**Date: 20071120**

**Docket: IMM-2254-07**

**Citation: 2007 FC 1212**

**Ottawa, Ontario, the 20th day of November 2007**

**PRESENT: THE HONOURABLE MR. JUSTICE SHORE**

**BETWEEN:**

**JULIO HERNANDEZ UTRERA**
**SARI CRUZ BANDA ZUNIGA**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

## INTRODUCTION

[1] What seems impossible in one context becomes plausible and even understandable in another, and consequently seems credible in circumstances resulting from country conditions contrary to what was initially believed. With the realization that the conditions themselves have an inherent logic, what might seem strange or out of context can be understood in time and place.

**NATURE OF JUDICIAL PROCEEDING**

[2] This is an application for judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board (the Board) dated May 7, 2007, that the applicants, citizens of Mexico, were neither “Convention refugees” nor “persons in need of protection”.

**FACTS**

[3] The applicants, Julio Hernandez Utrera, and his spouse, Sari Cruz Banda Zuniga, are citizens of Mexico. The spouse’s claim is based on that of Mr. Utrera, who is the principal applicant.

[4] The applicant, Mr. Utrera, claims a fear of persecution by soldiers, police and government informers following his participation as a volunteer with the Red Cross during its operations in the state of Chiapas in January 1994. According to his narrative and testimony to the Board, the government is persecuting him because it believes that Mr. Utrera has information concerning conflict locations and strategic points in Chiapas obtained while he was volunteering with the Mexican Red Cross. The applicant also alleges that these officers were aware that he had compromising information and photographs regarding the actions of soldiers against the people of Chiapas.

[5] Since that time, the applicant has been under police surveillance and has received death threats from soldiers and government informers. Moreover, in January 2006, the female applicant, Ms. Zuniga, was also subjected to intimidation by the same individuals persecuting Mr. Utrera.

Following this incident and having been once again discovered, the applicants left Mexico and arrived in Canada on February 27, 2006, where they claimed refugee status.

**IMPUGNED DECISION**

[6] On May 7, 2007, the Board found that applicants were neither “Convention refugees” under section 96 nor “persons in need of protection” under subsection 97(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), because there was no credible evidence of the essential points in their claims for refugee protection. The Board based its finding on the contradictions, omissions and implausibilities in the testimony of the principal applicant, Mr. Utrera, and the applicants’ evidence.

**Parties’ Submissions**

Applicants:

[7] The male applicant claims that the member did not consider the explanations that he provided during his testimony to the Board and for this reason made an unfair and unreasonable decision.

Respondent:

[8] The respondent feels that the Board’s decision is well-founded and that there is no credible evidence of the essential points in their claims for refugee protection. The respondent also emphasizes that the Board based its finding on the contradictions, omissions and implausibilities in the applicants’ testimony and evidence.

**ISSUES**

[9] (1) Did the Board err in not considering the explanations given on the essential points in the claim?

(2) Did the Board err in finding that Ms. Zuniga's allegations were totally dependent on the principal applicant's narrative and that their credibility is undermined by the numerous contradictions, omissions and implausibilities in the principal applicant's testimony?

**STANDARD OF REVIEW**

[10] The assessment of the credibility of witnesses and the weighing of evidence is within the Board's jurisdiction. The Court must therefore show a great deal of deference because it is the Board's responsibility to assess the testimony of the applicant and determine his credibility. If the Board's findings are reasonable, the Court's intervention is not warranted.

[11] However, the Board's decision must be based on the evidence; it cannot be made in a capricious manner, based on erroneous findings of fact or without regard to the material before it (*Mugesera v. Canada (Minister of Citizenship and Immigration*), [2005] 2 S.C.R. 100, at para. 38 (QL)).

[12] Accordingly, the appropriate standard of review for an issue of credibility is patent unreasonableness.

[13] A decision reviewable for patent unreasonableness

> [57] … will only be vitiated by an error that is “apparent on the face of the tribunal’s reasons” without the need for “significant searching or testing” (*Southam Inc.* at para. 57), or is so serious as to amount to “a fraud on the law or a deliberate refusal to comply with it” and “is treated as an act which is done arbitrarily or in bad faith and is contrary to the principles of natural justice” (*Syndicat des employés de production du Québec et de l’Acadie v. Canada Labour Relations Board*, [1984] 2 S.C.R. 412 at 420).

(*Taylor v. Canada (Attorney General)*, 2003 FCA 55, [2003] F.C.J. No. 159 (QL))

[14] Therefore, the Board’s findings regarding credibility are reviewable for patent unreasonableness. They can be set aside only if they were made in a perverse or capricious manner or were based on erroneous findings of fact.

