Federal Court  Cour fédérale

Date: 20120502

Docket: IMM-3074-11

Citation: 2012 FC 513

Ottawa, Ontario, May 2, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

Ever Hernand HERNANDEZ BOLANOS
Diano Rocio CORTES ALARCON
Estaban Felipe HERNANDEZ CORTES
Oscar Mauricio HERNANDEZ CORTES

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 9 August 2011 (Decision), which refused the

Applicants' applications to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicants are all citizens of Colombia. The Secondary Applicants are the Principal Applicant's wife (Diano), and their two sons. All fear the FARC guerrillas in Colombia and currently live in Toronto; they have been in Canada since their arrival on 14 June 2010.

[3] The Principal Applicant says that a FARC member telephoned him in December 2009 and told him to expect further communication. FARC fulfilled its promise in February 2010, when it sent him a letter and demanded he pay 20 million pesos – approximately $10,000 – as a "tax." The letter reminded the Principal Applicant that FARC had killed his brother-in-law for not giving in to its demands and instructed him to keep quiet if he wanted to keep his family safe. The Applicants provided the RPD with a copy of this letter (FARC Letter) which appears at page 466 of the Certified Tribunal Record (CTR).

[4] After he received the FARC Letter, the Principal Applicant was afraid for himself and his family. He looked for ways to raise enough money to pay FARC off. He hoped that if he paid the demand, FARC would leave him alone. He says that a FARC member called him at work on 21 March 2010 and told him that if he did not pay FARC would abduct his children from school.

[5] To meet FARC's demand, the Principal Applicant borrowed 10 million pesos from his mother-in-law. On 26 March 2010, he drove to Alban, Colombia to give FARC the money. Two gunmen on motorcycles met him on the road to Alban and escorted him to an abandoned house. The

gunmen signalled to the Principal Applicant to get out of his car, which he did. Two other men came out of the house and took the money from him.

[6] When the men at the house discovered that the Principal Applicant had only brought half of the demand, they threw him to the ground, bound his hands and feet, and blindfolded him. They threatened to kill him, so he begged for his life, saying that he would pay them in full if they gave him more time. The men spared his life, but left him at the house tied and lying on the floor. The Principal Applicant eventually freed himself and went home.

[7] After these events, the Principal Applicant and Diano discussed fleeing Colombia, but they did not have enough money to cover airfare for the whole family. The Principal Applicant quit his job and started driving his sons to and from school to protect them from FARC. The Applicants also began to sell off their possessions to raise money so they could leave Colombia.

[8] The Principal Applicant and Diano also decided to report FARC's demand to the Colombian authorities. The Principal Applicant went to the Attorney General's office in Madrid, the town where he lived, on 5 April 2010. Officials at the Madrid office sent him to an office in Facatativá, a city approximately twenty kilometres away. Officials at the Facatativá office contacted the office in Bogota where officials said they would send agents to investigate.

[9] On 14 April 2010, FARC again contacted the Principal Applicant to tell him he would have to pay 40 million pesos because he had not met the first demand in full. They gave him until 26 June 2010 to pay, failing which they said they would kidnap Diano or one of his children.

[10] Two GAULA agents came to the Applicant's home on 7 May 2010. GAULA units are composed of members of the Colombian Armed Forces and are responsible for investigating and preventing kidnappings and extortion in Colombia. These agents suggested a plan to the Applicant: he was to make the payment to FARC as planned, but they would give him a bullet-proof vest to wear, follow him in their car when he went to make the payment, and arrest the FARC members during the handover. The Principal Applicant did not agree to the agents' plan, so they simply took his report. They said they would only give him a copy of the report once they had made an arrest. The Principal Applicant later went to the Attorney General's Office in Bogota, but that office only gave him a notice of his complaint, not the report itself. The notice the Attorney General's office gave him appears at page 474 of the CTR and indicates that the case was active and under investigation when it was issued.

[11] After these events, the Principal Applicant felt unprotected. He reported his experience with the GAULA agents to the Ombudsman's Office in Bogota – a division of the Public Ministry (Ombudsman) – on 1 June 2010. The Principal Applicant gave the RPD a copy of the letter he provided to the Ombudsman, which appears at page 472 of the CTR. This letter bears a stamp from the administrative sub-directorate of the Ombudsman's Office, which indicates it was received on 1 June 2010.

[12] After complaining to the Ombudsman, the Principal Applicant moved with his family to Granada, a city approximately 230 kilometres from Madrid. The Applicants then decided that the safest course of action was for them to leave Colombia. They all had visas to come to Canada, so they came here. Diano flew to Toronto on 13 June 2010, and the Principal Applicant and their two sons followed on 14 June 2010. The Applicants claimed protection in Canada on 29 June 2010.

[13] The RPD joined the Applicants' claims under subsection 49(1) of the *Refugee Protection Division Rules* SOR 2002-228 and heard the claims together on 8 July 2011. All the Applicants relied on the Principal Applicant's narrative, so their claims stood or fell with his. The RPD also appointed the Principal Applicant as his sons' representative. The RPD considered the Applicants' claims after the hearing, made its Decision on 9 August 2011, and notified them of the Decision on 31 August 2011.

