Federal Court  Cour fédérale

**Date: 20160509**

**Docket: IMM-4197-15**

**Citation: 2016 FC 521**

**Ottawa, Ontario, May 9, 2016**

**PRESENT: The Honourable Madam Justice Strickland**

**BETWEEN:**

**EDGARDO ISMAEL FIGUEROA**
**MARISOL CAROLINA VIANA TORO**
**LUIS EDGARDO FIGUEROA VIANA**
**VICTORIA VALENTINA FIGUEROA VIANA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## JUDGMENT AND REASONS

[1] This is an application for judicial review of a decision of the Refugee Appeal Division of the Immigration and Refugee Board of Canada ("RAD"), dated August 26, 2015, in which the RAD confirmed the finding of the Refugee Protection Division ("RPD") that the Applicants are neither Convention refugees nor persons in need of protection pursuant to s 96 or s 97,

respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"), and dismissed their appeal.

**Background**

[2] The Principal Applicant is a citizen of Venezuela. He claims that he was the executive director and owner of a telecommunications company and a construction company, both located in Caracas. In June 2012 two men from the Sindicato Unico de Trabajadores de la Construccion des Distrito Capital Miranda y Vargas ("SUTIC" or "union") visited the Principal Applicant at a project site in Tiuna City and demanded a "collaboration payment". The Principal Applicant refused. The men returned a week later and, when the Principal Applicant refused a second time, they threatened him.

[3] One of these men returned every two weeks, on payday, and continued to make threats when the collaboration payment was refused. At other project sites people on motorcycles armed with guns threatened to withdraw workers unless the extortion money was paid to their union. As the Principal Applicant continued to refuse to pay, workers began to fail to report for work and there were threats from the union that the Principal Applicant would be killed. In December 2013, the Principal Applicant was followed from a project in Tiuna City to his home. Shortly after this, a motorcycle gang threatened to kill him if he did not meet their demands. The Principal Applicant consulted his lawyer who told him that if he approached the police he might be kidnapped or killed. The motorcyclists later threatened projects at other sites. On February 21, 2014, the Principal Applicant fled to Canada.

[4] Neither he nor his family heard anything further from the SUTIC until April 2014 when the Principal Applicant's wife noticed motorcycles parked near their home. She claims that in May 2014, while stopped at a traffic light, two bikers on each side of her car knocked on the car windows. Later, she again noticed bikers parking near her home and was frequently followed. On June 27, 2014, she saw a biker near the school where she was picking up her children and, about two hours later, saw the same biker in the parking lot of her home. She claims that she and the children had seen bikers stealing money and belongings from people in the street and hitting, stabbing or shooting others to steal their phones, bags or other belongings. The Principal Applicant's wife and their two children fled to Canada, arriving on September 24, 2014.

[5] By decision dated March 31, 2015 the RPD dismissed the Applicants' claim for refugee protection. The Applicants conceded at the hearing that there was no nexus to a Convention ground under s 96 of the IRPA. In assessing the risk to the Applicants pursuant to s 97 of the IRPA, the RPD found that the existence of an Internal Flight Alternative ("IFA") in Venezuela was the determinative issue. It concluded that the Applicants could live in Maracaibo, a large city that was a not an insignificant distance from Caracas. It noted the Applicants' testimony that they have extended family there and that they did not express any significant problems arising from relocation, other than continued fear of the unions and that a similar situation could arise if the Principal Applicant again worked in construction. The RPD found that it was not objectively unreasonable for the Applicants to relocate.

[6] The RPD found it unlikely that the union targeting the Applicants would operate outside the capital region, since the union's name, SUTIC, contains the name of the capital region

(Distrito Capital Miranda y Vargas). The Principal Applicant confirmed that the union worked in that area. The RPD also found that there was no documentary evidence to suggest that the SUTIC works or has significant ties or reach outside of their area of work and that the criminals were working for the union, not a greater criminal network. Further, the RPD found that the Principal Applicant's business has been shut down since his arrival in Canada and that the Applicants are likely no longer of interest to the union, or the criminals it employs, and would be unlikely to know that the Applicants were residing in another Venezuelan city. Although the Principal Applicant testified that he knew of other individuals in other industries who were pursued outside of Caracas by union-sponsored criminals, the RPD found that it had limited information concerning those individuals and, what it did have, suggested that their circumstances were distinguishable.

