Federal Court  Cour fédérale

Date: 20200515

Docket: IMM-4430-19

Citation: 2020 FC 626

Ottawa, Ontario, May 15, 2020

PRESENT: Mr. Justice Russell

BETWEEN:

ENVER AUGUSTO LOSADA CONDE
LISA CATHERINE PRIETO CASTANEDA
JULIANA LOSADA PRIETO
SEBASTIAN LOSADA PRIETO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application under s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] for judicial review of the decision of the Refugee Protection Division [RPD] of the Immigration and Refugee Board of Canada, dated June 26, 2019, which refused the

Applicants' application to be deemed Convention refugees or persons in need of protection under ss 96 and 97 of the *IRPA*.

[2] The decision under review is the second re-determination of the claims of Enver Augusto Losada Conde [PA], his wife Lisa Catherine Prieto Castaneda, and their children Juliana Losada Prieto and Sebastian Losada Prieto.

[3] Their claim was first heard by the RPD on November 5, 2013, and a negative decision was rendered on January 16, 2014 on the basis that the Applicants had not rebutted the presumption of adequate state protection in Colombia. The Applicants appealed the decision to the Federal Court, which then returned the decision for re-determination. On February 6, 2018, the RPD rendered another negative decision on the same basis. The Applicants appealed to the Federal Court, and the decision was returned on November 19, 2018, for a second re-determination.

II. BACKGROUND

[4] The Applicants are a family from Bogota, Colombia who seek protection, and allege that they are wanted and will be assassinated by the Revolutionary Armed Forces of Colombia [FARC].

[5] The PA worked as a veterinarian and owned his own clinic in Colombia. On August 12, 2013, he was at a café with a client when an assassin approached them and shot the

client. The client was killed and the PA was wounded by a gun shot to the stomach. As the client was dying, he said that the assassin was from the guerilla movement (signifying the FARC).

[6] The PA was taken to the hospital to be treated. While there, the police interviewed him as he was the only witness who could identify the killer, and the only witness who could say what the victim had said before he died. According to the PA, his testimony lead to the arrest of the assassin.

[7] During a visit to the PA at the hospital, one of his brothers was allegedly approached by two men. These men told the PA's brother that they were going to kill the PA for being an informer as well as the other Applicants.

[8] A few days later, another of the PA's brothers was approached by two men outside the brother's home. These men also stated that they were going to kill the PA and his family.

[9] While the PA was hospitalized, the FARC approached another veterinarian and took him to a FARC base in the countryside. A FARC officer determined that he was not the veterinarian the officer had wanted. According to the Applicants, this further confirmed that it was the FARC who had ordered the murder, and it became clear that the FARC wanted the PA to be brought to them.

[10] The family began staying with Ms. Prieto Castaneda's mother, who also lives in Bogota. During this time, they requested protection from the police, but they were told that it was not

possible because the police did not have enough officers to deal with all the protection requests they received.

[11] Because the police could not protect them, the Applicants sold their business and fled the country on September 8, 2013. They travelled to the United States before arriving in Canada on September 13, 2013.

[12] During the two previous hearings, the PA was designated as a vulnerable person based on a psychological assessment. At the hearing for the second re-determination on February 18, 2019, the RPD member [Member] asked the PA a number of general questions to determine whether he remained severely impaired from presenting his case.

[13] Following her initial questioning, the Member de-designated the PA as a vulnerable person and proceeded to question him about his claim.

III. DECISION UNDER REVIEW

[14] The RPD refused the Applicants' second re-determination in the Decision dated June 26, 2019, on the basis that the Applicants had an internal flight alternative [IFA] in Barranquilla, Colombia.

A. *De-designation of the Principal Applicant as a vulnerable person*

[15] At the hearing, the Member de-designated the PA as a vulnerable person because she determined that he was able to understand and respond to her general questions which were not related to his claim. His answers were coherent, directly addressed the questions she posed, and he exhibited a high form of communication. As a result, the Member found that the PA's ability to present his case was no longer impaired.

[16] The Member noted that she had not been provided with an updated psychological assessment for the PA. However, she stated that the two previous psychological assessments did not indicate difficulties that go beyond what is common for those appearing before the RPD. In fact, the Member noted that the PA had been diagnosed with post-traumatic stress disorder [PTSD], but she also indicated that this type of diagnosis was extremely common for people who appear before the RPD. The Member acknowledged that the PA was undergoing counselling despite refusing medication to treat his PTSD.

[17] Given the above, the Member de-designated the PA as a vulnerable person and advised him that she did not intend to ask him any questions directly about the shooting itself. However, in order to assess his forward-facing risk, she did question him about whether other witnesses were interviewed by police. The Member justified the question on the basis that it was periphery in nature. Upon answering the question, the PA became upset as he remembered the shock he felt at being shot, and counsel objected to the question.

B. *Nexus to a Convention Ground*

[18] The Member determined that the Applicants' fear is not linked to any of the five Convention grounds. She noted that the PA was not shot "for reasons of" his political opinion; rather, he was shot as an innocent bystander. Furthermore, the Member did not recognize the PA as a member of a particular social group. She indicated that he is at risk because of a very personal characteristic—his ability to give evidence which could lead to a prosecution.

