Federal Court  Cour fédérale

Date: 20121105

Docket: IMM-986-12

Citation: 2012 FC 1291

Ottawa, Ontario, November 5, 2012

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MARI ILDA AVILA RODRIGUEZ
JOSE ANICETO ELIAS COTLAME TEPOLE
(A.K.A. JOSE ANICETO E
COTLAME TEPOLE)
JOSE OMAR EDUARDO
COTLAME ZEPAHUA
(A.K.A. JOSE OMAR EDUAR
COTLAME ZEPAHUA)

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The principal Applicant, her common-law spouse and his son seek refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]. The principal Applicant fears persecution by paramilitaries in Colombia; her spouse and his son fear

persecution arising from criminality in Mexico. They seek judicial review of a decision by the Refugee Protection Division [RPD] of the Immigration and Refugee Board, which denied the claim of the principal Applicant on the basis of state protection and the claim of her spouse and his son as they lacked a section 96 of the *IRPA* nexus and was based on generalized risk in Mexico.

III. Judicial Review

[2] This is an application under subsection 72(1) of the *IRPA* for judicial review of the RPD's decision, dated January 11, 2012.

IV. Background

[3] The principal Applicant, Ms. Maria Ilda Avila Rodriguez, a citizen of Colombia, was born in 1960. Her spouse, Mr. Jose Aniceto Elias Cotlame Tepole, and his son, Jose Omar Eduardo Cotlame Zepahua, are citizens of Mexico, born in 1965 and 1991, respectively.

[4] The principal Applicant's brother and his business partner owned a restaurant in a town in Colombia and paid extortion fees to Revolutionary Armed Forces of Colombia [FARC] guerillas.

[5] In 1999, the principal Applicant claims paramilitaries attacked the town, destroying the restaurant. She alleges she and her family began to receive threatening telephone calls from paramilitaries accusing them of collaboration with FARC. She claims her brother complained to the judicial crown attorney and the Red Cross. They advised "that it was very difficult to do anything because nothing had happened to them yet" and "told him to take private security measures" (Principal Applicant's Personal Information Form [PIF] at para 14).

[6] The principal Applicant fled to the United States [U.S.] on April 26, 1999. She travelled to Colombia on October 2, 1999 and returned to the U.S. on May 16, 2000.

[7] The principal Applicant claims she remained in the U.S. waiting for her mother, sister, and son to obtain U.S. visas. She states that her family planned to seek protection in Canada, she worked in the US to support them, and she consulted a lawyer about U.S. asylum who advised her that her claim would be late and she would likely be deported.

[8] The principal Applicant's brother was accepted as a refugee in Canada in 2001.

[9] The principal Applicant alleges that the paramilitaries murdered three siblings of the business partner in 2001 and left a message saying: "this is what happens to accomplices of [FARC] guerillas" (Decision at para 9); two children of the murdered siblings disappeared in 2003. In 2008, paramilitaries looking for her and her brother threatened her mother and buyers of the family home. In 2009, paramilitaries killed the business partner's uncle for denouncing corruption; they also threatened her father and cousin's daughter while looking for her brother and the business partner.

[10] The principal Applicant's spouse travelled to the U.S. in 2001, returning to Mexico in 2005. In Mexico, he was mugged three times. He and his son then travelled to the U.S. on September 17, 2006.

[11] The principal Applicant and her spouse began a common-law relationship on March 3, 2008. They entered Canada with his son on September 30, 2009.

V. Decision under Review

[12] The RPD denied the principal Applicant's claim on three grounds: (i) she did not claim asylum in the U.S.; (ii) she re-availed to Colombia; and, (iii) she did not rebut the presumption of state protection. The claim of her spouse and his son failed because there was no nexus to a Convention ground and their risk was general.

[13] The RPD found that the principal Applicant lacked subjective fear of persecution because she did not claim asylum in the U.S. despite living there nine years. Refugees, it reasoned, "seek protection as soon as practical once out of the reach of the hands of their oppressors" (Decision at para 16). The RPD rejected her claim that she did not seek asylum because "it was too late" when she decided to file. If her fear was genuine, it held, she would have attempted to remedy her status.

