

AT WELLINGTON

<b>Appellants:</b>	<b>AB (Colombia)</b>
<b>Before:</b>	B L Burson (Member)
<b>Counsel for the Appellants:</b>	J Petris
<b>Counsel for the Respondent:</b>	No Appearance
<b>Date of Hearing:</b>	2 & 3 November 2011
<b>Date of Decision:</b>	30 November 2011

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**DECISION**

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**INTRODUCTION**

[1] These are joint appeals under section 194(1)(c) of the Immigration Act 2009 against decisions of a refugee status officer of the Refugee Status Branch of the Department of Labour, declining to grant refugee status and/or protected person status to the appellants, both citizens of Colombia. The appellants have been in a stable, long-term relationship for some years. They will be referred to hereafter as “the husband” and “the wife”.

[2] Their appeals arise out of the widespread forced displacement of persons from their land as an integral part of the armed conflict taking place in Colombia. The husband claims to have been at risk of harm from the *Fuerzas Armadas Revolucionarias de Colombia* (Revolutionary Armed Forces of Colombia), (FARC), a left-wing armed group in Colombia, because he has sought to assert his control over land that has been effectively seized by that group. FARC has indicated it knows the wife’s identity. The main issue to be resolved is whether each appellant has a well-founded fear of being persecuted.

[3] What follows is a summary of the evidence given by the appellants in support of their appeals. An assessment follows thereafter.

## **THE APPELLANTS' CASE**

### **The Husband's Evidence**

[4] The husband was born in the early 1980s into a landowning family in Y, situated in Z Department in Colombia. His family are relatively affluent, their wealth deriving from land holdings in various parts of Z. Their land holdings are comprised of both agricultural land and residential property. Some of the agricultural land was managed directly by the appellant's grandfather, who owned the land and who controlled the family business. Other land was leased to commercial sugar cane operations.

[5] The family's problems with their land began in the mid-1980s when FARC began to exert control in the area where the family had two large agricultural landholdings, the largest of which, called W, comprised 100 hectares. W was situated in an area partially covered in jungle-clad foothills. At this time, FARC began targeting landowners in the area demanding that they pay a "donation" to support FARC in its armed struggle against the Colombian state. The husband's grandfather refused. To force his compliance, FARC kidnapped, tortured and killed the husband's father. Concerned for their safety, the appellant's paternal uncles all fled to the United States. The appellant's grandfather then began paying the monthly sum to FARC, known as a "vaccination", in order to 'protect' his family from further harm.

[6] FARC soldiers began to come to W frequently, staying for three or four days at a time. While there, they treated the property as if it were their own, taking the husband's grandfather's vehicle for their own use. They also requisitioned the houses on the land for the senior FARC officers while soldiers were billeted in tents. The land was of some strategic value in that it overlooked the road and afforded a view of the surrounding area. Its partially hilly and jungle-clad nature afforded easy opportunity for FARC to retreat into the jungle in the event the army decided to attack them.

[7] In 1996, the appellant's grandfather subdivided the W land between his children. The husband inherited a share as the only son of his now deceased father. His grandfather continued to conduct the family business on the W land as best he could, as he did with the other landholdings owned by the family.

[8] Over time, it became progressively more difficult for the husband's grandfather to conduct business due to the activities of FARC. Quite apart from

the ongoing armed conflict, FARC members now came to W during harvest time, taking control of production and demanding greater portions of the proceeds of sale. Also, FARC roadblocks and checkpoints made it increasingly difficult for supplies to be obtained as and when they were needed.

[9] In approximately 2003, the husband's grandfather became ill. He told the husband that it was now impossible for him to conduct business and the family abandoned the land. From this time, the family ceased receiving any income from the W land and, effectively, FARC became the 'owners' of the land.

[10] The husband's personal difficulties with FARC began in late 2004. He was telephoned by one of his uncles, who had by then returned from the United States, and who had been informed that someone was building a structure on the portion of land he had inherited from his grandfather. The structure was being built near to a football field which had been established many years ago by his grandfather to provide a recreational outlet for the farm workers as well as for the local communities in the nearby villages from which their casual farm labour was sourced.

[11] The husband went to the local police station and requested they accompany him to the land. When the appellant and the police arrived there, they found a man building a house on it. The man informed them it was for living in and was to be a shop for selling drinks when the games were on. The husband told the man that this was private property and that he had not given the man permission to do this. The man replied that he had been given permission by the 'men from the mountains', common parlance for FARC. The police officer insisted that the husband was the owner and that the man take down the building. The man reluctantly did so but said to the husband that he was going to be "sorry" for his actions.