[19] In light of the above, the Member concluded that the Applicants fear retaliation because the PA identified a suspect of a crime to police. Their fear is not linked to any of the five Convention grounds as it amounts to a personal vendetta and, as such, their claim fails under s 96 of the *IRPA*.

C. *Risk of the Applicants being harmed in Barranquilla*

[20] The Member stated that the Applicants would not face a risk of harm in Barranquilla because the FARC does not continue to have the ability to locate people as they once did, and they no longer seem motivated to find the Applicants.

[21] The Member noted that the government of Colombia and the FARC had reached an agreement to end their armed conflict. There are some FARC dissidents but no document indicated that they are active in Atlántico, the department in which Barranquilla is located, or any of Atlántico's surrounding departments. Further, the Member stated that approximately 85% of the FARC members have demobilized and disarmed and have formed a peaceful political

party. The remaining 15% are not part of a central authoritative location or group, but are fragmented. The evidence demonstrates that the demobilization weakened both the soldiers in the field and their collaborators within urban centres.

[22] In conjunction with the above, the Member was not convinced that the FARC is motivated to find the Applicants because: (1) no member of the Applicants' family has been approached regarding their whereabouts since August 19, 2013; and (2) the PA's wife continues to have contact with a former colleague and there has been no indication of an ongoing search for the Applicants within the veterinarian community.

[23] As such, since the Applicants left Colombia in September of 2013, nothing has happened to indicate that the FARC remains interested in them. Thus, the Member was not persuaded that the FARC dissidents, given their weakened state, decentralization, and the fact that they are not active in the area, have the motivation to locate the Applicants if they were to move to Barranquilla.

[24] Furthermore, the Member indicated that the education and employment histories of the Applicants will allow them to find work in Barranquilla. The PA has been able to re-establish himself in Canada and the Member concluded that his PTSD would not prohibit him from doing the same in Barranquilla. Thus, the Member determined that the Applicants have not met their burden of proving that Barranquilla is an unreasonable IFA.

[25] Finally, Applicants' counsel had submitted a letter from a website editor who "evaluated the security risk for two former victims of the FARC," but the Member noted that this letter was of limited assistance to her because she did not have the Basis of Claim form for the victims concerned, and the letter addressed the risk in Bogota, not Barranquilla.

D. *Compelling reasons exception*

[26] The Member stated that the RPD is required to grant refugee status on humanitarian grounds to those who have suffered such appalling persecution that their experience alone is a compelling reason not to return them, even though they may no longer have any reason to fear further persecution. The Member was not persuaded that the Applicants' experience was sufficiently atrocious or appalling to trigger the "compelling reasons" exception.

IV. ISSUES

[27] The Applicants raise the following issues in this case:

A. Whether the RPD breached procedural fairness by refusing to permit counsel to question the PA;

B. Whether the RPD's conclusion that they did not have a nexus to perceived political opinion or membership in a particular social group was unreasonable;

C. Whether the RPD's conclusion that they had an IFA was unreasonable;

D. Whether the RPD's analysis of compelling reasons was unreasonable;

V. STANDARD OF REVIEW

[28] This application was argued prior to the Supreme Court of Canada's recent decisions in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*] and *Bell Canada v Canada (Attorney General)*, 2019 SCC 66. This Court's judgment was taken under reserve. The parties' submissions on the standard of review were therefore made under the *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] framework. However, given the circumstances in this matter, and the Supreme Court of Canada's instructions in *Vavilov* at para 144, this Court found that it was not necessary to ask the parties to make additional submissions on the standard of review. I have applied the *Vavilov* framework in my consideration of the application and it does not change the applicable standards of review in this case nor my conclusions.

[29] In *Vavilov*, at paras 23-32, the majority sought to simplify how a court selects the standard of review applicable to the issues before it. The majority did away with the contextual and categorical approach taken in *Dunsmuir* in favour of instating a presumption that the reasonableness standard applies. However, the majority noted that this presumption can be set aside on the basis of (1) clear legislative intent to prescribe a different standard of review (*Vavilov*, at paras 33-52), and (2) certain scenarios where the rule of law requires the application of the standard of correctness, such as constitutional questions, general questions of law of central importance to the legal system as a whole and questions regarding the jurisdictional boundaries between two or more administrative bodies (*Vavilov*, at paras 53-64).

[30] In the instant proceeding, the Applicants submitted that the application raises questions of mixed fact and law which are reviewable on a standard of reasonableness, and the Respondent concurred (*Dunsmuir* at para 47).

[31] There is nothing to rebut the presumption that the standard of reasonableness applies in this case. The application of the standard of reasonableness to these issues is also consistent with the existing jurisprudence prior to the Supreme Court of Canada's decision in *Vavilov* (*Dirie v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1052 at para 15 [*Dirie*]).