**LEGISLATIVE CONTEXT**

[15] Paragraph 95(1)(*b*) of the Act states that refugee protection is conferred on a person when the Board determines the person to be a Convention refugee or a person in need of protection.

| **Conferral of refugee protection** | **Asile** |
|---|---|
| **95.** (1) Refugee protection is conferred on a person when | **95.** (1) L’asile est la protection conférée à toute personne dès lors que, selon le cas : |
| … | [...] |
| (*b*) the Board determines the person to be a Convention refugee or a person in need of protection; or | *b*) la Commission lui reconnaît la qualité de réfugié ou celle de personne à protéger; |

[16] Section 96 and subsection 97(1) of the Act giving the following definitions of the expressions “Convention refugee” and “person in need of protection”:

| | |
|---|---|
| **Convention refugee** | **Définition de « réfugié »** |
| **96.** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion, | **96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques : |
| (*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or | *a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays; |
| (*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country | *b*) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner. |
| **Person in need of protection** | **Personne à protéger** |
| **97.** (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally | **97.** (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n’a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée : |

| | |
|---|---|
| (*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or | *a*) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture; |
| (*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if | *b*) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant : |
| (i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country, | (i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, |
| (ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country, | (ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas, |
| (iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and | (iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles, |
| (iv) the risk is not caused by the inability of that country to provide adequate health or medical care. | (iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats. |

**ANALYSIS**

[17] Before the situation in this case can be analyzed, with emphasis on the reasons supporting the Board's decision and the arguments of the parties, it is necessary to set out the method and principles that govern the finding of facts in a case.

[18] The "Handbook on Procedures and Criteria for Determining Refugee Status under the 1951 Convention and the 1967 Protocol relating to the Status of Refugees" (HCR/1P/4/Eng/REV.1 Reedited, Geneva, January 1992, UNHCR 1979), the official title of which in French is "Guide des procédures et critères à appliquer pour déterminer le statut de réfugié au regard de la Convention de 1951 et du Protocole de 1967 relatifs au statut des réfugiés", is an international instrument that defines the term "refugee" and sets out principles that must guide the determination of refugee status.

[19] With regard to supporting material, the Office of the United Nations High Commissioner for Refugees (UNHCR) states the following:

> **196.** It is a general legal principle that the burden of proof lies on the person submitting a claim. Often, however, an applicant may not be able to support his statements by documentary or other proof, and cases in which an applicant can provide evidence of all his statements will be the exception rather than the rule. In most cases a person fleeing from persecution will have arrived with the barest

> **196.** C'est un principe général de droit que la charge de la preuve incombe au demandeur. Cependant, il arrive souvent qu'un demandeur ne soit pas en mesure d'étayer ses déclarations par des preuves documentaires ou autres, et les cas où le demandeur peut fournir des preuves à l'appui de toutes ses déclarations sont l'exception bien plus que la règle. Dans la plupart des cas, une personne qui fuit la

necessities and very frequently even without personal documents. Thus, while the burden of proof in principle rests on the applicant, the duty to ascertain and evaluate all the relevant facts is shared between the applicant and the examiner. Indeed, in some cases, it may be for the examiner to use all the means at his disposal to produce the necessary evidence in support of the application. Even such independent research may not, however, always be successful and there may also be statements that are not susceptible of proof. In such cases**, if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt.** (Emphasis added.)

persécution arrive dans le plus grand dénuement et très souvent elle n'a même pas de papiers personnels. Aussi, bien que la charge de la preuve incombe en principe au demandeur, la tâche d'établir et d'évaluer tous les faits pertinents sera-t-elle menée conjointement par le demandeur et l'examinateur. Dans certains cas, il appartiendra même à l'examinateur d'utiliser tous les moyens dont il dispose pour réunir les preuves nécessaires à l'appui de la demande. Cependant, même cette recherche indépendante peut n'être pas toujours couronnée de succès et il peut également y avoir des déclarations dont la preuve est impossible à administrer. En pareil cas, **si le récit du demandeur paraît crédible, il faut lui accorder le bénéfice du doute, à moins que de bonnes raisons ne s'y opposent**. (La Cour souligne.)

[20] It also states the following:

**203.** After the applicant has made a genuine effort to substantiate his story there may still be a lack of evidence for some of his statements. As explained above (paragraph 196), **it is hardly possible for a refugee to "prove" every part of his case** and, indeed, if this were a requirement the majority of refugees would not be recognized. **It is therefore**

**203.** Il est possible qu'après que le demandeur se sera sincèrement efforcé d'établir l'exactitude des faits qu'il rapporte, certaines de ses affirmations ne soient cependant pas prouvées à l'évidence. Comme on l'a indiqué ci-dessus (paragraphe 196), **un réfugié peut difficilement «prouver» tous les éléments de son cas**

| | |
|---|---|
| **frequently necessary to give the applicant the benefit of the doubt.** | et, si c'était là une condition absolue, la plupart des réfugiés ne seraient pas reconnus comme tels. **Il est donc souvent nécessaire de donner au demandeur le bénéfice du doute.** |
| **204.** The benefit of the doubt should, however, only be given when all available evidence has been obtained and checked and when the examiner is satisfied as to the applicant's general credibility. **The applicant's statements must be coherent and plausible, and must not run counter to generally known facts**. (Emphasis added.) | **204.** Néanmoins, le bénéfice du doute ne doit être donné que lorsque tous les éléments de preuve disponibles ont été réunis et vérifiés et lorsque l'examinateur est convaincu de manière générale de la crédibilité du demandeur. **Les déclarations du demandeur doivent être cohérentes et plausibles, et ne pas être en contradiction avec des faits notoires.** (La cour souligne.) |

(UNHCR, *supra*)

[21] It is also important to look at all the facts to determine if “[t]he cumulative effect of the applicant's experience must be taken into account. Where no single incident stands out above the others, sometimes a small incident may be ‘the last straw’; and although no single incident may be sufficient, all the incidents related by the applicant taken together, could make his fear ‘well-founded’” (UNHCR, *supra*, at para. 201).

**(1) Did the Board err in not considering the explanations given on the essential points in the claim?**

Days spent in Chiapas

[22] The panel noted that there was a contradiction between the information in a letter of attestation from the Red Cross, the information contained in the principal applicant's Personal Information Form (PIF) and the information provided by the principal applicant in his testimony.

[23] Concerning the contradiction/inconsistency between the PIF and the testimony, the case law notes that this discrepancy is a factor that may undermine an applicant's credibility (*Rathinasigngam v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 988, [2006] F.C.J. No. 1247, at para. 56 (QL)).

[24] The principal applicant, Mr. Utrera, stated in his PIF that he had spent 13 days in the jungle, whereas the letter of attestation indicates that he spent 10 days in Chiapas. During the hearing, the principal applicant testified that he had spent 17 days there.

[25] When confronted with this contradiction, the applicant explained at the hearing that this calculation did not take into account the fact that, when he arrived in Chiapas on January 1, 1994, the conflict was at its height and it was too dangerous to enter the war zone. It was not until a few days later, that is, January 3, 1994, that he was able to find an ambulance, equip it, obtain medications, and enter the war zone (hearing transcript, pp. 16 to 18).

[26] The principal applicant pointed out that the attestation notes the number of active days in the forest, that is, from January 3 to 13, whereas the PIF takes into account the time required for

advance preparations in the city, that is, from January 1 to 3, and the 17 days mentioned during the hearing represents the total number of days of the experience (hearing transcript, pp. 16 to 18).

[27] Questioned about his subsequent involvement in Chiapas in that same year, the applicant responded at the hearing that he had returned for a period of 10 to 20 days on three occasions, in May, November and December 1994.

[28] Despite the Board's finding that the applicant had stated at the hearing that this information was included in his PIF, we cannot find such a statement in the hearing transcript. However, we note that, when the applicant was questioned by the panel member in this regard, he explained that it was not mentioned because he limited himself to writing about the most important period and that his subsequent returns were extensions of the first period (hearing transcript, p. 19).

[29] None of the letters submitted in a bundle under Exhibit P-6 indicates that the applicant returned to Chiapas three times in 1994. It should be noted, however, that the applicant explained at the hearing that he had not asked for an attestation for the other three trips to Chiapas in 1994 because he did not think that the problem was going to be so serious.

Contents of the report to the Red Cross

[30] The Board noted that the applicant had contradicted himself when he explained the content of a report he allegedly gave to a Mexican Red Cross official concerning his mission to Chiapas in January 1994.

[31] It must be noted that the Board is responsible for assessing the facts, and that this Court cannot reassess the facts presented before the Board if the Board has reasonably considered the evidence adduced (*Law Society of New Brunswick v. Ryan*, [2003] 1 S.C.R. 247, at para. 46).

[32] In this regard, the Board noted the following:

> …First, the claimant stated that he had mentioned in his report photographs he had taken and that these photographs showed soldiers killing indigenous people, soldiers and police arresting people in the street and himself with rebels. Later, he stated that in his report he had only referred to an ambulance that had been fired on. Subsequently, he stated that in his report he had told the Mexican Red Cross of the killings and that the Mexican Red Cross officials had told him that they would look into it. In his PIF, the claimant did not make any reference to this report….

(Board's decision, p. 2, para. 2)

[33] A reading of the hearing transcript indicates that there does appear to be some confusion about the content of the report. An in-depth review of the entire transcript, however, shows that we must look at all of the officer's questions in order to detect this confusion. Below is an excerpt from the transcript concerning the content of the report to the Mexican Red Cross.

> [TRANSLATION]
>
> BY THE PANEL MEMBER (to the first person in question)
>
> Q. When you were in Chiapas, how many reports did you write?
>
> A. Only one, a five-page report containing the names and addresses of the persons we treated. Their age, where they came from and, well, their personal information.
>
> …

<u>BY THE REFUGEE PROTECTION OFFICER</u> (to the first person in question)

Q. Mr. Hernandez, did you mention in your report any photos that you took?

A. Yes.

Q. The photos that were of interest to the paramilitaries there, what type of photos were they?

A. Most of the photos were of the helicopters that were kept in Tuxtla, or of the soldiers killing indigenous people.

Q. You took photos of soldiers killing indigenous people?

A. Yes, sir.

Q. You can see that on the photo?

A. Yes.

\- OK.

Q. What other type of photos did you have?

A. Photos of us helping the injured, of soldiers and police arresting all types of people in the streets, and other photos in which I was with the rebels in the rebel camps. When we were giving first aid to the injured.

Q. But under the Conventions on armed conflicts and all that, aren't you prohibited from taking of photos of civilians who are, well, killed or injured or even of soldiers or anyone who is party to a conflict?

A. Well, basically these photos were to be included in my report to the Red Cross and I had already struggled and considered taking more photos to flesh out my report.

\- OK.

Q. Sir, were these photos or copies of these photos given to the Red Cross?

A. No, because I couldn't get them developed.

\- OK.

Q. But you referred to these photos in your report?

A. **I referred only to an ambulance that had been fired on and, yes, I referred to photographs, but I only mentioned that ambulance.**

Q. You didn't mention photos showing civilians being killed, sir?

A. **In my report, I mentioned the <u>inhuman treatment</u> that people were receiving.**

- Sir, try to…to be precise in your answer. I asked you a precise question.

Q. Did you refer to the killings that you photographed?

A. No, I mentioned them only in writing.

…

A. **I mentioned the photographs of the incident where soldiers fired on the ambulance….**

…

- You referred to photos that you took that showed civilians being killed, sir.

A. Yes.

- OK, you have said yes, no and yes.

A. I understand the (inaudible). I believe I understand if I mentioned in my report the photos showing people being killed, someone killing the injured?

- You said that you took photos of army members killing indigenous people.

A. Yes.

Q. Did you mention that in your report to the Red Cross?

A. Yes.

…

(Hearing transcript, pp. 22 to 26)

[34] This excerpt shows that the parties at the hearing were unable to clarify exactly what was in the report. An examination of the answers given shows that the principal applicant specified in his report the incident where soldiers fired on the ambulance, and only referred to the other photographs, those showing soldiers killing civilians, in citing the inhuman treatment that people were receiving.

Omission in the Personal Information Form

[35] The Court noted that the applicant had failed to indicate, at question 31 of his PIF, the steps that he described in his testimony, namely, that upon his return from his mission in Chiapas, he had informed the Mexican Red Cross official of his persecution during his mission, that a report had been submitted at that time to the Human Rights Committee, and that a communiqué had been sent to the police.

[36] The respondent maintains that this [TRANSLATION] "was an essential element of the application, that is, the steps taken by the applicant in order to seek state protection, [and the Board] expected this element to be mentioned in the applicant's PIF" (respondent's memorandum, p. 6, para. 21).

[37] In *Basseghi v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 1867 (QL), Mr. Justice Max M. Teitelbaum remarked that an omission in the PIF may undermine an applicant's credibility:

> [33] It is not incorrect to say that answers given in a PIF should be brief but it is incorrect to say that the answers should not be complete with all of the relevant facts. It is not enough for an applicant to say that what he said in oral testimony was an elaboration. All relevant and important facts should be included in one's PIF. The oral evidence should go on to explain the information contained in the PIF.

[38] This was also the position of Mr. Justice Pierre Blais in *Arunasalam v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1070, [2001] F.C.J. No. 1451 (QL):

> [47] ... whether the Board notified the applicant that omissions from the PIF arising during the hearing are of significant importance would not change the fact that the applicant omitted facts in his PIF. Even if the Board had told him about it, the Board would still have been entitled to rely on the omissions to make findings of credibility. The applicant had the opportunity to explain why he omitted facts in his PIF. In my view, the Board respected the principles of natural justice and due process.

[39] Questioned about this omission, the applicant stated that he had not referred to the follow-up taken by the Red Cross regarding the complaint [TRANSLATION] "because that wasn't, that was completely futile. That didn't come to anything and, well, [he was] told that it would just be a matter of accusing the police through the police". As a result, he confirmed later that [TRANSLATION] "I did not write of the negligence of my State" (hearing transcript, at pp. 29 and 31).

[40] Mr. Justice Simon Noël noted the following in *Singh v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 357, [2006] F.C.J. No. 426 (QL), concerning the omission of an essential element:

> [17] ...There is no doubt that omissions regarding essential elements of the claim may be considered by the RPD, especially when a question had been asked regarding the element that was omitted (see, *inter alia*, *Eustace v. Canada (Minister*

> *of Citizenship and Immigration)*, 2005 FC 553, [2005] F.C.J. No. 1929; *Chen v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 767, [2005] F.C.J. No. 959, at paragraph 23). This is even more the case when there is a contradiction between the officer's notes, the story in the PIF and the testimony at the hearing. In this case, it was an omission bearing on an important element of the claim, even if it was not central.

[41] He concluded as follows:

> [25] …The assessment of the facts is a matter for the RPD, and it is the RPD's responsibility to decide, in each case, whether or not it must determine that the claimant's failure to mention a central element of the claim to the immigration officer is an element affecting his credibility. In certain cases, a fact can be so central that the fact of failing to mention it is a factor undermining the applicant's credibility. In other cases, the omission would not support a finding that the applicant is not credible. Each factual situation is unique and the RPD's assessment of it is subject to judicial review….

[42] Mr. Justice James Russell stressed in *Erdos v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 955, [2003] F.C.J. No. 1218, at para. 24 (QL), that the omission of a significant fact can be the basis for an adverse credibility finding by the Board. He stated, in quoting *Grinevich v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 444 (F.C.T.D.), "[that it] is trite law that omissions of a significant or important fact from a claimant's PIF can be the basis for an adverse credibility finding".

[43] The applicant, however, stressed that he [TRANSLATION] "was very credible about the main element of his claim, namely, his involvement as a volunteer in the conflict between the rebels in Chiapas and the soldiers in 1994, […and that the Board's] doubts are totally unjustified" (applicant's memorandum, p. 30, at para. 17).

Lack of documentary evidence

[44] The Board noted that the documentary evidence did not make any mention of any persecution against humanitarian personnel by the Mexican army.

[45] The case law in this regard explains that the lack of documentary evidence to corroborate a narrative may undermine credibility. Mr. Justice Luc Martineau of the Federal Court, in *Morka v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 315, [2007] F.C.J. No. 429 (QL), explained the effect of the lack of evidence as follows:

> [18] Lack of supporting documentary evidence is sufficient to rebut the presumption that the claimant's sworn testimony is true (*Adu v. Canada (Minister of Employment and Immigration)*, [1995] F.C.J. No. 114 (F.C.A.); *Diadama v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 1518, 2006 FC 1206; *Kahiga v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1538, 2005 FC 1240 at para. 10; *Oppong v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1187 at para. 5). Consequently, in these particular circumstances, it was not patently unreasonable for the Board to draw an adverse inference from a lack of information in documentary evidence that might reasonably be expected to be mentioned in the circumstances.

[46] The Board noted the following in its decision:

> When confronted with documentary evidence that an information search by the Immigration and Refugee Board found no information about acts of intimidation, arbitrary arrests or torture committed by the army against persons bringing food, clothing and medicine to non-governmental organizations in Chiapas, and no information about people of this type being sought by the army….

(Board’s decision, p. 3, para. 2)

[47] A consultation of the evidence shows that this document instead reads as follows:

> No information about the harassment, arbitrary arrest and torture by the military of persons, **other than human rights activists**, bringing food, clothing and medicine to NGOs in Chiapas, or whether the military would search for such persons outside

> of Chiapas, could be found among the documentary sources consulted by the Research Directorate. (Emphasis added.)

(Immigration and Refugee Board of Canada, Research Directorate, MEX41985.EF, 18 September 2003)

[48] In addition, this document notes the following:

> In 11 September 2003 correspondence, a representative of the Mexico Solidarity Network (MSN), a coalition of 88 organizations advocating for democracy, economic justice and human rights on both sides of the US-Mexico border (MSN n.d.), stated that he **was not aware of any cases in which persons <u>other than human rights activists</u> were harassed, arrested or tortured for bringing humanitarian supplies to NGOs in Chiapas.** Moreover, the MSN representative mentioned that he was not sure how the military would respond to such a situation (11 Sept. 2003). (Emphasis added.)

(Research Directorate, MEX41985.EF, *supra*)

[49] The transcript shows that the applicant explained to the panel why the sources consulted were unable to find any information about intimidation, arrests or torture by the military of persons bringing food, clothing and medicine to NGOs in Chiapas, or any other information indicating that the army was seeking such persons outside Chiapas.

> [TRANSLATION]
> A. You should have gone a little further back in time, before then, because in 1994 projectiles were fired on a Red Cross ambulance. We changed our Red Cross uniforms then and I have proof of that. Positive decisions were made then by the Red Cross authorities, but there were only two persons in my group, myself and one other, who witnessed…. And so, when the conflict became really vicious, we changed our uniforms because it was, it became too dangerous to be dressed in the Red Cross colours. And, well, if there was no report that truly claimed, disclosed, disclosed rather these problems of what we witnessed, that is because my delegation, my group was really small, and also because there was a certain lack of credibility on the part of certain groups or rather certain persons.

(Hearing transcript, p. 47)

[50] A search "a little further back in time" would have corroborated not only the applicant's statements but also the documentary evidence consulted by the Board. Specifically, the Human Rights Watch Publications of Mexico in 1994 stated the following:

> Ordered at first to suppress the rebellion by force, the Mexican army was responsible for serious human rights violations, including extrajudicial executions and torture.
>
> …
>
> The extensive network of Mexican nongovernmental human rights groups played a key monitoring role both in Chiapas and during the elections. **While there were few reports of physical attacks on monitors, subtle and not-so-subtle tactics of intimidation and discreditation were extremely common.** The Mexican National Network of Civil Organizations documented eighty-six illegal acts against nongovernmental organizations (NGOs) from April to July, ranging from arbitrary detention and surveillance to illegal searches of homes and offices. (Emphasis added.)

(http://www.hrw.org/reports/1995/WR95/AMERICAS-09.htm#P490_177020)

[51] In addition, the Human Rights Watch Publications of Mexico in 1996 noted the following:

> Unfortunately, impunity for human rights violations one key indicator of the political will to fight abuses remained pervasive during 1996, and the government continued to deny that violations had occurred in even the most blatant cases. No soldier had been brought to justice for the violations committed by the military during the 1994 uprising of the Zapatista Army of National Liberation (Ejército Zapatista de Liberación Nacional, EZLN), including the Ocosingo Clinic massacre and Ejido Morelia extrajudicial executions.
>
> The government also failed to take action against public servants responsible for torture and due process violations committed during a crackdown on alleged Zapatistas in 1995, documented in the February 1996 Human Rights Watch/Americas report, Torture and Other Abuses During the 1995 Crackdown on Alleged Zapatistas.

(http://www.hrw.org/reports/1997/WR97/AMERICAS-07.htm#P347_142944)

[52] In 1997, that same publication stated the following:

On the domestic front, however, Mexican officials took much less seriously the numerous and serious human rights problems that needed urgent attention. In rural Mexico, violence continued unabated. In April, Human Rights Watch issued findings covering Chiapas, Sinaloa, Guerrero, and Oaxaca states. **A common feature of much rural violence was the misuse of the structures of government-prosecutors' offices, the police, and courts-to harass real or perceived opponents of the ruling party, reinforcing victims' assumption that the justice system could not effectively and impartially mediate community conflicts stemming from political differences, economic rivalries, or religious discord. In Chiapas, for example, Human Rights Watch reported that while many of the assassinations, abductions, threats, and expulsions in rural Mexico were carried out by private individuals, government agents often facilitated such abusive acts, failed to prosecute the perpetrators, or appeared to use the judicial system to achieve partisan goals. Moreover, in many cases, officials participated directly in abuses.**

Those problems remained serious throughout the year. In northern Chiapas, community conflict continued to lead to expulsions and murder

…

The **Mexican government continued to react vehemently against international human rights pressure, dismissing well-documented human rights reports and even expelling foreign human rights monitors.** As in past years, Mexican human rights groups faced serious threats and attacks during 1997.

…

Also in Chiapas, the Coordinating Group of Nongovernmental Organizations for Peace (Coordinadora de Organismos No Gubernamentales por la Paz, CONPAZ) came under renewed attack. On October 7 and November 4, 1996, and February 9, 1997, unidentified assailants tried unsuccessfully to burn the group's offices. On November 7, 1997, a CONPAZ member group, Chiltak, received anonymous death threats naming several people who would be killed. Then, on May 7, the group's director, Gerardo González, received death threats by telephone.

The government showed disdain for international human rights reporting by rejecting information and reports by international human rights organizations, including Human Rights Watch and Amnesty International. The day that Human Rights Watch published its report on rural violence, for instance, the Foreign Ministry issued a statement asserting that the government was concerned about human rights protection but accusing Human Rights Watch of "Trying with its

> partial and unobjective report to distort the real human rights situation in Chiapas, Guerrero, Oaxaca, and Sinaloa." The statement, typical of the government's hollow human rights rhetoric, dismissed the report as dealing with "presumed violations that have been resolved or are in the process of being resolved."
>
> When Human Rights Watch challenged the accusations, the Foreign Ministry pointed out three cases that it considered resolved or in process of being concluded. In the report on rural violence, Human Rights Watch had noted the arrest of the aggressors in two of the cases indicated by the government. Of dozens of other cases detailed in the report, however, the Foreign Ministry failed to indicate any one in which a government official had been prosecuted for having committed a human rights violation.

(http://www.hrw.org/worldreport/Americas-08.htm#P782_159801)

[53] In addition, the Human Rights Watch Publications of Mexico in 2006 stated the following:

> The criminal justice system routinely fails to provide justice to victims of violent crime and human rights abuses. The causes of this failure are varied and include corruption, inadequate training and resources, and a lack of political will.

(http://hrw.org/englishwr2k7/docs/2007/01/11/mexico14885.htm)

[54] The Board based its decision on a small part of the 2003 document. The documentary evidence consulted by the Board, and the other sources cited above, confirm the applicant’s narrative and contradict the Board’s finding. The Board made a palpable error in relying on only a portion of this document. The excerpts cited above illustrate the political situation in Mexico and specifically Chiapas since 1994, and therefore it is reasonable to conclude that, despite the claim of a lack of documentary evidence, the applicant’s narrative is plausible.

Implausibility and communications between the applicant and the Red Cross

[55] Finally, the Board noted the following:

> ... there are varying versions of the facts concerning communications between the claimant and the Red Cross, that these variations undermine the claimant's credibility, and that, moreover, it is implausible that the Mexican Red Cross would have disregarded information that one of its volunteers was receiving death threats because he was in possession of information and photographs compromising to the Mexican army.

(Board's decision, p. 3, para. 2)

[56] Having examined the file, the Court notes that the applicant's testimony in conjunction with the documentary evidence explains why he was unable to obtain the assistance of the Mexican Red Cross.

[57] The applicant stated that the only entity strong enough to help him during the events in 1994 was the Central Delegation of the Mexican Red Cross. However, his unit was small and isolated in the jungle, and there was no communication. He also stated the following:

> [TRANSLATION]
>
> A: Yes, that would be important, and my life is important. But it's only that at that time, when I submitted my report, all those years ago, my complaint or my information did not carry a lot of weight, because this information, this complaint was blocked by people in the government, who said that they were doing that in order to prevent that the scale, that the scale of this conflict become, escalate and that I had problems myself.
>
> \- That is a new statement.
>
> Q: You already said in your PIF that people in the government had blocked your complaint?
>
> A: When I contacted the police, they told me that that was normal, that things happened, things that are sometimes contrary that contravene the law.

(Hearing transcript, p. 55)

[58] The applicant explained, as regards the sequence of events until 2006, that he had spoken about them to the Red Cross, specifically the following:

> [TRANSLATION]
>
> A: I spoke to the head of the Red Cross.
>
> Q: Who is that?
>
> A: His name is Edmundo Salgado S.A.L.G.A.D.O. Peralta.
>
> Q: And you spoke to him when?
>
> A: In 2005, when I was arrested, and in 2006, when I was injured. When I had my injury to my right leg treated, I told him that my problem was still going on, and they told me to calm down, that they would settle the situation, but nothing was solved, nothing changed.

(Hearing transcript, p. 56)

[59] Questioned why the applicant did not produce a letter from Mr. Peralta, he explained the following:

> [TRANSLATION]
>
> A: …I telephoned him to find out if he could send me a statement about the armed conflicts and my problem. The answer was that my file was already in the archives and that since he wasn't the head at the time the events took place in Chiapas, he couldn't really answer on my behalf or serve as some sort of guarantor or take responsibility, given that he had just been promoted to head recently.
>
> - Yes, but in your case, sir, there were also threats that you recently received. That's not in the archives.
>
> A: I asked him for a statement of my services and what he sent me is the only information he has.

(Hearing transcript, p. 57)

[60] The respondent is of the opinion that the variation and lack of consistency in these explanations justifies the Board's finding. In addition, it stresses that the Board was entitled to draw such a conclusion based on *Singh v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 62, [2007] F.C.J. No. 97 (QL):

> [1] The Court is of the opinion that the Board may draw reasonable conclusions based on implausibilities, common sense and rationality and may reject testimony if it does not accord with the probabilities affecting the case as a whole: (*Aguebor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 732 (QL); *Alizadeh v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 11 (QL); *Shahamati v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 415 (QL))

[61] It should be noted that the Board must be able to apply its own understanding of human behaviour when it determines whether the applicant's narrative is plausible (see *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 805, at para. 27 (F.C.T.D.) (QL)).

[62] Mr. Justice Darrel V. Heald noted the following in *Maldonado v. Canada (Minister of Employment and Immigration)*, 1980 2 F.C. 302 (QL):

> [5] ... the applicant's credibility concerning the sworn statements made by him and referred to supra. When an applicant swears to the truth of certain allegations, this creates a presumption that those allegations are true unless there be reason to doubt their truthfulness. On this record, I am unable to discover valid reasons for the Board doubting the truth of the applicant's allegations above referred to.

[63] The applicant's failure to indicate this information in his PIF could indeed result in the Board's doubting his credibility; however, the evidence shows that the applicant clearly explained that his request to the Red Cross was unsuccessful.

**(2) Did the Board err in finding that Ms. Zuniga's allegations were totally dependent on the principal applicant's narrative and that their credibility is undermined by the numerous contradictions, omissions and implausibilities in the principal applicant's testimony?**

[64] Rule 49 of the *Refugee Protection Division Rules,* SOR/2002-228 requires the Division to join the claim of a claimant to a claim made by the claimant's spouse.

| **Claims automatically joined** | **Jonction automatique de demandes d'asile** |
| --- | --- |
| **49.** (1) The Division must join the claim of a claimant to a claim made by the claimant's spouse or common-law partner, child, parent, brother, sister, grandchild or grandparent. | **49.** (1) La Section joint la demande d'asile du demandeur d'asile à celle de son époux ou conjoint de fait, son enfant, son père, sa mère, son frère, sa soeur, son petit-fils, sa petite-fille, son grand-père et sa grand-mère. |

[65] Mr. Justice James O'Reilly in *Ramnauth v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 233, [2004] F.C.J. No. 305 (QL), discussed the considerations necessary when claims are heard simultaneously. He maintained the following, citing *Zewedu v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. (QL) (F.C.T.D.):

> [9] …the reasons must disclose the basis on which the Board made its decision in respect of each claimant. The question is whether "the fact that the claims were joined has caused an injustice to either of the joined claims"….

[66] Despite the fact that the applicants submitted their PIFs individually, they submitted only one narrative. The female applicant testified at the hearing that she had received death threats from

police officers who were persecuting Mr. Utrera in order to obtain information from her. However, she stressed that she did not know what they were referring to. In addition, counsel for the applicants did not analyze the incident specifically in his memorandum pertaining to Ms. Zuniga.

[67] Ms. Zuniga did not raise any separate issue, so the Board did not err in determining that Ms. Zuniga's allegations were "totally dependent on her spouse's narrative". The fact that the Board published these reasons simultaneously does not constitute a violation of procedural fairness or the principles of natural justice.

**CONCLUSION**

[68] Martineau J. explained that "where the Board has reason to question the plausibility of central elements of a claim, it is entitled to give no credit to the rest of the applicant's testimony". In addition, "even though some of the points raised by the Board might seem weak from the applicant's point of view, it remains that cumulatively they reasonably justify the Board's conclusion" (*Singh v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1272, [2002] F.C.J. No. 1724, at para. 26 (QL)).

[69] However, the applicant's testimony reasonably explains any inconsistency between the documents that the Board relied on in its decision. It was therefore not open to the Board, in view of the context as a whole, to draw unfavourable conclusions and find that the applicant's narrative was not credible.

[70] Mr. Justice James K. Hugessen of the Federal Court of Appeal noted the following in *Attakora v. Canada (Minister of Employment and Immigration)* (F.C.A.), [1989] F.C.J. No. 444 (QL):

> ... Whether or not the applicant was a credible witness, and I have already indicated that the Board's reasons for finding him not credible are based in error, that does not prevent him from being a refugee if his political opinions and activities are likely to lead to his arrest and punishment.
>
> …
>
> ... While the Board's task is a difficult one, it should not be over-vigilant in its microscopic examination of the evidence of persons who, like the present applicant, testify through an interpreter and tell tales of horror in whose objective reality there is reason to believe.

[71] In focusing on the inconsistency exclusively, the Board failed to take relevant points into account, such as the political situation in Chiapas, and erroneously interpreted the evidence adduced.

[72] As Teitelbaum J. stated in *Ahortor v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 705:

> [45] The Board appears to have erred in finding the Applicant not credible because he was not able to provide documentary evidence corroborating his claims. As in *Attakora*, *supra*, where the F.C.A. held that the applicant was not required to provide medical reports to substantiate his claim of injury, similarly here the Applicant is not expected to produce copies of an arresting report. This failure to offer documentation of the arrest, while a correct finding of fact, cannot be related to the applicant's credibility, in the absence of evidence to contradict the allegations.

[73] The Board therefore made an error of law by finding that the applicant's deposition was not credible: "…if the applicant's account appears credible, he should, unless there are good reasons to the contrary, be given the benefit of the doubt" (UNHCR, *supra*, at para. 196).

[74] In addition, as cited by Mr. Justice Yvon Pinard:

> [4] ... Once the IRB determines that the claimant is not credible, it is not sufficient that he file a document and state that it is genuine and truthful; some form of independent evidence corroborating this statement is necessary in order to compensate for the negative findings on credibility….

(*Martinez v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 637, [2004] F.C.J. No. 775 (QL))

[75] The Board therefore had a duty to consider all of the objective evidence on the situation in Chiapas and not only the portions that suited it.

[76] "…[I]t is important to note that the presumption of truthfulness of the applicant's story can be shifted if the documentary evidence fails to mention what one would normally expect it to mention…" (*Martinez*, *supra*, at para. 6). In this case, the documentary evidence corroborates the applicant's narrative and was incorrectly set aside by the Board.

[77] Despite the inconsistencies noted by the Board, the applicant's narrative as a whole is plausible. His participation in the Mexican Red Cross was recognized as credible by the supporting documentary evidence and, considering the political situation in the Chiapas region and all of the above-mentioned documentary evidence, it is plausible that the applicant was again persecuted,

threatened, subjected to surveillance, arrested and intimidated by government agents. Moreover, "[t]he Board is entitled to rely on documentary evidence in preference to that of the claimant" (*Zhou v. Canada (Minister of Employment and Immigration*, [1994] F.C.J. No. 1087 (QL)).

[78] In light of the foregoing, the application for judicial review is allowed. The decision of the Refugee Protection Division of the Immigration and Refugee Board is set aside and the matter is referred to a differently constituted panel for redetermination in a manner not inconsistent with these reasons.

## JUDGMENT

**THIS COURT ORDERS that** the application for judicial review be allowed and the matter be referred to a differently constituted panel for redetermination.

"Michel M.J. Shore"

Judge

Certified true translation
Susan Deichert, LLB

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-2254-07 |
| **STYLE OF CAUSE:** | JULIO HERNANDEZ UTRERA<br>SARI CRUZ BANDA ZUNIGA<br>v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Montréal, Quebec |
| **DATE OF HEARING:** | November 14, 2007 |
| **REASONS FOR JUDGMENT BY:** | The Honourable Mr. Justice Shore |
| **DATED:** | November 20, 2007 |

**APPEARANCES:**

| | |
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| Caroline Doyon | FOR THE RESPONDENT |

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| JOHN H. SIMS, Q.C.<br>Deputy Attorney General of Canada | FOR THE RESPONDENT |