[14] The RPD considered the principal Applicant's return to Colombia inconsistent with subjective fear of persecution citing *Caballero v Canada (Minister of Employment and Immigration)* (1993), 154 NR 345 (FCA). The RPD rejected the principal Applicant's claim that she returned to help her family relocate and protect itself as there was insufficient credible evidence to persuade the RPD that her family could not relocate without her.

[15] The RPD found the principal Applicant did not provide clear, convincing evidence to rebut the presumption of state protection. Citing *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] 4 FCR 636, the RPD reasoned that evidence of inadequate state protection must be reliable, probative, and show, on a balance of probabilities that state protection is inadequate. The RPD also cited *Canada (Minister of Employment and Immigration) v Villafranca*

(1992), 99 DLR (4th) 334 (FCA), which held that the presumption is not rebutted simply because a state's efforts is not always successful if it has effective control of its territory, has military, police, and civil authority, and makes serious efforts to protect citizens.

[16] The RPD, citing *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, held that claimants must approach the state for protection if it might be reasonably forthcoming. From *Camacho v Canada (Minister of Citizenship and Immigration)*, 2007 FC 830, it inferred that failing to do so is (absent a compelling explanation) often fatal if a state is a functioning democracy, willing and having means to protect citizens. The RPD referred to *Canada (Minister of Citizenship and Immigration) v Kadenko* (1996), 124 FTR 160, for the principle that this burden is "proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all courses of action open to him or her" (para 5).

[17] The RPD was not persuaded that police would not investigate, arrest, and prosecute the paramilitaries if the principal Applicant had reported them and there had been sufficient evidence. The RPD did not accept that the disappearance of the children in 2003, after their mother sought protection, showed police would not help; nor did the RPD accept that police assisted paramilitaries in finding victims. The principal Applicant did not provide credible evidence sufficient to demonstrate that the police were not acting on reports by her family.

[18] The RPD expressed scepticism as to whether the paramilitaries would be interested in the principal Applicant even though (i) her PIF narrative mostly addressed her brother's experience with the paramilitaries and (ii) years had passed since the paramilitaries targeted her brother.

Nonetheless, the RDP accepted that the paramilitaries called the principal Applicant's house in Bogota after attacking her brother's restaurant, that the paramilitaries were looking for the principal Applicant in 2008 at her former home, and that the paramilitaries were still asking about her and her brother because they believed he and she were FARC militants and because he and she did not cooperate with the paramilitaries.

[19] The RPD held that Colombia's serious efforts to address crime and corruption outweighed evidence of human rights abuses by paramilitaries. Acknowledging the inconsistencies among the sources, the RPD found that the objective evidence demonstrated that there was adequate, albeit imperfect, state protection in Colombia for victims of crime. In support, the RPD listed Colombian institutions created to combat extortion and kidnapping. The RPD held that documentary evidence established that these efforts have been effective.

[20] The RPD found that the principal Applicant's spouse and his son had no nexus to a Convention ground. Citing jurisprudence by this Court, the PRD held that fear of criminality did not provide a nexus.

[21] The RPD found that their risk was too generalized to make them persons in need of protection under section 97 of the *IRPA*. The RPD highlighted the principal Applicant's spouse's testimony "that everybody is at risk of harm" and that "everybody is at risk" of mugging and robbing in Mexico and testimony by his son that "members of the drug cartel[s] grab any person" (Decision at para 49-50). Noting that the evidence shows many Mexicans are at risk of criminal

violence, the RPD concluded that they faced "a generalized risk of robbery, drug activity and violence, which every person in Mexico faces" (at para 51).

VI. Issues

[22] (1) Was the RPD's finding that the principal Applicant had adequate and effective state protection in Colombia reasonable?

(2) Was the RPD's finding that the principal Applicant lacked subjective fear as she had not applied for refugee protection in the U.S. and had re-availed to Colombia reasonable?

(3) Was the RPD's finding that the principal Applicant's spouse and his son faced a generalized risk in Mexico reasonable?

VII. Relevant Legislative Provisions

[23] The following legislative provisions of the IRPA are relevant:

Convention refugee	**Définition de « réfugié »**
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	*b*) soit, si elle n'a pas de nationalité et se trouve hors

country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

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

Personne à protéger

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

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

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 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

(iii) la menace ou le risque ne résulte pas de sanctions légitimes —

in disregard of accepted international standards, and	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.

