Federal Court  Cour fédérale

Date: 20110811

Docket: IMM-3396-09

Citation: 2011 FC 986

Ottawa, Ontario, August 11, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

ORLANDO RANGEL LEZAMA,
CARMAN ELOISA VITAL RANGEL,
AZUL ESTEFANIA RANGEL VITAL,
DANIA ISABELA RANGEL VITAL
and
ORLANDO RANGEL VITAL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 8 June 2009 (Decision), which

refused the Applicants' applications to be deemed Convention refugees or persons in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicants are citizens of Mexico. In addition to the Minor Applicants, who are named parties in this proceeding, the Male and Female Applicants have two younger children, who were born in Canada in 2008 and who are not named parties in this proceeding.

[3] The Male Applicant alleges that he unwittingly became involved with a drug trafficking organization when, in June 2007, he made an arrangement to sell at his wholesale fruit and vegetable business produce provided by Pascual Magana (Magana). On 4 July 2007, the Male Applicant discovered that Magana was hiding cocaine in produce shipments that were to be collected by other vendors. When the Male Applicant confronted him, Magana admitted that he was part of a large drug trafficking organization. He invited the Male Applicant to continue operating his business as a transfer point for drugs, assuring him that the police had been paid off and would not interfere. When the Male Applicant refused, Magana said that he would have to find a way to keep him quiet. The Male Applicant interpreted this as a death threat. He sold his store on 6 July 2007 and made plans to leave.

[4] On 8 July 2007, three men went to the Applicants' house in Leon, told them that they were delivering a message from Magana and struck the Male Applicant, who fell unconscious. When he regained consciousness, he and the Female Applicant immediately brought their children to their grandparents' house nearby and then, fearing that the men would pursue them, drove to

Aguascalientes, 100 kilometres away, for medical treatment. Shortly thereafter, their children joined them and stayed at the nearby home of the Male Applicant's sister. The truck in which the Male and Female Applicants drove to Aguascalientes was later set on fire, causing the Male Applicant to believe that Magana or his men had followed them to Aguascalientes.

[5] On 15 July 2007, the Male and Female Applicants obtained their passports and fled to Canada. Their children joined them two months later. On 14 January 2008, the Applicants made their refugee claims, all of which were subsequently joined to the claim of the Male Applicant.

[6] The RPD heard the claims on 26 May 2009. The Applicants were represented by an immigration consultant and an interpreter was present. In its Decision dated 8 June 2009, the RPD found that the Applicants had failed to establish a nexus to a Convention ground and that they had failed to establish, on a balance of probabilities, that they would be personally subjected to a risk to life, a risk of cruel and unusual treatment or punishment, or a danger of torture should they return to Mexico as state protection was available to them. For these reasons, both the section 96 and the section 97 claims were rejected.

DECISION UNDER REVIEW

Section 96 Analysis

[7] The RPD found that the Applicants were victims of crime. Their fear was not linked to any of the Convention grounds, namely race, religion, nationality, political opinion and membership in a particular social group. In light of Federal Court jurisprudence stating that victims of crime,

corruption or vendettas generally fail to establish a nexus between their fear of persecution and a Convention ground, the RPD rejected the Applicants' section 96 claims.

Section 97 Analysis

[8] The determinative issue in the section 97 analysis was the Applicants' failure to rebut the presumption of state protection. The RPD noted that a state is presumed to be able to protect its citizenry unless the state has completely broken down. Refugee claimants can rebut this presumption by adducing clear and convincing evidence of the state's inability to protect them. The test asks whether the state protection is adequate, although effectiveness is a relevant consideration. Evidence adduced to demonstrate inadequacy of protection must be reliable and probative and the standard of proof is the balance of probabilities. Claimants must approach the state for protection where it will be reasonably forthcoming. Where the state is a democracy, it will be difficult for a claimant to prove, on a balance of probabilities, that protection is unavailable.

[9] In the instant case, the RPD reviewed the documentary evidence and rejected the Applicants' evidence in favour of it. The documentary evidence indicated that Mexico is a democratic country not in a state of collapse. Indeed "serious efforts" are being made by the Mexican state to combat crime and corruption. There are a number of vehicles for reporting corruption of public employees and state officials, drug trafficking and kidnapping, including the Secretariat of Public Administration and Secretariat of Public Services, the 24-hour Telephone Assistance System for Citizens and the Federal Agency of Investigation. The RPD commented that joint efforts between Mexico and the US to combat drugs and drug-related crime have resulted in

considerable progress being made with respect to specialized police training, more sophisticated investigations and more major arrests.

[10] In light of these serious efforts, the RPD found that it is reasonable to expect persons in the Applicants' position to seek the assistance of these state agencies before seeking international refuge. The Applicants failed to contact the authorities and failed also to provide clear and convincing evidence that state protection would not be reasonably forthcoming.

[11] The RPD acknowledged both the Applicants' fear of reporting the incident to the police and their examples of unrelated incidents in the past when they had reported crimes to the police, particularly in domestic violence situations, without satisfactory results. However, the RPD commented that, in each of the examples put forward by the Applicants, the police had responded, even if the outcomes did not "bring about the conclusion desired by the [Applicants]."

[12] The RPD acknowledged that, in the instant case, the Male Applicant believed that the police were complicit in the operation of Magana's drug network because Magana had told him this. However, the Male Applicant had no evidence of police involvement and he had never seen or been contacted by police officers associated with Magana. The RPD also noted the Male Applicant's testimony that, after he had sold his business and fled Leon, Magana called him on his cell phone and sent men to his former residence. As the RPD pointed out, however, that was all Magana did. At no point did he or his men ever approach the Minor Applicants or the family members caring for them, either in Leon or in or near Aguascalientes. The RPD found that drug traffickers with connections to police would at least have visited the Male Applicant's family members. Also, if

Magana had wanted to silence the Male Applicant, it seems implausible that he would follow the Male Applicant to Aguascalientes, only to burn his truck and alert him to the fact that he knew where he was, thereby giving him an opportunity to escape. On this basis the RPD concluded that Magana was not as well connected as the Applicants believe him to be.

[13] The Male Applicant's claim was rejected and, because the other claims were tied to his, the remaining claims were rejected as well.

