Federal Court  Cour fédérale

Date: 20110211

Docket: IMM-2976-10

Citation: 2011 FC 170

Ottawa, Ontario, February 11, 2011

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

GUIDO ALEJANDRO TREJOS,
MARTHA CECILIA MORLAS SION

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated April 30, 2010, concluding that the applicants are not Convention refugees or persons in need of protection pursuant to sections 96 or 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c.27 (the Act) because the Board did not find the material aspects of either applicant's claim to be credible or well-founded.

FACTS

Background

[1] The male and female applicants are married. They have both lived without status in the United States for many years. They met in the United States in 2002, had a son in 2005, and were married on August 26, 2007.

[2] The male applicant is 44 year-old citizen of Colombia. He arrived in Canada on October 21, 2007, from the United States, and immediately claimed refugee protection.

[3] The female applicant is a 42 year-old citizen of Ecuador. She entered Canada on December 28, 2007, with her three minor children, to attend an appointment to make a refugee claim in Canada and join her husband. Two of the female applicant's children are from a previous marriage, while the third is from her marriage to the male applicant. The children's claims were considered in a separate hearing before the Board.

[4] The two applicant's claims are entirely different. As such, it is helpful to summarize the facts relating to each claim separately.

Claim of the male applicant

[5] The male applicant's claim is based upon his fear of persecution in Colombia at the hands of the Revolutionary Armed Forces of Colombia (FARC). The male applicant worked as a salesperson

for a wealthy businessman in Medellin. In June 1997 he and his employer's mother were kidnapped and held hostage by the FARC until the applicant's employer paid a ransom.

[6] The employer paid the ransom and the hostages were released after being held for one day, with warnings to not speak to the police or the press. These warnings were reiterated in written threats to the applicant's employer that specifically referenced the applicant. After one month, the applicant's employer ceased doing business as a result of the FARC threats and he and his mother left Colombia. The applicant did not receive any further threats from the FARC as a result of this incident.

[7] In 1997, the applicant became an active member of the Conservative Party in Colombia, helping with the election campaign of the Conservative Party's mayoral candidate in Medellin. He stated that he performed various tasks for the party, including acting as a driver for party leaders, organizing public meetings, and distributing campaign materials. His candidate won the mayoral election in August 1997.

[8] In September 1997, FARC members attacked a meeting of Conservative Party leaders in the applicant's neighbourhood. The applicant had not been at the meeting, but four fellow party organizers were shot and killed.

[9] Also in September 1997, the applicant received two "condolence cards," which are written death threats, from the FARC at his home. He also received threatening telephone calls.

[10] As a result of these threats, the applicant fled to his mother's house in Cali, Colombia, on December 17, 1997, where he remained for approximately one month. During that time, he received four threatening telephone calls from the FARC, who he believes knew where his mother lived because they had his identity documents from the June kidnapping.

[11] Attempting to escape the threats, in January 1998 the applicant and his ex-wife fled to a chicken farm owned by his former mother-in-law in a small town about 45 minutes by car from Cali. The applicant remained on the farm for approximately one year, helping his former mother-in-law on the farm. His ex-wife brought their children to visit, and the applicant did not leave the farm. The FARC did not locate him at the farm, but they did continue to contact his mother in Cali.

[12] The applicant then decided to flee to his aunt's home in the United States. Thus, in December 1998 he returned to his mother's house in Cali to gather the necessary documentation and money. Because he was still receiving frequent threats from the FARC, approximately two to three calls each month, the applicant hid in the house and left as little as possible.

[13] The applicant fled to the United States on November 2, 1999, with a visitor's visa. He deposed that his mother has continued to receive telephone calls threatening him harm. Furthermore, four of his former Conservative Party colleagues had been murdered by the FARC – two in 1998 and two in 2006.

[14] Before the Board, the applicant testified that one year after arriving in the US he tried to make a refugee claim using the services of a person he believed to be a lawyer, but who turned out

to be a fraud. By the time the applicant realized this, he testified that it was too late to file a claim for asylum in the US.

[15] As stated above, during his time in the US, the applicant entered into a relationship with the female applicant. They had a child in 2005, and they married in August 2007.

[16] The male applicant entered Canada on October 21, 2007 and claimed refugee protection.

Claim of the female applicant

[17] The female applicant is a citizen of Ecuador. Her claim is based on her fear of her ex-husband, Mike Norris, a US citizen who is originally from Egypt, and her belief that the Ecuadorian state cannot protect her from him.

