Federal Court  Cour fédérale

**Date: 20130917**

**Docket: IMM-9365-12**

**Citation: 2013 FC 957**

**Ottawa, Ontario, September 17, 2013**

**PRESENT: The Honourable Madam Justice Kane**

**BETWEEN:**

**LISSED OMAIRA MURILLO TABORDA**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Ms Taborda, seeks judicial review pursuant to section 72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the *Act*], of a decision of the Refugee Protection Division of the Immigration and Refugee Board [the Board], dated August 8, 2012, which dismissed her claim for protection under sections 96 and 97(1) of the *Act*.

[2] The applicant, a citizen of Colombia, came to Canada on September 24, 2010 and made an application for refugee protection on December 15, 2010, alleging persecution by the Revolutionary Armed Forces of Colombia – People's Army (Fuerzas Armadas Revolucionarias de Colombia, or FARC).

[3] The applicant claimed that she was approached by FARC while she was a part time university student. On the first occasion, on February 5, 2010, seven members of FARC approached a group of students, checked all their identification against a list and then left. On the second occasion, on February 27, 2010, one of the same men stopped the applicant on the street and told her that FARC needed "smart and pretty women" to help them in their fight and that anyone who refuses to join FARC would seriously pay for their refusal.

[4] On March 7, 2010, the applicant was kidnapped by members of FARC on her way home. One of her kidnappers was the man who had tried to recruit her. She was beaten, driven to an empty house and raped. The men told her to go home and be ready for when FARC returned to pick her up.

[5] The applicant attended at the hospital and reported the kidnapping and rape to the National Police station in her home town, Jerico. The police commander told her that the police would not be able to protect her from FARC and that she should move away or go into hiding for her protection and make her own security arrangements.

[6] The applicant then fled with her son to Bogota where they lived in hiding for six months while arrangements were made for her to flee Colombia. The applicant noted that she feared for her life and that of her son due to her own experiences with FARC and because her son's father, Carlos, had been killed by FARC in 1997 for refusing its recruitment attempt.

[7] The applicant stated that FARC continues to look for her. An affidavit from the applicant's sister indicates that FARC members came to her business looking for the applicant and when she told them the applicant had left the country, FARC threatened that they would find the applicant and make her pay for making fun of them. FARC then demanded that the applicant's sister pay 500,000 pesos every month as a "quota for the desertion of my sister and for the security of my family".

*The decision under review*

[8] The Board provided a lengthy decision which reflects its broad review of country condition documents regarding state protection in Columbia indicating the progress and the challenges in dealing with the risk and violence caused by FARC. The Board concluded that the preponderance of the evidence suggests that, although not perfect, there is adequate state protection in Colombia. The Board found that the strength of FARC is withering in part because of counter-guerrilla operations by Colombian police and military forces and better management of intelligence resources. This has resulted in a declining trend in murders, kidnappings and extortions by FARC. The Board also found that Colombia has effectively prosecuted corruption in the police ranks. While the Board acknowledged that the armed conflict in Colombia continues to cause significant civilian casualties, especially in rural areas where FARC actively recruits, it found that the applicant was not at risk

because she was not a typical target, as FARC typically targets political, business, and other figures with a certain profile.

[9] The Board also found that the applicant had not availed herself of state protection in Bogota. She had only made one report to the Police in Jerico.

[10] In the alternative, the Board found that the applicant had a viable Internal Flight Alternative [IFA] in Bogota because she did not fit a specific profile and would not be targeted, FARC had a diminished capacity to track people down, and she had lived without incident in Bogota for six months.

[11] While the Board referred to letters from the applicant's father and sister, it found them to be self-serving and gave them little weight. The Board noted that the applicant's sister was extorted by FARC because she had a profitable business, not because of the applicant's refusal to join FARC.

*The Issues*

[12] The applicant submits that the Board's decision that state protection is adequate and that the applicant did not rebut the presumption of state protection is not supported by the evidence: the Board ignored the more recent country condition documents; the Board failed to consider that the applicant fit a risk profile and continued to be targeted by FARC; and, the Board erred in its assessment of the IFA in Bogota.

