Federal Court Cour fédérale

Date: 20140728

Docket: IMM-6360-13

Citation: 2014 FC 750

Ottawa, Ontario, July 28, 2014

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ROCIO MORA GONZALEZ

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act] for judicial review of the decision of the Refugee Protection Division of the Immigration and Refugee Board [RPD or the Board], dated August 29, 2013 [Decision], which refused the application of the Applicant and her two children to be deemed Convention

refugees or a persons in need of protection under sections 96 and 97 of the Act. The Applicant's children were initially applicants in this proceeding as well, but discontinued the application and went to the United States on November 7, 2013.

BACKGROUND

[2] The Applicant is a citizen of Colombia who fled that country along with her two children in February 2012 due to a fear of the Colombian armed revolutionary group, the FARC (or Revolutionary Armed Forces of Colombia).

[3] The Applicant was a primary school teacher in Bogota and provided teacher instruction to women in Ciudad Bolivar on the weekends. Ciudad Bolivar is a poverty-stricken area where the Applicant had done "social work involving teaching and collection of basic necessities" for many years. In late 2010, one of her adult students, Teresa, began to ask her for donations to support local causes, and became offended and aggressive when she offered too little. It turned out Teresa was affiliated with the FARC. She reminded the Applicant that she knew her house and her family.

[4] Out of fear, the Applicant discontinued her weekend work in Ciudad Bolivar. Nevertheless, in February 2011, she was approached at her apartment building in the north of Bogota by a man who pointed across the street to Teresa. He demanded a donation of two million pesos within 20 days, to help "the boys of the Ciudad Bolivar to collaborate with the cause of the FARC," and warned her to keep silent about the demand.

[5] After this incident, the Applicant took a leave of absence from her job and went to the United States. During her absence, there were suspicious calls concerning her apartment, asking if it was left furnished and was available for rent. Her mother also received threatening calls on the Applicant's cell phone, inquiring when she was going to pay her "account."

[6] The Applicant returned to Colombia in June 2011 because her leave of absence had ended. She decided to sell her apartment. She and her children stayed at her mother's apartment in Bogota, and sometimes at her mother's house two hours away in Fusagasuga.

[7] On February 1, 2012, two women came looking for her at a school where she had previously taught. They left a package for her, including a "condolence" card signed by the FARC, and a message that she should remember her debts to the boys of Ciudad Bolivar.

[8] On February 16, 2012, she received a call at her mother's apartment saying that if she was not going to pay the money, she must help to recruit people for the FARC, which would be easy for her as a teacher. Otherwise, the caller said, they would harm her children or leave them as orphans. They told her that wherever she went they would find her, and warned her again to stay silent.

[9] The Applicant says that, based on advice from her father (a retired army officer) and others that she should not approach the authorities, she decided her only option was to leave the country. She says she was afraid that the FARC had infiltrated the local authorities. Also, in October 2011, when her son was harassed by some local boys with a bad reputation, the police

had failed to follow up after she reported the incident. The Applicant and her children left Colombia on February 21, 2012, and arrived in Canada via the United States on February 27, 2012. They made their refugee claim upon their arrival.

[10] The Applicant says the FARC continues to look for her. On April 9, 2013, her birthday, her mother received a call at her apartment in Bogota stating that the caller remembered the Applicant's debt and the family would have to pay it. The Applicant says that both of her parents and her siblings in Colombia have moved and changed phone numbers because of what has happened to her.

DECISION UNDER REVIEW

[11] The Board found the Applicant to be credible, as there were no relevant inconsistencies in her testimony or contradictions between her testimony and other evidence before the Board that were not satisfactorily explained. However, the Board found that the Applicant had failed to rebut the presumption of state protection, and was therefore neither a Convention refugee nor a person in need of protection.

