Federal Court  Cour fédérale

Date: 20090811

Docket: IMM-570-09

Citation: 2009 FC 819

Ottawa, Ontario, August 11, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ARIEL AVILA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of a Pre-Removal Risk Assessment (PRRA) officer (Officer), dated January 12, 2009 (Decision) refusing the Applicant's PRRA application.

BACKGROUND

[2] The Applicant is a 37-year-old citizen of Colombia. He and his wife, Dr. Sandra Mendosa, have two children aged 10 and 18. They are all citizens of Colombia and of no other country. Sandra and the children were found to be Convention refugees on December 3, 2008 by the Immigration and Refugee Board (IRB). Sandra was persecuted by the Revolutionary Armed Forces of Colombia (FARC) as a reprisal against the Applicant, who now fears that if removed to Colombia he will face further persecution by FARC because of his past anti-FARC activities.

[3] The Applicant alleges that he was a director and broadcaster of the Christian Radio Family Station in Tunja, Boyacá, Colombia. The station promoted peace and opposed the civil war in Colombia. The FARC guerrillas said this message undermined their revolutionary goals. The Applicant says that FARC members threatened him with death if he persisted with this message. The Applicant continued, however, and in July 1998 he was declared a military target by FARC and marked for death.

[4] The Applicant and his brother, Hayder Avila, left behind their respective families to flee the FARC guerrillas in Colombia. The Applicant fled Colombia on January 15, 1999 and went to the United States (U.S.). Hayder fled Colombia March 31, 2000 and he also went to the United States. They both arrived in Canada at Fort Erie via Viva la Casa Buffalo on December 24, 2004. They were given an appointment to return January 19, 2005 for an interview and were directed back to the U.S. Though Hayder subsequently re-attended for his interview, the Applicant did not return out of fear that he might be deported. Hayder was determined to be a Convention refugee by Canada on July 21, 2005.

[5] The Applicant and his wife and children arrived at Fort Erie, Ontario, on May 15, 2008 to make a joint refugee claim. The Applicant was informed by Canada Immigration that he was deemed to have abandoned his claim and was placed in the PRRA stream. His wife and children were allowed to make refugee claims.

[6] The Applicant was deemed inadmissible to Canada because of a conviction in the U.S. of the offence of driving under the influence of alcohol. He was later charged in Canada for assaulting his wife, but was given a conditional discharge. The Applicant was ordered deported June 21, 2007.

[7] The Applicant submitted a first PRRA application with supporting documentation without the benefit of counsel on June 25, 2007, due to what he says was a “break down in the solicitor client relationship with his counsel the week before the PRRA application was due.” The PIFS of the Applicant’s wife and brother were in the possession of the same lawyer and were not filed. The Applicant’s first PRRA was denied in a decision dated May 1, 2008. A subsequent application to the Federal Court for leave and judicial review of the first PRRA refusal was dismissed on October 20, 2008.

[8] On December 15, 2008, the Applicant and his wife filed (in his wife’s name) applications for permanent residence in Canada. These applications are currently being processed.

[9] The Applicant filed a second PRRA application on December 21, 2008. On February 4, 2009, the Applicant received notice that his second PRRA application was refused on January 12, 2009.

[10] The Applicant's first motion for a stay was refused by the Federal Court, but he was allowed two deferrals: one to allow him to procure travel documents and the other to await the decision on his second PRRA. The Applicant was granted a stay of removal on February 25, 2009.

DECISION UNDER REVIEW

[11] The Officer noted that the Applicant had forwarded evidence in his submission that pre-dated the negative PRRA decision of May 1, 2008. This evidence included a copy of the IRB decision for Hayden Rodriguez dated July 21, 2005 and the PIF of Sandra Ramirez signed June 5, 2007, as well as a translated complaint to the Attorney General's office in Duitama, Boyaca, Colombia dated December 10, 1998. There was no explanation as to why these documents were not available at the time of the previous PRRA decision and they were not considered by the Officer.

[12] The Officer placed little value on Sandra's affidavit dated October 20, 2008 because he said it came from a "person who is not disinterested in this decision and [it] is not supported by independent evidence from an authority such as the police or government official."

[13] The Officer also considered the RPD decision of December 3, 2008, which determined that the Applicant's wife and children were Convention refugees. The Officer concluded that the "RPD and PRRA decisions are based on the individual circumstances presented in each case. Therefore, this evidence is given low weight."

[14] The Officer also commented that the in-Canada applications for permanent residence "do not address the risks the Applicant fears in Colombia and are given low weight."

[15] The Officer felt that the Applicant had failed to link the objective documentation evidence to his personal forward-looking risks and considered this evidence in conjunction with the objective evidence obtained by personal research.

[16] The Officer decided that, although human rights abuses and political corruption continue in Colombia and the armed conflict has not stopped, "progress is being made as reported by the United States Report on Human Rights" and that "[w]hile there is government involvement with right wing paramilitaries, the authorities have acted against high ranking officials resulting in charges and arrest." Relying upon the Presidential Program Against Kidnapping and Abductions, the Officer also commented that the "government has taken measures to reduce kidnapping and abductions." He felt that the government has been "moving against demobilized paramilitaries even though the judiciary is under funded and overworked" and had "a program in place encouraging and assisting FARC members in deserting that illegal group."

