| Federal Court |  | Cour fédérale |
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**Date: 20101109**

**Docket: IMM-6029-09**

**Citation: 2010 FC 1119**

**Ottawa, Ontario, November 9, 2010**

**PRESENT: The Honourable Mr. Justice O'Keefe**

**BETWEEN:**

**JOSUE MANRIQUE CHAVARRO**
**FEBE CONTRERAS CHITIVA**
**KEVIN JOSUE MANRIQUE CONTRERAS**
**FEBE NATALIA MANRIQUE CONTRERAS**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated November 9, 2009, wherein the applicants were determined not to be Convention refugees or persons in need of protection under sections 96 and 97 of the Act. This conclusion was based on the Board's finding

that the principal applicant lacked credibility and lacked a well-founded fear of persecution in Colombia. The Board also found that the applicants had an internal flight alternative (IFA) available to them within Colombia.

[2] The applicants request that the decision of the Board be quashed and the claim remitted for reconsideration by a differently constituted panel of the Board.

**Background**

[3] Febe Contreras Chivata, (the principal applicant), her husband and her two children (the other applicants) are citizens of Colombia. The incidents giving rise to her claim for refugee protection took place some time ago. The principal applicant alleges that due to her religious teaching activities from 1999 to 2001, she became an enemy of the revolutionary forces known as Fuerzas Armadas Revolucionarias de Colombia (FARC) and that they threatened and otherwise persecuted her and her family until they left Colombia. As part of her religious teachings, the principal applicant told students to reject the FARC.

[4] The principal applicant alleges that on October 29, 1999, while leaving a school in Bogotá, a couple of men approached her identifying themselves as FARC members. They told her to discontinue preaching Christianity to the youth in the area as it was hurting their recruiting efforts. One of the men pressed a gun to her side and said that if their orders were disobeyed, her family would be killed.

[5] On May 15, 2000, while at a different school, the principal applicant was approached by the mother of a student who indicated that the guerrillas had taken her son. She located the son and convinced him to abandon the guerrillas. On July 25, 2000, FARC members located the principal applicant again and phoned her saying that she had not followed their orders and that they would kill her family. On November 20, 2000, neighbours told them that two men on motorcycles had been wandering around the community looking for her. That same day, the applicants left and stayed with the principal applicant's sister-in-law before renting a new guarded apartment in a different part of Bogotá.

[6] In 2001, the applicant changed jobs and began working in a different school. However, on March 12, 2001, she received another threatening phone call from a FARC member who said he knew where she lived and threatened to kill her and her family.

[7] On March 22, 2001, the applicants fled to the U.S. and claimed asylum there. The applicants allege that the claim was never properly heard due to filing errors.

[8] On August 6, 2008, the applicants and their U.S. born son came to Canada and made a refugee claim.

**Board's Decision**

[9] The Board did not believe the principal applicant's story nor did the Board believe that the principal applicant had a subjective fear of persecution in Colombia. The Board noted numerous inconsistencies and elements of the principal applicant's story which seemed implausible.

[10] The Board first noted that the principal applicant indicated that she feared for her life from the first encounter with FARC in October 1999 and she ceased speaking out against them at school. This was inconsistent with her account that while at a new school in 2000, a student's mother had come to her because she knew the principal applicant was against the FARC. The Board found it unlikely that the students at the old school would have informed students at the new school and so informed the student's mother. Conversely, if the principal applicant had indicated her opposition to FARC at the new school, the behaviour would have been inconsistent with her stated fear. In either case, the principal applicant's credibility was diminished.

[11] With regard to the student she convinced to leave the FARC, the Board was concerned as to how the FARC would have known that she had been responsible. The Board also felt that it was inconsistent for the principal applicant to testify that she took the FARC's threats seriously and obeyed their order but subsequently testify that she was disobeying their order merely by continuing to teach at the school. Continuing to teach at the school, if she understood this to be disobeying their order, was also inconsistent with her stated fear. Considering the FARC's documented brutality, the

Board also found it quite implausible that she would have been given a warning at all and utterly implausible that the FARC would have simply called again in July of 2000 to re-issue the same threat.

[12] Finally, her evidence that she continued her work at that school until the end of the year, despite an alleged death threat in September 2000, further impugned her credibility. The death threat over the phone that she received while at the new school in 2001 was the fourth such direct threat. Again, the Board found it implausible that the FARC would be so lenient towards an alleged foe that, according to her testimony, consistently ignored their instructions to stop sabotaging their recruitment efforts.

[13] In addition, the Board found upon reviewing the documentary evidence that FARC's reach within Colombia had been severely restricted in recent years and that her family could live in Santa Marta or Cartegena in the state of Magdelena in the north, which had been free from FARC attacks and kidnappings in all of 2008. This constituted an IFA in the Board's view, because it was not unreasonable to require the applicants to relocate there.

**Issues**

[14] The issues are as follows:

1. What is the appropriate standard of review?

2. Did the Board make erroneous findings on the issues of credibility and subjective fear?

3. Was the Board's IFA conclusion unreasonable?

**Applicants' Written Submissions**

[15] The applicants submit that the Board's findings on the issues of credibility and subjective fear are seriously impugned by erroneous findings of fact. They are also made without adequately raising the Board's concerns with the principal applicant and without providing adequate reasons.

[16] First, the principal applicant's testimony was entirely consistent with her stated fear. The Board erred when it stated that the principal applicant had consistently ignored the FARC's instructions.

[17] Secondly, the Board erred by implying that the principal applicant's testimony was inherently implausible. Her testimony regarding how the student's mother knew to seek her out was that although she was at a new school where she had never spoken out against FARC, students at that new school would likely have learned from students at the old school about her views. There was no evidence that countered this possibility and thus, it should have been accepted. The Board also did not adequately explain how her actions regarding the threatening call in July of 2000 were inconsistent with having a subjective fear. Moreover, no concern regarding such an inconsistency was ever brought to the principal applicant's attention during the hearing. The applicants also

submit that the Board's finding that FARC has a reputation for brutality is not based on the evidence before it (see application record, pages 145 to 147).

[18] Finally, the Board erred in relation to its comments about the FARC's known brutality because the Board did not cite what document, if any, this information came from. Indeed, the Board relied significantly on the fact that the FARC would have been unlikely to give so many warnings.

[19] The Board erred in its analysis of an IFA because it failed to ask the principal applicant specifically why moving to Santa Marta would be unreasonable and did not consider some documentary evidence suggesting that there are new threats other than the FARC in those areas. Further, the Board's analysis of the reasonableness of the alternative was solely focused on the occupations of the applicants and their ability to find work.

**Respondent's Written Submissions**

[20] The respondent rejects the applicants' assertion that the Board was bound to accept the truth of the principal applicant's story unless contradicted by objective evidence. There is a presumption of the truth of sworn testimony but that is rebuttable and Board members are permitted to base credibility and plausibility findings on common sense. The Board clearly put its concerns regarding inconsistencies and implausibility before the principal applicant during testimony so there was no issue of procedural fairness. The type of substantive errors in the credibility and plausibility findings the applicants point to invite the Court to engage in a microscopic analysis of the decision and is

improper. Furthermore, none of the alleged errors would be sufficient to require the intervention of the Court when considering the reasonableness of the decision as a whole. On a global reading, the decision regarding credibility was supported and reasonable.

[21] On IFA, it was open for the Board to find that the applicants had not met the burden before them of establishing, with evidence, the existence of conditions which would jeopardize the life and safety of an applicant in travelling or temporarily residing in the IFA. The applicants' submissions simply ask the Court to re-weigh the evidence and redetermine the reasonableness of the IFA.

**Analysis and Decision**

The Applicants' Burden

[22] The applicants seek to have the Board's ultimate conclusion quashed and the matter remitted back for reconsideration. Because the Board's decision was based and can stand independently on both the credibility finding and the IFA finding, the applicants must defeat both findings separately before the decision can be quashed (see *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 F.C.R. 636 at paragraph 14).

[23] **Issue 1**

What is the appropriate standard of review?

It is well settled that Board conclusions that are determinative of a refugee claim are determinations of mixed fact and law and are reviewable against the standard of reasonableness (see *Kaleja v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 252 at paragraph 19, *Sagharichi v. Canada (Minister of Employment and Immigration)* (1993), 182 N.R. 398 (F.C.A.), [1993] F.C.J. No. 796 at paragraph 3). As such, the reviewing court will inquire into the qualities that make such a determination reasonable and be concerned primarily with the existence of justification, transparency and intelligibility within the decision making process. The court will also be concerned with whether the decision falls within a range of possible acceptable outcomes which are defensible in respect of the facts and law (see *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47).

[24] Findings of fact, including credibility findings, elemental to the Board's conclusion on a determinative issue may only be interfered with by a reviewing court if the finding was made in a perverse or capricious manner or without regard for the material before it (see *Federal Courts Act*, R.S.C. 1985, c. F-7s. 18.1(4)(d), also see *Diabo v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1772 at paragraph 3). This recognizes the specialized skill of the Board and the fact that the Board is in a much better position than a reviewing court to gauge the credibility and plausibility of a refugee claimant's story, as well as the factual evidence that comes before it.

[25] Issues of procedural fairness are assessed on the correctness standard.

[26] **Issue 2**

Did the Board make erroneous findings on the issues of credibility and subjective fear?

In my view, the Board based its finding that the principal applicant lacked credibility on an identifiable inconsistency that ran throughout her testimony.

[27] Fundamentally, the principal applicant explained that her well-founded fear of persecution was based on threats of death to her and her family received from the FARC. The principal applicant, perhaps correctly, felt she did not need to explain in her Personal Information Form (PIF) the danger associated with the FARC but indeed relied on their notoriety. Her position was that as of the first threat in October 1999, she had a well-founded fear of persecution. She said that she acquiesced to those threats and complied. Such acquiescence would indeed support her subjective fear, yet her actions and following events as the Board indicated, are at odds with such a position.

[28] The most important aspect is that the principal applicant continued to receive death threats, each either explicitly or implicitly suggesting that she had not complied with the previous threat. She relies on this to establish the escalating nature of the danger she was facing. However, I think it quite reasonable for the Board to point out the inconsistency with her position. It was with reasoned discussion that the Board held that she was either fabricating or greatly exaggerating the encounters with the FARC or that she was continuing to disobey serious threats and thereby acting contrary to the assertion of having a subjective fear of persecution.

[29] The applicants assert that findings of implausibility may only be made in the clearest of cases and that the present case did not allow for such a finding (see *Valtchev v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776, [2001] F.C.J. No. 1131). In that case, Mr. Justice Francis Muldoon stated:

> 7 A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu…

[30] While this passage makes it clear that the Board cannot base implausibility findings on generalizations based on a lack of precise information, it does not alter the standard against which Board findings of fact are reviewed. The Board is conferred the authority to assess the evidence and make findings of credibility on common sense (see *Byaje v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 90 at paragraph 21) as long as such findings are not made in a perverse or capricious manner or without regard for the material before it.

[31] *Valtchev* above, was considered by Mr. Justice Yves de Montigny in *Awoh v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 945. The Board is entitled to base

implausibility findings on common sense and the Board's own expertise and experience, provided the Board does not rely on generalizations based on a lack of information (paragraph 20).

[32] Practically speaking, a finding of implausibility is simply an element or rationale for explaining an overall finding that an applicant lacks credibility or reliability. It is for the Board to make such findings on the basis of rationality and common sense (see *Shahamati v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 415 (C.A.)).

[33] In the present case, the Board's finding regarding the implausibility of the FARC to warn individuals at all, let alone five times, appears to have been based somewhat on speculation or generalizations about the brutality of the FARC. However, those generalizations do not amount to an error in the circumstances for the following reasons. First, the implausibility finding was primarily based on several noted inconsistencies in the principal applicant's story and only secondarily on the generalizations about FARC. Secondly, the generalizations were not contrary to the principal applicant's position. The principal applicant's own comments during the IFA discussion asserted the brutality of the FARC and the fact that she would be killed upon re-entry. As such, there was no breach of procedural fairness.

[34] On a global review of the Board's decision, I do not find that the credibility finding should be interfered with, nor was it unreasonable for the Board to explain and rely on the inconsistencies to determine that the principal applicant failed to establish a subjective fear.

[35] The applicants' claim that the Board did not bring the concerns of inconsistencies to the applicants' attention is unfounded. The transcript reveals that the Board repeatedly engaged in discussions during testimony with the principal applicant, asking her to explain apparent inconsistencies, contradictions or doubtful aspects of her story. The principal applicant, who appeared with representation, was adequately put on notice of the Board's concerns.

[36] Similarly, there is no live issue with respect to the adequacy of reasons in this case. The reasons were more than adequate to explain to the applicants why the decision was made. I would add that determining credibility is not a perfect science. All the Board is required to do is show that there was some objective reason or reasons for taking the position it does.

[37] **Issue 3**

Was the Board's IFA conclusion unreasonable?

I must reject the applicants' submissions with respect to an IFA.

[38] When the prospect of an IFA is raised, the burden falls to an applicant to show one of two things in order to defeat the suggestion. The applicant must either:

1. Show that on a balance of probabilities, there is a serious possibility of being persecuted in the proposed IFA area, or

2. Show that in all the circumstances, it would be objectively unreasonable for the claimants to seek refuge there.

(see *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589, [1993] F.C.J. No. 1172 (C.A.) (QL)).

[39] The Board raised the possibility of the state of Magdelena in the north as being an available IFA where the applicants could live. The Board did not base this on a whim, but on documentary evidence that described the seriously diminished strength of the FARC in recent years, especially in the north, and the fact that the state of Magdelena had been completely free of FARC incidents in 2008.

[40] At that point, the burden fell to the applicants to establish that the IFA was unreasonable. The unreasonableness test is hard to meet and requires nothing less than actual and concrete evidence of conditions jeopardizing the life and safety of the applicants (see *Ranganathan v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 164 (C.A.) at paragraph 15).

[41] The principal applicant's only response was to the first prong of the IFA test. She submitted that the FARC was everywhere in the country and would kill her the moment she returned. She said that the FARC keeps blacklists and that they would devote resources to finding and killing her because she was a high profile target for them. She did not have any documentary or other objective evidence to support these claims. This alone would have prevented the Board from accepting her position.

[42] The applicants did not submit any evidence with regard to any hardship a move to the state of Magdelena would impose. Thus, it was unnecessary for the Board to make positive findings in that regard. Those comments cannot amount to a reviewable error and in any event, were reasonable.

[43] For the above reasons, the application for judicial review is dismissed.

[44] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

## JUDGMENT

[45] **IT IS ORDERED that** the application for judicial review is dismissed.

"John A. O'Keefe"

Judge

## ANNEX

**Relevant Statutory Provisions**

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

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| 96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, | 96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques : |
| (a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or | a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays; |
| (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. | 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. |
| 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 | 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) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention | a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la |

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| Against Torture; or | Convention contre la torture; |
| (b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if | b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : |
| (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, | (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, |
| (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, | (ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas, |
| (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and | (iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles, |
| (iv) the risk is not caused by the inability of that country to provide adequate health or medical care. | (iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats. |
| (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. |

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-6029-09 |
| **STYLE OF CAUSE:** | JOSUE MANRIQUE CHAVARRO<br>FEBE CONTRERAS CHITIVA<br>KEVIN JOSUE MANRIQUE CONTRERAS<br>FEBE NATALIA MANRIQUE CONTRERAS<br><br>- and -<br><br>THE MINISTER OF CITIZENSHIP<br>AND IMMIGRATION |
| **PLACE OF HEARING:** | Ottawa, Ontario |
| **DATE OF HEARING:** | June 8, 2010 |
| **REASONS FOR JUDGMENT AND JUDGMENT OF:** | O'KEEFE J. |
| **DATED:** | November 9, 2010 |

**APPEARANCES:**

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| Michael Bossin | FOR THE APPLICANTS |
| Helene Robertson | FOR THE RESPONDENT |

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