[18] The female applicant entered the US on a visitor's visa in 1989. From the time that her visitor's visa expired, the female applicant lived in the US without status. She married Mr. Norris, her now ex-husband, in 1994 and they lived together in New York. From the moment of the birth of their daughter on November 5, 1996, the applicant's ex-husband continually tried to abscond with their child to Egypt and raise the child as a Muslim. He repeatedly threatened the female applicant, who numerous times had to contact US police.

[19] As a result of the threats, the female applicant fled to Ecuador with her two children (one from a previous relationship).

[20] In 1998, the female applicant's ex-husband found her in Ecuador and they briefly lived together again after her ex-husband convinced her that he wanted only to see their daughter. He then attempted to kidnap the child, in the course of which he also gagged, bound, and attempted to poison the female applicant. He was apprehended by Ecuadorian police, who detained him before allowing him to return to the US.

[21] The female applicant returned to the US with her two children in October of 2001. She moved to Florida, where she believed her ex-husband would not be able to locate her. She was wrong. The applicant deposed that she believes that her ex-husband was able to locate her because he had her identification information, including her social insurance number, and because he obtained her address from her friends and family members. In October of 2002 the ex-husband tried to locate the female applicant by telephoning her sister in Ecuador. Once he found her, he telephoned the applicant, her friends and her brother in New York, threatening to kill the applicant and abduct their child.

[22] In 2003, the applicant obtained a divorce from a court in Florida. The court found that shared custody would be detrimental to the child, and refused even to give visitation rights to the father.

[23] Since that time, the female applicant stated that her ex-husband has continually contacted her and threatened to take their child. This included a call to her workplace in Florida. She does not know how he obtained her work telephone number.

[24] Throughout her time in the US, the applicant lived without status. She stated that she could not be sponsored by her ex-husband for two reasons: (1) she learned that he in fact had a second wife and family in the US; and (2) their marriage was never happy. She further stated that she was not aware at first that she could claim asylum in the US on the basis of domestic abuse. When she did seek asylum on that ground, in 2001, her application was denied because of the delay.

[25] The female applicant stated that she did not believe that Ecuadorian authorities would protect her from her ex-husband because they treated him leniently when they detained him following his attempted abduction of their daughter in 1998.

Decision under review

[26] In a decision dated April 30, 2010, the Board dismissed both applicants' refugee claims because it found that neither applicants' claim was credible, nor was either claim well-founded:

> ¶9. The panel finds that the claimants are neither Convention refugees nor persons in need of protection for the reason that the panel does not find the material aspects of each of their respective stories to be credible or well-founded.

[27] As a result of this determination, the Board found that there was no nexus to any Convention ground under section 96 of the Act for either applicant. With regard to the male applicant, this was because the Board did not believe that he was a target of the FARC. With regard to the female applicant, this was because the Board did not believe that her fear of her ex-husband was well-founded. The Board therefore focused its analysis upon whether the applicants qualified for protection under section 97 of the Act.

Decision regarding the male applicant

[28] With regard to the male applicant, the Board found that his claim was not credible for the following reasons:

1. When asked at the hearing for what formed the basis of his fear of returning to Colombia, the Board stated that the male applicant referred to the 1997 incident in which he was kidnapped by the FARC. The Board held, however, that the real target in that kidnapping was his boss, and that because his boss paid the required ransom for his release there was no further reason to fear the FARC in that regard. Indeed, the applicant had received no further threats in relation to that incident.

2. The Board held that the applicant was inconsistent in how he described his role in the Conservative Party: in his oral testimony he referred to himself as a "leader" whereas in his Personal Information Form narrative he referred to himself as a "support worker and campaign organizer." The Board concluded at paragraph 15:

> . . . The panel believes that, on a balance of probabilities, he was embellishing his claim by attempting to magnify his role and prominence in the political activity. The panel draws a negative inference from this embellishment, which leads the panel to doubt, on a balance of probabilities, the overall truth of his story that he was targeted by the FARC for this involvement in the mayor's political campaign.

3. The Board held that it was unlikely that the applicant was a "leader" of the Conservative Party because he was not at the September 1997 rally where he stated that four party members were killed, nor did he mention that the mayor himself had been present. As a result of these doubts the panel stated at paragraph 16:

> . . . From these, the panel finds it hard to believe that this incident happened or, even if it did, that it supports the principal claimant's allegation that he was or is a target of this particular FARC group.

4. The Board held that the applicant's evidence regarding when he began receiving threats in relation to his political activities was also suspect. The applicant stated in his oral testimony that he began receiving the threats from the day of the political rally. The Board found it unlikely that the FARC would target the applicant, who had not been at the rally, and not the mayor.