[12] The Board observed that the presumption that states are capable of protecting their citizens, except where the state is in complete breakdown, lies at the centre of the state protection analysis. This presumption "underscores the principle that international protection comes into play only when a refugee claimant has no other recourse available." Citing *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at 724 [*Ward*], the Board found that "in order to rebut the

presumption of state protection, a claimant must provide clear and convincing evidence of the state's inability to protect its citizens." Furthermore, "[w]here a state is in effective control of its territory, has military, police and civil authority in place and makes serious efforts to protect its citizens, the mere fact that the state's efforts are not always successful will not rebut the presumption of state protection."

[13] The Board observed that in a functioning democracy a claimant cannot rebut the presumption by merely asserting a subjective reluctance to engage authorities; the claimant has an obligation to approach the state for protection in situations where it might reasonably be forthcoming. The evidentiary burden that rests on the claimant is "proportional to the level of democracy of the state in question."

[14] Conversely, the Board observed, a claimant is not required to risk their life seeking ineffective protection merely to demonstrate that it is indeed ineffective.

[15] The Board found that efforts by the state to provide protection are relevant but not sufficient; such efforts must also translate into operational adequacy. On the other hand, a standard of perfection is not required, and less than perfect protection is not a basis to find that the state was either unwilling or unable to provide reasonable protection.

[16] The Board observed that, in the present case, the Applicant testified that she did not contact the police about the events that caused her to flee Colombia with her children. She was

worried about information sharing between the police and the FARC, and stated that the police had failed to help when she reported the problems experienced by her son in October 2011.

[17] The Board went on to consider whether state protection would have been reasonably forthcoming, such that the Applicant was obligated to approach state authorities for protection before leaving the country to seek refugee protection. It found that Colombia is in effective control of its territory and has a functioning security apparatus to uphold the laws and constitution of the country. The RPD found that, while the situation in Colombia is imperfect, the country is a functioning democracy, and it was therefore incumbent upon the Applicant to demonstrate that she took all reasonable steps in the circumstances to seek protection.

[18] In the Board's view, the Applicant's testimony that she and her children would be at great risk if she contacted the police about the FARC was not supported by the documentary evidence. The Board found that there was no imminent risk to the lives of the Applicant and her children, and that the Applicant had ample opportunity between the initial extortion attempt in December 2010 and her final departure in February 2012 to approach the police. As such, the Board found that the Applicant's failure to approach police was not objectively reasonable (at para 40 of the Decision):

> In short, the principal claimant took no steps to involve the authorities with respect to the events that propelled her to leave Colombia not once but twice. The panel finds this objectively unreasonable. Adequate state protection would have been available to the claimants.

[19] The Board was not persuaded that if the Applicant was to return to Colombia and encounter problems with the FARC, the police would refuse to investigate or to arrest and

prosecute the perpetrators if there was sufficient evidence. Based on the documentary evidence, the Board found that the police in Colombia arrest and prosecute the perpetrators of crimes, including crimes committed by FARC members, and that if the Applicant was dissatisfied with the police response, further recourse would be available to her.

[20] The Board reviewed the Colombian government's efforts to eradicate the FARC. It found that police and government efforts had "weakened the FARC's military structure," and had "hit hard" and "contained" the FARC. It noted the "voluntary demobilization program," through which thousands of guerrillas and paramilitaries had been demobilized. It discussed the government's National Policy for Territorial Consolidation and Reconstruction, focused on combating guerrillas rather than drug traffickers and narco-paramilitaries, which had successfully neutralized the threat posed to Bogota, the central zone, and some other areas, but not others. The Board also noted the presence of the Unified Action Groups for Personal Freedom (GAULAs), which are elite units dedicated to preventing and acting against kidnapping and extortion. It discussed the National Protection Unit of the Ministry of the Interior, which had provided protection to over 10,000 at risk individuals including human rights advocates, journalists and social leaders, as well as a protection program through the Office of the Attorney General, available to victims and witnesses who provided information in a criminal proceeding.

