Federal Court  Cour fédérale

Date: 20110330

Docket: IMM-4046-10

Citation: 2011 FC 390

Ottawa, Ontario, March 30, 2011

PRESENT: The Honourable Mr. Justice Crampton

BETWEEN:

VILLEGAS ECHEVERRI, CLARA INES
VILLEGAS ECHEVERRI, LUISA FERNANDA
MARULANDA CARDONA, VICTOR HUGO
VILLEGAS, MANUELA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The principal Applicant, Clara Ines Villegas Echeverri ("Echeverri"), is a citizen of Colombia. She alleges that, between December 1989 and early 1991, members of the Revolutionary Armed Forces of Colombia ("FARC") threatened her and her siblings with death if they did not join their organization, murdered two of her brothers and then kidnapped one of her sisters.

[2] Ms. Villegas claimed refugee status in Canada along with her common law spouse (Mr. Marulanda) and her two daughters (collectively, the "Applicants") upon their arrival here in April 2009, after spending many years illegally in the United States.

[3] The Refugee Protection Division of the Immigration and Refugee Board of Canada rejected her claims on the basis that it found her "story to be not wholly credible in its material respects." In reaching this conclusion, two of the Board's key findings were that: (i) even if her claims were to be believed, the FARC was only interested in her brothers; and (ii) there had been "no conclusive determination by authorities that the killers of her brothers were the FARC." The Board also rejected Mr. Marulanda's claims on credibility grounds. In addition, the Board determined that the Applicants had not behaved in a manner consistent with their claims of having a subjective fear of persecution should they return to Colombia. It also found that they would have an internal flight alternative (IFA) in Bogota, should they return to Colombia.

[4] The Applicants seek to have the decision set aside on the basis that the Board erred by, among other things, (i) concluding that the FARC was only interested in Ms. Villegas' brothers, (ii) requiring proof of a conclusive determination by Colombian authorities that the FARC was responsible for the violent deaths of her brothers, and (iii) failing to consider the compelling reasons exception in section 108(4) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 ("IRPA").

[5] I agree with the Applicants' position on these particular points. Accordingly, for the reasons that follow, the Board's decision is quashed and remitted for reconsideration to a differently constituted panel of the Board.

I. Background

[6] Ms. Villegas comes from a poor neighbourhood in Medillin, Colombia. At the outset of the events described below, she had three brothers and two sisters. One of those sisters moved to the United States in 1987.

[7] Ms. Villegas claims that her family started to have problems with the FARC in October 1989 when she, her sister Beatriz and two of her brothers were approached near their home by two men who identified themselves as being with the FARC. These men, who wore FARC uniforms, allegedly threatened to kill Ms. Villegas and her siblings if they did not join the FARC. After they repeatedly refused to join the FARC at that time and following a number of subsequent approaches and threatening telephone calls from the FARC, Ms. Villegas' brother Jose was shot dead close to their home in December 1989.

[8] Shortly after her brother's murder, Ms. Villegas claims that she was again confronted near her home by two representatives of the FARC, who were on a motorcycle. Those men allegedly repeated that she and her brothers and sisters should join the FARC and threatened them if they did not do so. In April 1990, her brother Juan was again warned that additional members of his family would be killed if he did not join the FARC. He was also ordered to attend a meeting with the urban militia the following day. He immediately fled to his aunt's house. Two days later, his younger brother Gabriel was shot to death by people in an unidentified car.

[9] Juan was then sent to the United States and the rest of the family moved to the city outskirts. However, in early 1991, Ms. Villegas' sister, Beatriz, was found by the FARC and abducted one evening near her school. While she was held by the FARC, she was interrogated about the whereabouts of her brother Juan. When she informed the FARC that he was in the United States,

they demanded a ransom of $US 3,000 for her release. After the family managed to quickly collect this sum through Juan and his other sister who was living in the U.S., they paid the ransom and Beatriz was released, all within 24 hours. The family then apparently decided to flee Colombia.

[10] Ms. Villegas claims that, due to their financial circumstances, the family had to leave Colombia in stages. Beatriz apparently left sometime in 1991, while the others remained in hiding. Ms. Villegas then left in August 1992 and her parents left with her daughter Luisa in 1995. She then gave birth to a second daughter, Manuela in the United States in 1997 and met her common law husband, Mr. Marulanda, in 2001.