[32] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with whether it "bears the hallmarks of reasonableness — justification, transparency and intelligibility — and whether it is justified in relation to the relevant factual and legal constraints that bear on the decision" (*Vavilov*, at para 99). Reasonableness is a single standard of review that varies and "takes its colour from the context" (*Vavilov*, at para 89 citing *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]). These contextual constraints "dictate the limits and contours of the space in which the decision maker may act and the types of solutions it may adopt" (*Vavilov*, at para 90). Put in another way, the Court should intervene only when "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov*, at para 100). The Supreme Court of Canada lists two types of fundamental flaws that make a decision unreasonable: (1) a failure of rationality internal to the decision-maker's reasoning process; and (2) untenability "in light of the relevant factual and legal constraints that bear on it" (*Vavilov*, at para 101).

[33] With respect to errors of law and breaches of procedural fairness, the Applicants held that the Officer need only be shown to have erred. The Respondent asserted that the standard of review to determine whether the RPD fulfilled its duty of procedural fairness is correctness (*Dirie*, at para 15; *Ngeze v Canada (Minister of Citizenship and Immigration)*, 2016 FC 858 at para 22).

[34] Some courts have held that the standard of review for an allegation of procedural unfairness is "correctness" (*Mission Institution v Khela*, 2014 SCC 24 at para 79; *Khosa*, at paras 59 and 61). The Supreme Court of Canada's decision in *Vavilov* does not address the standard of review applicable to issues of procedural fairness (*Vavilov*, at para 23). However, a more doctrinally sound approach is that no standard of review at all is applicable to the question of procedural fairness. The Supreme Court of Canada in *Moreau-Bérubé v New Brunswick (Judicial Council)*, 2002 SCC 11 stated that the issue of procedural fairness:

> requires no assessment of the appropriate standard of judicial review. Evaluating whether procedural fairness, or the duty of fairness, has been adhered to by a tribunal requires an assessment of the procedures and safeguards required in a particular situation (*Moreau-Bérubé*, para 74).

VI. STATUTORY PROVISIONS

[35] The following provisions of the *IRPA* are applicable in this proceeding:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race,

membership in a particular social group or political opinion,	de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques:
(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or	a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;
[…]	[…]
Person in Need of Protection	**Personne à protéger**
97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally	97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée:
(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;
(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant:
(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,	(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,
(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent

in or from that country,	ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
[…]	[…]

VII. ARGUMENTS

A. *Procedural Fairness*

(1) Applicants

[36] The Applicants argue that the PA was given no advance notice that his designation as a vulnerable person might be revoked. Given the PA's personal circumstances—the PTSD diagnosis and his symptoms of mood deterioration during prolonged periods of uncertainty—the Member should have maintained the ruling that counsel be permitted to question him in chief.

[37] The Applicants rely on the Federal Court's decision in *Ndjizera v Canada (Minister of Citizenship and Immigration)*, 2013 FC 459 [*Ndjizera*]. In that decision, Justice Rennie explains that it was an error and a breach of natural justice for the RPD to ignore the applicant's psychology report demonstrating PTSD and a pattern of symptoms known as battered women

syndrome, and to deny her request to reverse the ordinary order of questioning (*Ndjizera*, at paras 3-5; *Thamotharem v Canada (Citizenship and Immigration)*, 2007 FCA 198 [*Thamotharem*]). Justice Rennie also held that asserting a witness will be questioned in a sensitive manner is no cure for this breach.

[38] Moreover, the Applicants submit that the Member approached the issue with a single-minded determination, perversely diminishing or selectively ignoring all evidence of ongoing psychological trauma. In fact, her disregard to the psychologist's diagnosis because it was dated from 2018 was perverse as nothing had changed in the PA's life relative to his stressors.

[39] The Applicants contend that the questioning of the PA by the Member to try and undermine the psychologist's diagnosis was also perverse because the Member has no expertise as a psychologist and her questioning bore no relation to assessing PTSD. This was contrary to the Federal Court's decision in *Elemah* and *Gill*, in which the Court stated that an RPD member should not be casually dismissive of a psychologist's diagnosis (*Elemah v Canada (Citizenship and Immigration)*, 2001 FCT 779; *Gill v Minister of Employment and Immigration*, (FC) Court File: 92-T-1624, March 31, 1994).

[40] According to the Applicants, the Member did not ask the PA a general question, but rather she had him re-imagine the moment when he was bleeding and was fearful that he could die. Counsel objected but the Member carried on with the hearing and made the PA answer questions in which he had had to defend his life and explain complex political and social

realities. As such, the Applicants claim that it was perverse for the Member to indicate that the PA was being questioned about “periphery” matters.

[41] Furthermore, the Applicants assert that the Member’s dismissive assertion that most refugee claimants suffer PTSD is entirely perverse, and is not a reasonable basis to justify being wilfully insensitive to procedure.

[42] In light of the above, the Applicants submit that the Member’s breach of natural justice is grave, and impacted the fairness of the entire hearing as it impaired the PA’s ability to justify himself in his testimony.

(2) Respondent

[43] The Respondent submits that the evidence before the RPD panel at the hearing in 2019 was not identical to past hearings because of the passage of time. According to the Respondent, the Applicants are requesting that the RPD panel fetter its discretion and simply rely on the questioning structure used by past RPD panels without regard to the evidence. The evidence before the Member supported that the PA was no longer a vulnerable person given his improved sleep and stress levels as well as his ability to respond to questions and to cooperate fully with the hearing.