5. The Board found it "strange" that the applicant received threatening letters as opposed to in-person visits from the FARC:

> ¶18. . . . If these indeed occurred, it is strange that the FARC did not simply go and confront him personally in Cali

> at his parents' house to demand to his face that he stop these political activities, rather than waste their time and days simply calling him and sending him threatening notes. This seemingly reticent or passive approach appears to be out of character with the National Documentation Package, which portrays the FARC as an aggressive and violent organization [citations omitted].

6. The Board drew a negative inference from the fact that the applicant had no documentation to corroborate his claims. The Board recognized that case law precludes basing a credibility finding on the absence of documentary evidence, but stated that where credibility is in doubt the Board is entitled to draw an adverse inference from the absence of documentary evidence. In this case, the Board doubted the applicant's explanation for the absence of any corroborating documents—namely, that his documents had been stolen by the fake lawyer in the US:

> ¶19. Furthermore, when the panel asked the principal claimant if he had those two condolence letters (death notes) or copies of these letters, which he said he received from the FARC after the September 1997 shooting incident, he said that he had lost them to an unscrupulous paralegal when he tried to file an asylum claim in the U.S.A. The panel, however, finds it hard to believe that he would not at least have taken the precaution of keeping copies of these in the event that he needed them in the future or the paralegal lost the originals. Neither did he have any denunciations filed against the FARC or news reports, as he did not complain to the police or report the problem with any news agency. Considering the other credibility issues discussed in this section, the panel takes a serious adverse inference from this utter lack of corroborating documentary evidence. . . .

7. The Board found that the fact that none of his family had been targeted by the FARC demonstrated that the applicant was not a target:

> ¶21. Furthermore, page 3 of his Personal Information Form (PIF) indicates that his father, his mother, two other daughters and a sister still live in Cali today, but they have not been harassed, confronted, or threatened with violence by the FARC out to take reprisal on them for his having escaped their clutches, if he truly were a target of the FARC. Of these, only the mother had received telephone calls asking for the principal claimant. The panel takes a strong adverse inference from this in that the FARC is known to be ruthless and aggressive against close family relatives of people they have targeted and who have eluded them, and yet these close

> relatives of the principal claimant have received no such attention from the FARC. Consequently, this leads the panel to believe, on a balance of probabilities, that the principal claimant was not or is not a target of the FARC [references omitted].

[29] The Board further found that even if the male applicant had once been a target of the FARC, any fear of the FARC was no longer well-founded for the following reasons:

1. The applicant testified that the FARC's demand was for him "not to speak ill of the guerrillas" and the applicant had complied with that demand. The panel concluded:

   > ¶20. Since this was the case, the panel believes, on a balance of probabilities, if he had truly been targeted by the FARC, that he no longer was or is such a target.

2. Approximately ten-and-a-half years had passed since the male applicant fled Colombia. Since then, not only has the applicant himself aged and changed in appearance, but also there have been significant changes in the capacity of the FARC to threaten him. The Board reviewed the national documentation package for Colombia and concluded at paragraph 23:

   > ¶23. In summary, the panel is satisfied that the FARC has moved away its bases of operations from urban areas to rural areas with headquarters in the mountains or jungles and no longer has the ability to track an individual from one area to another, due to surveillance by government security forces and their ability to interrupt communications.

[30] The Board concluded at paragraph 25:

> Consequently, based on the totality of the evidence adduced, including Counsel's submission, the panel is not persuaded to believe that the principal claimant (and his wife and children if they were to go with him) face persecution on a Convention ground or a risk to life, or of cruel and unusual treatment or punishment, or a danger of torture, should he be returned to Colombia.

Decision regarding the female applicant

[31] With regard to the female applicant, the Board found that her allegation of fear of her ex-husband should she return to Ecuador was not well-founded for the following reasons:

1. The Board doubted her subjective fear of her ex-husband, because she did not attempt to hide her contact information from him either when she was in Ecuador in 1998 nor when she returned to the US in 2001:

> ¶27. It is apparent that she took no pains to keep her phone number or address in Ecuador from Mr. Norris, who knew about them or got them from her friends and relatives who he had contacts with, so that he was able to communicate with her that led to their reconciliation and getting together again in 1998. From the panel's view, this is not evidence of the existence of her subjective fear of Mr. Norris.
>
> . . .
>
> ¶29. Despite her alleged fear of Mr. Norris, she and her daughters returned to the U.S.A. in 2001, heading for Florida in the hope that she could avoid Mr. Norris who then lived in New York. She said that he managed to track her down there, apparently through friends and relatives, phoning her at work one day. For one thing, the panel finds it hard to believe that she would return to the U.S.A., if she feared Mr. Norris would be able to find her there even if she settled in another city. And then, the panel notes that she did not return to Ecuador or to another place in this vast country of the U.S.A. to get away from him. It is also apparent to the panel that she did not limit confiding her contact numbers and addresses only to relatives and friends whom she could rely on to be discreet about sharing this information with Mr. Norris. It is reasonable to expect that, since she had a fear of being tracked down by Mr. Norris, she would take reasonable precautions to protect this information about her location from the man. The panel also finds it contradictory to her claim of fear of Mr. Norris that she did not return to Quito, Ecuador, the metro area of which has a fair sized population of about 2 million, in which she can blend with reasonable precautions on keeping her phone numbers and address confidential or only with relatives she can rely on to be discreet about this information from Mr. Norris. . . .