[14] With respect to the best interests of the Male and Female Applicants' Canadian-born children and the suggestion that sending them to Mexico would put them at an unacceptable risk, the RPD found that the Canadian-born children were not refugee claimants and as such the Decision did not apply to them. As a matter of practicality, the Male and Female Applicants would need to determine what is in the best interests of the Canadian children if the remainder of the family is removed from Canada.

[15] The RPD further found that, with respect to the submissions regarding the dangers that women in Mexico must face, gender was not raised as a ground of persecution and no evidence was adduced that any of the female Applicants feared returning to Mexico for reasons associated with their gender.

[16] Finally, with respect to the humanitarian and compassionate considerations raised, the RPD commented that the Applicants' situation may be deserving but it was not within the RPD's authority to make such an H&C determination.

ISSUES

[17] The Applicants raise the following issues:

i. Whether the RPD erred in its state protection analysis, particularly by making unreasonable plausibility findings;

ii. Whether the RPD failed to analyze the Applicants' subjective fear;

iii. Whether the RPD erred in its section 96 analysis by misstating and misapplying the law;

iv. Whether the RPD erred in its section 96 analysis by fettering its discretion or providing inadequate reasons; and

v. Whether the Applicants were denied natural justice as a result of incompetent representation by their immigration consultant.

STATUTORY PROVISIONS

[18] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,	**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe

social ou de ses opinions politiques :

(*a*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself of the protection of each of those countries; or

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

(*b*) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country.

b) soit, si elle n'a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Person in need of protection

Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

(*a*) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

(*b*) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themself of the protection of that country,

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,	(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,
(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and	(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,
(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
Person in need of protection	**Personne à protéger**
(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.	(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

STANDARD OF REVIEW

[19] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the

reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[20] This first issue challenges the RPD's state protection analysis, particularly its plausibility findings. The adequacy of state protection is a question of mixed fact and law ordinarily reviewable against a standard of reasonableness. See *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at paragraph 38.

[21] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law." See *Dunsmuir*, above, at paragraph 47; and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."

[22] The second issue concerns the alleged failure of the RPD to make findings regarding the Applicants' subjective fear. This touches upon the adequacy of the Decision and as such is reviewable under a standard of correctness. See *Martinez v Canada (Minister of Citizenship and Immigration)*, 2011 FC 13 at paragraph 21.

[23] The third issue asks if the RPD misstated or misapplied the law. This is a question of law. It is reviewable on the correctness standard. See *Khosa*, above, at paragraph 44.

[24] The fourth issue asks if the RPD fettered its discretion or failed to provide adequate reasons. These are questions of procedural fairness, reviewable on the correctness standard. See *Boughus v Canada (Minister of Citizenship and Immigration)*, 2010 FC 210 at paragraph 22; and *Khosa*, above, at paragraph 43.

[25] The fifth issue, denial of natural justice, also is reviewable on the correctness standard. See *Khosa*, above, at paragraph 43.

ARGUMENTS

The Applicants

The RPD Erred By Failing to Determine the Applicants' Subjective Fear

[26] The Applicants' claim is based on their fear of violence at the hands of Magana and his drug trafficking organization, which allegedly has ties to the police. They argue that the RPD erred by failing to make clear findings with respect to the subjective element of their claim and with respect to the credibility and plausibility of their subjective fear. They rely on *Flores v Canada (Minister of Citizenship and Immigration)*, 2010 FC 503 [*Flores*] at paragraph 31, wherein Justice Robert Mainville stated:

> [S]ave in exceptional cases, the analysis of the availability of state protection should not be carried out without first establishing the existence of a subjective fear of persecution. The panel responsible for questions of fact should therefore analyze the issue of the

> subjective fear of persecution, or, in other words, should make a finding as to the refugee claimant's credibility and the plausibility of his or her account, before addressing the objective fear component which includes an analysis of the availability of state protection.

The Member Misstated and Misapplied the Law in Its Section 96 Analysis

[27] The Applicants argue that the RPD misstated and misapplied the law in its section 96 analysis and, in so doing, fettered its discretion. Alternatively, it failed to provide adequate reasons for rejecting their section 96 claim.

[28] The RPD's finding that there is no nexus to a Convention ground where applicants are victims of crime or personal vendettas is, in the Applicants' view, "extraordinarily simplistic." The jurisprudence is more nuanced than the RPD appreciates. Moreover, the evidence does not support the findings.

[29] The Male Applicant is not simply a victim of crime, nor is he fleeing a vendetta. Rather, he was personally targeted for refusing to participate in criminal activity. Opposition to criminal activity can become opposition to state authorities when the criminal activity permeates state action or when state authorities are complicit in the criminal activity. See *Klinko v Canada (Minister of Citizenship and Immigration)*, [2000] 3 FC 327 (FCA) [*Klinko*]. Also, the Male Applicant's reasons for believing that state authorities were complicit in this activity were sound based on the information he received from Magana and Magana's alleged connections to the military. The RPD should have considered whether the Applicants' case fell within the *Klinko* exception. In failing to do so, it fettered its discretion.

The RPD's Plausibility Findings Were Unreasonable

[30] The Applicants challenge the RPD's implausibility findings regarding the Male Applicant's evidence that Magana was involved in a large drug trafficking organization that had paid off the police. It was unreasonable to expect the Male Applicant to have seen more of Magana's associates before concluding that he was involved with a large criminal organization. The Male Applicant discovered drugs in Magana's produce shipments. Drug traffickers, by necessity, are connected to large organizations. It was equally unreasonable to expect that the Male Applicant would have been approached by the police, who had been paid not to interfere in Magana's activities. When the Male Applicant refused to cooperate, Magana's men delivered a violent "message." As the documentary evidence demonstrates, drug trafficking is widespread in Mexico. The fact that Magana's men never bothered the Male Applicant's children or family is irrelevant. The Male Applicant's evidence is internally coherent. The RPD expresses no reservations regarding the Male Applicant's credibility but disregards his evidence without stating its reasons for doing so.

The RPD Erred In Its State Protection Analysis

[31] The RPD's assessment of the evidence, particularly its finding that police were not complicit in Magana's activities, resulted in an erroneous conclusion that state protection was available to the Applicants. But for this error, the Applicants' circumstances would have been recognized as not

requiring the Applicants to seek state protection because such protection would not be reasonably forthcoming. See *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1 [*Ward*].

