

Federal Court



Cour fédérale

**Date: 20220105**

**Docket: IMM-56-20**

**Citation: 2022 FC 4**

**Ottawa, Ontario, January 5, 2022**

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

**BETWEEN:**

**FABIAN ANDRES ALFEREZ MONSALVE  
GINNA FERNANDA CABELLERO JOVEN  
MARTIN ALFEREZ CABALLERO  
JULIETA ALFEREZ CABALLERO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**JUDGMENT AND REASONS**

I. Overview

[1] The principal Applicant, Fabien Andres Alferez Monsalve, his spouse Gina Fernanda Caballero Joven (the “co-Applicant”) and their children Martin Alferez Caballero and Julieta Alferez Caballero (the “minor Applicants”) (collectively “the Applicants”) are citizens of

Colombia. On August 1, 2018, the Applicants left Colombia for the United States of America out of fear of being killed by members of the criminal gang, the Urabenos, also known as “Clan Usuga”, “AGC” and “Cartel del Golfo”. Until their departure from Colombia, the Applicants resided in the city of Bogota.

[2] The Applicants’ fears arose from the principal Applicant’s role as a witness to a crime committed in a store co-owned by the principal Applicant and the co-applicant in 2010, by a member of the Urabenos. The member was eventually convicted, and sentenced to a term of imprisonment. The threats to him and his family arose in 2018 following the release of the gang member from prison.

[3] The Applicants entered Canada from the United States on August 7, 2018 to claim refugee protection. Agents of the Canadian Border Services Agency (“CBSA”) determined the Applicants were excepted from the Safe Third Country Agreement and able to make an asylum claim because the principal Applicant’s sister is a Canadian Citizen (ss. 101(1)e) and 102(1)c) of *IRPA*, s. 159.5(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 [“*IRPR*”]).

[4] The Refugee Protection Division (“RPD”) dismissed the Applicants’ claim for protection. The RPD accepted that the Applicants were targeted by the Urebanos, but not because of a *Convention* ground, but rather, as an act of retaliation for having an Urebanos member arrested and imprisoned eight years earlier. The RPD found that the Applicants’ claim was therefore best

assessed under s. 97 of the *IRPA*. However, the existence of a viable internal flight alternative (“IFA”) in Colombia was determinative of the claim.

[5] The RPD concluded that the Applicants have a viable IFA in the town of Florencia, Colombia. The RPD concluded that the Urabenos have neither the means nor the motivation to locate the Applicants in the proposed IFA location, and that it would not be unreasonable for them to relocate to that location, given their personal circumstances. The RPD’s rationale in making this determination can be summarized as follows:

- The Applicants did not hear from the Urabenos until 2018, more than eight years after the robbery took place. They were neither contacted nor located from 2010 to 2018;
- The Applicants were never physically visited by the Urabenos between the time of the robbery and the time of their departure from Colombia;
- The principal Applicant has family members residing in Bogota; he testified that the Urabenos have not contacted them;
- The principal Applicant testified that he does not have evidence to suggest that the Urabenos were still looking for him at the time of the hearing;
- Although the Applicants alleged that the Urabenos are everywhere in Colombia, the RPD found that according to the Colombia National Documentation Package (“NDP”), the Urabenos are not known to operate in Florencia;
- The RPD found that the Applicants have not demonstrated that the Urabenos have alliances with other groups in Florencia, nor that they have access to corrupt state actors there;

[6] I note that pursuant to s. 110(2)d) of the *IRPA*, the Applicants were unable to appeal the decision of the RPD to the RAD.

[7] The Applicants seek judicial review pursuant to s. 72(1) of the *IRPA* of the December 11, 2019 RPD decision.

[8] For the reasons set out below. I grant the application for judicial review and remit the matter back to a different member of the RPD for redetermination.

## II. Relevant Provisions

[9] The relevant provisions are sections 96, 97, 101(1)e), 102(1)c) and 110(2)d) of the *IRPA*, and s. 159.5(a) of the *IRPR*, set out in Schedule A attached.

