

Federal Court



Cour fédérale

Date: 20121127

Docket: IMM-800-12

Citation: 2012 FC 1367

Ottawa, Ontario, November 27, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

**MARIA ISABEL MENDOZA-RODRIGUEZ and
GUSTAVO ADOLFO GARCIA-ACOSTA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

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 (RPD) of the Immigration and Refugee Board, dated 28 December 2011 (Decision), which refused the Applicants' application to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Principal Applicant and her husband, the Secondary Applicant, are citizens of Colombia. The Secondary Applicant relied on the claim on his wife, so the Court will refer to her throughout as “the Principal Applicant”. The Principal Applicant claimed refugee status on 4 April 2011. Her narrative is as follows.

[3] The Principal Applicant grew up with her mother, Miryam Rodriguez de Mendoza, and brother, Diego German Mendoza (Diego), in Bogota, Columbia, in a neighbourhood called Santa Elena de Baviera. She remained very close with her family into adulthood, and they all lived near each other in the same neighbourhood.

[4] On 7 May 2000, Diego was arrested for kidnapping and extortion, and the Principal Applicant found out he was being investigated for belonging to a paramilitary group. Diego was under the orders of Miguel Angel Hernandez (Miguel), a friend of Diego’s who grew up in the same neighbourhood as the Principal Applicant’s family. Miguel’s uncle was Victor Carranza, who was a prominent emerald dealer in Colombia and had been involved in paramilitary organizations for years. The Principal Applicant learned that Diego was under the command of Victor Carranza and Angel Gaitan (Angel), who had also been arrested.

[5] The day that Diego was arrested he called the Principal Applicant and asked her to visit him where he was being detained. Diego told her that he was part of Victor Carranza’s paramilitary group and that the organization would take care of getting him out of jail. The paramilitary hired a lawyer for Diego, and managed to get him moved to the maximum security section of the prison.

[6] One or two days after Diego's arrest, Miguel and other members of the paramilitary showed up at the Principal Applicant's home. They were carrying weapons, and using aggressive and violent language. They told the Principal Applicant and her family that they had better follow the paramilitary's order; if not, the paramilitary would kill them at any moment they wanted. The paramilitary members told them not to tell anything to anyone, and forbade them from hiring a lawyer for Diego or speaking to any government authorities. They also told the Principal Applicant that her phones were being tapped and that her family was being watched.

[7] The Principal Applicant started receiving threatening phone calls from paramilitary members. They told her to stay quiet and obey their demands. Miguel and his men showed up at the Principal Applicant's house on a weekly basis, and were watching her constantly. Miguel would keep the Principal Applicant informed on what was going on with Diego's case because the paramilitary did not allow her to have any contact with his lawyer. The Principal Applicant would visit her brother in prison every Sunday, but these visits were controlled by Angel's security men, who were members of the paramilitary group.

[8] Based on her religious beliefs, the Principal Applicant thought Diego should leave the paramilitary group, and she often told him so when she went to visit him. He was always worried about her family's safety and would tell her to stay away from what was happening. Diego always told the Principal Applicant not to say anything to anyone about the harassment her family was dealing with, or the corruption in the jails. Diego would never talk to her about his involvement with the paramilitary group, but Miguel told the Principal Applicant that her brother was his trusted man, and that he had opened bank accounts and put real estate documents in his name.

[9] The Principal Applicant was afraid, and so in November 2000 she and her family moved to an apartment on the north side of the city to distance themselves from what was going on. The new apartment was about 45 minutes away by car from the Principal Applicant's old neighbourhood.

[10] In December 2000, the Principal Applicant received an invitation to visit a church in the USA, and so the Principal Applicant and her family went there for a month. Also in December 2000, the Principal Applicant's mother was diagnosed with cervical cancer. Due to her mother's health and Diego's legal troubles, the Principal Applicant returned to Colombia in January 2001.

[11] Around February 2001, the Principal Applicant started receiving threatening phone calls and noticed that she was being followed. She surmised that the paramilitary had found her family's new apartment. She also figured they had tapped her phone lines again, because during one of her visits to Diego he warned her to be careful what she said on the phone.

[12] Also in that month, Miguel and his bodyguards visited the Principal Applicant's husband's work. They showed up on the pretext of purchasing a vehicle and asked one of her husband's colleagues about his schedule and type of work. The Principal Applicant and her husband were very nervous, and so decided to get travelling documents together in case they needed to leave the country. They received tourist visas to the USA in March 2001.

[13] Miguel was found murdered around the end of April or beginning of May, 2001. People who worked for him, much like Diego, were murdered one by one around the same time. This series of murders scared the Principal Applicant very much, and she and her family decided to leave the country.

[14] Around the last week of April 2001, the Principal Applicant moved to another apartment about 40 minutes by car away from the previous apartment. Her family moved there just to get ready to leave for the USA and to wait for her mother to get her visitor's visa. Given all the people who had been murdered, the Principal Applicant decided it was too risky for them to stay in Colombia any longer. The Principal Applicant, her husband, and her daughter left Colombia on 29 May 2001. In June 2001, the Principal Applicant's mother told her that the sister and mother of Miguel had been found tortured and murdered.

