**Date: 20091015**

**Docket: IMM-1104-09**

**Citation: 2009 FC 1046**

**Ottawa, Ontario, October 15, 2009**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**CRISTIAN CAMILO**
**MONTENEGRO BUITRAGO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP**
**AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (Board), dated February 13, 2009 (Decision) refusing the Applicant's application to be deemed a Convention refugee or person in need of protection under sections 96 and 97 of the Act.

**BACKGROUND**

[2] The Applicant is a 28-year-old citizen of Columbia. He left Columbia for the United States in 2003, where he attended educational institutions until October, 2006. The Applicant then entered Canada and claimed refugee status on October 30, 2006.

[3] The Applicant's claim is based on his fear of persecution by the Autodefensas Unidas de Colombia (AUC), a Colombian organized crime group for which the Applicant once did some electrical repair work. The Applicant alleges that after he received payment for his services, he went to the police to report the AUC's activities. He also claims that in 2006 his father received a threatening call referring to the Applicant's location. No further contact has been made.

[4] The Applicant's claim was heard by the Board on January 13, 2009. The Board denied the Applicant's claim on February 13, 2009.

**DECISION UNDER REVIEW**

[5] Based on "the implausibility of essential segments of the claimant's testimony," the Board was not satisfied that the Applicant's story was believable. For instance, the Board was concerned that the Applicant had not provided a copy of the police report he had filed in Colombia. The Board was also not persuaded that the Applicant and his father would have conducted themselves in a way that would make them targets of organized crime.

[6] The Board considered the state protection offered by the Columbian government and determined that Columbia is making “definite efforts” to improve state protection. The Board noted that a duty exists for a refugee protection claimant to show that he has made every reasonable effort to claim state protection. Since he left Colombia immediately after filing his report and did not give the police an opportunity to protect him, the Applicant had failed to demonstrate that the police would not make serious efforts to protect him

[7] The Board acknowledged a subjective fear on the part of the Applicant, but determined that no objective fear had been proven. This lack of objective fear, combined with the Board’s disbelief of essential aspects of the Applicant’s testimony, provides the basis for the rejection of the Applicant’s claim.

**ISSUES**

[8] The Applicant submits the following issues on this application:

1) Did the Board misinterpret the law relating to a fundamental issue, which error tainted and prejudiced the entire rationale for the conclusion that the Convention criteria did not apply?
2) Was the Board correct in law, or did the Board ignore fundamental principles of justice, by adopting the presumption that a state is deemed to provide adequate protection for its

citizens in all instances of criminal activity even though the criminal activity may reasonably occur as a result of perceived malfeasance of its employees?

[9] The Court notes that additional issues have been raised in the Applicant's affidavit:

1) Did the Board err in its finding of the Applicant's credibility?

2) Did the Board err in its consideration and determination of state protection?

## STATUTORY PROVISIONS

[10] The following provision of the Act is applicable in these proceedings:

| **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 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 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.

**Person in need of protection**

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

**Personne à protéger**

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

**STANDARD OF REVIEW**

[11] In *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, “the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review.” Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of “reasonableness” review.

[12] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[13] In this instance, the Board’s interpretation of the Act will be reviewed on a correctness standard, while the Board’s application of the law to the facts will be considered on a standard of reasonableness (*Dunsmuir* at paragraph 164). Reasonableness will also be used to consider whether the Board erred in making its finding of credibility: *Aguirre v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 571.

[14] Moreover, reasonableness is the appropriate standard when reviewing the Board's consideration of state protection, since state protection. See *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 66.

[15] 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" (*Dunsmuir* at paragraph 47). Put another way, the Court should only intervene 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."

**ARGUMENTS**

**The Applicant**

[16] The Applicant submits that the Board erred by failing to observe that sworn testimony is presumed to be truthful unless there is a clear contradiction and a clear path of reasoned rejection. Both the Applicant's written submissions and his sworn statements ought to benefit from the presumption of truth. See *Maldonado v. Canada (Minister of Citizenship and Immigration)*, [1980] 2 F.C. 302. Moreover, adverse findings of credibility need to be made on the basis of reasonably drawn inferences, rather than speculation. See, for example, *Valtchev v. Canada (Minister of Citizenship and Immigration*), 2001 FCT 776.

[17] The Applicant submits that the Board erred in ignoring facts and evidence that were pertinent to his claim. He contends that his account of the facts, which was not accepted by the Board, was corroborated by documentary evidence. Such evidence included information produced by the Minister as well as information about the drug trade in Columbia. Rather than accepting the Applicant's evidence, the Board erroneously rejected it. The Board's finding was based on speculation, not reasonably drawn inferences. Because of this speculation, the Applicant was not given the fair hearing to which he is entitled.

**State Protection**

[18] The Applicant contends that the Board's focus on state protection was not suitable in this case, since the Applicant was forced to flee Columbia based on a threat of inaction and breach of trust by a state employee.

[19] The Applicant submits that the Board erred in placing the burden to disprove state protection on him, since it was due to ill-treatment by a state employee that the Applicant was forced to flee Columbia. Additionally, the Applicant contends that the Board erred in focusing on the good intentions of Columbia to improve state protection. The Applicant had already been a victim of the state.

