allegation prior to the female claimant's oral testimony.

[33] I find that the RPD did not err in its assessment of the late disclosure of the alleged sexual assault.

(c) *Viable IFA*

[34] A viable IFA means that a person can seek refuge in one part of their home country other than where they faced persecution or risk of harm. The two-part test for finding a viable IFA was established in *Rasaratnam v Canada (Minister of Employment & Immigration)*, [1992] 1 FC 706 (CA), 31 ACWS (3d) 139 [*Rasaratnam*]. Recently, at paragraph 37 of *Armando v Canada (Citizenship and Immigration)*, 2020 FC 94, Justice Pamel articulated the conjunctive two-part test to determine the availability of an IFA:

- 1) 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 in which it finds an IFA exists; and
- 2) Conditions in that part of the country must be such that it would not be unreasonable, in all the circumstances, including those particular to the claimants, for the claimants to seek refuge there.

[35] The onus is on the Applicants to negate one of the two prongs. The Applicants make scant submission on the issue of IFA as summarized above at paragraph 17, despite it being determinative. The Respondent's submissions were more fulsome.

[36] On the first prong, the RPD found that Los Urabeños did not show an interest in the Applicants that would lead them to expend resources to locate them throughout Colombia. The RPD also reasonably found that since leaving her job, the Former Superior has not contacted Kristel and that he has not shown an ongoing interest in her. Under the first prong of the IFA test, a relevant consideration is whether an agent of persecution has probable means and motivation to search for the applicant in the suggested IFA (*Nimako v Canada (Minister of Citizenship and Immigration)*, 2013 FC 540 at para 7). Here, the evidence shows that neither Los Urabeños nor the Former Superior are motivated to search for the Applicants should they relocate to Tunja.

[37] On the second prong, the RPD found it would not be unreasonable for the Applicants to relocate to Tunja. When the RPD member asked Johan if the Applicants could move to Tunja, he testified that they could not because Tunja is a quieter place, more geared towards farming, and does not have good schools for his son. The RPD found that while Los Urabeños may be able to locate the Applicants, the evidence did not establish that they had the interest or motivation to do so (*Abdullah v Canada (Citizenship and Immigration)* 2021 FC 76 at para 17, citing *Essel v Canada (Citizenship and Immigration)*, 2020 FC 1025 at para 13).

[38] I agree with the Respondent that the Applicants failed to negate both prongs of the test. On the first prong, I agree with the Respondent that the Applicants have failed to establish that they may be persecuted in the IFA. This is due to the lack of motivation of both Los Urabeños and the Former Superior to seek out the Applicants in the IFA.

[39] As for the second prong, I find that the Applicants have not satisfied the high threshold that there are conditions in the IFA that would make it unreasonable for the Applicants to relocate there. The Applicants have not demonstrated that living or relocating to Tunja would jeopardize their safety. The RPD also noted their individual circumstances such as their education levels and employment history.

[40] Accordingly, I find that when the Decision is reviewed as a whole, the RPD made a reasonable IFA determination based on the evidence before it.

## VI. Conclusion

[41] The application for judicial review is dismissed. The parties have not proposed a question of general importance for certification and I agree that none arises.

**JUDGMENT in IMM-3818-19**

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

1. The application for judicial review is dismissed.
2. There is no question for certification.
3. There is no order as to costs.

"Paul Favel"

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-3818-19

**STYLE OF CAUSE:** JOHAN BUENO GARCIA, KRISTEL GINED JULIO ROJAS, THOMAS BUENO JULIO v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

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