Federal Court  Cour fédérale

Date: 20160720

Docket: IMM-5470-15

Citation: 2016 FC 834

Ottawa, Ontario, July 20, 2016

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MIGUEL POTES MINA
YORLENYS ZUNIGA MORELO
MIGUEL POTES ZUNIGA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application pursuant to s 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of a decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada [RAD] dated November 9, 2015 which denied the Applicants' appeal of a negative refugee decision made by the Refugee Protection Division

[RPD], confirming that the Applicants are neither Convention refugees within the meaning of s 96 of the Act or persons in need of protection under s 97 of the Act.

II. BACKGROUND

A. *Facts*

[2] Miguel Potes Mina [Principal Applicant], his spouse, Yorlenys Zuniga Morelo and their 10-year-old son, Miguel Potes Zuniga, are all citizens of Colombia. Fearing harm in their home country at the hands of the Fuerzas Armadas Revolucionarias de Colombia [FARC] guerillas and the Urabenos criminal organization, they filed their refugee claims at the end of December 2014. The Urabenos are a violent criminal organization which evolved out of the right-wing paramilitaries in Colombia.

[3] The Principal Applicant played professional soccer from approximately 2001 to 2012, travelling frequently to cities in Colombia and throughout Latin America. He played for 8 teams throughout his career including teams in Nicaragua, Argentina and El Salvador. He says that the games were often televised and that he was approached in the street for autographs.

[4] The Applicants allege that members of their family have repeatedly been the targets of paramilitaries. In 2004, three male cousins of the Principal Applicant disappeared. In July 2008, the Principal Applicant's brother, Milton Potes Mina, disappeared after refusing to pay an extortion known as the *vacuna*. His family presumed him dead. In 2010, three other male cousins

of the family were killed. In November 2014, a son of one of the Principal Applicant's missing cousins was killed in Buenaventura.

[5] In November 2013, the Principal Applicant was approached by two men near his home. They told him he had to pay a one million pesos *vacuna* and hit him on the head with a gun. He was told that if he did not pay, he would end up like his brother. The Principal Applicant says he recognized one of the men as Chimbi, the commander of the local Urabenos group and the other as El Mariachi, another Urabenos member.

[6] The Applicants did not comply with the demand for payment and, in late December 2013, El Mariachi confronted the Principal Applicant at his house and warned him that if he did not provide the money within a week, he would be killed.

[7] The Applicants approached the authorities but, despite identifying both Chimbi and El Mariachi, they were not assisted. In January 2014, fearing for his life, the Principal Applicant left Colombia and went to the state of New Jersey in the United States. He returned to Colombia a few months later, after there had been no further threats, and he went to live at his uncle's home.

[8] On September 3, 2014, the Principal Applicant received a "private" call on his cell phone. A male caller threatened that he would be found no matter where he tried to hide. After receiving (but not answering) several such "private" calls, the Principal Applicant changed his number.

[9] On October 10, 2014, the Principal Applicant was confronted by two men on a motorcycle while he was out jogging. At first he thought the Urabenos had found him, but he suspects that these men were likely members of the FARC because they addressed each other as "comrade" – language used by the guerillas. The Principal Applicant says the "gun wielding man" told him he had 8 days to pay two million pesos as a *vacuna*. He promised to comply with their demands.

[10] The Applicants moved to an aunt's home in Ciudadela. On October 15, 2014, the Principal Applicant left Colombia by himself, as the family did not have the funds to travel together.

[11] On December 2, 2014, the Principal Applicant's spouse, Yorlenys Zuniga Morelo and their son were intercepted by two men on motorcycles. While patting her son on the head, the men warned that if she did not pay the *vacuna*, she knew what would happen. She went to the police with her sister-in-law to seek out assistance. She was referred to an agency who gave her instructions on what precautions could be taken for her and her son's safety, but they were given no protection. On December 15, 2014, she and her son left Colombia and joined the Principal Applicant in the United States.

[12] The Applicants then came to Canada to seek protection because two of the Principal Applicant's cousins had been given protection after facing similar threats in Colombia.

[13] In February 2015, the Applicants filed their refugee claims based on fear of harm in Colombia. On March 2, 2015, their hearing was held before the RPD.

B. *RPD Decision*

[14] The Applicants' claims were rejected by the RPD in a decision dated March 25, 2015, which found that: (i) credibility was a determinative issue; (ii) the alleged extortion demands and related threats suffered by the Applicants were criminal in nature rather than owing to the Applicants' family, social group, perceive political opinion or race; and (iii) the existence of Bogota as a reasonable Internal Flight Alternative [IFA] was also a determinative issue.