[21] After reviewing this evidence, the Board made the following observations:

> [52] The panel recognizes that the state protection situation in Colombia is imperfect and examples of problems are noted throughout much of the country documentation. For example, the US Department of State *Country Reports* notes that, although significantly fewer than in past years, there were reports of instances in which elements of the security forces acted

> independently of civilian control. The report also indicates that impunity and an inefficient justice system subject to intimidation limited Colombia's ability to prosecute effectively those accused of human rights abuses and to bring to trial former paramilitaries. Furthermore, the availability of drug-trafficking revenue often exacerbated corruption. However, weighted against this unfavourable evidence is pervasive evidence that Colombia acknowledges its past problems and is making serious efforts to rectify the corruption and impunity that exists. For example, the report notes that the government took significant steps to increase resources for the Prosecutor General's Office.
>
> [53] The panel further recognizes that Colombia continues to struggle in dealing with the threat posed by the FARC, despite the progress and positive developments noted previously […]
>
> [54] The panel acknowledges that Colombia is experiencing challenges in addressing the criminality and corruption that exists within the security forces. The panel further recognizes that there are some inconsistencies among several sources within the documentary evidence. However, the preponderance of the evidence regarding current country conditions indicates that, although imperfect, there is adequate state protection in Colombia for victims of crime and that the country is making serious efforts to address the problem of criminality. Overall, the panel is left to conclude that the police are both willing and able to protect victims of crime. Objectively, it is evident that Colombia, through its concerted efforts, has been successful in improving the safety and security of all its citizens. The Colombian authorities' efforts have translated into adequate state protection.

[22] Having found that the Applicant had failed to rebut the presumption of state protection, the Board concluded that the Applicant and her children were neither Convention refugees nor persons in need of protection.

ISSUES

[23] The Applicant raises the following issues in this application:

(a) Did the Board err by placing significant weight on the Applicant's attempts to engage the state, rather than focusing on the real question of whether state protection in Colombia is adequate?

(b) Did the Board err by placing a *legal* burden of seeking state protection on a refugee claimant?

(c) Did the Board fail to apply the proper test for adequacy of state protection and wrongly focus on the efforts of the state to address the problems?

(d) Did the Board err by failing to examine state protection from the viewpoint of the specific risk the Applicant and her children faced as targeted persons?

(e) Did the Board err by failing to refer to specific country documents evidence?

STANDARD OF REVIEW

[24] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 [*Dunsmuir*] held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to a particular question before the court is settled in a satisfactory manner by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless, or where the relevant precedents appear to be inconsistent with new developments in the common law principles of judicial review, must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis: *Agraira v Canada (Public Safety and Emergency Preparedness)*, 2013 SCC 36 at para 48.

[25] Issues (a), (b) and (c) allege, in various ways, that the Board applied the wrong test for state protection. As Chief Justice Crampton held in *Ruszo v Canada (Citizenship and Immigration)*, 2013 FC 1004 at para 22, a long line of jurisprudence has established a clear test

for state protection, and it is therefore not open to the Board to apply a different test. The issue of whether the proper test was applied is reviewable on a standard of correctness.

[26] On the other hand, the issue of whether the Board erred in applying the settled law on state protection to the facts of a particular case is a question of mixed fact and law that is reviewable on a standard of reasonableness (*ibid*). In the present case, the real issue is not whether the Board properly understood the test, but whether it properly applied it, and this question is reviewable on a standard of reasonableness.

[27] Issues (d) and (e) essentially ask whether the Board properly evaluated and interpreted the evidence in light of particular circumstances of the Applicant and her children. These are questions of mixed fact and law that are reviewable on a standard of reasonableness: *Dunsmuir*, above, at para 51.

[28] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at para 47, and *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

STATUTORY PROVISIONS

[29] The following provisions of the Act are applicable in these proceedings:

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 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.
Person in need of protection	**Personne à protéger**
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	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.
[…]	[…]

ARGUMENT

Applicant

[30] The Applicant argues that the Board placed undue weight on her prompt departure from the country, and that this was unreasonable. Delay in leaving the country is often taken to indicate a lack of subjective fear. If prompt action is also counted against claimants, this places them in a "catch-22" situation.