[44] The Respondent asserts that the Member’s question focused on the conduct of the police and not the shooting. The Applicants have misconstrued the question asked by the RPD, which is not a procedural or reviewable error.

[45] With respect to the Applicants' reliance on *Ndjizera*, the Respondent distinguishes that case and argues that the focus of the Court in that decision was the Gender Guidelines, and that women in domestic violence situations must have accommodation with respect to their testimony. The facts in the present case are different from *Ndjizera*.

[46] The Respondent asserts that Guideline 7 (*Preparation and Conduct of a Hearing in the Refugee Protection Division*) is relevant in the present matter because it deals with the questioning of claimants at hearings. The leading case regarding Guideline 7 is the Federal Court of Appeal decision in *Thamotharem*. In that case, the Federal Court of Appeal noted that RPD members are to consider the facts of the particular case before them in order to determine whether there are exceptional circumstances warranting a deviation from the standard order of questioning *(Thamotharem*, at paras 11, 19, 20).

[47] The Respondent contends that the Applicants had an opportunity to provide their story to the RPD, but the PA's circumstances were not sufficiently exceptional to change the normal order of questioning.

(3) Applicants' Reply

[48] In response to the Respondent's attempt to distinguish the principle in *Ndjizera*, the Applicants submit that, in that case, the applicant was traumatized by domestic violence, but in the present case, the PA was traumatized by a near-fatal shooting. Although the Court discussed the impact of domestic abuse, the Court's reasoning with respect to the issue of PTSD is equally

applicable to any witness impacted by PTSD, particularly where a psychological report sets out the impact this is likely to have on the witness.

[49] The Applicants allege that the Respondent provided no justification or rationale as to why the Member should have required a third medical report from 2019. What is more, she should have given notice of the issue before the hearing in order to ensure fairness.

[50] The Applicants contend that the Respondent's understanding of *Thamotharem* to the effect that the order of questioning can be reversed in exceptional circumstances is improperly converted into an extra requirement that the circumstances be "so exceptional" for this to happen. There is no requirement the evidence be of an extra-exceptional circumstance.

B. *Nexus to the Convention*

(1) Applicants

[51] The Applicants submit that the PA was instrumental in ensuring the assassin was imprisoned, and the Member's finding that he was showing integrity, not opposition, to the FARC by doing this, is a pure projection of her own values onto the agents of persecution.

[52] The Applicants rely on *Cai* and argue that the assessment of the nexus has to be predicated on how the FARC would regard a person who has caused the arrest and imprisonment of one of their assassins (*Cai v Canada (Citizenship and Immigration)*, 2015 FC 577 [*Cai*]). In

fact, the FARC perceives itself as acting for a political purpose and would perceive the PA's role in bringing the assassin to justice as political opposition.

[53] With respect to the Member's conclusion on "social group," the Applicants assert that she erred because the Federal Court has held that a witness is definable as part of a social group within the Supreme Court's definition in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, as he or she cannot undo having acted as a witness (*Reynoso v Canada (Citizenship and Immigration)*, 107 FTR 220).

(2) Respondent

[54] The Respondent submits that the PA may have a subjective fear of harm from the FARC, but this is not supported by objective evidence. Insufficient evidence was provided to support the belief that the FARC was involved in the shooting.

[55] The Respondent argues that the political opinion ground contained in the Convention refugee definition does not include the political opinion of the alleged persecutor.

[56] Furthermore, the Respondent claims that the PA's discussions with the police about a crime do not amount to political opinion or relate to a social group. Thus, the decision of the RPD, that there was no nexus to a convention ground, was reasonable.

(3) Applicants' Reply

[57] In response to the Respondent's argument, the Applicants submit that perceived political opinion is included in the Convention ground of "political opinion" (*Lai v Canada (Citizenship and Immigration)*, 2005 FCA 125 [*Lai*]; *Cai*, above). The Applicants' actions were sufficient for the FARC to ascribe an implied political opinion to him.

C. *Internal Flight Alternative*

(1) Applicants

[58] The Applicants submit that the Member's Decision is predicated on a cumulative or combined finding that the combination of some change in circumstances, and her presumption that the FARC dissidents will have lost interest and motivation to pursue the PA, means the Applicants are likely to be safe in another city. However, as the Federal Court of Appeal held in *Peng*, and the Federal Court held in *Gonzalez*, where an unreasonable aspect of reasoning may have affected the outcome, the entire decision should be set aside (*Peng v Canada (Employment and Immigration)*, (FCA), Court no. A-1054-90; *Gonzalez v Canada (Citizenship and Immigration)*, (FC), Court no. IMM-2611-97).

[59] For example, the Applicants argue that the reasons given by the Member to support her assumption that FARC dissidents are no longer motivated to find the Applicants are unreasonable. The Member had no evidentiary basis to refute the PA's statement that he is a person they want to kill. Hence, the IFA analysis should be set aside.