[15] On April 17, 2015, the Applicants filed a notice of appeal before the RAD.

III. DECISION UNDER REVIEW

[16] The RAD admitted two affidavits (one from the Principal Applicant and one from his sister) and a country information document relating to the threat posed by the Urabenos as new evidence. However, the Applicants' request for an oral hearing was denied.

[17] The RAD considered the RPD's finding that an IFA exists in Bogota. After reviewing the evidence and the RPD's reasons, the matter to be determined was whether the agents of harm feared by the Applicants have the means and the motivation to find them in Bogota. With regards to the Principal Applicant's status as a well-known soccer player, the RAD concurred with the findings of the RPD that his profile would not, on a balance of probabilities, make him more

likely to be located in Bogota. The evidence did not reveal that his profile extends beyond his hometown, that he has continued to pursue his soccer career, or that the alleged agents of harm knew about his professional profile.

[18] As regards the identity of the agents of harm, the RAD found that there was no credible evidence that the individuals described by the Principal Applicant ever identified themselves. The affidavit of the Principal Applicant's sister which formed part of the new evidence before the RAD did not provide sufficient evidence that the agents of harm belong to either of the groups feared by the Applicants. The RAD agreed with the RPD that the agents of harm are common criminals or unknown individuals.

[19] Assessing whether the agents of harm have the ability, willingness or motivation to look for the Applicants in another city, the RAD found that, while the Applicants may have family in Bogota, there is no credible evidence of them looking for the Applicants in any part of Colombia other than their hometown of Buenaventura. The RAD determined that no persuasive evidence was provided that the agents of harm have the ability to find the Principal Applicant in the proposed IFA location.

[20] The RAD also addressed whether it would be unreasonable for the Applicants to seek refuge in Bogota. While country documents note that societal discrimination against indigenous persons and Afro-Colombians can at times restrict their ability to exercise their rights, the RAD determined that there was no credible evidence that discriminatory behaviour against Afro-

Colombians amounts to persecution as defined by the Act. The RAD concluded that the Applicants have not been targeted in a way that limits their ability to live safely in the IFA.

[21] The RAD concluded that there was nothing to indicate that the Applicants face a serious possibility of persecution or, on a balance of probabilities, a danger of torture or risk to life or cruel and unusual treatment or punishment, and it would not be unreasonable for the Applicants to live in Bogota.

IV. ISSUES

[22] The Applicants raise the following issues:

1) Was the finding on the identity of the agents of persecution reasonable?
2) Was the conclusion on the availability of an IFA reasonable?

V. STANDARD OF REVIEW

[23] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review

analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[24] Both issues to be determined in this matter address whether the RAD committed reviewable errors. The standard of review to be applied in the review of the RAD's findings and assessment of the evidence is that of reasonableness and both issues will be analysed using this standard of review: *Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 35; *Siddiqui v Canada (Citizenship and Immigration)*, 2015 FC 1028 at para 42.

[25] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

VI. STATUTORY PROVISIONS

[26] The following provisions of the Act are applicable in this proceeding:

Convention Refugee	**Définition de « réfugie »**
96. A Convention refugee is a person who, by reason of a well-founded fear of	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui,

persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

craignant avec raison d'être persécutée du fait de sa race, 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;

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

(b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

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,

(i) elle ne peut ou, de ce fait,

because of that risk, unwilling to avail themself of the protection of that country,

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 in or from that country,

(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 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

Decision

111 (1) After considering the appeal, the Refugee Appeal Division shall make one of the following decisions:

(a) confirm the determination of the Refugee Protection Division;

(b) set aside the determination and substitute a determination that, in its opinion, should have been made; or

(c) refer the matter to the Refugee Protection Division for re-determination, giving the directions to the Refugee Protection Division that it considers appropriate.

Décision

111 (1) La Section d'appel des réfugiés confirme la décision attaquée, casse la décision et y substitue la décision qui aurait dû être rendue ou renvoie, conformément à ses instructions, l'affaire à la Section de la protection des réfugiés.

VII. ARGUMENTS

A. *Applicants*

[27] The Applicants allege that the RAD upheld the decision of the RPD without undertaking its own assessment of the documentary evidence, some of which addressed the credibility concerns of both tribunals. Furthermore, little weight was given to the pattern created by a series of events involving the Principal Applicant's family members being targeted, including the disappearance of his brother after receiving threats.