[31] The Applicant also argues that the Board's conclusion that Colombia is able to protect people personally targeted by the FARC is unreasonable.

[32] The FARC is a well-organized terrorist organization. Even if the Applicant had gone to police, and even if they had initiated an investigation and arrested one or two members of the FARC, this would not be sufficient evidence of the state's ability to protect against future persecution from that organization. Unless a claimant is repeatedly targeted by the *same individuals*, documentary evidence is more relevant to the state protection analysis than individual attempts to seek protection. It is unreasonable to place a legal burden on a refugee claimant to seek state protection: *Majoros v Canada (Citizenship and Immigration)*, 2013 FC 421 at para 16.

[33] In situations where a refugee claimant did not seek protection, the Applicant argues, the question to be addressed is whether protection might reasonably have been forthcoming, having

regard to a claimant's particular circumstances: *Navarrete Andrade v Canada (Citizenship and Immigration)*, 2013 FC 436 at para 24.

[34] While the Board purported to analyze the adequacy of state protection, the Applicant says, it failed to apply the proper test. The Board's review of country conditions focused entirely on efforts that the Colombian government is making to address problems with the FARC, criminality and corruption, and failed to address how those efforts translate into adequate state protection: *Meza Varela v Canada (Citizenship and Immigration)*, 2011 FC 1364 [*Meza Varela*]. It is not sufficient to show changes and improvements, or a willingness to improve. It must be shown that the changes have been effectively implemented in practice: *Bors v Canada (Citizenship and Immigration)*, 2010 FC 1004 at para 63; *Ralda Gomez v Canada (Citizenship and Immigration)*, 2010 FC 1041 at para 28. The focus of the analysis is not the state's efforts, but whether they have "actually translated into adequate state protection": *Jaroslav v Canada (Citizenship and Immigration)*, 2011 FC 634 at para 75; *Toriz Gilvaja v Canada (Citizenship and Immigration)*, 2009 FC 598 at para 39; *Lopez v Canada (Citizenship and Immigration)*, 2010 FC 1176 at para 8; *Henguva v Canada (Citizenship and Immigration)*, 2013 FC 912 at para 10.

[35] The Applicant says that the mere existence of victims' protection programs in Colombia is not sufficient reason to conclude that the state is able to provide adequate protection to the Applicant in her particular situation. First, the programs the Board described are designed to provide protection to human rights advocates, journalists and social leaders, and the Applicant does not belong to any such category. Furthermore, the programs designed to protect victims and witnesses in criminal proceedings do not provide adequate protection. Only 540 applications out

of 5,307 were accepted in 2011 (Response to Information Request, Immigration and Refugee Board, COL104011.E (30 March 2012), Certified Tribunal Record at p. 404 [March 2012 RIR]), meaning that the chance of obtaining any assistance from the state is about 10%. An assessment of the adequacy of state protection involves determining whether, in practice, the remedies are useful: *Hernandez v Canada (Citizenship and Immigration)*, 2007 FC 1211 at para 1; *Vigueras Avila v Canada (Citizenship and Immigration*), 2006 FC 359 at para 34.

[36] The Applicant argues that the objective evidence shows that the protection programs in Colombia lack resources and fail to provide adequate protection to the victims of crime. She quotes from the March 2012 RIR, above (Certified Tribunal Record at pp. 407-408):