[60] The Applicants also submit that the Member erred in analyzing the evidence with respect to the FARC's demobilization. The Applicants say that, once the urban militia are included, the number of guerilla soldiers who remain demobilized is only slightly more than 10% of the total estimated number of FARC militants.

[61] Furthermore, the Applicants contend that the Member's entire analysis disregards that the PA was targeted by the urban militia and they are largely unaccounted for. These people have infiltrated into all urban areas, and they remain at large. The Applicants argue that it is incomprehensible how the PA could not reasonably fear for his safety going to live in a city in this context.

[62] With respect to the letter from the editor of Colombia Reports, the Applicants submit that the report is relevant to the objective conditions in Colombia and, as such, the basis of claim forms of the other refugees are irrelevant. According to the report, the Applicants do not have to live in an area that is dominated by FARC to be murdered because the risk of assassination extends throughout the entire country.

[63] Furthermore, the Applicants argue that the Member erred in her analysis of risk under s 97. She applied a test of mere possibility, which is the s 96 test for risk, and subsequently applied a proof beyond a reasonable doubt test, as she insisted on proof that there are murders happening in Barranquilla incited by the FARC urban militia or dissidents.

[64] The Applicants also contend that the Member erred in her analysis of the second part of the IFA test because she disregarded the psychological reports that state that the PA's mental state will significantly deteriorate if he has to return to Colombia. The Member treated his ability to work as an assistant in Canada, where he is not at risk of being killed, as proof of how well he will cope if he is returned to Colombia. The Member also failed to engage in any analysis of reasonableness for the minor applicant, Sebastian. In fact, Sebastian remains in weekly therapy sessions because he has become highly sensitive to the family's anxiety. The Member gave no thought to whether it is reasonable for the family to take him to Colombia.

[65] The Applicants rely on *Barragan Gonzalez v Canada (Citizenship and Immigration)*, 2015 FC 502, and state that the Member erred in being casually dismissive of the significance of displacement. She failed to consider that the PA would be coping with psychological trauma and competing with masses of displaced persons to re-establish himself in a new city.

(2) Respondent

[66] The Respondent says that there is a high onus on the Applicants to establish that the proposed IFA is unreasonable. In this case, the Applicants did not meet this onus because they did not provide sufficient objective evidence (*Argote v Canada (Citizenship and Immigration)*, 2009 FC 128 at para 12; *Iyere v Canada (Citizenship and Immigration)*, 2018 FC 67 at paras 32 and 33).

[67] Furthermore, the Respondent argues that the evidence before the RPD regarding the FARC's lack of interest in the Applicants, and the FARC's lack of power and influence in the

proposed IFA, supports the RPD's finding of a viable IFA in Barranquilla. The Decision is reasonable and the Applicants' allegations amount to a request to reweigh the evidence.

(3) Applicants' Reply

[68] The Applicants allege that the Respondent has incorrectly converted the requirement to establish that the proposed IFA region is unreasonable into an additional "high onus."

D. *Compelling Reasons*

(1) Applicants

[69] The Applicants submit that the Member erred in law by finding that the PA had to prove the abuse and traumatisation he suffered should be more atrocious and appalling. The Member's presumption that witnessing a murder, being shot and fearing death is not sufficiently appalling is purely arbitrary.

[70] The Applicants rely on *Singh*, a decision in which the Court held that beatings which led to the applicant suffering from PTSD could be sufficient to warrant a compelling reasons finding (*Singh v Canada (Citizenship and Immigration)*, Court no. IMM-75-95; *Adjibi v Canada (Citizenship and Immigration)*, 2002 FCT 525 [*Adjibi*]). In this case, the PA suffered a traumatic event, which has had a lasting impact on his psychological state. The Member did not reasonably assess this.

(2) Respondent

[71] The Respondent argues that the "compelling reasons" exception only applies to a minority of present day claimants (*Canada (Employment and Immigration) v Obstoj*, 1992 CanLII 8542 (FCA)). The Respondent relies on Justice Rothstein's decision in *Hassan v Canada (Employment and Immigration)*, [1994] FCJ No 630 at para 11 and argues that it "only applies to extraordinary cases in which the persecution is relatively so exceptional, that even in the wake of changed circumstances, it would be wrong to return refugee claimants."

[72] The Respondent also submits that the decision in *Alharazim v Canada (Citizenship and Immigration)*, 2010 FC 1044 at paras 47-49 requires that the circumstances be so exceptional in severity as to rise to the level of "appalling" or "atrocious."

VIII. ANALYSIS

[73] I agree with the Applicants that this Decision must be quashed and the matter returned for re-determination.

A. *Ability to Locate*

[74] The RPD finds that "the FARC does not continue to have the ability to locate targets like they once did and they no longer seem motivated to find the claimants, in any event" (para 37).