[28] The Principal Applicant testified that he believed the agents of persecution were from the FARC based on his own personal knowledge that FARC members referred to each other as comrades. Neither tribunal explained why this testimony was dismissed or specified what was considered in coming to the conclusion that the men who had threatened the Principal Applicant in October 2014 were simply common criminals. The new evidence before the RAD in the form of a sworn statement by the Principal Applicant's sister described a man on a motorcycle coming to her home in April 2015 and looking for the Principal Applicant. In the Decision, the RAD incorrectly referred to this sworn statement as a "letter" when it was clearly sworn testimony which, given that it details the sister's belief that the Urabenos are looking for the Applicants, should have at least been addressed by the RAD.

[29] In finding that there was an IFA in Bogota, the tribunals both concluded that the Principal Applicant did not have a wide enough public profile to be identified outside of Buenaventura. However, the Principal Applicant played professional soccer for 11 years, including at a high

level in Bogota. The Applicants submit that the fact that the Principal Applicant played professional soccer for a lengthy period of time in the very place proposed as an IFA was clearly a relevant fact that ought to have been addressed by the RAD.

[30] The Applicants argue that both tribunals also ignored evidence that the Applicants were forced to return to Buenaventura from Bogota in 2012 because they could not survive in the city after the Principal Applicant lost his work as a professional soccer player. There was no evidence presented that they have any remaining support in Bogota.

[31] The Applicants say that an analysis under s 96 of the Act ought to have been undertaken. The Urabenos are successors to the right-wing paramilitaries who have a long history of disproportionately targeting Afro-Colombians. Little to no weight was given to the fact that there was a pattern of the Applicants' family members being targeted, all of whom were also Afro-Colombian. In fact, the RAD did not engage with this issue related to s 96 of the Act at all. However, the Applicants suggest that the failure to assess whether the risk faced was linked to a Convention ground led to the wrong legal test being applied to the question of IFA. The issue of IFA is part and parcel of the assessment of a well-founded fear of persecution. The RAD's analysis fails to consider the cumulative profile of the Applicants, an Afro-Colombian family that has been repeatedly targeted by paramilitaries.

B. *Respondent*

[32] The Respondent says that the Applicants' submissions amount to a disagreement with the Decision and do not identify reviewable errors. The RAD did not engage in a simple

confirmation of the RPD's findings; rather, it specifically considered the evidence that was before the RPD, conducted its own assessment, and put forth reasons that are detailed, rational and transparent.

[33] As regards the new evidence brought forward by the Applicants, the RAD found that the Response to Information Request which discussed the Urabenos did not need to be directly addressed because the RAD found that the Applicants' alleged agents of harm were not members of the FARC or the Urabenos.

[34] Furthermore, the RAD did not disregard the Principal Applicant's testimony or his belief that the agents of harm were members of the Urabenos or the FARC. It determined that the Applicants' evidence, including the affidavit of the Principal Applicant's sister, did not establish that those who threatened them were members of one of the feared groups. Moreover, the Respondent notes that the RPD found inconsistencies between the Principal Applicant's oral testimony and his interview with the Canada Border Services Agency, where he alleged that the two extortionists had positively identified themselves as members of the FARC.

[35] The Respondent says that the RAD applied the correct test and standard of proof when dealing with the proposed IFA, applying the balance of probabilities standard rather than "serious possibility." At the RPD hearing, Applicants' counsel said that the claim was primarily based upon s 97 of the Act, as a connection could not be drawn to a Convention ground. The RAD's focus on an IFA rather than a race nexus was efficient and reasonable, as the existence of

an IFA is determinative: *Figueroa v Canada (Citizenship and Immigration)*, 2016 FC 521 at paras 20, 36 [*Figueroa*].

[36] Given that the Principal Applicant only submitted a copy of a rescinded professional sports contract with a second division soccer team in El Salvador dated December 13, 2011, and three undated photographs, it was reasonable for the RAD to find that the Applicant had not adequately established that his profile as a former soccer player would motivate the agents of harm to locate and pursue him in Bogota. Contrary to the Applicants' claims, in reaching its conclusions, the RAD implicitly dealt with the allegation that the Principal Applicant had played soccer on a professional team in Bogota.

[37] The Principal Applicant and counsel for the Applicants both claimed that paramilitaries and guerillas use hitmen to kill those who fail to comply with their orders. The fact that there was no attempt on the Principal Applicant's life in Buenaventura between the first threat in 2013 and when he left for the United States in January 2014 is further support for the reasonableness of the RAD's conclusion that the agents of harm were not part of the Urabenos or the FARC.

