Date: 20081201

Docket: IMM-2458-08

Citation: 2008 FC 1329

Ottawa, Ontario, December 1, 2008

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

JEAN PIERRE HERNAN QUINTERO GUZMAN,
NIDIA ALEXANDRA GUEVARA PALACIOS,
DYLAN QUINTERO GUEVARA

Applicants

and

THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated May 7, 2008, concluding that the applicants are not Convention refugees or persons in need of protection.

FACTS

[2] The applicants are citizens of Columbia. The claim of their minor son, Dylan Quintero Guevara, a citizen of the United States of America, is not at issue in this application.

[3] The adult applicants each have separate claims to protection on the basis of different personal narratives. Additionally, each applicant claims protection by reason of the spousal relationship to the other.

Jean Pierre Hernan Quintero Guzman

[4] Jean Pierre Hernan Quintero Guzman ("the male applicant") worked as the administrator of his grandfather's farm near the town El Guamo in the Bolivar Department in northern Columbia.

[5] The applicant states that in 1999 a unit of the Revolutionary Armed Forces of Columbia (FARC) moved into the area and demanded that the farmers in the area pay a *vacuna* (extortion money) in the monthly sum of 90,000 pesos or $450 USD. They were given a deadline of December 31, 1999 to pay the money. The applicant and his grandfather refused to pay the sum and on January 2, 2000, the applicant joined his parents in Bogota, to avoid reprisals from FARC. His grandfather moved away from his farm to the nearby town of El Guamo.

[6] On March 4, 2000, the male applicant accompanied his father on a business trip to the USA. The applicant stated in the hearing that he had travelled with his father "with the idea that I might remain in the United States." However, he "felt alone" and returned to Bogota after 12 days, feeling

that as time passed he would no longer be in danger from the FARC. In April 2000, he visited his grandparents in El Guamo for three weeks. While there, he kept a low profile, as his grandfather had been receiving threatening letters from the FARC, which mentioned him as well. The applicant states that upon his return from the USA he became aware that the "threats were still ongoing" and felt that he was still in danger.

[7] On May 24, 2000, the male applicant again travelled to the USA, but returned to Bogota on September 7, 2000, upon being told that Colombian asylum claims in the United States were likely to be rejected. He states that while staying at his parents' home, he received phone threats. He went to the USA a third time on January 7, 2001, and remained there until he lacked money. He returned to Bogota on May 20, 2001. He stayed with his parents, but afterward moved in with Nidia Alexandra Guevara Palacios (the female applicant). He states that he received threatening phone calls at the female applicant's home. He left for the USA again on September 3, 2001.

Nidia Alexandra Guevara Palacios

[8] The female applicant worked as an administrative assistant to a well-known Caracol TV reporter, Manuel Teodoro Bermudez, who produced and anchored an investigative TV show on crime and corruption called *Séptimo Día*. The show was critical of the government's failure to protect citizens and exposed human rights abuses committed by FARC, paramilitary groups, the Colombian government and drug traffickers. The female applicant stated at the hearing that she was involved in the production of the show. She stated that the TV station received several bomb threats and threatening phone calls as a result of the TV program.

[9] While her boss was away, the female applicant received a phone call from the Campesinos de Cordoboa y Uraba (ACCU), a paramilitary group. They threatened her boss and also threatened the applicant for her involvement in the production. She tried to seek assistance from the Department of Administrative Security and the TV station but was told that there were no resources to protect her.

[10] On August 3, 2001, the applicant was driving home from a class at the university when she was accosted by three men driving an SUV, kidnapped at gunpoint, driven to a secluded area and beaten and raped by the three men. During the attack, she was told that she was being targeted for her involvement with the TV show and to send a message to her boss and others who worked on the program. She escaped, contacted the police and sought medical treatment for her injuries.

[11] After the male applicant left Colombia on September 3, 2001, the female applicant moved to her mother's home. On October 4, 2001, she joined the male applicant in the USA. The applicants were married in the USA.

[12] The male applicant made a claim for asylum in the USA, which was rejected. The Immigration Judge found the applicant's story credible but determined that he did not meet the definition of a Convention refugee because there was no nexus to the Convention definition, i.e. the persecution he feared was not on the basis of one of the grounds in the definition. The female applicant made a claim for asylum in the USA after the one-year deadline had passed, and thus her claim was never heard.

Decision under review

Jean Pierre Hernan Quintero Guzman – The Male Applicant

[13] The Board found that the male applicant was not credible. The determinative issue, according to the Board, was the lack of evidence of the male applicant's subjective fear of persecution. The Board found the fact that the male applicant had repeatedly returned to Colombia, once even returning to visit his grandfather in El Guamo, the town near his farm under control of the FARC, evinced a lack of fear of the FARC. The Board also found that the male applicant's grandfather, the principal target of the FARC because of his ownership of the farm, had remained in El Guamo for three years unharmed by the FARC.