**The Respondent**

[20] The onus is on the Applicant to establish that he is a person in need of protection pursuant to subsection 97(1). The Respondent submits that this onus includes the need to demonstrate an objective basis for his prospective fear of persecution. The Federal Court of Appeal in *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 99, held that subsection 97(1) is an objective test "to be administered in the context of present or prospective risk for the claimant."

[21] In addition, the Respondent submits the following citation from *The Law of Refugee Status* by James Hathaway for the Court's consideration of the objective branch of this test:

> [t]he concept of well-founded fear is rather inherently objective, and was intended to restrict the scope of protection to persons who can demonstrate a present or prospective risk of persecution, irrespective of the extent or nature of mistreatment, if any, that they have suffered in the past.

[22] The Respondent doubts the objective existence of the well-founded fear claimed by the Applicant because the AUC had surrendered a plethora of weapons and dismantled its military structures over three years prior to the Applicant's hearing. Moreover, the Applicant has not been contacted by any members of the AUC, and he is not certain that the organization remains interested in carrying out retaliation against him.

[23] Under these circumstances, the Board's conclusion that there was no objective basis for the Applicant's fear of returning to Colombia is reasonable.

### State Protection

[24] The onus is on the Applicant to "adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate." See *Canada (Minister of Citizenship and Immigration) v. Flores Carrillo*, 2008 FCA 94 at paragraph 30. The Applicant's evidence must convince the trier of fact of the inadequacy of state protection for the evidence to have sufficient probative value. In this instance, the Applicant failed to discharge the onus upon him to prove that state protection was not available to him.

[25] Based on the circumstances of this case, there is no clear and convincing evidence that Colombia is unable to offer protection to the Applicant. Moreover, the AUC has surrendered many weapons and has begun dismantling its military structures, thereby minimizing any threat the Applicant may face.

## ANALYSIS

[26] The basis for the Board's rejection of the Applicant's claim was that he "did show subjective fear of persecution and of risk to his life" but "he did not show the objective nature of his fear."

[27] The reasons why the Applicant could not establish an objective basis for his claim were that:

a. The Board found "essential segments of the claimant's testimony" to be implausible;

b. He was unable "to show objectively that he would be subjected to a risk to his life or to a risk of persecution";

c. By leaving Columbia "the day after filing his report and by not giving the police the opportunity to protect him, the claimant failed to show clearly and convincingly that the police would not make a reasonably serious effect to protect him."

[28] As the Board pointed out in its Decision, the Applicant testified that he did not know whether the AUC had any interest in him; he just did not "want to run the risk."

[29] Given the fact that the Applicant had no knowledge or evidence to suggest that the AUC had a present interest in him, and he could not demonstrate that Colombia could not, or would not, protect him, the Board's conclusion that the Applicant had failed to establish an objective basis for his claim is entirely reasonable. This finding stands alone and is quite apart from the Board's plausibility concerns. In the end, the Board says that, even if his subjective fear is accepted, the Applicant has presented no objective basis for that fear.

[30] The Applicant has represented himself in this judicial review application. His written materials are vague on the issues he raises for review. However, at the oral hearing, I was able to clarify with him that he believes the Board's plausibility findings were speculative and unreasonable and that he does not believe the state of Columbia will protect him.

[31] However, even if the Court were to accept that the Board's plausibility findings were unreasonable (which I do not), the Applicant has not truly addressed the Board's findings on objective fear. There is no evidence that the AUC or anyone else is interested in the Applicant. Rather, the evidence before the Board was that the AUC had surrendered its weapons and dismantled most of its military structures. There is also no evidence that rebuts the presumption of state protection. The Applicant argues that the presumption of state protection is a "preposterous principle," but this is no more than an argument that the Court should disregard the jurisprudence on this issue to suit the Applicant because he finds the law inconvenient to his application.

[32] The Applicant was forthright at the hearing and appears to understand the evidentiary deficiencies that confronted the Board. He felt that this was the fault of the advisor he had used, but he did not raise any procedural fairness issues in his written materials and there is no evidence before me on this point. All in all, the Applicant has raised no ground for judicial review that the Court can accept. The Decision is entirely reasonable given the evidence before the Board.

[33] The Applicant suggested a question for certification:

> Was the Board wrong to focus upon his qualifications and abilities?

[34] As I pointed out to him at the hearing, this does not raise a question of general importance. In addition, the issue of his qualification is not central to the Decision which is based upon the lack of evidence of objective risk.

**JUDGMENT**

**THIS COURT ORDERS AND ADJUDGES that**

1. The application is dismissed.
2. There is no question for certification.

"James Russell"
Judge

**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**COURT FILE NO.:** IMM-1104-09

**STYLE OF CAUSE:** CRISTIAN CAMILO MONTENEGRO BUITRAGO

v.

THE MINISTER OF CITIZENSHIP AND MMIGRATION

**PLACE OF HEARING:** TORONTO, ON

**DATE OF HEARING:** September 29, 2009

**REASONS FOR JUDGMENT:** RUSSELL J.

**DATED:** October 15, 2009

**WRITTEN REPRESENTATIONS BY:**

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