[38] The Respondent says that the Applicants failed to establish the identity of the agents of harm, or that they would have an interest in pursuing them outside of Buenaventura, or that any discrimination against Afro-Colombians would prevent them from establishing themselves in Bogota.

VIII. ANALYSIS

[39] The RAD found that "the main issue is whether the agents of harm feared by the appellants have the means and the motivation to find them in Bogota" (para 37). The RAD then considered "whether it would be unreasonable for the appellants to seek refuge [in Bogota]" (para 50). In the end, the RAD concluded that "the principal appellant's profile as a professional player would not, on a balance of probabilities, make him more susceptible to be located in Bogota" (para 39) and that "it is not objectively unreasonable for the appellants to seek refuge in the proposed IFA location" (para 50). The Applicants disagree with these findings and raise various issues for review.

A. *The Agents of Persecution*

[40] The RAD concluded that the Applicants had not shown the agents of persecution were anything more than "common criminals, or unknown individuals" (para 41) and that there was no persuasive evidence to suggest that "the agents of harm have the ability, willingness, or interest to search for the appellants outside of Buenaventura" (para 48).

[41] The Applicants disagree with this conclusion and point to the Principal Applicant's testimony that he recognised the individuals who first threatened him as Urabenos who were well-known in the community, and the subsequent threats that came from the FARC because the men involved referred to each other as "comrades." The Applicants also point to the new evidence provided by the Principal Applicant's sister to the effect that a man on a motorcycle came looking for the Principal Applicant at her home and inquired about him with neighbours.

The Applicants complain that the RAD refers to the sister's sworn statement as a "letter," and point out that her statement that she is convinced that Urabenos are looking for the Applicants should at least have been addressed by the RAD.

[42] Nothing turns on the use of the term "letter" because the sister's evidence was not discounted for not being sworn. All of the Applicants' evidence on this point was held to be insufficient because it was simply speculative:

> [40] The other issue before the RPD Member was, who are the agents of harm? The RPD Member finds that the people feared by the appellants are local criminals who "possess neither the motivation nor the means to locate the claimant in that city of more than six million people, based on evidence relative to efforts to locate them in Buenaventura." The principal appellant testified that he was approached by different groups asking for extortion money. However, there is no credible evidence that the agents of harm identified themselves. The RPD Member questioned the appellants on who they believe are the agents of harm. Initially, the principal appellant testified he believed the first encounter involved members of the Urabenos as he recognized them as men from his neighbourhood who belonged to this group. The principal appellant states that he was confronted by these men who belonged to the Urabenos twice, November 2013 and December 2013. The principal appellant then left Colombia in January 2014, and the associate and minor appellants moved to the principal appellant's uncle's home. The principal appellant returned to Colombia in May 2014 and also lived at his uncle's home. In September 2014, the principal appellant began to receive threats on his phone. However, there is no credible evidence before the RPD or the RAD that anyone approached the appellants at the uncle's home during their time there. Rather, the principal appellant testified that he was approached by two men in October 2014 but stated that these men belonged to the FARC. Specifically, the principal appellant states "I suspected that they were likely FARC – this was confirmed when one of the men addressed the other as his comrade."
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> [41] Furthermore, the 'new evidence' disclosed for the RAD appeal is a letter from the principal appellant's sister in which she described an unknown man coming to her residence and enquiring about the principal appellant's whereabouts. However, I find that this is not sufficient information to establish that this man is from

> the same group of men that confronted the principal appellant for money in the past. Rather, the appellants were not able to adequately establish who the agents of harm are. Thus, I find that through this 'new evidence' and the appellants' own evidence, there is no persuasive evidence that the agents of harm belong to either of the groups feared by the appellants. I find the appellants are speculating on who the agents of harm are and have not provided persuasive evidence that they belong to any of these groups. Coming to that finding given the evidence, I agree with the RPD Member that the agents of harm feared by the appellants are common criminals, or unknown individuals. I find the appellants are speculating as to, who the agents of harm are, and I do not give weight to such speculations.
>
> [footnotes omitted]

[43] It is possible to disagree with the RAD's conclusions about the weight to be given to this evidence, but disagreement about weight is not a justification for reviewable error. Nor can the Court second guess the RPD or the RAD on matters of weight. The Principal Applicant's sister may well be personally "convinced" that the Applicants are in danger from the Urabenos, but the Applicants still have to provide sufficient objective evidence to support their subjective fears and beliefs. The RAD simply found that they had failed to do so on this issue. There is nothing to suggest that this finding was unreasonable, or falls outside the range of possible, acceptable outcomes which are defensible on the facts and law.