> Several media sources indicate that the government's protection programs do not provide effective protection (Semana 5 Mar. 2012; El Espectador 6 Mar. 2012; El Colombiano 17 Apr. 2011). A report on threats to human rights defenders in Colombia, which was produced by the Minga Association (Asociación Minga), the Colombian Commission of Jurists (Comisión Colombiana de Juristas) and the Benposta Nation of Children (Benposta Nación de Muchachos), indicates that state protection is [translation] "still in the early stages despite regulatory developments in this regard" (Semana 5 Mar. 2012). According to a report by the UN, family members of disappeared persons [translation] '"continue to be the targets of attacks, accusations, threats and persecution, and are not offered effective protective measures'" (qtd. in El Espectador 6 Mar. 2012). Furthermore, the president of the National Association of Victims for Land Restitution and Access (Asociación Nacional de Víctimas por la Restitución y el Acceso a Tierras) told the Medellin-based newspaper El Colombiano that [translation] "'[m]any threatened leaders from the [Uraba and Choco] region have asked for protection and the risk assessments always result in a finding of ordinary risk, but then some of them end up assassinated'" (17 Apr. 2011).
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> […]
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> In its evaluation report, the Office of the Inspector General writes that delays in processing protection applications are frequent and take [translation] "more than two months" (ibid. Jan. 2011, Sec.

> 4.2). In addition, the Office has found that authorities at the regional level do [translation] "little or nothing" with regard to protection, and that governors and municipalities do not have "strategic security plans for vulnerable populations" (ibid.). It concludes by stating that the Directorate for Human Rights, which is in the Ministry of the Interior and Justice and is responsible for protection programs in Colombia, [translation] "does not truly assume its function of directing and coordinating" such programs (ibid.). It also says that the National Police are not assuming their full responsibility for conducting surveillance "rounds" (ibid.).

[37] Where there is strong *prima facie* evidence that adequate protection would not have been forthcoming, even if the Applicant had made greater efforts to seek it, then no such effort is required: *Commer Mora v Canada (Citizenship and Immigration)*, 2010 FC 235.

[38] The Applicant says she submitted an intensive package on country conditions in Colombia, and that the Board failed to review this evidence as it was obligated to do: *Villa v Canada (Citizenship and Immigration)*, 2008 FC 1229. She points in particular to a report by Dr. Marc Chernick (2009 Country Conditions in Colombia Relating to Asylum Claims in Canada, Certified Tribunal Record at pp. 705-726), whom she identifies as an internationally recognized expert on the Colombian situation. His credentials are set out in an addendum to the report (Certified Tribunal Record at pp. 724-726). She says that the Board completely ignored this report, similar to what occurred in *Lopez Villicana v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1205. The Applicant quotes from Dr. Chernick's report as follows:

> 8. What is clear is that the Colombian state is unable to protect those who have been targeted, be they communities facing forced internal displacement, or individuals threatened with kidnapping, extortion or extra-judicial assassination. Almost all human rights violations in Colombia occur with impunity.
>
> (Certified Tribunal Record at p. 708)

> […]
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> 40. … The successful military operations against the FARC that occurred in 2008 have weakened the FARC but this has no translated into a reduced risk to individuals who have been directly targeted by the FARC…
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> (Certified Tribunal Record at p. 720)
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> […]
>
> 44. … The State Department report underscores the problem with widespread impunity in the country. Despite the Uribe Administration's stated hard-line policies toward terrorism, the Colombian government is unable to protect a targeted individual.
>
> (Certified Tribunal Record at p. 721)

[39] The Applicant also points to a report by the Canadian Council for Refugees, based on a delegation sent by that organization to Colombia in November 2010 (Canadian Council for Refugees, *The Future of Colombian Refugees in Canada: Are we being equitable?* (March 2011), Certified Tribunal Record at pp. 727-764 [Canadian Council for Refugees Report]), which she says was also ignored by the Board. That report states:

> In terms of protection, the Colombian government has no reliable protection programs. Protection is only offered to very limited number of persons, and in most cases does not include the family of the victim. An ordinary citizen of Colombia does not have access to the protection programs mentioned above.
>
> (Certified Tribunal Record at p. 749)