**Decision Under Review**

[7] On appeal to the RAD the Applicants sought to submit seven documents as new evidence pursuant to s 110(4) of the IRPA. The RAD briefly addressed each document and determined that six of them had been published before the RPD hearing and, therefore, had been reasonably available to the Applicants at the time the RPD made its decision. The other document, the United States Department of State "Venezuela 2015 Crime and Safety Report" ("US DOS Report"), was published one month after the Applicants' hearing at the RPD on February 19, 2015. However, the RAD found that it was reasonably available and could have been submitted to the RPD during the almost seven weeks between the hearing and when the RPD released its decision on March 31, 2015. For these reasons, the RAD concluded that none

of the documents met the requirements of s 110(4) of the IRPA and did not admit them as new evidence.

[8] The RAD then referred to *Huruglica v Canada (Citizenship and Immigration)*, 2014 FC 799, noting that it would conduct its own assessment of the RPD's decision and come to an independent assessment of whether the Applicants are Convention refugees or persons in need of protection.

[9] The RAD noted that there are two prongs in an IFA assessment. The first of these is whether there is a serious possibility of persecution or risk in the proposed IFA. The RAD determined that there was no evidence that the Applicants were subjected to anything more than threats or harassment and that this did not rise to the level of persecution. There was also insufficient evidence that the union has the motivation to pursue the Applicants, or that the criminals working for it have the capacity to find them in the proposed IFA. Although the Principal Applicant claimed to know individuals in other industries who were followed outside of Caracas, there was insufficient evidence to substantiate that claim. The RAD found that, if the family moved to Maracaibo, on the balance of probabilities, no one would know where the Principal Applicant might work or live or even that the Applicants had returned to Venezuela.

[10] On the second prong, whether it is objectively reasonable for the Applicants to seek refuge in the IFA location, the RAD noted that Maracaibo is a large city of two million with much industry. Further, the Principal Applicant's skill set would enable him to find work there. Maracaibo would also have the amenities offered by any large modern city, including

educational and medical facilities. The RAD found that the Applicants had provided no evidence of any hardship which may occur if they had to relocate to Maracaibo. Having determined that an IFA was available, the RAD determined that it did not need to consider other aspects of their claim under ss 96 and 97 as the IFA applied to both.

**Issues**

[11] In my view, the two issues arising in this matter may be framed as follows:

1) Did the RAD err in its analysis of the admissibility of the new evidence?
2) Was the RAD's determination that an IFA was available to the Applicants reasonable?

**Standard of Review**

[12] The Respondent submits, and the Applicants acknowledge, that the Federal Court of Appeal recently determined that reasonableness is the appropriate standard of review for the RAD's decisions regarding new evidence under s 110(4) of the IRPA (*Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96 at paras 29 and 74 [*Singh FCA*]).

[13] Reasonableness is also the standard applicable to a decision-maker's assessment of an IFA which is primarily a factual inquiry attracting deference from reviewing courts (*Kamburona v Canada (Citizenship and Immigration)*, 2013 FC 1052 at para 18); *Deb v Canada (Citizenship and Immigration)*, 2015 FC 1069 at para 13; *Dunsmuir v New Brunswick*, 2008 SCC 9 at para 53 [*Dunsmuir*]).

[14] Reasonableness is concerned with the existence of justification, transparency and intelligibility, and whether the decision falls within a range of possible, acceptable outcomes (*Dunsmuir* at para 47; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59 [*Khosa*]).

[15] The Applicants raise an issue of procedural fairness pertaining to the question of whether they were provided sufficient notice of the IFA. Issues of procedural fairness are to be reviewed on the correctness standard (*Khosa* at para 43; *Mission Insitution v Khela*, 2014 SCC 23 at para 79).

**Legislation**

IRPA

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| 110(4) On appeal, the person who is the subject of the appeal may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the person could not reasonably have been expected in the circumstances to have presented, at the time of the rejection. | 110(4) Dans le cadre de l'appel, la personne en cause ne peut présenter que des éléments de preuve survenus depuis le rejet de sa demande ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'elle n'aurait pas normalement présentés, dans les circonstances, au moment du rejet. |

*Refugee Appeal Division Rules*, SOR/2012-257 ("Rules")

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| 29(3) The person who is the subject of the appeal must include in an application to use a document that was not previously provided an explanation of how the document meets the requirements of subsection | 29(3) La personne en cause inclut dans la demande pour utiliser un document qui n'avait pas été transmis au préalable une explication des raisons pour lesquelles le document est conforme aux exigences du paragraphe |

| | |
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| 110(4) of the Act and how that evidence relates to the person, unless the document is being presented in response to evidence presented by the Minister. | 110(4) de la Loi et des raisons pour lesquelles cette preuve est liée à la personne, à moins que le document ne soit présenté en réponse à un élément de preuve présenté par le ministre. |