[14] Moreover, the Board found that despite the applicant's claim that the FARC had given the applicant and his grandfather a deadline of December 31, 1999 to pay them the *vacuna*, the only retribution the applicant experienced was threatening phone calls which began two months after the deadline. The Board concluded that the reason for the applicant's apparent lack of fear of FARC was that the narrative about the FARC threatening his grandfather and himself was not true and had been contrived for the purposes of furthering his refugee claim.

[15] The Board also found that the male applicant's return trips to Colombia and the lack of evidence undermined the existence of an objective risk. Thus, the Board concluded that the applicant was neither a Convention refugee nor a person in need of protection under section 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27.

Nidia Alexandra Guevara Palacios – The Female Applicant

[16] The Board rejected the female applicant's claim on the basis that country conditions had changed and she no longer had an objective basis to fear persecution. The panel found that most of the paramilitary units in Colombia had entered into an accord with the government on July 15, 2003. The accord called for the demobilization of paramilitary units by 2005. The Board found that violence by paramilitary groups had been decreasing since 2002, many former paramilitary leaders were in jail or under inspection, and as of 2006, 32,000 former paramiltiaries (spelling?) had been demobilized and the United Self-Defence Forces of Colombia, or *Autodefensas Unidads de Colombia* (the AUC) and associated groups had ceased to function.

[17] In view of these changes and the fact that seven years had passed since the female applicant left Colombia, the Board found that the group who had victimized the claimant in all likelihood no longer existed.

[18] The Board concluded that there was no serious possibility that the claimant would face persecution from the group whose members attacked her, nor would she face a risk to her life, a danger of torture or a risk of cruel and unusual treatment or punishment, should she return to Colombia.

[19] The Board further concluded that the "compelling reasons" exception in section 108(4) of IRPA was not applicable to the female applicant. The Board stated:

> The central incident in the claimant's allegation being the single incident of sexual attack along with some threatening phone calls,

> although abhorrent, in the panel's view does not achieve the high standard required to warrant applicant of the compelling reasons exception in 108(4) of the IRPA

[20] The Board therefore rejected the claims of both applicants.

ISSUES

[21] The applicant raises the following issues in this application:

1. Did the Board err in finding that the male applicant's story was not credible and therefore concluding he was not a Convention refugee or person in need of protection;
2. Did the Board err in failing to undertake a separate analysis of the male applicant's claim pursuant to section 97 of IRPA;
3. Did the Board err in finding that there had been a change of circumstances in Colombia and therefore concluding that the female applicant was not a Convention refugee or person in need of protection;
4. Did the Board err in finding that the female applicant's persecutory treatment by the paramilitaries was not a compelling reason not to return her to Colombia; and
5. Did the Board err in failing to undertake a separate section 97 analysis of the female applicant's claim?

STANDARD OF REVIEW

[22] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to "ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of [deference] to be accorded with regard to a particular category of question."

[23] The Board's findings related to credibility and country conditions are findings of fact, and are subject to a standard of reasonableness. *Malveda v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 447, per Mr. Justice Russell at paragraphs 18-20; *Khokhar v. Canada (MCI)*, 2008 FC 449, 166 A.C.W.S. (3d) 1123, per Justice Russell at paragraph 22. The Board's finding that the female applicant's experience did not rise to the level of "compelling reasons" under section 108(4) is a finding of mixed law and fact, and is also subject to a standard of review of reasonableness. *Decka v. Canada (MCI)* 2005 FC 522, 140 A.C.W.S. (3d) 354, per Justice Mosley at paragraph 5.

[24] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." (*Dunsmuir* at paragraph 47).

[25] The applicants also submit that the Board erred in law in failing to conduct a separate section 97 analysis for each claimant. Errors in law are reviewed on a standard of correctness.

ANALYSIS

Issue No. 1: Did the Board err in finding the male applicant was not credible?

[26] The applicant argues that the Board's credibility finding is based solely on the fact that he returned to Colombia three times, and that "factors such as re-availment, delay in claiming protection, and failure to claim protection in other countries, may be taken into account when assessing credibility, but are not, on their own, determinative" of a refugee claim. In support of this argument, the applicant cites three cases in which courts have held that delay alone is not a determinative factor in a refugee claim. (*Huerta v. Canada (MEI)* (1993)157 N.R. 225 (F.C.A.); *Hue v. Canada (MEI)* [1988] F.C.J. No. 283 (F.C.A.); *Lameen v. Canada (Secretary of State)* (1994) 48 A.C.W.S. (3d) 1424 (F.C.)).

[27] However, the Board in this case was not relying simply on the delay in claiming refugee status, but rather the fact that the applicant's return to Colombia generally, and the FARC-controlled area where he had originally been threatened specifically, evinced a lack of subjective fear. It was reasonably open to the Board to conclude that the applicant's behaviour was not consistent with the events he had described, and that had these events occurred, the applicant would not have returned to Colombia. If a person is fleeing his homeland and seeking refuge from persecution, he would not return to his homeland because he was lonely.

[28] Second, the applicant argues that the Board did not consider the applicant's explanations for returning to Colombia on each of the occasions. The applicant stated that he returned on the first occasion because he missed his family and thought he might no longer be at risk. He kept a low

profile when he visited El Guamo. He returned to Colombia a second time because he had been advised his asylum claim in the USA would fail, and a third time because he did not have sufficient money to stay in the U.S. The applicant argues that the Board should have considered whether these explanations were reasonable. However, the Board decision described the applicant's explanations in its decision, and stated that it found it "difficult to believe the claimant feared the FARC by his actions of returning". It was open to the Board to conclude the explanations of the applicant were inadequate and inconsistent with his narrative.

[29] Third, the male applicant argues that the reliance on the failure of the FARC to harm his grandfather is misplaced as he, not his grandfather, was the primary target because of his role as administrator and his refusal to pay. The applicant stated in his PIF that when the FARC could not find him, they targeted his grandfather, who fled to Venezuela in 2003.

[30] In making its negative credibility determination, the Board noted that the only incidents that the applicant claimed had ever occurred were threatening phone calls, that the first of these calls had taken place two months after the alleged deadline to pay the *vacuna*, and that despite the fact that the FARC could not find the applicant and had targeted his grandfather, his grandfather had been able to remain in FARC-controlled territory for another three years. The Board found that these facts undermined the applicant's narrative. It was reasonably open to the Board to take into account that the applicant's grandfather was never harmed, and to find the applicant's story not credible on the basis of this fact along with the lack of reprisals against the applicant and the applicant's three trips back to Colombia, including to El Guamo.

Issue No. 2: Did the Board err in failing to undertake a separate analysis of the male applicant's claim under section 97?

[31] The applicant submits that the Board failed to conduct a separate analysis under section 97 of IRPA. According to the applicant, the Board did not properly consider whether an objective fear existed.

[32] The applicant argues that the Board simply relied on its negative credibility finding to hold that the applicant did not face an objective risk of persecution as a farm administrator.

[33] In considering the applicant's section 97 claim, the Board stated:

> Although lack of subjective fear may not necessarily be determinative under section 97, the panel, in arriving at the said conclusion, had considered whether the claimant is objectively at risk accordingly. The claimant's return trips to Colombia did not demonstrate the existence of an objective risk.

[34] The applicant's return trips to Colombia and the lack of any incidents, other than the alleged threatening phone calls, was reasonably adequate to demonstrate a lack of objective danger under section 97 in the applicant's particular circumstances.

Issue No. 3: Did the Board err in finding that the female applicant was not a Convention refugee due to the change in circumstances in Colombia?

[35] The applicant submits that the Board based its decision that the female applicant was no longer at risk on a selective reading of the evidence. In particular, the applicant points to

documentary evidence that despite the demobilization of the AUC members of paramilitary groups have continued to engage in human rights abuses, including targeting journalists and witnesses.

[36] The 2006 US Department of State Report on Human Rights Practices ("DOS Report"), states (Applicant's Record, p. 100):

> Despite a unilateral cease-fire declared by the AUC in 2002 and a nationwide demobilization, renege paramilitary members committed the following criminal acts and human rights abuses: political killings and kidnappings; forced disappearances; torture…suborning and intimidation of judges, prosecutors and witnesses…killings of human rights workers, journalists, teachers and trade unionists.

[37] The Reporters Without Borders 2007 Report on Colombia states (Applicant's Record, p. 125):

> Three journalists were killed and seven others forced to flee their region or even the country after being threatened. The paramilitary forces, dismantled but not disarmed, continue to terrorise people, especially in northern provinces.

[38] The female applicant stated in her PIF that she was afraid she would be a targeted as a witness. The Board did not address this allegation. Further, there was evidence on the record that the female applicant's association with the TV show was well known because of a magazine article profiling her relationship with her boss. The Board did not refer to any evidence of the continuing violence by paramilitary forces or the particular continuing threats to journalists. Despite noting that former members of paramilitary forces are now being tried for their crimes, the Board also did not refer to evidence of the threats to witnesses of crimes committed by the paramilitary forces.

[39] The Board therefore did not adequately consider the particular danger to the female applicant as a former employee of a targeted TV program or as a witness to a crime by members of a paramilitary group. This relevant evidence is contradictory to the Board's finding and should have been addressed by the Board before finding that the applicant is not a refugee.

Issue No. 4: Did the Board err in failing to conduct a separate analysis of the female applicant's claim under section 97 of IRPA?

[40] The applicant states that the Board did not adequately consider under Section 97 the objective risks to journalists and witnesses. The Board did not mention section 97 in addressing the female applicant's claim. However, the Board makes clear that it found that the applicant faced no serious possibility of risk as contemplated under section 97. However, the Board must address the contradictory relevant evidence referred to above.

Issue No. ~~4~~5: Did the Board err in finding that the female applicant's persecutory treatment was not a compelling reason to allow her to remain in Canada?

[41] The Board stated that the "single incident" of sexual assault and the threatening phone calls to the female applicant, although "abhorrent", did not rise to the level of extraordinary circumstances required by section 108(4) of IRPA.

[42] Section 108(1)(e) of IRPA provides:

108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person in need of protection, in any of the following circumstances:	108. (1) Est rejetée la demande d'asile et le demandeur n'a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants :

(*e*) the reasons for which the person sought refugee protection have ceased to exist.

e) les raisons qui lui ont fait demander l'asile n'existent plus.

[43] Section 108(4) provides:

(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.

[44] In *Adjibi v. Canada (MCI)* 2002 FCT 525, Justice Dawson held:

> **30** The reasons of the CRDD were simply that there was "insufficient evidence" that Mrs. Adjibi's persecution "was sufficiently 'atrocious' and 'appalling' to warrant the application of s.2(3)" of the Act.
>
> **31** Those reasons were, in my view, insufficient for the following reasons.
>
> **32** First, having found Mrs. Adjibi to have suffered persecution I do not understand what the CRDD meant when it spoke of the "insufficient evidence".
>
> **33** Second, and related to the first reason, persecution by definition requires maltreatment which rises to the level of serious harm. Meaningful reasons require that a claimant and a reviewing court receive a sufficiently intelligible explanation as to why persecutory treatment does not constitute compelling reasons. This requires thorough consideration of the level of atrocity of the acts inflicted upon the applicant, the effect upon the applicant's physical and mental state, and whether the experiences and their sequela constitute a compelling reason not to return the applicant to his or her country of origin. See: Shahid v. Canada (Minister of Citizenship and Immigration) (1995), 89 F.T.R. 106 (T.D.).

> **34** The failure of the CRDD to provide meaningful reasons was a reviewable error.

Similarly, in this case, the Board does not provide any explanation of why the "abhorrent" attack on the applicant was insufficient to trigger the protection of section 108(4). The female applicant provided the Board with letters from the doctor who treated her following her assault, a psychologist in Colombia who counseled her, and a letter from a counselor at Women's Habitat in Canada. The Board did not refer to this evidence or the continuing psychological harm suffered by the applicant in deciding that the "single incident" did not warrant a finding that there were compelling reasons not to return the female applicant to Colombia. If the Board considers that a "gang rape" is not a "compelling reason" because it was an isolated incident, then the Board must provide an intelligible explanation. The Court cannot substitute its view for that of the Board and cannot guess as to the Board's reasons.

[45] The jurisprudence is that a "compelling reason not to return the applicant to his or her country of origin" notwithstanding that the reasons for which the person sought refugee protection have ceased to exist only arises in exceptional cases. However, the jurisprudence requires that the Board provide adequate reasons including consideration of the psychological evidence about the affect from the "persecution, torture, treatment or punishment" as stated above, the Board did not refer to this evidence.

CONCLUSION

[46] I find that the Board's decision with respect to the male applicant was reasonable. It was open to the Board, based on the male applicant's return trips to Colombia, and the other circumstances of the male applicant's case, to conclude that his story was not credible. Further, the Board's analysis under section 97 was sufficient. However, the Board's decision with respect to the female applicant was unreasonable. The Board did not adequately consider the particular circumstances of the female applicant and the relevant evidence regarding the targeting of journalists and witnesses. The Board also did not provide adequate explanation of its finding that the applicant's circumstances did not warrant protection under section 108(4) of IRPA.

[47] For this reason, this application for judicial review is allowed in part and denied in part. The application for judicial review of the determination of the male applicant's claim is denied. The application for judicial review of the determination of the female applicant's claim is allowed, and will be referred back to the Board for redetermination.

[48] Neither party considered that this case raised any serious question of general importance that ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

This application for judicial review is allowed in part with respect to the female claimant, Nidia Alexandra Guevara Palacios, and her refugee claim is referred back to a differently constituted panel of the Board for redetermination.

"Michael A. Kelen"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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