[11] Mr. Marulanda claims that his contact with the FARC began in mid-1998 when he became involved with a community group that focused on helping youth in the municipality of Urumita, where he worked as a driver for his great-uncle, a missionary priest. Among other things, the community group tried to keep youth in the area away from violence and the FARC. After Mr. Marulanda had been working with that group for three or four months, he allegedly began to receive telephone calls from representatives of the FARC, who demanded that they keep away from the youth in the area and that he and his great-uncle meet with the FARC to discuss this issue. When they refused to meet, they began to receive telephone calls and letters demanding that they either stop their community work and support the FARC's cause or leave the area.

[12] Mr. Marulanda also claims that, in August 2000, he and his great-uncle were stopped at a FARC roadblock where their identity documents were checked. He alleges that they were almost abducted, but managed to escape after a military helicopter spotted the group and engaged the FARC in a firefight.

[13] He further claims that he received a death note which also declared him to be a military target, in September 2000, at the hostel where he lived. He then apparently moved back to his home town of Envigado. When the FARC traced him there and began to contact him by telephone, he fled to the U.S. in February 2001. He then learned that his great-uncle, the priest, was kidnapped for several days in June 2002. During his detention, his great-uncle allegedly was physically and psychologically abused. He was also told that the FARC wanted to discuss some "pending matters" with Mr. Marulanda. Mr. Marulanda alleges that after his great-uncle was released, a second death note addressed to him arrived at the hostel where he formerly resided.

II. The Decision under Review

[14] At the outset of its decision, the Board identified the determinative issues to be: (i) the credibility of Ms. Villegas and Mr. Marulanda; and (ii) the existence of an IFA. The Board also found that Ms. Villegas and Mr. Marulanda did not behave in a manner consistent with having a subjective fear of persecution.

[15] Regarding the credibility of Ms. Villegas, the Board found that, even if her allegations were to be believed, the FARC was "only interested in her brothers." However, it then drew a serious negative inference from the lack of conclusive evidence, such as a police report or a prior written death threat, that her brothers were killed by the FARC. It therefore concluded that it did "not believe in the overall credibility of [her] assertions."

[16] In the course of making these findings, the Board noted that, from early 1990, when Ms. Villegas had her first encounter with the FARC, to the time she left the country in 1992, the FARC did not contact her "personally as a target." It also noted that the FARC did not contact her parents during this period or until they fled the country in 1995, and that the FARC never contacted any of

the members of her mother's family who remained in Colombia, in an attempt to find Ms. Villegas. Based on these findings, the Board concluded that "the principal claimant was not or is not a target of the FARC."

[17] Moreover, the Board stated that it is hard to believe that, even if she had been targeted by the FARC in 1990, she would be such a target today, given that: (i) she fled Colombia 18 years ago; (ii) it has been 20 years since her alleged personal confrontation with the FARC; (iii) there have been considerable organizational changes within the FARC during that period; and (iv) her physical appearance has changed due to aging since she left Colombia.

[18] The Board also acknowledged a psychologist's report that allegedly corroborated Ms. Villegas' claims. However, it found that it was hard to believe that she suffers from post-traumatic stress disorder or, if she does, that it was caused by her experiences in Colombia. This finding was based on its observations that: (i) she did not hesitate when answering questions or give any indication of having a memory failure that could be caused by psychological stress; and (ii) she had a tendency to speculate and embellish.

[19] Regarding the credibility of Mr. Marulanda, the Board noted that the FARC wanted him to stop working with the community group, and that he complied with this demand. The Board found that since he complied with the FARC's request, "there was no longer any problem as far as the FARC were concerned." The Board also drew a negative inference from the fact that he did not file a police report and did not have a copy of the written death threat that he received in September 2000. After acknowledging the alleged telephone calls and written death threats that he received, the Board further noted that, apart from the incident when he and his great-uncle were stopped at a

roadblock, he did not have any personal confrontations with or visits from the FARC at the hostel where he stayed or at his home after he returned to his home in Envigado. In addition, the Board noted that his great-uncle was not visited or confronted by the FARC after he too returned to Envigado. The panel identified this fact as "reinforcing the panel's belief that, on a balance of probabilities, if he indeed had been targeted by the FARC, he no longer is a target as he had effectively complied with the FARC demand."