[44] At the hearing before me in Vancouver, the Applicants argued strenuously that the RAD does not really deal with the adverse credibility findings of the RPD – which were a significant aspect of the RPD's finding on the identity of the agents of harm – and does not deal with the sister's evidence which establishes that the same group are still looking for the Principal Applicant.

[45] In paragraph 30 of the Decision, the RAD sets out its approach to assessing the evidence and its indication that it gave "a certain deference to the RPD's findings regarding the appellants' credibility and any other issues where the RPD enjoys a particular advantage." The Applicants take no issue with this generic statement but say that credibility was not really addressed when it came to the identity of the agents of harm. However, paragraph 40 of the Decision specifically deals with the credibility concerns that arise from the Principal Applicant's own testimony on the identity of the agents of harm. The RAD points out that the "principal appellant testified that he was approached by different groups asking for extortion money. However, there is no credible evidence that the agents of harm identified themselves." In other words, the Applicants had certain beliefs about who the agents of harm were (the Urabenos and the FARC) but there was no credible evidence to establish this identity. It was not unreasonable for the RAD to defer to the RPD's findings in this regard. See *Gebremichael v Canada (Citizenship and Immigration)*, 2016 FC 646 at para 14.

[46] The sister's sworn declaration does not say that the man who came to the door on April 4, 2015, identified himself as either an agent of the Urabenos or the FARC. She says the man said "He knows who is looking for him" and "tell Miguel that we are looking for him and tell him not to hide and that he should show his face and surrender and COLABORATE WITH THE CAUSE." The Applicants say that this shows that the same group who approached him in the past is still looking for him, and that even if they are just common criminals, they are at least persistent. The RAD finds that "this is not sufficient information to establish that this man is from the same group of men that confronted the principal appellant for money in the past" (para 41). I don't think this can be said to be an unreasonable finding because saying that the Principal

Applicant knows who is looking for him does not establish that whoever they are has approached him before, especially when the Applicants have been found not to be credible on the identity issue.

[47] And the more significant finding is that "the appellants are not able to adequately establish who the agents of harm are." Their actual identity is crucial because the Urabenos and the FARC may well have the will and the means to find the Applicants anywhere in Colombia. The onus was on the Applicants to establish that the agents of harm were either the Urabenos or the FARC but they were unable to do this with persuasive evidence. I don't see that the RAD's findings on this crucial issue can be said to be unreasonable. In my view, the RAD reasonably dealt with the identification issues and showed appropriate deference to the RPD's credibility findings in so far as they impacted this issue.

B. *Profile as a Professional Soccer Player*

[48] The Applicants also say that the RAD misapprehended the evidence that supports the Principal Applicant's profile as a professional soccer player who would be recognised in Bogota:

> 49. In finding that there was an IFA in Bogota, the RPD and the RAD concluded that the adult male applicant did not have a wide enough public profile in all of Colombia such that he would be identified outside of Buenaventura. However, the conclusions fundamentally ignore the evidence provided by the Applicant in his testimony, without providing any justification why that portion of the testimony was unreliable. His lengthy, uncontested testimony about his professional career included the following:
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> > How many years did you play soccer professionally? 11 years
> >
> > Were the games televised? Yes, they were always televised.

> Did you play for the same team? No, different teams in different cities and different countries.
>
> When you say you played in different cities - games would be in one city? Six months I would be in one city, a year in another city.
>
> [...]
>
> In your whole career [...]? In my whole career I participated on part of 8 different teams.
>
> [...]
>
> What cities have you played for? Bogota. Ibague. Pasto.

50. The Applicant went on to describe how he was recognizable from due to his profile as a professional soccer player, would appear in media including television, radio and newspapers and that fans would approach him in the street to have him sign shirts or provide autographs.

51. However, the testimony that he played professional soccer at a high level in Bogota was a crucial fact which was ignored in finding that there was no "persuasive evidence his profile extends beyond his hometown". The fact that he played professional soccer for a lengthy period of time in the very place propose as an IFA was clearly a relevant fact which ought to have been addressed by the Board.

52. Even more problematically, in assessing the Principal Applicant's employability in Bogota, the RPD specifically refers to the fact that "he may be employable as a soccer coach in view of his professional career". This implies not only that the Board believes the Applicant had a professional career, but that he would be able to leverage his reputation in Bogota to find employment. The RAD cites this analysis with approval.

