

Federal Court



Cour fédérale

**Date: 20210521**

**Docket: IMM-4439-20**

**Citation: 2021 FC 482**

**Ottawa, Ontario, May 21, 2021**

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

**BETWEEN:**

**JOHN HECTOR GAMBOA VELASQUEZ**

**Applicant**

**and**

**MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

[1] The Applicant, John Hector Gamboa Velasquez, challenges a decision of the Refugee Appeal Division [RAD] dismissing his appeal from a decision of the Refugee Protection Division [RPD].

[2] Mr. Gamboa Velasquez is a citizen of Colombia. He came to Canada through the United States in September 2018. His claim to protection was based on an asserted extortion threat at

the hands of a Colombian criminal gang known as La Empresa and a larger affiliated gang known as Los Rastrojos. The RPD found Mr. Gamboa Velasquez was resourceful and mobile, having travelled and worked throughout Colombia, Argentina and Chile. For a number of years he had a form of immigration status in Chile but, after a year of absence, it was lost. The RPD denied the claim on the ground that he had an internal flight alternative [IFA] in either Cali or Bogota.

[3] The RAD dismissed Mr. Gamboa Velasquez's appeal, finding that he had a viable IFA in Bogota. This was based on the conclusion that La Empresa and Los Rastrojos represented localized threats and presented no serious risk to him in Bogota — a city of 10.5 million people.

[4] Mr. Gamboa Velasquez alleges the following errors by the RAD which, he argues, render the process unfair and the decision unreasonable:

- a) The RAD made an unclear and ambiguous credibility finding by accepting new evidence of ongoing threats but describing some of it as “convenient”.
- b) The RAD breached the duty of procedural fairness by refusing to conduct an oral hearing.
- c) The RAD made a speculative plausibility finding based on a factual error.
- d) The RAD ignored material evidence that contradicted its finding that Bogota represented a viable IFA.
- e) The RAD imposed an impossible burden on him by expecting him to tender evidence that would have been inadmissible under s 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[5] The standard of review for the evidence-based issues is reasonableness and, for the fairness issue, correctness.

I. Did the RAD Make Unclear, Inconsistent or Ambiguous Findings?

[6] There is no doubt that the RAD had reservations about the legitimacy of some of the new evidence solicited from Mr. Gamboa Velasquez's cousin about ongoing threats.

Notwithstanding those concerns, the RAD admitted the affidavit and accepted the threats as "worrying developments" [see para 14].

[7] I do not agree that the RAD decision lacks clarity or is inconsistent in its treatment of the new evidence of ongoing threats. It is a fundamental evidentiary principle that a trier-of-fact can selectively accept, reject or give varying weight to a witness's evidence. The assessment of evidence is, after all, not a zero sum exercise.

[8] A reviewing Court is also required to examine a decision holistically and not as a treasure hunt for errors: see *Canada (MCI) v Vavilov*, 2019 SCC 65 at para 102, [2019] SCJ No 65.

Shortcomings or flaws in the reasons given by an administrative decision-maker will not justify intervention on judicial review unless they are sufficiently central or significant as to render the decision unreasonable: see *Vavilov*, above, at para 100.

[9] Here the RAD accepted the cousin's affidavit evidence about ongoing threats and described those developments as worrying. The RAD was less impressed by the cousin's evidence that the gang told him that they intended to pursue the Applicant to Cali and Bogota.

The RAD reasonably described that evidence as “convenient” because it supposedly was communicated two weeks after the RPD had identified those two cities as viable IFA locations, all after 13 months of silence. The RAD summed up its concern about this evidence in the following way:

...I have considered the cousin's statement that the gang will find the Appellant “in Cali, Bogota, anywhere in Columbia, in Chile, Panama and in Costa Rica.” I find it convenient that the gang members, who presumably didn't read the RPD decision, mention Cali, Bogota “and any other location in Columbia”. After considering all of this evidence, I find, on a balance of probabilities, that the gang does not have the motivation to find the Appellant in the proposed IFA.

[Footnotes omitted.]

[10] It is open to a decision-maker to express concerns about the probative value of evidence while ultimately affording it weight. The RAD's initial reaction to the cousin's affidavit was not unreasonable. If anything, it was generous. It does strain credulity that within two weeks of the RPD finding that an IFA existed in Cali and Bogota, the gang allegedly visited the cousin threatening harm to Mr. Gamboa Velasquez in “Cali, Bogota [and] anywhere in Colombia”. The coincidence of this alleged event is all the more surprising because it happened after 13 months of gang inactivity and months after Mr. Gamboa Velasquez had left Colombia.