[17] The Officer concluded his comments on the documentary evidence by stating that "although conditions in Colombia are less than perfect and active terrorist and paramilitary groups that present a danger to the general population continue to exist, the government is making progress in limiting the negative effect of these organizations. Personal research also reveals that the authorities are taking steps against political corruption and human rights abuses by the police."

[18] The Officer points out that the Applicant has resided outside of Colombia for nine years and his mother was forced to move in 2004 and 2007 because she received threatening telephone calls from FARC members inquiring about his and his brother's whereabouts. However, the Officer found that this "assertion was not corroborated by supporting evidence from the Applicant's mother or other independent sources." The Officer referred to the purpose of the PRRA and noted that the "available evidence does not show that the Applicant is of interest to FARC guerrillas in Colombia." He concluded that "there is less than a serious possibility that the FARC guerrillas would be interested in harming the Applicant if he returned to Colombia."

[19] The Officer found that the Applicant did not face more than a mere possibility of persecution as described in section 96 of the Act and that there were no substantial grounds to believe that the Applicant faced a risk of torture. Nor were there reasonable grounds to believe the Applicant faced a risk to life or a risk of cruel and unusual treatment or punishment as described in paragraphs 97(1)(*a*) and (*b*) of the Act if returned to Colombia.

ISSUES

[20] The Applicant submits the following issues for review:

a. Did the Officer err in his interpretation and application of sections 96, 97 and 113 of the Act and the law of state protection?

b. Did the Officer base his Decision on an erroneous finding of fact or was it made in a perverse or capricious manner or without regard for the material before the Officer?

c. Did the Officer fail to observe the principles of natural justice, fetter his discretion or otherwise act beyond or refuse to exercise his jurisdiction?

d. What is the standard of review to be applied in assessing PRRA applications?

STATUTORY PROVISIONS

[21] The following provisions of the Act are applicable in these proceedings:

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	*a*) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette

fear, unwilling to avail themself of the protection of each of those countries; or

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

(ii) elle y est exposée en tout lieu de ce pays alors que d’autres personnes originaires

generally by other individuals in or from that country,

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.

Person in need of protection

Personne à protéger

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d’une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

Consideration of application

Examen de la demande

113. Consideration of an application for protection shall be as follows:

113. Il est disposé de la demande comme il suit :

(*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the

a) le demandeur d’asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n’étaient alors pas normalement accessibles ou, s’ils l’étaient, qu’il n’était pas raisonnable, dans les circonstances, de s’attendre à ce qu’il les ait présentés au

rejection;	moment du rejet;
(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	*b*) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;
(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;	*c*) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;
(*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and	*d*) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part :
(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or	(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,
(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.	(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

[22] The following provision of the Regulations is applicable in this proceeding:

167. For the purpose of determining whether a hearing is required under paragraph 113(*b*) of the Act, the factors	**167.** Pour l'application de l'alinéa 113*b*) de la Loi, les facteurs ci-après servent à décider si la tenue d'une

are the following:	audience est requise :
(*a*) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	*a*) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(*b*) whether the evidence is central to the decision with respect to the application for protection; and (*c*) whether the evidence, if accepted, would justify allowing the application for protection.	*b*) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection; *c*) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

STANDARD OF REVIEW

[23] The Applicant submits that the general standard of review for a PRRA refusal is reasonableness and cites *Obeng v. Canada (Minister of Citizenship and Immigration)* 2009 FC 61 at paragraphs 22-26.

[24] The Respondent agrees that the general standard of review is reasonableness. However, the Respondent emphasizes that the Officer's findings warrant considerable deference. The Decision must be justified, transparent and intelligible and must fall "within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See: *Dunsmuir v. New Brunswick* 2008 SCC 9 (*Dunsmuir*) at paragraph 47. The Respondent stresses that this particular Decision deserves a high degree of deference.

[25] In *Dunsmuir*, the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[26] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the 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.

[27] *Elezi v. Canada (Minister of Citizenship and Immigration)* 2007 FC 240 at paragraph 22 (*Elezi*) provides as follows:

> When assessing the issue of new evidence under subsection 113(a), two separate questions must be addressed. The first one is whether the officer erred in interpreting the section itself. This is a question of law, which must be reviewed against a standard of correctness. If he made no mistake interpreting the provision, the Court must still determine whether he erred in his application of the section to the particular facts of this case. This is a question of mixed fact and law, to be reviewed on a standard of reasonableness.

[28] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the issues on this application

to be reasonableness, with the exception of procedural fairness/natural justice issues and the error of law issue. 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": *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene 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."

[29] The Applicant has also raised a procedural fairness issue for which the standard of review is correctness: *Suresh v. Canada (Minister of Citizenship and Immigration)* 2002 SCC 1. I have also reviewed the alleged error of law using the correctness standard. See *Pushpanathan v. Canada (Minister of Citizenship and Immigration)*, [1998] S.C.J. No. 46.

