

REFUGEE STATUS APPEALS AUTHORITY
NEW ZEALAND

REFUGEE APPEAL NO 76485

REFUGEE APPEAL NO 76486

REFUGEE APPEAL NO 76487

AT AUCKLAND

Before:

M A Roche (Chairperson)
D L Henare (Member)

Counsel for the Appellants:

S Bhardwaj

Appearing for the Department of Labour:

No Appearance

Date of Hearing:

12 & 13 April 2010

Date of Decision:

17 June 2010

DECISION

[1] These are appeals against decisions of a refugee status officer of the Refugee Status Branch (RSB) of the Department of Labour (DOL), declining the grant of refugee status to the appellants, nationals of Colombia.

INTRODUCTION

[2] The appellants arrived in New Zealand on 26 February 2009. They lodged applications for refugee status on 26 August 2009. Following interviews on 15 and 26 September 2009, their applications were declined leading to these appeals.

[3] The appellants are a husband (the husband), a wife (the wife) and their five year old son. The appeals were heard together as they are based on the same set of facts. Each adult appellant gave evidence in support of all three appeals. The husband and wife represented their child (the child) as responsible adults

pursuant to section 141B of the Immigration Act 1987.

[4] The appellants fear being murdered in Colombia by members of a paramilitary group who have infiltrated a government organisation which employed the wife. The wife was approached by members of the group and asked to alter land records so that they could conceal their land holdings. Instead of co-operating, the wife left the country with her husband and child. The appellants fear that if they return to Colombia, they will be murdered by members of the paramilitary group as retribution for the wife's failure to co-operate with them.

[5] The essential issues to be determined in this appeal are whether the appellants' fears are well-founded and whether there is a Convention reason for the harm they fear.

THE APPELLANTS' CASE

[6] Both the wife and the husband gave evidence at the hearing. In addition to their oral evidence, the appellants filed a number of corroborative documents which are listed later in this decision.

The wife's evidence

[7] What follows is a summary of the evidence given by the wife at the hearing. Its credibility is assessed later in the decision.

[8] The wife is aged in her mid-30s. She is from Bogota. After leaving school, she attended university and gained a degree in communications and journalism. She then worked in a series of jobs in Bogota until being made redundant in early 2002. She and her husband then started a small business which closed in 2004.

[9] In August 2004, the wife gave birth to her son. She stayed at home looking after him for approximately two years before deciding to re-enter the workforce.

[10] It was very difficult to find employment in Bogota around that time and the wife made a large number of unsuccessful job applications before she managed, through a contact of her husband to arrange a meeting with a manager at the National Department of Planning (*Departamento Nacional de Planeacion* "DNP"). He was managing a programme that involved verifying and updating the records of government-owned property in Colombia. This programme was under the control

of the United Nations Programme for Development (*Programa de las Naciones Unidas para el Desarrollo* “PNUD”).

[11] On 5 September 2006, the wife began a contract for the DNP updating records relating to government-owned property in Bogota. She worked in an office in the DNP building in central Bogota. She liaised with various government departments concerning the records of land and buildings under their control and updated details, such as the value of the property and the identity of the owner on a central register. Identity of the owner was an issue because, following extensive government restructuring, a number of departments no longer existed and it was necessary to have the properties under the control of new departments registered under the new departmental names.

[12] On 28 February 2007, the wife’s contract finished. She enjoyed the work which paid well, and applied for another contract. She remained working between contracts. Her second contract started on 15 March 2007. Her work under the second contract was similar, however the properties she was dealing with now expanded beyond Bogota to include a large number of rural properties. The wife was responsible for ensuring the accuracy of archived information about these properties and for helping create a new information system for the control and management of information about government-owned property in Colombia. This information system was named SIGA (Information System for the Management of Assets). The wife was in charge of the SIGA database and was the person who authorised information to be entered on it.

[13] One of the wife’s responsibilities was to organise and provide training to staff in government departments who were responsible for correcting land records and forwarding them to the wife for entry on the SIGA database. She travelled within Bogota to the offices of various government departments in order to deliver this training.

[14] One hundred and thirty different government departments were involved in the project. The wife was expected initially to focus on the larger of these, which included the National Directorate of Narcotics (*Dirección Nacional de Estupefacientes* “DNE”) and the Colombian Institute for Rural Development (*Instituto Colombiano de Desarrollo Rural* “INCODER”).

[15] The appellant’s second contract finished on 30 June 2008. As previously, she continued working prior to the commencement of her third contract. In early

July 2008, prior to signing her third contract, she travelled from Bogota to Santa Marta on the Atlantic coast. The purpose of the trip was to provide training for INCODER staff from the various regions in the Atlantic zone. The wife provided training for about 30 INCODER personnel on the type of information she required from them about properties owned by INCODER for entry on the SIGA database. This information included the property's value, its description, the public services it had (such as water), whether it was occupied, the nature of the buildings on it, its size, its registration number and whether it had any encumbrances. It was envisaged that after receiving the training delivered by the wife, the INCODER staff would begin visiting rural government-owned properties to ascertain these details and would send the information back to the wife in Bogota for entry on the SIGA database.