[40] The Applicant says that while a tribunal need not refer to every piece of evidence presented, the more significant a piece of evidence is, the more likely it is that the failure to refer to it will result in a finding that the decision was unreasonable, especially when it appears to contradict a finding of the Board. The Board had an obligation to assess the evidence that

contradicted its findings and explain why that evidence did not alter its conclusion: *Cetinkaya v Canada (Citizenship and Immigration)*, 2012 FC 8 at para 66 [*Cetinkaya*]; *Vargas v Canada (Citizenship and Immigration)*, 2011 FC 543 at para 16; *Nino Yepes v Canada (Citizenship and Immigration)*, 2011 FC 1357 at paras 5, 8; *Adeoye v Canada (Citizenship and Immigration)*, 2012 FC 680 at para 13 [*Adeoye*]. This is also true, the Applicant argues, where the contradictory evidence is general country condition evidence: *Adeoye*, *Cetinkaya* (both above) and *Ponniah v Canada (Citizenship and Immigration)*, 2014 FC 190 at para 17 [*Ponniah*]. The common presumption that the Board has considered all of the evidence cannot systematically immunize the decision from judicial review: *Tavakoli Dinani v Canada (Citizenship and Immigration)*, 2012 FC 1063 at para 25.

[41] In the Applicant's view, the Board failed to turn its mind to the main question of whether the state can protect those who are specifically targeted by the FARC: *Avila Rodriguez v Canada (Citizenship and Immigration)*, 2012 FC 1291. She cites Justice O'Keefe's recent observation in *Vargas Bustos v Canada (Citizenship and Immigration)*, 2014 FC 114 at para 40 that "FARC's reduced military capacity does not mean that the state can protect people who have been specifically targeted by FARC for harassment or extortion." She says the Board dealt with the evidence only in generalities, without adequate attention to the pertinent details: *Altun v Canada (Citizenship and Immigration)*, 2012 FC 1034; *Fanado Kirby v Canada (Citizenship and Immigration)*, 2012 FC 169.

Respondent

[42] The Respondent argues that there was no error in the Board's finding that state protection is available in Colombia and that the Applicant and her children had failed to avail themselves of that protection. The Board applied the correct legal principles and came to a reasonable conclusion. Absent a complete breakdown in the state apparatus, claimants must show clear and convincing evidence that the state is unable to protect them, and even a democratic government is not expected to be able to protect its citizens at all times: *Ward*, above; *Canada (Minister of Employment and Immigration) v Villafranca* (1992), 150 NR 232 (FCA).

[43] Colombia is not in a state of complete breakdown; it is a democracy with the ability and willingness to provide adequate protection from the FARC. Thus, the presumption of state protection applies and there was a heavy burden on the Applicant to prove that she had exhausted all possible protections available to her. Contrary to the Applicant's argument, there is a legal burden on a refugee claimant to seek state protection in such cases: *Ward*, above, at p. 725; *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171 at paras 46, 56. Here, the Applicant left Colombia without making any effort to contact the police.

[44] Subjective reluctance to approach the police is not sufficient to rebut the presumption of state protection where the documentary evidence indicates that protection would have been forthcoming: *Camacho v Canada (Citizenship and Immigration)*, 2007 FC 830 at para 10; *Rio Ramirez v Canada (Citizenship and Immigration)*, 2008 FC 1214 at para 28.

[45] While the Applicant argues that the Board erred by failing to assess the effectiveness of state protection, the Respondent says the law is well settled on the test for state protection; the question is whether state protection would be adequate, not effective. The Board is not required to assess whether state protection is minimally effective. The Board properly placed the burden on the Applicant to rebut the presumption of state protection with clear and convincing evidence that it was inadequate: *The Minister of Citizenship and Immigration v Flores Carrillo*, 2008 FCA 94 at paras 17-19 [*Flores Carillo*] ; *Flores v Canada (Citizenship and Immigration)*, 2008 FC 723 at paras 9-10; *Kaleja v Canada (Citizenship and Immigration)*, 2011 FC 668 at para 25; *Ward*, above; *Tjipuravandu v Canada (Citizenship and Immigration)*, 2013 FC 927 at para 14; *Larionova v Canada (Citizenship and Immigration)*, 2013 FC 874 at para 43; *Beri v Canada (Citizenship and Immigration)*, 2013 FC 854 at para 33; *G.M. v Canada (Citizenship and Immigration)*, 2013 FC 710 at para 65; *Ferko v Canada (Citizenship and Immigration)*, 2012 FC 1284; *Kis v Canada (Citizenship and Immigration)*, 2012 FC 606 at para 16.