[12] Approximately two months later, towards the end of 2004, the husband and his mother, with whom he lived, received a number of telephone calls from a person who claimed to be the sports coordinator for the local administration. The man told them that FARC had told him the property was theirs and they could do what they wanted. The husband and his mother both told the man that the land was the husband's and that the matter would be reported to the police.

[13] The husband went to the police who informed him that the best thing he could do would be to remove the goals from the football field. In early 2005, the husband arranged for the goal posts to be taken down and the fences around the

land to be repaired in order to prevent entry onto the land. Within a few days of this being done, the sport coordinator for the local administration arrived unannounced at the house where the husband lived with his mother. This man had a letter addressed to the appellant's mother in which she was advised to return the goal posts. The letter indicated that if they did not make this land available they should make other land available. The letter indicated that the man wrote the letter out of fear for his own life. The husband went to the local administration to complain but was informed that they were powerless to do anything about land in that area.

[14] After discussing the matter with his mother, the husband decided that the best thing to do was to sell the land. He approached local real estate agents but was told that selling the land would be difficult because people in the area knew that he was having problems. At around this time he met the wife.

[15] In 2006, the husband's grandfather died. Following his death, the husband inherited along with his uncles and aunts, a part-share in the other land that his grandfather owned. He decided to pursue his sale of the portion of the W land he had inherited in his own name in 1996. In mid-to-late 2006, he was approached by a local man who purchased the land at a heavily discounted price. With the proceeds of sale, the appellant purchased a house in Y, which he rented out.

[16] Towards the end of 2007 or early 2008, the husband began receiving threatening telephone calls. The caller stated that the husband had not been given permission by FARC to sell the property and demanded the husband give to them the proceeds of the sale. The caller also told him to forget about ever returning to any of the W land. In the last telephone call, the appellant was threatened with death. The caller told the husband that they knew where he lived, where he worked and who his partner was.

[17] The appellant reported this last telephone call to the police. Fearing for his life, he sold his house in Y, his car, and resigned from his job. He moved to X, situated approximately one hour away, where the wife had gone to study at university. In X, the husband and the wife stayed with one of the husband's maternal aunts. The husband hardly ventured outside. He worked over the Internet for a relative of the wife and socialised mainly at the home.

[18] In early 2009, the wife returned to Y to help her father cope with his marital difficulties. She found a job in Y and returned to the husband's family home as she had been living there with him prior to moving to X. The husband continued

living in X where his wife and mother visited him. On two occasions, the appellant also travelled to Y. He went to see his grandmother, with whom he was close, and who was unable to travel. He also travelled to see the wife on her birthday. He took precautions by only travelling directly to their home in Y and travelled only during weekdays so as to minimise his chances of being identified.

[19] During one visit in April 2009, he was approached by two men on a motorcycle near to his mother house. One of the men produced a gun and requested the husband go with them "to talk". The husband ran to his mother's house and informed his mother and the wife what had happened. The following day, the husband reported this incident to the local police.

[20] At around this time the husband's uncle, who had returned from the United States, had also been threatened by FARC for seeking to resist their attempts to control the land he had inherited from the husband's grandfather. In discussion, the husband and his uncle decided that, for the time being, they would wait and see how things developed in the conflict between FARC and the Colombian state. In the meantime, they wanted to return to the family land to obtain some family possessions from the house at W. In the presence of the police, the husband returned to the W land with his uncle the same day the husband reported the incident. The house was dilapidated and there was no sign of any livestock. The land looked like it had not been worked for some time. They returned to Y and the husband returned to X the next day.

[21] He did not return to Y thereafter. The husband and wife discussed their situation and it was agreed they would be safer outside Colombia. The husband told the Tribunal that he does not believe that anywhere in Colombia is safe for him. FARC has an established informant network throughout the country. As a result of decades of armed conflict, people are generally wary of strangers. All his family live in the immediate vicinity of Y or are overseas. If he went elsewhere in Colombia such as Bogota, he would have no family to rely on. People would then naturally ask him why he was there and what his background was. This information would then find its way back to FARC.

[22] The husband and wife obtained visas to New Zealand and travelled without further incident to New Zealand arriving in mid-2009.

[23] Since being in New Zealand, the appellant has been in regular contact with his mother. He has not heard of any further approaches to the family home by persons looking for him. He has been told that at one point the Colombian army

was seen on the family land. They were advised that the army was simply conducting a search operation.

[24] The husband told the Tribunal that he does not want to give up his land. He wishes to continue with his grandfather's work but fears that, should he try to exert control over the land, he will be killed. His mere presence in Y was enough to be seen as a threat to the status quo as established by FARC. For much the same reasons his uncle has now fled to Canada.