[15] On 4 July 2001, Diego was supposed to be released from prison because the paramilitary group had paid the prosecution a large bribe to release him and they could not prove he was guilty of anything. On 3 July 2001, Diego was taken out of his cell and executed. The government's official version of events says that he was killed during an uprising at the prison, but the uprisings took place in a different area of the prison from where Diego was held. The Principal Applicant believed that Diego wanted to leave the paramilitary and that is why he was killed. The Principal Applicant's mother told her that the paramilitary had been looking for her family in places like her beauty parlour and church, and that it was too dangerous for them to return for Diego's funeral. The Principal Applicant therefore stayed in the USA.

[16] The Principal Applicant thought that after her brother's death the paramilitary would leave her family alone. However, shortly after Diego's murder her mother started receiving threatening phone calls from Angel. He wanted the documents Diego had given her concerning the bank accounts and properties that were in his name. The Principal Applicant's mother gave Angel the documents he wanted, and he told her that if anyone in their family disclosed his relationship to the paramilitary or blamed his death on them, then they would be killed as well.

[17] In August 2001, the Principal Applicant and her sister hired a lawyer named Tulio Nieto Arbelaez to start a legal process against the institution responsible for the management of jails in Colombia. In September 2001, Angel was murdered. On 10 December 2001, the Principal Applicant's mother received her visa to the USA and joined the Principal Applicant and her family there on 18 December 2001.

[18] Once in the USA, the Principal Applicant and her family applied for refugee protection. The Principal Applicant's mother returned to Colombia in December 2002, because she could not afford her medical costs in the USA. Since that time the Principal Applicant's mother has been moving around to try to avoid the paramilitary.

[19] The Principal Applicant was granted political asylum in the USA in December 2003, but that decision was appealed and she lost her status. The Principal Applicant appealed that decision and the process finally ended in December 2010, with the Principal Applicant being denied asylum. Facing deportation to Colombia, the Principal Applicant left the USA for Canada.

[20] The Principal Applicant filed a refugee claim on 4 April 2011. She fears that if she returns to Colombia she will be killed by the paramilitary of which her brother used to be a member because they think or assume that her brother revealed information to her and her family about their activities. The paramilitary also knows that the Principal Applicant advised her brother to leave the group, and that she has made a complaint to the authorities about her brother's death. Her claim was denied on 28 December 2011.

Documentary Evidence

[21] The Principal Applicant submitted a large amount of documentation in support of her claim.

The personal documentation includes:

- A copy of the materials submitted in support of the refugee claim she made in the United States;
- Letters corroborating the Principal Applicant's statements about the harassment her family suffered at the hands of the paramilitary;
- Materials about the lawsuit started by the Principal Applicant related to her brother's death;
- Evidence and newspaper articles corroborating the death of Diego, Angel, and other members of the paramilitary.

[22] The Principal Applicant also submitted many materials dealing with country conditions and paramilitary groups in Colombia. Three of these submissions are of particular interest to this application. The first is an article from a publication called *In Sight* titled "Emerald Czar a Test for Colombian Justice," dated 22 March 2011. It is available on page 1060 of the Certified Tribunal Record (CTR). This article discusses the political and economic power wielded by Victor Carranza, and states "Carranza is Colombia's Teflon man, who, over a 30-year period, has beat back numerous attempts to assassinate or prosecute him. His ability to survive is surpassed only by his business acumen – he remains one of the world's top emerald dealers and one of Colombia's largest, and most politically-connected, landowners." The article describes numerous attempts to prosecute Carranza for illegal activities, but none have been successful. He even managed to avoid

conviction when a mass grave containing 50 bodies was found on his property. The article also discusses Carranza's numerous high-powered political connections.

[23] There is also a publication by Gendercide Watch called "Case Study: Colombia." On page 1069 of the CTR this article describes Carranza as a "legendary emerald dealer, rancher, and paramilitary chieftain linked to hundreds of political killings in the department of Boyaca and Colombia's eastern plains." Another article that discusses Carranza is dated January, 2001 and called "Columbia's paramilitaries"; it is found on page 1072 of the CTR. This article discusses how fights over emerald-rich territories cumulated in the "Green War" of 1988, with Carranza emerging as the principle victor. By the 1990s Carranza emerged as one of the country's wealthiest and most powerful individuals. It also says that Carranza is expanding his acquisitions with help from paramilitary groups.

[24] The RPD heard the Principal Applicant's claim on 12 December 2011, and issued the Decision rejecting it on 28 December 2011.

DECISION UNDER REVIEW

[25] The RPD found the Principal Applicant was not a Convention refugee or person in need of protection because state protection was available to her in Colombia, and that she did not make reasonable attempts to avail herself of it.

[26] The RPD began its state protection analysis by stating that a claimant who alleges that state protection is inadequate must present evidence to persuade the Board of such. *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 establishes a presumption that unless a state is in complete

breakdown it is capable of protecting its citizens. After canvassing the country condition documents, the RPD found that Columbia is a democracy, and while the situation is not perfect it has effective control of its territory and is able to uphold the laws of the country. A failure to pursue state protection will usually be fatal to a refugee claim where the state is a functioning democracy, and the more functioning the democracy the heavier the burden on the claimant to demonstrate that he/she has exhausted all the resources available to him/her.