**Issue 1: Did the RAD err in its analysis of the admissibility of the new evidence?**

*Applicants' Position*

[16] The Applicants submit that the RAD erred by adopting a conjunctive, rather than disjunctive interpretation of s 110(4) (*Olowolaiyemo v Canada (Citizenship and Immigration)*, 2015 FC 895 at para 19). The RAD was required to consider whether the evidence failed to meet both prongs of the test under s 110(4) (*Deri v Canada (Citizenship and Immigration)*, 2015 FC 1042 at para 55 [*Deri*]). Instead, the RAD focused on the publication dates of the Applicants' new evidence, the first prong, without considering whether it also failed to meet the second prong, whether it was reasonably available or whether the Applicants could not have been expected to have presented it at the time their claim was rejected. The Applicants submit that because the RPD failed to give notice, prior to the hearing, that its proposed IFA was Maracaibo, they could not have been reasonably expected to present evidence on that issue. Further, because the RPD did not explicitly state that IFA was a determinative issue, the Applicants could not reasonably have been expected to provide the evidence post-hearing as the RAD suggests.

[17] The Applicants submit that the RAD further erred by failing to apply the test for new evidence set out in *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at para 13 [*Raza*]. The Applicants could not reasonably have been expected to anticipate that the RPD

would focus on the specific IFA to Maracaibo (*Ismailov v Canada (Citizenship and Immigration)*, 2015 FC 967 [*Ismailov*]) and the RPD's questioning was not sufficient notice that the IFA was a determinative issue. Notice to applicants of an IFA must be clear and sufficient (*Ay v Canada (Citizenship and Immigration)*, 2010 FC 671 at paras 46-47 [*Ay*]). The new evidence was highly material and contradicted the RPD's finding that the family had a viable IFA in Maracaibo. Failure to apply the implicit *Raza* factors in considering it was a breach of procedural fairness.

[18] The Applicants note that in *Singh FCA*, the Federal Court of Appeal found that the RAD has the freedom to apply s 110(4) with more or less flexibility depending on the circumstances. The Applicants submit that the practical realities of this case, the materiality of the evidence submitted and the fact that it contradicts the RPD's findings on the availability of an IFA in Maracaibo, warranted a more flexible approach to s 110(4). The Applicants submit that the importance of this approach was demonstrated in *Sanchez v Canada (Citizenship and Immigration)*, 2009 FC 101 [*Sanchez*] and that the same reasoning should be applied in this case. The Applicants also submit that cases upholding the RAD's decision not to admit evidence are distinguishable. For example, in *Deri* at para 63, other documentary evidence regarding the applicant's HIV status had been produced to the RPD, so the applicant was aware of the issue. Further, by failing to conduct a meaningful analysis of the evidence in accordance with the *Raza* factors, the RAD failed to review the RPD's decision on the correctness standard (*Canada (Citizenship and Immigration) v Huruglica*, 2016 FCA 93 at para 78) and merely rubber stamped the RPD's decision.

*Respondent's Position*

[19] The Respondent submits that, pursuant to Rule 29(3) of the Rules, the onus is on the Applicants to demonstrate how the new evidence meets the requirements of s 110(4) of the IRPA. The Applicants did not make any submissions before the RAD on two of the proposed documents and claimed that the rest were not reasonably available as they did not receive sufficient notice of the IFA issue. The RAD considered whether the proposed new evidence met the requirements of s 110(4) of the IRPA. It also considered the Applicants' explanation that they could not reasonably have been expected to have presented the evidence because of the lack of prior notice of the IFA but observed that the Applicants could have presented the evidence to the RPD. The Respondent submits that the onus is also on the Applicants to support their claim before the RPD (*Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 (CA)). Further, that the RAD found that the evidence did not arise after the rejection of the refugee claims, and also that the Applicants reasonably could have been expected in the circumstances to have presented the evidence at the time of the rejection. Therefore, the RAD did not err. Further, the RAD's reasoning is consistent with *Singh FCA* which found that there is no doubt that the explicit conditions set out in s 110(4) have to be met and the provision is to be narrowly interpreted.

*Analysis*

[20] At the start I would note that if it is determined that an IFA exists, then this is determinative of the claim for refugee protection (*Calderon v Canada (Citizenship and Immigration)*, 2010 FC 263 at para 10 [*Calderon*]). Further, the onus is on the Applicants to put

their case before the RPD and demonstrate that they meet the requirements to claim refugee protection (see, for example, *Cabdi v Canada (Citizenship and Immigration)*, 2016 FC 26 at para 24). It is also the Applicants who must convince the RAD that the new evidence meets the requirements of s 110(4) of the IRPA, as stated in s 29(3) of the Rules.