[46] The fact that some state programs in Colombia are not always effective does not mean that state protection is not adequate. The test is adequacy, not perfection. Since the onus is on the Applicant, if the evidence is mixed, it is entirely open to the Board to conclude that there is no clear and convincing evidence of the state's inability to protect. The Respondent quotes Justice Letourneau's analysis in *Flores Carillo*, above, at para 30 regarding the nature of the evidence that is required:

> In my respectful view, it is not sufficient that the evidence adduced be reliable. It must have probative value. For example, irrelevant evidence may be reliable, but it would be without probative value. The evidence must not only be reliable and probative, it must also have sufficient probative value to meet the applicable standard of proof. The evidence will have sufficient probative value if it

> convinces the trier of fact that the state protection is inadequate. In other words, a claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate.
>
> [Respondent's emphasis]

[47] The Respondent says the Board did not ignore any evidence that was on the record before it. Rather, it carefully considered all of the evidence on state protection. The evidence considered as a whole did not satisfy the Board, on a balance of probabilities, that the Applicant would be at risk: *Florea v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 598 (FCA); *Woolaston v Canada (Minister of Manpower and Immigration)*, [1973] SCR 102; *Hassan v Canada (Minister of Employment and Immigration)*, [1992] FCJ No 946, 147 NR 317 (FCA).

[48] Furthermore, the Respondent argues, this Court has recently held on multiple occasions that the principle articulated in *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, 157 FTR (TD) [*Cepeda-Gutierrez*] does not apply where the documents in question are general country documents that are not specific to the Applicant: *Quinatzin v Canada (Citizenship and Immigration)*, 2008 FC 937 at para 29; *Shen v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1001 at para 6; *Camacho Pena v Canada (Citizenship and Immigration)*, 2011 FC 746 at para 34; *Salazar v Canada (Citizenship and Immigration)*, 2013 FC 466 at paras 59-60; see also *Zupko v Canada (Citizenship and Immigration)*, 2010 FC 1319 at para 38; *Corzas Monjaras v Canada (Citizenship and Immigration)*, 2010 FC 771 at paras 20-22. In the present case, none of the reports the Applicant claims were ignored contained specific allegations of risk to the Applicant; they were all general country condition documents.

[49] The Respondent says that the Board analyzed all of the evidence and came to a conclusion that was open to it based on the evidence on the record; the arguments of the Applicant amount to a request that the Court re-weigh the evidence, which is not the Court's function on judicial review.

ANALYSIS

[50] The Board's key finding was that, if the Applicant had taken steps to involve the authorities before leaving Colombia, "[a]dequate state protection would have been available to the claimants." Furthermore, if the Applicant and her children return to Colombia and encounter problems with the FARC, the Board was not persuaded "that the authorities would refuse to investigate their allegations and refuse to arrest and prosecute the perpetrators if there was sufficient evidence." This conclusion was based upon the following:

> The documentary evidence, some of which is referenced below, indicates that the police arrest and prosecute the perpetrators of crimes, including crimes committed by FARC members. If the claimants found themselves dissatisfied with the police response to their allegations, the documentary evidence indicates that recourse would be available. Moreover, there are a number of organizations and agencies that assist Colombian victims of crime in obtaining appropriate services and protections from the government and authorities.

[51] The Board then goes on to review the evidence regarding the following:

(a) State efforts to combat the FARC; and

(b) Services available to those at risk.

