

CANADA / JUDGMENT

TB9-15453

COURT

Refugee Appeal Division

DECIDED

8 January 2020

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RAD File / Dossier de la SAR : TB9-15453

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TB9-15457

Private Proceeding / Huis clos

Reasons and decision ? Motifs et décision

Persons who are the subject of the appeal

XXXX XXXX XXXX XXXX

XXXX XXXX XXXX XXXX

XXXX XXXX XXXX XXXX

XXXX XXXX XXXX XXXX

XXXX XXXX XXXX

Personnes en cause

Appeal considered / heard at

Montreal, QC

Appel instruit / entendu à

Date of decision

January 8, 2020

Date de la décision

Panel

Me Patricia O'Connor

Tribunal

Counsel for the persons who are the subject of the appeal

Me Michael F Loebach

Conseil des personnes en cause

Designated representative

XXXX XXXX XXXX XXXX

Représentant(e) désigné(e)

Counsel for the Minister

N/A

Conseil du ministre

REASONS FOR DECISION

I. INTRODUCTION

- [1] XXXX XXXX XXXX XXXX (the Principal Appellant/PA), and his wife XXXX XXXX XXXX XXXX are citizens of Colombia. Their minor children XXXX XXXX XXXX XXXX, XXXX XXXX XXXX XXXX and XXXX XXXX XXXX are citizens of Colombia and the United States. They appeal a decision of the Refugee Protection Division (RPD) rendered on May 22, 2019, rejecting their claim for refugee protection.
- [2] The Appellants allege that they are being personally targeted by the Clan Úsuga and fear for their lives.¹ The RPD rejected the claim, finding that the minor Appellants are US citizens and have advanced no claim against that country and this finding is unchallenged on appeal. Moreover, the RPD determined that the PA and his spouse can avail themselves of an Internal Flight Alternative (IFA) in Tunja, Boyacá.
- [3] After considering the evidence, I allow the appeal in part, finding that the PA and his spouse credibly established that they are persons in need of protection pursuant to s. 97(1)(b) of the Immigration and Refugee Protection Act (IRPA). The claim regarding the minor Appellants is denied, as they are citizens of the USA and can return to that country.

II. BACKGROUND

- [4] The Appellants lived in XXXX XXXX, Magdalena where the PA worked for a XXXX XXXX XXXX XXXX. His work involved XXXX, XXXX and XXXX the XXXX XXXX XXXX onto XXXX XXXX XXXX XXXX XXXX.

- [5] On XXXX XXXX, 2017, the PA and his spouse were approached by two armed men from the Clan Úsuga. Held at gunpoint, the PA was instructed to attend a meeting with members of the Clan Úsuga on XXXX XXXX, 2017, to provide them confidential XXXX information. The Appellants reported the incident to the GAULA, a specialized anti-kidnapping and anti-extortion unit in Colombia.
- [6] After the PA failed to present at the meeting on XXXX XXXX, 2017, he received a call on his cell phone angrily telling him that he had a second chance to attend a meeting to provide members of the Clan Úsuga information about XXXX. While the PA reported the incident to the Attorney General's Office (the Fiscalía) which assured him that he would receive protection, he never did.
- [7] The PA did not attend the meeting on XXXX XXXX, 2017. Instead, his family changed their schedule and routine.
- [8] On XXXX XXXX, 2017, the PA was accosted by men who held him at gunpoint. He was physically assaulted and told that the Clan Úsuga knew detailed information about him and his family. Once again, he was told to attend a meeting to provide confidential XXXX information. The PA did not attend the meeting. While he reported the incident to the Fiscalía, the police did not provide protection measures.
- [9] The PA and his family went to stay with their in-laws in XXXX XXXX. On XXXX XXXX, 2018, the PA was physically threatened with a knife and handed a letter outside the in-laws' building. The letter stated that his failure to attend the meeting meant that he now has to pay for his safety, otherwise the life of his family is at risk. Therefore, in addition to providing privileged XXXX information, the PA was also required to pay XXXX XXXX pesos per quarter. The PA reported this incident to the Ombudsman.
- [10] The PA did not comply with the demands in the letter. On XXXX XXXX, 2018, unknown men tried to remove his children from school. Following this incident, the PA made a report to the Office of the Inspector General. On XXXX XXXX, 2018, the PA and his family moved to XXXX, Atlántico. At first, they stayed with a family relative. Then, they moved to another apartment.
- [11] On XXXX XXXX, 2018, the Appellants left Colombia and travelled to the USA. They entered Canada on XXXX XXXX, 2018, hoping to return to Colombia.
- [12] However, on XXXX XXXX, 2018, the PA's mother in Colombia received a funeral floral arrangement with an attached note declaring the Appellants a military objective. The PA's mother reported the incident to the authorities.
- [13] The Appellants, who fear being killed by the Clan Úsuga, claim refugee protection.