[21] In this case the proposed new evidence was comprised of the following documents:

- *Electoral Gazette of the Bolivarian Republic of Venezuela*, "Article 275 of the Organic Law of Suffrage and Political Participation" dated February 18, 2009. The document lists Venezuelan unions, including SUTIC and its chapters in other parts of the country;
- *Sebastiana Barraez Perez*, "How Extortion is Carried out by the Barinas Construction Workers Union", undated. The RAD found that it spoke to events which occurred in 2010 and 2011;
- *Conflictove.org*, "Caracas: Workplace Terrorism in Fort Tiuna" dated December 4, 2012;
- *Genesis Arevalo (Quinto Dia)*, "Union-hired Hit Men", undated. The RAD determined that it appears to have been published in 2012;
- *Chris Arsenault (Al Jazeera)*, "Awe and Fear: Politicised fangs of Venezuela", dated June 8, 2013;
- *United States Department of State, Bureau of Diplomatic Security*, "Venezuela Crime and Safety Report", dated February 19, 2015; and
- *Philip Sherwell (The Telegraph)*, "Venezuela: a land of political killings and gang turf wars", dated October 11, 2014.

[22] In considering the *Electoral Gazette* article, the RAD noted its date and found that it was reasonably available to the Applicants prior to the RPD's decision. It also noted the Applicants' submission that it was not reasonable to expect such evidence as the Applicants had no prior notice of an IFA being an issue. The RAD rejected this submission stating that IFA is an integral part of the Convention refugee definition and just one of the many issues which can be identified at a hearing and that it was incumbent upon counsel or the Applicants to be prepared for such

questions. Further, the Applicants could have requested an adjournment or postponement or could have requested time to make post-hearing disclosure of evidence. The RAD also noted that the Applicants had 71 days between the date of the hearing and the date on which the decision was rendered during which time they could have disclosed the new evidence. It found that they chose not to despite the availability of the evidence and the opportunity to present it. The RAD conducted a similar analysis for the remaining articles which were also found not to be new evidence and, therefore, not to be admissible. As to the US DOS Report, because it was published on February 19, 2015 the RAD found that it could not reasonably have been obtained in time for the hearing before the RPD, but it was available for almost seven weeks before the decision was rendered and, on that basis, it also did not meet the s 110(4) requirements.

[23] As the RAD noted, none of the documents, other than the US DOS Report, arose after the rejection of their claim as demonstrated by the fact that their publication dates or content predate the RPD's March 31, 2015 decision. Accordingly, pursuant to s 110(4), the RAD was entitled to reject the evidence on that basis. In the absence of any evidence that the documents could not, with reasonable diligence, have been identified and disclosed by the Applicants, the RAD's determination that they were reasonably available prior to the rejection of the Applicants' claim is reasonable.

[24] As to the Applicants' submission that the RAD erred by adopting a conjunctive interpretation of s 110(4) by considering only the dates of the documents, this is not supportable based on the RAD's reasons, described above. The RAD was clearly aware of the Applicants' position that insufficient notice of the IFA meant that the necessity of the evidence could not

reasonably have been anticipated. It did not adopt a conjunctive interpretation of s 110(4), it simply rejected the Applicants' position. In my view this was a reasonable assessment. As noted by the RAD, an IFA is an integral part of Convention refugee status, it is incumbent on claimants and their counsel to be prepared to address that issue. In *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589 [*Thirunavukkarasu*], the Federal Court of Appeal clarified its prior decision in *Rasaratnam v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 706 (CA) [*Rasaratnam*]. In doing so it stated that the idea of an IFA is "integral" in the definition of a Convention refugee, not something separate, and quoted from *Rasaratnam* at p 710:

> …since by definition a Convention refugee must be a refugee from a country, not from some subdivision or region of a country, a claimant cannot be a Convention refugee if there is an IFA. It follows that the determination of whether or not there is an IFA is integral to the determination whether or not a claimant is a Convention refugee…

Also see *Calderon* at para 10.

[25] In *Thirunavukkarasu* the Federal Court of Appeal also stated that *Rasaratnam* settled the question of who bears the burden of proof with respect to an IFA, and that the onus rests on the claimant. Further, that the decision-maker does have a duty to notify applicants of a particular IFA location:

> On the one hand, in order to prove a claim to Convention refugee status, as I have indicated above, claimants must prove on a balance of probabilities that there is a serious possibility that they will be subject to persecution in their country. If the possibility of an IFA is raised, the claimant must demonstrate on a balance of probabilities that there is a serious possibility of persecution in the area alleged to constitute an IFA. I recognize that, in some cases the claimant may not have any personal knowledge of other areas

