

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

**REFUGEE APPEAL NO.71564/99**

**AT CHRISTCHURCH**

<b><u>Before:</u></b>	G J X McCoy (Member)
<b><u>Counsel for Appellant:</u></b>	Ms Jay Shadforth and Mr Mark Williams
<b><u>Representative for NZIS:</u></b>	No appearance
<b><u>Date of Hearing:</u></b>	13 July 1999
<b><u>Date of Decision:</u></b>	14 October 1999

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**DECISION**

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This is an appeal from a decision of the Refugee Status Branch of the New Zealand Immigration Service (RSB) dated 18 June 1999 declining to grant refugee status to the appellant, a citizen of Colombia.

This appeal was heard at Christchurch Women's Prison on 13 July 1999. The appellant had been in custody there since 10 June 1999, having been deported from Japan the day before. She had unsuccessfully sought to enter Japan on an unlawfully obtained Spanish passport.

At the conclusion of the hearing the Authority adjourned for 30 minutes and thereupon delivered a written decision (as required under its Terms of Reference) allowing the appeal of the appellant and that of her two sons included in her application for refugee status.

It was truly exceptional for the Authority to deliver a decision on the day of the hearing but the case was overwhelmingly strong and an adjourned decision may not have been available for some months as the Authority had a series of international commitments immediately following the hearing date. Justice

required a prompt decision. Upon the delivery of the decision allowing her appeal, the Authority learned that the appellant was released from custody within 90 minutes at the behest of the New Zealand Immigration Service. This in itself is a tribute to the rule of law in action.

### **THE DECISION DELIVERED IMMEDIATELY AFTER THE HEARING**

The Authority reproduces as part of this formal decision the handwritten decision delivered at the Prison on 13 July 1999. The appellant and her Counsel were informed that the Authority would deliver a fuller decision amplifying various aspects of decision when circumstances permitted.

“The appellant is a Colombian national having been born there on 29 May 1958. In Colombia she gave birth to four sons out of her marriage to LF.

I find that her father, mother, sister and two elder sons were executed by the Frente de la FARC (“FARC”) in Colombia in the first week of January 1995. As a result, panic-stricken and fearing for her life the appellant and her two remaining sons (AAFP born 2 July 1978 and AMFP born 5 July 1985, both of whom are included in the application and this appeal) fled to Venezuela. After a series of traumatic incidents the appellant arrived in New Zealand, being forced by circumstances to leave her two sons temporarily behind in Thailand.

I have found the appellant to be entirely credible in her testimony. Her life has been harrowing and shocking.

She has established a well-founded fear of persecution based on imputed political belief, in relation to the FARC. She is on their death-list because of the actions of her father who had befriended FARC before turning against them. In return FARC exterminated her family for their disloyalty. FARC intends to kill her and her two remaining sons as part of their policy of absolute retaliation in respect of those who will not actively support them in their political attempts to overthrow the Government in Colombia.

The critical issue is whether the appellant ought to relocate to another part of Colombia.

It is apparent from the DOS and Amnesty International materials so helpfully prepared by Counsel for the appellants that Colombia is now experiencing a significant crisis that is tearing the country apart. FARC and other guerilla groups are on the offensive. See the article in the New Zealand Herald of 12 July 1999, para 1. This is consistent too with the Reuters report of 11 July 1999 in the New Zealand Sunday Star Times page A13. The Authority made both these articles published respectively two and one days before the hearing available to Counsel.

The appellant is a fragile lady. Expert evidence corroborates the Authority’s own observation borne out of considerable experience of these types of cases that she is suffering from Post Traumatic Stress Disorder.

I have heard poignant testimony from Mary Kamo, Chaplain to the Christchurch Women’s Prison, which strengthens the case for the appellant by showing her vulnerable personality and circumstances.

I have analysed that the actual existence of a risk free area in Colombia for the appellant is now problematical. The stability of the area is in real doubt. The urban areas are already overburdened. There is no assurance of safety for her and her two sons. FARC is aggressive and determined.

When the appellant's age, gender, health and family situation are added to the calculus, together with her social vulnerabilities, it is not reasonable or conscionable to require this lady to return to the country which carries the graves of her family, murdered in such appalling circumstances.

In conclusion, the appeal is allowed. Refugee status is granted to the appellant and both her sons. The family will be united again."

## **COLOMBIA – COUNTRY CONDITIONS**

This is the first occasion in which the Authority has ever had to consider an appellant claiming refugee status in relation to Colombia.

### **1. Civil War Background**

The Government in Colombia continues to face a serious challenge to its control over the national territory, as longstanding and widespread internal armed conflict and rampant violence persist. The principal participants in the civil war since the late 1950's have been government security forces, paramilitary groups, guerrillas, and narcotic traffickers. Paramilitary groups and guerrillas attacked unarmed civilians suspected of loyalty to an opposing party in the conflict (DOS Report 1998, p 545).

The two major guerrilla groups, the Revolutionary Armed Forces of Colombia (FARC) and the National Liberation Army (ELN), consist of an estimated 11 000 to 17 000 full-time combatants organised into more than 100 semiautonomous groups. The FARC and the ELN, along with other smaller groups, exercised a significant degree of influence and initiated armed action in nearly 700 of the country's 1 073 municipalities during 1997 and 1998 (DOS Report 1998, p 545). The major guerrilla organisation received a significant part of their revenues from fees levied on narcotics production and trafficking. Guerrillas supplanted absent state institutions in many sparsely populated areas of the national territory (DOS Report 1998, p 545).

Paramilitary organisations have played a large role in the civil war in Colombia. In recent years the Colombian government has repeatedly renewed its public commitment to vigorously tackle paramilitary organisations, but it has been widely reported that many such groups operate with the support and complicity of the

armed forces themselves (Amnesty International, p 5; DOS Report 1998, p549). There has been no authentic political will to tackle such organisations and no effective action has been taken to dismantle them. The National Police were also implicated in extrajudicial executions of young men suspected of sympathising with guerillas (Human Rights Watch, p 111). In areas where paramilitaries were present, police officers were directly implicated in joint army-paramilitary actions and sometimes organised paramilitaries and supplied information for them to assemble death lists. Army-backed paramilitary groups are now responsible for two out of every three political killings in Colombia. The terror tactics used by these groups play an increasingly central role in the armed force's counter insurgency war against the armed opposition (Amnesty International, p 5).

According to latest reports (DOS Report 1998, p 546) paramilitary groups throughout the country murdered, tortured and threatened civilians suspected of sympathising with guerrillas in an orchestrated campaign to terrorise them into fleeing their homes, thereby depriving guerrillas of civilian support.

The civilian judiciary is inefficient, severely overburdened by a large case backlog and undermined by intimidation and the prevailing climate of impunity. Less than three percent of all crimes committed nationwide are prosecuted successfully. This situation remains at the core of the country's human rights problems (DOS Report 1998, p 546). Violence against women and children is a serious problem (DOS Report 1998, p 546).

The cycle of violence resulted in the deaths of 2 000 to 3 000 persons in 1998. Violence and instability in rural areas displaced 300 000 civilians from their homes during the year, with the total number of internally displaced citizens during 1995-1998 probably exceeding 750 000. Forced displacement in 1998 occurred in several regions: the northern departments of Antioquia, Bolívar, Cesar and Norte de Santander; the Middle Magdalena region and the region known as Uraba, bordering Panama and including northern Choco department. Forced displacement spread to new areas formerly at the margins of conflict, including the departments of Choco and Putumayo (Human Rights Watch p 111). Internally displaced citizens are forced to seek haven in already overburdened urban areas where unemployment is high, education for children is not possible and housing conditions are unsanitary (The Christian Science Monitor , p1).

## **2.1 FARC**

The FARC, established as a rural-based, pro-Soviet guerrilla army in 1964, is the largest, best-trained and best-equipped insurgent organisation in Colombia. The group is comprised of about 8,000 – 12,000 armed combatants and an unknown number of supporters mostly in rural areas (Patterns of Global Terrorism, p 19).

## **2.2 Activities**

The group carries out armed attacks against Colombian political, economic, military, and police targets. Many members pursue criminal activities, and carry out hundreds of kidnappings for profit annually. The group has well-documented ties to narcotics traffickers, principally through the provision of armed protection for coca and poppy cultivation and narcotics production facilities, as well as through attacks on government narcotics eradication efforts (Patterns of Global Terrorism, p 19). In 1998 they also began bombings of Colombia's oil pipelines.

According to recent reports (DOS Report 1998, p 547) the FARC and the ELN regularly attacked civilian populations in 1998, committed massacres, and held more than 1 000 kidnapped civilians with ransom payments serving as an important source of revenue. In some places, guerrillas collected "war taxes", pressed the citizenry into their ranks, forced small farmers to sow illicit crops, and regulated travel, commerce and other activities. FARC earns 40% of its estimated \$1 billion annual income from such taxes (Time p 31).

According to CINEP (an NGO) guerrillas committed 160 homicides outside of combat during the first nine months of the year. Local elected officials or candidates for public office, teachers, civic leaders, business owners and peasants opposed to their political or military activities were common targets. Communities controlled by guerrillas also experienced killings described as cleansing of criminal antisocial elements (DOS Report 1998, p 552).

Kidnapping was an unambiguous, standing policy and major source of revenue for both the FARC and ELN (DOS Report 1998, p 554; Human Rights Watch p 112). Of the 2216 kidnappings reported during 1998, 667 were attributed to the FARC. Reports indicate serious human rights abuses carried out by FARC including torture of detained prisoners (DOS Report 1998, p 554; Human Rights Watch p 112). Guerrillas have also been reported to forcibly recruit children to serve as soldiers (DOS Report, p 558).

On December 28 and 29 1998, the FARC's 18<sup>th</sup> front launched a major attack against the personal headquarters of the leader of the AUC paramilitary umbrella group in Cordoba. The guerrillas tortured and decapitated noncombatant civilians, and attempted to justify these killings with allegations that the civilians were paramilitary supporters (DOS Report, p 558).

It appears that FARC officials believe they could govern their own nation. Along the Caguan River, in southern Caqueta province FARC have created their own public services, including agricultural banks, and set up toll booths along the roads for improvements. FARC recently held a local election under quasi-Marxist rules. A FARC leader was reported as declaring "We have every intention of governing as much of this country as we can" (Time p 31).

### **2.3 Operations in Cali**

In recent years there have been reports of FARC's operations in Cali.

In May 1996 FARC rebels were involved in a shoot out on the outskirts of Bogota. Military sources said the FARC had been slowly building up its forces around Bogota in an apparent bid to surround the capital (Periscope Daily Defence News, p 1).

In October 1997 FARC was reportedly urging various candidates to give up their hopes of being elected in the Cauca area election in Cali. If they refused the group allegedly threatened to apply the "people's justice" by making them military targets (BBC Summary, October 1997 p 1).

In November 1997 FARC rebels blew up two army trucks southeast of Cali (Agence France Presse, p 1).

## **3. Recent Developments**

### **3.1 Peace Talks**

President Pastrana, during his campaign and upon assuming office, placed a high priority upon achieving a lasting eternal peace. On July 9 1998 he initiated peace talks by meeting with FARC leader Manuel Marulanda Velez. In a pre-negotiation

concession to the FARC, the Government committed to withdraw its military forces from five southern municipalities from November 7 for a 90-day period, effectively turning the area over to FARC control (The Economist p 41; DOS Report p 561; Time p 31; Patterns of Global Terrorism p 19). President Pastrana travelled to the demilitarised area on 7 January this year to inaugurate peace talks but Marulanda did not attend, and this has led analysts to doubt the FARC's interest in a peace deal. It has turned the demilitarised zone into its own mini State, and a haven for kidnapping and drug-trafficking operations and forced recruitment (The Economist, p 41).

### **3.2 FARC and Paramilitary Activities**

There have been reports that authorities in Venezuela and Colombia recently intimidated refugees into returning from Venezuela to Colombia, despite the continuing paramilitary offensive in the region. Meanwhile over six hundred refugees left the village of La Pista for Venezuela (Human Rights Watch 1999 p 1; The Associated Press p 1).

In June this year paramilitary groups were reported to have launched a major offensive in the FARC controlled territory of the Catatumbo River valley, sending hundreds of residents fleeing into Venezuela. On 29 May 1999 forces of the AUC paramilitary group entered the Catatumbo region of Colombia, detaining and killing people whose names appeared on their list (Human Rights Watch 1999 p 1; Associated Press p 1). FARC have declared that they will fight to maintain control of the region where they charge taxes on coca and settle property disputes.

On 13 March 1999 a joint security operation in Cali left dead two founders and leaders of the FARC (BBC Summary March 1999, p 1).

On 30 May 1999 over one hundred and fifty people were abducted from a church in Cali, and the incident was blamed solely on the ELN. However, reports have indicated that FARC guerrillas may have joined forces with the ELN to stage the kidnap attack together (BBC Summary June 1999 p 1).

On 11 July 1999 it was reported at least 40 counter insurgency troops and 38 FARC insurgents were killed in heavy clashes 25 kilometres south of the capital. The region's south and east of Bogota have long been considered a stronghold of

FARC and provide a natural springboard for attacks on the capital. (Reuters, New Zealand Sunday Star-Times 11 July 1999, A13).

On 12 July 1999 the Colombia Government declared a dusk-to-dawn curfew across more than 30% of the country, including the outskirts of Bogota in an effort to contain a nationwide Marxist rebel offensive. 35,000 people had been killed by FARC in the last 10 years. FARC and the smaller National Liberation Army (ELN) have a combined fighting force of some 20,000 combatants and control up to half the country, mostly rural areas. (Reuters, New Zealand Herald 12 July 1999, B3).

### References

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- “General says FARC rebels helped ELN group in church kidnapping” *BBC Summary of World Broadcasts*, 5 June 1999
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- “Colombia rebels force Govt to impose curfew” *Reuters, New Zealand Herald* 12 July 1999, B3

### **THE APPELLANT’S CASE**

The appellant was born in Cali in 1958. She was married in 1974 and divorced in 1985. There were four sons of the union. The appellant’s father had been for some considerable number of years providing food and money to FARC. Everyone in the family was aware of these facts. The father had no option but to provide these resources – it was not a voluntary matter. To be asked by FARC to provide food and money to them was a matter of life and death. Neighbours and others in the small rural town of C in which the appellant’s father lived, were all at the mercy of FARC which was extremely strong in that area. Apart from FARC, ELN 19 and UP (other guerilla organisations) levied demands on the ordinary people in the area.

On one occasion the appellant’s father simply did not have enough to satisfy the demands from FARC. The appellant, at the father’s request, sent two of her sons with money and some hens to the father’s place, some 100 kilometres from where she lived. FARC, for reasons that are unknown, but are probably to do with the father’s initial inability to provide the resources, FARC burnt down the father’s house incinerating him, the appellant’s mother, sister and her two elder sons. This type of incident was typical when FARC felt slighted. The appellant was overcome when she learned the news. She travelled to the family home and found a number of leaflets that had been left behind by FARC reminding people to co-operate with them, on demand. Some of the neighbours had been terrorised in this way before and leaflets advertising the malevolent revenge that would follow were scattered deliberately around. FARC operate on the basis that the sins of one individual are the sins of the family. The father simply did not have the means to supply FARC – that was a fatal mistake.

The appellant and her remaining two children fled from Colombia with help from relatives. Eventually the appellant was able to travel to South Korea. This oddity of destination is explicable on the basis that Colombians do not need a visa to

enter South Korea, as Colombia had provided welfare assistance to South Korea immediately after the Korean War and South Korea continues to recognise that assistance in its immigration policy.

After spending some time in South Korea working as a machinist in a factory the appellant and her sons left South Korea with the intention of trying to enter Australia. After a short trip to the Philippines, which was the cheapest airfare, the appellant and her sons arrived in Bangkok. There she worked (as did the boys) in making clothes. The appellant could only acquire enough money for her own ticket to fly to New Zealand as she had used her money to obtain a false Spanish passport in part exchange for her Colombian passport. A Spanish passport meant visa free entry into New Zealand.

On 24 April 1998 the appellant arrived in New Zealand on the false Spanish passport. Her motive in coming to New Zealand was purely work related. She need to work to pay for her sons tickets to New Zealand. In December 1998 she was married in Auckland to a New Zealand citizen, ET. Within four months they had separated. The appellant could not earn enough in New Zealand so she decided to travel to Japan to be with her friend who promised her remunerative work in making and selling clothing there. However, the Japanese Immigration Authorities refused her entry into Japan on the basis that her Spanish passport was false. She was deported to New Zealand where she was detained in Christchurch Women's prison. She applied for refugee status at the suggestion of the New Zealand Police.

The two sons remain in Bangkok as the appellant has not been able to pay for their passage to New Zealand.

## **THE ISSUES**

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

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

In terms of Refugee Appeal No. 70074/96 Re ELLM (17 September 1996) the principal issues are:

1. Objectively, on the facts as found, is there a real chance of the appellant being persecuted if returned to the country of nationality?
2. If the answer is Yes, is there a Convention reason for that persecution?

Because the issue of relocation arises in this case, the decision of this Authority in Refugee Appeal No. 523/92 Re RS (17 March 1995) requires two additional issues to be addressed:

- (a) Can the appellant genuinely access domestic protection which is meaningful?
- (b) Is it reasonable, in all the circumstances, to expect the appellant to relocate elsewhere in the country of nationality?

The Authority found that there was a real chance the appellant would be persecuted in Colombia for the Convention reason of either a political or an imputed political belief. For the reasons given in the handwritten decision, the Authority could not find that the appellant should be relocated within Colombia. The Authority bore in mind the spirit of "The Michigan Guidelines on the Internal Protection Alternative". The Authority concluded that the appellant could not genuinely access domestic protection, which is meaningful and that it was not reasonable, in all the circumstances, to expect the appellant to relocate elsewhere in her country of nationality.

A high degree of caution must be exercised when determining whether an individual can genuinely access meaningful domestic protection, especially when the agent of persecution is a counter insurgency group, which controls 30% of the country, as in Colombia. The appellant must receive the benefit of the doubt in this analysis.

No part of Colombia was free from other risks which either amount to, or are tantamount to, a risk of persecution.

**APPELLANT'S LEGAL ADVISERS**

The Authority was especially assisted by the very comprehensive and detailed oral and written submissions made by Ms Jay Shadforth and Mr Mark Williams. They were of an extremely high standard and it is right that the Authority records the considerable assistance it received by their highly professional and thorough presentations.

**CONCLUSION**

For the above reasons, the Authority finds that the appellant and her sons are refugees within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. The appeal is allowed.

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Member