[32] The Applicants submit that the RPD should have engaged in a full assessment of the evidence relevant to the issue of state protection. Given Mexico's governance and corruption problems, which are acknowledged in the country conditions documentation, it is not enough to rely on a blanket statement that Mexico is a democracy. See *Villicana v Canada (Minister of Citizenship and Immigration*, 2009 FC 1205 at paragraph 67. Mexico is not a "full democracy" and the availability of state protection cannot be presumed. According to a report of the Washington Office on Latin America, corruption of state authorities and impunity for drug traffickers undermine the country's efforts to maintain the rule of law and combat the drug trade. Amnesty International reports that only the most serious criminal cases can be expected to be investigated. Coupled with the Applicants' past attempts to seek police assistance for less serious matters—which complaints were accepted but not followed up on by police—this documentary evidence indicates that the RPD acted unreasonably in expecting the Applicants to approach the state for protection.

The Respondent

The RPD's Findings Were Reasonable

[33] The Respondent submits that the RPD's conclusions regarding state protection were reasonably open to it based on the documentary evidence. The Applicants argue that there are governance and corruption problems in Mexico, but the RPD acknowledged this. Its assessment of

the documentary evidence and the manner in which it is weighed against the evidence of the Applicants is an exercise in which the RPD has expertise.

[34] The Applicants further argue that the RPD failed to make clear findings with respect to their subjective fear. That is not the case. The RPD analyzed the plausibility of the Applicants' reasons for not seeking state protection and rejected their explanation that they believed the police to be complicit in Magana's activities. Moreover, even where subjective fear is established, a finding of state protection is sufficient to defeat the claim. See *Flores*, above.

[35] The Respondent contends that there was "hardly any evidence" to connect the Applicants' subjective fear to the Convention ground of political opinion. As Justice Denis Pelletier of this Court observed in *Palomares v Canada (Minister of Citizenship and Immigration)* (2000), 191 FTR 286, [2000] FCJ No 805 [*Palomares*] (QL) at paragraph 15: "While denouncing corruption can be a political act, not every brush with corruption amounts to a political act or is perceived by the corrupt as a political act."

[36] Finally, the Respondent points out that the Applicants failed to show that the conduct of their former counsel deprived them of natural justice or procedural fairness.

The Respondent's Further Memorandum

[37] The Respondent challenges the Applicants' reliance on *Flores*, above, as support for their argument that the RPD erred by failing to make a clear finding regarding their subjective fear. First,

as the Respondent asserted above, the RPD did make such a finding. However, in *Prasad v Canada (Minister of Citizenship and Immigration)*, 2011 FC 559 at paragraph 13, Justice James O'Reilly distinguished *Flores*, stating:

> Given that the Federal Court of Appeal has clearly found that s. 97 contains only an objective component (*Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at para 33), I cannot conclude that the Board erred by not making a definitive [*sic*] about the credibility of the applicants' subjective fear. At the same time, I agree with Justice Mainville that state protection should not be analyzed in a vacuum. The nature of the applicant's fear should be at least identified and the capacity and the will of the state to respond to the applicant's circumstances should be then analyzed.

[38] Further, the Respondent challenges the Applicants' reliance on *Klinko*, above, stating that the instant case is distinguishable on its facts. The applicant in *Klinko* denounced institutional corruption through his actions. In the instant case, the Male Applicant did not denounce drug trafficking; he simply refused to participate in it because doing so was against the law.

ANALYSIS

[39] The Applicants have raised a range of issues. However, not all of them need to be considered because of the way the Decision is structured. The determinative issue in the section 96 analysis is nexus to a Convention ground. The only ground considered under the section 97 analysis is state protection.

Subjective Fear

[40] The Applicants say that the RPD's failure to make a credibility finding and a clear finding of lack of subjective fear leads to an unreasonable error. This argument is made in relation to the section 96 finding based upon the absence of a nexus to a Convention ground. The Applicants concede that it does not apply to the section 97 analysis.

[41] The Applicants' position relies upon a line of cases in this court. First of all, in *Flores*, above, at paragraph 31, following a detailed review of the jurisprudence, Justice Mainville determined that,

> …save in exceptional cases, the analysis of the availability of state protection should not be carried out without first establishing the existence of a subjective fear of persecution. The panel responsible for questions of fact should therefore analyze the issue of the subjective fear of persecution, or, in other words, should make a finding as to the refugee claimant's credibility and the plausibility of his or her account, before addressing the objective fear component which includes an analysis of the availability of state protection.

[42] This principle was followed by Chief Justice Allan Lutfy in *Velasco Moreno v Canada (Minister of Citizenship and Immigration)*, 2010 FC 993, at paragraphs 1, 3 and 4:

> In my view, a negative determination of the Refugee Protection Division which turns on the issue of state protection must be scrutinized with particular care where the member chooses to make no credibility finding concerning the applicant's allegations of a subjective fear.
>
> …
>
> However, the judge sitting in judicial review must be satisfied that the applicant's allegations, usually in the personal information form and the transcript of the refugee hearing, were treated as true by the decision-maker.
>
> Only then can a proper review be made of the member's state protection analysis. The state protection issue should not be a means

> of avoiding a clear determination concerning the subjective fear of persecution.