## III. Issues

[10] I intend to limit my analysis to the reasonableness of the RPD's conclusion regarding the first prong of the IFA test set out in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589, 109 DLR (4th) 682 [*“Thirunavukkarasu”*] and *Ranganathan v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164, 193 FTR 320 [*“Ranganathan”*]; namely, whether there is a place in Colombia where the claimant would not be at risk.

## IV. Analysis

A. *Standard of review*

[11] Both parties submit that the RPD's decision is subject to review on the reasonableness standard. I agree (*Canada (M.C.I.) v Vavilov*, 2019 CSC 65, 441 DLR (4th) 1 ["*Vavilov*"] at para 25). None of the exceptions to the presumption of reasonable review applies in the circumstances (*Vavilov* at para 17.)

B. *Reasonableness of the decision*

[12] Given that an IFA in another part of the same country is determinative of a claim for refugee status, the onus is on an applicant to prove that he or she is at serious risk of being persecuted throughout the country (*Thirunavukkarasu* at paras 2 and 6). The test for determining whether a claim for protection under either section 96 or 97 of the *IRPA* should be rejected because the claimant has a viable IFA derives from *Thirunavukkarasu* and *Ranganathan*, and is broadly stated as follows:

*(1) Is there somewhere in the country of reference (usually the country of nationality) where the claimant would not be at risk?*  
*and*

*(2) if so, would it be reasonable for the claimant to relocate there?*

[13] While the Applicants raise several grounds of error which they contend constitutes unreasonableness affecting the whole of the decision, I intend to limit my analysis to only three, all of which relate to the means and motivation of the Urabenos to locate the Applicants in the proposed IFA.

[14] First, the RPD concluded the Urabenos do not have the means or the motivation to pursue them in the proposed IFA because, in part, they (the Urabenos) do not have a physical presence in the IFA. However, the National Documentation Package (NDP) demonstrates the Urabenos have a country-wide reach. Specifically, as advanced by the Applicants:

- NDP item 7.2 indicates that the Urabenos “interfere at the national level”, represent the “structure with the biggest presence in Colombia”, “foster 2500 gangs across Colombia”, and “have succeeded in infiltrating divisions of the armed forces and the justice system”.
- NDP item 7.15 indicates that the Urabenos “are the largest and most influential [gang] currently operating in Colombia”, “are considered the main criminal organization in Colombia with national reach”, and “have extended their significant and violent influence throughout the Americas”.

[15] An organization can have national reach without a physical presence. The RPD improperly conflated the concepts of “presence” and “influence” of the agents of persecution (*Mauricio Berrios v. Canada (Citizenship and Immigration)*, 2021 FC 739 at paras 44 to 47).

[16] Second, the NDP evidence of the national reach of the Urabenos contradicts the findings of the RPD. The RPD failed to refer to this evidence. The failure to refer to relevant evidence, which contradicts a finding, constitutes an error which, standing alone, can render a decision unreasonable (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1999] 1 FC 53, 157 FTR 35 at para 17. A judicial review may be granted when an administrative decision-maker fails to refer to critical evidence that contradicts the conclusion and where the

reviewing court determines that the omission, when considered in context, demonstrates that the decision-maker disregarded the material before him or her. (*Penez v Canada (Citizenship and Immigration)*, 2017 FC 1001 at para 25). I am satisfied this is the case here.

[17] Third, the RPD's conclusion that the Urabenos are not motivated to locate the Applicants contradicts the evidence, accepted by it, of the threats received by the Applicants in 2018. If the Urabenos were sufficiently motivated to threaten and pursue the Applicants in 2018, eight years after a crime was committed, I consider it unreasonable to conclude, without further elaboration, that that same gang would not pursue them in 2019. Also, the RPD's conclusion about a lack of motivation based upon the fact there were "no attempts to locate the family [...] between 2010 and 2018", is speculative. No one, including the Applicants, is in a position to pronounce upon what the gang attempted to do.

#### V. Conclusion

[18] I am of the view the shortcomings outlined above are sufficient to demonstrate that the impugned decision lacks justification, transparency and intelligibility (*Vavilov* at para 99). The decision is not, in my view, based on reasoning that is both rational and logical; I am not satisfied that the decision-maker's reasoning "adds up" (*Vavilov* at paras 102 and 104).