[13] The respondent submits that the Board's findings were reasonable: the Board considered all the country condition documents and, although the Board referred to the older documents, the more recent documents were presumed to have been considered; the applicant did not make sufficient efforts to seek state protection in Jerico or Bogota; and, the weight to be given to the evidence is up to the Board.

[14] The respondent also submitted that although the Board did not make any credibility findings, there were parts of the applicant's story that the Board could reasonably question. The respondent noted that the applicant had not put Carlos' name on her son's birth certificate, suggesting that perhaps this was a reason for the Board to not have considered Carlos as a similarly situated person. The respondent also noted that the applicant and her sister claimed to have reported the applicant's rape to a police commander at the National Police Station in Jerico, who told the applicant that the police could not protect her. The respondent suggested that it was unlikely that a high level police commander would be on duty in Jerico at the time of the night when the applicant made her report. These submissions are, in my view, speculative and not relevant for this application for judicial review. The Board did not make any credibility findings, and as such, the Board is taken to have accepted the applicant's evidence.

*The standard of review*

[15] The parties agree that the standard of review applicable to the Board's decision is that of reasonableness. The role of the Court is to determine whether the Board's decision "falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47, [2008] 1 SCR 190). There may be several

reasonable outcomes and "as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome" (*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 59, [2009] 1 SCR 339).

*Was the Board's assessment of the adequacy of state protection reasonable and did the applicant rebut the presumption?*

[16] The key issue is whether the Board erred in determining that the applicant had not rebutted the presumption of state protection. This requires consideration of whether the Board's assessment of the adequacy of state protection was reasonable and whether the applicant's efforts to seek state protection were sufficient and, if not, whether the applicant provided clear and convincing evidence that state protection would not have been reasonably forthcoming having regard to her particular circumstances. With respect to the Board's IFA findings, many of the same issues arise given the Board's assessment that FARC had a diminished capacity to find the applicant and that the applicant was not a person of interest to FARC.

[17] The Board considered the relevant and applicable principles governing state protection. Refugee protection is considered to be surrogate or substitute protection in the event of a failure of national protection. Persecuted individuals are required to first approach their home state for protection before the responsibility of other states becomes engaged (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at para 18, 103 DLR (4th) 1 [*Ward*]). The presumption that a state is capable of protecting its citizens is only rebutted by clear and convincing evidence that state protection is inadequate or non-existent and the applicant bears the onus of providing such evidence

(*Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at paras 18-19, [2008] FCJ No 399; *Ward* at paras 50-52).

[18] State protection need not be perfect but must be adequate. To be adequate, state protection must be effective to a certain degree and the state must be both willing and able to protect (*J B v Canada (Minister of Citizenship and Immigration)*, 2011 FC 210 at para 47, [2011] FCJ No 358). Adequate state protection also requires that it be adequate at the operational level (*Henguva v Canada (Minister of Citizenship and Immigration)*, 2013 FC 483 at para 18, [2013] FCJ No 510; *E Y M V v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1364 at para 16, [2011] FCJ No 1663).

[19] The onus on an applicant to seek state protection is commensurate with the state's ability and willingness to provide protection (*Sow v Canada* (*Minister of Citizenship and Immigration*), 2011 FC 646 at para 10, [2011] FCJ No 824; *Kadenko v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1376 at para 5, 143 DLR (4th) 532).

[20] The Board provided a thorough review of the measures being taken and the progress in Colombia to combat FARC. However, as noted by the applicant, the Board relied on country condition documents that were dated. Although the Board referred to the 2011 National Documentation Package, the documents most referred to by the Board were dated 2009 and earlier.

[21] The applicant pointed to recent country condition reports, particularly the April 2011 Response to Information Request [RIR], May 2010 UNHCR Report, and other articles published in

2011 which indicated that FARC has penetrated all aspects of Colombian government and could use its influence to obtain information that would enable it to track people down across Colombia. More generally, the RIR indicated that FARC remained a significant risk that the police could not protect citizens against.

[22] Although the Board need not refer to every piece of evidence, where more important evidence is not specifically mentioned and analyzed in the Board's reasons, the Court may be more willing to infer that the Board made an erroneous finding of fact "without regard to the evidence" (*Cepeda-Gutierrez v Canada (Minister of Citizenship & Immigration)*, [1998] FCJ No 1425 at para 17, 157 FTR 35).