DECISION UNDER REVIEW

[14] The RPD found that the Principal Applicant had not established a serious possibility of persecution, a risk of torture, a risk to his life, or a risk of cruel and unusual treatment or punishment in Colombia. It therefore denied the claim for protection. It also denied the claim because the Applicants had not rebutted the presumption of state protection.

[15] The RPD first reviewed the Principal Applicant's allegations of extortion by FARC, his story of payment and detention, his interaction with the Colombian authorities, and his flight to Canada.

Guerrilla and Paramilitary Action in Colombia

[16] The RPD found that Colombia has experienced forty years of conflict between government forces and guerrillas, including FARC, and paramilitary organizations. This conflict has caused many civilian casualties and has internally displaced many Colombian citizens. All actors in the conflict are implicated in human rights violations, including killings, disappearances, forced

displacement, violence against women, and intimidation. The RPD also noted that several groups in Colombia are at increased risk of harm.

Credibility and Subjective Fear

[17] When it analysed the Principal Applicant's credibility, the RPD said it was guided by *Maldonado v Canada (Minister of Employment and Immigration)*, [1980] 2 FC 302 (FCA), which establishes that refugee a claimants' testimony is presumed true. It also pointed to *Orelien v Canada (Minister of Employment and Immigration)*, [1991] FCJ No 1158 (FCA), which teaches that the RPD cannot hold that "evidence is credible or trustworthy unless satisfied that it is probably so, not possibly so." The RPD also said that it had assessed all the oral and documentary evidence, though it would only refer to those pieces of evidence it thought were relevant.

[18] The RPD found that it did not believe the Applicants were being threatened by anyone in Colombia and found that the Principal Applicant had fabricated his entire story of threats, extortion, and assault to bolster his fraudulent claim for protection.

[19] The RPD noted that the Principal Applicant had testified he knew about FARC and its operations; he said he had been personally affected by FARC's actions through the murder of his brother-in-law. The RPD asked the Principal Applicant why he did not leave Colombia immediately after he was threatened since, given his knowledge of FARC, he knew it is a dangerous organization. He answered that he thought they would leave him alone after he paid them. The RPD rejected this explanation, saying that the Principal Applicant knew that FARC was dangerous because its members killed his brother-in-law. The RPD found his belief that FARC would leave

him alone after he paid half the money was unreasonable, given what had happened to his sister and nephew.

[20] When the RPD asked why he did not leave Colombia immediately after FARC members tied him up and beat him, he said that leaving one's home and family is not an easy decision to make. The RPD said that, although leaving one's home is difficult, it is easier than staying to be beaten, kidnapped, or killed. This explanation undermined the Principal Applicant's credibility. The RPD found that, if the Principal Applicant was actually in fear, he would have left Colombia immediately after the threats.

[21] The RPD found that the Principal Applicant could have fled immediately after FARC demanded money from him. It found that he was able to come up with 20 million pesos and all of his family members had visas to come to Canada. The RPD also found that, even if it accepted his explanations, his belief that FARC would leave him alone if he paid them made no sense and was unreasonable; evidence he had provided to the RPD showed that FARC often demanded more money after extortion demands were met. He also could not expect FARC to leave him alone at the same time as he promised to pay the second half of the 20 million pesos demanded of him.

[22] The RPD noted that the Principal Applicant had not filed a report with the authorities until 5 April 2010, after FARC called him and wrote him a letter, beat and tied him up, and after he had given FARC money. He explained the delay in contacting the authorities by saying that, after the first threat, he had made a rushed decision, though he was not sure if the rushed decision was to pay off FARC or go to the authorities. He also said that he did not go to the police initially because the caller and letter both said he would be harmed if he did; he went to the police on 5 April 2010 because he thought they would be able to protect him.

[23] The RPD found that the Principal Applicant's testimony on this point was confusing. It said that, because the threats were repeated, there was no evidence that the risk to him was reduced. Further, the RPD wondered why he did not approach the authorities when he was at risk based on previous threats, but then approached the police when the threats were repeated. It also noted that the Principal Applicant had produced a document which showed his relatives had not received protection from the authorities, even though they made reports.

[24] Although he tried to explain his story, the RPD found that the Principal Applicant gave confusing testimony. Even if he had gone to the authorities as he said he had, the sole reason he went was to get proof that he sought protection which was not forthcoming. The RPD noted he had only two contacts with the authorities, on 5 April and 7 May 2010. It also noted the GAULA agents said they would not give him a report until they made an arrest, after he refused to follow their plan. The RPD inferred from the agent's response that the police did not believe he was being extorted by FARC and that they wanted to make sure he was a *bona fide* complainant before giving him a copy. The RPD found that all the Principal Applicant wanted was documentation to show he had gone to the authorities and made a report.

[25] The RPD found that the Principal Applicant had only approached the authorities in Colombia to create evidence which would bolster his fraudulent refugee claim. It noted that he testified he went to the Attorney General's office in Bogota to obtain proof that he had filed a report, not to complain about police conduct. He also testified that he wanted this proof to show the Ombudsman and that he went to the Ombudsman for help because he was not getting it from the police.

