

Federal Court



Cour fédérale

Date: 20230824

Docket: IMM-9485-22

Citation: 2023 FC 1144

Ottawa, Ontario, August 24, 2023

PRESENT: The Honourable Mr. Justice Manson

BETWEEN:

**ANGELA IDALY VARGAS PEREZ
WALTER ANDRES VALBUENA
MARTINEZ AARON MATIAS VALBUENA
VARGAS**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] This is an application for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board (the “RPD”), dated September 16, 2022 (the “Decision”), which dismissed the Applicants’ refugee claim based on the lack of a nexus to a convention

ground, the lack of a risk to life or risk of cruel and unusual treatment or punishment, and the availability of an internal flight alternative (“IFA”).

[2] The RPD found that the Applicants were neither Convention refugees nor persons in need of protection within the meaning of sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

II. Background

[3] The three Applicants are citizens of Colombia: the Principal Applicant, Walter Andres Valbuena Martinez, his wife the Associate Applicant, Angela Idaly Vargas Perez, and their son the Minor Applicant, Aaron Matias Valbuena Vargas.

[4] The Applicants refugee claim stems from their fear of persecution at the hands of members of the Ejército de Liberación Nacional (the “ELN”).

[5] The Principal Applicant owned and operated a bakery with his wife in Colombia. The Applicants were first targeted for extortion by members of the ELN in the town of Bosa in October 2018. The Principal Applicant received a pamphlet from the ELN threatening and extorting him to pay 10 million pesos a month in order for him to be able to operate his business.

[6] The Principal Applicant did not pay and moved the Applicants’ bakery to Madrid Cundinamarca in November 2018. In August 2019, he received yet another threatening pamphlet

from the ELN, where the ELN threatened to name the Applicants as military targets if they did not pay.

[7] On June 25, 2021, the Principal Applicant received a call from a member of the ELN who threatened the Applicants with death. On July 6, 2021 the Principal Applicant received a funeral card with photos of the Principal Applicant and the Associate Applicant at the bakery.

[8] The Applicants fled Colombia on July 9, 2021 and made the refugee claim that is the subject of this judicial review.

III. Decision under Review

[9] On September 16, 2022, the RPD issued the Decision refusing the Applicants' refugee claim.

[10] The RPD found that the Applicants failed to satisfy the burden of establishing that they face a serious possibility of persecution on a Convention ground, or that they would personally be subjected to a risk to life or a risk of cruel and unusual treatment or punishment, or a danger of torture, should they return to Colombia.

[11] In so finding, the RPD observed that the Applicants claim was based on them being victims of extortion and not by reasons of their race, nationality, political opinion, religion or membership in a particular social group. As such, the Applicants' claim was to be assessed under subsection 97(1) of the *IRPA* and not section 96.

[12] The RPD stated that this required an assessment of (1) the risk faced by the Applicants and (2) whether the risk is generally faced by others. The RPD made the following determinations:

- A. The Applicants did face personal risk on a balance of probabilities.

- B. However, extortion is a widespread risk in Colombia, including for business owners and their families. Criminal targeting is widespread in Colombia. According to the National Documentation Package (the “NDP”) for Colombia, new armed groups (“NAG”) seek to dominate illegal economic activities previously controlled by small criminal organizations. In order to obtain funds and place pressure on communities, some NAGs also reportedly extort persons working in the formal and informal economy, such as tradesmen, business owners, street vendors, public transport employees, farmers, auto mechanics and messengers for payment of protection money or bribes.

[13] The RPD also found a viable IFA in Sincelejo, Colombia. The RPD found that:

- A. There was a lack of motivation for the ELN to locate the Applicants.
 - i. They had not received any direct or indirect threats since arriving in Canada.

 - ii. The NDP reveals that extortion groups in Colombia are more likely to pursue high-profile targets.

- iii. The Applicants were no longer operating their bakery, thus the ELN would have diminished motivation to pursue them.

- B. The ELN likely would have the means to track the Applicants if necessary, however given the Applicants low profile, the ELN was unlikely to expend significant resources to locate the Applicants. Therefore the Applicants did not face prospective risk in Sincelejo.

- C. Relocating to Sincelejo was reasonable for the Applicants.
 - i. The Principal Applicant and Associate Applicant were 36 and 34 years of age respectively and highly educated. They would be able to find work in Sincelejo.

 - ii. There were no concerns over access to education or healthcare.