2. The Board found that her evidence regarding the way that the Ecuadorian police responded to her ex-husbands attempt to kidnap their child from Ecuador demonstrated police protection:

> ¶28. About that time in 1998 in Ecuador, her maid had called Ecuadorian police during an altercation between her and Mr. Norris that appeared to have turned violent, and the police actually arrested Mr. Norris, as he was about to board a plane back to the U.S.A., and detained him for one month before they finally released him and allowed him to return to the U.S.A. Mr. Norris did not go back to Ecuador after that, no doubt due to his concern of getting rearrested by the police. From the panel's view, this indicates that in that year, Ecuadorian police extended protection to women on matters of domestic violence.

3. The Board found that state protection for victims of domestic violence has improved in Ecuador in the twelve years since the applicant fled, and that state protection would be available to the female applicant should she return to Ecuador.

[32] The Board concluded at paragraph 31:

> Taking all the above into account, the panel does not believe, on a balance of probabilities, that the female claimant has a well-founded fear of persecution or harm from Mr. Norris. Furthermore, the panel does not believe, on a balance of probabilities, the existence of her subjective fear.

Considerations regarding both applicants

[33] In addition to the above reasons, the Board found that the existence of a subjective fear of persecution was undermined for both applicants because neither had claimed protection in the US. The Board considered both applicants' explanations for their failure to properly seek asylum, but

concluded that neither demonstrated that they had gone to any serious efforts to make their claims. The Board concluded as follows:

> ¶34. The panel finds this inaction or lack of action on their part troubling and unreasonable in that, if they were truly in fear of being returned to their respective countries of origin, it would have been reasonable to expect that they would have taken steps and actions that reflect the urgency of their situation, that is, to apply for refugee protection at the first opportunity in a safe country, which the U.S.A. is known to be. If they did not succeed there, they would then have had a second chance with Canada.

[34] The Board cited a number of authorities for the proposition that "it is appropriate to inquire into the circumstances of any protracted postponement of or inaction on a refugee claim as a means of evaluating the sincerity of the claimant's need for protection," namely James C. Hathaway, *The Law of Refugee Status* (Toronto, Butterworths, 1991); *Leon v. Canada (Minister of Citizenship and Immigration)*, IMM-3650-97 (F.C.T.D.), Muldoon, October 23, 1998; *Juzbasevs v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 262, at paragraph 15; and *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1595.

[35] At paragraphs 39-40, the Board concluded that the applicants were not persons in need of protection:

> ¶39. Based on the totality of the foregoing evidence adduced, including Counsel's submission, the panel finds that the claimants do not, on a balance of probabilities, face a risk of harm, or a risk to life, if they were to return to their respective countries of origin today.
>
> ¶40. The panel also finds that the principal claimant can more than likely join his wife in Ecuador, as that country facilitates applications to permanent residency to persons married to nationals of Ecuador [references omitted].

LEGISLATION

[36] Section 96 of the Act, grants protection to Convention refugees:

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.

[37] Section 97 of the Act grants protection to persons whose removal from Canada would subject them personally to a risk to their life, or of cruel and unusual punishment, or to a danger of torture:

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	a) soit au risque, s'il y a des

substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or	motifs sérieux de le croire, 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 (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, (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, (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and (iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, (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) 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) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

ISSUES

[38] The applicant submits that the following four issues arise:

1. Did the Board err in its determination that the male applicant was not credible?;

2. Did the Board err in its determination that the male applicant's claim is no longer well-founded?;

3. Did the Board err in its determination that the female applicant does not have a subjective fear?; and

4. Did the Board err in its implied finding that there is adequate state protection available to the female applicant?

STANDARD OF REVIEW

[39] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of (deference) to be accorded with regard to a particular category of question": see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at para. 53.

[40] Questions of credibility and state protection concern determinations of fact and mixed fact and law. It is clear that as a result of *Dunsmuir* and *Khosa* that such issues are to be reviewed on a standard of reasonableness.