[20] Regarding the subjective fear of the Applicants, the Board noted that Ms. Villegas was in the United States for 17 years but did not claim asylum because the one year time limit for doing so allegedly had expired by the time she learned about the possibility of making such a claim. The Board also noted that she was then told by a lawyer that her chances of succeeding were slim. With respect to Mr. Marulanda, the Board similarly observed that he lived for approximately eight years in the United States without making a claim for asylum, basically for the same reason as Ms. Villegas. The Board stated that if they truly feared being returned to Colombia, it would be reasonable to expect that they would have applied for refugee protection in a timely manner and at the first opportunity. After briefly discussing some of this Court's jurisprudence regarding the consequences of failing to apply for asylum in similar circumstances, the Board concluded that there was neither an objective basis nor a subjective basis for the Applicants' stated fears. However, as noted at paragraph 29 below, this finding seems to have been linked to the Board's conclusions regarding credibility.

[21] Regarding the availability of an IFA, after summarizing the information in a number of the documents in its National Documentation Package for Colombia, dated April 30, 2010, the Board

found that the Applicants could safely resettle in Bogota, if they were required to return to Colombia. Among other things, the information summarized by the Board reported that:

i. Colombia is a functioning democracy in which free and fair elections recently were held;

ii. government forces have succeeded in pushing the FARC out of heavily populated urban areas and regaining control over road arteries;

iii. there was only one reported incident in 2009 in which the FARC harmed anyone in Bogota – that involved a terrorist attack on a Blockbuster outlet in January of that year;

iv. the only report of an incident involving the FARC in a large urban centre in 2008 occurred in September of that year, when a car bomb killed four civilians in front of a court house in Cali;

v. efforts of the state to provide protection to its citizens are not always perfect but are most successful in urban areas such as Bogota;

vi. although the FARC continues to control remote areas, support for the FARC in Bogota and other large urban areas has vanished; and

vii. the FARC is attempting to regain legitimacy in the rural population by avoiding harm to civilians, while focusing on high impact military targets.

[22] Finally, with respect to the minor Applicant Manuela Villegas, who is a citizen of the United States, the Board found that there is adequate state protection in that country, such that she would not face a serious risk of persecution or harm if she were to return to that country.

III. Standard of Review

[23] The standard of review applicable to the Board's credibility findings is reasonableness (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, at paras. 51-55; *Canada (Minister of Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339, at paras. 46-47.)

[24] For the reasons set forth in *Alharazim v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 1044, at paras. 16-25, I believe that reasonableness is the appropriate standard of review to apply with respect to the issue that has been raised regarding the proper interpretation and application of subsection 108(4) of the IRPA. In my view, the recent decisions of the Supreme Court of Canada in *Smith v. Alliance Pipeline Ltd.*, 2011 SCC 7, at paras. 28 and 37, and in *Celgene Corp. v. Canada (Attorney General)*, 2011 SCC 1, at para. 34, provide further support for this position.

[25] It follows that the Board's credibility findings and its failure to conduct an assessment under subsection 108(4) will stand unless the Board's decision does not fall "within the range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, above, at para. 47).

[26] Given my disposition of the matters discussed below, it is not necessary to address the standard of review applicable to the other issues that the Applicants raised with respect to the Board's decision, and that are not addressed in these reasons.

IV. Analysis

A. *Did the Board err in reaching its finding regarding the overall credibility of Ms. Villegas' claims and then failing to consider the exception in subsection 108(4)?*

[27] In decisions made under sections 96 and 97 of the IRPA, an adverse finding regarding the overall credibility of an applicant's claims and a finding that an IFA is available in the applicant's home country provide separate and distinct grounds for rejecting the application for refugee protection. That is to say, if the Board's IFA analysis can withstand judicial review, its decision typically will stand, even though the Board may have made one or more unreasonable credibility findings. The converse is also true. Of course, this assumes that the Board has not committed any overriding errors that warrant setting aside its overall decision, for example, on procedural fairness grounds.