ARGUMENTS

The Applicant

[30] The Applicant submits that the Officer applied the wrong test in assessing risk to the Applicant and erred in his interpretation and application of sections 96, 97 and 113 of the Act and the law of state protection. When applying the Convention refugee definition in section 96, the Applicant need only establish that the risk is well founded and that there is more then a mere

possibility of risk: *Adjei v. Canada (Minister of Employment and Immigration)*, [1989] F.C.J. No. 67 (F.C.A.).

[31] The Applicant relies upon section 10.1(4) of Canadian Citizenship and Immigration (CIC) Operations Manual, Pre-Removal Risk Assessment (Manual) at page 38:

> The Convention Against Torture has issued the following guidelines:
>
> i. If the country concerned is one in which there is evidence of a consistent pattern of gross flagrant or mass violations of human rights?
>
> ii. Has the applicant been tortured or maltreated by or at the instigation of or with the consent or acquiescence of a public official or other person acting in their official capacity in the past? If so, was it the recent past?
>
> iii. Is there medical or other independent evidence to support a claim by the author that he/she has been tortured or maltreated in the past? Has the torture had after effects?
>
> iv. Has the situation referred to in (a) above changed? Has the internal situation with respect to human rights altered?
>
> v. Has the applicant engaged in political or other activity within or outside the country which would appear to make him/her vulnerable to the risk of being placed in danger or torture where h/she to be expelled, returned, or expedited to the country concerned?
>
> vi. Are there factual inconsistencies in the claim?

[32] The Applicant says that the Officer failed to apply the guidelines for assessing risk and that the Applicant's case falls squarely within the purview of the guidelines for the following reasons:

> a. There was credible and trustworthy evidence before the Officer of a consistent pattern of current ongoing gross flagrant or mass violations of human rights by the FARC, including the kidnapping

> and killing of perceived political opponents, by the same group which attacked the Applicant and his family in Colombia. (Response to Information Request COL 102779.FE dated April 9, 2008; Amnesty International Colombia Report July 2008; US Department of State Country Reports in Human Rights Practices-Colombia dated March 11, 2008; Annual Report of the United Nations High Commissioner for Human Rights and Reports of the Office of the High Commissioner and of the Secretary General dated February 28, 2008);
>
> b. There was independent corroborative evidence before the Officer in the form of the IRB decision of December 3, 2008, which determined that the Applicant's wife and children were Convention refugees. This decision was based on the wife's PIF narrative and testimony;
>
> c. There was substantial documentary evidence before the Officer that the situation in Colombia had not changed since the Applicant's departure from Colombia (Amnesty International Colombia Report July 2008, and US Department of State Country Reports in Human Rights Practices-Colombia dated March 11, 2008);
>
> d. The Applicant's assertion that he was engaged in political or other activity within or outside the country appear to make him vulnerable to the risk of being placed in danger or torture. This was accepted by the Officer;
>
> e. There were no factual inconsistencies in the claim.

[33] The Applicant contends that, on a plain reading and application of the Respondent's own guidelines, he has established a well-founded risk of persecution.

[34] With respect to section 97 of the Act, the Applicant says that standard of proof to be applied when assessing a risk of torture, cruel and unusual treatment or punishment is whether it is more likely than not that he faces risk to life, risk of torture, or cruel or unusual treatment or punishment: *Li v. Canada (Minister of Citizenship and Immigration)* 2005 FCA 1. The Applicant notes that the

Officer erred in applying the wrong standard of proof. As errors of law are reviewable on a standard of correctness, the Officer's Decision must be set aside: *Pushpanathan*.

[35] In the Applicant's view, the Officer erroneously focused on the length of time that the Applicant had been outside of Colombia. The evidence before the Officer was that the Applicant's brother had been granted Convention refugee status in July 2005 and the Applicant's wife and children on December 3, 2008. The Applicant's brother has been outside Colombia since March 2000 and the Applicant's wife and children have been outside of Colombia since June 2001. Despite their being out of Colombia for several years, there was a current serious risk of persecution. The Applicant's fear of persecution and cruel and unusual treatment was interrelated with the refugee claims of his brother and wife; therefore, the Officer's Decision amounts to a repugnancy and is patently unreasonable and was made without regard to the evidence before him.

[36] The Applicant submits that the Officer also erred in his interpretation and application of subsection 113(a) of the Act in refusing to consider the PIFS of the Applicant's brother and his wife, Sandra. The Applicant cites *Raza v. Canada (Minister of Citizenship and Immigration)* 2007 FCA 385 at paragraphs 13-15 for the meaning of subsection113(a) of the Act:

> **13** As I read paragraph 113(*a*), it is based on the premise that a negative refugee determination by the RPD must be respected by the PRRA officer, unless there is new evidence of facts that might have affected the outcome of the RPD hearing if the evidence had been presented to the RPD. Paragraph 113(*a*) asks a number of questions, some expressly and some by necessary implication, about the proposed new evidence. I summarize those questions as follows:

1. Credibility: Is the evidence credible, considering its source and the circumstances in which it came into existence? If not, the evidence need not be considered.
2. Relevance: Is the evidence relevant to the PRRA application, in the sense that it is capable of proving or disproving a fact that is relevant to the claim for protection? If not, the evidence need not be considered.
3. Newness: Is the evidence new in the sense that it is capable of:
    (a) proving the current state of affairs in the country of removal or an event that occurred or a circumstance that arose after the hearing in the RPD, or
    (b) proving a fact that was unknown to the refugee claimant at the time of the RPD hearing, or
    (c) contradicting a finding of fact by the RPD (including a credibility finding)?
    If not, the evidence need not be considered.
4. Materiality: Is the evidence material, in the sense that the refugee claim probably would have succeeded if the evidence had been made available to the RPD? If not, the evidence need not be considered.
5. Express statutory conditions:
    (a) If the evidence is capable of proving only an event that occurred or circumstances that arose prior to the RPD hearing, then has the applicant established either that the evidence was not reasonably available to him or her for presentation at the RPD hearing, or that he or she could not reasonably have been expected in the circumstances to have presented the evidence at the RPD hearing? If not, the evidence need not be considered.
    (b) If the evidence is capable of proving an event that occurred or circumstances that arose after the RPD hearing, then the evidence must be considered (unless it is rejected because it is not credible, not relevant, not new or not material).

14 The first four questions, relating to credibility, relevance, newness and materiality, are necessarily implied from the purpose of paragraph 113(*a*) within the statutory scheme of the IRPA relating to refugee claims and pre removal risk assessments. The remaining questions are asked expressly by paragraph 113(*a*).

> **15** I do not suggest that the questions listed above must be asked in any particular order, or that in every case the PRRA officer must ask each question. What is important is that the PRRA officer must consider all evidence that is presented, unless it is excluded on one of the grounds stated in paragraph [13] above.

[37] The Applicant submits that although Justice Sharlow's comments were made in the context of a PRRA that followed an RPD hearing, the principles apply by analogy to the case at bar. Contrary to the Officer's interpretation of subsection 113(1) of the Act, the evidence adduced by the Applicant, including the PIFS of his brother and wife, fell squarely within the purview of subsection 113(a) of the Act as "credible, relevant, new and material." Therefore, the Officer erred in failing to give the Applicant prior notice of any concerns about the PIFS of the Applicant's wife and brother to allow the Applicant to explain why those documents had not been available at the time of the previous PRRA Decision.

[38] The Applicant says that his brother and wife's PIFS were not presented as part of the first PRRA application because he had experienced a breakdown of the solicitor-client relationship with his previous counsel in the week before his PRRA was due. His previous counsel had prepared the PIFS of the Applicant's brother and wife and had them in his possession. The Applicant had retained previous counsel for the express purpose of completing his PRRA application. As a result of ineffective assistance by his previous counsel and the break down of the solicitor-client relationship in the week before the PRRA application was due, the Applicant was unable to file the PIFS for his first PRRA application on June 25, 2007.

[39] The Applicant contends that the Officer's findings that his fear of persecution was not well-founded, that there was less than a serious risk of harm, and that adequate state protection is available in Colombia, amounted to speculation and conjecture by the Officer that was unsupported by the evidence. The Applicant cites *Isse v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1020 (*Isse*) at paragraph 14:

> **14** The panel's conclusion regarding the applicant's late pregnancy is made without any evidentiary basis, rather it is based on the panel's own views. It is urged that those views were in turn based on the panel's awareness of Somali culture and tradition, but if that is the case the significance of that culture and those traditions is not explained. All that is said is that it was implausible her husband would wait 16 years after marriage for the birth of a first child. The panel's conclusion was purely speculative. In the recent case of *Mahalingam v. Canada (Minister of Citizenship and Immigration)*[1], Mr. Justice Gibson summarized the law relating to speculation as follows:
>
> > For its own speculation or feeling, the CRDD cited no evidence in support. In *Minister of Employment and Immigration v. Robert Satiacum* [(1989), 99 N.R. 171 (F.C.A.)] Mr. Justice MacGuigan wrote:
> > The common law has long recognized the difference between reasonable inference and pure conjecture. Lord Macmillan put the distinction this way in *Jones v. Great Western Railway Co.* (1930), 47 T.L.R. 39 at 45, 144 L.T. 194 at 202, (H.L.):
> >
> > > The dividing line between conjecture and inference is often a very difficult one to draw. A conjecture may be plausible but it is of no legal value, for its essence is that it is a mere guess. An inference in the legal sense, on the other hand, is a deduction from the evidence, and if it is a reasonable deduction it may have the validity of legal proof. The attribution of an occurrence to a cause is, I take it, always a matter of inference.
>
> In *R. v. Fuller (1971), 1 N.R. 112* at 114, Hall J.A. held for the Manitoba Court of Appeal that "[t]he tribunal of fact cannot resort to

> speculative and conjectural conclusions." Subsequently a unanimous Supreme Court of Canada expressed itself as in complete agreement with his reasons: [1975] 2 S.C.R. 121 at 123, 1 N.R. 110 at 112. In the absence of some evidence, cited by the CRDD and weighed against the evidence to the contrary to support its "feeling", I conclude that the CRDD here resorted to a speculative and conjectural conclusion which was clearly central to its decision. In so doing, it committed a reviewable error.

[40] The Applicant says that the speculation and conjecture of the Officer about the Applicant's fear of persecution is a reviewable error.

[41] The Applicant also says that, due to any clear indication by the Officer as to what the Officer believed or disbelieved about the Applicant's evidence, including his PRRA narrative, the PIF narratives of his brother and wife and his wife's affidavit, as well as the lack of reasons for the Officer's findings, mean that the Officer committed an error of law. The Applicant relies upon *Elezi v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 275 (F.C.T.D.) at paragraph 5:

> **5** Thus, the principal Applicant's evidence with respect to the abduction and rape was disbelieved by the CRDD on findings of implausibility. With respect to plausibility findings generally, the law is clear as stated by Justice Muldoon in *Valtchev v. Canada (Minister of Citizenship and Immigration)* [2001] F.C.J. No. 1131, at paragraphs 6 to 7 as follows:
>
> > Presumption of Truth and Plausibility
> > The tribunal adverts to the principle from *Maldonado v. M.E.I.*, [1980] 2 F.C 302 (C.A.) at 305, that when a refugee claimant swears to the truth of certain allegations, a presumption is created that those allegations are true unless there are reasons to doubt their truthfulness. But the tribunal does not apply the Maldonado principle to this applicant, and repeatedly disregards his testimony, holding that much of it appears to it to be implausible. Additionally, the tribunal

> often substitutes its own version of events without evidence to support its conclusions.
>
> A tribunal may make adverse findings of credibility based on the implausibility of an applicant's story provided the inferences drawn can be reasonably said to exist. However, plausibility findings should be made only in the clearest of cases, i.e., if the facts as presented are outside the realm of what could reasonably be expected, or where the documentary evidence demonstrates that the events could not have happened in the manner asserted by the claimant. A tribunal must be careful when rendering a decision based on a lack of plausibility because refugee claimants come from diverse cultures, and actions which appear implausible when judged from Canadian standards might be plausible when considered from within the claimant's milieu. [see L. Waldman, Immigration Law and Practice (Markham, ON: Butterworths, 1992) at 8.22]

[42] The Applicant summarizes why this application for judicial review should succeed:

a. The Officer’s errant interpretation and application of sections 96, 97 and 113 of the Act and the law of state protection;

b. The Officer’s did not give fair consideration to the Applicant’s application;

c. The Officer’s erroneous exclusion of material evidence and his failure to consider evidence;

d. The Officer’s Decision was based on speculation and conjecture without regard to the evidence;

e. The Officer’s misstatement and/or misapprehension of the evidence;

f. The Officer’s fettering of its discretion and breach of principles of natural justice.

[43] The Applicant submits that, since he was denied the opportunity for a refugee hearing, he was precluded from demonstrating the well-foundedness of his fear of persecution. The Applicant also says that the Officer's Decision was unreasonable because:

a. The FARC continue to operate in Colombia, commit violent acts, and are responsible for serious human rights abuses including kidnappings and killings;
b. Adequate state protection or Internal Flight Alternatives are not available for those targeted by the FARC; and
c. Objective reports indicate that collusion between paramilitaries and high-ranking members of state institutions exists, and impunity remains a serious problem.

[44] The Applicant also insists that he met the statutory and regulatory criteria for an oral hearing. The Officer discounted the credibility of the Applicant's assertion that he remains at risk of persecution from FARC guerillas if returned to Colombia and discounted the affidavit of the Applicant's wife as not credible. An oral hearing would have provided the Applicant with an opportunity to know and address the concerns of the Officer prior to the rendering of a final decision.

The Respondent

PRRA Decision is Reasonable

[45] The Respondent submits that the Applicant has failed to demonstrate that the Officer's Decision falls outside the range of permissible outcomes. The Officer noted that each refugee claim

is assessed on its own merits and, therefore, the success of the refugee claims of the Applicant's family does not mean that the Applicant is meritorious and ought to be accepted as well. The Officer considered the Applicant's personal circumstances, including current county conditions and the fact that the Applicant has been outside of Colombia for nine years. Whatever threat forced the Applicant to leave Colombia has now dissipated.

[46] The Respondent says it is trite that an assessment of whether a claimant is a Convention refugee or person in need of protection is a forward-looking exercise. Regardless of what has happened in the past, the decision-maker is required to decide whether there are grounds for believing that returning the Applicant to his or her country of nationality or habitual residence will put him at undue risk of persecution or harm proscribed by sections 96 and 97 of the Act.

[47] The Respondent contends that the Officer came to a reasonable conclusion that there is insufficient evidence to support a determination that threats which forced the Applicant's flight from Colombia more than nine years ago still persist. The acceptance of the refugee claims of the Applicant's family is immaterial and, even if their claims were based on the same threat as the Applicant faces, the fact his family was deemed at risk at the time their claims were decided does not mean that an assessment of the risk at the present time is forbidden or improper. The Officer rightly looked at country conditions and determined that the risks that forced the Applicant to flee have dissipated. The Applicant has failed to demonstrate that such a finding was not reasonably open to the Officer.

[48] The Respondent notes that the Applicant's allegation that the Officer erred in not affording him an oral hearing cannot stand as the Applicant has failed to demonstrate how section 113 of the Act and section 167 of the Regulations apply to him.

[49] The Respondent submits that this application is a challenge to the denial of a PRRA application. Therefore, the proper Respondent is the Minister of Citizenship and Immigration, not the Minister of Public Safety and Emergency Preparedness. The Respondent requests that the style of cause be amended accordingly.

[50] The Respondent also submits that it is trite law that judicial review applications are confined to the record that was before the administrative decision maker. The Respondent notes that the Applicant's Record includes information that was not before the Officer.

[51] The Respondent points out that the Applicant does not point to any authority for the proposition that the onus was on the PRRA Officer to seek an explanation from him, or to give him prior notice of concerns, related to the introduction of pre-existing information.

[52] The Respondent says that the *Raza* decision does not apply to this case because in *Raza* all of the documents that were submitted to the Officer were created after the rejection of their refugee claim. The Respondent states that the Applicant "ignores the importance of the express statutory conditions of paragraph 113(a) of the Act…[and] ignores the fundamental principles of PRRA assessment."

ANALYSIS

[53] The Applicant has asserted several grounds for a reviewable error in the Decision. I have reviewed all of them. In my view, there is nothing in the Decision to suggest that the Officer applied the wrong tests, or the wrong standards of proof, to the Applicant's section 96 and section 97 claims. The Applicant's arguments really amount to an allegation that the Decision was unreasonable.

[54] Likewise, I cannot find that the Officer committed a reviewable error with regard to subsection 113(a) of the Act in refusing to take into account the PIFS of the Applicant's brother and wife. This evidence was available before the previous negative PRRA decision so that the Applicant could have been reasonably expected to provide it. The Applicant provided no explanation why it had not been provided earlier and there was no obligation on the Officer to bring these concerns to the attention of the Applicant and ask for an explanation that the Applicant had failed to provide. The Officer cannot be faulted for excluding evidence in a situation where no explanation was provided as to why it had not been provided earlier. Providing an explanation to the Court as part of this judicial review application is of no assistance to the Officer who had to make the Decision and it does not indicate that a reviewable error was made. Decisions are reviewed against the material that was before the decision-maker at the time the decision was made.

[55] The only substantial ground of complaint, in my view, is the Applicant's assertion that the Decision is unreasonable because there was no evidentiary basis for a finding that the Applicant did not face section 96 and section 97 risks. In fact, the Applicant argues that the evidence points entirely away from the Officer's conclusion in this regard and/or was wrongly discounted.

[56] The Officer discounts the wife's affidavit as having "little probable value" (*sic*) because it is "supplied by a person who is not disinterested in this decision and is not supported by independent evidence from an authority such as the police or government official."

[57] However, as the Officer also notes, the purpose of the wife's affidavit was to point out that her own successful refugee claim, as well as the successful claims of her children and the Applicant's brother, were substantially based upon the Applicant's experience of persecution in Colombia. In fact, Ms. Ramirez says that her "fear of persecution is based in part on my husband's experience of persecution. Our cases are interrelated as set out in our respective PIFS which are attached to my husband's affidavit in these proceedings."

[58] As I have found, the Officer appropriately declined to look at the PIFS because no explanation was offered for not producing them earlier. However, this does not leave Ms. Ramirez's assertions on interrelatedness without corroborative support.

[59] There is, first of all, the Applicant's own testimony on interrelatedness which the Officer appears to discount without saying why. No adverse credibility findings were made against the

Applicant so that his evidence in this regard must be presumed true because there was no reason to disbelieve it. See *Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (C.A.) at 305; and *Elezi v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 275.

[60] Added to this was the fact that Ms. Ramirez and the children and brother have made successful refugee claims and these facts were before the Officer. The Officer discounts these facts by saying that "PRD and PRRA decisions are based on the individual circumstances presented in each case. Therefore this evidence is given little weight."

[61] It is, of course, true that RPD and PRRA decisions are based upon individual circumstances, but the Applicant's individual circumstances include clear evidence that the basis of his fears are interrelated to the risks that were faced by his other family members, and those family members have been found to be Convention refugees. In effect, the Officer is saying that this factor only deserves "low weight" because individual circumstances differ, but apart from this truism the Officer does not explain why the Applicant's circumstances should be so different from those of other family members when there is evidence of interconnectedness before him as well as evidence of successful refugee claims.

[62] The Applicant has never had his evidence evaluated by the RPD. His refugee claim was declared abandoned because he failed to show up when he was told to. In the circumstances, the Officer provides no real explanation as to why the facts of interconnectedness and successful claims

by the Applicant's family should be given "low weight" when they are obviously a crucial and highly material aspect of the Applicant's "individual circumstances."