VIII. Position of the Parties

[24] The principal Applicant submits that the RPD was unreasonable in finding that she lacked subjective fear because she did not claim asylum in the U.S. and returned to Colombia. The principal Applicant concedes that the RPD may draw a negative inference from failure to claim refugee protection in a first safe country but contends this is not decisive. The principal Applicant refers to *Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1292, which required the RPD to "assess why there was delay in the application and why asylum was not sought at the first occasion" (para 13). The principal Applicant claims that both her concern for her family and her inability to trust anyone else to relocate them justify re-availment. The principal Applicant cites *Yusuf v Canada (Minister of Employment and Immigration)*, [1992] 1 FC 629, 133 NR 391 (FCA), which held that a refugee regime does not exclude "brave or simply stupid persons in favour of those who are more timid or more intelligent" (para 5).

[25] According to the principal Applicant, the finding that she had not rebutted the presumption of state protection was unreasonable. The principal Applicant argues that democratic government does not necessarily establish adequate state protection.

[26] The principal Applicant argues that the RPD made its state protection finding in a capricious and perverse manner. The principal Applicant claims that the RPD failed to discuss specific evidence showing Colombia cannot protect personally targeted individuals. The principal Applicant highlights a report by Dr. Marc Chernick, Visiting Associate Professor at Georgetown University's Centre for Latin American Studies, stating that Colombia, despite aggressive policies, cannot protect targeted individuals and a letter from Amnesty International to similar effect [Chernick report].

[27] While the principal Applicant concedes that the RPD need not refer to every piece of evidence, she submits that the circumstances obliged the RPD to discuss this particular evidence. The principal Applicant argues that the RPD failed to explain how it weighed evidence and why state initiatives against paramilitaries and guerillas establish state protection. The principal Applicant cites *Cetinkaya v Canada (Minister of Citizenship and Immigration)*, 2012 FC 8, which holds that "the more significant a piece of evidence is, the more likely it is that a failure to make reference to it will result in a finding that the Decision was unreasonable, especially when it appears to be a marked contradiction to a finding of the RPD" (para 66).

[28] The principal Applicant claims that the state protection analysis does not only ask if a state has a legislative and procedural framework to address abuses. Decision-makers must also assess the capacity and will to effectively implement that framework.

[29] The principal Applicant adds, citing *Gonsalves v Canada (Minister of Citizenship and Immigration)*, 2008 FC 844, that refugee claimants "need not risk their lives in seeking [state] protection merely to demonstrate its ineffectiveness" (para 16).

[30] In respect of the claim of her spouse and his son, the principal Applicant submits that the RPD did not conduct an individualized inquiry for two reasons. First, the RPD did not address whether his risk was personalized due to the time that he spent abroad from Mexico. Second, the RPD did not address whether the foreign nationality of his spouse, the principal Applicant, would personalize his risk.

[31] The principal Applicant also argues the RPD's interpretation of subsection 97(1) of the *IRPA* errs in law by focusing on the reasons of persecution. The principal Applicant relies on *Zacarias v Canada (Minister of Citizenship and Immigration)*, 2011 FC 62, which did not accept that a claimant specifically and repeatedly targeted by criminals had general risk. The principal Applicant submits that generalized risk only exists in extreme situations like disasters affecting all inhabitants of a country.

[32] The Respondent submits that a central aspect of the RPD's state protection finding was that the principal Applicant had not established that she had been directly or personally targeted by the paramilitaries. On this basis, according to the Respondent, the RPD concluded that state protection for the principal Applicant would be adequate. Citing *Castro Nino v Canada (Minister of Citizenship and Immigration)*, 2012 FC 506, the Respondent argues that the RDP may reasonably distinguish direct and indirect targets of violence in making a state protection finding. In this

context, a direct target would be a person who has been personally targeted by a violent group (in this case, the principal Applicant's brother) and a person who has been indirectly targeted because they have some relationship to a direct target.