[14] Finding that the Applicants' risk was generally faced by individuals in the country and that there was a viable IFA, the RPD dismissed the Applicants' subsection 97(1) persons in need of protection refugee claim.

IV. Issues

- A. *Did the RPD err in its assessment of section 97 of the IRPA?*

B. *Did the RPD err in its IFA analysis?*

V. Standard of Review

[15] The standard of review is reasonableness.

VI. Analysis

A. *Did the RPD err in its assessment of section 97 of the IRPA?*

[16] The RPD held that the Applicants faced a unique personalized risk of death, but that this risk was a generalized one within the meaning of subparagraph 97(1)(b)(ii) of the *IRPA* because the NAG is widespread in Colombia and they extort persons working in formal and informal economy, such as business owners for payments of protection money or *vacuna* (bribes). However, the RPD failed to properly address the application of subparagraph 97(1)(b)(ii) and was unreasonable in this regard.

[17] As stated by Justice Gleason in *Portillo v Canada (Citizenship and Immigration)*, 2012 FC 678 at paragraph 36:

... It is simply untenable for the two statements of the Board to co-exist: if an individual is subject to a personal risk to his life or risks cruel and unusual treatment or punishment, then that risk is no longer general. If the Board's reasoning is correct, it is unlikely that there would ever be a situation in which this section would provide protection for crime-related risks. Indeed, counsel for the respondent was not able to provide an example of any such situation that would be different in any meaningful way from the

facts of the present case. The RPD's interpretation would thus largely strip section 97 of the Act of any content or meaning.

[18] As well, Justice Rennie, as he then was, found in *Vaquerano Lovato v Canada (Citizenship and Immigration)*, 2012 FC 143 at paragraph 14:

... section 97 must not be interpreted in a manner that strips it of any content or meaning. If any risk created by "criminal activity" is always considered a general risk, it is hard to fathom a scenario in which the requirements of section 97 would ever be met. Instead of focusing on whether the risk is created by criminal activity, the Board must direct its attention to the question before it: whether the claimant would face a personal risk to his or her life or a risk of cruel and unusual treatment or punishment, and whether that risk is one not faced generally by other individuals in or from the country...

[19] The Applicants here faced a heightened and different risk not faced by other businessmen/vendors in Colombia, given that the ELN had threatened the Principal Applicant and his wife over a period of time to obtain the extortion money, then the threats amalgamated to reprisal payments for the payments missed, and then threats turned to a death threat. The RPD's decision is both unreasonable and incorrect.

B. *Did the RPD err in its IFA analysis?*

[20] The test to be applied in determining whether there is an IFA is two-pronged, and both prongs must be satisfied for a finding that a claimant has an IFA:

1. The Board must be satisfied, on a balance of probabilities, that there is no serious possibility of the claimant being persecuted or subject personally to a risk to their life or a risk of cruel and unusual treatment or punishment or to a danger of torture, in part of the country to which it finds and internal flight alternative exists; and
2. Conditions in that part of the country must be such that it would not be unreasonable in all the circumstances, including those particular to the claimant, for the claimant to seek refuge there (*Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA)).

[21] In order to establish that a viable IFA exists, a decision maker must be able to demonstrate that the situation in the IFA is “qualitatively different” than the situation in other parts of the country where there exists a reasonable chance of persecution (*Cruz Martinez v Canada (Citizenship and Immigration)*, 2008 FC 399). According to the NDP, it appears that there is a significant chance that the Applicants will be targeted in Sincelejo.

[22] The RPD erred in finding Sincelejo to be a viable IFA for the Applicants, when the evidence before it shows that the ELN is present in Sucre, which is a department of Colombia in respect of which Sincelejo is the capital. Again, it is likely that the Applicants may be targeted by the ELN in Sincelejo and the RPD was unreasonable on this front.

JUDGMENT in IMM-9485-22

THIS COURT'S JUDGMENT is that:

1. The application is allowed and the matter referred to a different decision-maker for reconsideration.
2. There is no question for certification.

"Michael D. Manson"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-9485-22

STYLE OF CAUSE: ANGELA IDALY VARGAS PEREZ, WALTER
ANDRES VALBUENA MARTINEZ, AARON
MATIAS VALBUENA VARGAS v THE MINISTER
OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

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JUDGMENT AND REASONS: MANSON J.

DATED: AUGUST 24, 2023

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