[43] My reading of the quotation from *Flores*, above, is that Justice Mainville's comments were directed at a state protection analysis. However, in *Velasquez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1201, at paragraphs 15-22, Justice James O'Reilly recently provided a detailed discussion of the issues that arise in relation to an IFA finding:

> The concept of an IFA is an inherent part of the Convention refugee definition because a claimant must be a refugee from a country, not from a particular region of a country (*Rasaratnam v Canada (Minister of Employment and Immigration*), [1992] 1 FC 706 at para 6). Once an IFA has been proposed by the Board, it must consider the viability of the IFA according to the disjunctive two part test set out in *Rasaratnam*. The claimant bears the onus and must demonstrate that the IFA does not exist or is unreasonable in the circumstances. That is, the claimant must persuade the Board on a balance of probabilities either that there is a serious possibility that he or she will be persecuted in the location proposed by the Board as an IFA, or that it would be unreasonable to seek refugee in the proposed IFA given his or her particular circumstances.
>
> There may, however, be an overlap between the Board's consideration of an IFA and its analysis of state protection. The first branch of the IFA test is met where there is no serious possibility of persecution in the particular location. That finding may flow either from a low risk of persecution there or the presence of state resources to protect the claimant, or a combination of both. But, in either case, the analysis can only be carried out properly after the particular risk facing the claimant has been identified.
>
> Indeed, the Board's failure to consider the specific risks feared by a claimant in an IFA analysis will constitute an error of law (*Gutierrez v Canada (Minister of Citizenship and Immigration*), 2010 FC 1010). It is an error, therefore, for the Board to make a blanket finding that an IFA is available to a refugee claimant, without reference to the type of persecution feared by the claimant or that person's particular circumstances. Again, the first question the Board must answer when a proposed IFA is in issue is whether, on a balance of probabilities, there is a serious possibility that the claimant will be persecuted in the location proposed by the Board. Generally speaking, that

question cannot be answered if the nature of the person's fear has not been specifically identified.

Similarly, in the context of a state protection analysis, it is an error of law for the Board to conclude that state protection is available if it fails to make any findings about the applicant's personal circumstances (*Moreno v Canada (Minister of Citizenship and Immigration)*, 2010 FC 993). In *Moreno*, the Board found that the applicant, a native of Bogota, would not be targeted by FARC in that city, contrary to his testimony. That conclusion necessarily implied that the Board did not accept the applicant's account of events, yet it made no explicit adverse credibility findings. Therein lays one of the dangers in assessing state protection or IFA without analyzing the applicant's particular allegations -- adverse credibility findings may creep into the analysis without explanation.

Here, having raised IFA as the determinative issue, the Board was required to determine whether, on a balance of probabilities, there was a serious possibility that Ms. Orozco would be persecuted in Bogota. The Board was further required to consider whether relocation to Bogota was unreasonable given Ms. Orozco's particular circumstances.

I find that the Board's failure to identify the particular risk Ms. Orozco claimed to fear resulted in a faulty IFA analysis. The Board found, for example, that Ms. Orozco did not fall within the groups most targeted by FARC. However, she claimed to be an active member of the Conservative Party and a humanitarian worker who spoke out against FARC. It is not clear why the Board felt she was unlikely to be targeted, even if she was not a farmer, or an elected official, a journalist, or a member of some other group specifically mentioned in the documentary evidence. In addition, Ms. Orozco stated that she had gone to police, but the threats against her continued and family members were subsequently killed. That evidence was obviously relevant to the issue of whether the state could protect her, and ultimately, whether there was a serious possibility that she would be persecuted in Bogota. Yet, the Board did not mention it.

It may have been the case, as in *Moreno*, above, that the Board did not believe all of Ms. Orozco's allegations. If so, it had an obligation to make explicit credibility findings. The analysis of a proposed IFA is not a substitute for those findings.

In my view, this is not one of those rare cases where the IFA analysis could stand on its own, without reference to the particular risk from

> which the claimant sought protection. The Board was obliged to consider both whether Ms. Orozco faced a serious risk of persecution in Bogota and whether relocating to Bogota was, in any event, reasonable for someone in Ms. Orozco's particular circumstances. Without this inquiry, the IFA analysis is merely an abstract exercise. Here, the Board's discussion did not address the risk faced by someone in Ms. Orozco's unique circumstances. That omission amounts to an error of law and I must, therefore, allow this application for judicial review on that basis.

[44] Justice O'Reilly has also provided further thoughts on this issue in *Prasad*, above, at paragraphs 10 to 14:

> The applicants argue that the Board was obliged to make a definitive finding about the nature of the risk they faced before addressing the issue of state protection. They rely on two decisions of Justice Robert Mainville: *Flores v. Canada (Minster of Citizenship and Immigration*), 2010 FC 503, and *Jimenez v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 727. In *Jimenez*, Justice Mainville stated:
>
> > A decision with regard to the subjective fear of persecution, which includes an analysis of the refugee claimant's credibility and the plausibility of his or her account, must be made by the Immigration and Refugee Board to establish an appropriate framework for an analysis, where necessary, of the availability of state protection that takes into account the individual situation of the refugee claimant in question. (Para 4.)
>
> In *Flores*, Justice Mainville noted that s. 97 of IRPA, like s. 96, imports both subjective and objective components (para 26), but the issue of state protection is only relevant to the objective component (para 27). Based on these conclusions, the applicants argue that the Board erred by addressing state protection without analyzing their credibility on the issue of their subjective fear of harm even though their claim was based solely on s. 97.
>
> In my view, Justice Mainville's observation about s. 97 was not essential to his conclusion. In *Flores*, both s. 96 and s. 97 were in issue. Justice Mainville's principal assertion that objective factors should be addressed after a claimant's subjective fear has been identified was clearly relevant to s. 96 and led him to conclude that the Board had erred in that case by dealing with state protection

> without identifying the risk to which the state was called upon to respond. The proper approach in a case where, as here, only s. 97 is in play, was not before him.
>
> Given that the Federal Court of Appeal has clearly found that s. 97 contains only an objective component (*Li v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1 at para 33), I cannot conclude that the Board erred by not making a definitive about (*sic*) the credibility of the applicants' subjective fear. At the same time, I agree with Justice Mainville that state protection should not be analyzed in a vacuum. The nature of the applicant's fear should be at least identified and the capacity and the will of the state to respond to the applicant's circumstances should be then analyzed.
>
> Here, I am satisfied that the Board had identified the nature of the risk the applicants feared and went on to consider the question whether state protection was available to them. I see no error in its approach.

[45] I do not think that the problems identified in these cases arise on the present facts before me. First of all, the state protection analysis is directed exclusively at the section 97 claim. The section 96 claim is disposed of exclusively on the basis of nexus. A reading of the Decision as a whole reveals that, in deciding the nexus issue, the RPD accepted the Applicants' account of what had happened to them and there were no adverse credibility issues. It is also clear that the RPD accepted the Applicants' subjective fear of persecution and the source of that fear. However, even if everything the Applicants say about the basis of their subjective fear is true, what they say does not establish the necessary connection to a Convention ground.

[46] Subjective fear was not really at issue in this case. The Decision reveals that the Applicants' narrative and their fear of being harmed by Magana were accepted by the RPD. The claim was weak on objective evidence to connect their fears to a Convention ground or to rebut the presumption of adequate state protection.

[47] The RPD certainly questions the Applicants' interpretation of what has happened to them and their fears of what is likely to happen to them if returned to Mexico, but the RPD does not disbelieve the events which caused the Applicants to leave Mexico or their fear of returning there.

[48] In any event, the nature and the sources of the Applicants' fears were clearly identified before the RPD embarked upon its nexus and state protection analysis. I see no reviewable error here. See *Prasad*, above, at paragraph 13.

The RPD Fettered its Discretion and/or Provided Inadequate Reasons – Section 96

[49] The Applicants say that the RPD misapplied the law regarding nexus to a Convention ground and provided inadequate reasons for rejecting their section 96 claim on this basis.

[50] The Supreme Court of Canada in *Ward*, above, defined political opinion as any opinion on any matter in which the machinery of state, government and policy may be engaged. The Federal Court of Appeal in *Klinko*, above, at paragraphs 27 and 30-31, characterized opposition to corruption as an expression of political opinion. Justice Francis Muldoon of this Court, in *Reynoso v Canada (Minister of Citizenship and Immigration)* (1996), 107 FTR 220, [1996] FCJ No 117 (QL) held that political opinion is not confined to partisan opinion or membership in partisan movements. In *Reynoso*, for example, the applicant knew too much about the activities of a corrupt mayor and lived in fear of death because of it.

[51] In the instant case, the Male Applicant refused to engage in criminal behaviour. There was no evidence adduced to demonstrate, on a balance of probabilities, that the state, and particularly the police, were complicit in Magana's drug trafficking operation or that the Male Applicant was denouncing state actors. Certainly, Magana told the Male Applicant that the police were being paid to allow the drug operation to function, and the Male Applicant believed it. However, it appears that the Male Applicant simply took Magana at his word. The RPD acknowledged this very problem—the Male Applicant never saw or produced any evidence of state involvement in Magana's drug operation. The Applicants want the RPD and the Court to accept this bare allegation of police involvement as true, and to believe that the state is so wholly corrupt that speaking out against drug trafficking is the same as speaking out against state action. However, as there is no evidence of state involvement in Magana's drug operation, speaking out against it does not constitute speaking out against state action.

[52] I do not mean to imply that the Male Applicant's belief that the police were complicit is completely implausible. In fact, the documentary evidence indicates that corruption among public officials is a problem in Mexico. So, the Applicant's version of events regarding Magana is possible. However, possible is not enough. The Applicants need to make out their case on a balance of probabilities and I am not satisfied that they have done so.

[53] There was no evidence before the RPD, other than the Applicants' assertions, that the authorities were involved, who was involved or how and to what extent they were involved.

[54] Someone who refuses to participate in crime as a matter of conscience is not, for that reason, a member of a political group. Given the evidence for a political connection adduced by the Applicants, the reasons were adequate and the authorities relied upon by the RPD were apt.

[55] Justice Pelletier's words in *Palomares*, above, at paragraph 15, are helpful in the present case:

> It is my view that these elements of proof do not suffice to establish the nexus which is required for refugee status. While denouncing corruption can be a political act, not every brush with corruption amounts to a political act or is perceived by the corrupt as a political act. The risk to which the applicant is exposed arises from her status as a witness to a crime. Even if members of the state apparatus are involved, the fact of making a complaint does not necessarily involve political action, nor does it mean that the complaint will be seen by them as political action. It is difficult to speculate as to why the authorities did not act upon the applicant's identification but while corruption is one possible reason, mistaken identity is another. As for the attempts on her life, the perpetrators knew where she worked. It would not require official collaboration for them to locate her home. Simple surveillance would do. This is not to minimize the applicant's fears but to point out that the link with state sanction or collusion is weak. For these reasons, the CRDD's determination was not unreasonable and the application for judicial review must be dismissed.

[56] Likewise in the case before me, the link with state sanction or collusion is weak and the RPD cannot be faulted for its conclusions on point.

[57] In *Klinko*, above, the link was not weak, and the factual differences are instructive for the present case. This is what the Federal Court of Appeal concluded on point at paragraphs 34-35:

> The opinion expressed by Mr. Klinko took the form of a denunciation of state officials' corruption. [page342] This denunciation of infractions committed by state officials led to reprisals against him. I have no doubt that the widespread

> government corruption raised by the claimant's opinion is a "matter in which the machinery of state, government, and policy may be engaged".
>
> Indeed, the record contains ample evidence that the machinery of government in the Ukraine was actually "engaged" in the subject-matter of Mr. Klinko's complaint. The country information reports, in the present instance, contain statements by the President of Ukraine and two senior members of the Security Service of Ukraine about the extent of corruption within the government and the need to eradicate it both politically and economically. Where, as in this case, the corrupt elements so permeate the government as to be part of its very fabric, a denunciation of the existing corruption is an expression of "political opinion". Mr. Klinko's persecution, in my view, should have been found to be on account of his "political opinion".

[58] In my view, no such supportive evidence can be found to establish the necessary link in the present case.

[59] As for adequacy of reasons, the test has been stated many times. In *Ragupathy v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 151, the Federal Court of Appeal put it as follows at paragraph 14:

> Whether reasons provide an adequate explanation of a decision can be tested by referring to the functions performed by a reasons requirement. Of the functions identified by Sexton J.A. in *VIA Rail Canada Inc. v. National Transportation Agency*, [2001] 2 F.C. 25 (C.A.), two are particularly pertinent to the present case. First, reasons help to ensure that the decision-maker has focused on the factors that must be considered in the decision-making process (at para. 17). Second, they enable the parties to exercise their right to judicial review (at para. 19) and the court to conduct a meaningful review of the decision.

[60] With these considerations in mind, I can find nothing inadequate about these reasons on nexus. Concision is not inadequacy.

State Protection

[61] Because the nexus issue disposes of the Applicants' section 96 claim, the RPD considered state protection only in relation to section 97.