[33] The Respondent argues that the RPD was not obliged to expressly address the documentary evidence adduced by the principal Applicant, in particular, the Chernick report. The Respondent argues that the Chernick report addresses the risks of individuals who were directly targeted by the paramilitaries. Since the RPD considered the principal Applicant to be only an indirect target of the paramilitaries, the Chernick report did not bear on her personal circumstances and the RDP was not obliged to analyze it. The Respondent cites *Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356 for the proposition that the RPD's obligation to discuss particular evidence is proportionate to how directly related that evidence is to the personal situation of an applicant.

[34] The Respondent contends that the RPD's analysis of the principal Applicant's delay in claiming refugee protection and her re-availment was reasonable. Citing *Ortiz Garcia v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1346, the Respondent argues that re-availment, in the absence of compelling circumstances, "typically suggests an absence of risk or a lack of subjective fear of persecution" (at para 7). It was also reasonable to find that the nine years the principal Applicant spent in the U.S. also detracted from her subjective fear. The Respondent cites *Garavito Olaya v Canada (Minister of Citizenship and Immigration)*, 2012 FC 913 for the propositions that (i) delay in filing a refugee protection claim "can be fatal to an applicant's claim"

absent a satisfactory explanation and (ii) the mere fact that the applicants had one relative in Canada is insufficient to overcome failure to apply earlier in another country (at paras 53-4).

[35] The Respondent submits that the risk of the principal Applicant's spouse and his son is generalized and outside the scope of paragraph 97(1)(b) of the *IRPA*. The Respondent argues that they did not show that they had been targeted or faced prospective risk beyond that of Mexicans generally. The Respondent refers to *Ayala v Canada (Minister of Citizenship and Immigration)*, 2012 FC 183, for the principle that "[w]here a portion, not necessarily a majority, of the population is subjected to threats of extortion and violence, the evidence must demonstrate that the Applicants have experienced something that is beyond what has been experienced by the population that is otherwise subjected to such threats" (para 8).

[36] In response to submissions that the risk in the present case is higher due to the fact that the principal Applicant's spouse and his son had been out of Mexico for a long time and that his wife is foreign, the Respondent submits that their testimony indicated that the basis of their fear was generalized risk.

IX. Analysis

[37] Whether the principal Applicant has adequate state protection in Colombia is a question of fact reviewable on a reasonableness standard (*Yang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 930. This standard also applies to the RPD's findings on subjective fear (*Fonnoll v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1461) and generalized risk (*Samuel v Canada (Minister of Citizenship and Immigration)*, 2012 FC 973).

[38] Under this standard, this Court may only intervene if the RPD's reasons are not justified, transparent or intelligible. To be reasonable, decisions must be in the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at para 47).

(1) Was the RPD's finding that the principal Applicant had adequate and effective state protection in Colombia reasonable?

[39] To rebut the presumption of state protection, applicants must bring clear, convincing, reliable, and probative evidence that demonstrates, on a balance of probabilities, that Colombia cannot provide adequate state protection (*Carrillo*, above, at para 30).

[40] A reasonable state protection assessment distinguishes willingness to protect from ability to protect. *Kovacs v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1003 has held that evidence of improvement and progress does not necessarily equate with effective protection and that "changes [must] have been effectively implemented in practice" (para 64 and 66).

[41] The principal Applicant submitted clear and convincing reports from reliable sources that appear to demonstrate, on a balance of probabilities, that Colombia cannot protect those who have been targeted by paramilitaries. A Canadian Council for Refugees [CCR] report states that paramilitaries can "track people down" throughout Colombia, that "citizens forced to return to their country are likely to be immediately noticed by the Colombian information system and civil society", and that there are "no reliable protection programs" for "ordinary citizens" (Tribunal Record [TR] at pp 600 and 611). A report by Dr. Chernick, describes the re-armament of paramilitaries and states unequivocally that, despite government policy, Colombia cannot protect

"individuals threatened with kidnapping, extortion or extra-judicial assassination" (TR, para 8 at p 551). Amnesty International [AI] claims that while "authorities are still attempting to paint a positive picture", successor groups to paramilitaries can "pursue victims throughout [Colombia and] may do so where the individual is of particular interest" and are "close[ly] coordinat[ed with] police and security forces" (TR at pp 574, 580 and 576). AI notes that the "vast majority of human rights abuses are characterized by complete impugnity" (TR at p 581).