[63] It also seems to me that the Officer's analysis of country condition is not reasonable. The Officer acknowledges that "active terrorist and paramilitary groups that present a danger to the general population continue to exist … ." The fact that the government may be "making progress" or "taking steps against political corruption and human rights abuses by police" does no equate to anything like a basis for finding that the Applicant is not at risk in the way he says he has been targeted and in the way that the RPD has found that his family were at risk. There was substantial documentary evidence before the Officer that the situation in Colombia has not changed since the Applicant's departure, including the Amnesty International Report of July 2008, and the US Department of State Country Reports in Human Rights Practices – Colombia, dated March 11, 2008.

[64] The Officer's focus on the length of time that the Applicant has been outside of Colombia as a basis to discount the risks he faces overlooks the evidence that Ms. Ramirez and the children have been outside of Colombia since June 2007 and were nevertheless found to be refugees in December 2008. Likewise, the Applicant's brother has been outside of Colombia since March 2000. There was evidence of interrelatedness of claims and the country condition documents do not suggest that anything has changed.

[65] The first PRRA officer had decided that the Applicant did not have a well-founded fear of persecution in Colombia and there were no substantial grounds to believe that he faced section 97 risks if returned.

[66] The first PRRA officer accepted that adequate state protection does not exist in Colombia for those targeted by groups such as the FARC and that there is collusion between paramilitaries and high-ranking members of state institutions. He also found that impunity remains a serious problem and that no IFA exists for those who are targeted.

[67] The essence of the first officer's decision is found in the following words:

> The applicant has been outside of Colombia for over nine years. The last personal incident that he describes happened in December 1998, and the last incident involving his brother happened in August 1999. The evidence before me does not support that the applicant has been sought since that time, or that his family has been harassed or targeted. I find it objectively unreasonable that the FARC continues to be interested in the applicant after a passage of over eight years. He states that being targeted by the FARC is equivalent to being issued a death sentence because of the group's ability to locate people throughout the country. I accept that the FARC continue to operate in Colombia, commit violent acts and are responsible for serious human rights abuses. I also accept that adequate state protection or an Internal Flight Alternative are not available for those targeted by the FARC. Nevertheless, the existence of FARC in Colombia is not, in and of itself, indicative of a personalized forward-looking risk for the applicant. The evidence does not support that the applicant's fear of the FARC is objectively well-founded.

[68] The second PRRA application was made on the basis of a change in circumstances which the Applicant felt overcame the lack of evidence in his first application of personalized forward-looking risk. In his submissions the Applicant asserted as follows:

> My brother (CRDD positive July 21st, 2005), and wife and children (CRDD positive December 3rd, 2008) have all been determined to be Convention refugees in Canada. I have enclosed copies of their CRDD decisions confirming their determination as Convention refugees. Their refugee claims are based substantially on my experience of persecution in Colombia and our respective claims are interdependent."

[69] Unfortunately, apart from the simple assertion of interdependence, the Applicant does not explain the factual basis for his position. The brother was granted refugee status in 2005, so that this fact had to be before the first PRRA officer and the CRDD decisions themselves do not provide the facts or the reasons to meet the gap. The Applicant was, basically, relying upon the fact that his wife and children were granted refugee status in 2008 as the new evidence of well-foundedness for his second PRRA claim.

[70] The Applicant also submitted an affidavit signed by his wife on October 20, 2008 as part of his second PRRA application. In that affidavit, Ms. Ramirez provides the following information:

> My fear of persecution is based in part on my husband's experience of persecution. Our cases are interrelated as set out in our respective PIFs which are attached to my husband's affidavit in these proceedings.

[71] Unfortunately, Ms. Ramirez's PIF was excluded because it was not new evidence and no explanation was provided as to why it had not been submitted with the Applicant's first PRRA

application. However, in paragraphs 9-12 of her affidavit, Ms. Ramirez provides the following evidence:

> 9. I want Ariel to remain in Canada with my children and I permanently.
>
> 10. My children and I are afraid that if Ariel is removed from Canada, he will end up back in Colombia and we may never see him again. The situation there has become worse since we left Colombia. We believe that his life is in danger there because of his past activities against the FARC and the inability of the Colombian government to provide protection.
>
> 11. Several of my family members have been forced because of attacks by the FARC, to flee Colombia since my departure. My father Guillermo Mendoza was forced to leave Colombia around December 2007 because of attacks by the FARC. He lives in the U.S. He was a pastor who owned and operated a Christian radio station in the city of Tunja in Colombia. My father used the radio station to protest against the FARC and warn the people to oppose the FARC's recruitment efforts. Ariel was the radio announcer who actually did the broadcasts against FARC until he was forced to leave. Then my father took over from Ariel conducting the broadcasts himself until the FARC bombed the radio station.
>
> 12. Both Ariel and my father are well known to the FARC because of their protest activities. My father remained in Colombia after Ariel's departure, and went on an evangelical campaign against the FARC in which he went to several cities spreading his message. He kept changing his address in order to avoid capture by the FARC because he did not believe that the police could protect him.

[72] In his Decision, the second PRRA officer discounts this evidence as follows:

> It is noted that the applicant's wife stated in her affidavit of 20 October 2008 that her refugee claim was based partially on the applicant's. The RPD and PRRA decisions are based on the individual circumstances presented in each case. Therefore, this evidence is given little weight.

[73] The Officer also discounts the affidavit of Ms. Ramirez for the following reason:

> The applicant submitted an affidavit by his wife, Sandra Mendoza Ramirez on 20 October 2008. In this document the declarant states that she and many of her family members as well as her husband and his relatives have been targeted by FARC because of their connection to a Christian radio station in Colombia. This affidavit is supplied by a person who is not disinterested in this decision and is not supported by independent evidence from an authority such as the police or government official. Consequently, it is given little probably (*sic*) value.

[74] So the Applicant is stymied when it comes to showing the interconnectedness of his claim to that of his wife and family. In his own affidavit, he relies upon PIFs that are excluded and when it comes to Ms. Ramirez's affidavit she is faulted by the Officer because she is not a disinterested witness. There are no reasons from the RPD hearing available, so we do not know what the RPD found as regards the Applicant's brother and wife and whether their claims were, indeed, part of a general narrative about FARC persecution of this family, including the Applicant.

[75] The PIFs are probably the best evidence of the interconnected of the claims and, even though the Officer correctly excluded them because he was given no explanation as to why they had not been produced earlier, I feel a considerable unease because of the way the system may have prevented the Applicant from presenting his case. I am afraid that he might be in real danger from the FARC but has not been able to demonstrate this for various reasons. His refugee claim was not considered at the time of his brother's because he was afraid he would be deported back to Colombia and he failed to return when told to do so, and his attempts to claim refugee status along with his wife and children were thwarted because he was deemed to have abandoned his claim and he was placed in the PRRA stream.

[76] Because of this unease, I have reviewed the PIFs of Ms. Ramirez and the Applicant's brother even though they were excluded by the PRRA Officer and were not part of his Decision.

[77] Ms. Ramirez' PIF reveals that her fears were intimately connected to death threats that had been made against the Applicant and that it was the Applicant's activities at the radio station that had brought the family to the attention of the FARC. The brother's PIF also makes it clear that it is the Applicant who has brought the FARC down upon his family and that he is in just as much danger as they were.

[78] I cannot say that the Officer was wrong to exclude the PIFs, but it is clear to me that the Applicant is in grave danger if he is sent back to Colombia.

[79] The PRRA Officer obviously had his own concerns about this danger because, in the Decision, he makes much of the country condition documents and suggests that things are not as bad as they once were in Colombia. But his would seem to be entirely at odds with the strong conclusions to the contrary of the first PRRA officer that were made eight months earlier. In addition, the second PRRA officer fails to deal with the contradictory evidence in the documentation before him that says nothing has really changed in Colombia.

[80] On the basis of *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425, I have to conclude that the Officer has overlooked and has failed to deal with contradictory evidence.

[81] However, this would not be fatal to the Decision if the conclusions of the first PRRA stand and the Applicant has not shown forward-looking personalized risk because he has not shown he has been, or will be, targeted by the FARC.

[82] The PIFs of his wife and brother make it very clear that the Applicant is in danger, and the wife and brother were granted refugee status (the wife in 2008) based upon a narrative that reveals the Applicant's activities have brought the FARC down upon his entire family.

[83] My view is that the Officer's discounting of the wife's evidence in her affidavit on the basis that it was supplied "by a person who is not disinterested in this decision and is not supported by independent evidence from an authority such as the police or government official" is entirely unreasonable because it leaves out of account the crucial fact that the wife has been found by the RPD to be a trustworthy witness in her own claim for refugee status. It also leaves out of account the wife's affirmations of interconnectedness that are corroborated by the Applicant himself, whose credibility is not questioned and whose evidence must be presumed true. It is also unreasonable because, although it is true that "RPD and PRRA decisions are based on the individual circumstances presented in each case," the Applicant's individual circumstances include the fact that he is at the centre of a family situation in which both his brother and his wife have been found to be refugees and his own account of this centrality, as found in his PRRA application, is never questioned by an adverse credibility finding and so must be presumed true. The granting of refugee status to his wife and family was new evidence that had an impact on the whole of the Applicant's narrative. It was not given the weight it deserved and the Applicant's situation was not reviewed in

light of this significant change of circumstances. In my view, this renders the entire Decision unreasonable.

[84] This is somewhat of a relief because, as the excluded PIFs make clear, the Applicant is in real danger if returned and the country conditions documents do not suggest to me that the FARC is less effective, notwithstanding the commendable attempts by the Government of Colombia to deal with the situation.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The style of cause is amended to show the "Minister of Citizenship and Immigration," and not the Minister of Public Safety and Emergency Preparedness, as the Respondent.

2. The application for judicial review is allowed, the Decision is quashed, and the matter is referred back for reconsideration by a different officer in accordance with these reasons.

3. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.:	IMM-570-09
STYLE OF CAUSE:	***ARIEL AVILA***
	v.
	THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Toronto, ON
DATE OF HEARING:	July 8, 2009
REASONS FOR JUDGMENT And JUDGMENT:	RUSSELL J.
DATED:	August 11, 2009

WRITTEN REPRESENTATIONS BY:

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Ms. A. Leena Jackkimainen	FOR THE RESPONDENT

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