[28] In this case, I am satisfied that the Board's IFA analysis can withstand scrutiny. The Board's conclusion that the Applicants have a viable IFA in Bogota was made following a detailed assessment of information reported in a number of credible objective sources of information regarding country conditions in Colombia. Having particular regard to the uncontested evidence summarized at paragraph 21 above, that finding was not unreasonable. Ordinarily, this conclusion would provide a sufficient basis upon which to reject this type of an application for judicial review, even though it is solely forward-looking in nature.

[29] However, this case is exceptional given: (i) the nature of the alleged persecution suffered by members of Ms. Villegas' immediate family; (ii) the fact that she also claimed to have suffered past persecution; (iii) the fact that the Board made some unreasonable findings in the course of impugning the overall credibility of her claims; and (iv) the Board specifically found that "[t]he determinative issue in this case is credibility, and in relation to that, the well foundedness of the claimants' fear" (emphasis added). Had the Board not made the two unreasonable credibility findings discussed below, it may well have accepted the overall credibility of Ms. Villegas' claims, including as they related to her subjective fears, such that it would then have been obliged to address the humanitarian provision that is set forth in subsection 108(4) of the IRPA.

[30] Subsection 108(4) states:

Exception	Exception
(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.	(4) L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

[31] A long line of jurisprudence establishes that the Board is entitled to proceed directly to a forward-looking assessment of whether an applicant for refugee protection has a well-founded fear of future persecution, without first making a determination of whether the applicant has suffered past persecution and, if so, whether subsection 108(4) applies. (*Hassan v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 946 (C.A.); *Yusuf v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 35, at para. 2 (C.A.); *Brown v. Canada (Minister*

of Citizenship and Immigration), [1995] F.C.J. No. 988, at para. 7 (T.D.); *Yamba v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 457, at para. 6; *Corrales v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1283, at paras. 6-7 (T.D.); *Kudar v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 648, at para. 10; *Brovina v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 635, at paras. 6-9; *Decka v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 822, at paras. 15-16; *Thiaw v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 965, at para. 24; *Cardenas v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 537, at para. 37; and *Kamara v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 785, at para. 40).

[32] However, there may be some situations in which the nature of the alleged past persecution is so severe that it would be contrary to the underlying spirit of subsection 108(4), and a reviewable error, for anyone reviewing the application for refugee protection to fail to consider the potential applicability of that provision (*Alharazim*, above, at paras. 44-53). For the reasons discussed in *Alharazim*, above, those situations are limited to where there is *prima facie* evidence of past persecution that is so exceptional in its severity as to rise to the level of "appalling" or "atrocious."

[33] As recognized in *Canada (Minister of Employment and Immigration) v. Obstoj*, [1992] 2 F.C. 739, at 747-748 (C.A.), the inspiration for what is now subsection 108(4) is found in Article 1 C (5) of the 1951 *United Nations Convention Relating to the Status of Refugees* (the "Refugee Convention"). Article 1 C (5) states:

> C. This Convention shall cease to apply to any person falling under the terms of section A if:

….

> (5) He can no longer, because of the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality;
>
> Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke compelling reasons arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.

[34] With respect to the second paragraph of Article 1 C (5), the UN *Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees* (the "Handbook") states:

> 136. The second paragraph of this clause contains an exception to the cessation provision contained in the first paragraph. It deals with the special situation where a person may have been subjected to very serious persecution in the past and will not therefore cease to be a refugee, even if fundamental changes have occurred in his country of origin. The reference to Article 1 A (1) indicates that the exception applies to "statutory refugees". At the time when the 1951 convention was elaborated, these formed the majority of refugees. The exception, however, reflects a more general humanitarian principle, which could also be applied to refugees other than statutory refugees. It is frequently recognized that a person who – or whose family – has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee. (Emphasis added.)

[35] The underscored words of the passage quoted immediately above make it clear that the past persecution contemplated by the second paragraph of Article 1 C (5) was intended to extend to past persecution of family members of the refugee claimant. This was recognized by my colleague

Justice Martineau in *Suleiman v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1125, at paras. 13 and 22. In my view, this is particularly the case with respect to past persecution of a refugee claimant's immediate family members, namely, siblings, children and parents.