[16] Despite the issues that have long existed in Colombia concerning control of land by paramilitaries and groups such as the FARC, it never occurred to the wife that she, or the people that she was training, would be in any danger as a result of their work on the land records system.

[17] The training took place over two days and was scheduled to finish at midday on the second day. During a break on the second training day, the wife received a telephone call from someone who identified himself as an INCODER employee. He told her that he and some of his colleagues had missed the training and requested a meeting with her after the training finished. Because the training venue (a university) was due to close at midday, the wife suggested that the man and his colleagues meet her at a coffee shop at a mall she had visited during lunch time the previous day.

[18] At approximately midday, the wife went to the coffee shop where she was met by two men and a woman. She proceeded to spend several hours explaining to them the details of the information INCODER employees needed to obtain for the SIGA database. When she finished explaining things to them, the people told her that they were members of a paramilitary group and they wanted her to co-operate with them. They did not want some of the INCODER properties that were going have their details verified to be entered on the SIGA database. They told her that she was to provide them with the lists of verified properties provided to her by INCODER employees and that they would specify pieces of land on those lists that were to be excluded from the SIGA database. They told her that if she did not co-operate with them, there would be consequences for her. They also told her

that she was not to stop working on the SIGA project.

[19] The appellant flew back to Bogota from Santa Marta as scheduled the same day. She did not tell anybody at her work about the paramilitaries and their threats, nor did she tell her husband. Although she was shocked and upset by her encounter with the paramilitaries, she thought that perhaps she had left the problem behind in Santa Marta. She did not consider reporting the matter to the police or the security forces because they are corrupt and infiltrated by the paramilitaries. Approximately five days after she returned from Santa Marta, she started a third contract with the DNP.

[20] It was expected that it would take some time for the information about the rural properties to be gathered by INCODER staff and forwarded to the wife so in the meantime, she occupied herself with other tasks at DNP.

[21] On 18 July 2008, the wife received a call from one of the paramilitary people. He reminded her of the job they had requested her to do and also told her the details of her husband and son's work and school and their daily routines. He also told her not to approach the police for help or to resign from her job.

[22] As soon as she got home, the wife told her husband about the telephone call and about the meeting with the paramilitary people in Santa Marta. He was frightened and angry with her for not telling him earlier what had happened in Santa Marta. Over the weekend, the couple discussed what to do about the situation they had found themselves in. They decided that the husband should resign from his job immediately so that he could ensure the safety of their son. The following Monday, the husband gave his notice to his employer. He was required by law to work out 10 days' notice. During this time, he changed his and the child's routines as much as possible. When his job finished, he continued to take the child to school and pick him up every day, changing their departure times, route and mode of transport frequently. For the remainder of their time in Colombia, the husband and wife lived off the wife's salary and a bonus payment he had received from his employer on leaving.

[23] On 16 August 2008, a bomb exploded in the supermarket frequented by the appellants that was less than 100 metres from their home. There were no fatalities and local newspapers attributed the bombing to guerrillas.

[24] The day after the bombing, the wife received a call from a member of the

paramilitary on her mobile telephone. It was her son's birthday. The caller told the wife that the bomb had been a warning for her. He reminded her of her agreement with the paramilitary group and told her that she was being watched.

[25] The husband and wife decided that they needed to leave Colombia for their safety. They wanted to go as far away from Colombia as they could. The immigration agency that they approached suggested that New Zealand would be a suitable place because the husband would be able to obtain a student visa and, when he completed his studies, would be able to apply for a job and, ultimately obtain New Zealand residency. The husband and wife began to take steps to organise their affairs to leave Colombia.

[26] In mid-September 2008, the wife began to receive lists with details of properties from the INCODER people she had trained. However, much of the information required had not been gathered and the wife returned the lists for correction.

[27] On 22 September 2008, the wife received a telephone call and was instructed to meet a woman at a café nearby her work at 5pm that day and to bring the property lists sent to her by INCODER staff with her. The wife printed out a copy of the lists (approximately 30 pages) and met the woman at the café as instructed. She gave the woman the lists and explained that they were only partially complete because a large number of listings had to be returned for correction. The woman was angry with the wife for the lack of progress with the lists and told her that her husband's resignation did not guarantee his safety. The wife pleaded with her not to hurt her family and told her that she was co-operating.

[28] In October 2008, the wife received further lists from INCODER regional officers. These also lacked some of the required information and had to be returned for correction. During this month, she received the corrected lists that she had returned in September. This month, the husband and wife received approximately \$4,000 from her parents who had agreed to purchase the couple's apartment and car. The husband and wife had told her parents about their intention to travel but had said that they were doing it because they wished to work abroad.

[29] On 28 October 2008, the husband completed his application for a New Zealand student permit.

[30] In early November 2008, the wife was contacted again. The caller congratulated her for putting pressure on the INCODER staff to produce the lists (the wife had sent some emails to INCODER, trying to get them to speed up the gathering and provision of information for her). The caller told the wife that the group would wait until December for her to provide them with the new lists and more information.

[31] On 18 December 2008, the wife received another call. The caller was a male and was angry with her that no more information had been made available. She pleaded with him not to do anything and told him that because Christmas and summer holidays were commencing, the work would not be progressed until mid-January. The wife was hopeful at this time that the family's travel arrangements would be completed by then and that the appellants would have been able to leave Colombia before she was contacted again by the paramilitaries. However, there were delays. The wife had mistakenly signed a student visa application instead of a visitor's visa application and had to lodge a new application. Also, the appellants' passports were misdirected and sent to Puerto Rico instead of back to Colombia, causing further delay and necessitating the cancellation and rebooking of the appellants' flights, which had been scheduled for 15 January 2009.

[32] The appellant returned to work after the holidays. On 23 January 2009, she received a call from someone who was demanding the final listings. She told the caller that she would try to have the lists finished for them by the end of February. The caller warned her that the lists were not to be published prior to the paramilitaries' notifying her which lands were to be omitted from them.

[33] The wife's contract finished on 20 February 2009. Her final contract had only been for a month. Although the DNP had tried to negotiate a longer contract with her, she made the contract shorter, telling her director, but not other people at work, that she intended to travel. Even though she had been warned by the paramilitaries a number of times not to resign or leave her work, it did not occur to her to negotiate a longer contract and simply abandon it. She considered there would be grave legal consequences for her, should she do so.

[34] The appellants spent the weekend at home in their apartment and departed from Colombia on 23 February 2009. After arriving in New Zealand, they realised that obtaining New Zealand residency would not be as straightforward as they had understood. In July 2009, they sought advice from a Citizens' Advice Bureau in Hamilton and told the worker they saw there that they could not return to Colombia

because of safety issues. The Citizens' Advice Bureau referred them to a Migrant Centre in Hamilton. At the Migrant Centre, they were advised to inform Immigration New Zealand (INZ) about their concerns. On 22 July 2009, they went to the INZ office in Hamilton where they were provided with refugee status claim forms which they lodged on 26 August 2009.

The husband's evidence

[35] What follows is a summary of the evidence given by the husband at the hearing. Its credibility is assessed latter in this decision.

[36] The husband is aged in his mid-30s. He studied industrial engineering at university and worked in a variety of jobs after graduating, both in Colombia and in Panama. For approximately four years prior to his departure from Colombia for New Zealand, he was employed as a marketing manager in a large company.

[37] In 2006, when their son was approximately two years old, the wife decided to re-enter the workforce and began searching for work. The husband mentioned to his boss that his wife was looking for a job. His boss told him that he had a friend at DNP who was looking for people to work on a project for him. The boss subsequently introduced the wife to his friend and she obtained employment there. The husband recalls that the wife enjoyed her work. Neither he nor she ever imagined that it would give rise to problems.

[38] The husband first became aware that there were problems in July 2008 when his wife received a telephone call from a member of the paramilitary group who wanted her to co-operate with them. After receiving this call, the wife told the husband what had happened in Santa Marta and the threats that had been made against the family. The husband was frightened and angry with his wife for not telling him earlier what had happened. He decided that he should immediately leave his work so that he could ensure the safety of their son. The wife had received the telephone call on a Friday. He resigned on the following Monday. While he worked out his 10 days' notice, he began to vary the time that he left and the route that he followed when he took his son to and from kindergarten and went to work. He also tried to be near other people and not be alone on the street with his son.

[39] The next significant event was on 16 August 2008 when a bomb exploded at the supermarket nearby the appellants' apartment. This was the place where

the appellants normally bought their groceries and went to have coffee. Although the news media attributed the bomb to guerrilla groups rather than to paramilitaries, the husband has no doubt that the people who were threatening his wife were responsible for the bomb and it was intended to frighten them. The following day, the wife received a telephone call telling her that the bomb had been detonated near her home so that she would know that they were serious. The husband was present when his wife received this call. It was their son's birthday and they were all home together. It was around this time that the appellants decided that they needed to leave the country.

[40] The husband recalls that in September, his wife met with a woman after work who was from the paramilitary and that when she came home, she was scared because the woman had been angry with her because she had not provided her with all the information the group wanted.

[41] By this time, the appellants had started making plans to leave Colombia. There were a series of delays that affected their departure plans. They initially had flights booked to leave in December that were subsequently changed for dates in January and then in February. The husband and wife discussed together how long she should make her final work contract for and decided that it should be for a month. They were of the view that if she had a longer contract and had to leave, she may have legal problems. Although the wife's parents knew of their decision, the husband told only his closest friends and family a week prior to their departure that they were intending to travel. They did not sell their apartment or car openly on the market, instead they sold both privately to the wife's parents. They told the wife's parents that they wanted to leave the country to study. They told no-one about the threats from the paramilitaries.

[42] The husband recalls that the wife was contacted by the paramilitary group in November and in December 2008 and that her final contact from them was some time around the beginning of February. When the wife finished work, the appellants stayed home for the weekend and then departed from Colombia the following Monday.

[43] They did not make any kind of official complaint about the threats the wife received. Nor did the wife complain to someone within the DNP or PNUD. Around the time she was being threatened, there was a lot of publicity about the level of corruption in Colombia and the infiltration of the paramilitary groups into the government. They decided that it was too dangerous to complain.

[44] The husband would prefer not to have left Colombia. By coming to New Zealand, the appellants have given up their family, friends and everything that was familiar to them. They came to New Zealand because they needed to do so to ensure their safety.

DOCUMENTS FILED

[45] A number of documents corroborating the appellants' claims were filed with the RSB and appeared on the wife's DOL file. Additional corroborating documents were filed subsequent to the hearing.

[46] Of particular significance were the following:

- (a) A certificate dated 9 November 2009 issued by PNUD confirming the dates of the wife's first three fixed term contracts and details of the payment she received for each.
- (b) A copy of the wife's fourth contract together with translation.
- (c) A bank statement showing the final payment from PNUD received by the wife pursuant to the contract.
- (d) An extract from the PNUD website.
- (e) A copy of a news article sourced from the internet concerning a bombing in a shopping centre in Bogota on 16 August 2008 "Panic at Carrefour" *www.Elespector.com* (17 August 2008).

THE ISSUES

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

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

[48] 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

[49] Prior to determining the framed issues, it is necessary to make an assessment of the appellants' credibility.

[50] The Authority found the husband and the wife to be credible witnesses. Their evidence was consistent both with that of each other and with the accounts provided to the RSB. The claim that the wife worked as a consultant for PNUD is corroborated by the documentary evidence filed which is also consistent with her claimed commencement and termination dates. This documentation is genuine in appearance and nothing in either the documents or the evidence of the appellants suggests that it is bogus. In addition, the appellants' claims are corroborated by country information, reviewed below, which establishes both that INCODER is significantly infiltrated by paramilitaries and that paramilitaries are highly sensitive to land registration issues. The appellants' accounts are accepted in their entirety.

COUNTRY INFORMATION

[51] Since the 1990s, Colombia has been the most violent country in the Western hemisphere, with its region's worst human rights record. It has been estimated that 80 percent of all human rights violations committed against the civilian population have been carried out by paramilitaries. Between 2002 and 2006 an estimated 8,582 civilians were murdered or disappeared by paramilitaries and/or state forces: Jasmin Hristov NACLA Report on the Americas *Legalising the illegal: paramilitarism in Colombia's "Post-Paramilitary" era* (July-August 2009) ("the Hristov report on paramilitarism").

[52] The Colombian paramilitary groups have their origin in squads set up by land owners, including cattle ranchers and drug traffickers, to protect their interests against guerrillas groups FARC (the Revolutionary Armed Forces of Colombia)

and ELN (the National Liberation Army). These paramilitary groups were initially legalised by the government and trained and supported by the Colombian armed forces and police aiming to counter guerrilla influence, protect economic interests, and ensure security.

[53] The activities of the paramilitaries broadened over time to incorporate opposition not only to guerrillas but to political, trade union and popular leaders. Local populations and members of the political establishment deemed supportive of guerrillas were also attacked. They became progressively more influential with increasing support from drug traffickers who provided finances, training and armaments. In 1997 seven large paramilitary groups united to form the United Self-Defence Forces of Colombia (AUC): Overseas Development Institute Between War and Peace: land and Humanitarian Action in Colombia (December 2007) (“the Overseas Development Institute report”).

[54] Despite the demobilisation of many paramilitaries pursuant to the 2005 Justice and Peace law, they maintain their political, economic and social structures. Critics of the law facilitating their demobilisation have suggested that it has been used to launder the illegal wealth of paramilitaries including land and to legitimise their control: Overseas Development Institute report, page 9; Carlos M Gutierrez “Colombia’s death squads get respectable” *Le Monde Diplomatique* (10 December 2005). Despite the partial demobilisation carried out pursuant to the 2005 law, paramilitaries continue to exist and to carry out human rights violations. Demobilised paramilitaries have also re-armed into criminal gangs. As was noted in the most recent United States Department of State human rights report on Colombia:

The AUC demobilization led to a reduction in killings and other human rights abuses, but paramilitary members who refused to demobilize and new illegal armed groups continued to commit numerous unlawful acts and related abuses, including the following: political killings and kidnappings; physical violence; forced displacement; subornation and intimidation of judges, prosecutors, and witnesses; infringement on citizen’s privacy rights, restrictions on freedom of movement; recruitment and use of child soldiers; violence against women, including rape; and harassment, intimidation, and killings of human rights workers, journalists, teachers, and trade unionists: united States Department of State 2009 Country Reports on Human Rights Practices: Colombia (11 March 2010) (the DOS report)

[55] In a similar vein a recent Human Rights Watch report noted:

The Uribe administration claims that paramilitaries no longer exist. While more than 30,000 individuals have supposedly demobilised, Colombian prosecutors have turned up evidence that many of them were not paramilitaries at all, but rather, civilians recruited to pose as paramilitaries. Law enforcement authorities never investigated most of them.

Meanwhile, new-armed groups often led by mid-level paramilitary commanders have cropped up all over the country. The Organization of American States (OAS) Mission verifying the demobilizations has identified 22 such groups, totalling thousands of members. The groups are actively recruiting new troops, and are committing widespread abuses, including extortion, threats, killings and forced displacement: Human Rights Watch World Report Colombia (January 2008).

[56] The Overseas Development Institute report describes the relationship between the paramilitaries and land in the following terms:

As the influence and power of self-defence groups increased, they began to actively expand their control of territory. In the words of one commentator, the 'struggle for territorial dominion...replaced social conflicts over land' and the paramilitaries moved 'from being defenders of newly acquired and threatened agricultural property...[to] controllers of territory'. This further exacerbated agrarian conflicts as they invested their drug money in large agricultural estates. It is estimated that, from the early 1980's until 2000, paramilitaries acquired 4.5 million hectares, representing around 50% of Colombia's most fertile and valuable land. Some commentators believe this figure to be currently around 6.8 million hectares: Overseas Development Institute report, page 5.

[57] A Human Rights Watch report also notes the control of productive land by paramilitaries and the violence by which they achieve this control:

To their enormous profit, they have forced hundreds and thousands of small landowners, peasants, Afro-Colombians, and indigenous persons to flee their families' productive lands. The paramilitaries and their supporters have often taken the abandoned lands, leaving the surviving victims to live in squalor on city fringes, and leaving Colombia second only to Sudan as the country with the most internally displaced people in the world: Human Rights Watch Breaking the Grip Obstacles to Justice for Paramilitary Mafias in Colombia (October 2008) page 3.

[58] The same report noted the infiltration of the paramilitaries into the military and political spheres in Colombia resulting in their ability to subvert the rule of law:

With their growing clout aided by drug-trafficking, extortion, and other criminal activities, paramilitaries have made mafia-style alliances with powerful landowners and businessmen in their areas of operation; military units which have often looked the other way or worked with them; and state officials, including numerous members of the Colombian congress, who have secured their posts through paramilitaries' ability to corrupt and intimidate. Through these alliances, paramilitaries and their cronies have acquired massive wealth and political influence, subverting democracy and the rule of law. (page 3).

[59] Registration and formalisation of land tenure poses a threat to paramilitary control of land. Methods used to obscure the ownership of land include the use of false documents, registration in the names of dead people and multiple changes of ownership. Notary or registry offices have sometimes been burned down in order to eliminate previous registry details of land appropriated by paramilitaries: Overseas Development Institute report, page 6.

[60] INCODER is the government agency responsible for redistributing and protecting land. It has been described as an ineffective organisation (only .3% of the displaced population received a parcel of land in 2006). This failure has been attributed to corruption within INCODER and its infiltration by paramilitaries. According to the Overseas Development Institute report and other studies, INCODER has handed out title to hundreds of hectares of land to paramilitaries and has bought non-cultivable land at excessive prices or with inherited debts, often from front-men linked to paramilitaries and/or drug traffickers: Overseas Development Institute report, page 9; Hristov report on paramilitarism, page 7.

IS THERE A REAL CHANCE OF THE APPELLANTS BEING PERSECUTED?

[61] For the purposes of refugee determination, "being persecuted" has been described as the sustained or systemic violation of basic or core human rights such as to be demonstrative of a failure of state protection; see *Refugee Appeal No 2039/93* (12 February 1996) and *Refugee Appeal No 74665/03* [2005] NZAR 60; [2005] INLR 68 at [36] to [125]. Put another way, it has been expressed as comprising serious harm plus the failure of state protection; *Refugee Appeal No 71427* (17 August 2000).

[62] The Authority has consistently adopted the approach in *Chan v Minister of Immigration and Ethnic Affairs* (1989) 169 CLR 379 (HCA), which held that a fear of being persecuted is well-founded when there is a real, as opposed to a remote or speculative, chance of such persecution occurring. This entails an objective assessment as to whether there is a real or substantial basis for the anticipation of being persecuted. Mere speculation will not suffice.

[63] The wife was threatened that she, her husband and her son would be at risk if she failed to co-operate with the demands made of her by the representatives of the paramilitary organisations concerning the registration of land administered by INCODER. She was specifically warned on a number of occasions that if she left her employment to avoid co-operating with the paramilitaries, there would be serious consequences for her and her family.

[64] The wife has now clearly earned the enmity of her paramilitary "handlers". She has failed to supply them with the lists they required to ensure that the titles of land they had an interest in were not listed in the government database (SIGA). She also left her employment despite the warnings she had been given not to.

Given the country information about the strength the paramilitaries, their significant infiltration into Colombian society, and the atrocities carried out by them in association with their aims to control land in Colombia, it is accepted that the threats against the appellants were serious and that there is a real chance that if they return to Colombia they will be kidnapped or killed.

[65] The level of corruption in Colombia and the infiltration of the paramilitaries into the police, military and judiciary is such that the Authority accepts that state protection is not available to the appellants in Colombia. The Overseas Development Institute report notes at page 8 that an impediment to the effective implementation of legislation protecting the internally displaced and their land is partly attributable to high levels of corruption and infiltration by illegal armed groups within relevant institutions and within the political establishment. The Hristov report on paramilitarism also comments on the 'solid relationship' and collaboration between the paramilitaries and state institutions such as the military, the police, the Administrative Security Department (DAS) and INCODER: Hristov report page 8. The DOS report on Colombia notes that the Supreme Court and prosecutor-general's investigation into links between politicians and paramilitary groups has implicated 87 members of congress, 15 governors and 35 mayors.

[66] Previous decisions of this Authority have found that effective state protection in Colombia is not available against the AUC (the paramilitary umbrella group) or the FARC: *Refugee Appeal No 73898* (9 November 2004) and *Refugee Appeal No 76289* (8 May 2009). The same reasoning applies to the question of state protection for the present appellants. Because of the significant paramilitary infiltration into and corruption of the arms of state from whom they could be expected to seek protection, their inability to obtain protection is accepted.

[67] Similarly, given the nature of the paramilitaries' presence and influence in Colombia it is accepted that the appellants could not avoid harm by relocating within Colombia. Their fear of being persecuted is well-founded. The first issue framed for consideration is answered in the positive.

IS THERE A CONVENTION GROUND FOR THE PERSECUTION FEARED BY THE APPELLANTS?

[68] The Authority turns next to the issue of Convention ground.

[69] It is the appellants' case that they are covered by the political opinion

ground of the Convention. Their counsel argues that the wife's conduct in failing to co-operate with the paramilitaries, amounts to the expression of a political opinion.

[70] The Authority disagrees. Although a broad interpretation of the political opinion ground of the Convention is important, an overly broad interpretation allows almost any issue to be categorised as political. Such an interpretation would nullify the intention of the drafters of the Refugee Convention to limit its application to those covered by the five specific Convention grounds.

[71] The interpretation of the political opinion ground of the Convention was recently considered by the Authority in *Refugee Appeal No 76339* (23 April 2010). In that decision, the Authority reiterated the view that what is political opinion is not a matter of definition but depends on the circumstances of the case, see [88].

[72] In *Refugee Appeal No 76339*, the Authority discussed the approach taken in the United Kingdom to this issue and noted the decision *Gomez v Secretary of State for the Home Department* [2000] INLR 549, endorsed in the later decisions of *Suarez v Secretary of State for the Home Department* [2002] EWCA Civ 722 and *A v Secretary of State for the Home Department* [2003] INLR 249 (CA).

[73] *Gomez* and *Suarez* have particular resonance in the present case as both concerned the refugee claims of Colombian nationals. In *Gomez* at [54] it was stated that:

[54] Reflecting these common sense notions, the tribunal would categorically reject the idea that even in countries such as Colombia where the boundaries between the political and non-political have been heavily distorted by the conduct of paramilitary bodies and drug cartels, every case where such a body persecutes someone must be on account of an imputed political opinion. We would reaffirm the point made in *Quijano v Secretary of State for the Home Department* [1997] Imm AR 277 that where the concern of persecutors was not a political one but rather to maintain their economic position through criminal activities and to that end intimidate and if necessary, eliminate those that oppose the pursuit of that aim, then there will be no conflict based upon a refusal to perform political acts but only criminal ones.

[55] The assessment will all depend upon the particular circumstances of a case examined in the light of all the evidence circumstantial or otherwise.

[74] In the present case the wife did not suggest in her evidence that her decision not to co-operate with the paramilitaries was based on a political opinion or even a strongly held objection to the activities of the paramilitaries. When asked why she did not simply co-operate with their demands she stated she could

for a while but that [as soon as these types of people contact you], ‘you understand you will never be alone’ and ‘you won’t be free any more’. It appeared that she envisaged finding herself being forced to co-operate with the paramilitaries indefinitely without being able to safely extricate herself. She was fearful of them and her ability to co-operate with their demands was not completely within her control as she was dependent on others to provide her with the details of properties for entry on the SIGA database.

[75] The paramilitaries the wife was dealing with required her assistance to retain the control of lands they had illegally occupied or acquired in pursuit of their criminal enterprise. Their concern in this regard was not political, but rather to maintain the economic position they had assumed through criminal means. The non co-operation of the wife can properly be seen as a refusal to be involved in a criminal enterprise. It is not the expression of a political opinion nor can a political opinion be imputed to her in respect of this refusal.

[76] The Authority next turns to the Convention ground of particular social group. In *Refugee Appeal No 71427* (16 August 2000) the Authority analysed the meaning of the phrase ‘particular social group’ in the Convention and the principles for determining whether groups are particular social groups for the purposes of the Convention. This analysis is set out below:

[94] First, the ambit of this element of the definition must be evaluated on the basis of the basic principles underlying the Refugee Convention. International refugee law was meant to serve as a “substitute” for national protection where the latter was not provided. The Convention has built-in limitations to the obligations of signatory states. These restricting mechanisms reflect the fact that the international community did not intend to offer a haven for all suffering individuals...

[96] Second, the particular social group category is limited by anti-discrimination notions inherent in civil and political rights: *Ward 733, 739*. Underlying the Convention is the international community’s commitment to the assurance of basic human rights without discrimination: *Ward 733*. This theme outlines the boundaries of the objectives sought to be achieved and consented to by the delegates who negotiated the terms of the Convention. It sets out, in a general fashion, the intention of the drafters and thereby provides an inherent limit to the cases embraced by the Convention. In distilling the contents of the head of “particular social group” therefore, it is appropriate to find inspiration in discrimination concepts. The manner in which groups are distinguished for the purposes of discrimination law can be appropriately imported into this area of refugee law: *Ward 735*. In short, the meaning assigned to “particular social group” should take into account the general underlying themes of the defence of human rights and anti-discrimination that form the basis for the international refugee protection initiative: *Ward 739*. See also *Applicant A* at 232 & 257 and *Shah* at 639C-D, 651A-D, 656E, 658H.

[97] Third, the *eiusdem generis* approach developed by the US Board of Immigration Appeals in *Re Acosta* 19 I & N, Dec. 211, 233 (BIA 1985) provides a

good working rule in that it properly recognises that the persecution for reason of membership of a particular social group means persecution that is directed toward an individual who is a member of a group of persons all of whom share a common immutable characteristic. That characteristic must be either beyond the power of an individual to change, or so fundamental to individual identity or conscience that it ought not be required to be changed. What is excluded by this definition are groups defined by a characteristic which is changeable or from which disassociation is possible, so long as neither option requires renunciation of basic human rights: *Ward* at 736-737. See also *Shah* at 643C & 644D, 651E, 656F & 658E, 658H.

[98] Fourth, while the social group ground is an open-ended category which does not admit of a finite list of applications, three possible categories can be identified (*Ward* 739):

- (a) Groups defined by an innate or unchangeable characteristic;
- (b) Groups whose members voluntarily associate for reasons so fundamental to their human dignity that they should not be forced to forsake the association; and
- (c) Groups associated by a former voluntary status, unalterable due to its historical permanence.

[99] The first category would embrace individuals fearing persecution on such bases as gender, linguistic background and sexual orientation, while the second would encompass, for example, human rights activists. The third branch is included more because of historical intentions, although it is also relevant to the anti-discrimination influences, in that one's past is an immutable part of the person.

[100] Fifth there is a limitation involved in the words "particular social group". Membership of a particular social group is one of only five categories. It is not an all encompassing category. Not every association bound by a common thread is included: *Ward* at 728-232, *Applicant A* at 242, 260 and *Shah* at 643B-C, 656D, 658H.

[101] Sixth, there is a general principle that there can only be a particular social group if the group exists independently of, and is not defined by, the persecution. Nevertheless, while persecutory conduct cannot define the social group, the actions of the persecutors may serve to identify or even cause the creation of a particular social group in society: *Ward* at 729, *Applicant A* at 242, 263-264, 285-286 and *Shah* at 639G-H, 645E, 656G, 658H, 662B.

[102] Seventh, cohesiveness is not a requirement for the existence of a particular social group. While cohesiveness may be helpful in proving the existence of a social group, the meaning of "particular social group" should not be limited by requiring cohesiveness: *Ward* at 739; *Shah* at 642A-643G, 651G, 657F, 658H, 661D.

[77] Counsel has suggested that the wife is covered by this ground because being a government employee constitutes membership of a particular social group. This assertion does not survive analysis. The wife was targeted by the paramilitaries because she was the sole individual responsible for the entry of land details provided by INCODER onto the SIGA database. The risk she faces arises from her failure to comply with her agreement to co-operate in the corruption of that database. Her risk was created by her access to the SIGA database and not

because of her membership of any group. Although other civil servants in Colombia may be targeted by paramilitary organisations because of particular roles they may hold, it does not follow that government employees in Colombia are a particular social group for the purposes of the Refugee Convention. They are not.

[78] The Authority turns next to the question of whether the appellants' family constitutes a particular social group for the purpose of the Refugee Convention.

[79] Membership of a family is undoubtedly an immutable characteristic. It has long been accepted by this Authority and in overseas jurisdictions that family membership can constitute membership of a particular social group for the purposes of the Refugee Convention; see *Secretary of State for the Home Department v Savchenkov* [1996] Imm AR 28; *Minister for Immigration and Multicultural Affairs v Sarrazola (No 4)* [2001] FCA 263 *Thomas v Gonzales* 409 F 3d 1177, 1188; *Refugee Appeal Nos 74046, 74047, 74048, 74049* (30 June 2005); *Refugee Appeal No 75528 and 75528* (23 June 2005); *Refugee Appeal No 75456* (17 June 2005). This consensus is accepted in academic literature: J Hathaway, *The Law of Refugee Status* (1991) pp 164-166; GS Goodwin-Gill, *The Refugee in International Law*, 2nd ed (1996), p361.

[80] The proposition that membership of a family can constitute a particular social group is uncontroversial. However, there has been controversy as to whether the Refugee Convention is engaged in cases where a member of a family attracts adverse attention for non-Convention reasons or reasons unknown and persecutory treatment is then directed at other family members. In other words the question is whether the primary family member (whose predicament is the reason for the risk to other family members) must themselves be covered by one of the four other Convention grounds (race, religion, nationality or political opinion). The view that the primary family member must be covered by another Convention ground has in the past been accepted in the United Kingdom, see for example *Quijano v Secretary of State for the Home Department* [1997] Imm AR 227, a Colombian case where it was held that because the primary family member, the appellant's stepfather, was not persecuted for a Convention reason, his family members did not have a nexus to a Convention reason either.

[81] The approach in *Quijano* was overturned in *Secretary of State for the Home Department v K; Fornah v Secretary of State for the Home Department* [2006] UKHL 46 (the *Fornah* decision). In the *Fornah* decision, it was held that *Quijano*

represented an incorrect interpretation of the Refugee Convention and that membership of a family was plainly membership of a particular social group within the meaning of Article 1A(2) of the Convention. Therefore a claimant who asserted that he was persecuted for reasons of his family membership did not have to establish that the primary family member was being persecuted for a Convention reason. In his judgment, Bingham LJ commented that to hold otherwise implies that membership of a particular social group is (at least on some sets of facts) to be regarded as 'merely adjectival or parasitic upon the other [Convention] reasons' when no distinction is made between it and the other Convention reasons in Article 1A(2) ...and that:

The motive may be to terrorise the person against whom the persecutor entertains ill will (for a 'non-Convention' reason) by getting at his family; but when it comes to the question whether the family are persecuted by reason of their membership of a particular social group-the family- I do not see that the persecutor's motive has any relevance.

[82] Lord Hope also commented on the nature of discrimination by reason of family membership. At [45] he stated:

It is universally accepted that the family is a socially cognisable group in society... The ties that bind members of a family together, whether by blood or marriage, define the group. It is those ties that set it apart from the rest of society. Persecution of a person simply because he is a member of the same family as someone else is as arbitrary and capricious, and just as pernicious as persecution for reasons of race or religion. As a social group the family falls naturally into the category of cases to which the Refugee Convention extends its protection.

[83] The Authority considers that *Fornah* represents a correct interpretation of the particular social group ground with respect to family members. Applying this reasoning to the present appeals, although it is clear that the primary family member (the wife) does not face a risk of being persecuted for a Convention reason, the sole reason for the risk faced by the husband and the child is their membership of the wife's family. The persecution of which they are at risk is for reasons of their membership of a particular social group ground and they are entitled to the protection of the Refugee Convention.

[84] The wife however is not. Although this may seem incongruous given her plight, the scheme of the Refugee Convention is not to provide a haven for all suffering individuals. As was noted in *Refugee Appeal No 71427*, the protection which signatory states are obliged to provide under the Refugee Convention is deliberately limited by the five Convention grounds, otherwise the definition of 'refugee' would be an individual who has a well-founded fear of persecution

without more; see also *Canada (Attorney General) v Ward* [1993] 2 SCR 689 at 732. The Authority is precluded from further considering the wife's circumstances pursuant to section 129W of the Immigration Act.

CONCLUSION

[85] The Authority finds that the husband and the child are refugees within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is granted. Their appeals are allowed.

[86] The Authority finds that the wife is not a refugee within the meaning of Article 1A(2) of the Refugee Convention. Refugee status is declined. Her appeal is dismissed.

"M A Roche"
M A Roche
Chairperson