> of the country, but, in all likelihood, there is documentary evidence available and, in addition, the Minister will normally offer some evidence supporting the IFA if the issue is raised at the hearing.
>
> On the other hand, there is an onus on the Minister and the Board to warn the claimant if an IFA is going to be raised. A refugee claimant enjoys the benefit of the principles of natural justice in hearings before the Refugee Division. A basic and well-established component of the right to be heard includes notice of the case to be met (see, for example, *Kane v. Board of Governors (University of British Columbia)*, 1980 CanLII 10 (SCC), [1980] 1 S.C.R. 1105, at page 1114). The purpose of this notice is, in turn, to allow a person to prepare an adequate response to that case. This right to notice of the case against the claimant is acutely important where the claimant may be called upon to provide evidence to show that no valid IFA exists in response to an allegation by the Minister. Therefore, neither the Minister nor the Refugee Division may spring the allegation of an IFA upon a complainant without notice that an IFA will be in issue at the hearing. As was explained by Mr. Justice Mahoney in *Rasaratnam*, *supra*, at pages 710-711:
>
> > [A] claimant is not to be expected to raise the question of an IFA nor is an allegation that none exists simply to be inferred from the claim itself. The question must be expressly raised at the hearing by the refugee hearing officer or the Board and the claimant afforded the opportunity to address it with evidence and argument.
>
> These two very different obligations, therefore, should be carefully distinguished.
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> (emphasis added)

[26] In *Thirunavukkarasu* the Federal Court of Appeal appears to have re-stated that the question of an IFA must be raised at the hearing.

[27] The Applicants refer to *Ay* to support their view that advance notice is required. There, quoting the second paragraph above, from *Thirunavukkarasu*, Justice Boivin stated that proper

notice is given only when the applicant is notified prior to a hearing that an IFA is to be considered so that the claimant can have adequate time to adduce evidence.

[28] However, Justice Boivin did not refer to the above portion of *Thirunavukkarasu,* incorporating the finding in *Rasaratnam*, that the question must be explicitly raised at the hearing. Further, he concluded that upon review of the transcript there were many ambiguities regarding the issue of the IFA and that the respondent had not convinced him that the RPD had provided sufficient and clear notice that the IFA was an issue nor that it was clearly addressed during the hearing.

[29] In this case, a review of the transcript reveals that the RPD stated at the beginning of the hearing that an IFA was an issue with which it was concerned.

[30] And, as the RAD noted, the Applicants were put on notice that the RPD was considering Maracaibo as a possible IFA during the hearing. The RPD asked the Principal Applicant if he had family members in Maracaibo, to which he responded that he had uncles and cousins there. The RAD also asked the Principal Applicant whether he thought his family could be free there from the threats to which they were exposed in Caracas. He responded that the threats were not just confined to the Caracas region and that the group of criminals were in contact with other regions or parts of the country in order to ensure that no one would be free from extortion. He added that this had happened to other individuals that he knows. He was asked about these other individuals and stated that they were involved in other types of business activities but that once these groups are aware of important projects, they would follow regardless of relocation.

[31] The RPD also asked, since the Principal Applicant and his companies hadn't been involved in projects in almost a year, why this group of criminals would still be interested in him such that they would seek him out in another city. The Principal Applicant responded that the group's goal was to keep contractors frightened and, to be effective, if contractors refuse to pay then they and their families would be persecuted, kidnapped and likely killed. The RPD also asked why the Principal Applicant thought this group of criminals would have the ability to find him in another city, in Maracaibo, given that it is a large city of over two million people. The Principal Applicant replied that anyone who had access to records such as electricity, telephone, income tax returns or bank accounts could locate him and that this was not private information, although he could not explain how someone could go about obtaining that information. The RPD asked why the criminals who work for this specific union, which works in the capital region, would have this kind of link with other areas of the country. The Principal Applicant replied that while unions may legally be confined to work in specific geographic regions, the criminals who they engage and who extort, kidnap and kill, are not are not subject to that limitation.

[32] At the conclusion of the hearing, and prior to counsel's submissions the RPD stated:

> In terms of documentary evidence, if there's documentary evidence that supports his contention that these criminal union groups have this capacity of finding people throughout the country and using the—accessing addresses and things like this, if there's points within the documentary evidence that suggest that this is the case, that would be helpful as well…in particular, that would be useful

[33] The RPD also stated that any submissions that counsel would like to make on credibility, generalized risk, IFA and state protection would be considered. Counsel submitted that because

crime of this nature was rampant across the country there was no IFA and that corruption within the Venezuelan government was high, referencing generally the US DOS Report in support of Venezuela being one of the most corrupt countries in the world. Applicants' counsel submitted it would, therefore, be easy for a criminal organization to use bribery to obtain information.