[11] It was thus not unreasonable for the RAD to express skepticism about that part of the affidavit and then to conduct its own evaluation of the objective evidence of risk in Bogota.

[12] The RAD's IFA finding was based on a reasonable assessment of the available evidence that distinguished the extant risks in Cali and Bogota. Accordingly, the RAD's finding that Bogota was a viable IFA and Cali was not was a rational and not inconsistent outcome.

II. Did the RAD Act Unfairly by Refusing to Convoke an Oral Hearing?

[13] The RAD declined Mr. Gamboa Velasquez's request for an oral hearing on the following basis:

[11] The Appellants are requesting an oral hearing before the RAD but one is not merited. Hearings are limited to circumstances when new evidence which is admissible in the appeal raises a serious issue with respect to the Appellant's credibility, that is central to the decision, and if accepted, would justify allowing or rejecting the refugee protection claim. As this affidavit does not raise any issue relating to the Appellant's credibility and would not justify, on its own, the determination of this claim, I find that there is no jurisdiction to hold a hearing. The request is denied.

[Footnotes omitted.]

[14] The RAD's decision was procedurally correct. In the context of this case, there was neither a need nor a requirement for an oral hearing. Mr. Gamboa Velasquez's credibility was not an issue either directly or indirectly because the claim to protection was not decided based on the reliability of his evidence. The determinative issue was only the viability of an IFA in Bogota. Furthermore, even if the cousin's affidavit was questioned, Mr. Gamboa Velasquez could add nothing of corroborative value to its contents. He was, after all, not privy to any of the alleged events that occurred after he left Colombia.

III. Did the RAD Impose an Impossible Evidentiary Burden on Mr. Gamboa Velasquez?

[15] Mr. Gamboa Velasquez argues that the RAD wrongly imposed a burden on him to address the motivation and reach of La Empresa and Los Rastrojos to pursue him into Bogota. It is true that the RAD expressed a concern about the absence of much evidence on this issue before the RPD but it pointed out correctly that it is up to a claimant to prove that a proposed IFA is untenable — a task that Mr. Gamboa Velasquez did not fulfill. Mr. Gamboa Velasquez is also critical of the RAD’s comment that the evidentiary gap before the RPD could have been filled with new evidence “on the IFAs in his appeal”. The RAD’s statement is not entirely clear but ultimately it represents a hypothetical point that was not material to the conclusion that a viable IFA existed in Bogota. It is also not an open invitation to ignore the confines of s 110(4) of the IRPA, above. The evidence of risk is not static. It was always open to Mr. Gamboa Velasquez to present credible evidence to the RAD that the agents of harm had, since the RPD hearing, established a presence in Bogota that put him at a heightened risk.

IV. Did The RAD Make an Unreasonable Plausibility or Speculative Finding About Risk Based on an Error of Fact?

[16] It is apparent that the RAD may have erred when it said that Mr. Gamboa Velasquez was either in Cali or Bogota when alleged threats were made to his family in Buenaventura “between July 2018 and February 2019 and the new evidence of March 2020”. By March 2020, Mr. Gamboa Velasquez was actually in Canada — a fact that the RAD noted (see para 5 of the RAD decision).

[17] Mr. Gamboa Velasquez argues that this factual mistake was material to the outcome because it influenced the RAD's conclusion that the agents of persecution did not know where he was and lacked the means of locating him. Mr. Gamboa Velasquez also says that, in making these findings, the RAD was speculating about the motives and capacities of his persecutors.

[18] I agree with the Minister that, if the RAD made the error attributed to it, it would have made no difference to the outcome. Whether Mr. Gamboa Velasquez was in Cali, Bogota or Canada at the time of the alleged threats was immaterial to the RAD's point that, for almost two years after he left Buenaventura, the agents of persecution did not know where to find him. If it was otherwise, they would not still be fruitlessly looking for him in Buenaventura. I also agree with the Minister that the RAD's finding that the agents of persecution lacked the means or the motivation to pursue Mr. Gamboa Velasquez into Bogota was not based on speculation. Rather, it was grounded on evidence that La Empresa and Los Rastrojos had no meaningful presence in Bogota and no motive to pursue him — as a single unexceptional extortion target — to that city.

V. Did the RAD Ignore Material Evidence Bearing on Risk in Bogota?

[19] Mr. Gamboa Velasquez claimed that he was at risk from two criminal gangs. La Empresa had a significant presence in and around his home in Buenaventura but it was not historically active in Bogota. Nevertheless, La Empresa had a working relationship with Los Rastrojos. Mr. Gamboa Velasquez claimed that this affiliation put him at risk in Bogota thus making it unsuitable as an IFA. His argument on this application is that the RAD ignored material evidence showing that Los Rastrojos had a connection to both Cali and Bogota.

Because the RAD overturned the RPD finding that Cali was safe for Mr. Gamboa Velasquez, its recognition of Bogota as an IFA, he says, was inconsistent and unreasonable.

[20] The weakness in Mr. Gamboa Velasquez's argument is that the weight of reliable evidence adopted by the RAD showed that Los Rastrojos did not have a significant, if any, presence in Bogota. It was on this basis that the RAD found that neither La Empresa nor Los Rastrojos had the means or the motive to pursue Mr. Gamboa Velasquez if he took up residence in Bogota.

[21] The evidence relied upon by Mr. Gamboa Velasquez to establish the risk in Bogota was in the form of a chart attached to a 2018 report dealing with the reported presence of various armed groups across Colombia. Included in the chart was a single reference to the reported presence of Los Rastrojos in Bogota. The RAD did not refer to this evidence but it was not required to. Instead the RAD considered and accepted other evidence that described in considerably greater detail the situation of Los Rastrojos and La Empresa throughout the country. It summed up that evidence in the following way:

[15] The Appellant argues that the NDP shows that the La Empresa gang is affiliated with the Los Rastrojos gang who operate on a national level. The NDP shows that this type of gang is a significant threat to public order and is "responsible for more violent actions, deaths and disappearances than traditional left-wing guerilla groups". Los Rastrojos was, until 2012, the most powerful criminal organization in Columbia. Additional documentation indicates that the Los Rastrojos have been linked to abuses and attacks against Afro-Columbians, particularly on the Pacific Coast of Columbia. As a result of a power-sharing agreement with a rival gang, Los Rastrojos operates in the south of Columbia while La Empresa is the Buenaventura arm of Los Rastrojos. By 2016, La Empresa and Los Rastrojos were in a decline given the rise of a rival gang. As of 2017, the NDP shows



that the Los Rastrojos did not have a presence in Bogota but continued to have a presence in the area around Cali. I find that, due to the continued geographic presence of La Empresa and Los Rastrojos around Cali, this town is not a safe IFA for the Appellant and find that the RPD erred in this part of its analysis. However, based on the objective evidence of the continued decline of Los Rastrojos in its influence and geographic control, I find that Bogota is a safe IFA for the Appellant.

[Footnotes omitted.]

[22] As noted above, the RAD relied upon a number of country condition reports dealing, in part, with gang violence in Colombia. That material dealt with the influence of Los Rastrojos in various parts of Colombia. Although the gang was said to be active in a handful of the 32 Colombian departments, Bogota is not specifically identified. Much of Los Rastrojos activity was said to be focused in the north of the country and into parts of Venezuela. Other information cited by the RAD indicated that Los Rastrojos, like La Empresa, was in significant decline mainly from arrests and inter-gang conflict. The only competing evidence before the RAD was a chart listing Los Rastrojos as one of seven gangs with some reported but undefined presence in Bogota. The focus of the underlying report was unrelated to gang risks.

[23] It was not unreasonable for the RAD to accept the detailed country condition reports which indicated that Bogota was essentially free from the influence of La Empresa and Los Rastrojos in preference to the inconclusive evidence relied upon by Mr. Gamboa Velasquez. His risk narrative was based on an allegation that he had been targeted for extortion by a local gang. He did not suggest that he had some elevated profile that would place him at indefinite risk throughout Colombia.

VI. Conclusion

[24] The RAD decision contains a rational chain of analysis of the facts and the law. While the reasons may contain a few minor gaps, they do not disclose any significant errors that would justify a finding of unreasonableness. This application is, accordingly, dismissed.

[25] Neither party proposed a certified question and no issue of general importance arises on this record.

**JUDGMENT IN IMM-4439-20**

**THIS COURT'S JUDGMENT is that** this application is, accordingly, dismissed.

"R.L. Barnes"

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Judge

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

**DOCKET:** IMM-4439-20

**STYLE OF CAUSE:** JOHN HECTOR GAMBOA VELASQUEZ v  
MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** HELD BY VIDEOCONFERENCE

**DATE OF HEARING:** APRIL 28, 2021

**JUDGMENT AND REASONS:** BARNES J.

**DATED:** MAY 21, 2021

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