[41] The Board's determinations of credibility are to be reviewed on a standard of reasonableness: *Wu v. Canada (Citizenship and Immigration)*, 2009 FC 929, at para. 17; *Aguirre v. Canada (Minister of Citizenship & Immigration)*, 2008 FC 571 at para. 14.

[42] The standard of review for determinations of state protection is also reasonableness: see, for example, my decisions in *Corzas Monjaras v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 771 at para. 15; and *Rodriguez Perez v. Canada (Minister of Citizenship and Immigration)* 2009 FC 1029 at para. 25.

[43] In reviewing the Board's decision using a standard of reasonableness, the Court will consider “the existence of justification, transparency and intelligibility within the decision-making process” and “whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *Dunsmuir*, supra, at paragraph 47; *Khosa*, supra, at para. 59.

ANALYSIS

Issue 1: Did the Board err in its determination that the male applicant was not credible?

[44] The applicant has identified the following errors with regard to the Board’s consideration of the evidence regarding the male applicant’s claim:

1. The Board misstated the male applicant’s testimony regarding the basis for his fear of returning to Colombia. In its reasons, the Board states that when asked about this, the male applicant responded that the basis was the June 1997 kidnapping and ransom incident. This does not accurately represent the questioning. Instead, the applicant described the June 1997 kidnapping incident in response to the Board’s request that the applicant “tell me about your first significant encounter with the FARC”. When asked by his counsel why he continued to fear the FARC, however, the applicant testified “Because of my political ideas and because I’m against all of their ideology, their ideas.” That is, the applicant’s evidence was that the basis for his fear of the FARC is his political activities and not the June 1997 kidnapping. The male applicant’s counsel clarified this during his questioning at the hearing:

> Q: Okay. So you are saying that you’ve been targeted by the FARC because of your political ideas as a member of the Conservative Party not because you were kidnapped?

A: Yes. (Certified Tribunal Record (CTR) at 701)

2. The Board quibbled with the applicant's apparently contradictory description of himself as a "leader" in his oral testimony as opposed to a "support worker and campaign organizer" in his written statements. This is also a misstatement of applicant's oral evidence. Specifically, when the applicant used the word "leader" in his oral testimony, it was in the following statement, made in response to the Board's question regarding his subsequent encounters with the FARC:

> I was a leader in the campaigns, in the political campaign of the Conservative Party. . . . (CTR at 693)

3. Far from misrepresenting his role, when the male applicant was asked by his counsel to describe what he did as a member of the Conservative Party, he answered as follows:

> I would gather people, convoke people for the political campaigns. I would drive cars for the political leaders. (CTR at 702)

4. The Board doubted the applicant's recollection of the September 1997 political gathering at which four Conservative Party leaders were shot and killed by the FARC, because the Board felt that (1) the applicant should have been there if he was a party leader, and (2) the mayoral candidate should have been there. The applicant submits that there was no evidence before the Board regarding why the applicant was not at the meeting, nor was there any evidence regarding whether the mayor had attended. Indeed, the mayor may have been at the meeting. The applicant was not asked whether the mayor was there, why the applicant was not, nor whether the meeting was a particularly important one. The applicant submits that the Board's speculation as to these factors is unsupported by the evidence.

5. The Board doubted that the applicant was targeted because the Board found it more likely that the FARC would have targeted the mayor himself. The applicant submits that this doubt entirely overlooks the applicant's testimony that the FARC had a policy of targeting those who helped political leaders, as well as the leaders themselves, and that the FARC had killed many of his colleagues in the Conservative Party.
6. The Board found it "strange" that the FARC did not threaten the applicant in-person but rather send threatening letters. The applicant notes a number of problems with the Board's doubts in this regard:
    i. at the time, the applicant was in Medellin, not Cali as the Board stated;
    ii. there was no evidence that the FARC knew where the applicant was during the period that he was in hiding, because the FARC contacted his relatives who always said that he was not there; and
    iii. the Board cannot speculate as to the FARC's motives for choosing to use threatening letters and phone calls versus in-person threats.
7. The Board states that it can draw an adverse inference from the lack of corroborating evidence because it has other credibility concerns. The applicant submits that none of the other credibility concerns are valid and, therefore, the Board was not entitled to draw an adverse inference from the lack of documentary corroboration.
8. Furthermore, although the Board stated that there was an "utter lack of corroborating documentary evidence," the applicant had in fact submitted the following corroborating documents to the Board:
    i. His Conservative Party membership card;

ii. A letter from the First Vice-president of the Senate, stating that the male applicant was affiliated with the Conservative Party from 1990 to 1998, was known as “an honest, hard-working person and of good customs,” and did “social and community work”;

iii. A letter from the Second Vice-president of the Santiago de Cali Council attesting to the same facts; and

iv. An affidavit from the male applicant’s mother, sworn in 2008, confirming that the male applicant fled Colombia approximately eight years prior to her affidavit “due to threats made by telephone which I witnessed because I received them on the telephone number of my house.”