[34] In my view, it is clear from the transcript that the RPD was considering at the hearing the existence of a viable IFA, in particular to Maracaibo. The RPD also specifically asked to be pointed to documentary evidence that criminal gangs had the capacity to locate people in other parts of the country. In my view, this was "clear and sufficient" notice that an IFA was at issue (*Singh v Canada (Citizenship and Immigration)*, 2010 FC 58 at paras 13-14 [*Singh*]). Further, counsel did not point the RPD, as it had suggested, to any specific country documents that could have supported the Applicants' testimony that criminals associated with the union had the capacity to and would locate the Applicants if they were to move to another city. Nor did counsel provide country documentation post-hearing in support of that claim, although the RPD had clearly raised the issue.

[35] Here the Applicants have not questioned the competency of their counsel. Further, as recently restated in *Singh FCA*, it is well established that applicants must live with the consequences of the actions, or in this case, inaction, of their counsel (*Singh FCA* at para 66).

[36] Finally, because the existence of an IFA is always determinative of a refugee claim, in my view, the discussion of an IFA by the RPD at the hearing was also sufficient to notify the Applicants that the IFA was a determinative issue (*Calderon* at para 10). The Applicants also

submit that they should have been notified in advance that Maracaibo in particular was a proposed IFA. For the reasons above, I do not agree. Further, the Principal Applicant's testimony was that the family could be located anywhere in Venezuela, therefore, evidence submitted after the hearing, but before the rejection of the claim, could have supported this general proposition, encompassing Maracaibo.

[37] The Applicants also rely on my decision in *Ismailov*, submitting that it is directly applicable to this matter as the Applicants could not reasonably have been expected to anticipate that the RPD would focus on the specific IFA of Maracaibo. I do not agree. In *Ismailov* the RPD impugned the applicant's credibility based on his claim that he was able to leave the country despite being subject to an on-going investigation by Uzbek police. The applicant provided no evidence to the RPD demonstrating that those under investigation were able to leave the country, but sought to submit such evidence on appeal to the RAD. The RAD determined that this evidence was reasonably available prior to the rejection of their claim. I found this to be unreasonable as the applicant could not have anticipated that the RPD would impugn his credibility based on his ability to leave his country of origin. *Ismailov* dealt with an unusual and fact-specific credibility determination. Conversely, as discussed above, IFAs are inherent in determinations of refugee protection (*Calderon* at para 10; *Thirunavukkarasu*). Further, in *Ismailov*, the RPD's decision was given orally immediately following the hearing without any intervening time for the applicant to make further submissions. In the present case, more than two months passed between the hearing and the decision and the RAD determined that the evidence was reasonably available to the Applicants during that time.

[38] Based on the above, it is my view that the record supports the RAD's determination that the Applicants were aware of the potential IFA and could have provided the new evidence after the hearing and before the RPD rendered its decision. The RAD's conclusion falls within the possible, acceptable outcomes, and is transparent, justifiable and intelligible.

[39] Regarding the Applicants' submission that the RAD should have explicitly considered the *Raza* factors, this has little merit. As I found in *Deri*, once the RAD has determined that the explicit statutory requirements have not been met, there is no need to consider the *Raza* factors as the RAD has no residual discretion:

> 55 I see no reason why that same approach would not be followed in regard to s 110(4). The RAD must first determine if the three explicit conditions set out in s 110(4) have been met: 1) did the evidence arise after the rejection of their claim? If not, 2) was it reasonably available, or 3) could the applicant reasonably have been expected, in the circumstances to provide the evidence? If none of these conditions are met, then, on a plain reading of s 110(4), the RAD has no discretion to admit the new evidence.

[40] The Federal Court of Appeal's comments and its answer to the certified question in *Singh FCA* support this approach:

> [63] However, subsection 110(4) is not written in an ambiguous manner and does not grant any discretion to the RAD. As mentioned above (see paras. 34, 35 and 38 above), the admissibility of fresh evidence before the RAD is subject to strict criteria and neither the wording of the subsection nor the broader framework of the section it falls under could give the impression that Parliament intended to grant the RAD the discretion to disregard the conditions carefully set out therein. Moreover, this approach complies perfectly with this Court's decision in *Raza*. The criteria set out in that decision regarding paragraph 113(a), which, moreover, are not necessarily cumulative, do not replace explicit legal conditions; rather they add to those conditions to the extent that they are "necessarily implied" from the purpose of the provision, to reiterate this Court's words at paragraph 14 of *Raza*.

> Otherwise, this would mean ignoring the conditions set out at subsection 110(4) and then delving into a balancing exercise between Charter values and the objectives sought by Parliament. In the absence of a direct challenge to this legislation, it should be given effect and the RAD has no choice but to comply with its requirements.
>
> [74] …
>
> Answer: To determine the admissibility of evidence under subsection 110(4) of the IRPA, the RAD must always ensure compliance with the explicit requirements set out in this provision. It was also reasonable for the RAD to be guided, subject to the necessary adaptations, by the considerations made by this Court in *Raza*. However, the requirement concerning the materiality of the new evidence must be assessed in the context of subsection 110(6), for the sole purpose of determining whether the RAD may hold a hearing.