[26] The RPD also found that the Principal Applicant had not given any of the non-police entities he had approached for help sufficient time to investigate his complaints. In his testimony he said that he had contacted Social Action, the representative of the Municipality of Grenada, the Ombudsman, and the prosecutor's office. The RPD noted that he went to the police on 7 May 2010, then approached non-police entities for help before he left Colombia on 14 June 2010. Although the Principal Applicant testified that the Ombudsman usually provided a written response to complaints and he had not received one, the RPD found his belief that his complaint was not being investigated was speculative. His report to the Ombudsman received appropriate attention, but the Applicants left Colombia before the investigation was complete because he had fabricated his allegations to support a refugee claim.

[27] The RPD also based its finding that the Principal Applicant had approached the authorities with baseless allegations to bolster a refugee claim on his testimony that he would be harmed if he waited for the investigation. At the hearing, the RPD asked why he had complained if he had intended to leave, and he said that he wanted to ask for protection to see if he would get it before he left. The RPD said there was no persuasive evidence that he had seriously sought state protection. He had testified that the police never communicated with him. The RPD found that the Principal Applicant was not interested in getting help in Colombia. He had no basis for his fear of persecution because he was not being persecuted in Colombia.

[28] The RPD also found that the Principal Applicant was not credible because of inconsistencies in his testimony. He testified that FARC became interested in him when he started a transportation business. At the hearing, the following exchange occurred:

RPD: When did you start having the public transportation? I think you mentioned to (inaudible) letter that you had two public taxi cars on the road?

PA: Yes, that's correct. I gave my lawyer certification for one of the vehicles that was started in 2009, and before I started with another company in 2009 but I was not able to get the certification in time.

RPD: You owned a vehicle or you owned companies?

PA: Of the vehicles, the vehicles.

RPD: You owned vehicles?

PA: Two vehicles.

[…]

RPD: So in total how many cars you owned?

PA: Two

RPD: Did you own any trucks or vans?

PA: No

[...]

RPD: What car were you driving?

PA: It's a very small car, a Renault Twingo, a very small Twingo.

RPD: Is this the car mentioned in [exhibit] C-7?

PA: No, it's different.

RPD: Is it the car that you weren't able to get the documentation for?

PA: No it's different, it's the small car that I used in Madrid to get to my workplace.

RPD: I asked you earlier how many cars you have and you said two, but now you seem to have at least three? Can you explain?

PA: Yes, that's true, I mentioned the two vehicles before that I had working in the eastern plains region. This vehicle was my personal vehicle.

RPD: The reason you thought that was, referring to this small vehicle you have in Madrid, when I asked you a minute ago how many cars you had ---

Counsel: Sir, I have wrote [*sic*] down your question, and your question was when did you start having public transportation, a couple of taxi cars. You were asking about the cars used for public transportation.

RPD: Okay, let my review my notes, counsel. This is mine, "In total how many cars you own." "Two". "Do you own any trucks or vans", "No"

If I asked then I don't remember asking, but I didn't ask about the taxis. I thought we did but that was – but it was earlier on if I did. Unless I go through my notes I wouldn't be able to tell you, but I could tell you clearly that I asked for ---

[29] The RPD noted that, when he described taking the money to FARC in March 2010, the Principal Applicant said he drove a third car which was his personal vehicle. The RPD found his testimony was inconsistent on this issue and rejected his explanation. It said that he thought its question was about a document he submitted which referred to a vehicle that he owned. The RPD noted it had asked him how many vehicles he owned, and he had said two. On the basis of this inconsistency, the RPD found that the Principal Applicant did not pay FARC any money and that he was not contacted by FARC.

[30] The RPD concluded that there was no basis for the Principal Applicant's subjective fear of persecution. It found that he had gone to several authorities in Colombia; his counsel said at the hearing the RPD was holding this against him and this put him into an impossible position. The RPD noted that refugee claimants are encouraged to present documentary evidence to support their

claims but, where claimants are not credible, it must weigh the documentary evidence they submit. The RPD found that the Principal Applicant approached the Colombian authorities in order to leave a paper trail, not because he was persecuted by FARC.

[31] The RPD also looked at the documents the Principal Applicant had submitted from the Attorney General's office, the Ombudsman, and from FARC. It noted that the probative value of documents may depend on the author, the author's qualifications, corroboration, and the motivation for the document's production. The RPD also noted that in *Syed v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 597 (FC) Justice Pierre Blais upheld the RPD when it gave little weight to a report from a medical practitioner where the RPD did not find the claimant credible on the basis of inconsistencies and implausiblities.

[32] On the basis of the problems with respect to the major issues, the RPD found the Principal Applicant generally lacked credibility. It did not believe that anything he said had actually occurred.

State Protection

[33] In the alternative to its general negative credibility finding, the RPD examined whether state protection was available to the Principal Applicant in Colombia.