[36] Considering that subsection 108(4) was intended to be an "exceptional" provision, applicable "to only a tiny minority" of claimants (*Obstoj*, above, at 747-748), it is reasonable to infer that the circumstances in which it was contemplated that subsection 108(4) would apply in the context of family members typically would involve immediate family members, as opposed to more distant relatives.

[37] That said, it is important to recognize that claims for protection under section 96 of the IRPA must be based on direct, as opposed to indirect, persecution (*Rafizade v. Canada (Minister of Citizenship and Immigration*), [1995] F.C.J. No. 359, at paras. 10-11; *Ndegwa v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 847, at paras. 8-9; *Escorcia v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 644, at para. 39). Therefore, where the *prima facie* evidence of "appalling" or "atrocious" past persecution concerns the past persecution of an immediate family member, there must also be credible evidence that could establish either some direct past persecution of the specific applicant for refugee protection, or persecution of that person's family as a social group (*Ndegwa*, above; *Asghar v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 768, at paras. 19-20), before the Board's obligation to consider the potential application of subsection 108(4) will be triggered.

[38] As noted in section II above, the Board found, on a balance of probabilities, that, even if Ms. Villegas' claims were to be believed, "the FARC had no interest in her but rather were after the

brothers in the family." In reaching this finding, the Board appears to have confused the issue of whether all of the siblings in the family had been persecuted, with the questions of which members of the family the FARC (i) chose to murder in order to achieve its objectives; and (ii) may have most wanted to recruit. In my view, the Board's finding that the FARC was "only interested in her brothers" was unreasonable, given Ms. Villegas' uncontradicted evidence that:

i. in October 1989, two representatives of the FARC threatened Ms. Villegas, her sister Beatriz and two of her brothers with death if they did not join the FARC;

ii. shortly after her brother Jose was killed, Ms. Villegas was again confronted and allegedly threatened if she, her remaining brothers and her sister Beatriz did not join them;

iii. in April 1990, her brother Juan was warned that additional members of his family would be killed if he did not join the FARC;

iv. shortly after her brother Gabriel was murdered, her sister Beatriz was kidnapped; and

v. shortly following Juan's subsequent flight to the United States, Ms. Villegas, Beatriz and her parents moved to the outskirts of Medillin, thereby evidencing their belief and fear that the FARC was targeting and persecuting the family as a whole, rather than just the brothers.

[39] After making the unreasonable finding that the FARC was only interested in Ms. Villegas' brothers, the Board proceeded to reject the overall credibility of Ms. Villegas' claims, at least in part for this reason and also because she provided "no conclusive evidence that her brothers were killed by the FARC" (emphasis added). The Board characterized the absence of such evidence as being a "lack of … crucial documentary evidence in support of her claim" (emphasis added).

[40] The Board erred by requiring conclusive evidence that the FARC was responsible for the death of Ms. Villegas' brothers. In the absence of any other stated basis for disbelieving her testimony that her brothers were murdered by the FARC, it was unreasonable for the Board to require conclusive evidence in support of this claim before being prepared to accept it, particularly given: (i) her uncontradicted testimony; and (ii) the corroborating and unimpugned documentation that she provided to the Board, including (a) her brothers' death certificates, which stated that they died in a violent manner, and (b) a news article which reported that "the Judge 77 from Criminal Instruction did the removal of [her brother Jose's] corpse, which presented multiple impacts from 9 millimeter (*sic*) caliber bullets" (translation) (*Maldonado v. Canada (Minister of Employment and Immigration*, [1980] 2 F.C. 302 (F.C.A.); *Attakora v. Canada (Minister of Employment and Immigration)* (1989), 99 N.R. 168 (F.C.A.); *Ahortor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 705 (T.D.); *Alvarez v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 154, at para. 5).

[41] On the particular facts of this case, the combination of this latter error and the Board's unreasonable finding that the FARC was only interested in Ms. Villegas' brothers was very significant. In short, had the Board not imposed this inordinately high evidentiary burden upon

itself, it may well have concluded that the FARC was indeed responsible for the murder of two of Ms. Villegas' brothers.

[42] In turn, had the Board accepted that the FARC was responsible for those murders, it would have recognized that the murders clearly constituted past persecution of them that rose to the level of "appalling" or "atrocious."