[19] The within application for judicial review is granted and the matter remitted to a different member of the RPD for redetermination.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that** the within application for judicial review is granted, without costs. The matter is remitted to a different member of the RPD for redetermination. No question is certified for consideration by the Federal Court of Appeal.

“B. Richard Bell”

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Judge



## SCHEDULE

***Immigration and Refugee Protection Act, SC 2001, c 27***      ***Loi sur l'immigration et la protection des réfugiés, LC 2001, c 27***

**Convention refugee**

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,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

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

**Person in need of protection**

97 (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist,

**Définition de réfugié**

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) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

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

**Personne à protéger**

97 (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire,

of torture within the meaning of Article 1 of the Convention Against Torture; or	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 themselves 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.
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

### **Ineligibility**

101 (1) A claim is ineligible to be referred to the Refugee Protection Division if

### **Irrecevabilité**

101 (1) La demande est irrecevable dans les cas suivants :

(e) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence;

### **Regulations**

102 (1) The regulations may govern matters relating to the application of sections 100 and 101, may, for the purposes of this Act, define the terms used in those sections and, for the purpose of sharing responsibility with governments of foreign states for the consideration of refugee claims, may include provisions

(c) respecting the circumstances and criteria for the application of paragraph 101(1)(e).

### **Restriction on appeals**

110(2) No appeal may be made in respect of any of the following:

(d) subject to the regulations, a decision of the Refugee Protection Division in respect of a claim for refugee protection if

(i) the foreign national who makes the claim came directly or indirectly to Canada from a country that is, on the day on which their claim is made, designated by regulations made under subsection 102(1)

e) arrivée, directement ou indirectement, d'un pays désigné par règlement autre que celui dont il a la nationalité ou dans lequel il avait sa résidence habituelle

### **Règlements**

102 (1) Les règlements régissent l'application des articles 100 et 101, définissent, pour l'application de la présente loi, les termes qui y sont employés et, en vue du partage avec d'autres pays de la responsabilité de l'examen des demandes d'asile, prévoient notamment :

c) les cas et les critères d'application de l'alinéa 101(1)e).

### **Restriction**

110(2) Ne sont pas susceptibles d'appel :

d) sous réserve des règlements, la décision de la Section de la protection des réfugiés ayant trait à la demande d'asile qui, à la fois :

(i) est faite par un étranger arrivé, directement ou indirectement, d'un pays qui est — au moment de la demande — désigné par règlement pris en vertu du paragraphe 102(1) et partie à

and that is a party to an agreement referred to in paragraph 102(2)(d), and

(ii) the claim — by virtue of regulations made under paragraph 102(1)(c) — is not ineligible under paragraph 101(1)(e) to be referred to the Refugee Protection Division;

***Immigration and Refugee Protection Regulations,***  
SOR/2002-227

**Non-application —  
claimants at land ports of  
entry**

159.5 Paragraph 101(1)(e) of the Act does not apply if a claimant who seeks to enter Canada at a location other than one identified in paragraphs 159.4(1)(a) to (c) establishes, in accordance with subsection 100(4) of the Act, that

(a) a family member of the claimant is in Canada and is a Canadian citizen

un accord visé à l'alinéa 102(2)d),

(ii) n'est pas irrecevable au titre de l'alinéa 101(1)e) par application des règlements pris au titre de l'alinéa 102(1)c);

***Règlement sur l'immigration et la protection des réfugiés,***  
DORS/2002-227

**Non-application —  
demandeurs aux points  
d'entrée par route**

159.5 L'alinéa 101(1)e) de la Loi ne s'applique pas si le demandeur qui cherche à entrer au Canada à un endroit autre que l'un de ceux visés aux alinéas 159.4(1)a) à c) démontre, conformément au paragraphe 100(4) de la Loi, qu'il se trouve dans l'une ou l'autre des situations suivantes :

a) un membre de sa famille qui est un citoyen canadien est au Canada

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

**DOCKET:** IMM-56-20

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FERNANDA CABALLERO JOVEN, MARTIN  
ALFEREZ CABALLERO, JULIETA ALFEREZ  
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AND IMMIGRATION

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