III. DETERMINATIVE ISSUE

[14] I find the determinative issue is whether the RPD erred in finding the PA and his spouse can avail themselves of an IFA in Colombia.

IV. ADMISSIBILITY OF EVIDENCE PRESENTED ON APPEAL

[15] Subsection 110(4) of the IRPA provides that the Appellants may present only evidence that arose after the rejection of their claim or that was not reasonably available, or that the Appellants could not reasonably have been expected in the circumstances to have presented at the time of the rejection. If the new evidence meets the test for admissibility in ss. 110(4), then the RAD is required to further analyze the content of the document which requires an assessment of the credibility, relevance and newness of the evidence.²

[16] The Appellants request to submit the following documents as new evidence on appeal:

- Item 1: Letter from XXXX XXXX XXXX, June 17, 2019;
- Item 2: Letter from XXXX XXXX XXXX, June 19, 2019;
- Item 3: Letter from XXXX XXXX XXXX XXXX XXXX, June 21, 2019;
- Item 4: Police denunciation given by XXXX XXXX XXXX XXXX XXXX, June 11, 2018.
- Item 5: Medical consultation of XXXX XXXX XXXX XXXX, June 11, 2019;
- Item 6: Employment letter regarding XXXX XXXX XXXX XXXX XXXX, May 23, 2019, attesting to the fact that he is employed at the XXXX XXXX XXXX;
- Item 7: Citizenship Identification card of XXXX XXXX XXXX XXXX XXXX;
- Item 8: Invoice from XXXX XXXX XXXX, May 31, 2017;
- Item 9: security video footage from the apartment building of the PA's mother.

[17] For the following reasons, I find Items 1 through 8 are inadmissible on appeal while Item 9 is admissible.

Items 1,2, and 8

[18] Item 1 is a letter from XXXX XXXX XXXX dated June 17, 2019, attesting to the fact that he is a XXXX XXXX at the building where the PA's mother resides. He intervened following the delivery of the funeral floral arrangement on XXXX XXXX, 2018. Item 2 is a letter from the XXXX of the building who was also present when the funeral arrangement and note were delivered.

[19] On the face of it, both letters post-date the rejection of the claim by the RPD. However, the content of the letters describes the circumstances surrounding the delivery of the funeral floral arrangement, a pivotal incident that took place at least 14 months prior to the rejection of the claim. The Appellants have not explained why Items 1 and 2 were not reasonably available or obtainable prior to the rejection of the claim. It bears noting that

new evidence is not to be admitted to the RAD to complete a deficient record submitted before the RPD. As such, I find that Items 1 and 2 do not meet the statutory requirements for admissibility pursuant to s. 110(4) of IRPA.

- [20] Item 8 is an invoice dated May 31, 2017, aimed at establishing that the building where the PA's mother lives actually exists. Here again, the Appellants have not explained why this document which pre-dates the rejection of the claim by the RPD, was not reasonably available or could not have been reasonably expected. Item 8 is not admissible on appeal.

Items 3, 4, 6 and 7

- [21] Item 3 is a letter dated June 21, 2019, from the PA's colleague XXXX XXXX XXXX XXXX XXXX. This letter which post-dates the rejection of the claim, describes that he was approached by armed members of the Clan Úsuga on XXXX XXXX, 2018, who were looking to find the PA to kill him. Following this incident, he made a police denunciation (Item 4) on June 11, 2018. A letter dated May 23, 2019 (Item 6) speaks to the fact that XXXX is employed by the same XXXX as the PA and he has attached a copy of his ID card (Item 7).
- [22] Here again, this evidence pertains to an incident which precedes the rejection of the claim by a period of 11 months. The PA states that he did not provide this information at the time of the rejection because he did not reach out to his former colleague until after the rejection of the claim. In my view, the PA has not reasonably explained why he did not reach out to his former colleague prior to the rejection of the claim by the RPD or why this evidence was not obtainable prior to the rejection. A refugee claimant is required to put his best foot forward at the RPD hearing. I find that this evidence does not meet the statutory requirement for admissibility under 110(4).