[75] On this issue, the RPD's findings are summarized as follows:

> [38] I find that, given the FARC's weakened state as a result of the peace accord, they no longer have the ability to locate people like they once did.
>
> …
>
> [47] The FARC is not the powerful guerrilla group it once was when the principal claimant witnessed his client being murdered.
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> …
>
> [52] What is clear from all of objective documents is that the FARC dissident presence is largely concentrated near the borders of Panama and Ecuador, as well as in the Meta department, where the flat plains transform into Amazonian jungle and rivers take over from roads as the main transport arteries for drug trafficking. Further, and most importantly, none of these documents indicate that the FARC dissidents are active in Atlántico, the department in which Barranquilla is located, or any of Atlántico's surrounding departments.
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> …
>
> [57] I acknowledge that the FARC used to be a powerful and violent force operating throughout Colombia with the ability to gain access to a variety of public and private institutions; however, this is no longer the case. Approximately 85% of the FARC members have demobilized, disarmed and formed a peaceful political party. The remaining 15% are not part of a central, authoritative location or group but are fragmented.
>
> [58] What is clear from the documents is that: (l) the number of FARC dissidents is small in comparison to those who laid down their arms; (2) FARC dissidents are currently decentralized; (3) they are not located in the IFA city of Barranquilla or its surrounding area; (4) and Colombia, as compared to when the claimants left, is much safer. Given this, I am not persuaded, on a balance of probabilities, that the FARC dissidents would have the ability to locate the claimants or that they would use their limited manpower and left over resources to do so.

[76] The RPD does not acknowledge the full picture when it says that 85% of FARC members were demobilized and disarmed and formed a peaceful political party, and that the remaining 15% are not part of a central authoritative location or group but are fragmented.

[77] The evidence is clear that the 85% who were demobilized as part of the peace process were uniformed guerilla soldiers who were a minority of all FARC militants. See Human Rights Watch, World Report 2019 - Colombia (Application Record, at pages 362-365). The evidence also suggests that at least 55% of that 85% later defected, so that the percentage who remained demobilized is quite small when the urban militia are included, and it is the urban militia who the Applicants fear. See Insight Crime Analysis Report, February 6, 2017; Panam Post, November 22, 2017 (Application Record, at pages 272-274).

[78] In fact, the RPD appears to disregard the evidence that it is the urban militia who initially targeted the Applicants and the evidence is that the urban militia continue to have significant numbers in urban areas.

[79] As the Ramirez assassination demonstrated, the urban militias do not wear uniforms and so appear as ordinary citizens.

[80] The RPD also mischaracterized the Insight Crime article used by the Member to demonstrate that attempts by FARC dissidents to unite were dealt a severe blow because of the death of Rodrigo Cadete. What the article actually says is that Cadete was working for a dissident leader called Duarte who was planning to restore the FARC guerilla presence to pre-peace levels throughout the country. In addition, of course, the Insight Crime article deals only with FARC guerillas and not the urban militia who the Applicants fear.

[81] The RPD also appears to equate the likelihood of assassination with particular areas of Colombia that the FARC controls. However, the evidence supports that victims do not have to live in particular areas dominated by FARC. The Ramirez assassination demonstrates that a target can be murdered by an agent who is not necessarily a FARC dissident. Assassinations are a real danger even where there is no territorial control. The United Nations High Commissioner for Refugees [UNHCR] Guidelines say that assassination extends throughout the whole of Colombia:

> Given the purported ability of some NAGs and guerilla groups to operate country-wide, and indeed internationally as part of international criminal networks, a viable IFA/IRA may not be available to individuals at risk of being targeted by such actors. **It is particularly important to note the operational capacity of NAGs and the FARC, in particular, to carry out attacks in all parts of Colombia, irrespective of territorial control.**
>
> UNHCR, "Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Colombia": HCR/EG/COL/15/01 (2015).

[82] The RPD also neglects significant contrary evidence when she equates areas of control and areas of open guerrilla action by uniformed FARC soldiers as proof that the Applicants will not face a significant danger in an urban setting such as Barranquilla.

B. *Targeting the Applicants*

[83] The RPD did not question that the PA had tried to stop a FARC assassination, and later identified the assassin and ensured his imprisonment. Yet, the RPD concluded that the FARC was not only insufficiently organized to harm the Applicants in Barranquilla, but was also without the means or the interest to do so:

[59] I am also not persuaded that the FARC is motivated to find the claimants because nobody in the claimants' family has been approached regarding their whereabouts, since August 19, 2013.

[60] While I acknowledge that the principal claimant's brothers were approached within days of the shooting, over the last five and a half years, nobody has followed up with them as to the whereabouts of the claimants. For example, the principal claimant has his two brothers as well as a sister who continue to live in Bogota. The FARC even knew where Palmiro lived (although he has since moved) and did not bother to follow up with him. The female claimant also has two brothers in Bogota as well as her parents, all of whom have never been approached.

[61] The claimants allege that another veterinarian was held by FARC in September of 2013 and this was a case of mistaken identity. But, again, this was five and a half years ago and nothing has happened since. The female claimant continues to have contact with a former colleague and there has been no indication of an ongoing hunt for the claimants within the veterinarian community. Another veterinarian even bought their practise and they have not heard any rumours of ongoing targeting at their former clinic.