[43] This is significant because, had the Board not also erred in concluding that the FARC was only interested in Ms. Villegas' brothers, there was evidence which could have reasonably led the Board to conclude either that: (i) she had personally been persecuted; or (ii) she was a member of a social group, namely, her family, that was persecuted, and that she had a sufficient nexus to that persecution as to warrant refugee protection (*Ndegwa*, above).

[44] Therefore, the preconditions to the Board's obligation to consider whether the "compelling reasons" exception in subsection 108(4) might apply, were satisfied. Indeed, once those preconditions were satisfied, the Board's obligation to consider the potential application of subsection 108(4) was increased in this particular case, because: (i) there was other evidence which strengthened the Applicants' case under that provision; (ii) the Applicants' counsel repeatedly requested the Board to consider the potential application of that provision, throughout the oral hearing (see, for example, pp. 849-854, 867, 880 and 890 of the CTR); and (iii) the Board agreed to adjourn the hearing specifically to permit the Applicants' counsel to better prepare his case under subsection 108(4) (CTR, p. 876).

[45] Accordingly, I am satisfied that the Board committed a reviewable error by erring with respect to the two credibility findings discussed above and then failing to consider the potential application of subsection 108(4).

V. Conclusion

[46] Some of the facts and findings of the Board in this case are very unfavourable to the Applicants. These include the long period of time that the Applicants spent in the United States without claiming asylum and the Board's finding that the Applicants would have an IFA in Bogota. The latter finding was made following a detailed assessment of information in a number of credible objective sources of objective information regarding country conditions in Colombia. Having particular regard to the uncontested evidence summarized at paragraph 21 above, that finding was not unreasonable. Ordinarily, this would provide a sufficient basis upon which to reject this application.

[47] However, this case is exceptional because: (i) there was evidence before the Board which indicated that some members of Ms. Villegas' immediate family had been subjected to a level of persecution which, *prima facie*, rose to the level of being "appalling" or "atrocious"; and (ii) there was also evidence which could reasonably have led the Board to conclude either that (a) Ms. Villegas had personally been persecuted, or (b) she was a member of a social group, namely her family, which had been persecuted, and that she had a sufficient nexus to that persecution as to warrant refugee protection.

[48] Had the Board not made important errors in disbelieving the overall credibility of Ms. Villegas' claims, it may well have accepted the credibility of those claims. Had it done so, it would

then have been obliged to consider whether there were compelling humanitarian reasons, arising out of past persecution, for invoking the subsection 108(4) exception to the cessation clause in paragraph 108(1)(e) of the IRPA.

[49] In short, had the Board accepted the overall credibility of Ms. Villegas' claims, there would have been credible evidence that: (i) she herself, or the social group consisting of her family, had been subjected to past persecution; and (ii) two of her brothers had been subjected to persecution that, *prima facie*, rose to the level of being "appalling" or "atrocious", by virtue of the fact that they were murdered by the FARC. In these circumstances, the Board was obliged to explicitly determine, and to address in its reasons, whether Ms. Villegas or her family, as a social group, had in fact been subjected to past persecution and whether there were compelling humanitarian grounds, as contemplated by subsection 108(4), for not requiring her to avail herself of the adequate state protection that the Board found now exists in Bogota.

[50] In failing to make these determinations, and to address these issues in its reasons, the Board erred.

[51] In contrast to the situation that arose in *Kalumba v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 680 at para. 18, where an IFA was found to exist at the time of the applicant's flight from his home country, such that there was never any basis for granting refugee protection to the applicant, no such finding was made in this case.

[52] Accordingly, this application for judicial review is granted.

JUDGMENT

THIS COURT ORDERS AND ADJUGES THAT the Board's decision, dated June 16, 2010, in which it rejected the Applicants' claims under sections 96 and 97 of the IRPA, is set aside and remitted to a differently constituted panel of the Board for reconsideration in accordance with these reasons.

There is no question for certification.

"Paul S. Crampton"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4046-10
STYLE OF CAUSE:	CLARA INES VILLEGAS ECHEVERRI ET AL v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	February 23, 2011
REASONS FOR JUDGMENT AND JUDGMENT:	Crampton J.
DATED:	March 30, 2011

APPEARANCES:

John W. Grice	FOR THE APPLICANTS
Rafeena Rashid	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Davis & Grice Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANTS
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT