

**1113003 [2012] RRTA 609 (25 July 2012)**

**DECISION RECORD**

**RRT CASE NUMBER:** 1113003

**DIAC REFERENCE:** CLF2010/163186

**COUNTRY OF REFERENCE:** Colombia

**TRIBUNAL MEMBER:** Megan Deane

**DATE:** 25 July 2012

**PLACE OF DECISION:** Sydney

**DECISION:** The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.

## STATEMENT OF DECISION AND REASONS

### APPLICATION FOR REVIEW

1. This is an application for review of decisions made by a delegate of the Minister for Immigration and Citizenship to refuse to grant the applicants Protection (Class XA) visas under s.65 of the *Migration Act 1958* (the Act).
2. The primary applicant is a citizen of Colombia who arrived in Australia on [date deleted under s.431(2) of the *Migration Act 1958* as this information may identify the applicant] July 2008. The secondary applicant is a citizen of Czech Republic who arrived in Australia [in] January 2009. The applicants applied to the Department of Immigration and Citizenship (the Department) for the visas [in] December 2010. The delegate decided to refuse to grant the visas [in] November 2011 and notified the applicants of the decisions.
3. The delegate refused the visas on the basis that the first named applicant is not a person to whom Australia has protection obligations under the Refugees Convention.
4. The applicants applied to the Tribunal [in] December 2011 for review of the delegate's decisions.
5. The Tribunal finds that the delegate's decisions are RRT-reviewable decisions under s.411(1)(c) of the Act. The Tribunal finds that the applicants have made a valid application for review under s.412 of the Act.

### CLAIMS AND EVIDENCE

6. The Tribunal has before it the Department's file relating to the applicants. The Tribunal also has had regard to the material referred to in the delegate's decision, and other material available to it from a range of sources.
7. In the protection visa application, the applicant stated she left Colombia due to an "accident" which had occurred 10 years previously. Her written statement set out:

I had to leave my country Colombia, due to an 'accident' that I had 10 years ago.

All occurred on [date] 2000, in the neighbourhood called: [Suburb 1]. In the [address] Bogota, Colombia.

I went to my house when I heard scream and sounds like fireworks, I stopped for a moment just to see what was happening, when I saw a guy from the other corner pointing a weapon was perhaps instinct but I turn, I think just for a moment, at which point I heard a buzz closer and closer until I felt a burning pain in my right leg. I saw blood all over my leg began to feel dizzy, I remember walk to reach half of my block and lost consciousness, I faint, I'm not sure how long. When I woke up I was with my Mother in the Medical Center in my neighbourhood, I was there for half an hour or forty minutes, I don't remember very well. I handled the [hospital] where I was attended and removed the bullet that was in my leg.

After going through this nightmare I was released from the hospital the next day. The Police came to my house to talk to my Mom because at that time I was underage. They wanted to talk to me to inquire or to give testimony of what happened and he wanted me to identify subjects who had robbed the [local business], but at that time I

was resting, and for this reason not to talk to police about what happened. The reason was that my testimony helps to capture three of the common criminals who were fugitives. But at that time I was underage and my Mama was the one who ought to intercede for me with any questions or information needed. And for this reason, I could not talk to police about what happened.

One of my mistakes was, I to reach the hospital in my neighbourhood, I said that I had seen common criminals who had robbed the [local business]. And I could describe them clearly.

Days after; unfortunately my Mom received a call at my house. It was a death threat to me. By phone a subject of deep voice 'says my Mama' said to her: "its better if you shut your mouth than we shut her mouth but a bullet."

My family was alarmed by the call, and declined to help with identification. Because my life and my family could be at risk.

When the accident occurred, in my neighbourhood was better not to ask, because not all common criminals were arrested by the police, three of whom remain at large.

Time passed and slowly I was trying to have a normal life.

But we knew that for a rumour in my neighbourhood, they said common criminals who wanted revenge on those who had spoken to police. In a neighbourhood like mine, beware of rumours and many of them were true; and can cause problems without solution.

In the neighbourhood, told me that at night they saw a car parked in front of my house, as if expecting someone. But my family and I ever pay attention to this.

I can say that obviously, I knew something was wrong. I learned from the owners of the [local business] that two common criminals had been released because his time had already finished being detained. And they were committing crimes again in the neighborhood.

Whenever I left my house I was scared, felt as if anyone was chasing me, was horrible, I was afraid of any noise, did not have much social life, stop haunting my friends who were gradually moving away from me.

My life was confined at home. And the anxiety overwhelmed me all the time.

Until the [date], 2007 the unexpected happened: some common criminals were waiting at the door of my house in a car to one of my older brothers [Mr A], gunmen in another car, hit him forcing him to get on the carriage of them carried. As my Mama witness from the window of what happened because my brother gave a loud scream [Mr A].

My Mama witnesses everything that happened. She came quickly to the nearest police station.

Robbing and beating him, but thank God without being killed my brother returned to the house in the morning...

This fact, destroyed my confidence, my fear became more real than ever. I took it for granted that something bad would happen. After I found out that my mother had

received another call, saying that common criminals wanted revenge for the last time they had detained.

My life was never the same, and the only solution found was that my family protects my life, pulling me as soon as the country. All we did not make much noise. Just to avoid attracting attention.

This is the reason why I left my country Colombia, for fear of losing my life or something serious to happen to any member of my family. I became refugees, now that my life was threatened and the only alternative I found was leaving home, my friends, my family... All that was I.

Even now when my Mom received a call back, in which he said that it was better than I was away and never returned; Realizing no longer being a spectator to the violence of my country, becoming a victim of violence.

What do you fear may happen to you if you go back to that country.

The fear of losing my life or something more serious happens to any other member of my family.

The fear that I felt would return, these events that have marked my life and my whole family are found in Colombia, has already been proved that an offender no barriers, no brakes, they have shown themselves capable of doing what they please, with the robbery of my brother [Mr A], we made it clear that they are not interested or have any respect for life. Do not rest until taking my life.

If I returned, my family would return to the same nightmare as before, the daily unrest, threats and would not just for me, would be for the whole family. I had no life in Colombia, always lived with the fear of leaving the door of my house. Every day I felt guilty of what happened to them, and when to leave the fear was general. I not only felt, that affected the peace of my whole family. The insecurity of feeling that at any time would come for me and kill me was trimmers. The depression affected all day, I felt.

I heard my Mama mourn, asking why God us?

Only by being in the place and wrong time, I become guilty of any damage that these criminals cause. The damage caused by these criminals can't be helped and I know that if returned to Colombia would lose my life. Causing damage incurable to my Mama that has already suffered too due to this fact and my whole family.

I know the common criminals in my neighborhood waiting for me: If I return I will die.

Who do you think may harm/mistreat you if you go back?

Who would hurt me, the common criminals who still want revenge for I have been in place and wrong time, because they think that I was one of the people who identify when they were arrested and stood on the detained.

I would cause great damage to my Mama, because she suffered a lot after living these incidents and that she wants the best for me and being in Australia knows that nothing will happen to me. My family would be affected by this fear again; the unrest would grow for everyone in my home.

My few close friends from childhood, would also be affected. They were also as support for when these incidents occurred.

Why do you think this will happen to you if you go back?

I believe and I'm sure because of the theft that took my brother [Mr A], A calls threat;

And rumours had in my neighbourhood before I went to study in Australia.

Do you think the authorities of that country can and will protect you if you go back?  
If not, why not?

Obviously not; With the facts that have already occurred to me and my brother is clear that the authorities in Colombia does not protect me. They never did and they will not.

To this day is clear to me that the authorities are only good for people with a lot money and influences.

8. The applicant provided a copy and translation of the complaint made to the police in relation to the kidnapping of her brother [in] September 2007.
9. The applicant also provided a statement from her mother, [Ms B] with a translation. Her mother set out that the applicant had witnessed some criminals robbing a [local business] and they attempted to shoot her. After they took her to the hospital they decided not to make a statement to the police because they were afraid that if the criminals were caught they would take reprisals against the applicant or the family. They were afraid because they did not know whether all the criminals had been caught. Some days later, they received two calls threatening the applicant's life if she testified.
10. The applicant's mother stated that her son had also been the victim of a crime known as "Paseo Milonario" [express kidnapping] where a person is taken from their car and taken on a tour of the city in order to force them to withdraw all their money from the bank. Her son had been kidnapped for almost two hours while they stole all the money from his accounts and his vehicle from outside their house.
11. There had been an increase in common crimes in the neighbourhood and they decided to send the applicant to study and reside outside Colombia. They thought that if the criminals realised that she was the person who had seen the robbery of the [local business], they could hurt her. They supported her application because they feared that common criminals could hurt another family member.

*Interview with the delegate*

12. The applicant took part in a telephone interview with the delegate [in] November 2011. The applicant stated that she was a citizen of Colombia and did not have the right to reside in any other country.
13. In relation to the secondary applicant, the applicant stated that they had met 2 ½ years previously. He was her fiancé The relationship began at that time. It began in Australia.

14. The applicant stated that her whole family lived in Colombia; her mother, her three brothers, her uncles and aunts and cousins lived in Bogota. Only her cousin [name deleted: s.431(2)] was in Australia.
15. In response to the delegate's questions, the applicant stated that she had come to Australia because eleven years previously she had been a witness to a robbery at a [local business] and she was shot in the leg. She was walking home and she heard people whistling and talking behind her. She turned around and she saw a man pointing a gun at her. She was in shock and kept staring at him and she thought he had deliberately shot her because she saw him so that she would not be a witness. This happened [in] 2000. The police wanted her to testify because she had said that she remembered the robber and she could recognise him. They wanted her to testify to give him a longer sentence. Her mother would not let her testify because she knew that it would change her life.
16. Later, her mother received a phone call telling the applicant to be quiet otherwise they would silence her by shooting her. The police insisted that she testify but she and the family kept quiet and did not go out or have contact with anyone. She was three months short of finishing high school. Her friends used to bring her work home for her. In mid-October she went back to school but her cousin drove her door to door.
17. The delegate noted that she had also gone to University in Colombia. The applicant stated that she was studying [subject deleted: s.431(2)]. She did not finish.
18. The suburb where she lived was dangerous so her family did not want her to testify because she would be linked to some of the dangerous groups and she would be in even more danger. The police would not have been able to protect her. They would not offer appropriate protection so that she would feel free to testify.
19. When she started going to University, she stayed at home and did not go out much but she still could not help hearing all the bad things that went on around them. One day she heard that one of the people involved in the robbery had been set free and that he was committing crimes again in the area. Then people told her that they noticed a car parked nearby too often and she and her family tried to ignore it.
20. [In] 2007 her brother [Mr A] arrived home in his car. When he went to open the garage door, some men came and took him into another car. He yelled and her mother saw what was happening. One of the men pointed at her mother. He was told to get in the car or his mother would be shot. They took his car as well. Her brother was taken from one automatic teller to another on "the Millionaire's walk" where a person is made to take money out from different banks. Then they beat him and threw him in a paddock. He returned home the next day badly hurt.
21. These incidents had led to her leaving Colombia. Also, they had begun telephoning them at home again. She did not know who it was, but they had called saying that they wanted revenge.
22. The delegate asked why the applicant had waited until 2008 to leave Colombia. The applicant stated that her family had not had the money. After what had happened to her and her brother it took them a long time to save the money to buy a ticket to come to Australia.

23. The delegate asked why the applicant had not lodged a protection visa application until 2010 if she was afraid of returning to Colombia. The applicant stated that she did not want to say what had happened because she and her family had suffered so much. She just wanted to come and study and learn and then stay, not to go back to Colombia. Unfortunately the agency that was arranging her course made a mistake and she could not continue studying and the only way she could stay was to apply for a protection visa.
24. The delegate noted that the applicant appeared to fear revenge from criminals, which was not a matter covered by the Refugees Convention. The applicant stated that when she applied for the protection visa they did not have an adviser and she did not know how to apply. She did not know what to do because she would be killed if she returned to Colombia.

*Information provided to the Tribunal*

25. [In] March 2012 the applicant's representative provided written submissions. The representative submitted that the applicant had been unrepresented when she lodged her protection visa application and was unaware of the requirements of the Convention. She inadvertently omitted any reference to a Convention ground in her claims, which should have been based on her membership of a particular social group. The representative submitted that the particular social group consisted of persons who:
  1. Have witnessed a serious crime carried out by organised criminals;
  2. Are from the middle class; and
  3. Reside in particularly high crime suburban areas of Colombia.
26. The representative submitted that the applicant was a witness of crime, having suffered a gunshot wound to the leg as she witnessed a robbery taking place at a [local business] in the [Suburb 1] area of [Locality 2]. The representative submitted that those carrying out the crime were part of a larger group of organised criminals because they were able to identify and contact the applicant's family in the immediate aftermath of the crime.
27. The representative sought to narrow the group by its members' geographical location and socio-economic position and identified her as a member of the Colombian middle class. The applicant's family owned property, having lived at the same property since 1957. The family members had provided statements showing their incomes to demonstrate that they were middle, not upper, class. The representative further sought to narrow the group by its members residing in certain high crime neighbourhoods within Colombia. The representative provided two newspaper articles highlighting that [Locality 2] was amongst the most crime affected areas of Bogota.
28. The representative submitted that the applicant's membership of a particular social group preceded the persecution that was inflicted upon the group by organised criminals. As soon as a middle class resident of a high crime suburban area of Colombia witnesses a serious crime, they become a member of the particular social group. The applicant's family owned property but was unable to protect themselves effectively from organised criminals, being members of the middle-class. The social group was narrowed down by its members residing in certain high crime neighbourhoods. Members of the group were distinguishable from the greater society through their vulnerability to the violence perpetrated by powerful criminal groups

and were further distinguished as they lacked the resources or influence to secure their personal safety following such actions.

29. In relation to persecution, the representative submitted that the applicant faced a threat to her life or liberty in the aftermath of the [2000] shooting, having received verbal threats over the telephone from unknown persons who warned her family that any cooperation with the authorities would result in the applicant's death. More recently, her mother had received a telephone call advising that it was better that the applicant remained in Australia.
30. The representative submitted that the Colombian Government was incapable of adequately protecting an individual in the applicant's situation and that the applicant would face the same danger if she were to relocate.
31. In relation to the nexus with the Convention, the representative submitted that the applicant was directly targeted by organised criminals due to the fact that she was a witness of crime who was a middle-class member of Colombian society who was unable to obtain either the protection of the private security or the Colombian police force. The discrimination was exacerbated as the applicant resided in a high crime suburban area of Bogota. The criminals targeted the applicant as they were concerned about her capacity to identify them and enable their prosecution. The representative submitted that another motivating factor was her position as a middle class witness of crime and inability to protect herself adequately. The representative submitted that they were further motivated by the fact that the applicant was a resident of the high crime area of [Locality 2], as they had the requisite well-established connections within the area, both to authorities and broader networks.
32. In relation to the requirement that persecution be systematic, the representative submitted that violence against witnesses of crime was persistent and ongoing and thereby systematic in nature. In relation to the requirement that the Convention ground be an essential and significant reason for the harm, the representative submitted that the applicant was directly targeted as she was a member of the particular social group:

The organised criminals directly targeted the Applicant as she witnessed a serious crime which took place in the high crime area in which she resided. Furthermore, as the Applicant was a member of the middle-class, she would not be able to protect herself from such persecution, thereby establishing the necessary causal link to the relevant Convention grounds.

33. Further documents provided by the representative included:
  - The applicant's statement and medical report from the protection visa application;
  - A declaration of the Local Church Minister, [Reverend C], which set out
    1. I have been employed as a Minister for the [church] in Bogota since 1987.
    2. My Church is actively involved in community activities.
    3. Those activities include provision of services for the underprivileged, a health brigade and language assistance.
    4. I first met [the applicant] in 1998.



5. I have known [the applicant]'s family since 1997.
6. I was aware of the incident in [month] 2000, during which [the applicant] was shot by some robbers after witnessing them commit an assault on a [local business].
7. I can confirm that the robbers are part of a larger group.
8. My past experience indicates that the Colombian police would be unlikely to offer effective protection to those in the middle class from such groups.
9. The targeting of [the applicant] and her family after the attack was exacerbated by her inability to obtain effective protection by the police force or private security.
10. I am absolutely certain that the police force would not offer adequate protection to someone in [the applicant]'s position.
11. I am absolutely certain that members of my Church who fall within the middle class are not afforded the protection of the police force.

- A declaration of the applicant's mother, [Ms B] which set out:

1. I am the mother of [the applicant], born on [date] in Bogota D.C.
2. I have lived at the aforementioned address for 52 years, at a property which our family has inhabited since 57.
3. In my earlier statement to the Red Cross, I explained that my family had been threatened with reprisals as a result of my daughter witnessing a robbery taking place at a [local business].
4. The fact that I received threats against both [the applicant] and my family indicates that the criminals are part of a larger group of organised criminals.
5. Following these threats, my family did not have the means to obtain protection from a private security company, nor the influence to obtain the necessary protection from the Colombian Government.
6. My family and I decided that it would not be in [the applicant]'s interest to pursue the threats by notifying the authorities, as other members of our community in a similar position suggested that we would not be afforded protection. We were advised by these persons that such reporting would result in violent repercussions, and this was not a risk we were willing to take in the circumstances.
7. These events have led my daughter to be extremely fearful of returning to Colombia, and she will be in an extremely vulnerable position if she is forced to return.

- Financial statements from the applicant's family;
- UNICEF statistical indicators;

- Online newspaper articles and further country information.

*The Tribunal's hearing*

34. The applicants appeared before the Tribunal [in] March 2012 to give evidence and present arguments.
35. The applicants were represented in relation to the review by their registered migration agent.
36. In response to the Tribunal's questions, the applicant stated that the secondary applicant was her fiancé. The applicant stated that they had met in Australia 2 ½ years previously and the relationship began at that time. They had been living together for 2 years. They shared bills and their families knew that they were a couple.
37. The applicant stated that she did not want to return to Colombia because she was afraid for her life and something might happen to her family. The area where she lived was not safe for her or her family.
38. It all started when she witnessed a robbery [in] 2000. She stopped at the [local business] on her way home and the men were in the [local business], threatening people and demanding money. One man in particular was threatening people with a gun. He shot her in the right leg. She was taken to hospital so that the bullet could be removed. When the police came, they wanted her to be a witness against the person who had done it. She was a minor and her family did not want her to give evidence. On the following days, the police officers kept insisting that she give evidence and everyone could see the police were there.
39. A few days after the police came, her mother received a phone call saying that it was better for her to keep her mouth closed. The person did not identify himself or say anything else. There was only one call, but they could see cars parking at night or driving past very slowly. This was threatening because she had been a witness and she had seen who had committed the crime. Had she given evidence, the people would have stayed in jail longer.
40. No one gave evidence of the robbery. Her family did not want her to give evidence. There were three other witnesses. Once she was back at home she gave the description and immediately the family knew they were members of FARC because of the way that the robbery took place and the way they dressed, because that was their style.
41. The Tribunal noted that the applicant had not mentioned the FARC before in her submissions, in the representative's submissions or in her interview with the delegate. The applicant agreed and stated that it was either the FARC or similar guerrillas connected with the FARC.
42. The representative stated that their submissions did not specify the group because it was not clear who was terrorising the neighbourhood.
43. The applicant stated that she did not know whether the police were trying to make anyone else testify or whether anyone else in the [local business] was threatened. She did not give evidence.
44. One of the criminals went to prison. She does not know the name of that person. Her family kept her away from that. She had seen four others who went into hiding. She did not know if they went to prison too.

45. In 2006, there were rumours that one of the robbers had been released and was in the neighbourhood. They started to see what they had seen in the beginning, the cars driving by slowly. The Tribunal asked whether there were any more telephone threats. The applicant stated that after that, her brother was kidnapped.
46. The representative stated that the written submissions did not focus on the kidnapping because it was not certain that the incidents were related, but it was relevant to who the perpetrators are and there was a possibility that they are linked. The representative referred to the country information which was provided with their written submissions and referred to witnesses, the middle class and children being targeted.
47. The applicant stated that her brother was attacked in 2007. After one of the robbers was released from jail there were some other robberies, but they are not sure if it was the same people who committed the robberies. The person who had been in jail was seeking revenge. In the suburb the people talk and it came to her mother's attention. They thought the robbers were seeking revenge because they thought that she had given evidence against them. The Tribunal asked why, if only one of them went to jail, one of his associates would not take revenge earlier. The applicant stated that she heard that the person who had been in jail was the head of the group.
48. Because she did not give testimony, her family wanted to protect themselves and her. Maybe they didn't take revenge against her because they were waiting for him to be released. The Tribunal noted that six years was a long time and asked why they would draw attention to themselves so far down the track. The applicant stated that maybe it was because her older brothers were studying at expensive institutions and it was assumed that they would earn a lot of money once they got their degrees. It was seen in the neighbourhood that they had good positions and good money and a nice car. They were perceived to be better off.
49. They started seeing cars driving by and at first did not pay much attention. One night when her brother arrived home, four people abducted him. They forced him out of his car and into theirs. Her mother saw it because it was across the street. He was taken and bashed. He was robbed of the money in his possession and the money in the bank. He was thrown out in a meadow. When her brother asked why they did it, they said they had been paid to do it. He was told not to look at them and not to say anything. He was hit with a gun and thrown to the ground.
50. The applicant stated that her brother usually parked outside the house. The Tribunal asked whether it was possible that it was a random attack. The applicant stated that she believed it was not because one month later they received another call that they were seeking revenge because they thought that she had given evidence against them on the insistence of the police.
51. The Tribunal noted that the robbers would know whether she had given evidence because it would have been used in the court case. The applicant stated that she had described the robbers to her mother and her mother told the police so the police took her mother's evidence as if it was hers, but it was oral and she never provided a written statement.
52. She was attacked because she was a witness. She saw the person who shot her. She is afraid of going back because she knows what happened to her brother and it was her fault. After she came to Australia, they rang her home again. They said it was better for her to stay in Australia.

53. The last threat was in October of 2010. The ongoing threats were because the family has money. The Tribunal asked whether the callers were asking for money. The applicant stated that they were not but they could kidnap her elder brother also because they were seeking revenge.
54. Her brothers were both still living at home despite earning good salaries because it was the home of their grandparents who had looked after them when her father left the family when she was young. Her grandmother was still there but her grandfather passed away [some] years ago.
55. The family did not move away because it was the same everywhere. In another city it would be the same. The people who have been threatening them would know where they would move.
56. The Tribunal asked why the criminals would not have acted earlier if they intended to follow the family wherever they went. The applicant stated that they wanted to make her afraid so that they could do something else later on.
57. The Tribunal asked whether the two incidents might be random acts. The applicant stated that they were not random because when the robbery took place it was well known that they were well off. At that stage they were dependent on her uncle and it was well known that the family was well off for the neighbourhood. They stood out.
58. The representative submitted that the neighbourhood was at the lower socio-economic end of the scale and being well off there is not equivalent to being well off in Colombian society more generally.
59. The Tribunal asked why the robbers would continue to pursue her. The applicant stated that that was how they work.
60. The Tribunal put to the applicant that the country information indicated that FARC's method of operating was such that if they intended to harm her, they would have done so.
61. The applicant stated that prior to 2007 the family did not have money. Her brother had been robbed so they took the path of getting a proper visa and coming to Australia in 2008. They knew that it had been the same people who kidnapped her brother because of the calls that were made and the way they were dressed. They were wearing caps, they were all in black, with black army boots and gloves. The Tribunal put to the applicant that it would seem to be common for people committing crimes to be wearing black. The applicant stated that it was the guerrillas or FARC because they always dress like that and the way it was orchestrated. If FARC wanted to get her, they would, but they were trying to strike fear. After what happened to her brother, she knows she would be next.
62. The applicant stated that the family did not want to be involved with the police because the guerrillas may be involved with the police also. She did not make a report to the police. The Tribunal noted that she had stated that the police wanted to take a report, which indicated that police protection would have been available. The applicant did not agree because in order to get protection she needed money, and even if it was the case she would not have had protection.

63. They did not report the threats to the police but her mother reported it to the Red Cross. They have no proof, just her mother's word. She is sure that the police would like to listen but there was no way they can prove it.
64. After the robbery, there were three threats, after her brother was abducted there were two, and since she has been in Australia, there were three, but not in the last 18 months.
65. Her brother did make a police report. His car was stolen and he was robbed of his money and his belongings. That was why her family decided it was better for her to come to Australia. They thought that if she gave evidence against all the phone calls, something more serious would happen, like what happened to her brother.
66. The Tribunal put to the applicant that the country information did not indicate that state protection would be withheld for any reason. The applicant stated that she would have to give money to the police. In her neighbourhood there was no police protection because they thought there might be a connection between the police and the group that attacked her brother. They knew that she had gone to Australia, her brothers have good jobs, they must belong to a powerful group so there must be a connection. Even if the police did provide protection, the group is more powerful.
67. In her brother's case, it could be seen that they have good jobs but no one in the family knew that she had come to Australia. She did not go out, she had no friendships in the neighbourhood.
68. The Tribunal asked why [Reverend C] had stated that police protection was not available to the middle classes and noted that this was not consistent with the available country information. The representative stated that as a Minister he may be in the position to be aware of many cases in Colombia. He knows of the applicant's case. He was the Minister of a [church] which her family had attended for many years. He knew what happened to her and to her family. He knew the neighbourhood that she lives in and how the police behave. He was aware of what happens in her community. The statement was specifically in relation to the applicant's neighbourhood.
69. The Tribunal asked whether it would be reasonable for the applicant to live somewhere else in Colombia, considering that she has established herself in Australia. The applicant stated that she had always lived in Bogota, and so had her family. If she lived to another city it would not be the same for her. If she moved to a small town, they could still find out where she was. They knew that she was in Australia and they could find her somewhere else. It was easier for them to find her in Colombia. They haven't found where she lives in Australia.
70. The Tribunal asked why they would still be interested in her twelve years later, and five years after her brother was kidnapped. The applicant stated that it was because she is their target and because they have the money. They want to strike fear. The same thing could happen to her. The representative queried the interpreting and the Tribunal sought clarification of the applicant's response. The applicant stated that they may keep threatening, making phone calls because they know that her brothers have money and they might get money and they could harm her and take her life. No one had asked for money yet. No one has sought to extort money from the family.
71. The secondary applicant indicated that he did not wish to add anything.

72. In relation to the particular social group which had been posited by the representative, the Tribunal noted that it was possible that the description defined the group so narrowly that it did not constitute a group. The representative submitted that particularly in areas of high crime, witnesses of crime were more susceptible to retaliation. The central element of the group was witnesses of crime. The Tribunal noted that “witnesses of crime” would appear to lack the requisite element of being a group “distinguished from society at large”. The present case also might be an individual case of being in the wrong place at the wrong time.
73. The Tribunal noted that the written statement by the applicant’s mother indicated that they did not go to the police, but the applicant had stated that her mother gave them the description. The applicant stated that this had occurred the day after the robbery. The police came and wanted to see whether she could provide a statement and they asked her mother for her to give a testimony of what she had seen. She had told her mother that there were four men dressed in black wearing black army boots. Her mother told the police that but she did not give a written statement and her mother did not give oral evidence.
74. The Tribunal put to the applicant that if the criminals had been members of the FARC, it would have been expected that she would have made this claim when she lodged the initial visa application. The applicant stated that she and her family would say they were the FARC because of how they got access to information, it had to be them. She could not say it for sure but they have to be related or linked because they act in the same way as the FARC.
75. The Tribunal asked why she did not make the claim at the beginning. The applicant stated that she did not have the support that she has now and she thought she’d present the case to the best of her ability. She just said social group. She didn’t specify at that stage. The applicant stated that she always thought that the guerrillas and the FARC were the same.
76. The Tribunal noted that in her interview with the delegate, the applicant had stated that the suburb where she lived was dangerous so her family did not want her to testify because she would be linked to some of the dangerous groups and she would be in even more danger. The Tribunal put to the applicant that this would appear to be the perfect opportunity to mention the FARC. The applicant replied that she knew that and she did not mention the FARC at the interview.
77. The Tribunal noted that the fact that the applicant had brought up the FARC so late when it was such a crucial part of her claims might undermine her credibility. The Tribunal noted that the applicant’s credibility into issue. The representative submitted that the applicant had not told them that it was the FARC in particular, but had never suggested that she knew particularly which group it was. The Tribunal noted that even if the FARC had been implicated it would have been mentioned earlier than at the Tribunal’s hearing.
78. The Tribunal noted that it would also be required to consider the complementary protection provisions and that it would be making an assessment as to whether there was a real risk of significant harm as well as whether there was a real chance of persecution.
79. The Tribunal allowed further time for further submissions to be provided after the hearing.

*Material received after the hearing*

80. [In] March 2012 the representative requested further time in which to provide submissions which was granted.

81. [In] May 2012 the representative provided further written submissions which set out:

#### PARTICULAR SOCIAL GROUP

In our original submissions, we identified the Appellant's particular social group as being defined by three characteristics. In line with the concerns raised by Tribunal Member Deane at the hearing, we would like to further clarify the particular social group to which we submit the Appellant belongs.

The characteristics which members must possess include: -

1. Witnessed a serious crime carried out by organised criminal gangs;
2. Reside in an area in which the organised criminal gangs frequently operate;  
and
3. Lack access to state or private protection.

In *Applicant S v MIMA*, Gleeson CJ, Gummow and Kirby JJ [at 27] clarify that there is no requirement of recognition or perception by the relevant society that the collection of individuals comprises a particular social group.

Member Deane expressed concern over accepting a social group that is seemingly construed too narrowly to be recognised under the Convention's provisions. We can clarify the essential elements of the social group as witnesses of crime who are pursued by the offenders, as they are unable to avail themselves to police or private protection. This description is broader than that initially provided, however, we maintain our original submission that the Applicant is placed at greater risk due to the fact that she resides in a particularly dangerous area in which these gangs frequently conduct activities and therefore are more likely to have connections to local authorities.

Although the harm faced may not solely result from the fact that the criminals predominantly operate out of a specific lower socioeconomic area, it is nevertheless essential that the particular gangs have a sufficient connection to that area in order to be able to continue their ongoing regime. This is how they manage to continually inflict terror on those they deem willing or able to provide evidence against them; let alone those believed to have already cooperated with or provided information to the police in any way, as is the case involving the current Appellant.

#### SIGNIFICANT HARM

There is no doubt that if the Appellants claims concerning the threats received are accepted by the tribunal as fact, the harm faced by the Appellant must certainly be regarded as significant. There are various reports, including the ones annexed to our original submissions, which outline the violent activities of said paramilitary groups. The real and imminent harm faced by the Appellant includes but is not limited to kidnapping, torture and the arbitrary deprivation of her life and liberty.

#### NEXUS WITH A CONVENTION GROUND

The Appellant is systematically targeted by paramilitary organisations because she is a member of the particular social group outlined above, i.e. being a witness of crime and a member of the local community who is unable to obtain appropriate protection. Although there is no way to clearly distinguish the violence faced by the Appellant from those real dangers faced by all Colombian citizens, the courts have departed

from this requirement if the background to the conflict reveals the existence of a link to the convention ground. It is clear from the Appellants written and oral testimony that she is singled out from the community at large due to her membership of the particular social group described above. The systematic targeting of victims who happen to witness criminal activity, by way of continual aggressive threats, is vital to the ongoing activities of the criminal gangs, who may thereby effectively act with general impunity from the relevant authorities.

#### CREDIBILITY

At the hearing on [date] March 2012, the Appellant stated that the criminal group that had targeted her may have been FARC. This statement was not intended to be declaratory or to misleading in any way. Rather, it was intended to illustrate that the criminal group that had targeted the Appellant was part of a larger group of organised criminals, as illustrated by the report by the US Citizen and immigration Services (Annexure 10 of the original written submissions). This report states at paragraph 4 of page 2, that most of the paramilitary groups are "grouped together in a national umbrella organisation". The continued conduct of the kidnappers and the strategic use of threatening telephone calls immediately following the incident strongly pointed to the involvement of members of this umbrella organisation, which includes cooperation and collusion by members of FARC.

On the issue of general credibility, we submit written statements from [Ms D], [Mr E] and [Mr A].

[Ms D] has been friends with the Appellant for 2 years. In her statement, annexed hereto and marked "A", she attests to the Appellant's trustworthiness, and speaks highly of her character generally. Similarly, the statement of [Mr E], a friend of the Appellant's who has known her for over 20 years, also attests to the Appellant's good character and honesty in his statement, annexed hereto and marked "B". The statement provided by [Mr E] has not been translated into English due to time constraints.

The statement of the Appellant's brother, [Mr A] has been translated into English by the Appellants representative, [Mr F], under oath as a fluent Spanish speaker. Annexed hereto and marked "C1" is the original statement and marked "C2" is the translation by [Mr F]. The statement outlines facts supporting the Appellant's assertions raised during the MRT hearing.

If the submission of an approved translation of either of the above statements is deemed necessary, pending the outcome of the decision by the MRT, we undertake to provide one immediately forthwith.

#### COMPLEMENTARY PROTECTION

Complementary protection is the term used to describe a category of protection for people who cannot be returned to their home country because there is a real risk the person would suffer harm that engages Australia's international non-refoulement (non-return) obligations under the International Covenant on Civil and Political Rights (ICCPR) and its Second Optional Protocol aiming at the abolition of the death penalty, and the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

Non-refoulement obligations are engaged where there are substantial grounds for believing that, as a necessary and foreseeable consequence of being removed from



Australia to a person's home country, there is a real risk that the person will suffer significant harm.

Significant harm is where a person will:

- be arbitrarily deprived of his or her life
- be subjected to torture
- be subjected to cruel or inhuman treatment or punishment
- be subjected to degrading treatment or punishment.

If the Appellant is returned to her home in Colombia, there is a substantial risk that she will be located by the vast network of interconnected criminal gangs who target witnesses of crime either to silence them from complying with future police investigations, or seek revenge if they believe that prior cooperation resulted in their arrest/incarceration.

Even though the Appellant did not herself actively participate in the police investigation, the fact that police attended her house on multiple occasions to seek her cooperation was enough to draw the ire of the perpetrators and their many criminal affiliates. Due to the ongoing violent socio-political climate in Colombia, it is not difficult for these criminal networks to inflict terror on those that are seen to oppose such forces. Furthermore, once you are registered as a target by the network, you may be targeted at any time in any place, as much of the cartel's success rests in their ability to share information and carry out revenge attacks on behalf of other factions.

This has been a long-recognised element of the underlying criminal structure which has oppressed Colombia's citizens for decades. The well-established system of corruption and intelligence sharing has resulted in one of the worst humanitarian crises throughout the world, and has infiltrated various levels of governmental decision-making. The fact that the Appellant is not able to obtain police protection is in no way reflective of the general inability of national police departments to protect victims of crime. It is instead a unique aspect of the criminal and socio-political landscape in Colombia, whereby significant levels of corruption have had a major impact on the availability of police protection.

If the Appellant was to return to Colombia there is a significant chance that her location will be determined and she will therefore face increased and persistent threats of torture, cruel, degrading or inhuman treatment, and arbitrary death if she fails to comply with excessively onerous demands placed upon her and her family.

82. The representative provided a translation of a statement from the applicant's brother, [Mr A]:

... I continue to reside in Bogota in the same area of [Locality 2], after the occurrences took place. My current employment does not allow me to travel to any other cities. We reside in the home of my grandparents with my mother and my brothers. As children we were raised by our grandparents and they provided unconditional love and support. We have resided at this property for many years and we understand how important it is to maintain and look after their home in [Locality 2].

With time [Locality 2] has converted into a zone of high crime, but my family, including myself, try by any means possible to stay away from the public eye and exposure to these criminals and threats. We try to maintain security and peace of

mind within our family unit. Crime is present and it will always be around. A way in which we try to deter exposure of our family unit in the public eye, and prevent any reoccurrence of past events is by calling my mother on arrival to the home so she can have the garage door open and ready so as to not prolong the time it takes to enter the property. Additionally, we try not to go out late at night or contact any persons other than close family members and friends that are well known.

We understand the inherent risk of residing in the same zone/place but the significant aspect is that our home is very important to us sentimentally.

83. [In] May 2012 the applicant's representative advised that the applicant's relationship with the secondary applicant had ceased.

## **INFORMATION FROM INDEPENDENT SOURCES**

### **Background to the FARC (Fuerzas Armadas Revolucionarias de Colombia)**

84. The UK Home Office Colombia Country Assessment dated April 2001, states that FARC emerged as an organisation in 1964 and initially supported the interests of the poor:

#### **Fuerzas Armadas Revolucionarias de Colombia (FARC - Revolutionary Armed Forces of Colombia)**

Originating in peasant self-defence groups in the 1950s, it emerged in 1964 as the pro-Moscow armed wing of the Partido Comunista Colombiano (PCC). It overshadowed the PCC and became an independent organisation, ostensibly, at least initially, supporting the interests of the poor (it called for example, for agrarian reform, nationalisation of foreign enterprises, a 50% reduction in land and property taxes and a 40% reduction in public utility charges). In 1983, the FARC accepted the government's offer of a general amnesty to guerrilla groups and a partial cease-fire, which was formalised in March 1984. The following year, the FARC joined with democratic left-wing groups, including its original sponsor, the PCC, in forming the UP. The cease-fire agreement was renewed in March 1986, but, following the government's failure to guarantee the safety of UP election candidates, the FARC returned, by late 1987, to a policy of "total insurrection". In 1997 FARC set out conditions for entering into peace talks with the government: the dismantling of what it described as the national security doctrine, paramilitary structures and legal self-defence groups (CONVIVIRS); suspension of special public order zones; and the introduction of a number of unspecified democratic reforms. Leader: Manuel Marulanda Velez (Country Information and Policy Unit, 2001, UK Home Office Colombia Country Assessment, UK Home Office, April)

### **Activities of the FARC 2000 - 2008**

85. A UNHCR report from September 2002 describes the FARC (or FARC-EP at that time) as "Colombia's largest and most active guerrilla organization", which had expanded by attracting students, intellectuals and workers in urban areas and carrying out acts of kidnapping and extortion to raise funds:

The FARC-EP, (Revolutionary Armed Forces of Colombia-Army of the People, Fuerzas Armadas Revolucionarias de Colombia-Ejercito del Pueblo), founded in 1965, has transformed itself to become Colombia's largest and most active guerrilla organization. Rooted in the self-defence forces that were formed in the "Era of Violence", the FARC began as a rural peasant army, adhering to a communist ideology and dominated by the Communist Party. By the time of the collapse of the Soviet Union in 1991, FARC had distanced itself

from the Communist Party and had developed support in urban centers by attracting students, intellectuals and workers. Through money obtained by kidnapping, extortion and selling protection to drug traffickers and coca growers, FARC expanded its membership, financial reserves and territorial control. Military and economic motives now overshadowed their political and social agenda that include land ownership issues and political reform. Involvement in illicit cultivation, narco-trafficking and kidnapping brings FARC an estimated US \$500 million per year. Thus FARC is able to project its military capability almost countrywide, with notably increasing activity in urban centers. Their present strength is estimated at 17,000, fighters organized in 7 regional bloques and consisting of over 60 frentes. The current Commander-in-Chief of the FARC is Manuel Marulanda Velez, alias "Tirofijo" (sureshot). Due to their perceived lack of a commitment to ideological issues and the indiscriminate violence they visit upon civilians, the FARC now have minimal popular support in Colombia (United Nations High Commissioner for Refugees 2002, 'International Protection Considerations regarding Colombian asylum-seekers and refugees', September).

86. The Immigration and Refugee Board of Canada provided the following information in 2003 regarding FARC's activities in Bogotá and other major cities, similarly identifying the existence of the group's urban militias:

In June 2001, Jorge Briceño Suarez, a senior leader of the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, FARC), announced that the group was intending to bring its struggle to Colombia's cities (Real Instituto Ebanó 4 Mar. 2003). According to Román Ortiz, an expert on Latin American security and defence issues, the decision to urbanize the conflict reflects a realization by FARC leaders that the costs of large-scale assaults against military targets were unacceptably high, and that an urban campaign would bring pressure to bear on the middle and upper classes upon which the government draws much of its support (ibid.).

An important element in the FARC's urban strategy has been the exploitation of new technologies and tactics borrowed from European guerrilla movements such as the Provisional Irish Republican Army (PIRA) (ibid.; Jane's Intelligence Review Sept. 2002, 24-25; ibid. Mar. 2003, 23). These technologies include the use of remote-controlled mortars, as seen in the attacks on the presidential palace and the José María Córdova military school in August 2002, and the establishment of a new system of urban guerrilla cells which may be modelled on the PIRA's "active service units" (ibid. Sept. 2002, 24-25). These cells, each of which is composed of no more than 12 individuals, make use of their own network of safe houses and escape routes in order to minimize the risk of detection (Real Instituto Ebanó 4 Mar. 2003). According to police officials, the FARC's Antonio Nariño Urban Network (Red Urbana Antonio Nariño, RUAN) sent approximately 60 guerrillas trained in the use of the new tactics to Bogotá in January 2002 (Jane's Intelligence Review Sept. 2002, 25).

In addition to the urban cells described above, the FARC has engaged in a strategy of creating urban militias connected to [its] regular armed fighters [and] may have as many as 12,000 urban militias, highly concentrated in Bogotá and Medellín but also in many of the medium sized urban centers such as Bucaramanga and Villavicencio (Adjunct Professor 30 June 2003).

A Stetson University College of Law associate professor who served as a district judge in Medellín between 1983 and 1986 and currently specializes in the legal dimensions of narcotics trafficking and guerrilla insurgency also indicated that the FARC is active in nearly all of Colombia's major cities, where its members are "responsible for gathering intelligence to feed to the rural fronts, for carrying out recruitment, and for conducting acts of kidnapping, extortion, and robbery against the

urban population” (7 July 2003). The associate professor went on to claim that recent events have indicated that the guerrillas ... are concentrated [in urban centres] and capable of delivering attacks against the formal infrastructure. ... Brazen attacks by cells of combatant groups have increased. There has also been a noticeable rise in the level of violence between guerrillas and paras [paramilitary groups] in the poor areas as fronts from either side compete and battle for the control of “turf” in the slums. ... While military actions such as tactical strikes and bombings against police installations and government properties have continued, the tactics of the urban guerrilla ... fronts have expanded to assume more of an intelligence-gathering role than a tactical strike role. Regardless, terrorism for the purposes of intimidation, control, and financial gain is still a primary plank in the guerrilla ... modus operandi (ibid.).

Bogotá, where the FARC’s organizational structure and activities are becoming increasingly complex, is believed to harbour cells from the group’s 10th, 22nd, 42nd, 45th and 53rd Fronts (El Espectador 11 Aug. 2002). Additionally, members of the FARC’s Huila-based Teófilo Forero “mobile column” (columna móvil) have reportedly travelled to the capital on a number of occasions in order to carry out attacks such as the 7 February 2003 bombing of El Nogal nightclub in which 35 people were killed and more than 160 injured (Semana 22 Feb. 2003; Jane’s Intelligence Review Mar. 2003, 22) (Immigration and Refugee Board of Canada 2003: COL41716.E – Colombia: Update to COL35124.E of 20 September 2000 on the activities of the Revolutionary Armed Forces of Colombia (Fuerzas Armadas Revolucionarias de Colombia, FARC) in urban centres (September 2000-July 2003), 28 July).

87. A news article dated 5 April 2004 describes the activities of the FARC and its militia groups in Bogotá:

The dispute between the guerrillas and the paramilitary groups, already old in certain regions in the north and south of the country, is also taking place in south Bogotá’s populous Ciudad Bolívar sector. First came the FARC [Revolutionary Armed Forces of Colombia], who in May 1982 via Conference 7 ordered their fronts to deploy forces in the main cities in order to undertake intelligence work which would facilitate the commission of terrorist attacks, abductions and extortion. They established themselves in places such as Bosa, Ciudad Bolívar, Soacha, Patio Bonito and Suba, and formed militias which began to intimidate a city which considered itself impervious (‘Power struggle between rebels, paramilitaries spreads to Colombian capital’ 2004, *BBC Monitoring Online*, source: Cambio, 5 April).

88. Following the election of President Uribe in 2002, the Colombian government took a firm stance on the activities of the FARC, and their numbers waned but their activities continued.
89. International Crisis Group 2009, *Ending Colombia’s FARC Conflict: Dealing the Right Card*, Latin America Report No.30, 26 March, pp. 20 – 23 & 29 [http://www.crisisgroup.org/library/documents/latin\\_america/30\\_ending\\_colombias\\_farc\\_conflict\\_dealing\\_the\\_right\\_card.pdf](http://www.crisisgroup.org/library/documents/latin_america/30_ending_colombias_farc_conflict_dealing_the_right_card.pdf) dated 26 March 2009 (the ICG Report) states that “from the early 1980s until the arrival of Uribe in 2002, all Colombian governments sought in one way or another to negotiate with the FARC”. However, the report states the “members of the opposition and other economic and political sectors began to promote a tough stance vis-à-vis the FARC in the 2002 presidential and congressional campaigns”. The article reports that the Uribe government, which was elected in 2002, has launched a series of military offensives against the FARC which have successfully weakened the group. The report describes

President Uribe's strategy as "aimed at military victory and ending the conflict without political negotiations".

90. The ICG Report sets out that as at 2009, despite heavy losses inflicted by the military, the FARC remained active in Colombia. The report states that the FARC was utilising "new tactics rely heavily on ambushes and indiscriminate use of unconventional explosive devices, in a manner that violates international humanitarian law". The report contains the following information:

Latin America's oldest guerrilla organisation, the Revolutionary Armed Forces of Colombia (FARC), is under severe stress. Close to seven years of the Uribe presidency have hurt the FARC's capability and morale. Several top commanders have been captured, killed in combat, murdered by their own men, or died of natural causes, as in the case of Manuel Marulanda, the FARC's historic leader. Thousands of foot soldiers have deserted, bringing the guerrillas' troop strength down by almost half, to perhaps 10,000 today. Still, under its new leader, Alfonso Cano, the FARC has shown renewed internal cohesion and continued capacity to adapt to changes in the security environment.

Strong pressure notwithstanding, the FARC still has remarkable adaptive capacity. Key units and some members of the central command (the Secretariat) have withdrawn to strongholds in the jungle and mountains, as well as in neighbouring countries, to evade government offensives and regain strength. The way in which hostage releases and redeployments have been conducted recently suggests that Cano is having some success in reasserting leadership. New tactics rely heavily on ambushes and indiscriminate use of unconventional explosive devices, in a manner that violates international humanitarian law. While command-and-control structures have been decentralised at the tactical level, the FARC Secretariat remains capable of coordinating actions around the country. Still substantial income from drug trafficking enables the insurgents to continue the war but has also led to alliances between some FARC units and Colombia's many organised criminal outfits and new illegal armed groups.

91. The ICG Report also information on "urban warfare" by the FARC. The report states that "several attacks with explosives, presumably carried out by FARC militiamen or commandos, have been launched in cities like Bogotá, Cali, Buenaventura, Neiva and even small villages like Ituango".
92. Other reports indicate that despite military attacks against the FARC, the group were still active and committing human rights abuses in Colombia by 2008, including attacks with explosions, kidnappings, the use of landmines and the forced displacement of civilians (Amnesty International 2009, *Report 2009 – Colombia*, 28 May <http://thereport.amnesty.org/en/regions/americas/colombia>; Human Rights Watch 2009, *World Report – Colombia*, 14 January [http://www.hrw.org/sites/default/files/related\\_material/colombia\\_0.pdf](http://www.hrw.org/sites/default/files/related_material/colombia_0.pdf); US Department of State 2009, *Country Reports on Human Rights Practices 2008 – Columbia*, 25 February, Sections – introduction, 1a, 1f, 1g, 2a, 2c & 2d).
93. Amnesty International's 2009 annual report on Colombia states that "the FARC and the ELN continued to kill civilians and carry out kidnappings";

More than 189 killings of civilians were attributed to guerrilla groups in the 12-month period to June 2008, compared to 214 in the previous 12-month period.

...The use of landmines by guerrilla groups was widespread. In 2008, more than 45 civilians and 102 members of the security forces were killed and 160 and 404 injured, respectively.

...There were a series of bomb attacks in urban centres, some of which the authorities blamed on the FARC, and in which civilians were the main victims (Amnesty International 2009, *Report 2009 – Colombia*, 28 May <http://thereport.amnesty.org/en/regions/americas/colombia>).

94. The 2009 Human Rights Watch annual report for Colombia states that there had been continued “abuses against civilians” by the FARC:

The Colombian government dealt serious blows to the Revolutionary Armed Forces of Colombia (FARC) guerrillas in 2008. But guerrillas continued to engage in kidnappings, use of antipersonnel landmines, recruitment of child combatants, and other abuses.

...Both the FARC and the National Liberation Army (ELN) continue to engage in abuses against civilians.

95. The US Department of State report on human rights practices in Colombia for the year 2008 stated that the FARC had continued to commit human rights abuses. The report contains the following relevant information on FARC activity during 2008:

The FARC and ELN committed the following human rights abuses: political killings; killings of off-duty members of the public security forces and local officials; kidnappings and forced disappearances; massive forced displacements; subordination and intimidation of judges, prosecutors, and witnesses; infringement on citizens’ privacy rights; restrictions on freedom of movement; widespread recruitment of child soldiers; attacks against human rights activists; and harassment, intimidation, and killings of teachers and trade unionists.

...Preliminary reports indicated that landmines, used primarily by the FARC and ELN, caused 147 deaths and 564 injuries during the year

...

...The Presidential Program for Human Rights reported that during the first nine months of the year, the FARC killed at least 250 persons, while another 84 persons were killed in massacres in which the perpetrators remained unidentified. The Presidential Program for Human Rights reported that between January and September, the FARC killed 286 members of the public security forces and the ELN killed 44.

...The FARC and ELN continued to commit numerous kidnappings. Fondolibertad reported that during the year, guerrillas kidnapped 156 persons (38 percent of those in which a perpetrator was identified), the FARC 117 persons, and the ELN 39 persons.

Kidnapping for ransom remained a major source of revenue for both the FARC and ELN. The FARC continued to hold political and foreign-born hostages taken in previous years. (US Department of State 2009, *Country Reports on Human Rights Practices 2008 – Columbia*, 25 February, Sections – introduction, 1a, 1f, 1g, 2a, 2c & 2d).

## The FARC in 2012

96. In 2012, Amnesty International (AI) reported that the FARC and the ELN “committed serious human rights abuses and violations of international humanitarian law, including unlawful killings, hostage-taking and the recruitment of children”. Government figures reportedly indicated that in the first 10 months of 2011, “49 members of the security forces and 20 civilians were killed and hundreds more injured by anti-personnel mines employed predominately by the FARC” In the previous year, “35 members of the security forces and one civilian were killed in 2010 and 363 injured” by FARC mines. (Amnesty International 2011, *Annual Report 2011 – Colombia*, 13 May).
97. A February 2012 travel warning published by the US Department of State noted that while the “incidence of kidnapping has diminished significantly from its peak in 2000, and has remained relatively consistent for the past two years...terrorist groups such as FARC, the National Liberation Army (ELN), and other criminal organizations continue to kidnap and hold civilians for ransom or as political bargaining chips”. (US Department of State 2012, ‘Travel Warning Colombia 21 February 2012’, Travel.State.Gov website, 21 February <[http://travel.state.gov/travel/cis\\_pa\\_tw/tw/tw\\_5667.html](http://travel.state.gov/travel/cis_pa_tw/tw/tw_5667.html)>). Previous travel advice from the US Department of State in August 2011 noted that:

Emerging criminal gangs (BACRIM) began to develop after the demobilization of the paramilitary fighters from the Autodefensas Unidas de Colombia (AUC). BACRIM [*bandas criminales* – criminal bands] competes and sometimes cooperates with the FARC in the drug trade. The violence associated to BACRIMS occurs throughout Colombia and is a major law enforcement challenge which has led to an increase in the murder rate within some urban areas. (US Department of State 2011, ‘Colombia Country Specific Information’, Travel.State.Gov website, 23 August <[http://travel.state.gov/travel/cis\\_pa\\_tw/cis/cis\\_1090.html](http://travel.state.gov/travel/cis_pa_tw/cis/cis_1090.html)>)

98. In August 2011, *The Christian Science Monitor* reported that since 2008, BACRIMs “have stepped up their actions, and in certain parts of the country retaken the initiative from the security forces”;

This loss of initiative is most obvious in provinces like Arauca, Cauca, Chocó, Nariño, and Vichada. During this period, the smaller ELN has actually grown from 1,500 to 2,000 fighters, and deepened its involvement in the drug trade. The BACRIMs, foremost among them the Rastrojos and Urabeños, have increased their cooperation with the Marxist rebels, and in at least 11 of the country’s 32 departments of provinces, are working with the guerrillas in the interests of the drug trade. (McDermott, J 2011, ‘Colombia’s new security push’, *The Christian Science Monitor*, 9 August <<http://www.csmonitor.com/World/Americas/Latin-America-Monitor/2011/0809/Colombia-s-new-security-push>>)

## RELEVANT LAW

99. Under s.65(1) a visa may be granted only if the decision maker is satisfied that the prescribed criteria for the visa have been satisfied. The criteria for a protection visa are set out in s.36 of the Act and Part 866 of Schedule 2 to the Migration Regulations 1994 (the Regulations). An applicant for the visa must meet one of the alternative criteria in s.36(2)(a), (aa), (b), or (c). That is, the applicant is either a person to whom Australia has protection obligations under the 1951 Convention relating to the Status of Refugees as amended by the 1967 Protocol relating to the Status of Refugees (together, the Refugees Convention, or the Convention), or on other ‘complementary protection’ grounds, or is a member of the same family unit as a

person to whom Australia has protection obligations under s.36(2) and that person holds a protection visa.

### **Refugee criterion**

100. Section 36(2)(a) provides that a criterion for a protection visa is that the applicant for the visa is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations under the Refugee Convention.
101. Australia is a party to the Refugees Convention and generally speaking, has protection obligations to people who are refugees as defined in Article 1 of the Convention. Article 1A(2) relevantly defines a refugee as any person who:
  102. 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, is unable or, owing to such fear, is unwilling to return to it.
103. The High Court has considered this definition in a number of cases, notably *Chan Yee Kin v MIEA* (1989) 169 CLR 379, *Applicant A v MIEA* (1997) 190 CLR 225, *MIEA v Guo* (1997) 191 CLR 559, *Chen Shi Hai v MIMA* (2000) 201 CLR 293, *MIMA v Haji Ibrahim* (2000) 204 CLR 1, *MIMA v Khawar* (2002) 210 CLR 1, *MIMA v Respondents S152/2003* (2004) 222 CLR 1, *Applicant S v MIMA* (2004) 217 CLR 387, *Appellant S395/2002 v MIMA* (2003) 216 CLR 473, *SZATV v MIAC* (2007) 233 CLR 18 and *SZFDV v MIAC* (2007) 233 CLR 51.
104. Sections 91R and 91S of the Act qualify some aspects of Article 1A(2) for the purposes of the application of the Act and the regulations to a particular person.
105. There are four key elements to the Convention definition. First, an applicant must be outside his or her country.
106. Second, an applicant must fear persecution. Under s.91R(1) of the Act persecution must involve 'serious harm' to the applicant (s.91R(1)(b)), and systematic and discriminatory conduct (s.91R(1)(c)). The expression 'serious harm' includes, for example, a threat to life or liberty, significant physical harassment or ill-treatment, or significant economic hardship or denial of access to basic services or denial of capacity to earn a livelihood, where such hardship or denial threatens the applicant's capacity to subsist: s.91R(2) of the Act. The High Court has explained that persecution may be directed against a person as an individual or as a member of a group. The persecution must have an official quality, in the sense that it is official, or officially tolerated or uncontrollable by the authorities of the country of nationality. However, the threat of harm need not be the product of government policy; it may be enough that the government has failed or is unable to protect the applicant from persecution.
107. Further, persecution implies an element of motivation on the part of those who persecute for the infliction of harm. People are persecuted for something perceived about them or attributed to them by their persecutors.



108. Third, the persecution which the applicant fears must be for one or more of the reasons enumerated in the Convention definition - race, religion, nationality, membership of a particular social group or political opinion. The phrase 'for reasons of' serves to identify the motivation for the infliction of the persecution. The persecution feared need not be solely attributable to a Convention reason. However, persecution for multiple motivations will not satisfy the relevant test unless a Convention reason or reasons constitute at least the essential and significant motivation for the persecution feared: s.91R(1)(a) of the Act.
109. Fourth, an applicant's fear of persecution for a Convention reason must be a 'well-founded' fear. This adds an objective requirement to the requirement that an applicant must in fact hold such a fear. A person has a 'well-founded fear' of persecution under the Convention if they have genuine fear founded upon a 'real chance' of being persecuted for a Convention stipulated reason. A fear is well-founded where there is a real substantial basis for it but not if it is merely assumed or based on mere speculation. A 'real chance' is one that is not remote or insubstantial or a far-fetched possibility. A person can have a well-founded fear of persecution even though the possibility of the persecution occurring is well below 50 per cent.
110. In addition, an applicant must be unable, or unwilling because of his or her fear, to avail himself or herself of the protection of his or her country or countries of nationality or, if stateless, unable, or unwilling because of his or her fear, to return to his or her country of former habitual residence. The expression 'the protection of that country' in the second limb of Article 1A(2) is concerned with external or diplomatic protection extended to citizens abroad. Internal protection is nevertheless relevant to the first limb of the definition, in particular to whether a fear is well-founded and whether the conduct giving rise to the fear is persecution.
111. Whether an applicant is a person to whom Australia has protection obligations is to be assessed upon the facts as they exist when the decision is made and requires a consideration of the matter in relation to the reasonably foreseeable future.

### **Complementary protection criterion**

112. If a person is found not to meet the refugee criterion in s.36(2)(a), he or she may nevertheless meet the criteria for the grant of a protection visa if he or she is a non-citizen in Australia to whom the Minister is satisfied Australia has protection obligations because the Minister has substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that he or she will suffer significant harm: s.36(2)(aa) ('the complementary protection criterion').
113. 'Significant harm' for these purposes is exhaustively defined in s.36(2A): s.5(1). A person will suffer significant harm if he or she will be arbitrarily deprived of their life; or the death penalty will be carried out on the person; or the person will be subjected to torture; or to cruel or inhuman treatment or punishment; or to degrading treatment or punishment. 'Cruel or inhuman treatment or punishment', 'degrading treatment or punishment', and 'torture', are further defined in s.5(1) of the Act.
114. There are certain circumstances in which there is taken not to be a real risk that an applicant will suffer significant harm in a country. These arise where it would be reasonable for the applicant to relocate to an area of the country where there would not be a real risk that the applicant will suffer significant harm; where the applicant could obtain, from an authority of

the country, protection such that there would not be a real risk that the applicant will suffer significant harm; or where the real risk is one faced by the population of the country generally and is not faced by the applicant personally: s.36(2B) of the Act.

### **Member of the same family unit**

115. Subsections 36(2)(b) and (c) provide as an alternative criterion that the applicant is a non-citizen in Australia who is a member of the same family unit as a non-citizen mentioned in s.36(2)(a) or (aa) who holds a protection visa. Section 5(1) of the Act provides that one person is a 'member of the same family unit' as another if either is a member of the family unit of the other or each is a member of the family unit of a third person. Section 5(1) also provides that 'member of the family unit' of a person has the meaning given by the Regulations for the purposes of the definition. The expression is defined in r.1.12 of the Regulations to include a de-facto partner.

### **FINDINGS AND REASONS**

116. The first named applicant provided a valid Colombian passport and set out in her protection visa that she did not have the right to enter or reside in any other country. The Tribunal is satisfied that the first named applicant is a national of Colombia and the Tribunal will assess her claims against that country.
117. The second named applicant applied for the visa on the basis that he was a member of the applicant's family unit. Since that time, the representative has advised that the relationship between the first and second named applicants has ceased.

#### *Interpreting*

118. The applicant's representative queried the accuracy of the interpreting during the hearing. The interpreter advised that she was Peruvian and understood the applicant well. The Tribunal noted that there might be colloquial differences between Colombian Spanish and Peruvian Spanish and asked the representative whether they wished to obtain a new interpreter. The representative advised that they did not and that they would make submissions in relation to any points which might require clarification. The Tribunal was satisfied with the accuracy of the interpreting at the hearing.

### **The first named applicant's claims**

119. The applicant claimed to fear being harmed in return to Colombia because she was a witness to a robbery [in] 2000 and the criminals thought that she would give evidence against them. The applicant claimed that her brother was subjected to an express kidnapping in 2007 which was linked with the robbery that she witnessed in 2000. The applicant claimed that after she arrived in Australia her mother received a telephone call stating that it was better that she remained in Australia.
120. The country information provided by the representative and in the Tribunal's own research indicates that there is a relatively high level of crime in Colombia.
121. The applicant provided medical records from her bullet wound and the Tribunal accepts that she did witness a robbery [in] 2000 and that she was shot in the leg by the same criminals. The Tribunal accepts that she gave a description of the criminals to her mother who passed this on to the police but that she did not give a written statement for fear of reprisals.

122. In light of the translation of the police report, the Tribunal also accepts that the applicant's brother was kidnapped and robbed [in] 2007.
123. However in spite of the applicant's claims that one of the criminals involved in the robbery in 2000 went to prison and three remained at large, the applicant remained in the same house for nearly eight years after the robbery. She also remained there [some] months after her brother's kidnapping before she travelled to Australia. At the hearing, the applicant stated that she did not move because the situation would be the same wherever she lived. Although the applicant stated that her family received three telephone threats after the robbery, two after her brother's kidnapping and three since she has been in Australia, she was not harmed in the eight years that she remained in Colombia and on her own evidence, there have been no further threats against her or her family in 18 months.
124. At the hearing, the applicant claimed that the robbers were affiliated with the FARC. Although the applicant had not previously mentioned the FARC, the representative sought to clarify the claim in written submissions after the hearing by stating that criminals tended to come under various umbrellas and referred to the applicant being threatened by paramilitary groups (which was not the applicant's claim). The FARC and the paramilitary groups are different organisations, although the recent country information indicates that the guerrillas (the FARC and the ELN) and BACRIM might be co-operating in the drug trade.
125. Even if the criminals were associated with the FARC, the country information indicates that although there was a stronger line taken against the FARC following the election of President Uribe, the FARC was still bombing and killing perceived opponents throughout the period that the applicant remained in Colombia. Even if the applicant had spent most of her time at home, the Tribunal does not accept that this would have prevented them from harming her there if they had been inclined to do so. If the criminals were not associated with FARC, they did not harm the applicant in the eight years that she remained in Colombia after the shooting incident, and she did not give evidence against them. The fact that the applicant lived in the same house for eight years before leaving Colombia without any harm befalling her leads the Tribunal to find that the criminals are not interested in harming her now or in the reasonably foreseeable future.
126. In relation to her brother's kidnapping, the country information indicates that there is a high level of criminal activity in Colombia and the applicant's representative submitted that [Locality 2] was low socio-economic area. The applicant stated that they stood out in the neighbourhood and that her brothers were attending expensive educational institutions and were expected to have good incomes. The applicant stated that the criminals did not take reprisals against the family until 2007 because it was not until then that they appeared to have any money. However the applicant also stated that the telephone callers had not asked for any money and the Tribunal does not accept that the applicant was being targeted because her family was perceived to be wealthy. In light of the seven year gap between the kidnapping of the applicant's brother in 2007 and the robbery and shooting in which the applicant was involved in 2000, and the information provided by the representative which indicates that the applicant's family lived in a high crime area, the Tribunal does not accept that the kidnapping in 2007 was linked to the robbery and shooting incident in 2000.
127. The applicant stated that her mother had received threats but they did not know who was making the threats. The applicant did not testify and she did not leave Colombia for eight years after the shooting incident took place. Although the applicant stated that her mother had further telephone calls saying that it was better for the applicant to remain in Australia, on her

own evidence there has been no further contact in 18 months. The Tribunal considers that if the criminals intended to carry out any threats against the applicant, there was ample time and opportunity for them to do so in the time after the shooting incident in 2000 before she travelled to Australia.

128. Nearly twelve years have now passed since the shooting incident in 2000 and the Tribunal finds that there is not a real chance that the applicant would face persecution if she were to return to Colombia now or in the reasonably foreseeable future. Accordingly the Tribunal finds that the applicant does not have a well-founded fear of Convention based persecution in Colombia on this basis.
129. Although the applicant's representative made submissions in relation to her membership of a particular social group which they described initially as "witnesses of crime who were from the middle class and lived in particularly high crime suburbs in Colombia" and then narrowed to "witnesses of crime", the Tribunal does not accept that the applicant faces a real chance of persecution if she returns to Colombia. Accordingly the Tribunal does not find that she would face a real chance of persecution for membership of any particular social group however described and it is not necessary for the Tribunal to assess whether the groups proposed by the representative constitute particular social groups for the purposes of the Convention.

#### *Complementary protection*

130. As the Tribunal has found that the applicant is not owed protection obligations on the basis of meeting the definition of a refugee, the Tribunal must consider whether she meets the complementary protection provisions. In relation to these provisions, the representative submitted that there was a substantial risk that she would be located by the vast network of interconnected criminal gangs who target witnesses of crime either to silence them from complying with future police investigations, or seek revenge if they believe that prior cooperation resulted in their arrest/incarceration.
131. However for the same reasons as the Tribunal has found that there is not a real chance that the applicant would face persecution if she returned to Colombia, the Tribunal also finds that there are not substantial grounds for believing that, as a necessary and foreseeable consequence of the applicant being removed from Australia to a receiving country, there is a real risk that the applicant will suffer significant harm.

#### **The second named applicant**

132. The second named applicant based his claims on being a member of the family unit of the first named applicant. There are no claims or evidence that he has a real chance of persecution for a Convention reason if he returns to his country of nationality and the Tribunal finds that the second named applicant does not have a well-founded fear of Convention based persecution.
133. For the same reasons, the Tribunal finds that there are not substantial grounds for believing that, as a necessary and foreseeable consequence of the second named applicant being removed from Australia to a receiving country, there is a real risk that the second named applicant will suffer significant harm.
134. As the Tribunal has found that the first named applicant is not owed protection obligations, the second named applicant also does not meet subsections 36(2)(b) or (c).

## **CONCLUSIONS**

135. The Tribunal is not satisfied that either of the applicants is a person to whom Australia has protection obligations. Therefore the applicants do not satisfy the criterion set out in s.36(2)(a) or (aa) for a protection visa. It follows that they are also unable to satisfy the criterion set out in s.36(2)(b) or (c). As they do not satisfy the criteria for a protection visa, they cannot be granted the visa.

## **DECISION**

136. The Tribunal affirms the decision not to grant the applicants Protection (Class XA) visas.