[25] The husband told the Tribunal that he was aware of new legislation passed by the Colombian Congress aimed at providing reparation to persons who had been forcibly displaced from their land as a result of the armed conflict in Colombia. He had discussed this with his mother on the telephone. They support this initiative but are concerned about the security implications. Leaders of movements seeking justice for persons displaced from their land have been murdered by the guerrillas and paramilitaries.

### **The Wife's Evidence**

[26] The wife was born in the late 1980s and grew up in Y. She met the husband in 2004. The wife told the Tribunal that Y is a small town and people tend to know each other. The husband's family were regarded as a wealthy family on his father's side as they owned land. She was aware his father had been killed, but did not know the details.

[27] The wife came to know about the husband's trouble with land he had inherited because she used to overhear the husband talking about it with his mother. She asked him what it was about and he told her that he was having problems with that particular piece of land from the guerrillas but did not say too much more about it.

[28] The wife told the Tribunal the couple began living together in the house that he shared with his mother at the beginning of 2007. By this time, the husband had sold his land and bought a house in Y that had been rented out.

[29] In mid-2007, the wife went to X to attend university where she stayed with one of the husband's aunts. The husband visited her frequently. In late 2007/early 2008, the husband began receiving telephone calls from the guerrillas. He telephoned her in February 2008 very frightened. He told her that they had spoken to him in a very rude manner and had made very strong threats against

him. They decided that he would come to X and the husband sold his house and car and moved to X. One of her cousins arranged employment for the husband in his business. The husband worked from home over the Internet. Life was difficult as the couple were too afraid to socialise outside the family home.

[30] They did not consider moving to Bogota or elsewhere because they had no family outside the region. The wife explained that in Colombia everywhere was dangerous. The main way to stay safe was to socialise only within family or with close friends.

[31] The wife explained that she returned to Y in early 2009 to be close to her father who was suffering greatly due to his separation from her mother. She obtained employment in Y and returned to the husband's mother's house that they had shared as a couple. Although the wife was concerned about returning to Y, her fear about her own safety was not that strong. In her view, threats were being made against her simply to put pressure on the husband. The wife explained that mostly she tried to visit the husband in X, but on two occasions the husband came to Y. Once to see his grandmother, with whom he had been raised and who could not travel, and once to visit the wife on her birthday.

[32] In April 2009, during one such visit to Y by the husband, the wife was at home when the husband came running in to the house. He looked very scared and told her and his mother that he had just been threatened with a gun by men on a motorcycle. The matter was discussed amongst the family and it was decided that it would be better if they were to try to leave the country. The following day the matter was reported to the police. The husband returned briefly to the family land with a policeman and his uncle to obtain personal possessions. The husband then returned to X while she waited in Y. They decided to apply for visas to come to New Zealand. They left Colombia in mid-2009.

### **Documents and Submissions Received**

[33] On the Immigration New Zealand file there is a large number of documents relating to:

- (a) the ownership of the family land in W, its subsequent division by the husband's grandfather, and the husband's inheritance of a portion of this land;

- (b) the husband's inheritance of a part-share in other land formerly owned by his grandfather;
- (c) complaints made by the husband to the police in relation to threats made in 2008 and 2009;
- (d) an application made by the husband's mother to the relevant government agency *Accion Social* in respect of the murder of her husband in 1985;
- (e) the husband's ownership and dealings with the land he inherited from his grandfather.

[34] On 25 October 2011, the Tribunal received written submissions from counsel in respect of the appellants. Counsel made opening and closing oral submissions. During the hearing, counsel served on the Tribunal a copy of the decision of the Refugee Status Appeals Authority in *Refugee Appeal No 76485, 76486 and 76487* (17 June 2010).

### **ASSESSMENT OF THE EVIDENCE**

[35] Under section 198 of the Immigration Act 2009, on an appeal under section 194(1)(c) the Tribunal must determine (in this order) whether to recognise the appellant as:

- (a) a refugee under the 1951 Convention Relating to the Status of Refugees ("the Refugee Convention") (section 129); and
- (b) as a protected person under the 1984 Convention Against Torture (section 130); and
- (c) as a protected person under the 1966 International Covenant on Civil and Political Rights ("the ICCPR") (section 131).

[36] In determining whether the appellant is a refugee or a protected person, it is necessary first to identify the facts against which the assessment is to be made. That requires consideration of the credibility of the appellant's account.



## **Credibility**

[37] The Tribunal accepts the appellants as credible witnesses. Their accounts were both given in a straightforward and candid manner. The evidence of both the husband and wife was highly consistent with what they had said before and with each other. The husband's claim to have inherited land and to have been threatened by FARC agents was corroborated by credible country information and documentation on the file. The appellants' accounts are accepted in their entirety.