[27] At paragraph 24 of the Decision, the RPD stated that the Principal Applicant “fears the paramilitaries in Colombia, and specifically, Victor Carranza, who is the head of the paramilitary organization... The claimant testified that Victor Carranza, and other members of the paramilitary had visited her home on a number of occasions...” The RPD pointed out that when the Principal Applicant was asked what information she had that was of concern to the paramilitaries she said that the paramilitary members who visited her home on a regular basis had told her of their illegal arms permits obtained through the Ministry of Defence, and about scientific material they used for the men who worked for them. The Principal Applicant testified that this information was divulged to her because the paramilitary wanted her family to know how powerful it was. She also testified that the paramilitary did not want her to hire a lawyer for her brother because it wanted their own lawyers to deal with all their men who were incarcerated.

[28] The RPD then reviewed country conditions in Colombia. It found that Colombia has functioning democratic institutions and a relatively independent and impartial judiciary. The RPD stated that there was persuasive evidence that Columbia was trying to rectify its past problems of criminality and corruption. The RPD recognized inconsistencies in the documentary evidence (paragraphs 27-33 of the Decision), but found that the preponderance of the evidence suggested that

state protection is adequate in Colombia. The RPD also found, at paragraph 27 of the Decision, that a “person sought by paramilitary groups would have to have sufficient value to that group for it to [be] motivated or inclined to pursue that person elsewhere in Colombia.”

[29] The RPD pointed out that the Principal Applicant testified that she never went to the authorities out of fear for her own life, as well as fear for Diego’s life. The RPD found that although “the claimants would have been justifiably afraid, I find it unreasonable that they did not seek the protection of police given they knew that the state was both willing and able to apprehend members of the paramilitaries as evidenced by the arrest and incarceration of her brother and two other heads of the paramilitary.” The RPD found that the evidence of these other arrests demonstrated that the state could provide protection to its citizens and that it is willing to bring top members of the paramilitaries to justice. Because the Principal Applicant never reported any of the incidents to any authority, she has denied the state the opportunity to protect her. The presumption of adequate state protection cannot be rebutted simply by asserting a reluctance to engage the state. The RPD said that doubting “the effectiveness of the protection offered by the state when one has not really tested it does not rebut the existence of a presumption of state protection.”

[30] The RPD found there was insufficient evidence to support the assertion that the Principal Applicant is at a heightened risk due to the lawsuit started in 2001; her sister and mother remain in Colombia, and have received no further threats. The RPD also stated that there was insufficient evidence adduced to demonstrate that any member of the paramilitary is still seeking the Principal Applicant. Again, the Principal Applicant’s mother and sister have been living in Colombia without incident, and the Principal Applicant said that she is not aware of anyone currently looking for her

or her family. The RPD stated that, on a forward looking assessment, there is no more than a mere possibility that the Principal Applicant will be sought by paramilitaries in Colombia.

[31] The RPD found the Principal Applicant had not rebutted the presumption of state protection, so her claim for protection could not succeed. The Principal Applicant had established her identity, and she was accepted as credible. The Principal Applicant had proven that her brother was murdered by a paramilitary organization and that her family was harassed by them. However, there is a presumption that a democratic state, like Colombia, is able to protect its citizens (which the Principal Applicant had not rebutted). The Principal Applicant had a burden to demonstrate that she took all reasonable steps to avail herself of the state protection available to her, and to provide clear and convincing evidence of the state's inability to protect. She did not do so in this case. The RPD found that the Principal Applicant was not a Convention refugee or a person in need of protection under sections 96 or 97 of the Act. As the Principal Applicant's husband's claim rested entirely upon hers, it was refused as well.

ISSUES

[32] The Applicants raise the following issue in this proceeding:

- a. Did the RPD ignore evidence about the agent of persecution (Victor Carranza) in conducting its state protection analysis?

STANDARD OF REVIEW

[33] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9 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 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.

[34] The Principal Applicant says the RPD ignored evidence which showed that Victor Carranza is above the protection able to be offered by Colombia. The standard of review on this issue is reasonableness. In *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, the Federal Court of Appeal held at paragraph 36 that the standard of review on a state protection finding is reasonableness. Justice Leonard Mandamin followed this approach in *Lozada v Canada (Minister of Citizenship and Immigration)*, 2008 FC 397, at paragraph 17. Further, in *Chaves v Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, Justice Danièle Tremblay-Lamer held at paragraph 11 that the standard of review on a state protection finding is reasonableness.

[35] 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 paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa* 2009 SCC 12 at paragraph 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.”

ARGUMENTS

The Applicants

[36] The Applicants submit that although the RPD considered evidence about Colombian paramilitaries in general, it failed to address the evidence concerning the specific paramilitary leader the Applicants fear. The Principal Applicant provided evidence of the power and influence of the main agent of persecution, and it is unreasonable that this evidence was not considered in the Decision.

[37] The RPD found the Principal Applicant to be credible and did not dispute that the events recounted in the Principal Applicant’s PIF had occurred. The Decision rested on the RPD’s conclusion that the Principal Applicant had not rebutted the presumption that Colombia, as a democratic state, was able to adequately protect her. The RPD did not take issue with any other portion of the Applicants’ refugee claim.

[38] One of the RPD’s key findings was that Colombian authorities have demonstrated a willingness to bring members of paramilitary organizations to justice, and that the Applicants’ failure to seek state protection was not objectively justified. The Applicants submit that in coming to this conclusion the RPD ignored the evidence submitted about Victor Carranza, the Applicants’ main agent of persecution.

[39] The documentary evidence submitted indicates that although the Colombian government has demonstrated a willingness, in general, to bring paramilitaries to justice, it has not been able to bring Victor Carranza to justice due to his immense power and influence.

[40] The Applicants point to the decision in *Torres v Canada (Minister of Citizenship and Immigration)*, 2010 FC 234 [*Torres*]. In that case, the RPD found the applicant had not taken reasonable steps to seek state protection in Mexico, and that the state was adequately able to protect him. However, in coming to that conclusion the RPD failed to consider the specific profile of the agent of persecution. Justice Russel Zinn found this unreasonable, stating at paragraph 39:

The profile of the alleged human rights abuser is important due to the fact that, even in democratic countries, certain individuals can be above the law. The adequacy of state protection frequently depends on the characteristics of the abuser. If the abuser is in a position of power or has close ties to the police or other authorities, it may be very difficult, if not impossible, for a claimant to obtain protection.

[41] Justice Zinn also said, at paragraph 43 of *Torres*:

In this case, the Board thoroughly reviewed the incidents of abuse that the applicant suffered. However, the Board provided only minimal discussion of the profile of the abusers. There was no substantive discussion of the applicant's allegations that Mr. Almendariz was involved with organized crime, or that he was politically connected, or that he had connections to the police. These issues are important in determining whether the Mexican authorities would be able and willing to provide protection, particularly in light of the documentary record that suggests powerful individuals in Mexico can commit crimes with impunity.

[42] The RPD's discussion of the agent of persecution was minimal. In fact, Victor Carranza was only mentioned once, in passing. The RPD said nothing about his power and influence, and never acknowledged that his profile may be more than an ordinary paramilitary leader.

[43] The Applicants provided three articles specifically discussing Victor Carranza: *In Sight*, “Emerald Czar a Test for Colombian Justice” dated 22 March 2011, *Gendercide Watch*, “Case Study: Colombia” undated, *Afn.org*, “Colombia’s Paramilitaries” dated January 2001.

[44] The *In Sight* publication included the following information:

- Over a 30-year period, there have been numerous attempts to prosecute Mr. Carranza, as well as numerous attempts to assassinate him;
- Mr. Carranza has survived numerous legal, political, and physical attacks, and his ability to survive these attacks has garnered him the nickname “Colombia’s Teflon Man”;
- Even in the face of repeated testimony from various former paramilitary members, Mr. Carranza has still managed to avoid prosecution;
- Mr. Carranza avoided conviction even when a mass grave holding 50 bodies was found on his property;
- Mr. Carranza is one of the world’s top emerald dealers and one of Colombia’s most politically well-connected landowners;
- New evidence has emerged linking Mr. Carranza to paramilitary groups, but it is unlikely to lead to a conviction;
- Mr. Carranza was imprisoned in 1998 on charges of drug trafficking and maintaining a paramilitary army, but was released in 2001 and later cleared of all charges and was compensated for wrongful imprisonment;
- Spain tried to extradite Mr. Carranza in 2002 and 2010, but these attempts were unsuccessful;

- There is evidence of links between Mr. Carranza and Colombian President Juan Manuel Santos, as well as other influential people such as a former Defence Minister;
- Mr. Carranza wields substantial economic power, and while he was in prison Colombia's revenues from the emerald trade dipped significantly.

The Principal Applicant points out that this item was relied upon in her final submissions at the oral hearing.

[45] The Applicants submit that the reasonable conclusion to be drawn from this evidence is that Victor Carranza is "above the law." This will also likely be the case on a prospective basis, as there is little indication that the situation is bound to change. This evidence contradicts the RPD's finding that the state is able and willing to provide the Applicants with adequate protection. It also provides corroborating evidence to her position that to complain to the police about Victor Carranza would be risky and futile.

[46] The evidence submitted about Victor Carranza was very important to the Applicants' claim. It was uncontradicted, and no reason was offered why it was given no weight in the Decision. The RPD simply ignored this evidence. The RPD may be correct that some paramilitary members have been arrested and prosecuted, but this has little applicability to the Applicants' specific agent of persecution. The RPD recognized that Colombia's legal system is "overburdened, inefficient, and hindered by subordination and intimidation of judges, prosecutors, and witnesses." Considering this type of environment, it is understandable that the Applicants would not risk confronting Victor Carranza.

[47] The Applicants submit that the issue in this judicial review is not whether this evidence would have necessarily swayed the RPD, but whether the evidence was important enough that it should have been given specific consideration in the Decision. The Applicants submit that it was. The RPD accepted, at paragraph 24 of the Decision, that the Principal Applicant was “specifically” afraid of Victor Carranza. It was therefore incumbent on the RPD to consider his specific power and influence, not only that of the paramilitaries in general.

[48] The RPD also stated there was no evidence the paramilitaries have shown any interest in the Principal Applicant or her family in recent years. The Principal Applicant points out that her 72-year-old mother returned to Colombia, in part to obtain ongoing cancer treatment, the cost of which was prohibitive in the United States. Since returning to Colombia she has been living in different residences to avoid the paramilitary. The Principal Applicant also submits that her mother is not similarly situated and that her age and ill health may have protected her. The Principal Applicant’s half-sister was also not similarly situated because it was the Principal Applicant who took an active role in visiting her brother after his arrest, and the threats against her were made in this context.

[49] Although the RPD did not actually go into an internal flight alternative analysis, it did suggest that the Principal Applicant is not of a sufficiently high profile for the paramilitaries to pursue her in other areas of Colombia. The Principal Applicant submits the failure of the RPD to take into account the profile of the Principal Applicant’s agent of persecution also impacted this analysis. This was also addressed in *Torres*, where Justice Zinn said at paragraph 53:

The Board also concludes that Mr. Almendariz would not have the national reach to follow the applicant to either of the proposed IFAs but provides no justification for this conclusion. As was discussed above, the applicant alleged that Mr. Almendariz had connections with organized crime and with powerful political figures, in addition to his role as the President of the Mexican Association of Hotels and

Motels. The Board did not address these and did not, as has been said, examine the IFAs considering the profile of the agent of persecution. Its analysis of the availability of an IFA given the identity of the agent of persecution was unreasonable.

[50] The Applicants submit that this evidence is sufficient to demonstrate that the Decision might have been different absent the RPD's errors (see *Pankou v Canada (Minister of Citizenship and Immigration)*, 2005 FC 203; *Alam v Canada (Minister of Citizenship and Immigration)*, 2005 FC 4; *Hassan v Canada (Minister of Citizenship and Immigration)*, 2005 FC 601). That being so, the Applicants submit that the Decision is unreasonable and request that it be referred back to the RPD for redetermination. The Applicants also submit that given the only issue is the availability of state protection, that it would be appropriate for the Court to direct that reconsideration be limited to that issue.

The Respondent

[51] The Respondent submits that the RPD is a specialized tribunal and an expert in its field. Evidence of country conditions fall into its expertise, and the RPD is entitled to determine the weight to be assigned to each piece of evidence (see *Meija v Canada (Minister of Citizenship and Immigration)*, 2009 FC 354; *Aguebor v Canada (Minister of Employment and Immigration)*, (1993) 160 NR 315 (FCA); *Medarovik v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 61). The onus rested with the Principal Applicant to rebut the presumption that adequate state protection was available (see *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at page 709; *Thirunavukkarasu v Canada (Minister of Employment and Immigration)*, [1993] FCJ No 1172 (FCA) at paragraphs 5-6), and she failed to rebut that presumption in this case.

[52] In concluding that the Principal Applicant had not rebutted the presumption of state protection, the RPD considered the following evidence:

- The Principal Applicant testified she never sought legal counsel for her brother and never reported the incidents of being threatened to the authorities;
- The incarceration of the Principal Applicant's brother and two other paramilitary members demonstrated that the state was both willing and able to apprehend members of the paramilitaries.

[53] The RPD also made the following findings:

- The Principal Applicant's failure to report the incidents to the police denied the state the opportunity to protect her;
- There was insufficient evidence adduced to indicate that any member of a paramilitary organization is currently seeking out the Principal Applicant.

[54] Refugee protection is only provided when the protection of a claimant's country of nationality is unavailable (*Carrillo*, above, at paragraph 25). The onus is on the Principal Applicant to establish that she is unwilling or unable to avail herself of the protection of Colombia. It is not sufficient for the Principal Applicant to demonstrate that the Colombian government has not always been effective at protecting its citizens from the paramilitary groups. Further, a subjective reluctance to approach the state for protection does not demonstrate that state protection is unavailable (*Ward* at pages 724-725; *Camacho v Canada (Minister of Citizenship and Immigration)*, 2007 FC 830; *Canada v Villafranca*, (1992) 18 Imm LR (2d) 130 (FCA) at pages 132-133).

[55] Absent a complete breakdown, a state is presumed able to protect its citizens. The RPD acknowledged there is some tolerance by the police in Columbia of the illegal activities of the paramilitaries; however, this did not suggest a heightened risk to this particular Principal Applicant. The Respondent submits there was a great deal of evidence that Colombia has made significant gains in combating the paramilitary groups. It was open to the RPD to prefer some evidence over other evidence (see *Cepeda-Gutierrez v Canada*, [1998] FCJ No 1425 (FC) [*Cepeda-Gutierrez*] at paragraph 16; *Szucs v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1614 at paragraph 11).

[56] The Respondent submits that the articles that specifically mention Victor Carranza do not undermine the RPD's finding that the state has presented a willingness to bring the paramilitary group in question to justice. The articles do not stand for the proposition that the Colombian government allows Victor Carranza to act with impunity. While the articles note that the Colombian government has been unsuccessful in prosecuting Victor Carranza, they do not say why. One article speculates there may currently be insufficient evidence to bring formal legal proceedings. The other two articles simply mention Victor Carranza in passing, saying that he is a paramilitary leader who has been linked to killings. No mention is made of attempts to arrest or prosecute him. The Respondent submits that these articles do not undermine the RPD's finding that if the Principal Applicant had approached the authorities for protection it would have been available.

[57] The Respondent further submits that it does not make sense that the Principal Applicant was afraid to approach the authorities about Victor Carranza because he was in prison during the time in question. When the Principal Applicant was asked why she did not approach the authorities for protection she did not specifically mention Victor Carranza, but stated that she was afraid the police

had been infiltrated by the paramilitaries and that she would be harmed for going to the police. The Respondent states that this demonstrates that Victor Carranza had little, if anything, to do with the Principal Applicant's failure to approach the authorities.

[58] The Respondent also states that the *Torres* decision is distinguishable from the present situation. In that case, the applicant approached the authorities and was specifically told that his complaint would go nowhere due to the profile of his persecutor. The applicant's failed attempts to obtain protection were a significant factor in *Torres*, with Justice Zinn stating at paragraph 40 that the applicant's failed attempts to seek protection were "crucial," and that they were all that could rebut the presumption of state protection. He went on to say at paragraph 41 that the response the applicant received from the authorities was essential in determining the adequacy of the protection received.

[59] Furthermore, the powerful assailants in the *Torres* case were specifically involved in the persecution. Here, there is no evidence that Victor Carranza took an active role in anything to do with the Principal Applicant. The threats came from other paramilitary leaders while Carranza was in prison. The Principal Applicant clearly indicated that she was persecuted by the group as a whole, so the RPD considered whether the authorities would take action against the specific leaders of the group. It reasonably concluded, based on the imprisonment of three of the paramilitary's leaders, that the authorities have demonstrated a willingness to take action. Thus, the RPD concluded that the Principal Applicant had not taken reasonable measures to seek state protection.

[60] Further, the Respondent points out that the Principal Applicant's sister and mother still reside in Colombia, and have not been threatened by the paramilitaries since 2001. The RPD found that there was no evidence the paramilitaries are still interested in the Principal Applicant, and that

the paramilitaries would not pursue the Principal Applicant if she were to return to Colombia. The Respondent submits that this is independently sufficient to dispose of this application.

[61] The Principal Applicant argues that she is at greater risk than her family members, but the factors she puts forward do not distinguish her from her family members in a meaningful way. One of the reasons the Principal Applicant claims she is at risk is because her family started a lawsuit in relation to her brother's death. However, the law suit was started by her entire family, including her mother and sister, and they have not been harmed.

[62] Another reason the Principal Applicant claims to be at risk is because she possesses important information about the paramilitary, but the Principal Applicant testified that her mother was present when she learned this information. The Principal Applicant also claims that she is more at risk because it is she who took an active role in visiting her brother in jail. However, there are multiple references in her PIF to other people visiting her brother as well; she said things such as "we went to the prison," and "we went to see my brother."

[63] The Principal Applicant further claims that she is not similarly situated to her mother due to her mother's age and poor health. However, according to the Principal Applicant's story her mother was as much a target to the paramilitary as she was; her mother was even personally threatened once. Like the Principal Applicant, the mother initiated the law suit and she holds information about the paramilitary. The Respondent points out that the RPD specifically considered the fact that the Principal Applicant's mother has been keeping a low profile in Colombia, but still came to the conclusion that the fact that she had no further encounters with the paramilitary indicates that they are no longer interested in the Principal Applicant or her family.

[64] The Respondent submits that considering all the evidence in this case it was open to the RPD to find that state protection, although not perfect, was adequate. The Respondent requests that this application be dismissed.

The Applicants' Reply

[65] The Applicants submit that the Respondent has not demonstrated that it was reasonable for the RPD to make an adverse state protection finding without at least referring to the evidence specifically concerning Victor Carranza. The issue is not that the RPD preferred some evidence over other evidence; the issue is that it ignored the evidence concerning Victor Carranza.

[66] Considering the importance of the evidence, the Principal Applicant submits that she has rebutted the presumption that the RPD considered it. The RPD canvassed the general documentary evidence extensively; thus it is even more reasonable to expect the Decision to at least mention the evidence about the specific agent of persecution that the Principal Applicant fears. If the RPD did weigh this evidence, and for some reason found it worthless, it would be reasonable to expect to find some hint of this reasoning in the extensive Reasons. If the RPD refers in detail to evidence in support of its conclusion, but is silent on evidence pointing the other way, it is easier to infer that evidence was ignored (*Cepeda-Gutierrez*, above, at paragraph 17). The Applicants submit that to recognize such an error is not substituting the Court's view of the evidence, it is simply saying that it must be satisfied the RPD turned its mind to the evidence.

[67] The evidence in question is not about the imperfections of state protection offered by Colombia; it is about the complete impunity for the particular paramilitary leader in question.

Further, the Applicants point out that the Respondent has not attempted to distinguish the decision in *Torres*, which the Applicants submit is right on point.

[68] The Principal Applicant submits that her failure to approach the state for protection is not determinative. There is no absolute requirement for a refugee claimant to approach the state, especially if it may be dangerous or futile to do so. This cannot always be characterized as “subjective reluctance.” It was incumbent on the RPD to determine whether the Principal Applicant’s failure to approach the state was justified, and whether protection by the state in the Principal Applicant’s situation might be reasonable forthcoming.

[69] As regards the Respondent’s allegations that the events in question occurred over a decade ago, the Principal Applicant points out that no adverse credibility findings were made in relation to her evidence. Further, the documentary evidence suggests that “due to their presence in vast sectors of Colombia and extensive information networks, it is likely that FARC, ELN, and successor groups to the AUC [paramilitaries] have the capacity to pursue victims even after they have spent many years outside the country”. A report of the United Nations High Commission for Refugees also says that paramilitaries “often employ highly sophisticated databases and computer networks and are able to trace people even years after their initial search.” The Applicants submit that this is also something that should have been considered in the Decision.

[70] The Applicants acknowledge that the Decision is for the RPD to make, but only after assuring the parties that all evidence has been considered. The Applicants submit that did not occur in this Decision, and requests that it be reconsidered.

ANALYSIS

[71] The Applicants place particular reliance upon Justice Zinn's decision in *Torres*. *Torres* was, however, an IFA decision, at least in part, and the profile of the principal abuser, Mr. Almendariz, and his reach throughout Mexico assumed a particular importance in the context of that case. Also, in *Torres*, the evidence was strong that Mr. Almendariz had taken direct violent action against the applicants and this had occurred in the fairly recent past, so that his continued interest in them was obvious. In addition, *Torres* places significant emphasis on the applicants' attempt to seek protection; in the present case, no attempts were made. [

[72] The present case bears little factual resemblance to the *Torres* situation. The Principal Applicant's evidence concerning the man she called the "main agent of persecution" was that

Our lives were peaceful, but on May 7, 2000, everything changed for us when I found out through a TV newscast that my brother had been arrested by the Guala police. He was being charged with kidnapping, extortion and was being investigated to see if he belonged to the paramilitary. My family and I were surprised because we had no idea my brother was involved with this group, apparently under the orders of Miguel Angel Hernandez, a man my family knew because he grew up in the same neighbourhood as we did and was a friend of my brother. Miguel was the nephew of Victor Carranza. We only new Victor because we knew he was Miguel's uncle and we could see him, very seldom, in the neighbourhood or in the neighbourhood's mall. As time passed, we learned through my brother that Miguel was under the command of Victor and Angel Gaitan, who had also been arrested. Victor Carranza was being investigated by the DAS unit of the police and was also detained. Victor Carranza got out with 286 million Pesos bail.

[73] The RPD specifically addresses the Principal Applicant's evidence concerning Victor Carranza at paragraph 24 of the Decision:

The claimant testified that she fears the paramilitaries in Colombia, and specifically, Victor Carranza, who is the head of the paramilitary

organization. The claimant testified that her brother, who was the head member of the paramilitary, had been arrested and incarcerated in May 2000. The claimant also testified that two other heads of the paramilitary organization had also been arrested and incarcerated. The claimant testified that Victor Carranza, and other members of the paramilitary had visited her home on a number of occasions warning her, her husband and her mother against obtaining legal counsel for her brother, as well as against sharing any information they knew about the organization with anyone. The claimant testified that they were told that if they do not comply with the two stipulated demands, they would be assassinated. When asked what information the claimant knew about the paramilitaries, that was of little concern to them, she testified that the paramilitaries, who had visited their home on a regular basis, had told them of their illegal arms permits which had been obtained from the Ministry of Defense and about scientific material used for the men who worked for them. The claimant testified that as a result of having this information she and her family were military objectives, regardless of whether they shared the information or not. When asked if she knew why the paramilitaries would reveal incriminating evidence to them, if they were concerned about it being divulged, the claimant testified that it was because they wanted claimants to know that they had power. When asked why the members of the paramilitaries did not want her family to obtain a lawyer to help free her brother, the claimant testified that she had been told that they wanted to retain their own lawyers to deal with all of their men who were incarcerated.

[74] The RPD makes no IFA finding in this case. Its conclusion is that no one is currently seeking the Applicants:

Furthermore, I find that insufficient evidence was adduced to indicate that either Mr. Hernandez or any other member of the paramilitary organization is currently seeking out the claimant. The claimant testified that her mother remains in Colombia, although maintaining a low profile and moving around, however she has had no further encounters with any members of the paramilitaries since the claimant left Colombia. The claimant also testified that her sister, also, lives in Colombia, and that none of the claimant's family members have had any further encounters with Mr. Hernandez or any of his men since she left Colombia, nor is she aware of anyone currently looking for her or her family.

Insufficient reliable and probative evidence was forwarded to indicate that any members of the paramilitaries are currently looking

for the claimant or that they would have an ongoing interest in her stemming from the incident which occurred in 2000 and early 2001. Consequently, in a forward looking assessment, I find that, there is no more than a mere possibility that the claimant would be sought out by the paramilitaries if she was to return to Colombia.

[75] The Decision is mostly about state protection, but there is also a clear finding that no member of a paramilitary organization is seeking the Applicants.

[76] The Applicants say, in accordance with *Cepeda-Gutierrez* principles, that it was unreasonable of the RPD not to specifically address the evidence presented on Victor Carranza, the principal agent of persecution.

[77] The RPD's conclusion that no member of the paramilitary organization in question was currently seeking the Applicants is based upon similarly situated person grounds. The Principal Applicant's mother and sister have remained in Colombia and have had "no further encounters with any members of the paramilitaries since the claimant left Colombia." I think this finding is reasonable.

[78] The reasons put forward by the Principal Applicant as to why she feels threatened by the paramilitary, and Mr. Carranza in particular, are that she has knowledge of the paramilitary group, they know that she visited her brother in jail and wanted him to leave the group, and the family hired a lawyer after the brother's death to start the legal process. All of these factors apply equally to her mother. The evidence about Victor Carranza's present impunity does not come into play if neither he nor his group is seeking the Principal Applicant. Nor does the evidence concerning the sophisticated data collecting abilities of paramilitary groups. Neither the Principal Applicant's sister

or mother have been bothered by Victor Carranza or his group since the Principal Applicant left Colombia in 2001.

[79] As regards the state protection analysis itself, the Applicants say that it was reasonable for them not to approach the police because of Victor Carranza's impunity, and the RPD simply fails to mention or deal with the profile of the main agent of persecution, as was the case in *Torres*.

[80] In my view, however, even if the RPD's finding that no member of a paramilitary organization is currently seeking the Applicants is not a stand-alone reason for rejecting the claim, it still has to be taken into account when reviewing the RPD's state protection analysis.

[81] The RPD's basic position is that

the fact remains that at no time did the claimant seek the protection of the state, even though she had first-hand knowledge of their willingness and ability to arrest and incarcerate three heads of the organization she feared.

[82] The Principal Applicant says that, in considering whether it was reasonable for her not to approach the state, the RPD has failed to consider the evidence that demonstrates the power, and impunity enjoyed by Victor Carranza.

[83] When the Decision is read as a whole, however, I do not think this is the case.

[84] The RPD finds that no member of a paramilitary organization is currently seeking (and this includes Victor Carranza) the Applicants. I have already concluded that, given the experience of the Principal Applicant's mother and sister, this was not an unreasonable conclusion for the RPD to reach. If Victor Carranza was interested in punishing the Principal Applicant, he would be equally

interested in punishing her mother and sister, and he has taken no action against them for a long time.

[85] The RPD is assessing forward-looking risk and the availability of state protection against paramilitary violence if the Applicants return to Colombia. Having concluded, reasonably, that the Principal Applicant does not face a threat from “Mr. Hernandez or any other member of the paramilitary organization,” Mr. Carranza cannot be considered as the main agent of persecution. He is not interested in the Principal Applicant, in the same way that he is not interested in the Principal Applicant’s mother and sister. Hence, there is no reason for the RPD to assess the *In Sight* article that refers in a general way to Victor Carranza’s “Teflon” prowess. There is nothing in this article that says that Victor Carranza is interested in the Applicants. The Principal Applicant took no steps to seek state protection in the past, at a time when the police had actually taken steps against Victor Carranza and his paramilitary group, and there is no evidence to suggest that these people will harm the Applicants if returned to Colombia. As the Decision makes clear, this is the reason why the RPD felt the Applicants had not rebutted the presumption of adequate state protection for what had happened to them in the past, or for what they face in the future. The Victor Carranza evidence needs no specific mention if he is not a specific threat.

[86] The evidence which the Applicants refer to about Victor Carranza speaks of his connection to a paramilitary group, and his use of that group to protect his business interests.

[87] The evidence suggests that Victor Carranza has been very successful at avoiding “numerous attempts to assassinate or prosecute him.” In my view, assassination attempts on Victor Carranza have nothing to do with the adequacy of state protection available to the Applicants.

[88] The article also reveals that Victor Carranza has been able to avoid convictions in various prosecutions brought against him in the past. It also points out that he has been prosecuted and convicted in the past and that he has spent time in jail. None of this is sufficiently connected to the Applicants as to require specific mention in the RPD's state protection analysis.

[89] I can find nothing unreasonable in the Decision.

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

JUDGMENT

THIS COURT’S JUDGMENT is that

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

“James Russell”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-800-12

STYLE OF CAUSE: **MARIA ISABEL MENDOZA-RODRIGUEZ and
GUSTAVO ADOLFO GARCIA-ACOSTA**

- and -

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: October 25, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** HON. MR. JUSTICE RUSSELL

DATED: November 27, 2012

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