9. Although the Board found that “FARC is known to be ruthless and aggressive against close family relatives of people they have targeted and who have eluded them,” the Board made no reference to any specific document within the National Documentation Package to support that claim. The applicant submits that this prevents the Court from evaluating the evidence upon which the Board based this finding.

10. There was also no evidence before the Board regarding whether the FARC knows of the existence or whereabouts of the male applicant’s father, who abandoned the applicant’s mother before the applicant was born, or his sister or daughters in Cali. The only evidence was that the FARC knew of the applicant’s mother, and, as corroborated in her affidavit, the FARC did contact her.

[45] In addition to finding that the male applicant was not credible based upon his testimony regarding his experiences in Colombia the Board also found that the fact that the male applicant made no serious attempt to apply for asylum in the US suggested that he does not have a subjective fear of persecution should he return. A finding regarding a subjective fear of persecution is also a credibility determination.

[46] The applicant submits that the Board overlooked the applicant's evidence regarding his attempt to claim asylum through an ultimately fraudulent lawyer, and his fear of deportation based upon his lack of understanding of the asylum process.

[47] In *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1595, referenced by the Board, Justice Mosley considered the effect of a delay in making a refugee claim:

> ¶17. The applicant submits that the Board erred in concluding that her evidence as to why she did not make a claim in the United States was vague and asserts that she provided plausible explanations for the delay. It is well settled that delay in making a refugee claim is an important factor which the Board may consider in weighing a claim for refugee protection: *Heer v. Canada (Minister of Employment & Immigration)*, [1988] F.C.J. No. 330 (Fed. C.A.). In this case, a delay of over four years suggests a lack of a subjective fear of persecution and it was open to the Board to reject the applicant's explanations. The applicant, in effect, is asking the Court to make its own assessment of her reasons and substitute its opinion for that of the Board. Unless the finding was patently unreasonable, which I do not find, there is no basis for the Court's intervention.

[48] Whether a delay in claiming refugee protection will on its own be sufficient for finding a lack of subjective fear of persecution and disposing of a refugee claim depends upon the facts of the case.

[49] In this case, although the male applicant lived in the US for approximately eight years, the Board recognized that his window to make an asylum claim was one year. The Board considered the applicant's evidence regarding why this was not the case:

> ¶32. . . . The panel notes that he did not take any action soon after arrival and prior to the end of the one-year deadline, as he said that he did not know he could make an asylum claim, and he was "fearful of being deported" as he was an illegal.

[50] Although the Board found that the male applicant's lack of action "troubling and unreasonable" because it is reasonable to assume that a refugee who is truly in fear would seek protection at the first opportunity, the Board did not address why this remained a reasonable assumption in the face of the male applicant's testimony that he did attempt to make such a claim. The Court finds that the Board's errors regarding its assessment of the male applicant's credibility also taint the Board's conclusion that the male applicant had no subjective fear of returning to Colombia.

[51] The Board's findings of credibility are entitled to considerable deference by the Court. As stated by the Federal Court of Appeal in *Aguebor v. Canada (M.E.I.)*, 160 N.R. 315, at paragraph 3, the Court should only interfere in the credibility findings of the Board where those findings "could not reasonably have been drawn":

> ¶3. There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony: who is in a better position than the Refugee Division to gauge the credibility of an account and to draw the necessary inferences? As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review. … In our opinion, *Giron* in no way reduces the burden that rests on an appellant, of showing that the inferences drawn by the Refugee Division could not reasonably

> have been drawn. In this case, the appellant has not discharged this burden.

[52] In this case, however, the Court agrees with the applicant that the Board committed errors in its consideration of the male applicant's evidence. The Board's credibility finding is based upon significant misstatements of the evidence, as detailed above.

[53] Nevertheless, this conclusion does not end the Court's inquiry because the Board found that even if the applicant had been credible, he would still not require protection because the fear would no longer be well-founded.

Issue 2: Did the Board err in its determination that the male applicant's claim is no longer well-founded?

[54] The Board had two reasons for concluding that any fear that the male applicant had of the FARC as a result of the threats received in 1997 and 1998 were no longer well-founded at the time that he made his refugee claim. First, the Board found that the male applicant had complied with the FARC's demand of him—namely, that he "not speak ill of the guerrillas." The Board therefore found that because the applicant had complied, the FARC would no longer target the applicant:

> ¶20. Since this was the case, the panel believes, on a balance of probabilities, if he had truly been targeted by the FARC, that he no longer was or is such a target.