[62] The Applicants, first of all, say that the RPD places the threshold too high when it says in paragraph 18 that

> Mexico is a democratic country and thus the burden on the claimant to seek protection from the state agencies of the country is a high one which he should have first attempted prior to seeking international protection.

[63] The Applicants seek to rely upon that line of cases which describe Mexico as an emerging democracy with many problems that require careful scrutiny, so that the usual presumption of adequate state protection for a fully fledged democracy cannot be applied.

[64] The Applicants have referred the Court to Justice Roger Hughes' decision in *Lopez v Canada (Minister of Citizenship and Immigration)* 2010 FC 1176 at paragraph 8:

> Another error of law is with respect to what is the nature of state protection that is to be considered. Here the Member found that Mexico "is making serious and genuine efforts" to address the problem. That is not the test. What must be considered is the actual effectiveness of the protection. I repeat what I said in *Villa* v. *Canada (Minister of Citizenship and Immigration*) 2008 FC 1229 at paragraph 14:
>
> > 14. The Applicants lawyer was given an opportunity to make further submissions as to IFA and did so in writing. In doing so reference was made to a number of reports such as those emanating from the United Nations and the United States and to decisions of this Court including *Diaz de Leon v*.

> *Canada (MCI)*, [2007] F.C.J. No. 1684, 2007 FC 1307 at para. 28; *Peralta Raza v. Canada (MCI)*, [2007] F.C.J. No. 1610, 2007 FC 1265 at para.10; and *Davila v. Canada (MCI)*, [2006] F.C.J. No. 1857, 2006 FC 1475 at para. 25. Those and other decisions of this Court point to the fact that Mexico is an emerging, not a full fledged, democracy and that regard must be given to what is actually happening and not what the state is proposing or endeavouring to put in place.

[65] In my view, there is no issue in the present case that the RPD used "serious and genuine efforts" as the test for adequate state protection in Mexico. The RPD considered the "actual effectiveness of the protection" and looked at "what is actually happening and not what the state is proposing or endeavouring to put in place."

[66] The RPD says in paragraph 18 of the Decision that the burden to seek protection is a "high one" but this is not, in the context of the Decision as a whole, meant to suggest that the RPD accepts without question that Mexico is like Canada or is a fully developed democracy and that we can assume that state protection exists. If this were the case there would be no need for the detailed analysis of what Mexico is actually doing which appears in the Decision.

[67] The cases cited and relied upon by the Applicants all indicate the need to look closely at what Mexico is actually doing to protect its citizens. In *Yanez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1059 at paragraph 32, Justice Danièle Tremblay-Lamer outlined what is needed:

> While Mexico is a functioning democracy, it nonetheless faces well-documented governance and corruption problems. As such, the presumption of state protection is somewhat diminished and, thus, decision-makers must engage in a full assessment of the evidence

> placed before them. This assessment should include the context of the country of origin in general, all the steps that the applicants did in fact take, and their interaction with the authorities (*Zepeda*, above at para. 20; *Villicana v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1205, 86 Imm. L.R. (3d) 191 at para. 67).

[68] An examination of the Decision in this case reveals that the RPD did not in its state protection analysis treat Mexico as a fully-fledged democracy. After a full assessment of the evidence (including context) all steps taken by the Applicants and their interaction with the state authorities, the RPD reached the following conclusion:

> The claimants have not satisfied me with clear and convincing proof that the authorities in Mexico would not be willing or able to assist them. While criminality and corruption continue to be problems in Mexico I am not persuaded, on a balance of probabilities, that the state is not willing or able to provide adequate, although not perfect protection. The claimants did not make effort [*sic*] to exhaust reasonably available recourse to state protection when that protection is likely to have been forthcoming.

[69] It is, of course, possible to disagree with this conclusion. Mexico is a particularly difficult country to assess. Much depends upon the specifics of each case and the evidence cited. However, I cannot say that the RPD's conclusions in this instance were reached without a review of the necessary context and of what Mexico is actually doing or that the RPD's conclusions fall outside of the *Dunsmuir* range.

[70] The great weakness in the Applicants' case is the Male Applicant's failure to report to the authorities both Magana's drug trafficking (and its alleged links to the police) and Magana's attacks on the Male Applicant. It is understandable that the Male Applicant feared approaching the local police but, as the RPD noted, they were not his only recourse.

[71] The Applicants provided examples of past incidents when they or others made reports to the police and, each time, received an unsatisfactory response. As the RPD notes, however, they did get a response. This indicates that the police are making efforts, albeit not always satisfactory efforts, to protect citizens. As the Federal Court of Appeal recently held in *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, the test for a finding of state protection is whether that protection is adequate, not whether it is effective, *per se*. The RPD relied on documentary evidence indicating that the state of Mexico is making efforts and that these efforts are having an impact on corruption and the drug trade. I am not satisfied that the Applicants exhausted the state protection that was reasonably available to them and I can find nothing unreasonable in the RPD's analysis and conclusions on this issue.

[72] The Applicants further argue that the state protection analysis is unreasonable because it is, at least in part, based upon speculative conjecture and an unwillingness to believe the Applicants rather than upon relevant inferences drawn from the evidence. The offending sequence occurs at paragraph 12 of the Decision:

> In this case the male claimant states that he was afraid to go to the police because Magana had told him told him [*sic*] that it was a large organization and that police were being paid so they could operate. However, the male claimant never saw any other men with Magana and only saw two other people who made the deliveries. The male claimant was beaten by three men who said they were bringing a message from Magana. The male claimant was never approached by any police. Also, when the male claimant was leaving Leon for Aguascalientes he left his children at his mother- in-law's house which was just about 150 metres away. The minor claimants were not bothered there and nor was his mother-in-law bothered. The minor claimants were moved to the male claimant's sister's house in Aguascalientes where they stayed for two months after the male and female claimant left Mexico. Once again the minor claimants were not bothered there and nor were his sisters. After the claimants left Mexico, neither Magana nor his associates made any effort to locate

> the claimant aside from going to his former place of residence in Leon. Although the claimant believes he was being followed because the truck he traveled in was found burned in the town of San Antonio, the place he first went to in Aguascalientes, and he received a call from Magana who said he knew where he was, the claimant believes this information may have been given by a former boyfriend of his sister. If Magana was part of a large, well organized and well connected network of criminals who were drug traffickers, and he wanted to silence the male claimant, it seems implausible that he would follow the claimants to Aguascalientes only to burn their truck and once again warn the claimants. Further, it seems reasonable that criminal [*sic*] with connections to police and drug traffickers would at least visit the home of the male and female claimants' parents or other family members. Instead they simply visited their former home in Leon. I find that Magana is not as well connected as the claimant seems to believe.

[73] The RPD is, of course, entitled to assess what the Applicants say against common sense and plausibility. As Justice Raymond Décary said in *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 N.R. 315 at 316-17 (FCA):

> There is no longer any doubt that the Refugee Division, which is a specialized tribunal, has complete jurisdiction to determine the plausibility of testimony…. As long as the inferences drawn by the tribunal are not so unreasonable as to warrant our intervention, its findings are not open to judicial review.

[74] It has to be borne in mind here that what is being assessed by the RPD is the Applicants' fears of Magana, based upon Magana's possible association with gangs, drug trafficking and the state, as an explanation as to why the Applicants did not go to the police. All the RPD is saying is that, apart from what Magana has told the Male Applicant, the whole context of what has happened to them does not suggest that Magana has the kind of connections that would justify the Applicants not approaching the police. What Magana said about his status and his connections and what the Applicants may surmise does not have to be accepted at face value. The RPD is not engaging in conjecture as far as I can see. It is merely saying that the evidence of Magana's alleged sphere of

operations and his influence with the state authorities does not seem to have been established when it is borne in mind that the threat from Magana was that he would silence the Male Applicant. The usual way of silencing someone when the perpetrator has criminal and state connections did not occur in this case. This includes Magana's alleged military connections, not specifically mentioned but, in my view, obviously subject to the same logic. Once again, it is possible to disagree, but I do not think the RPD'S general point can be said to fall outside the *Dunsmuir* range.

[75] Finally, the Applicants attack the state protection analysis on the basis that it does not specifically address documentation which claims that Mexico cannot protect its citizens. The Applicants rely upon *Cepeda Gutierrez v Canada (Minister of Citizenship and Immigration)* (1998), 157 FTR 35, [1998] FCJ No 1425 (QL) at paragraph 17.

[76] The Applicants cite and quote from the WOLA report in At a Crossroads: Drug Trafficking, Violence and the Mexican State, which was item 7.2 in the RPD package. They also refer to Amnesty International's Mexico: Laws Without Justice: Human Rights Violations and Impunity in the Public Security and Criminal Justice, which was item 9.1 in the RPD package.

[77] The excerpt from the WOLA report deals with the reach and power of the drug cartels and the corruption that undermines Mexico's ability to ensure the rule of law and combat criminal organizations and the drug trade. The Amnesty report says that impunity remains the norm in Mexico and only the most serious cases can expect an investigation after a lot of effort and likely reprisals for trying.

[78] The Applicants complain that the RPD fails to mention "these directly relevant and credible reports, both of which support the applicants' case and run counter to the generally positive picture preferred by the member."

[79] I do not think the RPD adopts a "generally positive picture" of the situation in Mexico. The on-going problems with crime and corruption are acknowledged, but the RPD points out that the state provides services to those who, like the Applicants, fear violence at the hand of drug dealers and other criminals and that Mexico is offering assistance to citizens who feel they need state protection. In the present case, the Applicants made no effort to access those services and protections so that, in their case, they can offer no personal experience that would suggest that Mexico's efforts and current infrastructure of protections and services could not have assisted them before they made the choice to flee to Canada. In this context, I do not feel that either of these reports required specific mention. The WOLA report outlines Mexico's efforts to curtail the drug trade. It points to the difficulties experienced and suggests what must be done to overcome those difficulties. It also points out that it is "too soon" to tell whether the government strategies will be effective or not. I see nothing in the report that directly contradicts the findings of the RPD in this case. The RPD acknowledges that there are difficulties but confirms that Mexico is acting and that the authorities will respond. The Amnesty report deals with human right violations within the public security and criminal justice system. This was not the basis of the Applicants' claim. However, once again, these problems are referenced in the Decision. The report does not contradict the RPD's conclusions in a way that would require specific mention. The Applicants' comments are taken out of context.

Recent Jurisprudence of the Court

[80] My review of the recent jurisprudence of the Court suggests the following points of relevance to the present case:

a. Applicant Bears the Burden of Rebutting the Presumption of State Protection

The Federal Court of Appeal observed in *Carillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, that a refugee claimant bears the burden of rebutting the presumption of state protection by showing, on a balance of probabilities, that state protection is inadequate. The Applicant must provide relevant, reliable and convincing evidence.

Justice Zinn, in *Torres v Canada (Minister of Citizenship and Immigration)*, 2010 FC 234, adopted a contextual approach towards determining whether a claimant has rebutted the presumption of state protection (taking into account: the nature of the human rights violation; the profile of the human rights abuser; the efforts of the victim to seek protection; the response from authorities; and the documentary evidence). I believe that the RPD adopted an appropriate contextual approach in the present case.

b. Applicant Need Seek State Protection Only Where It Is Reasonably Forthcoming

The Supreme Court of Canada, in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 D LR (4th) 1, indicated that it would defeat the purpose of international protection if a claimant were required to risk his or her life seeking ineffective protection merely for the purpose of demonstrating that ineffectiveness. Justice La Forest held that "only in situations

in which state protection 'might reasonably have been forthcoming', will the claimant's failure to approach the state for protection defeat his claim";

c. How Do We Determine Whether State Protection Is Reasonably Forthcoming? Mexico on the Democracy Spectrum

The question then becomes how do we determine whether state protection "might reasonably have been forthcoming" in a given case? The Federal Court of Appeal in *Kadenko v Canada (Minister of Citizenship and Immigration)* (1996), 143 DLR (4th) 532, 206 NR 272 at paragraph 5, held that "the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her." Conversely, the less democratic a state's institutions are the less a claimant needs to do and the less reasonably forthcoming state protection is presumed to be.

This Court has looked at adequate state protection in Mexico by assessing Mexico's position on the "democracy spectrum." This is only one of the relevant considerations, however, in assessing the availability of state protection.