## **Findings of Fact**

[38] The Tribunal finds that the husband has inherited a number of different land holdings from his late paternal grandfather. Whilst the majority is owned jointly with other family members, in the mid-1990s he inherited a parcel of land in his own name. In 2004, he encountered problems with FARC who have sought to exert control over this land. FARC have, over time, exerted total control over the land and effectively appropriated the land. When the husband sought to exert control over the land by insisting on the removal of an unauthorised structure from the land he was threatened. In an attempt to avoid harm, the husband has sold the land he owned in his own name. When FARC became aware of this "unsanctioned" transaction, it demanded the husband hand over the proceeds of sale. In order to avoid the threats the husband subsequently moved to a nearby city but when returning on an occasional basis to his former home to visit close relatives he has been further threatened. In the course of the threats FARC have indicated that they know who the wife is and of her relationship to the husband.

## **THE CLAIMS UNDER THE REFUGEE CONVENTION**

[39] Section 129(1) of the Act provides that:

"A person must be recognised as a refugee in accordance with this Act if he or she is a refugee within the meaning of the Refugee Convention."

[40] Article 1A(2) of the Refugee Convention provides that a refugee is a person who:

"... owing to well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion, is outside the country of his nationality and is unable or, owing to such fear, is unwilling to avail himself of the protection of that country; or who, not having a nationality and being outside the country of his former habitual residence as a result of such events, is unable or, owing to such fear, is unwilling to return to it."

[41] In terms of *Refugee Appeal No 70074* (17 September 1996), the principal issues are:

- (a) Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
- (b) If the answer is yes, is there a Convention reason for that persecution?

[42] For the purposes of refugee determination, “being persecuted” has been defined as the sustained or systemic violation of core human rights, demonstrative of a failure of state protection – see *Refugee Appeal No 74665/03* (7 July 2004) at [36]-[90]. Put another way, persecution can be seen as the infliction of serious harm, coupled with the absence of state protection – see *Refugee Appeal No 71427* (16 August 2000), at [67].

[43] In determining what is meant by “well-founded” in Article 1A(2) of the Convention, the Tribunal adopts the approach in *Chan v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), where it was held that a fear of being persecuted is established as well-founded when there is a real, as opposed to a remote or speculative, chance of it occurring. The standard is entirely objective – see *Refugee Appeal No 76044* (11 September 2008) at [57].

**Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to Colombia?**

*Human rights in Colombia generally*

[44] There is little doubt that Colombia continues to be plagued by high levels of violence. The United States Department of State 2010 *Human Rights Reports: Colombia* (8 April 2011) (the 2011 DOS report) at p1, notes:

“On August 7, President Santos assumed office from President Alvaro Uribe. The 46-year internal armed conflict continued between the government and terrorist organizations, particularly the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN). Security forces reported to civilian authorities. There were instances in which elements of the security forces acted independently of civilian control.

...

The FARC and ELN committed the following human rights abuses: political killings; killings of members of the public security forces and local officials; widespread use of landmines; kidnappings and forced disappearances; massive forced displacements; subornation and intimidation of judges, prosecutors, and witnesses; infringement on citizens' privacy rights; restrictions on freedom of movement; widespread recruitment and use of child soldiers; attacks against human rights

activists; violence against women, including rape and forced abortions; and harassment, intimidation, and killings of teachers and trade unionists”.

[45] The Inter-American Commission on Human Rights *Annual Report 2010 Colombia* Chapter IV, at p343, notes that according to government figures collected on the basis of violations of international humanitarian law, between January and October 2010 there were 12,811 killings and violation of international humanitarian law. This translates to over 40 unlawful killings per day for the 10-month period. During the same period, there were 32 massacres with 153 victims. For the same period in 2009, there were 13,116 murders and 24 massacres. The significant rates of unlawful killings demonstrates how dangerous it can be for innocent civilians caught up in the conflict in Colombia.

[46] The International Displacement Monitoring Centre *Colombia: Property restitution in sight but integration still distant* (5 September 2011) (the 2011 IDMC report) records, at pp5-6, that the parties to the conflict are active in 24 of the country's 32 regional departments but particularly so in a small number of departments. Included in the latter list is the department in which the husband's family land is situated.

#### *Forced displacement in Colombia*

[47] The decades-long conflict in Colombia has left millions of persons internally displaced. Although estimates vary, the number of internally displaced people (IDPs) in Colombia is, by any measure, substantial. According to the International Displacement Monitoring Centre report *Building momentum for land restoration: Towards property restitution for IDPs in Colombia* (November 2010) (the 2010 IDMC Report), at p7, the estimated number of IDPs range between 3.3 and 4.9 million. The subsequent 2011 IDMC report, at p6, states that according to reliable reports, 280,000 people were newly displaced in 2010 which, added to previous displacement figures, creates an estimated total of some 5.2 million IDPs up to December 2010. To put this into perspective, this figure amounts to almost 12 per cent of the national population. Indigenous and Afro-Caribbean rural populations comprise a significant proportion of those displaced.

[48] Estimates as to the scale of the forced dispossession of land vary significantly, ranging between 1.2 million hectares (1.1 per cent of Colombian territory) up to some 10 million hectares (8.8 per cent of territory); see 2010 IDMC report at p10.

[49] The means by which people are forcibly dispossessed of their land is detailed in the 2010 IDMC report which notes, at p8:

“As well as engaging in fighting which has forced people to flee their land, guerrilla and paramilitary groups alike have seized land and forced the owners or occupants to flee as a fundamental tactic in strengthening and perpetuating their military, political and economic position. They have in many cases killed or threatened to kill family members in order to force owners or occupiers to abandon their land. According to a commission which the government established to draw up a plan for property reparations, displacements following threats such as: “It’s your choice: either the whole family leaves together now, or the widow leaves with the children” have been widespread and everyday.

*Forced and fraudulent sales*

In many cases illegal groups, notably the paramilitaries and subsequently post-demobilisation armed groups, have acquired formal ownership of land through forced or false sales. In some of these cases, they have registered land which they have forcibly seized in the name of a front man, concealing their identity as perpetrators and so making it difficult to trace the crime.

In the cases of forced sales, victims have been threatened and forced to sign contracts and subsequently to register a deed. In many documented cases, family members have been killed when the owner has refused to sell. Often no payment is made for these “sales”; if any payment is made at all, it is normally significantly below the market value. However, all the formalities required for a land sale are observed, and the transaction appears legal.

In other cases, parties looking to appear as the legitimate owners of land after displacing owners or occupants have obtained sales contracts if the property was not previously registered with a deed, forged the signatures of the contracted parties or forced them to sign, and used the document to complete and register title deeds. The transfer of property in this way requires appearance before a public notary, whose negligence (at best) or complicity in formalising forced sales has been widespread.”

[50] The 2011 IDMC report notes, at p20, that open military confrontation is not the main reason why people flee their places of residence. It states that a much more subtle form of violence is “direct threats against the civilian population”. The methods employed to displace people from their land has changed over time. The report cites a survey which indicates that the incidence of threats by illegal armed groups as the driver of displacement has increased from approximately 40 per cent in the 1980s to roughly 60 per cent in the last five years. In contrast, the assassination of family members has dropped over time from 21 per cent in the 1990s to 7 per cent in the last years.

[51] The 2011 IDMC report goes on to observe, at p21:

**“Agents of Displacement**

Forced displacement in Colombia is caused by various actors in the multi-party armed conflict. Traditionally, perpetrators of displacement have been guerrilla and paramilitary groups. These groups have caused displacement to expand their strategic military presence, secure access routes, and establish zones of political

influence. They have also displaced people for economic gain, either to secure land for coca plantations or, in the case of the paramilitaries, to secure land for large projects owned by corporate groups.

The civil society survey described in the previous section asked IDPs to identify which actor was responsible for their displacement. IDPs identified guerrilla groups (FARC and ELN), paramilitary groups (Autodefensas Unidas de Colombia), unidentified guerrilla groups, unidentified armed groups, Government forces, and new paramilitary armed groups.

Over time, there have obviously been variations in the incidence of each group on displacement, for different reasons. 40% of people that were displaced before 1998 identified the AUC as the group causing their displacement, and this rate fell to 22,6% after 2005. This reduction is most likely caused by the paramilitary demobilization that took place in 2006.

In Contrast, FARC's incidence of displacement went up from 14,2% in the eighties to 32% in the last years. This could be explained by the group's increasing participation in the drug trade and the waning of its ideology as a pro-peasant group."

[52] In June 2011, the Colombian Congress adopted a victim's law which created a mechanism to provide property restitution for victims of forced displacement. While a welcome development, significant obstacles to effective implementation exist, including security for those seeking to make use of the schemes restitution mechanism; see 2010 IDMC report, at pp11-17; 2011 IDMC report, at p38.

### *The various contexts of land appropriation in Colombia*

[53] Land appropriation by FARC and other non-state agents in Colombia occurs in a variety of contexts, ranging from pure criminal economic gain through to the political in the form of the ouster of the state from effective territorial control. This is noted in the 2011 IDMC report at pp 36-37:

"Armed groups including the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia or FARC) and the National Liberation Army (Ejército de liberación Nacional or ELN), paramilitary groups, and the new armed groups that emerged in their place following their formal demobilisation from 2006, have all appropriated land to expand their strategic military presence, secure access routes, and establish zones of political influence.

They have also appropriated land for coca plantations which have brought them enormous economic gain, while paramilitary groups have appropriated land for large monoculture projects owned by corporate groups which have benefited from government support. IDPs have also lost land when they have fled fighting between the armed groups and state forces.

[54] Similarly, the 2011 DOS report notes, at section 2.d:

"FARC and ELN guerrillas and new illegal armed groups, which included some former paramilitary members, continued to use forced displacement to gain control

over strategic or economically valuable territory, weaken their opponents' base of support, and undermine government control and authority. Illegal armed groups also used landmines and roadblocks to confine entire villages in order to protect illicit crops and prevent pursuit by state security forces. The FARC, ELN, and new illegal armed groups continued to use force, intimidation, and disinformation to discourage IDPs from registering with the government; guerrilla agents often forced local leaders and community members to demonstrate against illicit crop eradication efforts, including causing mass displacements. International organizations and civil society expressed concern with the increase in urban displacement caused by violence.”

[55] The Tribunal notes that on 4 November 2011, the leader of FARC was killed in a joint military-police operation, the latest in a series of deaths of high-ranking leaders, which have severely weakened the movement. It is unclear whether this will remove any remaining vestige of FARC’s political ambitions. Silke Pfeiffer “The end of FARC?” *Foreign Policy* (8 November 2011) argues FARC’s recent setbacks will not lead to its overnight collapse. Furthermore, Pfeiffer argues that although a risk, it is too early to tell whether any new leader will maintain FARC’s cohesiveness and prevent it disintegrating “into uncoordinated units driven entirely by criminal business interests”.

*Application to the facts: the husband*

[56] The husband has been threatened with death by persons aligned to FARC for exerting his rightful ownership over the W land. This land is seen by FARC as belonging to them. The husband’s father was kidnapped, tortured and killed by FARC in the 1980s to force the family’s compliance with FARC’s will and over time, FARC have displaced the husband’s family from the land. The husband has unsuccessfully sought to avoid these problems by grudgingly selling that portion of the W land he owned outright. FARC have responded by demanding he turn over to them the proceeds of sale and ‘banning’ him from returning to the remainder of the W land. By issuing such threats, FARC have effectively appropriated all 100 hectares of the W land. The husband moved elsewhere but upon returning to Y has been directly threatened.

[57] The Tribunal has no doubt that the husband has a well-founded fear of being persecuted if returned to Colombia. He does not wish to cede control of his land to FARC. Yet any attempt by him to exert control will create a real chance that he would suffer the same fate as his father and countless other Colombians who have resisted FARC’s will. The incident in April 2009 implies that his mere presence in Y, where his family reside, is seen by FARC as an declaration of intent to exert control and puts him at risk. It is not possible for him to live safely elsewhere in Colombia because of the absence of family networks and the

extensive presence of FARC informers across the country and the closed nature of Colombian society as a result of decades of brutal civil conflict; see *Refugee Appeal No 73898* (9 November 2004) at [87].

[58] FARC have arbitrarily deprived him of his property in breach of Article 17 of the Universal Declaration of Human Rights 1948. However, to locate the husband's predicament solely within the bounds of the right to property is to miss the point. The husband cannot seek to enjoy this right vis-à-vis FARC without exposing himself to breaches of absolute rights under the ICCPR. In particular, the arbitrary deprivation of his life in breach of Article 6 ICCPR or exposing himself to torture or inhuman or degrading treatment or punishment in breach of Article 7 ICCPR. The significant level of unlawful killings in Colombia clearly establishes that the police and security agencies of the Colombian state are simply unable to protect him from these risks.

[59] The husband's predicament amounts to a sustained violation of core human rights demonstrative of a failure of state protection. It is appropriately categorised as being persecuted: see J C Hathaway *The Law of Refugee Status* (Butterworths, Toronto, 1991) at p104 and *Refugee Appeal No 74665/03* (7 July 2004). The first principal issue is answered in the affirmative for the husband.

*Application to the facts: the wife*

[60] Just as the Tribunal is clear that the husband has a well-founded fear of being persecuted, it is equally clear the wife does not.

[61] While FARC have indicated that they know who she is, they have never sought to harm or event threaten the wife as a means to put pressure on the husband.

[62] When the husband returned to X after the April 2009 incident, the wife remained living in Y. Indeed, the wife told the Tribunal she did not consider herself to be at particular risk and saw no need to change her routine at the time. She continued to work and experienced no difficulties despite the fact she remained in the home she and the husband had shared with his mother for the months prior to their departure for New Zealand. Likewise, FARC have never sought to harm the husband's mother or grandmother in order to place pressure on him.

[63] The wife's concerns were primarily for the husband, with whom she wished to marry, have a family and generally live a peaceful life together. These were things she could not do in Colombia because of the threats to him.

[64] For these reasons, the Tribunal finds that the risk to the wife is remote and speculative and does not rise to the real chance level. The first principal issue is therefore answered in the negative in respect of the wife.

*Is there a Convention reason for the persecution?*

[65] Having regard to the previous findings, this issue arise only in respect of the husband.

Relevant Principles: Nexus

[66] While the relevant principles are settled, their application can be complex. The Refugee Status Appeals Authority (RSAA) recognised that the "for reasons of" element in the refugee definition can be satisfied either by the reason for the serious harm or by the reason of failure of state protection, or by both – see *Refugee Appeal No 71427/99* [2000] NZAR 545. The RSAA stated:

"[112] Accepting as we do that Persecution = Serious Harm + The Failure of State Protection, the nexus between the Convention reason and the persecution can be provided **either** by the serious harm limb **or** by the failure of the state protection limb. This means that if a refugee claimant is at real risk of serious harm at the hands of a non-state agent (eg husband, partner or other non-state agent) for reasons unrelated to any of the Convention grounds, but the failure of state protection is for reason of a Convention ground, the nexus requirement is satisfied. Conversely, if the risk of harm by the non-state agent is Convention related, but the failure of state protection is not, the nexus requirement is still satisfied. In either case the persecution is for reason of the admitted Convention reason. This is because "persecution" is a construct of two separate but essential elements, namely risk of serious harm and failure of protection. Logically, if either of the two constitutive elements is "for reason of" a Convention ground, the summative construct is itself for reason of a Convention ground. See *Shah* 646C-D, 648C, 653E-G and 654D."

[67] The jurisprudence of the RSAA makes clear the standard for establishing causation is low. In *Refugee Appeal No 72635* (6 September 2002) the RSAA held:

"[173] We are of the view that it is sufficient for the refugee claimant to establish that the Convention ground is a **contributing** cause to the risk of "being persecuted". It is not necessary for that cause to be the sole cause, main cause, direct cause, indirect cause or "but for" cause. It is enough that a Convention ground can be identified as being relevant to the cause of the risk of being persecuted. However, if the Convention ground is remote to the point of irrelevance, causation has not been established."



### Political Opinion

[68] Counsel submits that the relevant Convention ground is political opinion. FARC have a political aim and, in targeting landowners, impute a negative political opinion to them.

[69] In *Refugee Appeal No 76339* (23 April 2010), the RSAA considered the proper approach to be taken to the interpretation of the Convention ground of political opinion. At [88], the Authority rejected the broad formulation in favour of a contextual approach. Under this approach, the bounds of the political opinion ground are determined by the specific geographical, historical, political and socio-cultural contexts in the country of origin. The RSAA emphasised the fact-specific nature of the inquiry and rejected the proposition that acts in opposition to non-state actors engaged in criminal activity necessarily amounts to the expression of a political opinion; see [88]-[99].

[70] Country information establishes that land appropriation in Colombia occurs in a variety of contexts, only some of which are linked to a Convention ground. The contestation of land in Colombia may be intensely political, it may reflect a pure criminal enterprise, or it may be a mixture of the two. This is reflected in decisions from the United Kingdom concerning Colombia, namely, *Gomez v Secretary of State for the Home Department* [2000] INLR 549 and *Suarez v Secretary of State for the Home Department* [2002] EWCA Civ 722. These cases emphasise that in Colombia where criminal economic activity supports groups with political structures and objectives, whether any risk of being persecuted established on the facts arose for political or criminal reasons, or a mixture of both, depended on a case-by-case analysis of the specific circumstances of the individual; see *Gomez* at [54] and *Suarez* at [32] and [46]. The RSAA has considered the application of these principles to Colombia in a number of cases; see, *Refugee Appeal No 73898* (9 November 2004); *Refugee Appeal No 76289* (8 May 2009) and *Refugee Appeal No 76485, 76486 and 76487* (17 June 2010).

[71] What these show is that whether any risk to an appellant is contributed to, either by an expression of a political opinion or a negative one being imputed to him or her, depends on analysis of all the relevant circumstances, including the identity of the group appropriating the land and the relationship of the claimant to the appropriation process.

### *Application to facts*

[72] The husband strongly objects to what FARC has done, both to his family and in Colombia generally. He rejects FARC's attempts to usurp his family's rights over their land and intends to reassert familial control over the land, which has been expropriated by FARC, at some future point. He is, however, afraid he will be killed if he tries to do so. His predicament stems from his insistence that the land is his and his family's to do with as they wish. He stated to the Tribunal his belief FARC see him as a threat because he has treated one portion of the 'W' land as his own. They are concerned that he will try and do likewise with the remainder. By doing so, he challenges the ability of FARC to assume control of the family's land and treat it as their own.

[73] While there is no doubt a substantial element of economic gain is involved in the specific context of Colombia, such a direct contest over control of the land also has a significant political element to it. In the particular circumstances of this case, FARC would impute a negative political opinion to the husband, particularly given his family's lengthy history of involuntary cooperation with them and his family's local status as landowners and employer of casual labour.

[74] The Tribunal is satisfied that there is sufficient nexus to the Convention ground of political opinion. The second principal issue is therefore also answered in the affirmative.

### **Conclusion on Claims to Refugee Status**

[75] For these reasons, the Tribunal finds the husband is a refugee under section 129 of the Act but that the wife is not.

### **The Convention Against Torture**

[76] Section 130(1) of the Act provides that:

"A person must be recognised as a protected person in New Zealand under the Convention Against Torture if there are substantial grounds for believing that he or she would be in danger of being subjected to torture if deported from New Zealand."

[77] Section 130(5) of the Act provides that torture has the same meaning as in the Convention Against Torture, Article 1(1) of which states that torture is:

"... any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third

person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity. It does not include pain or suffering arising only from, inherent in or incidental to lawful sanctions."

### **Assessment of the Claims under Convention Against Torture**

[78] Because the husband has been recognised as a refugee he is entitled to the protection of New Zealand from *refoulement* to Colombia. That means that he cannot be deported from New Zealand to Colombia; see Article 33 of the Refugee Convention and sections 129(2) and 164 of the Act. The exception to section 129 which is set out in section 164(3) of the Act does not apply. Therefore, there are no substantial grounds for believing the husband would be in danger of being subjected to torture in Colombia.

[79] It has not been argued that the wife is at risk of torture as defined under section 130(5). She relies on no additional factors in her protected person claim. For the reasons already given, there are no substantial grounds for believing the wife is in danger of being subjected to torture as defined under the Act.

### **The ICCPR**

[80] Section 131(1) of the Act provides that:

"A person must be recognised as a protected person in New Zealand under the Covenant on Civil and Political Rights if there are substantial grounds for believing that he or she would be in danger of being subjected to arbitrary deprivation of life or cruel treatment if deported from New Zealand."

[81] Pursuant to section 131(6) of the Act "cruel treatment" means cruel, inhuman or degrading treatment or punishment but, by virtue of section 131(5):

- "(a) treatment inherent in or incidental to lawful sanctions is not to be treated as arbitrary deprivation of life or cruel treatment, unless the sanctions are imposed in disregard of accepted international standards:
- (b) the impact on the person of the inability of a country to provide health or medical care, or health or medical care of a particular type or quality, is not to be treated as arbitrary deprivation of life or cruel treatment."

### **Assessment of the Claims under the ICCPR**

[82] Again, because the husband is recognised as a refugee he is entitled to the protection of New Zealand from *refoulement* to Colombia. For the reasons already

given in relation to the claim under section 130 of the Act, there is no prospect of the husband being deported from this country. Accordingly, the husband is not a person who requires recognition as a protected person under the ICCPR.

[83] The question of whether the wife is at risk of cruel, inhuman, or degrading treatment or punishment or arbitrary deprivation of her life has been considered already in the context of the claim for refugee status. She relies on no additional factors in her protected person claim. For the reasons outlined in *AC (Syria)* [2011] NZIPT 800035 (27 May 2011), no lower threshold of harm exists for establishing cruel, inhuman, or degrading treatment or punishment in the protected person context than exists in the refugee context. For reasons already given, there are no substantial grounds for believing the wife is in danger of suffering cruel treatment as defined under the Act.

## CONCLUSION

[84] For the foregoing reasons, the Tribunal finds that the husband :

- (a) is a refugee within the meaning of the Refugee Convention;
- (b) is not a protected person within the meaning of the Convention Against Torture;
- (c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[85] For the foregoing reasons, the Tribunal finds that the wife :

- (a) is not a refugee within the meaning of the Refugee Convention;
- (b) is not a protected person within the meaning of the Convention Against Torture;
- (c) is not a protected person within the meaning of the Covenant on Civil and Political Rights.

[86] The appeal of the husband is allowed. The wife's appeal is dismissed.

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