[23] Although otherwise a comprehensive decision which considered all the relevant legal principles, I agree with the applicant that the Board ignored the more recent and relevant evidence concerning the risk posed by FARC and that, despite progress, FARC is still active and capable of harming civilian targets.

[24] As noted by Justice Rennie at para 27 of *Andrade v Canada (Minister of Citizenship and Immigration*), 2013 FC 436, [2013] FCJ No 461, with respect to a very similar passage in the decision of the Board with respect to FARC:

> [27] The Board also noted that some FARC members have been demobilized and that some hostages have been freed. The Board quoted a statistic from 2009 that murders committed by illegal groups had decreased by 2.2% and that the number of kidnappings for extortion has also been reduced by 23%. Not only is this information somewhat dated, it shows that murder, kidnapping and extortion remain serious problems.

[25] The Board also failed to consider whether the applicant fit a specific profile of interest to FARC. The Board referred to the UNHCR Eligibility Guidelines in noting that FARC targets groups of people with a certain profile, including "women with certain profiles". The UNHCR Eligibility Guidelines provide: "[v]iolence against women is reportedly used systematically by illegal armed groups for controlling territories and communities in different areas of the country… [a]dditionally, women may be subjected to forced recruitment for the purpose of sexual servitude". The applicant's evidence, which was accepted by the Board, was that FARC pursued her because she was "smart and pretty". The applicant's encounters with FARC, including the physical and sexual abuse after she refused its recruitment efforts, place the applicant into the category of "women with certain profiles" as described by the UNHCR Eligibility Guidelines. The Board should, therefore, have considered whether the applicant would be a person of interest given this profile.

[26] With respect to the letters from the applicant's father and sister which the Board found to be self-serving, I find this characterisation to be problematic. The documents were sworn affidavits. Moreover, the people who could most likely attest to the fact that FARC continued to look for the applicant would be her family members.

[27] As noted by Justice O'Keefe in (*S M D v Canada (Minister of Citizenship and Immigration)*, 2010 FC 319 at para 37, [2010] FCJ No 369) "it would seem to me that any letter written to support the applicant's claim would be, by the Board's reasoning, self-serving. This cannot be the case. An applicant has to be able to establish their case."

[28] In *Ugalde v Canada (Minister of Public Safety and Emergency Preparedness*), 2011 FC 458, [2011] FCJ 647, Justice de Montigny considered a similar issue and the relevant jurisprudence and noted at para 26:

> [26] However, jurisprudence has established that, depending on the circumstances, evidence should not be disregarded simply because it emanates from individuals connected to the persons concerned: *R v Laboucan*, 2010 SCC 12, at para 11. As counsel for the Respondent rightly notes, *Laboucan* concerned a criminal matter; however, immigration jurisprudence from this Court has established the same principle. Indeed, several immigration cases hold that giving evidence little weight because it comes from a friend or relative is an error.
>
> [27] For example, in *Kaburia v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 516, Justice Dawson held at paragraph 25 that, "solicitation does not per se invalidate the contents of the letter, nor does the fact that the letter was written by a relative." Likewise, Justice Phelan noted the following in *Shafi v Canada (Minister of Citizenship and Immigration)*, 2005 FC 714, at para 27:
>
> > The Officer gives little weight to other witnesses' affidavit evidence because it comes from a close family friend and a cousin. The Officer fails to explain from whom such evidence should come other than friends and family.
>
> Similarly, Justice Mactavish stated the following in *Ahmed v Canada (Minister of Citizenship and Immigration)*, 2004 FC 226, at para 31:
>
> > With respect to [*sic*] letter from the President of the organization, I do not understand the Board's criticism of the letter as being "self-serving", as it is likely that any evidence submitted by an applicant will be beneficial to his or her case, and could thus be characterized as 'self-serving'.
>
> [28] In light of this jurisprudence, and under the circumstances, I do not believe it was reasonable for the Officer to award this evidence low probative value simply because it came from the Applicants' family members. Presumably, the Officer would have preferred letters written by individuals who had no ties to the

> Applicants and who were not invested in the Applicants' well-being. However, it is not reasonable to expect that anyone unconnected to the Applicants would have been able to furnish this kind of evidence regarding what had happened to the Applicants in Mexico. The Applicants' family members were the individuals who observed their alleged persecution, so these family members are the people best-positioned to give evidence relating to those events. In addition, since the family members were themselves targeted after the Applicants' departure, it is appropriate that they offer first-hand descriptions of the events that they experienced. Therefore, it was unreasonable of the Officer to distrust this evidence simply because it came from individuals connected to the Applicants.