[62] The claimants suggest that the FARC has not followed up with anyone because they have the resources to know that the claimants have left Colombia. In a Response to Information Request dated April 9, 2013, it states that guerrillas groups can trace people living aboard [*sic*]; however, it is based on the behaviour of the individual rather than a structure to detect the immigration and emigration of people. Therefore it does not seem as if the FARC has an institutionalized system to detect that the claimants have left Colombia. The Response goes on to say that guerrilla groups can watch family [*sic*], however, the evidence is clear that there has been no ongoing contact or intimidation of the claimants' family.

[63] It seems that, since the claimants left Colombia in September of 2013, nothing has happened to indicate that the FARC remains interested in the claimants. Given this, I am not persuaded that the FARC dissidents have the motivation to locate the claimants if they were to move to Barranquilla.

[64] Counsel argues that there is no evidence to suggest that lengthy absences from Colombia will make these claimants safe. He points to a Response to Information Request dated April 9, 2913 which indicates that, if a person is an objective of high value, family and assets can be watched and, if the victim

> returns to Colombia and makes contact with these family members, these groups can locate the victim. However, in this case, we know that the claimants' family has had no contact with the FARC is [*sic*] over five and a half years, so there is no indication that they are being watched. Further, this Response was prepare [*sic*] in 2013 when the FARC had the ability to track down victims throughout the country. As discussed above, the FARC is now weak and decentralized. I am not persuaded that they continue to have this ability.
>
> [65] Counsel also submits that the UNHCR Eligibility Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Colombia states that IFA, for victims of the FARC, is unreasonable. However, this document is also dated. It was prepared in 2015, prior to the demobilization. IFA may have been unreasonable in 2015, when the FARC was powerful. However, the FARC is now demobilized, has lost 85% of its members and, those that remain, are decentralized.
>
> [66] Lastly, counsel submits that the FARC dissidents are working with other criminal organizations. While this is true, it is highly speculative to suggest that: (1) the faction of the FARC that was interested in the claimants are dissidents and have not laid down their arms like 85% of other members; (2) that the faction that was interested in the claimants also have joined another criminal organization; and (3) that this new criminal organization has the same interest in using its resources to harm the claimants. The likelihood of all three of these factors coming together is slim.
>
> [67] I find that the FARC dissidents have neither the ability, nor the motivation, to pursue the claimants in Barranquilla given their weakened state, decentralization and that they are not active in the area.
>
> [Footnotes omitted.]

[84] Once again, the RPD relies upon misleading demobilizing figures and a lack of FARC centralization that do not give the full picture of the FARC's urban reach.

[85] It is not clear to me what the Member means when she says that, even though the FARC has the capacity to determine if people have left Colombia, this is "based upon the behaviour of the individual rather than a structure to detect the immigration and emigration of people."

[86] The evidence is that the FARC has an extensive information network. See Insight Crime Report, April 12, 2018 (Application Record, at page 281).

[87] It is also difficult to understand the RPD's reliance on "Another veterinarian even bought their practice and they have not heard any rumours of ongoing targeting at their former clinic." The Applicants' unquestioned testimony was that their clinic was bought by a man they did not know and that they have no contact with anyone who knows this man.

[88] There is no reason why the FARC and its urban allies would not continue to target someone who was brave enough to assist in bringing their own urban assassin to justice. The evidence is that there is a significant number of FARC allies in urban areas. See Colombia Reports, January 27, 2019 (Application Record, at page 367).

[89] The unquestioned evidence is that the PA's brothers have been told that the FARC intends to kill the PA, together with his wife and children, and that the police are either unwilling or unable to protect them.

[90] In setting aside the second RPD decision, the Court made the following observations:

> [23] … they were already at risk... Clearly the *Fiscalia* were of the view that there was a real risk, as it asked the National Police on an urgent basis to provide protection.
>
> [24] Second, it defies common sense that one should expect a person at risk to "continue their requests for protection" in the face of advice from those who would provide it - the National Police - that they did not have the resources to provide protection. There is no evidence that the position of the police was likely to change regardless of the finding of the risk assessment…
>
> [Emphasis in original.]

[91] The FARC may not have contacted the PA's family in Colombia recently, but they would have no reason to do so if they know he is out of the country. This does not mean that they will not murder the Applicants if they return.

[92] The FARC and their urban allies have every motive to remain interested in the PA. He was the sole witness to a murder that can be traced to them and was primarily responsible for the imprisonment of the assassin. The FARC has indicated that they plan to murder the Applicants in revenge. Except for the passage of time, there is little to support the RPD's conclusion that he FARC are no longer interested in the Applicants and do not have the organizational means to carry out their threats if the Applicants return to Colombia.

[93] In general, then, the RPD's IFA analysis is unreasonable in that it deliberately overlooks the significant contrary evidence that the FARC and its allies have both the will and the means to target and murder the Applicants if they return to Colombia.

C. *Revocation of PA's Status of Vulnerable Person*

[94] I also agree with the Applicants that it was procedurally unfair of the RPD to revoke the PA's vulnerable person status in the way that this occurred.