[34] The RPD found that the Principal Applicant had approached authorities in Colombia for protection, but after the 7 May 2010 incident – where he refused to participate in the GAULA agents' plan to confront FARC – he did not approach them again. He also testified he went to the Ombudsman and provided a letter to that effect, and that he went to three other agencies, but the RPD found he did not provide any persuasive evidence that he had approached any other agencies

for help. If he had gone to anyone else for protection, this would have been after he went to the Ombudsman on 1 June 2010. He then left Colombia on 14 June 2010, allowing only two weeks for the other agencies to investigate his complaints.

[35] The RPD said *Romero v Canada (Minister of Citizenship and Immigration)* 2008 FC 977 establishes that a claimant's decision to flee before the police have had an opportunity to investigate does not amount to a lack of state protection. It found that there was no persuasive evidence that the police were not investigating his complaint and his departure from Colombia may have interfered with their investigation.

[36] The RPD also referred to the presumption of state protection established by *Canada (Attorney General) v Ward*, [1993] 2 SCR 689. It found that, although the Principal Applicant had set out an elaborate scheme of protective agencies he said he approached, he had not given those agencies enough time to deal with his complaint. The Principal Applicant had testified that the police did nothing after he complained to them, but he also testified that they came to his home and suggested a course of action, which he refused because it was too risky. He also did not give the Ombudsman or other agencies he approached time to investigate his complaint. The RPD found that there was no evidence the police were not investigating his complaint. It further found that the establishment of the GAULA units showed that the government was taking steps to protect target groups and that the effectiveness of this protection had to be presumed. After the GAULA agents got involved, FARC did not approach him again.

[37] The RPD said that effectiveness of state protection is relevant, but this Court has held that adequacy, not effectiveness, is the appropriate test. It found that Colombia has accepted its past problems and is making serious efforts to protect its citizens. The Colombian government is making

an effort to combat human rights abuses and has established several institutions to combat extortion and kidnapping. On the totality of the evidence, the RPD found that the Principal Applicant had not rebutted the presumption of state protection with clear and convincing evidence.

[38] The RPD concluded its analysis on state protection by reviewing the jurisprudence on this issue. It noted that the burden on refugee claimants to rebut the presumption increases with the level of democracy in the state against which protection is claimed. Although the Applicants claimed protection against Colombia, the RPD wrote that the documentary evidence before it established that Mexico (*sic*) is a democracy with free and fair elections. The RPD found that, in countries like Mexico (*sic*), claimants must show more than that they approached the police for protection but were denied.

[39] The RPD concluded that the Applicants are not Convention refugees or persons in need of protection, so it denied their claim.

ISSUES

[40] The Applicants raise the following issues in this application:

a. Whether the RPD erred by not making a finding under section 97;

b. Whether the RPD's credibility finding was reasonable;

c. Whether the RPD's state protection finding was reasonable;

d. Whether the RPD's finding that the Principal Applicant lacked subjective fear was reasonable;

e. Whether the RPD applied the correct test for state protection.

STANDARD OF REVIEW

[41] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, 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 well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[42] In *Elmi v Canada (Minister of Citizenship and Immigration)* 2008 FC 773, at paragraph 21, Justice Max Teitelbaum held that findings of credibility are central to the RPD's finding of fact and are therefore to be evaluated on a standard of review of reasonableness. Finally, in *Wu v Canada (Minister of Citizenship and Immigration)* 2009 FC 929, Justice Michael Kelen held at paragraph 17 that the standard of review on a credibility determination is reasonableness. The standard of review on the second issue is reasonableness.

[43] In *Carillo v Canada (Minister of Citizenship and Immigration)* 2008 FCA 94, the Federal Court of Appeal held at paragraph 36 that the standard of review on a state protection finding is reasonableness. This approach was followed by Justice Leonard Mandamin in *Lozada v Canada (Minister of Citizenship and Immigration)* 2008 FC 397, at paragraph 17. Further, in *Chaves v Canada (Minister of Citizenship and Immigration)* 2005 FC 193, Justice Danièle Tremblay-Lamer held at paragraph 11 that the standard of review on a state protection finding is reasonableness *simpliciter*. The standard of review on the third issue is reasonableness.

[44] In *Cornejo v Canada (Minister of Citizenship and Immigration)* 2010 FC 261, Justice Kelen held at paragraph 17 that the standard of review on the assessment of subjective fear of persecution was reasonableness. Justice John O'Keefe made a similar finding at paragraph 20 in *Brown v Canada (Minister of Citizenship and Immigration)* 2011 FC 585. The standard of review on the fourth issue is reasonableness.

[45] 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 paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 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."

[46] In *Uwase v Canada (Minister of Citizenship and Immigration)* 2007 FC 1332, Justice Yves de Montigny held that, "the RPD has an obligation to address the objective risks and dangers stipulated in paragraphs 97(1)(a) and (b) of the IRPA where evidence has been led that could support such a finding of risk, even if it has rejected a section 96 claim on credibility concerns" (see also *Bouaouni v Canada (Minister of Citizenship and Immigration)* 2003 FC 1211 at paragraph 41). On the first issue, the reviewing Court must come its own conclusion on whether the RPD has complied with this obligation (see *Dunsmuir*, above, at paragraph 50). The standard of review on the first issue is correctness.

[47] On the fifth issue, in *Saeed v Canada (Minister of Citizenship and Immigration)* 2006 FC 1016, Justice Yves de Montigny held at paragraph 35 that, when examining the RPD's application of the test for state protection, the appropriate standard of review is correctness. Justice Paul Crampton made a similar finding in *Cosgun v Canada (Minister of Citizenship and Immigration)* 2010 FC 400 at paragraph 30. The standard of review on the fifth issue is correctness

STATUTORY PROVISIONS

[48] The following provisions of the Act 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, membership in a particular social group or political opinion,	**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, 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,	**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

their country of former habitual residence, would subject them personally	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 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 des soins médicaux ou de santé adéquats.
[…]	[…]

ARGUMENTS

The Applicants

The Credibility Finding Was Unreasonable

The Nephews' Accounts

[49] The Applicants argue that the RPD's general credibility finding was unreasonable becaues it ignored evidence related to refugee claims the Principal Applicant's nephews made in Canada. The Principal Applicant fears FARC in part because his brother-in-law – his nephews' father – was killed by FARC for not paying money when it was demanded. The RPD accepted the nephews as refugees because of this event; their Personal Information Forms were before the RPD in this case. Other members of the RPD found that the nephews' accounts were credible, and their accounts included aspects of the Principal Applicant's story. Further, there was other documentary evidence before the RPD in this case which established the truthfulness of the nephews' accounts. The RPD erred by finding the Principal Applicant's story wholly unbelievable when it did not cite any grounds or evidence in the nephews' claims that it did not believe.

The Money Request

[50] The Applicants also argue that the RPD's treatment of the Principal Applicant's account of giving FARC only half of the demanded amount was unreasonable. The RPD found an internal contradiction in this story: it said that it did not make sense that he believed FARC would leave him alone after paying only half of the demand. This finding ignores the Principal Applicant's testimony that he promised to pay them half of the money only after FARC members said they would kill him. The RPD's credibility finding was unreasonable because it ignored evidence which was before it.

A Speculative Inference

[51] The RPD's inference that the police did not give him a copy of his complaint because they wanted to see if his complaint was *bona fide* was speculative. *Valtchev v Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No 1131 at paragraph 7 says that findings of plausibility should only be made in the clearest of cases and cannot be speculative. The inference as to why the police did not give the Principal Applicant a copy of his complaint fails both of these tests.

Microscopic Evaluation

[52] The RPD engaged in a microscopic evaluation of the evidence when it relied on the apparent inconsistency in the number of cars he owned to challenge the Principal Applicant's credibility. The number of cars he owned was not central to his claim and this inconsistency could not show that he had not paid FARC any money. By engaging in such a microscopic evaluation, the RPD committed the error cautioned against in *Mohacsi v Canada (Minister of Citizenship and Immigration)* 2003 FCT 429 at paragraph 20.

Inconsistent Treatment of Evidence

[53] In addition, the RPD unreasonably used evidence from the Principal Applicant's sister to impeach his credibility, while at the same time it found that evidence was not credible. The RPD pointed to his sister's experience with FARC – when it killed her husband – to show that FARC had not left her and her family alone after they paid the demand. This was then used to establish that the Principal Applicant's belief that he would be left alone after he paid FARC was unreasonable. The RPD also said the Principal Applicant knew of FARC's murderous history because FARC had

murdered his brother-in-law. At the same time, the RPD found that the Principal Applicant's narrative, in which the killing of his brother-in-law played a key part, was completely fabricated. The way that the RPD treated this evidence renders its findings perverse and capricious.

Failure to Make a Section 97 Finding

[54] The RPD did not make any finding in relation to the claim under section 97 of the Act because it found that the Principal Applicant's lack of subjective fear was sufficient to dispose of both claims. Although subjective fear is an element of all claims under section 96 of the Act, the Applicants say that it is not part of a section 97 claim. The RPD did not make a nexus finding, which left open a claim under section 97. The RPD then committed an error when it did not make any finding under section 97.

Subjective Fear

[55] The Applicants also argue that the RPD's subjective fear finding, which it used to foreclose the analysis under section 97, was unreasonable. When it found that the Applicants' failure to leave Colombia showed they did not have a subjective fear, the RPD ignored case law which establishes that there is no hard and fast rule on when claimants must leave in order to establish subjective fear. Delay must be assessed on the facts of each case. The RPD did not take into account the Principal Applicant's testimony that FARC gave him until 26 June 2010 to pay, or they would kidnap his wife or one of his sons. The Applicants left Colombia two weeks before the deadline FARC had imposed on them. The RPD also did not consider the Principal Applicant's testimony that he delayed leaving Colombia because it was not easy to do so.

The State Protection Finding

Inappropriate Burden

[56] The Applicants argue that the RPD imposed too high a burden on them to rebut the presumption of state protection. In effect, they had to show that they had exhausted all avenues available to them in order to rebut the presumption of state protection. *Hinzman v Canada (Minister of Citizenship and Immigration)* 2007 FCA 171 teaches that, in the United States of America (USA), claimants must show that they have exhausted all avenues for state protection. In countries like Colombia, where democratic institutions are not as strong as they are in the USA, claimants do not have to show that they have exhausted all avenues available to them. By requiring the Applicants to meet the threshold required of claimants from the USA, rather than the proper threshold for Colombia, the RPD placed a burden on them which was too high.

[57] Further, the RPD referred to country condition evidence on Mexico, rather than on Colombia. The evidence for Mexico could not show the burden on the Applicants. This makes the RPD's conclusion on state protection unreasonable.

[58] Also, when it concluded that the Applicants had not rebutted the presumption of state protection, the RPD failed to consider the evidence from the Principal Applicant's sister. FARC killed the brother-in-law, which showed that state protection was unavailable to him and his family, including the Principal Applicant's sister. Evidence to this effect was before the RPD. The sister and brother-in-law were similarly situated persons to the Applicants, so the RPD should have considered the evidence which showed that state protection was not available to them.

Improper Test

[59] The Applicants also challenge the RPD's state protection finding on the basis that the RPD applied an inappropriate test for state protection. In *Bautista v Canada (Minister of Citizenship and Immigration)* 2010 FC 126, Justice Michel Beaudry overturned a decision from the RPD which used the same language that the RPD used in this case. Justice Beaudry held that it was an error for the RPD to look at what structures Mexico was endeavouring to put in place, rather than what was actually occurring on the ground. The RPD committed the same error in this case.

The Respondent

[60] The RPD's conclusions that the Principal Applicant was not credible and that there was state protection available to the Applicants in Colombia were reasonable. These findings were grounded in the evidence before the RPD, so the Court should not interfere with the Decision.

Findings Based on Evidence

[61] When the RPD found that the Principal Applicant was not credible, it based this finding on four main inconsistencies in his evidence:

a. He believed FARC would leave him alone after he paid half the money demanded, although he knew how FARC operated;

b. His delay in leaving Colombia was inconsistent with subjective fear;

c. His explanation for why he did not immediately go to the authorities on being threatened was confusing; and

d. His testimony on the number of cars he owned was inconsistent.

[62] The RPD is in a better position than the Court to assess credibility and is best positioned to test the plausibility of a claimant's testimony, so the Court should not interfere with these findings. It is also acceptable for the RPD to doubt a claimant's credibility based on contradictions, inconsistencies, and implausiblities.

Speculative Inference Does not Matter

[63] Nothing turns on the RPD's inference as to the GAULA agents' motivation for not giving the Principal Applicant a copy of his complaint. The Decision should not be overturned on this basis.

The Number of Cars Mattered

[64] Although the Applicants have characterized the RPD's treatment of the Principal Applicant's testimony about how many cars he owned as microscopic, this testimony was significant. The Principal Applicant testified that he drove in his own car to take the money to FARC. If, as he testified, he only owned two cars which were being used in Eastern Colombia, the Principal Applicant could not have driven his own car to take the money to FARC. It was reasonable for the RPD to conclude on this basis that the Principal Applicant had not given FARC any money. The RPD reasonably relied on inconsistencies in the testimony and was not overzealous in searching them out

The Sister's Evidence

[65] The RPD reasonable found that the Principal Applicant and his sister had taken the same steps to report FARC to the police and complain to the Ombudsman. This finding did not contradict the RPD's finding that the Principal Applicant had never been threatened by FARC.

Delay

[66] When it found that the Applicant's delay in leaving Colombia showed he did not have subjective fear, the RPD did not ignore the Principal Applicant's testimony that leaving his country was hard. Rather, the RPD reasonably considered, weighed, and rejected this statement. As the Applicants say, delay must be examined on the merits of each case. Though the Applicants disagree with how the RPD weighed this evidence, it is not for the Court to re-weigh the evidence on judicial review.

The RPD is not Bound by its own Decisions

[67] The RPD's credibility determination was reasonable. *Bakary v Canada (Minister of Citizenship and Immigration)* 2006 FC 1111, *Cortes v Canada (Minister of Citizenship and Immigration)* 2008 FC 254, and *Noha v Canada (Minister of Citizenship and Immigration)* 2009 FC 683 all establish that each claim should be determined on its own facts and that the RPD is not bound to follow its own previous findings of fact. The RPD was aware that it had previously granted the nephews' refugee claims, but it is possible that those decisions were not correct, so they cannot be used to impugn the findings in this case.

The RPD Considered Section 97

[68] When the RPD concluded that the Principal Applicant had no subjective fear, it clearly said that it made this finding in relation to the Applicants section 96 claim. The RPD also clearly conducted an analysis of the section 97 claim when it found that state protection was available.

The State Protection Finding was Reasonable

[69] The Applicants did not provide any persuasive evidence to show that the authorities were not investigating the Principal Applicant's complaint. The Applicants also left Colombia only two weeks after the Principal Applicant complained about the police conduct to the Ombudsman. As *Castillo v Canada (Minister of Citizenship and Immigration)* 2011 FC 134 and *Romero*, above, establish, a claimant's decision to flee before the authorities have had enough time to investigate does not show that state protection is not available. The Applicants did not rebut the presumption of state protection.

[70] The RPD also considered documents from their relatives the Applicants submitted to show a lack of state protection. The RPD reasonably gave little weight to this evidence because the Principal Applicant testified that he went to the police even though he knew from his relatives that their protection would be ineffective.

The RPD Applied the Proper Test

[71] *Hinzman*, above, shows that claimants have a heavy burden to show why they did not pursue all avenues of state protection where they claim against a well functioning democracy. The RPD found that Colombia was such a democracy and is making serious efforts to address its past

problems. Although Justice Beaudry overturned a similar finding in *Bautista*, above, this does not mean that the finding in this case was unreasonable. The RPD mentioned Mexico rather than Colombia when it calibrated the Applicants' burden, but this does not render the Decision unreasonable. The RPD did not ignore or misconstrue any evidence going to state protection, so its finding on this aspect of the Applicant's claim was reasonable.

The Applicants' Reply

[72] The Respondent has said that the RPD's conclusion that the Principal Applicant left without giving the police time to investigate was reasonable; the Applicants say that they left when they did because of the deadline FARC set for the second payment. The law does not require that claimants put their lives at risk to allow for only the possibility that state protection might be available, and in this case there was evidence that the authorities had been unable to protect their family in the past.

[73] Further, the Applicants say that the RPD's speculative inference as to why the police did not give the Principal Applicant a copy of his complaint was part of an overall pattern of flawed credibility findings. This means that the credibility finding as a whole cannot stand.

[74] In addition, the inconsistency in the number of cars the Principal Applicant owned does not show that he did not give FARC money. The Principal Applicant actually testified that he had two business vehicles in Eastern Colombia, but used his personal vehicle to deliver the money to FARC.

[75] The Respondent is correct that each claim must be determined on its own merits and the RPD is not bound by its previous findings of fact. However, that is not at issue in this case. What the Applicants challenge is the RPD's conclusion that the Principal Applicant's story was false,

without considering the nephews' documents. The RPD had accepted these documents on other occasions, so it was incumbent on it to provide reasons why it rejected them in this case without explanation.

[76] The Applicants also disagree with the Respondent's interpretation of *Hinzman*, above. They say that *Hinzman* teaches that only in countries like the USA which have a full arsenal of checks and balances between the three branches of government are claimants required to exhaust all avenues of protection. In a country with fewer democratic institutions and safeguards, claimants do not have to show that they pursued as many avenues of state protection. Further, when the RPD considered the democratic situation in Mexico, it did not show that Colombia is similar to the USA. As such, the burden on claimants to rebut the presumption of state protection for Colombia cannot be as heavy as it is for claimants from the USA.

ANALYSIS

[77] The Applicants have raised a number of grounds for reviewable error with respect to the RPD's findings on credibility and lack of subjective fear. However, those findings are underpinned by an alternative finding of adequate state protection. Unless the Applicants can establish reviewable error with respect to the state protection finding their application for judicial review must fail.

[78] The Applicants say that the RPD refers to country conditions in Mexico rather than Colombia. It is true that this error occurs, but a reading of the Decision as a whole and the documentation relied upon by the RPD makes it clear that this is an inadvertent typographical error.

I am satisfied that the state protection analysis was carried out with Colombia in mind (see *Portillo Sanchez v Canada (Minister of Citizenship and Immigration)* 2006 FC 648 at paragraph 12).

[79] The Applicants say that the RPD did not address the level of democracy that exists in Colombia and based its analysis on USA conditions in accordance with *Hinzman*, above.

[80] It is clear from the Decision as a whole that the RPD was fully aware that the level of democracy affects what a claimant is expected to do to refute the presumption of adequate state protection (see paragraph 57). It is also clear to me that, notwithstanding the typographical error with regard to "Mexico," the RPD addressed the level of democracy that exists in Colombia and did not just assume it was equivalent to the USA. The Applicants conceded in the hearing before me that free and fair elections exist in Colombia but they say that the RPD overlooked problems with the judiciary.

[81] The RPD says that there "is a relatively independent and impartial judiciary" in Colombia. This makes it clear that the RPD is aware that the judiciary in Colombia is not entirely independent but is only "relatively" so, and that the RPD is fully aware it is not looking at Columbia in the same way it would look at the USA.

[82] The US Department of State's *2009 Human Rights Reports: Columbia* (DOS Report) that was before the RPD in this case provides the following information:

> While the law provides for an independent judiciary, much of the judicial system was overburdened, inefficient, and hindered by subornation and intimidation of judges, prosecutors, and witnesses. In these circumstances impunity remained a serious problem, although the government took action to address these issues. The Superior Judicial Council (CSJ) reported that the civilian judicial system suffered from a significant backlog of cases, which led to

> large numbers of pretrial detainees. Implementation of the new criminal accusatory system reduced the time for resolving new criminal cases by over 75 percent, with conviction rates of approximately 60 percent under the new system, compared with 3 percent under the old, inquisitorial system. However, a large backlog of old-system cases remained.
>
> Judicial authorities were subjected to threats and acts of violence. According to the protection program in the Prosecutor General's Office, during the year 470 judicial employees sought varying forms of protection from the CSJ for reasons including threats. Although the Prosecutor General's Office ran a witness protection program for witnesses in criminal cases, witnesses who did not enter the program remained vulnerable to intimidation, and many refused to testify.
>
> The UN special rapporteur on the independence of judges and lawyers, Gabriella Carina Knaul de Albuquerque e Silva, reported on high level of threats and attacks against judicial officials such as judges, defense lawyers, prosecutors, and investigators as well as civilian participants in the justice system such as witnesses and victims. The special rapporteur acknowledged the government had programs in place to provide protection but called for increased measures to ensure the protection of justice officials. The special rapporteur noted that threats against judicial personnel contributed to the high rate of impunity, along with insufficient resources for the administration of justice and inadequate initial investigations.