[29] The role of the Court is not to re-weigh the evidence but, because the Board attributed little weight to the affidavits due to their self serving nature and for no other stated reason, the Board must reconsider this evidence.

[30] Moreover, even if the Board was justified in giving the affidavits low weight, it did give them some weight and, in doing so, misunderstood the information provided by the applicant's sister. The applicant's sister clearly attested that FARC members came to her business looking for the applicant and when she told them her sister had left the country, FARC threatened that sooner or later they would find the applicant and make her pay for making fun of them. FARC then demanded that the applicant's sister pay 500,000 pesos every month as a "quota for the desertion of my sister and for the security of my family". The Board's finding that FARC's extortion of the applicant's sister was not related to the applicant's refusal to join FARC is not supported by the evidence.

*Was the Board's IFA finding reasonable?*

[31] The Board found that it would not be objectively unreasonable or unduly harsh for the applicant to reside in Bogota and to seek the protection of the state there, should she require it. This finding is not supported by the evidence.

[32] The test for an IFA is well established. There is a high onus on the applicant to demonstrate that a proposed IFA is unreasonable (*Ranganathan v Canada (Minister of Citizenship and Immigration)*, [2001] 2 FC 164, [2000] FCJ No 2118 (FCA)). The two-pronged test for an IFA was established in *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 589, [1993] FCJ No 1172 (FCA). The test is: (1) the Board must be satisfied, on a balance of probabilities, that there is no serious possibility of the claimant being persecuted in the proposed IFA; and, (2) conditions in the proposed IFA must be such that it would not be unreasonable, upon consideration of all the circumstances, including consideration of a claimant's personal circumstances, for the claimant to seek refuge there.

[33] As noted above, the Board did not consider the more recent country condition documents about the strength of FARC, which indicate that, despite setbacks, FARC still had the ability to pursue targets anywhere within Colombia. In addition, the Board did not consider whether the applicant would fit a profile of interest to FARC as a woman who had been sexually targeted. As noted above "women with certain profiles" as described by the UNHCR Eligibility Guidelines are at risk and the applicant could fit in that profile. The Board erred in concluding that she did not fit any profile of interest.

[34] In addition, the Board misunderstood the evidence of the applicant's sister, which indicated that FARC continued to threaten and look for the applicant.

[35] The Board's finding that the applicant had safely lived in Bogota for six months without being discovered ignored or misconstrued the applicant's evidence that she lived in hiding in Bogota and that she could be located if she used any identity documents, including for the purposes of finding employment.

[36] Given that both parts of the IFA test must be satisfied, it is not necessary to consider whether the Board's assessment of the second branch of the test was reasonable. I note, however, that the Board stated that apart from her general fear of FARC, the applicant stated no other impediments to living in Bogota. This is not an accurate summary of the applicant's evidence regarding Bogota nor does the Board acknowledge the psychological report provided which describes the risk the applicant would face to her mental health if she were to return.

*Conclusion*

[37] In conclusion, the Board's findings that there is adequate state protection for the applicant in Colombia and that she failed to provide clear and convincing evidence that state protection would not be reasonably forthcoming given her experiences and circumstances is not supported by the evidence. Rather, the evidence portrays a high risk of violence and persecution by FARC of people with particular profiles, which the applicant may fit. Similarly, the Board's findings with respect to the IFA in Bogota are not supported by the evidence regarding FARC's reach, the applicant's profile and the threats made to her via her family.

## JUDGMENT

**THIS COURT'S JUDGMENT is that**:

1. The application for judicial review is allowed.

2. No question is certified.

"Catherine M. Kane"

Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-9365-12 |
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| **DATE OF HEARING:** | AUGUST 28, 2013 |
| **REASONS FOR JUDGMENT AND JUDGMENT:** | KANE J. |
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| Nimanthika Kaneira | FOR THE RESPONDENT |

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