[95] The Member did this at the commencement of the hearing without notice and notwithstanding counsel's objections. There was no reason to suggest that the psychological evidence that had earlier supported the PA's vulnerable person status did not continue to apply, and the Member's decision to conduct her own assessment to find that "the principal claimant's ability to present his case was no longer severely impaired" was based upon her own unqualified judgment and her finding that neither of the earlier psychological assessments indicate difficulties that go beyond what is common for those appearing before the RPD:

> [21] I considered both the psychological assessment of Dr. Devins dated October 9, 2013 and the updated psychological assessment dated January l1, 2018. The RPD was not provided with more up to date psychological assessment for this second re-determination. I find that neither of these psychological assessments indicate difficulties that go beyond what is common for those appearing before the RPD. Dr. Devins diagnosed the principal claimant with post-traumatic stress disorder (PTSD): however, this type of diagnosis is extremely common for people who appear before the RPD, as most claimants, if not all, have experienced trauma. In any event. Dr. Devins' assessments do not indicate a severe impairment. Dr. Devins indicates that the principal claimant responded directly to questions during the assessment and cooperated fully.

[96] There is no indication of what qualifications the Member has to make this kind of assessment and decide that the PA's psychological trauma is the same as other applicants. And there was no reason, given the previous psychological evidence and the acceptance of the PA as

a vulnerable person at previous hearings, to expect that he needed to provide more psychological evidence without notice.

[97] Clearly, this was procedurally unfair.

D. *Nexus*

[98] The RPD's finding that there is no political nexus to the Applicants' fears is not necessarily supported by the jurisprudence:

> [32] To find that there is a nexus, the harm inflicted on the claimants must be for reasons of one of the five convention grounds. The principal claimant was not shot "for reasons of" his political opinion. The principal claimant was shot as an innocent bystander. Further, FARC did not tell the principal claimant's brothers that he and his family were going to be killed "for reasons of" his political opinion. The evidence is that the threat was for being an informer to the police. Even in cases where murders are committed by government agents, the Court has found that a political opinion could not be imputed merely as a result of witnessing and reporting a crime. Identifying the assassin to the police is a sign of the principal claimant's integrity, it is not an expression of a political opinion; it is more of a criminal nature.

[99] What the RPD fails to consider is the political opinion ascribed to the PA by the FARC. In *Lai*, above , the Federal Court of Appeal made the following point:

> [83] I also seriously doubt that the political opinion ground contained in the Convention refugee definition can be read to include the political opinion of the persecutor towards the claimant's situation, as alleged by the appellants, since the other Convention grounds - race, religion, nationality, and membership in a particular social group - refer to characteristics possessed by the individual claimant. The key words in the Convention refugee definition are that the person must have a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion

> (see *Zolfagharkhani* at 550). While the situation should be approached from the perspective of the persecutor, it is the claimant's political opinion, *or the political opinion ascribed to the claimant by his or her government*, that must lie at the root of the persecution (see *Ward* at 747).
>
> [Emphasis added.]

[100] In the present case, the RPD rejects the ascription possibilities out of hand and fails to consider whether, in the Colombian context, the FARC routinely ascribes a political opinion to those individuals who obstruct it or take action against its members or interests.

E. *Compelling Reasons*

[101] The RPD's assessment of compelling reasons falls short of what was required in the circumstances of this case:

> [75] The RPD is required to give recognition of refugee status on humanitarian grounds to this special and limited category of persons, i.e. those who have suffered such appalling persecution that their experience alone is compelling reason not to return them, even though they may no longer have any reason to fear further persecution. However, the exceptional circumstances envisaged must apply only to a tiny minority of present day claimants.
>
> [76] The case law indicates that the threshold necessary to demonstrate "compelling reasons" is a high one. It must be remembered that the nature of all persecution, by definition, involves death, physical harm or other penalties. The compelling reasons exception only applies to extraordinary cases in which the persecution is relatively so exceptional, that even in the wake of changed circumstances, it would be wrong to return refugee claimants.
>
> [77] While I am sure the principal claimant considers being shot as an innocent bystander, and his resulting PTSD diagnosis, fits within the scope of the compelling reasons exception, I am not persuaded that this treatment is sufficiently atrocious or appalling to trigger the "compelling reasons" exception.

[102] The Court held in *Adjibi* at para 33, the following:

> … Meaningful reasons require that a claimant and a reviewing court receive a sufficiently intelligible explanation as to why persecutory treatment does not constitute compelling reasons. This requires thorough consideration of the level of atrocity of the acts inflicted upon the applicant, the effect upon the applicant's physical and mental state, and whether the experiences and their sequela constitute a compelling reason not to return the applicant to his or her country of origin.

[103] While the RPD refers to the PA's "PTSD diagnosis," it is clear from the rest of the Decision that the Member believes that neither of the PA's psychological assessments "indicate difficulties that go beyond what is common for those appearing before the RPD" and that "this type of diagnosis is extremely common for people who appear before the RPD, as most claimants, if not all, have experienced trauma" (para 21). In other words, the Member is of the view that the severe trauma experienced by the PA and its continuing impact upon his psychological health, is no different "from most, if not all" claimants. The evidence before the Member clearly suggests otherwise. The issue needs to be re-assessed.

IX. CERTIFICATION

[104] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT IN IMM-4430-19

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a differently constituted RPD panel.
2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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