53. The agents of harm who approached him in November 2013 knew about him and his professional career.

54. Furthermore, in finding an IFA in Bogota, the RPD and RAD ignored evidence that the applicants were forced to return to Buenaventura from Bogota in 2012 because they could not survive in the city after the adult male applicant lost his work as a professional player. There was no evidence that they had family or friends in Bogota who would still receive them and offer support.

[emphasis in original, references omitted]

[49] Once again, however, the Applicants are simply disagreeing with the weight given by the RAD to the evidence on this issue and the conclusions drawn:

> [38] The principal appellant focuses on the fact that he was a professional soccer player and due to this profile, he would be targeted anywhere he may choose to live in Colombia. The RPD Member canvassed this issue at the RPD hearing. The RPD Member finds:
>
> > The claimant alleges that he is widely known as a professional athlete in Colombia, making it impossible for him to relocate safely. The Panel accepts evidence that he played at a professional level, both inside and outside the country, including objective evidence that in December 2011 the claimant severed a professional sports contract with a Second Division El Salvador soccer team, Dragon Sports Club. The Panel does not; however, accept the submission that the claimant has a high profile throughout Colombia on the basis of his sports career, in view of the identified widespread credibility problems in his evidence, in conjunction with an absence of objective evidence that the Panel finds would reasonably be available to support such an assertion, such as media references to him. What the Panel has, besides the terminated contract, are two undated team photos and an action photo taken on the pitch. The Panel accepts that the claimant may have some notoriety as a local success story in his hometown of Buenaventura but concludes there is insufficient objective and reliable evidence to support a finding that the claimant is widely known and will be readily recognizable in every part of the country as he alleges.
>
> [39] Through my review of all the evidence before the RPD and the RAD, I agree with the RPD Member that the principal appellant's profile as a professional player would not, on a balance of probabilities, make him more susceptible to be located in Bogota. The RPD Member accepted that the principal appellant is a professional soccer player. I note at the hearing, the principal appellant testified that his games were televised and he was well

> known as a soccer player. However, I find the principal appellant has not provided persuasive evidence that his profile extends beyond his hometown. Furthermore, refugee protection is forward-looking, and I have taken into consideration that the last contract the principal appellant had with a professional soccer team ended in 2011. There is no persuasive evidence before the RPD or the RAD that establishes the level of profile the appellant had as a profession soccer player in Colombia. Here, the onus is on the appellants to provide corroborative evidence to establish the level of profile held by the principal appellant and other than the contract, there is no further evidence before the RPD or the RAD. There is no credible evidence that he has continued to actively pursue his soccer career since 2011. I also note that the principal appellant continued to live in Buenaventura after the threats began, and even though he lived in other places, there is no credible evidence before the RPD or the RAD that he was found due to his professional status. The only encounter he had while living at his uncle's home was when he was approached on the street and even then, there is no credible evidence that these agents of harm knew about his professional profile. I find that the principal appellant has not adequately established that this profile has, and will, motivate the agents of harm to pursue him and locate him in Bogota. This can further be explained through the analysis below.
>
> [footnotes omitted]

[50] It is clear from the Decision that the RAD did not ignore or misapprehend the evidence on profile. It simply concluded on the facts that the Principal Applicant did not have the kind of profile outside of his hometown of Buenaventura that would place him at risk if the family moved to Bogota. Once again, it is possible to disagree with this finding but it falls within the range of possible, acceptable outcomes which are defensible on the facts and the law. There is no indication that the RPD or the RAD ignored evidence on this issue.

[51] The fact that the agents of harm who approached the Principal Applicant in 2013 knew about him and his professional career does not support a conclusion that the Principal Applicant is well-known throughout Colombia or in Bogota.

[52] The fact that the Principal Applicant "may be employable as a soccer coach in view of his professional career" does not mean that he is "well-known" in Bogota. Experience is not the same thing as notoriety or celebrity status.

[53] The Applicants strenuously argued at the hearing before me that even if they could not establish that the agents of harm were either the Urabenos or the FARC, so that the threat was just local criminals, the people of Buenaventura who would know the Principal Applicant as a local sports hero would also know of his whereabouts in Bogota, and this would inevitably become known to the agents of harm. This argument, however, suffers from the same problems as other evidence put forward on this issue. It is speculative and is dealt with by the RAD's general conclusion that "No persuasive evidence was presented to the RPD or the RAD that suggests that the agents of harm have the ability, willingness, or interest to search for the appellants outside of Buenaventura" (para 48).