[83] When the Decision is read as a whole, it is clear that the RPD is fully aware of, and has taken into account, the problems mentioned in this paragraph. For example, in paragraph 50 of the Decision, the RPD says that

> However, claims of impunity continued to be widespread, due in some cases to obstruction of justice, a lack of resources for investigations and protection of witnesses and investigators, and inadequate coordination among government entities.

[84] The RPD also acknowledges the same problems in its conclusions:

> However, weighted against this is persuasive evidence that indicates that Colombia candidly acknowledges the past problems and is making serious efforts to rectify the corruption and impunity that exists. The panel accepts that Colombia is experiencing challenges in

> addressing the criminality and corruption that exists within the security forces in Colombia. It recognizes that there are some inconsistencies among several sources within the documentary evidence; however, the preponderance of the objective evidence regarding current country conditions suggests that, although not perfect, there is an adequate state protection in Colombia for victims of crime, that Columbia is making serious efforts to address the problem of criminality, and that the police are both willing and able to protect victims.

[85] Although neither party raised it at the hearing before me, the record shows that when the RPD heard the Applicants' case and made its Decision, an updated version of the RPD's National Documentation Package for Colombia was available which includes the US Dos *2010 Human Rights Report*. I have carefully compared both reports and can find no material differences regarding the situation in Colombia that was relied upon by the RPD. Hence, I do not regard this as a material error.

[86] All in all, I do not think it can be said that the RPD did not acknowledge and take into account the problems that exist in Colombia's justice system and the "challenges in addressing the criminality and corruption that exists within the security forces" and the "obstruction of justice issues" when assessing the adequacy of state protection in Colombia for persons in the position of the Applicants. The Applicants disagree with the RPD's conclusions on this point but I cannot say those conclusions fall outside of the *Dunsmuir* range.

[87] There was also no application of an improper test. The RPD not only looked at the efforts that Colombian authorities are making to provide protection, it also looked at "operational adequacy" (see *Park v Canada (Minister of Citizenship and Immigration)* 2010 FC 1269 at paragraph 56). The RPD acknowledges the "serious efforts" that Colombia is making to "rectify the corruption and impunity," but it also addresses the "adequacy" of the protection available and finds

there is a “functioning security force” in place. For example, the RPD looks at the Principal Applicant’s own experience with the GAULA unit that has been specifically founded to deal with extortion and kidnapping:

> The formation and action of GAULA in the view of this panel is evidence that the government is taking steps to protect the target group, and in the evidence to the contrary, it must be presumed that these steps will be effective.

[88] At the hearing before me, I specifically asked counsel for the Applicants to show me any evidence or arguments on the record before the RPD that suggested operational inadequacy or a contrary conclusion to the one reached by the RPD. Apart from the judicial independence factor which I have already addressed, he said that he was unaware of any such evidence. This is hardly surprising, given the Principal Applicant’s own testimony before the RPD as to why he went to the police:

> RPD: Bearing that in mind why did you go to the police on April 5th, 2010 to make a report?
>
> PA: That was a decision my wife and I made after all the repeated events of threats that we had had. We thought that by going to the national police, the authorities, that we would get some kind of protection from them.
>
> RPD: What made you think you would get protection?
>
> PA: They’re the authorities in my country and I think they’re there to protect the civilian population.

[89] The evidence is also that when he did seek protection, the GAULA unit responded. The US DOS Report says that “GAULAs (Unified Action Groups for Personal Liberty, military and police entities formed to combat kidnapping and extortion) and other elements of the security forces freed 64 hostages during the year.” Other evidence before the RPD described in some detail how GAULA

groups function. None of this suggests operational inadequacy or that the government is not addressing the problem and implementing operational measures to deal with it. Whatever may have happened to other family members on other occasions, the RPD had to examine the Applicants' own narrative of interaction with the authorities and the evidence on state protection adduced in this case (see *Bakary*, above, at paragraph 10, and *Noha*, above, at paragraphs 102 and 103). It seems to me that the RPD did this.

[90] Read as a whole, I do not think that the RPD's state protection analysis contains the reviewable errors the Applicants allege, so it must stand. Even if the RPD made errors in its conclusions on credibility and subjective fear, the Applicants did not rebut the presumption of adequate state protection. It is well established that a finding of adequate state protection is fatal to claims under both sections 96 and 97 of the Act, so the Decision must stand (see *Macias v Canada (Minister of Citizenship and Immigration)* 2010 FC 598 at paragraph 14).

[91] Counsel agree there is 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

NAME OF COUNSEL AND SOLICITORS OF RECORD

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