Item 5

- [23] This document establishes that the PA's father went to consult a neurosurgeon on June 11, 2019, for a history of XXXX XXXX and XXXX requiring permanent care. I accept that the document post-dates the rejection of the claim and was not reasonably available or obtainable at the time of the rejection. Turning to the factors set out in Singh, I find that the document itself is not probative as it does not shed light on the issues raised in this appeal—namely whether the PA and his spouse can avail themselves of an IFA in Colombia. Item 5 is not admissible on appeal.

Item 9

- [24] Before the RPD, the Appellants submitted still photographs taken from security video footage from the lobby of the apartment building where the PA's mother resides in Colombia. The still photographs depict the delivery of a funeral floral arrangement on XXXX XXXX, 2018. In the final decision rejecting the claim, the RPD found the still shots from the video footage are unclear and not compatible with other photographs taken of the floral

arrangement inside the apartment belonging to the PA's mother. Item 9 is a copy of the security video footage from which the still shots were taken.

- [25] I note at the outset that this video footage was submitted to the RAD on July 3, 2019, meaning one day following the perfection of the appeal. This triggers the application of Rule 29 of the RAD Rules which states that a document submitted after the appeal is perfected must not be used in the appeal unless it is authorized by the RAD.
- [26] When deciding whether to allow the submission of a document after the appeal is perfected, the RAD must consider any relevant factors, including the document's relevance and probative value; any new evidence the document brings to the appeal; and whether the person who is the subject of the appeal, with reasonable effort, could have provided the document within the appeal record.³
- [27] Counsel has provided an affidavit explaining that the video footage could not be submitted prior to the perfection of the appeal, given extenuating circumstances related to the process server which was tasked with submitting the document to the RAD. I accept the explanation and allow the filing of Item 9 following the perfection of the appeal because it is information which is new, relevant and probative.
- [28] Next, I have considered whether Item 9 is admissible as new evidence pursuant to ss. 110(4) of the IRPA. As noted above, the Appellants provided still shots of the video footage to the RPD. The RPD raised an overriding concern about the clarity of the photograph in the decision rejecting the claim, finding that the still shot extracted from the video footage is not compatible with other photographs of the floral arrangement. Having submitted the still shots, the Appellants could not reasonably have expected that they were required to present the video footage from the security camera at the time of the rejection of the claim. The video footage is relevant and probative as it assists with the assessment of the Appellants' forward-looking risk and internal flight alternative in Colombia. I authorize Item 9 as new evidence on appeal.

V. ORAL HEARING BEFORE THE RAD

- [29] I have admitted Item 9 as new evidence on appeal. The video footage assists with the assessment of the Appellants' forward-looking risk in Colombia. However, Item 9 does not raise a serious issue with respect to the Appellants' credibility which would justify allowing or dismissing the appeal. Rather, the determinative issue in this case is IFA. As such, the RAD must proceed without an oral hearing in the present case.⁴

VI. SCOPE OF THE RAD APPEAL

[30] The RAD reviews decisions on a standard of correctness after conducting an independent assessment of the evidence before it.⁵ Deference may be required when the RPD enjoys a meaningful advantage in the assessment of the credibility of oral evidence.⁶ I have applied the correctness standard in the present case.

VII. ANALYSIS

1. The RPD erred in its analysis of IFA

[31] It is settled law that the onus is on the Appellants to demonstrate that it is unreasonable for them to seek refuge in a different part of this country before resorting to international protection.⁷

[32] This assessment is based on a two-prong test. First, the RPD must be satisfied that the Appellants do not face persecution or that they are not personally subjected to a risk to life or a risk of cruel and unusual treatment or punishment in the identified IFA. Secondly, the 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 Appellants, for them to seek refuge there.⁸

[33] In the present case, the RPD found that the adult Appellants can avail themselves of an IFA in Tunja, Boyacá based on the following:

- The PA was the victim of an attempted extortion and was the subject of physical intimidation and threats from members of the Clan Úsuga after he reported them to the authorities.
- This being said, the Appellants' delay leaving Colombia is irreconcilable with people who believe that they can be found with ease and harmed anywhere in the country. While the PA was accosted with a weapon on three separate occasions (XXXX XXXX, 2017; XXXX XXXX, 2017, and XXXX XXXX, 2018), the Appellants only left Colombia XXXX XXXX, 2018, even though they had a visa for the USA since 2012.
- While acknowledging that the Clan Úsuga has the capacity to track people down within Colombia, the RPD found that this group does not have the motivation or interest to do so in the present case. The RPD noted that the Clan Úsuga did not locate the Appellants when they relocated to XXXX prior to their departure from Colombia; extended family members who still live in XXXX XXXX and XXXX, have not been approached by the Clan Úsuga for over a year; and there is no evidence that members of the Clan Úsuga have presented at the PA's previous employment to find him.

- The RPD found that the evidence including photographs of a funeral flower arrangement and a note purportedly from the Clan Úsuga is not genuine. Moreover, it strains credibility that the PA's parents would have allowed the floral arrangement in their apartment instead of leaving it with people in charge of security in the building and that they would have remained living in their apartment if they actually received the floral arrangement, as alleged.
 - The RPD also found that the Appellants can safely relocate to the region of Tunja, Boyacá given that a map found in the NDP for Colombia indicates that the Clan Úsuga is not present in that region.⁹
- [34] I agree with Counsel that the RPD has erred in the analysis of IFA in the present case.
- [35] While the RPD found that the Appellants' delay fleeing XXXX XXXX points to the fact that they have no subjective fear and therefore they have a viable IFA in Tunja, this analysis is flawed because the Appellants' subjective fear is irrelevant to the IFA analysis. Rather, the RPD (who assessed the claim within the ambit of s. 97 of IRPA) was tasked with assessing whether the Appellants are subjected to a risk to life or a risk of cruel and unusual treatment or punishment in the identified IFA.
- [36] Next, I find that the RPD erred in finding the funeral floral arrangement and attached note declaring the PA and his family a military objective is not genuine.
- [37] The Appellants provided photographs of a funeral floral arrangement that was delivered to the PA's mother. Photographs taken inside her apartment reveal the front side of a large white floral arrangement with a few pink flowers and a pink banner pinned across the front of the arrangement. In contrast, the still photos taken from footage on the security camera show the back side of the floral arrangement. As such, the banner and pink flowers cannot be seen. Given the noted differences in the photos of the floral arrangement, the RPD concluded that the photos are not genuine.
- [38] As noted above, I have admitted new evidence on appeal (Item 9) which is video footage taken from the security camera in the lobby of the apartment building of the PA's mother. The video footage depicts a young boy with a motorcycle helmet presenting a funeral floral arrangement to the XXXX of the building who was standing behind the front desk. The floral arrangement is large. The front side of the floral arrangement is not visible in the video footage since it is facing the boy. While the pink banner is not fully visible in the footage given that it is also facing the boy, it is still possible to see pieces of the pink banner on opposite ends of the floral arrangement, flapping in the breeze. The delivery boy featured in the video is compatible with the boy depicted in the still shot taken from the video footage that was submitted to the RPD. The photograph of the floral arrangement taken inside the mother's apartment shows a pink banner affixed to the front of the arrangement. The end pieces of the banner are loose on either side of the arrangement. This is compatible with the loose pieces of the banner flapping in the breeze that is observed on the video footage.

- [39] While it is true that the photograph of the front side of the floral arrangement taken in the apartment of the PA's mother depicts a few pink flowers which cannot be seen in the video footage, I find nothing turns on this since it is obvious that the floral arrangement which is predominantly white, did not include the pink flowers in the back side of the arrangement. On a balance of probabilities, I find the video footage of the boy delivering the funeral floral arrangement is compatible with the photographs which formed part of the RPD record. I accept that they are genuine.
- [40] The note attached to the floral arrangement declares the PA and his family a military objective. The heading on the note states it is from the "Autodefensas Gaitanistas de Colombia AGC" although the note is signed "CLAN ÚSUGA". Contrary to the RPD, I do not find this to be a major anomaly undermining the credibility of the letter. I have already noted at the outset of this decision that CLAN ÚSUGA is known under different names including Autodefensas Gaitanistas de Colombia.¹⁰
- [41] I also find that the RPD has erred in the IFA analysis by engaging in speculation. For instance, the RPD found that if the flower arrangement was indeed genuine, the PA's mother would not have brought the arrangement into her apartment but would have left it with security. Moreover, the PA's parents would not have remained in the apartment if the floral arrangement was genuine. However, the RPD has erred by engaging in a subjective view of the evidence to support the IFA analysis. To the contrary, the PA has reasonably explained that his parents remained living in the apartment because the building is equipped with a good security system and they made a police complaint expecting protection after receiving the funeral floral arrangement and attached note.
- [42] Next, I note that the RPD correctly determined that a map found in the documentary evidence points to the fact that Tunja, Boyacá is not under the influence of Clan Úsuga. However, I do not find this map determinative in the present case. The RPD acknowledged in its decision that the Clan Úsuga has the capacity to track down the Appellants anywhere in Colombia, if they so wish. I note that a 2019 Colombia Report¹¹ describes that Clan Úsuga is Colombia's largest illegal armed group with between 3,000 and 7,000 combatants. Another source describes that the Clan Úsuga is Colombia's largest illegal armed group with a national reach-meaning that this group is able to operate throughout the country.¹²
- [43] Against this backdrop, I note that the Clan Úsuga has declared the Appellants a military objective, which is a serious matter and points to their motivation and interest in pursuing the Appellants.¹³ Objective evidence explains that when a person is declared a military objective, it means that their life, physical integrity and freedom are endangered and this threat also extends to their family. When a person is declared a military objective, it means that they have been issued a threat to be killed.¹⁴

- [44] Sources indicate that most of the armed groups in Colombia have issued threats declaring a person a military objective. An assistant professor notes that "relocation within Colombia is not an option for those who have been declared a military objective" because paramilitary and guerilla structures have extended vertical organizations and large networks.¹⁵
- [45] Under the circumstances, I find that the PA and his spouse, who are declared a military target, cannot safely relocate to Tunja. While it is true that the family was not found when they lived in XXXX, I do not find this determinative. The PA and his family lived there for a short period of less than three weeks during which time they lived cautiously, and moved to different locations.
- [46] In sum, I am satisfied on a balance of probabilities that the PA and his spouse would personally be subjected to a risk to their lives or a risk of cruel and unusual treatment or punishment from Clan Úsuga if they relocate elsewhere in Colombia. Given this finding, it is not necessary to consider the second prong of the IFA test.
- [47] Having determined that the RPD erred in its assessment of IFA, I turn now to correct the error by conducting my own analysis of the claim.

The PA and his spouse are persons in need of protection pursuant to s. 97(1)(b) of IRPA

- [48] I find that the PA proffered credible testimony corroborated by supporting documentation, establishing that he was employed at a XXXX in XXXX XXXX where he had access to privileged information regarding XXXX. He has provided reports that he made to the GAULA, the Fiscalia, and the Ombudsman after being threatened by the Clan Úsuga at gunpoint; being threatened by a young man brandishing a knife; an attempted kidnapping of his children from school; and demands from the Clan Úsuga that he pay copious amounts of money in exchange for his safety following his refusal to provide them with privileged information. Video footage, photographs and a copy of a letter from the Clan Úsuga corroborate that the PA and his family are now declared a military objective in Colombia.
- [49] In sum, I find that the Appellants provided credible evidence establishing that they are personally targeted and threatened with serious harm by the Clan Úsuga stemming from the PA's refusal to comply with their request for privileged information and payment of money in exchange for their safety.
- [50] I note that this is compatible with objective evidence establishing that criminal organizations (referred to as New Armed Groups [NAGs]) are a significant problem in Colombia and that the Clan Úsuga is the most powerful illegal armed group in Colombia.¹⁶
- [51] I have already determined that based on the particular context of this case, the Appellants do not benefit from an IFA in Colombia.

- [52] With respect to state protection, I note that this was not raised as an issued by the RPD. I find the Appellants have rebutted the presumption of adequate state protection in Colombia.
- [53] As noted above, the Clan Úsuga is described as the largest and most influential illegal armed group in Colombia with a national reach.¹⁷ Colombia Reports indicate that some members of the group have been arrested but authorities have failed to curb the power of this group and their continued influence allows them to engage in corruption and collusion with local and regional authorities.¹⁸ They claim to have informants in civil society, the military and the political sphere.¹⁹ Objective evidence further states that it is normal at the [National Protection Unit] to take a long time to provide protection to threatened people; the vast majority of victims of criminal groups do not receive protection; and the source of the threat is seldom investigated.²⁰
- [54] In the present case, the PA and his parents have made complaints to the GAULA, the Fiscalía, and the Ombudsman but no concrete assistance has been forthcoming. As such, I find that the PA and his spouse have rebutted the presumption of adequate state protection in Colombia.
- [55] On a balance of probabilities, I conclude that the Appellants face a personalized and prospective risk to their lives or a risk of cruel and unusual treatment or punishment in every part of Colombia. This is a specific personal risk faced prospectively by the Appellants as opposed to indiscriminate or random risk faced by the Appellants and others.

VI. REMEDY

- [56] For all these reasons, I allow the appeal, finding that the PA and his spouse are persons in need of protection pursuant to s. 97(1)(b) of the IRPA. The appeals regarding the minor children are dismissed as they are not Convention refugees or persons in need of protection.

Patricia O'Connor

Me Patricia O'Connor

January 8, 2020

Date

PO/lp

1 The Clan Úsuga or Clan Úsuga David is a paramilitary group in Colombia also known as Los Urabeños or the Gulf Clan (Clan del Golfo). They refer to themselves as Gaitanist Self-defense Forces of Colombia (the Autodefensas Gaitanistas de Colombia). See National Documentation Package (NDP) for Colombia, 31 May 2019, Tab 7.2 Paramilitary Successor groups and criminal bands (bandas criminales, BACRIM), areas of operation and criminal activities, including the Clan del Golfo [...] COL105773, IRB, 24 April 2017.

2 Canada (Citizenship and Immigration) v. Singh, 2016 FCA 96, para. 55.

3 RAD Rule 29(4).

4 See section 110(3) and 110(6) of IRPA.

5 Canada (Citizenship and Immigration) v. Huruglica, 2016 FCA 93, paras. 78, 103.

6 Ibid, paras. 58, 59 and 70.

7 Momodu v. Canada (Citizenship and Immigration), 2015 FC 1365, para. 6; Abdalghader v. Canada (Citizenship and Immigration), 2015 FC 581, para. 22.

8 Thirunavukkarasu v. Canada (Minister of Employment and Immigration), [1993] F.C.J. No 1172, [1994] 1

F.C. 589 (F.C.A); Rasaratnam v. Canada (Minister of Employment and Immigration), [1991] F.C.J. No. 1256, [1992] 1 F.C. 706, 140 N.R. 138 (F.C.A).

9 NDP for Colombia, (31 May 2019), Tab 1.2: Illegal armed groups' territories. Colombia Reports. 15 March 2019.

10 NDP for Colombia (31 May 2019), Tab 7.2, supra, note 1.

11 NDP for Colombia (31 May 2019), Tab 1.2 supra note 9.

12 NDP for Colombia (31 May 2019), Tab 7.2, supra note 1, p. 5.

13 NDP for Colombia (31 May 2019), Tab 7.21, What it means to be a "military objective" (objetivo militar) including who executes these threats and methods of issuing them; whether there is an internal flight alternative for someone who has been issued a threat; state response, IRB COL105118.

14 Ibid, p. 1.

15 Ibid, p. 8.

16 NDP for Colombia (31 May 2019), Tab 1.2, supra note 9.

17 NDP for Colombia (31 May 2019), Tab 7.15 The Urabeños (also known as Clan Úsuga or Autodefensas Gaitanistas de Colombia), including areas of operation, especially in Buenaventura, criminal activities, and state response; whether the Urabeños seek out individuals, [...]. IRB 6 March 2015. COL105044, p. 5.

18 Ibid, p. 20.

19 NDP for Colombia (31 May 2019), Tab 1.2, supra note 9.

20 NDP for Colombia (31 May 2019), Tab 7.15, supra note 17, p 9.

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RAD.25.02 (April 04, 2019)

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