[55] This finding was reasonably open to the Board based on the evidence.

[56] The second reason why the Board concluded the applicant did not have an objective fear of persecution was that the Board found that changes in the applicant's personal circumstances and

physical appearance due to aging in the 10 and a half years since the applicant left Columbia and in the circumstances of the FARC organization and the capacities of the Colombian government meant that the male applicant would be able to return to Colombia and evade any FARC attempts to locate him. With regard to changes in the FARC's capacities, the Board stated as follows:

> ¶23. In summary, the panel is satisfied that the FARC has moved away its bases of operations from urban areas to rural areas with headquarters in the mountains or jungles and no longer has the ability to track an individual from one area to another, due to surveillance by government security forces and their ability to interrupt communications.

[57] The applicant submits that the Board failed to consider relevant evidence that contradicted the Board's findings on these points. In particular, the applicant contends that the Board failed to address the following concerns raised by the applicant:

1. The applicant's testimony that the FARC had his personal identity information, including his identity card number, from the June 1997 kidnapping, and so could identify him once he used the card—for example, to open a bank account, get a job, or at roadblocks.
2. In addition to the portions of the documentary evidence cited by the Board, the National Documentation Package also included reports stating that FARC continues to be active in Colombia and to target community leaders: for example, the Human Rights Watch Annual Report for Colombia, 2009, which was considered in part by the Board, also states:

> Human rights defenders, journalists, community leaders, trade unionists, indigenous and Afro-Colombia leaders, displaced persons' leaders, and paramilitaries' victims seeking land restitution or justice are frequently the targets of threats and violence by armed actors.

3. The evidence demonstrates that contrary to the Board's conclusion, in addition to remaining active, the FARC also continues to have the ability to track individuals. For example, the United States Department of States Report on Colombia, 2009, which is also in the National Documentation Package, states that the FARC and other guerrilla groups

> routinely interfered with the right to privacy. These [guerrilla] groups forcibly entered private homes, monitored private communications, and engaged in forced displacement and conscription. (CTR at 629)

4. The applicant submitted a newspaper article from 2004 in which a professor of Latin American politics at Bradford University is quoted as saying that "there is a very strong vendetta culture in Colombia when someone is targeted. Even after five or six years, some people remain targets." The applicant submits that although the newspaper article is from 2004, there is no more recent evidence that contradicts the statements made in it.

[58] The Court finds that the Board's conclusion that the applicant is no longer a target of the FARC because he has acceded to the FARC's demands of him, and its conclusion that the passage of time (10 and a half years) has diminished the FARC's interest in targeting the applicant, is reasonable based on the evidence.

Conclusion regarding the male applicant

[59] The Court finds that the Board's conclusion regarding the male applicant's credibility and his subjective fear of persecution in Colombia were not justified based upon a proper reading of the evidence before the Board. However, these errors do not justify granting this judicial review

application because the Board had an independent basis for determining that the applicant has no objective basis for fearing the FARC – namely, that he is no longer a target of the FARC because he has acceded to their demands of him and a significant amount of time has passed.

Issue 3: Did the Board err in its determination that the female applicant does not have a subjective fear?

[60] The Board provided a number of reasons for its conclusion that the female applicant did not have a subjective fear of persecution should she be returned to Ecuador. First, the Board doubted the female applicant's subjective fear of her ex-husband. The Board found that she "reconciled" with her ex-husband in 1998 prior to his attempted abduction of their daughter. The Board also found, at paragraph 27, that the female applicant had not troubled to hide her contact information in Ecuador from her ex-husband.

[61] Second, the Board found that the fact that she returned to the US in 2001 demonstrated that she did not fear that her ex-husband could locate her. Related to this, the Board found that had she truly feared her ex-husband the female applicant would have returned to Ecuador, where she had previously received police attention.

[62] Finally, the Board found that the female applicant's lack of action in seeking asylum in the US was evidence of her lack of subjective fear of persecution.

[63] The applicant maintains that the Board's conclusion was unreasonable because it misstates the evidence. In particular, the applicant submits that the Board made the following errors with

respect to its conclusion that the female applicant does not have a subjective fear of persecution in Ecuador:

1. The Board inaccurately represented the evidence regarding the female applicant's experience with her ex-husband when he found her in Ecuador in 1998. In particular, the incident differed from the Board's description in the following ways:
    i. The female applicant did not "reconcile" with her ex-husband but, rather, was duped into allowing him to visit to see their daughter because she believed his motives to be pure; and
    ii. While the Board suggests that the Ecuadorian police properly dealt with the incident, in fact the female applicant believes that the Ecuadorian police utterly failed to protect her: they released from custody an attacker who had gagged and bound her, attempted to poison her, and attempted to abduct her child. The female applicant testified that she believed that her ex-husband obtained his release through corruption and bribery. She testified that she has lost her faith in the Ecuadorian criminal justice system.
2. The Board misstated the evidence regarding the ways in which the female applicant's ex-husband could locate her. In particular, he had the contact information of her family and friends in Ecuador from before their separation, and he had her social security number in the US.
3. The Board improperly considered the female applicant's motives for returning to the US in 2001. In particular, she had two US-born children, and specifically moved to Florida instead of New York in order to avoid her ex-husband.

4. The Board was unreasonable in expecting the female applicant to move within the US or to return to Ecuador. She could not move within the US because she has no status there. She could not return to Ecuador because she does not believe that there is adequate state protection available to her there.
5. In concluding that her lack of any serious action to legalize her status in the US was evidence of a lack of a subjective fear, the Board overlooked the applicant's testimony that she had applied for permanent residency on the grounds of protection from domestic violence but had been refused. Moreover, the applicant submits that she could not apply for refugee protection in the US because her agent of persecution is a US citizen.

[64] As stated above, much deference is due to the Board regarding its credibility determinations, of which the existence of a subjective fear of persecution forms a part. In this case, the Board's conclusions were reasonably open to it based upon the evidence before it. The Board considered the female applicant's testimony and evidence and concluded that she did not have a subjective fear of persecution. Although the applicant has objected to some of the ways in which the Board characterized this evidence, it is not the role of this Court to re-weigh the evidence that was before the Board.

Issue 4: Did the Board err in its implied finding that there is adequate state protection available to the female applicant?

[65] Although it does not explicitly make a finding regarding the availability of state protection to the female applicant in Ecuador, the Board makes reference to state protection at two points in its decision. First, at paragraph 28 the Board states that the fact that Ecuadorian police detained her ex-

husband before releasing him and allowing him to return to the US, "indicates that in that year, Ecuadorian police extended protection to women on matters of domestic violence".

[66] Second, at paragraph 30 of its decision, the Board states:

> ¶30. Furthermore, her bad experience with Mr. Norris in Quito was in 1998; that is 12 years to this day. Since then, Ecuador, a democratic republic, apparently has progressed markedly in matters of domestic violence and women issues as indicated in a report of the UN Committee on the Elimination of Discrimination Against Women (CEDAW), dated 25 April 2008. Aside from an Ombudsman for women and family issues, special police stations to deal with violence against women have been set up with offices in key areas of the country. (References omitted.)

[67] The applicant further submits that the Board erred in finding that there is state protection available to the female applicant in Ecuador. The applicant submits that the Board failed to consider any of the documentary evidence that runs counter to its finding in this regard. The Board had before it evidence that there is corruption and other abuses within the security services and judicial system, widespread domestic and sexual violence combined with police and judicial reluctance to respond to it, and according to the US Department of State Report on Ecuador, 2009, a "national problem" with trafficking in persons, especially women and children.

[68] The Board has a duty to consider whether a person in a claimant's position would face a risk of persecution under section 97, even in the face of doubts regarding the claimant's subjective fear: see, for example, my decision in *Amare v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 228, at paragraphs 12 and 13. But the Board is generally presumed to have considered all of the evidence before it, although the reviewing Court may infer that it has not done so in cases where the Board fails to address material contradictory evidence: *Cepeda-Gutierrez v. Canada (Minister of*

Citizenship and Immigration), [1998] F.C.J. No. 1425 (F.C.A.)(QL), 157 F.T.R. 35, at paragraphs 16-17.

[69] In this case, the female applicant's persecuting agent is a US citizen who lives in the US. The Board reasonably found that the Ecuadorian state had provided the female applicant with adequate protection when it detained her persecutor in Ecuador for one month prior to his returning to the US, and would continue to provide adequate protection should he again return to Ecuador to harass her. The Board's conclusion was therefore reasonable, and this Court cannot interfere with its findings that the female applicant would receive adequate protection in Ecuador.

CONCLUSION

[70] For the reasons stated above, the Court concludes that it will not interfere with the Board's conclusions that neither the male applicant's nor the female applicant's claims for refugee protection should be granted. The Court recognizes the misunderstandings and omissions in the Board's reasons with regard to the evidence provided by the male applicant, but finds that these errors were not material to the Board's ultimate decision because the Board had a separate and independent basis for that decision.

CERTIFIED QUESTION

[71] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT'S JUDGMENT is that:

The application for judicial review is dismissed.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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