[52] The Board says many things about the law regarding state protection and what claimants must do in order to rebut the presumption of state protection, but at no place in the Decision does the Board address the fundamental question: Can the state provide adequate protection to the Applicant and those like her who have been specifically targeted by the FARC?

[53] The evidence regarding government efforts to reduce the FARC's military strength and reach does not answer this question. See *Meza Varela*, above. Likewise, the Board's references to the National Protection Unit and the Protection and Assistance Program for Victims and Witnesses are of dubious relevance. The Applicant doesn't appear to fit the profile of those protected by the National Protection Unit, and the Protection and Assistance Program only accepted 540 applications out of 5,307 in 2011 (see March 2012 RIR, Certified Tribunal Record at pp. 403-404). The Board doesn't explain what is adequate about such a low level of acceptance nor does the Board address the UNHCR evidence that "[t]here is no real Witness Protection System in Colombia, there is no real victims protection" (see Canadian Council for Refugees Report, Certified Tribunal Record at p. 746).

[54] More importantly, and as the Applicant points out, documentation in the Board's own documentation package expresses the view that government protection programs are not effective. Yet the Board fails to address this evidence that directly contradicts its own conclusions. See *Cepeda-Gutierrez*, above.

[55] What is more, the Board fails to mention or deal with strong contradictory evidence from the Applicant that the "Colombian state is unable to protect those who have been targeted, be

they communities facing forced internal displacement, or individuals threatened with kidnapping, extortion or extra-judicial assassination." See Dr. Chernick's report at p, 3 (Certified Tribunal Record at p. 708). Similar evidence was introduced from the Canadian Council of Refugees.

[56] The Respondent suggests that *Cepeda-Gutierrez*, above, should be read narrowly so that it does not apply where the documents in question use general country documents and are not specific to the applicant. Justice Manson recently disposed of this argument in *Ponniah*, above.

> [16] However, the Applicant cited many excerpts from a United Nations High Commission on Refugees report titled "Guidelines for Assessing the International Protection Needs of Asylum-Seekers from Sri Lanka" (at pages 56 and 61) and a United Kingdom Border Agency report titled "Sri Lanka: Country of Origin Information," (at pages 93, 120-122, 126-127 and 158). These excerpts show that Tamil men from both Eastern and Northern Sri Lanka are victims of enforced disappearances and abductions, undocumented detentions, extortion and ransom, extrajudicial killings, frequent harassment, close scrutiny from police and anti-terrorism measures, harsh material conditions and economic marginalization.
>
> [17] The Respondent argues that the precedent in *Cepeda-Gutierrez* applies to evidence specific to an applicant, and not general country condition evidence. I find that nothing in *Cepeda-Gutierrez* supports such a narrow reading so as to constrain its precedent to evidence regarding the Applicant's personal situation. This is supported by the jurisprudence (*Packinathan*, above, at para 9; *Pinto Ponce v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 181; *Gonzalo Vallenilla v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 433).

[57] Instead of addressing this evidence, the Board acknowledges real problems in Colombia but then takes refuge in an unsupported generalization;

> However, the preponderance of the evidence regarding current country conditions indicates that, although imperfect, there is adequate state protection in Columbia for victims of crime and that the country is making serious efforts to address the problem of

> criminality. Overall, the panel is left to conclude that the police are both willing and able to protect victims of crime.

[58] Significantly, even this summary evades the key issue which is whether the state can protect individuals specifically targeted by the FARC. In addition, no evidence is cited by the Board that supports this conclusion and there is a lot of evidence that contradicts it.

[59] The Board spends a lot of time reciting in a perfunctory way the legal principles that govern the state protection issue, but it avoids dealing with the specifics of the evidence on the key issue. Phrases such as "the preponderance of the evidence" cannot be used to evade the Board's duty to examine and cite evidence that actually supports its conclusions and deal with evidence that directly contradicts those conclusions.

[60] Counsel agree there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The application is allowed. The Decision is quashed and the matter is referred back for redetermination by a different Board Member; and
2. There is no question for certification.

"James Russell"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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