[41] In my view it was reasonable for the RAD to base its decision on the explicit statutory requirements in s 110(4) of the IRPA without specifically referring to the *Raza* factors.

[42] The Applicants also argue that a more flexible approach to the new evidence was warranted in this case (*Singh FCA* at para 64).

[43] In this regard the Applicants rely on *Sanchez*, however, as I have previously stated in *Deri* (paras 63 and 64) and in *Rodriguez Torres v Canada (Citizenship and Immigration)*, 2015 FC 888 at para 33, in *Sanchez* which is a stay decision, Justice Shore appears to find that there was a reasonable explanation as to why the new evidence had not been submitted previously by the applicant. On that basis, even though it pre-dated the RPD hearing, the Pre-Removal Risk Assessment officer could consider it as it was relevant and credible. The officer could also have considered it as part of his independent research.

[44] As a result, I am not convinced that *Sanchez* is of assistance to the Applicants as their explanation for not providing the proposed new evidence was not accepted by the RAD. And, as I concluded in *Deri*, *Sanchez* does not support a view that the RAD has discretion to consider new evidence that did not meet any of the three explicit criteria set out in s 110(4).

[45] The Federal Court of Appeal in *Singh FCA* also addressed a submission based on *Sanchez*, as well as *Elezi v Canada (Citizenship and Immigration)*, 2007 FC 240, that the RAD may take into account the probative value and credibility of evidence in order to counteract the requirements of s 110(4). The Federal Court of Appeal explicitly rejected that interpretation (at paras 36 and 63). Further, I do not accept that the Federal Court of Appeal's statement in paragraph 64 – that the RAD always has freedom to apply the conditions of s 110(4) with more or less flexibility – in any way detracts from its prior finding in paragraph 35 that the explicit statutory requirements of s 110(4) leave no room for discretion.

[46] For these reasons, I do not agree with the Applicants that the failure to apply the implicit *Raza* factors was a breach of procedural fairness in these circumstances. Nor do I agree that the RAD failed to review the RPD's decision on a correctness standard, the RAD stated that it would conduct its own independent assessment of the IFA and I find that it did so.

**Issue 2: Was the RAD's determination that an IFA was available to the Applicants reasonable?**

*Applicants' Position*

[47] The Applicants note the RAD's finding that they were harassed and threatened by the union in Caracas but that the experiences of the Principal Applicant's wife did not rise to the level of persecution. The Applicants submit that the cumulative effect of threats can constitute persecution (*Muckette v Canada (Citizenship and Immigration)*, 2008 FC 1388) and that the RAD's approach should be rejected as an attempt to diminish the applicability of the first prong of the IFA test. Further, the RAD makes no reference to the Principal Applicant's testimony that the union would pursue the Applicants to Maracaibo. The RPD essentially makes a plausibility finding that the union would not pursue them despite evidence to the contrary. Plausibility findings should be made only in the clearest cases (*Valtchev v Canada (Citizenship and Immigration)*, 2001 FCT 776 at paras 6-7). The RPD found the Applicants' testimony was credible and their allegations substantiated. By making a plausibility finding contrary to credible testimony, the RAD makes the same type of error as the RPD. The Applicants also allege that the RAD made veiled credibility findings (*Zokai v Canada (Citizenship and Immigration)*, 2004 FC 1581 at para 13). The RPD found the Applicants to be credible and the RAD did not make adverse credibility findings, yet it did not accept the uncontradicted evidence of the Principal Applicant that the criminals engaged by the union would locate and pursue them in Maracaibo.

[48] The Applicants also submit that the lack of notice by the RPD regarding the IFA in Maracaibo was a breach of procedural fairness and the finding that there was insufficient

documentary evidence was a breach of natural justice. The RAD's conclusion that the Applicants provided no evidence of hardship in Maracaibo ignores their testimony and the relevant evidence that the RAD excluded and is compounded by an overly narrow and formalistic interpretation of s 110(4) of the IRPA.

*Respondent's Position*

[49] The Respondent submits that the RAD's findings are without error. The RAD determined that there was insufficient evidence of the union's motivation to pursue the Applicants, or its capacity to locate them and, further, that there was no evidence as to hardship in the proposed IFA. Read as a whole, the decision is reasonable. What the Applicants ask is that the Court microscopically review the decision, which is not the proper approach (*Anaya Ayala v Canada (Citizenship and Immigration)*, 2008 FC 1258 at para 8).

[50] The Respondent submits that, despite the Applicants' submission that there was a breach of procedural fairness due to lack of notice of the IFA, proper notice requires only that the question is expressly raised at the hearing and that the claimants are given an opportunity to respond (*Rasaratnam*) and that this was what the RPD did in this case.