[42] A Human Rights Watch report that was not included in the Tribunal Record but was part of the National Documentation Package [NDP] considered by the RPD also concludes that Colombia protects certain vulnerable groups but not "former [paramilitary] victims seeking to assert their rights. Nor does it provide protection or assistance to the many ordinary Colombians who are now being threatened or attacked by the successor groups" (Human Rights Watch: Paramilitaries' Heirs: The New Face of Violence in Colombia (New York: Human Rights Watch, 2010 at p 107). A Response to Information Request, COL103286.E, dated 23 February 2010, in the NDP also gives evidence of inadequate state protection against paramilitaries. Only one expert consulted in COL103286.E said protection was adequate; according to a subsequent interview with the CCR, he admitted he was "not a reliable source [on internal conflict, a point he made] clear to the IRB" (TR at p 613).

[43] It was not reasonable to find that Colombia's anti-criminality efforts outweigh evidence of human rights violations by paramilitaries. The RPD claims it weighed country conditions evidence in finding that adequate and effective state protection exists:

> [32] … The Board recognizes that there are some inconsistencies among several sources within the documentary evidence; however, the preponderance of the

> objective evidence regarding current country conditions suggests that, although not perfect, there is an adequate state protection in Colombia for victims of crime, that Colombia is making serious efforts to address the problem of criminality, and that the police are both willing and able to protect victims. The evidence also suggests that the state's efforts addressing the problem of criminality have been effective.

[44] The preponderance of evidence in the record and the NDP suggests otherwise; that Colombia cannot effectively protect those who are targets of paramilitaries.

[45] Some evidence shows that paramilitaries involved in kidnapping and extortion have been arrested, that kidnappings and extortion has decreased, and that there has been success in demobilizing paramilitaries. A lukewarm report by the United Nations High Commissioner for Refugees [UNHCR] states that government efforts against paramilitaries "have achieved positive results" but adds that Colombia "need[s] to redouble preventative mechanisms for population at risk" (TR at p 529).

[46] Evidence of improvement cited by the RPD does not fully embrace the particular situation of the principal Applicant. Evidence of demobilization and decreased extortion and kidnapping rates demonstrates success in curbing paramilitaries but does not specifically ask if persons who have been targeted by paramilitaries have effective protection. The materials noted in paragraphs 41 and 42 above, however, address this very issue; they strongly suggest Colombia cannot protect paramilitary targets.

[47] In the present case, the RPD's state protection finding is unreasonable as it did not weigh the documentary evidence with consideration to the principal Applicant's particular situation. Although there is some inconsistency in the evidence as to the success of the Colombian government in

demobilizing the paramilitaries, the evidence was consistent on the question that the RPD should have been asking in weighing the evidence: "Can Colombia protect a person who has been targeted by paramilitaries?"

[48] Instead, the RPD infers state protection for the principal Applicant from evidence of efforts to curb the paramilitaries generally. This strategy recalls *Cervenakova v Canada (Minister of Citizenship and Immigration)*, 2012 FC 525, where this Court found that the RPD was unreasonable in weighing the evidence by "search[ing] desperately for any sign of operational adequacy in a generally bleak situation and call[ing] this 'real progress' and 'some success' and 'serious action'" (para 74).

[49] The record indicates that the principal Applicant's family sought state protection. The RPD did not dispute the credibility of the principal Applicant's statement that her brother complained to the judicial crown attorney.

[50] The Respondent takes the position that the RPD made a reasonable finding that the principal Applicant had adequate and effective state protection as a person who was not a direct target of the paramilitaries:

> [4] The central aspect of the Board's state protection finding was that, since the Applicant had not established that she had been personally targeted by the paramilitaries, state protection would be adequate for her, as it was for her mother, son and sister. While the issue would be very different for someone who have been personally targeted, the Board's finding was based in the specific facts before it, and was not unreasonable. (Respondent's Further Memorandum of Argument on Judicial Review)

[51] With respect, this interpretation asks the Court to take a Procrustean approach to the RPD's reasons – stretching what the RPD actually said to fit the jurisprudence as stated in *Castro Nino*, above. In this case, the approach advanced by the Respondent would stretch the RDP's reasons to the point of distortion.

[52] Closer review of the RDP's decision shows that the RPD queried whether the principal Applicant had been targeted directly by the paramilitaries but ultimately determined that she had been personally targeted by the paramilitaries and that Colombia could offer her state protection in these circumstances:

> [29] . . . When asked why any paramilitary group would be interested in her when she mainly writes in her PIF narrative about the problems her brother had in Colombia, Maria indicated that she is her brother's family member and if she had not fled Colombia, she may have had problems. Maria went on to say that the paramilitary groups may not have been demobilized in Colombia. When asked why any paramilitary group would be interested in her today, many years after the incidents of 1999, Maria stated that the paramilitaries do not forget; they have lists of people that they look for; and they feel that she and her family members are militants of the guerillas. Maria explained that the paramilitaries do not forget; they have lists of people that they look for; and they feel that she and her family members are militants of the guerillas. Maria explained that the paramilitaries are still asking about her and her brother because she and her brother did not obey them or deal with them and the paramilitaries want more space on a political level [Emphasis added]. Maria testified that she does not believe police would help her if she were to return to Bogota, Colombia and had problems with the paramilitaries because Julio's mother sought the help of police for years and his family members have disappeared. Maria went on to indicate that she thinks police make it easier for paramilitaries to find their victims.
>
> [30] I find that Maria has failed to rebut the presumption of state protection with clear and convincing evidence. I am not persuaded that police would not investigate all of Maria's allegations if she was to report them. I am also not persuaded that police would not arrest and prosecute all of Maria's assailants [Emphasis added] if there was sufficient evidence. (Decision, above)

[53] The foregoing demonstrates that the RPD found that (i) the paramilitary groups were the principal Applicant's "assailants" and, (ii) notwithstanding this, that the principal Applicant had effective and adequate protection.

[54] The Respondent's argument relies on a misinterpretation of the RPD's reasons. The RPD's finding that Colombia could provide adequate and effective state protection to the principal Applicant even though she had been personally targeted by the paramilitaries is inconsistent with the interpretation advanced by the Respondent – that state protection was available because the principal Applicant was not an indirect target.

[55] The Respondent asks this Court to take the latter interpretation because the RPD asked why the principal Applicant believed the paramilitaries were interested in her when her PIF mostly discussed her brother's problems. The RPD, however, did not dispute the principal Applicant's evidence of personal targeting and ultimately determined that she had adequate and effective state protection even though she had been personally targeted. Consequently, the reasons of the RPD cannot support this inference and the Respondent's argument on this ground fails.

[56] The undersigned member of this Court recognizes that "[r]easons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis" (*NLNU v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 at para 16). In this case, however, not only did the RPD fail to make a finding on the Respondent's argument – it also came to a finding that is essentially inconsistent with the notion that the principal Applicant was not a direct target.

(2) Was the RPD's finding that the principal Applicant lacked subjective fear as she had not applied for refugee protection in the U.S. and had re-availed to Colombia reasonable?

[57] Delay in claiming refugee protection is not itself a "decisive factor" but is something decision-makers may "take into account in assessing both the statements and the actions and deeds of a claimant" (*Huerta v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 271 (QL/Lexis) (FCA) at para 4). A decision-maker must "consider the explanations offered by the respondent for the delay in filing a refugee claim" (*Ruiz v Canada (Minister of Citizenship and Immigration)*, 2012 FC 258 at para 57).

[58] Decision-makers may consider re-availment in assessing fear of persecution but must consider an explanation that a claimant who re-availed offers (*Hernandez v Canada (Minister of Citizenship and Immigration)*, 2012 FC 197 at para 21).

[59] The RPD rejected the principal Applicant's claim that she did not seek asylum in the U.S. as it was too late to apply by the time she decided to claim. The RPD reasoned that if she "was genuinely fearful of returning to Colombia, she would have made an attempt to normalize her status" (at para 18). In respect of her claim that she returned to Colombia to relocate her family, the RPD found that "[i]nsufficient credible evidence was presented to indicate that Maria's family members could not have been relocated in Colombia without Maria returning" (Decision at para 21).

[60] In *Shanmugarajah v Canada (Ministry of Employment and Immigration)*, [1992] FCJ No 583 (QL/Lexis), the Federal Court of Appeal stated that "it is almost always foolhardy for a Board in a refugee case, where there is no general issue as to credibility, to make the assertion that the

claimants had no subjective element in their fear". This Court has arrived at a similar conclusion in *Camargo v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1434 and *Sukhu v Canada (Minister of Citizenship and Immigration)*, 2008 FC 427.

[61] While failure to claim asylum in the U.S., despite living there for nine years, is troubling, the RPD did not dispute the principal Applicant's general credibility. Consequently, this Court presumes the principal Applicant's testimony was credible (*Sukhu*, above, at para 26).

[62] Given that the RPD did not make a general negative credibility finding, its decision that the principal Applicant lacked subjective fear is not reasonable. In *Sukhu*, above, Justice Yves de Montigny described the cognitive dissonance arising if decision-makers accept testimony as to persecution but simultaneously find an applicant lacks subjective fear:

> [27] If the Board member wanted to impugn the credibility of the applicants, he had to say so explicitly and to provide an explanation. In the absence of such a finding, it is difficult to understand why the Board member came to the conclusion that the applicants' fears were not subjectively well founded. If he accepts that the female applicant has been twice sexually assaulted, how could she not have a subjective fear to return to the location of her aggressors, in a country where the authorities are unwilling and/or incapable to protect her? …

[63] The RPD did not dispute the principal Applicant's credibility as to whether paramilitaries had attacked and continued to threaten her family; thus, it is "difficult to understand" how it found she lacked subjective fear (*Sukhu*, above, at para 27).

(3) Was the RPD's finding that the principal Applicant's spouse and his son faced a generalized risk in Mexico reasonable?

[64] To be a person in need of protection under section 97 of the *IRPA*, the principal Applicant's spouse and his son must show, on a balance of probabilities, that their removal to Mexico would subject them personally, in every part of Mexico, to a risk to their lives or cruel and unusual treatment that is not faced generally by other individuals in or from Mexico.

[65] The RPD was reasonable in finding that the principal Applicant's spouse and his son faced a generalized risk in Mexico. At the hearing, the principal Applicant's spouse and his son alleged a fear of criminality in Mexico that both conceded was felt by everyone in the country (TR at pp 806 and 815). *Prophète v Canada (Minister of Citizenship & Immigration)*, 2008 FC 331, aff'd 2009 FCA 31, has held that risk of criminal violence in a country where criminal violence is highly prevalent is general rather than personal, even if a claimant is a member of a sub-group that is more vulnerable to victimization (para 23).

[66] It is not unreasonable to consider Mexicans who have lived abroad or who have non-Mexican spouses to be sub-groups described in *Prophète*, above. The RPD did not expressly conclude that the principal Applicant's spouse and his son were part of a sub-group. Deference, however, requires the Court to pay "'respectful attention to the reasons offered or which could have been offered in support of a decision'" [emphasis in original] (*Public Service Alliance of Canada v Canada Post Corp*, 2011 SCC 57, [2011] 3 SCR 572, aff'ing the dissenting reasons of Justice John Maxwell Evans, 2010 FCA 56 at para 164, citing Professor Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy", in M Taggart, ed, The Province of Administrative Law (Oxford: Hart Publishing, 1997) 279 at p 286).

[67] The circumstances of the principal Applicant's spouse and his son are distinguishable from those in *Zacarias*, above, where the claimant's risk was greater than that of the general populace because he was subject to individual and ongoing targeting by a criminal gang. The evidence does not demonstrate that the principal Applicant's spouse and his son are subject to individual and ongoing threat of criminal violence in Mexico.

X. Conclusion

[68] For all of the above reasons, the principal Applicant's application for judicial review is granted and the matter is returned for a hearing anew (*de novo*) before a differently constituted panel of the tribunal; the principal Applicant's spouse and his son's application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that

1. The principal Applicant's application for judicial review be granted and the matter be returned for a hearing anew (*de novo*) before a differently constituted panel of the tribunal.
2. The principal Applicant's spouse and his son's application for judicial review be dismissed.
3. No question for certification.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-986-12
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PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	October 31, 2012
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
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