[54] It is also clear that both the Principal Applicant and his spouse testified that the spouse has two aunts and a brother living in Bogota (see para 62, RPD decision). And neither of them raised the lack of family support as a reason why the IFA was unreasonable.

C. *Section 96 Assessment – Wrong Legal Test*

[55] The Applicants say that the RAD did not assess the situation they faced as Afro-Colombians who have been disproportionately targeted in Colombia by the Urabenos:

> 55. The decision of the RAD begins by briefly acknowledging that the Applicants were raising their status as Afro-Colombians. The situation of Afro-Colombians was particularly relevant in the

context of targeting by the Urabenos, successors to the right-wing paramilitaries who have a long history of disproportionately targeting Afro-Colombians.

56. In this context there is little to no weight given to the fact that there was a pattern of the male applicant's family being targeted. Several of his family members, including a brother had been killed or disappeared after receiving similar threats, all of whom were also Afro-Colombian.

57. This issue was placed front and centre in both the submissions to the RAD and in the new evidence from the Applicant's sister:

> He is at risk in any city in Colombia because, in addition to the risk that he'll be executed, he is bullied because of his skin colour. In the majority of the cities in Colombia there exists an obvious racism. Us Afro-Colombians are shot and murdered for being considered different. We are fated to face such crimes as discrimination and death because of our skin colour, which elicits hatred and disdain- because of our ethnic background.

58. The RAD does not engage with this issue at all, deciding that the finding on IFA was decisive. However, the failure to assess whether the risk faced was linked to a Convention ground led to the wrong legal test being applied to the question of IFA.

59. As the Court of Appeal makes clear in *Thirunavukkarasu*, the issue of IFA is not a separate test or threshold, it is part and parcel of the assessment of a well-founded fear of persecution. What this means in practice is that the legal test for IFA is different under s.96 than under s.97. The issue to be addressed by the Board under s.96 was well established by the Court of Appeal in *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] 2 F.C. 680; (1989), 57 D.L.R. (4th) 153 (C.A.):

> What is evidently indicated by phrases such as "good grounds" or "reasonable chance" is, on the one hand, that there need not be more than a 50% chance (i.e., a probability), and on the other hand that there must be more than a minimal possibility. We believe this can also be expressed as a "reasonable" or even a "serious possibility", as opposed to a mere possibility.

> 60. At paragraph 32, the RAD specifically says that it does not need to address the issue of the s.96 claim because the IFA finding applies to both s.96 and s.97. However, the RAD then goes on to make a finding on the first prong of the IFA analysis·explicitly on the onus of a balance of probabilities:
>
> > I find, on a balance of probabilities, and on my own assessment of the evidence, that the appellants have not provided persuasive evidence to support their allegations that the agents of harm have the motivation to find the appellants in the proposed IFA location in Colombia.
>
> 61. This analysis fails to consider the cumulative profile of the Applicants, a family headed by a professional soccer player, from an extended Afro-Colombian family repeatedly and violently targeted by paramilitaries who disproportionately target Afro-Colombians. The targeting of the Applicants was not random, and when considered in context as part of a cumulative profile was linked to a Convention ground. An analysis under s.96 ought to have been undertaken.

[56] There was no evidence before the RPD or the RAD that the Principal Applicant was targeted for any other reason than his wealth, which is insufficient for a nexus to a refugee ground under s 96 of the Act. See, for example, *Figueroa*, above, at paras 20 and 36. The Principal Applicant was not targeted because he comes from an extended Afro-Colombian family. For this reason, both the RPD and the RAD focus on s 97 risk. However, the Applicants' status as Afro-Colombians was certainly a factor that had to be assessed under the second prong of the IFA test when deciding whether it is reasonable, in all of the circumstances, for the Applicants to relocate to Bogota. In fact, the RAD devotes considerable time to this factor:

> [51] In reference to the second prong for IFA, the RPD Member asked the appellants whether there was any other reason besides their fear of the agents of harm as to why they cannot live in Bogota. The principal appellant replied that there is a lot of discrimination due to the colour of his skin as an Afro-Colombian. The appellants submit that "their financial situation has also changed and there is no evidence that the associate claimant

[appellant] would be able to work as a teacher or at a restaurant in Bogota. It is not a question of transferable skills but rather whether or not as Afro-Colombians, they would get employment in Bogota.

[52] The RPD Member finds:

> Unlike the majority of internally displaced persons (IDP) who relocate to Bogota, the claimants have years of prior experience living in Bogota and it is to be expected that they would continue to have some personal and professional contacts in that location. They also have family resources in that location – the associate claimant's brother and two aunts live there – which suggests they would have some support in resettling there. The associate claimant previously worked in Bogota as a cleaner and in restaurants. She testified to subsequently obtaining years of experience running a restaurant kitchen in Cali, which, if true, the Panel considers to be a highly transferable skill, and she also has a teaching certificate. The claimant has a certificate as an IT Technician and alleges some experience as an administrator for a restaurant, and may also be employable as a soccer coach in view of his professional career.

[53] There are country documents which note that "Societal discrimination against indigenous persons and Afro-Colombians at times restricted the ability of these groups to exercise their rights." I also note that the appellants have lived in many cities within Colombia in the past. The onus is on the appellants to adequately establish that such discrimination would prevent them from establishing themselves in another city such as Bogota. However, in reviewing the evidence, I note that there is no credible evidence that this discriminatory behaviour has amounted to persecution and not enabled them to live in any other part of Colombia in the past. The principal appellant testified that his son was called a 'black slave' at school. However, again, this does not amount to persecution as defined by *IRPA*. There is no evidence of any of the appellants being targeted for being Afro-Colombians that limits their ability to live safely in the IFA location. The adult appellants have work experience and education. It is clear from their past history that being Afro-Colombian has not limited them from living in any of these other cities in the past, which include Cali and Bogota.

[54] The RPD Member finds:

> The Panel accepts the claimants' evidence in regard to the problems of racial discrimination in Colombia, and notes plentiful objective evidence in regard to disadvantages faced by Afro-Colombians as well as indigenous people in that country.
>
> The Panel also observes, however, that the adult claimants, despite many years living in Bogota, the proposed Internal Flight Alternative, where Afro-Colombians constitute a visible minority, gave no specific instances of having been harmed or adversely affected by racial discrimination. Under questioning from her counsel, the associate claimant first testified that it would be difficult for her to get a teaching job in Bogota. The Panel accepts that their racial identities may make relocation more difficult, but finds that this fact does not make Bogota and unreasonable Internal Flight Alternative, in view of all the circumstances particular to the claimants.
>
> [55] Therefore, I find the RPD Member's assessment as it relates to the second prong of the IFA test is accurate, and I find the appellants have not provided persuasive evidence, either to the RPD nor the RAD, that they could not live safely in the proposed IFA location is unreasonable in their personal circumstances.
>
> [footnotes omitted]

[57] The legal test for a viable IFA is accurately set out in the Decision. However, the Applicants are now, in effect, saying that the RAD applied a wrong "balance of probabilities" test to the first prong of the test in considering s 96 persecution where the standard is a "serious possibility."

[58] As the Decision makes clear, however, the RAD considered both s 96 persecution and s 97 risk when addressing the first prong of the IFA test and applied the correct test to each:

> [56] The appellants have not provided evidence to meet the onus on them to meet the two prongs of the IFA test. I have not found

> anything in my review of the evidence before the RPD or the RAD that would indicate that they face a serious possibility of persecution or, on the balance of probabilities, of a danger of torture or risk to life or cruel and unusual treatment of punishment and it would be unreasonable for the appellants to live in Bogota.

[59] It would appear that the Applicants are confusing the standard of proof applicable to facts and the standard for assessing the risk of future persecution. In *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2006 FC 420, the Court had the following to say on point:

> [184] A distinction has to be drawn between the legal test to be applied in assessing the risk of future persecution, and the standard of proof to be applied with respect to the facts underlying the claim itself. While the legal test for persecution only requires a demonstration that there is more than a mere possibility that the individual will face persecution in the future, the standard of proof applicable to the facts underlying the claim is that of the balance of probabilities: *Adjei*, at p. 682. See also *Li v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1, 2005 FCA 1 at 9-14 and 29.

[60] It was not legally incorrect for the RAD to use a balance of probabilities test for facts underlying the claim itself. The Decision is clear that the "serious possibility" test was applied to assessing the future risk of persecution.

D. *Conclusions*

[61] The Applicants are naturally disappointed with the Decision and their fears of returning to Colombia may well be entirely genuine. However, subjective fear alone is not sufficient to support a claim for protection under the Act. The RPD and the RAD carefully examined their fears and considered whether they could be objectively supported on the facts. The Applicants have not shown that either tribunal was wrong or unreasonable on the facts.

[62] Counsel agree that this application raises no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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