*Analysis*

[51] The two pronged test for assessing an IFA is well established in the jurisprudence and was identified by the RAD in its decision. As stated in *Rasaratnam*:

> …the Board was required to be satisfied, on a balance of probabilities, that there was no serious possibility of the appellant

> being persecuted in [the IFA] and that, in all the circumstances including circumstances particular to him, conditions in [the IFA] were such that it would not be unreasonable for the appellant to seek refuge there…

(see also *Thirunavukkarasu*).

[52] The burden is on the Applicants to establish on objective evidence that relocation to the IFA is unreasonable (*Argote v Canada (Citizenship and Immigration)*, 2009 FC 128 [*Argote*]. As stated by Justice Zinn in *Argote*:

> 12 The applicants submit that the Board erred in its analysis because it failed to consider their unique circumstances and whether it was reasonable that they relocate. In my view, the applicants' submission is entirely misguided. Whether the relocation to the IFA is unreasonable is an objective test and the onus is on the applicants to establish on objective evidence that the relocation to the IFA is unreasonable. It is not for the Board to prove that it is reasonable, as the applicants suggest…

(see also *Pidhorna v Canada (Citizenship and Immigration)*, 2016 FC 1 at paras 40-42; *Alvarez v Canada (Citizenship and Immigration)*, 2009 FC 1164 at paras 10, 15 [*Alvarez*]; *Multani v Canada (Citizenship and Immigration)*, 2012 FC 734 at para 13 [*Multani*]).

[53] Put otherwise, it must be objectively reasonable "upon consideration of all the circumstances, including an applicant's personal circumstances, for an applicant to seek refuge" (*Navaratnam v Canada (Citizenship and Immigration)*, 2015 FC 274 at paras 50-51).

[54] In this matter the Applicants were found to be credible, however, this does not overcome the need for objective evidence that the proposed IFA is not viable. In *Alvarez*, the applicants were also found to be credible, but the Court said:

> This sets a very high threshold for the unreasonableness test, as Létourneau J.A. observed in *Ranganathan* at paragraph 15: "It requires nothing less than the existence of conditions which would jeopardize the life and safety of a claimant in travelling or temporarily relocating to a safe area. In addition, it requires actual and concrete evidence of such conditions." To accept anything less would be to allow persons to seek protection in Canada simply because they would be better off physically, economically and emotionally here than in a safe place in their own country: *Ranganathan*, at paragraph 16.

[55] I have found that the RAD's decision not to admit the new evidence under s 110(4) was reasonable and there is otherwise a lack of objective evidence to establish that the proposed IFA is unreasonable. The RAD considered the objective circumstances in Maracaibo, including factors such as the city's size and distance from Caracas. And, contrary to the Applicants' submission, it also considered the Principal Applicant's testimony regarding relocation. However, given the lack of objective evidence demonstrating that relocation was unreasonable, it was open to the RAD to weigh the evidence and determine that the IFA to Maracaibo was reasonable.

[56] Finally, although the Applicants submit that the lack of notice vitiates the RAD's decision as it breached procedural fairness, as I found above, the Applicants received sufficient notice at the hearing. While it might have been preferable for the RPD to provide notice before the hearing, jurisprudence suggests that notice during the hearing, so long as it is clear and the Applicants have an opportunity to respond, is also sufficient (see *Singh* at paras 12-14;

*Thirunavukkarasu*; *Rasaratnam*; *Ay* at para 46; *Alvarez* at paras 10, 15; *Multani* at para 13). As set out above, the Applicants were clearly notified of the IFA to Maracaibo and given an opportunity to respond.

[57] For these reasons, the RAD's decision falls within the possible, acceptable outcomes and is therefore reasonable.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is dismissed.

2. There shall be no order as to costs.

3. No question of general importance for certification was proposed or arises.

"Cecily Y. Strickland"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-4197-15 |
| **STYLE OF CAUSE:** | EDGARDO ISMAEL FIGUEROA, MARISOL CAROLINA VIANA TORO, LUIS EDGARDO FIGUEROA VIANA, VICTORIA VALENTINA FIGUEROA VIANA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | APRIL 26, 2016 |
| **JUDGMENT AND REASONS:** | STRICKLAND J. |
| **DATED:** | MAY 9, 2016 |

**APPEARANCES:**

| | |
|---|---|
| Caitlin Maxwell<br>Prasanna Balasundaram | FOR THE APPLICANTS |
| Suran Bhattacharyya | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

| | |
|---|---|
| Downtown Legal Services<br>Toronto, Ontario | FOR THE APPLICANTS |
| William F. Pentney<br>Deputy Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |