

**REFUGEE STATUS APPEALS AUTHORITY**  
**NEW ZEALAND**

**REFUGEE APPEAL NO 73898**

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**AT AUCKLAND**

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| <b><u>Before:</u></b>                     | B Burson (Member) |
| <b><u>Counsel for the Appellants:</u></b> | H Hylan           |
| <b><u>Appearing for the NZIS:</u></b>     | No Appearance     |
| <b><u>Date of Hearing:</u></b>            | 11 October 2004   |
| <b><u>Date of Decision:</u></b>           | 9 November 2004   |

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**DECISION**

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[1] These are appeals against the decisions of a refugee status officer of the Refugee Status Branch (RSB) of the New Zealand Immigration Service (NZIS) declining the grant of refugee status to the appellants.

**INTRODUCTION**

[2] The appellants are mother and daughter and nationals of Colombia and Chile respectively. The mother arrived in New Zealand on 8 February 2001 and made a claim for refugee status on 5 March 2001. The daughter, a minor aged 8, arrived in New Zealand on 1 January 2002 and, by the mother, made a claim for refugee status on 5 February 2002. The mother was interviewed in respect of her claim for refugee status on 20 September 2001 and her daughter's on 25 February 2002. By decisions dated 28 May 2002 the RSB declined each appellant's claim for refugee status, decisions which each now appeals to the Authority.

[3] Having regard to the fact that the putative agents of persecution are identical in each case and said to place them at risk for the same reasons and given that the mother's evidence has stood as the evidence of the daughter's, a joint decision will be issued in respect of each appellant. The mother is the responsible adult for the daughter in terms of s 141B(3) of the Act.

[4] The central feature of each appellant's claim for refugee status is a fear of being killed if returned to Colombia by the paramilitary group the *Autodefensas Unidas de Colombia* (AUC) and/or *Fuerzas Armadas Revolucionarias de Colombianas* (FARC) because of their family's ownership of a tract of land in a strategically important area; a circumstance said to give rise to the imputation by each of these protagonists to the conflict, of a political opinion of support for the other.

[5] At the outset the Authority notes that the AUC is an umbrella paramilitary organisation, one not existing at the time the mother's problems first arose but which grew out of those that did. The Authority will therefore use the terms paramilitary / AUC interchangeably throughout as denoting the same agent of persecution.

### **THE APPELLANTS' CASE**

[6] The following is a summary of the evidence of the mother. Thereafter an assessment will follow.

[7] The mother was born in X in 1965. She was the eldest of four children although she, unlike her siblings, was raised by her maternal grandparents on their land. This was located approximately one hour out of X and was situated near to a main road. The mother's siblings all resided with her mother in B and she has had no contact with them at all.

[8] She attended primary school in X but owing to problems that the family were experiencing she was sent to school in B from the late 1970s until the mid-1980s. At this time, her grandfather was shot at on a number of occasions when travelling in his car. He was also beaten on occasions. On two occasions, when she had returned to X from B for holidays, the mother was in the car with her

grandfather when it was shot at by unknown persons. Although she was not injured in any such attack, her grandfather was. His wounds were not, however, serious. In addition to this, the family also suffered attacks on their property during this time.

[9] These events were related to the tensions between the Conservative and Liberal Parties in Colombia. Her grandfather was a wealthy rural land owner and as such, a member of a small group in the X region, all of whom were aligned to the Conservative Party. He was a member of a committee which bankrolled both local and national election campaigns by Conservative Party members. This set their family apart from the wider community in the X region, who were mainly supporters of the opposing Liberal Party.

[10] The mother undertook some political activity for the Conservative Party as did her uncle: during some local and national elections she distributed pamphlets to people travelling the road that ran past the land and would place banners in public places in X itself.

[11] In 1985 her grandfather died. At this time the mother was still in high school. When she finished her studies she returned to the land in X. Upon her return, the mother learned from her grandmother that the latter had given permission for some university students to stay in accommodation on the land, so that they could conduct research for their thesis. There were six of them at the time the mother returned, although her grandmother had told her that originally there were only three. Eventually, approximately 10 students were there and they stayed for two to three months. The family thought nothing of it; it was not unusual to help students in this way.

[12] One day the Colombian army arrived at the house unexpectedly. They told the astonished family that these students, who had been staying on the family land, were in fact members of FARC. The soldiers accused them of knowingly sheltering FARC guerrillas. This, the family emphatically denied, but their protestations of innocence went unheeded. They were verbally abused and pushed. Her grandmother had a gun pointed at her. Her uncle was punched, hit with a gun and taken away by the army to a nearby police station. While he was released the next day, he nevertheless returned with visible bruises to his arms and his face. He told them that he had been beaten in detention and the soldiers

questioning him had repeatedly accused the family of knowingly sheltering FARC guerrillas.

[13] Over the following six months the army returned to the house a number of times and searched the premises for FARC guerrillas. Although each time they found no one, the family were nevertheless questioned about harbouring guerrillas. During each of these further searches they were pushed and verbally abused but unlike the first search, no one was taken away for further interrogation.

[14] In mid-1987, some one or two months after the last visit by the army, the family were visited for the first time by paramilitaries. They beat the uncle and threatened to kill the mother and the aunt. They were all verbally abused. The paramilitaries rampaged through the house, destroying their possessions. They were accused of supporting FARC.

[15] Following this incident, there was no further visit by the paramilitaries for a year. This is not to say that the intimidation ceased; rather, the next 12 months saw the family being indirectly harassed and intimidated. Much damage was caused to their business through fences being cut and water supplies interfered with. The paramilitaries threatened and intimidated their workers forcing many to leave. Local people now were too frightened to do business with the family, lest they be accused themselves by the paramilitaries, of supporting a business that in turn supported FARC.

[16] When the paramilitaries did return in mid-1988 it was worse. On this occasion they destroyed farm machinery and sprayed bullets into the walls and ceilings of the house. Again they hit the uncle and aunt. The grandmother was threatened. They were once more accused of supporting FARC. Again the family protested their innocence but were disbelieved. The paramilitaries demanded their land from them and gave the family an ultimatum: to leave in the next few weeks or be killed. The family did not however go soon enough. Towards the end of that month, the paramilitaries returned. They treated them in much the same way, made the same allegations and made it clear that this was their last chance. If they did not leave in the next couple of days, they would be killed.

[17] The following day the family simply left the farm and went to B. The mother's grandmother, uncle and aunt obtained visas for Venezuela and left within

the next few days. The mother pleaded with her family not to go to Venezuela as it is was dangerous there too. They went nonetheless, though without the appellant.

[18] The appellant contacted a friend in B and told him what had happened. He arranged a place for her to stay. He said he was opening a branch of his business in Chile and would secure her the requisite work visa. This employment however, would not commence for a few months. Therefore, the mother remained in B, staying at places arranged by her friend for no more than a week at a time until she left for Chile at the end of 1988. Shortly before she left she received a threatening telephone call telling her that they knew where she was and that if she did not leave immediately she would be killed.

[19] The appellant duly went to Chile where she worked for her friend's company. In 1992 her employer asked her to go to Colombia to attend a convention in B. Despite having reservations, she went. While in B she telephoned the lawyer to whom her grandfather had entrusted documents relating to the land. It was her intention to see if the land could be sold. The lawyer told her, to her surprise, that she had been nominated as an inheritor of the land in her grandfather's will. She left the lawyer her telephone number at the hotel where she was staying. She was both shocked and surprised to receive a telephone call the following day from the paramilitaries. The caller asked her why she returned and if she wanted to die. She was told to leave Colombia immediately. Fearing for her safety, the mother changed her plans and left the next day.

[20] In 1993 the mother, hoping to find her family, whom she had no contact with since their enforced departure from Colombia in 1988, accepted a request by her employer to be transferred to Venezuela. Once there, she began looking for them. After a lengthy search, she was told that her family had gone back to Colombia in mid-1994. Disappointed, the mother decided to return to Chile where she continued to make enquiries of their whereabouts. When back in Chile she learned from a friend in X that her uncle had returned there in October 1994 to enquire after the family's property. He was killed by the paramilitaries who had taken over the land.

[21] The mother remained in Chile where she entered into a relationship with a Chilean national. In late 1996 the daughter was born. The appellants both stayed

in Chile until 1999 when the mother decided to return to Colombia. Tired of living the life of an exile, she thought that enough time had passed and she would be left alone.

[22] After returning to Colombia the appellants stayed in B and rented a small apartment. She contacted a friend in X who told her in no uncertain terms, that it was not safe to come back to X. There was more FARC and paramilitary activity than before. She contacted a notary public to have a copy of the certificate of title of the land sent to her. He was not in when she called. She left her telephone number with the man's secretary. However, instead of being contacted by the notary public, she was contacted by the paramilitaries who told her to leave immediately or she and her daughter would be killed. Worried, the mother asked a friend and asked if she could stay with her. The friend refused because she was worried about her own safety if she did so. The following day she received another call and a more explicit threat against both appellants was made. The mother decided to leave Colombia and returned to Chile with the daughter the following day.

[23] After returning to Chile the relationship with the father of her child began to deteriorate. A bitter custody struggle over the daughter began. This culminated in threats being made to use influence to have the mother deported back to Colombia. Believing their intention and ability to do so, fearing the consequences of this, and by this time under enormous psychological pressure, the mother left for New Zealand. The daughter was left in the custody of her now ex-partner.

[24] After arriving in New Zealand, the mother learnt that her ex-partner's mother had died and that her daughter was in a bad situation. She contacted the ex-partner and offered to return to Chile to look after the daughter. By this time he had been diagnosed with cancer and was in no position to care for the daughter. However, his family intervened and made it clear that they would not tolerate her presence in Chile. The daughter was sent to the mother here in New Zealand instead. She was told if either of them returns, the ex-partner's family will seek to have them both sent back to Colombia.

[25] The mother fears that if sent back to Colombia, each will be targeted by the AUC (by now, the relevant paramilitary umbrella organisation) or FARC. The AUC want to have the land because it is productive and strategically located; as such, it

is a resource that should be denied to FARC by preventing its' ownership by a FARC sympathizing family. The FARC will target them because they will be seen to have been people who are supporting the AUC by having made land available. Nowhere in Colombia is safe for them.

[26] The Authority received from the appellants' representative, written submissions and a bundle of country information relating to the human rights situation in Colombia, particularly as it related to the paramilitaries. It has also received the original of the mother's expired passport, residence permit for Chile with translation and Chilean identity cards for each appellant in Chile. On 4 November 2004 the Authority received a letter from the Chilean Consulate in New Zealand confirming that the mother has lost her right to residence in Chile.

[27] The Authority also received a letter from two Colombian nationals, AAA and BBB, each of whom confirmed that the appellants had returned to Colombia in 1999 and they had been contacted by the mother. BBB stated that she advised the mother not to stay as the situation had worsened. She confirmed the deaths of the uncle and that the mother received the threatening telephone calls. AAA also filed a statement confirming the return in 1999. She confirmed the involvement of the grandfather in the Conservative Party and confirmed the fact that the appellants' family is at risk from the paramilitaries. AAA confirmed she was visiting the appellants in the middle of 1999 when the mother was threatened over the telephone. AAA confirms the mother asked her if she and her daughter could stay at her house, but AAA refused because of concerns about her own security.

[28] Finally, the Authority received from the mother, an original carbon copy of the airline tickets with which the mother and daughter travelled from Chile to Colombia in 1999 and original copies of the boarding passes that they used to return to Chile at that time.

## **THE ISSUES**

[29] The Inclusion Clause in Article 1A(2) of the Refugee Convention relevantly provides that a refugee is a person who:

"...owing to a 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."

[30] In terms of *Refugee Appeal No 70074/96* (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?

## **ASSESSMENT OF THE APPELLANTS' CASE**

### **CREDIBILITY**

[31] The mother's evidence to the Authority was clear, candid and consistent. While it contained matters that had not previously been mentioned it notes the mother's explanations for the same and notes the original documentation submitted, particularly in relation to the mother's return in 1999. It accepts her explanation as to why these matters were not introduced.

[32] The Authority notes the witness statements of AAA and BBB confirming the mother's evidence as to the threats made in 1999. It also notes the statements on the file from CCC, the lawyer first consulted by the appellant in 1992 in relation to the estate and DDD, a friend, as to her problems in Chile with her ex-partner. Whilst the weight that can be attached to these documents is limited, given the makers of these statements were not available to the Authority for examination, nevertheless, to the limited extent reliance can be placed on them, they are broadly corroborative of the mother's otherwise generally credible account.

[33] The Authority accepts the mother's account in its entirety.

[34] Turning to the issue of well-foundedness, the Authority proposes to firstly consider the risk to the mother from the paramilitaries as they have emerged as the principal agent of persecution and if found to be well-founded, to consider the



AUC related risk to the daughter. If necessary, the Authority will then consider the claimed risk from FARC to each appellant.

## **THE MOTHER'S CLAIM**

### **A WELL-FOUNDED FEAR OF BEING PERSECUTED**

[35] The core of the mother's fears for their safety, if returned to Colombia, stems from the family status as rural landowners. The mother has described a history of violence directed against the family as a result. Initially this was at the hands of agents of the Liberal Party. In more recent times by agents of the state (the military) and non-state agents (the AUC or paramilitaries); the latter being said however, to work closely with the former.

[36] Having examined independent country information, it is the Authority's finding that the mother's fear of AUC related harm falls well within the dynamics of both historical and contemporary violence in Colombia.

### Conservative and Liberal Party politics in Colombia and the mother's identity

[37] In "*Waging War And Negotiating Peace, The Contemporary Crisis In Historical Perspective*" *Violence in Colombia 1990-2000 Waging War and Negotiating Peace* (Burgquist, Penaranda and Sánchez Ed., A Scholarly Resources Inc, 2001, Chapter 10), Burgquist notes the common themes between Colombia's "War of The Thousand Days" (1899 – 1902), a civil war between the Conservative government and then Liberal guerrilla movement and the modern insurgency. Thus, he details (see pp196-197) the introduction of summary military justice by the then Conservative Government, justified by the dramatized (and often exaggerated) accounts of excesses by Liberal revolutionaries. Even then, party political identification in Colombia provided the framework for endemic violence.

[38] In more modern times, Colombia suffered a period of extreme political violence during the 1940s and 1950s, a period known as *La Violencia*, where the Liberal and Conservative parties waged a brutal civil war. Maullin, *Soldiers, Guerrillas and Politics in Colombia* (Lexington Books, Massachusetts 1973,

Chapter 2) details how this basic political cleavage has informed the modern insurgency. Although other geopolitical factors and economic factors have played their part, it is Maullin's view that violence between Liberals and Conservatives outweigh the other contributing factors which shaped the emergence of Colombia's insurgency movement - see p5.

[39] Maullin states that, the National Front arrangement brokered in 1958 in which the Conservatives and Liberals agreed to share the Presidency on a rotating basis has, in some ways, had the effect of accentuating party political identification at a local level. While ameliorating the harsher effects of the electoral violence, it was not entirely eliminated; conditions continued to exist which allowed for the continuation of party political violence. Maullin concluded, writing in about 1973:

“...partisan identification may still serve as a motive or pretext for political violence in Colombia.”

[40] It is not necessary to set out the history of political violence in Colombia in any great detail the purpose of this decision. The point that plainly emerges from the above material is that party political affiliation of “Conservative” or “Liberal” is a factor which historically, has been a significant social identifier in Colombia. Indeed, that this Liberal/Conservative political identity has a long history is expressly noted by the UNHCR *International Protection Regarding Colombian Asylum Seekers And Refugees* (Geneva) September 2002 at para 4 (the UNHCR Guidelines).

[41] Against this historical background, the mother's claim that her family was well known in the X area because of their status as members of a locally small clique of land owners who supported the Conservative Party, is one which is entirely in keeping with the historical record.

[42] The significance of this for present purposes, lies in the fact this identity will always be with her in the X area; it cannot be undone. If she returns there it is simply inevitable that, whether or not she reclaims the land as she has sought to do twice before, she will be identified as a member of the family who owned the land in question; an identity made all the more stark in the local context, because of the family's minority identity as Conservative party supporters amongst a Liberal majority. Accordingly, the paramilitary group presently in control of the land will always be able to identify her if she returns to the X area.

### The struggle for control of the family land

[43] After reviewing the dynamics of modern violence in Colombia in terms of land, labour conditions and resource extraction, the conflict has been cogently described by Sanchez “*Problems Of Violence, Prospect Of Peace*” in Violence in Colombia 1990-2000 (*supra*, chapter 1, at p6) as being characterised by:

“... multi-dimensional violence for the control of resources, territories, social forces, and power ...”

[44] While Sanchez here is talking about the impact of the violence on a particular section of Colombian society, his description of the violence in these terms is apposite. The argument that the conflict between leftist guerrillas such as FARC and right wing paramilitary organisations can be described in terms of a struggle over control of land and attendant economic resources is made by Cubides *From Private to Public Violence: The Paramilitaries, Violence in Colombia 1990-2000* (*supra* at Chapter 6). Cubides notes (at pp132–133) (*verbatim*):

“... To paraphrase Reyes, in Colombia, the struggle for territorial dominion has replaced social conflicts over land. Something analogous has happened with the paramilitaries. From being defenders of newly acquired and threatened agricultural property, they have become controllers of territory. Through that process they have learned that violence, in addition to accomplishing retaliatory objectives to satisfy private aims, is an efficient mechanism of social control.

#### **Economic Rationality According to Income**

The devaluation of human life that is evident in the impudence with which paramilitaries describe their actions against unarmed persons has as its counterpart the explicit description of the economic rationality that permits them to consolidate themselves, secure regional support, and create a social foundation for their bellicose acts: They present themselves as the restorers of the social order lost with the arrival of the guerrillas. Here it is extraordinary how the analyst’s description of the economic mechanisms involved neatly coincide with that of the paramilitaries themselves.

“One-third of the 800,000 refugees”, writes Alejandro Reyes, “lost their lands at the hands of paramilitary groups, who appropriated [them] as booty in the war in order to reconstruct a social base submissive to the great haciendas. Buying cheaply where there were guerrillas, bringing in private security and appropriating the property became an enormous business that combined economic power and private use of force, the two privileged resources available to the mafias and great landowners. ...”

[45] Sanchez (*supra*, p.20) discussing the emergence of the “Self-Defense groups”, notes (*verbatim*):

“... The Self-Defense groups have their own military commands, a radio station, a regular newspaper, uniforms, emblems, and a model to apply, “Puerto Boyacá.

That was the first region from which the guerrillas were completely expelled in the late 1980s. ...”

[46] The Authority here notes the reference to Puerto Boyaca. This is an area that is considered part of the *Medio-Magdalena* (or middle Magdalena) region and is situated adjacent to the area in which the family land is located. The time line chimes with the mother’s account. It is entirely plausible that after their success in expelling the guerrillas from Puerto Boyaca, the paramilitaries would turn their attention to the adjoining areas such as X.

[47] Herein lies objective underpinning to the claim by the mother that the source of her continuing fear of being killed, lies in the fact that their land situated in a fertile rural area, has become seen by both FARC and the particular regional AUC progenitor at that time, as being a strategic resource worth controlling. The mother pinpointed the land as being close to a prominent road. This would only enhance the strategic worth of the land in the eyes of the armed groups.

[48] Against this background, it can readily be seen why the paramilitaries controlling the family’s land would be reluctant to see the family seek to assert their lawful claim to the land. This provides an objectively established context to both the murder of the mother’s uncle in 1994, when he sought to regain control of the land and the threatening telephone calls received by the mother when she returned to Colombia in 1992 and 1999, during which time she made enquiries about the land.

#### The Paramilitary forces in Colombia:

[49] In historical terms the AUC are a relatively recent incarnation in the Colombian political scene. While the left wing guerrilla groups, such as the *Fuerzas Armadas Revolucionarias de Colombianes* (FARC), *Ejército de Liberación Nacional* (ELN) have their origins in the post-National Front political turmoil of the early 1960s – see Maullin (*supra*, 27–41); by comparison the *Autodefensas Unidas de Colombia* (AUC) has its origins elsewhere.

[50] A useful summary as to the formation of the AUC, can be found in the UNHCR Guidelines which, at paras 14-15 note (*verbatim*):

“... ”

**Paramilitary self defence groups:**

Paramilitary organisations emerged in the early 1980s, initially to provide protection to large landowners and drug lords against the guerrillas who had targeted these groups for kidnapping and extortion. The largest such group, the United South Self-Defence Forces of *Córdoba* and *Urabá* (ACCU) appeared in the early 1990s and constitute a merger between paramilitaries and groups established by the military to act as death squads. Headed by two brothers trained as death squad leaders, Carlos and Fidel Castano, the ACCU forms the nucleus of the United Self-Defence Forces of Colombia (AUC), an umbrella group led by Carlos Castano and formed around 1997. Between 1992 and 2001, the AUC grew from 850 to over 8,000 combatants.

Using extreme brutality toward civilian populations, the group has, “killed tortured and threatened civilians suspected of sympathising with guerrillas in an orchestrated campaign to terrorize them into fleeing their homes”, in an effort to supplant rebel control of coca growing area and strategic territory. ...”

[51] The AUC has a well documented history of human rights abuses. Human Rights Watch in its comprehensive report *War Without Quarter: Colombia and International Humanitarian Law* (October 1998, at part 4) chart the emergence of the AUC as an umbrella paramilitary organisation and details the litany of human rights abuses attributed to its’ members including murder, torture and the taking of hostages (see part 4 generally). Further, the annual reports of both Human Rights Watch and Amnesty International for the years 1998 and 1999 confirm the implication of the AUC in multiple and egregious human rights abuses.

[52] The Authority finds, there is ample country information to support the mother’s belief that, at the time she was last in Colombia (1999), she might have been killed by the paramilitaries who had seized the land.

[53] Such an historical risk is however, insufficient to found refugee status. That the mother’s account fits within the wider context of modern violence in Colombia does not, without more, make her a refugee. Her fear must be currently well-founded as at the date of determination of her appeal - see *Refugee Appeal Number 70366/99* Re C (22 September 1997) [1997] 4 HKC 236. It is thus necessary to consider the current position in relation to the AUC.

#### Contemporary political events and the AUC

[54] Since the appellants departure from Colombia in 1999, there have been significant developments in Columbia.

[55] Firstly there was a change in Government in 2002. The election of the Uribe administration saw a marked change in governmental policy towards the

AUC. For its part, the AUC declared a unilateral ceasefire in December 2002 – see International Crisis Group *Demobilising the Paramilitaries in Colombia: An Achievable Goal* (5 August 2004) at p4. It entered into agreements with the new Government. The Relito I Accord, signed on 15 July 2003, stipulated the opening of formal negotiations geared towards achieving the demobilization of Colombia's main paramilitary group by the end of 2005 (*supra* at p3).

[56] International Crisis Group (*supra*, at p4) note that despite the signing of the Relito I agreement, reports of human rights abuses continue. It cites a report by the Colombian Peace Commissioner that states between December 2002 and December 2003, the AUC committed 362 homicides, 16 massacres and 180 kidnappings.

[57] Further, in *Colombia, State Protection (January 2003-March 2004)* (May 2004) the Research Directorate of the Canadian Immigration and Refugee Board (at para 4.1), note the increased use by paramilitary groups of targeted assassinations and threats as opposed to massacres. It cites a study published by the Colombian Commission of Jurists in November 2003 which reported increased use of torture by all sides to the conflict.

[58] The AUC and the government entered into a new Accord (Relito II) on 13 May 2004. Notwithstanding this, there continue to be reports of ceasefire violations. Government sources claim that AUC has been responsible for three massacres and 25 homicides since January 2004. NGOs and human rights organisations have registered a further six homicides, two massacres and 12 death threats – see International Crisis Group (*supra* at p4-5).

[59] There is some doubt as to the future of these agreements as a device to eliminate paramilitary violence. The International Crisis Group report that on 25 May 2004, the AUC published a new negotiating agenda; one which departs from its previous understanding with the government and states:

- (a) The AUC's mission would not cease after demobilization but would continue until "the end of the conflict";
- (b) The AUC would not pursue negotiations under the threat of being brought to justice or subject to judicial process;

- (c) The AUC would not yield any areas they control to the insurgent and will continue to protect those regions.

[60] In relation to this, International Crisis Group note (*supra* at p8) (*verbatim*):

“One real danger of such an arrangement would be preservation of links between the armed forces and the demobilised paramilitaries. The paramilitaries would no longer be involved in combating the insurgents but would act as a kind of massive neighbourhood watch in direct communication with local military and police commanders.”

[61] Furthermore the viability of the demobilization process envisaged by the Relito accords is further weakened by the dispute between the government and the AUC as to the Alternative Sentencing Bill for crimes committed by AUC. This has been modified by the government in light of domestic and international concern that this draft Bill was not consistent with Colombia’s obligations under international law; amendments rejected by the AUC (*supra* at pp5 and 6).

[62] Given the above factors, the real risk to the mother arising from her family being targeted by the paramilitaries is not eliminated, the Authority finds, by the mere fact the AUC has declared a ceasefire and entered into the Relito Accords. It is clear that paramilitary violence, while existing at lower levels, continues nonetheless. There must be serious doubt as to the viability of the Relito Accords, as a process to reduce paramilitary violence to a level which would mean the Authority could say with any confidence, that the risk to the mother has, for these reasons, fallen below the real chance threshold.

#### State protection

[63] What distinguishes the paramilitaries from other armed non-state groups in Colombia are the repeated allegations of links between them and the Colombian military. This has been the subject of two reports by Human Rights Watch namely *Colombia, The Ties That Bind: Colombian Military And Paramilitary Links* (February 2000) and *The Sixth Division Military – Paramilitary Ties and US Policy in Colombia* (September 2001).

[64] Summarising the former, Human Rights Watch state (at p2):

- (a) As recently as 1999 there was compelling evidence that army officers set up a paramilitary group using active duty, retired and reserved duty military

officers who effectively operated alongside army soldiers in collaboration with them.

- (b) There was credible evidence of a sharing of intelligence and weapons, between army officers and paramilitary organisations. This alliance between military intelligence, paramilitary groups and hired killers is national in scope.

[65] As to the latter, Human Rights Watch summarises:

- (a) The “sixth division” is a phrase used in Colombia to refer to paramilitary groups. Colombia’s army has five divisions. Many Colombians nevertheless told Human Rights Watch that paramilitaries are so fully integrated into the army’s battle strategy, co-ordinated with its soldiers in the field and linked to government units via intelligence, supplies, radios, cash and common purpose that they effectively constitute a sixth division of the army. – at p1.

- (b) Noting that the situation in Colombia is more complex than this perception implied, Human Rights Watch state (*verbatim*):

“... Nevertheless, the reference to the “sixth division” reflects a reality that is in plain view. Human Rights Watch has documented abundant, detailed and compelling evidence that certain Colombian army brigades and police detachments continue to promote, work with, support, profit from and tolerate paramilitary groups, treating them as a force, allied to and compatible with their own. ...”

- (c) Officers at brigade and battalion level and in some police detachments regularly flout or ignore orders to break ties with paramilitary groups. It notes that the brigades implicated in this collusion include brigades that operate in Colombia’s largest cities including the capital.

[66] Both Amnesty International’s *AI World Report: Colombia* (2003) and Human Rights Watch *Annual Report: Colombia 2003* continue to make reference to military-paramilitary collusion. Human Rights Watch note the Governments claims that this collusion is not a matter of Government policy or tolerance but state nonetheless:

“... the range of abuses clearly depend on the approval, collusion, and tolerance of high ranking officers. Yet, the Uribe administration has yet to arrest paramilitary leaders or high ranking members of the armed Forces credibly alleged to collaborate with paramilitary forces”



Similarly, the United States Department of State *Annual Report On Human Rights Practices 2003: Colombia* (25 February 2004) at section 1a, notes that while progress has been made in some cases, in many cases it has not and concludes that impunity for military personnel who collaborate remains a problem. Amnesty International (*supra*) state little progress is being made on prosecuting such persons. It notes that reforms to the Constitution threaten to consolidate impunity in cases of human rights violations. This, in conjunction with a failure to ensure strict application of an earlier ruling by the Colombian Constitutional Court would, Amnesty International state, increase the military's control over the judicial process.

[67] It has been a long standing feature of New Zealand refugee law that a failure of state protection can be constituted not only when persecution is committed by the state concerned but also when it is either:

- (a) condoned by the state concerned; or
- (b) tolerated by the state concerned; or
- (c) not condoned or tolerated by the state concerned but nevertheless present because the state either refuses or is unable to offer adequate protection.

see - *Refugee Appeal No 11/91 Re F* (5 September 1991); *Refugee Appeal No 2039/93 Re MN* (12 February 1996); *Refugee Appeal No 71462/99* (27 September 1999); *Refugee Appeal No 71427/99* [2000] NZAR 545.

[68] For the purposes of the present decision there is little to be gained by embarking on an analysis as to whether the position of the Colombian state as regards paramilitary violence is appropriately categorised in (a), (b) or (c) above against this background. As is noted by the Authority in *Refugee Appeal No 71427/99* (*supra* at para [66], p568):

“In our view the proper approach to the question of state protection is to enquire whether the protection available from the state will reduce the risk of serious harm to below the level of well-foundedness, or, as it is understood in New Zealand, to below the level of a real chance of serious harm. The duty of the state is not, however, to eliminate all or risk of harm.”

[69] Thus the Authority rejected the approach of the House of Lords in *Horvath v Secretary of State for the Home Department* [2000] 3 WLR 379 in so far as it is

suggested, at least in the context of non- state actors, that provided there was a system for protection in the home country and a reasonable willingness by the state to operate it that met the state's duty to protect in the refugee context.

[70] It may be the case that where the actions complained of are committed by state actors as opposed to non state actors, the duty of the state to take appropriate measures is more immediate. Hathaway *The Law Of Refugee Status* (Butterworths Toronto 1991, 125) speaks of "timely and effective rectification" – a phrase adopted in the context of brutality by some Lithuanian policemen towards a member of the local communist party by Sedley LJ in *Svazas v Secretary of State for the Home Department* [2002] INLR 197, 204 (UKCA).

[71] That said, in terms of the focus of the inquiry into state protection, it makes little difference whether the agent of persecution is the state or a non-state actor. Whatever the content of the states' duty to protect in terms of state or non state actors, in either case, the steps or initiatives taken, to be material for the purposes of the Convention, must have the net effect of reducing the risk of harm to below the real chance threshold.

[72] As stated in *Refugee Appeal 71427/99* (supra) such measures need not eliminate all risk but absent the end point of reduction of risk of serious harm to below the real chance threshold, the means employed or best intentions of the state are non determinative of the state protection issue. This is the point made in *Noune –v- Secretary Of State For The Home Department* [2001] INLR 526, 539 – 540(UKCA).

[73] The question remains the same irrespective of the status of the agent of persecution. Indeed, Simon Brown LJ in *Svazas* (supra, para [54], at p 217) appears to recognise that the state/non - state distinction, has effect in terms of the state protection inquiry, only at an evidential level in establishing the fact of lack of state protection, (that is, it will be evidentially easier to establish when a state agent is closely involved), rather than raising/lowering the standard depending on which side of the state/non state divide the claimed agent of persecution is said to fall.

[74] Insofar as Sedley LJ in *Svazas* ( supra at para [16], p 204) suggests that in relation to non state agents, the standard of protection is somehow less for the

purposes of the Convention then, for the reasons set out in *Refugee Appeal No 71427/99* (*supra* at paras [62] – [67]) this reasoning is not to be followed. The Authority observes that it appears from the report, that the decision in *Noune* was not before their Lordships in *Svazas*. In any event, it is far from clear that Sedley LJ was doing anything other than making the simple point that it will be easier for a state to control its own agents, rather than private individuals and evidence of a failure to take prompt and effective remedial action will be a potent indicator of a failure of state protection. Thus, while the starting point of analysis may be different, ultimately, in either case, the question is the same: it is the practical effect of the steps taken on the risk that counts – (*supra* at paras [21] – [22], pp206 – 207 and paras [36] – [37] at pp212 – 213).

[75] The significance of this is that the mother's direct fear in *C* is from the AUC, technically a non state actor. Yet, in terms of establishing a well-founded fear across the country, her claim is based on links (including intelligence sharing) between the AUC and elements within the security apparatus, a state actor. This case thus highlights the artificiality of seeking to draw too great a distinction on this basis and, at least in the context of refugee law, reaching into over elaborate inquiries as to the nature of the state's duty to protect in each case. Once a real chance of serious harm has been established, and regardless of the identity of the agent of persecution, the focus of the refugee determination process falls on the effect of the measures taken, if any, by the state on the predicament of the claimant. It is not about the apportionment of blame – see *Refugee Appeal No 71427/99* at [63].

[76] The simple fact is that information available to the Authority shows there continues to be ongoing reports of not only collusion but crucially, also impunity for those state agents known, or suspected, of collusion. This does not sit easily with Hathaway's notion of "timely and effective rectification". This marriage of collusion and impunity does not evidence effective state protection.

[77] In light of the above the Authority finds that the Colombian state cannot offer the mother effective protection such that the risk to her falls below the real chance threshold.

#### **CONCLUSION ON RISK OF SERIOUS HARM AT HANDS OF AUC**

[78] The Authority finds, for the reasons given above, that there is a real chance that if returned to X the AUC will try and kill the mother. The first principal issue is answered in the affirmative.

#### **NEXUS TO CONVENTION REASON**

[79] The Authority notes that the mother's family have been accused by the paramilitaries of knowingly sheltering FARC guerrillas. Whilst it may be argued this is simply a device used by the paramilitaries to justify the expropriation of the land for their own purposes, and that the real driving motive of the paramilitaries was economic gain, nevertheless, it cannot be said that the imputation by paramilitaries of a political opinion to the mother, is one which has not in any way informed her predicament.

[80] There is country material to place the conflict between the paramilitary groups and the guerrilla movements on an ideological plain at the time the land was effectively appropriated in the 1980s. To the extent that this conflict may have, to some extent, morphed over time into something less ideologically driven, the Authority observes it is cold comfort to the persecuted to know, that a particular political opinion, their race, or other Convention protected interest is being cynically exploited by the agent of persecution as justification for the control of scarce and/or strategic resources and the maintenance of economic power.

[81] The underlying reality is that the Convention ground is the articulated reason for the serious harm. The Authority has no doubt the imputed political opinion would be used by the paramilitaries as justification for killing the mother. Whether the agent of persecution (here the AUC) actually means it or is cynically exploiting it (i.e. their motive), is irrelevant. Either way, it is inappropriate to characterise this factor as remote and speculative to the point of irrelevance in terms of informing the mother's predicament— see *Refugee Appeal No 72635/01* (6 September 2002) [2003] INLR 629.

[82] In the alternative, the Authority finds the predicament of the mother arises by her membership of her particular family which would form a particular social group for the purposes of the Convention

#### **CONCLUSION ON PRINCIPAL ISSUES – THE MOTHER**

[83] There can be no doubt that should the mother return to the X area, there is a real chance that she would be killed by the paramilitaries for a Convention reason. The question arises as to whether or not she has available to her a viable internal protection alternative elsewhere in Colombia.

#### **INTERNAL PROTECTION ALTERNATIVE**

[84] As touched on above, a significance of the continuing reports of active collusion between the security forces and the paramilitaries (including the sharing of intelligence) discussed above, is that it lends considerable weight to the contention of the mother that she will not be able to seek effective internal protection anywhere in Colombia. It is not insignificant that the mother has been located each time she returned to Colombia and threatened. Even though she has been absent from Colombia for some time, the Authority cannot be confident her whereabouts, once they became officially known, would not be made available to the paramilitaries via elements within the state's security apparatus.

[85] Furthermore, the risk that the mother's location would be made known to the paramilitaries is, the Authority's finds, enhanced by the Colombian government's use of an increased network of collaborators and informants.

[86] The International Crisis Group Report *Colombia: President Uribe's Democratic Security Policy* (13 November 2003) note that more than 1.5 million citizens have allegedly been enrolled in the government's network of collaborators and informants. Of this total, collaborators form the majority and are people who inform the military and the police about any suspicious activity in the municipalities or towns and villages. They do not receive money. Informants on the other hand, do receive money and are paid for information which helps to catch members of the armed groups. The normalisation of a network of collaborators, who effectively watch the neighbourhood can only increase the possibility that newcomers to the areas are noticed, checked and their presence made known to the authorities.

[87] This factor must be viewed in context of a country polarized by decades of violence. Sanchez (*supra*, at pp13–14) observes that (*verbatim*):

“... As a result of multiple violence, daily life in Colombia has been deeply transformed. *Forms of sociability* (such as parties, evening meals in restaurants) have been greatly reduced, *recreational activities* for children in the streets and parks have been limited (due

to the threat of kidnapping), *forms of dress* in the streets have become very austere (women, for example, cannot wear jewelry or carry valuables). Homes are becoming real prisons surrounded by iron fences and metal bars. There has been a growth in the construction of closed communities, which can be considered a type of spatial apartheid, with impassable barriers for “undesirables”. In neighborhoods in many cities, the streets, especially for young people, “have been sown with death”, they are zones of socialisation for criminals. In Colombian cities, walking on the street or hailing taxis at night are high-risk activities. In a word, all collective practices have been affected in one way or another by the various forms of violence.

As a consequence of these trends, the already fragile public sphere has shrunk and, in a way, has become a world of fear and force. In contrast, the private sphere is cherished and considered the world of refuge and safety. In Yifu Tuan’s expression, the streets have become “landscapes of fear” – fear of terrorists, fear of thieves, fear of neighbors, fear of security guards, fear of beggars, and even fear of the victims of violence *stretched out in the streets*. This state of affairs called forth an explosion of private guards who watch over residences, public buildings, and banking institutions, and, in extreme cases, it has brought forth community self-defense groups. The city has become a world of inhabitants living *incomunicado*.”

[88] The picture that is painted is of a society that has become suspicious of strangers and is very much an inward looking society. The ability of the mother to keep her identity effectively hidden from those watching over the public and private spaces in a proposed site of internal protection would be very limited. The possibility that her identity would be demanded to be known is a real one. If so, the chance this would be relayed to the AUC via elements within the security apparatus, given the evidence of collusion, cannot readily be dismissed as remote or speculative.

[89] In relation to internally displaced persons in Colombia generally, UNHCR staff have spoken of a presence of armed groups in the shanty towns that have sprung up outside Bogotá - see William Spindler *Colombia’s Congress Calls Attention To “Grave Human Rights Situations” Of Bogotá’s Displaced Population* UNHCR Press Release (23 August 2004). This is likely to be the situation generally and the possibility some of these armed groups are AUC affiliated is real.

[90] As to this issue, the Authority observes finally, that the UNHCR guidelines caution against the application of an internal protection alternative to Colombia claimants (*supra* at para 74). Amongst the factors giving rise to this advice is said to include the fact that illegal armed groups have established effective communication networks and are able to trace and reach targets throughout Colombia.

[91] In light of all of the above matters the Authority is not satisfied that the risk of serious harm to the mother in the X area will fall below the real chance threshold simply by moving elsewhere in Colombia.

#### **THE DAUGHTER'S CLAIM**

[92] The claim made on her behalf is that should she be returned to Chile, her paternal family will effectively ensure that she is removed to Colombia where she will face a fear of being killed by the paramilitaries. Given the daughter's life has been directly threatened in 1999 because of her membership of this family, and is a potential inheritor of the land, the daughter's risk is as real as that of the mother's should she be returned to Colombia.

[93] The daughter of course is not a citizen of Colombia but rather a citizen of Chile: the claimed persecution arises in her case as she will be unlawfully rendered to Colombia by her paternal family, thereby exposing her to harm. Having accepted the credibility of the mother, there is no reason for the Authority to find this aspect of her evidence incredible. Aspects of this part of her account are supported by documentary evidence. To the extent necessary the Authority extends the benefit of the doubt on this point. The first principal issue is answered in the positive for the daughter.

[94] As for the Convention reason this is supplied by her being a member of a particular social group, namely the family of her mother.

#### **SUMMARY OF CONCLUSIONS**

- (a) The mother's evidence is credible.
- (b) The mother's fear of being killed on return by the paramilitaries is objectively well-founded.
- (c) The claim that the daughter will be sent on to Colombia from Chile is accepted. The daughter is at risk of being killed if sent to Colombia.
- (d) The imputation of a political opinion to the mother by the paramilitaries is a sufficient contributing factor to her predicament. Alternatively the mother's

predicament is caused by her membership of a particular social group. The daughter would be killed because she too is a member of the family.

- (e) The mother and the daughter cannot safely relocate elsewhere in Colombia.

**FEAR OF HARM FROM FARC**

[95] Having regard to the Authority's findings as to a well-founded fear of the appellants being persecuted at the hands of the AUC, it is not necessary to address the appellant's other argument that each has a similar fear at the hands of FARC.

**CONCLUSION**

[96] For the reasons set out herein, the appeals of the mother and the daughter are allowed. The principal issues are answered in the positive for each. They are refugees within the meaning of Article 1A(2) of the refugee Convention. Refugee status is granted to both.

.....  
B Burson  
Member