Justice Luc Martineau in *Avila v Canada (Minister of Citizenship and Immigration)*, 2006 FC 359 recognized that the determination of the adequacy of state protection is very fact-specific; it cannot be stated in absolute terms; "Each case is *sui generis*." While one judge of the Court may find that state protection is available in a particular Mexican state, that does not preclude another judge from finding that the very same state offers inadequate protection on the basis of different facts. That each case must be determined on its own facts has been emphasized repeatedly by this Court. See, for example, Justice Mainville in *Flores*, above,

at paragraph 38; and Justice Michael Phelan in *C.J.H. v Canada (Minister of Citizenship and Immigration)*, 2010 FC 499 at paragraph 10;

d. Where Is Mexico on the Democracy Spectrum According to Federal Court Jurisprudence?
Mexico is Not a Developed Democracy

In *Capitaine v Canada (Minister of Citizenship and Immigration)*, 2008 FC 98, 166 ACWS (3d) 150, Justice Johanne Gauthier found that the Board's determination that the claimant had not rebutted the presumption of state protection was unreasonable. The Board's reasons did not support finding that Mexico was a developed democracy similar to that of the US or Israel (see paragraphs 20-24). She also found, more specifically, that on the facts of the case, the Board's reasoning did not support finding that the applicant was required to seek Mexico's protection before fleeing to Canada.

Following Justice Gauthier's lead, Justice Danièle Tremblay-Lamer in *Zepeda v Canada (Minister of Citizenship and Immigration)*, 2008 FC 491 at paragraph 20, indicated that Mexico's position on the democracy spectrum was such that the Board was required to engage in a full assessment of the evidence:

> I find Madam Justice Gauthier's approach to the presumption of state protection in Mexico to be persuasive. <u>While Mexico is a democracy and generally willing to protect its citizens, its governance and corruption problems are well documented. Accordingly, decision-makers must engage in a full assessment of the evidence placed before them suggesting that Mexico, while willing to protect, may be unable to do so.</u> [Emphasis added.]

> In my view, in the instant case, the RPD did undertake a full assessment of the evidence and found that the police had been consistently responsive to the Applicants' complaints in the past, even if the outcomes differed from what the Applicants would have wanted.
>
> My decision in *Villicana*, above, falls into this category. In that case, the RPD had made no adverse credibility findings and the application came down to whether the RPD's state protection analysis was reasonable. I acknowledged Justice Tremblay-Lamer's finding in *Zepeda*, above, (which is discussed below) that the jurisprudence of this Court recognizes Mexico as a functioning democracy but also recognizes that there are well-documented governance and corruption problems which require decision-makers to engage in a full contextual assessment of the evidence before them on the issue of state protection. The applicants did not approach the authorities, fearing that doing so would expose them to risk because the principal applicant had previously been harassed by the police in Mexico City, who were allegedly friendly with the agents of persecution. They also said that, even if they had approached the police, the evidence before the RPD was that the police would not have assisted them. My conclusion was that the RPD had not engaged in the full contextual analysis required and, in particular, had failed to deal with evidence that strongly contradicted its own conclusions. I do not think that this problem occurred in the present case.

[81] There have been other cases where the Court has found that the presumption of state protection in Mexico has been rebutted. See, for example, *Barajas v Canada (Minister of Citizenship and Immigration)*, 2010 FC; *Perez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 947; *Yanez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1059; *Mendoza*

v Canada (Minister of Citizenship and Immigration), 2010 FC 119, 88 Imm LR (3d) 81; and *FMH v Canada (Minister of Citizenship and Immigration)*, 2010 FC 772.

2010 Jurisprudence

State Protection Found Not to Exist

[82] The above-noted cases illustrate the Court's general thinking regarding state protection.

[83] In recent cases where the Court has found that the RPD acted unreasonably in finding that state protection was available in Mexico, the Court has remarked that the RPD failed to take into account important evidence pointing towards a lack of state protection – be it subjective evidence specific to the applicant's circumstances, or more general documentary evidence. With respect to the documentary evidence, I note in the instant case, that the RPD took considerable pains to address the relevant documentary evidence.

[84] In *Torres*, above, Justice Zinn found the RPD's conclusion that it was implausible that the federal police would not take any action against the abusers to be both "unreasonable and naïve" since the documentary "record is replete with examples of well-connected persons being protected by or at least not investigated by the police at all levels in Mexico." In the present case, there is no persuasive evidence that there are well-connected people involved. Indeed, the RPD found that Magana was not as well connected as the Applicants believed him to be.

[85] In *Espinoza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 763, Justice Michael Kelen found that the RPD's failure to address a particularly relevant Los Angeles Times article on state protection was fatal because the Times was one of the "most credible newspapers in the US, and this article is important, relevant and contradictory evidence."

[86] In *FMH v Canada (Minister of Citizenship and Immigration)*, 2010 FC 772 Justice Michel Beaudry found that the RPD's analysis on the question of state protection was incomplete in that the RPD noted the resources available to women who are victims of violence under the law in Mexico but did not mention any of the evidence submitted by the applicant on the ineffectiveness of the implementation of the law in general. Justice Beaudry noted: "Such evidence was extremely relevant in this case and contrary to the Board's finding that state protection existed for the Applicant in Mexico."

[87] In *SAMG v Canada (Minister of Citizenship and Immigration)*, 2010 FC 812, I found that "the RPD's analysis of state protection is formulaic, often irrelevant, and is unresponsive to the specifics of this case….The RPD simply disregards the voluminous package of authoritative and trustworthy documentation … that directly contradicted the RPD's conclusions that Mexico could provide adequate state protection."

State Protection Fount to Exist

[88] In many cases, however, the Court has upheld the RPD's determination as to the availability of state protection in Mexico.

[89] Justice Michel Shore emphasized the importance of showing deference to the RPD in *Deheza v Canada (Minister of Citizenship and Immigration)*, 2010 FC 521. He indicated that the evidence contained in the National Documentation Package on Mexico was admittedly of a mixed nature and that it was open to a decision-maker to

> …focus on the corruption in Mexico to conclude that state protection will not be reasonably forthcoming; or, as is the case at bar, the decision-maker may focus on the political will and means at the disposal of the Mexican state to conclude that it can protect citizens.

[90] Either way, Justice Shore indicated, the question is simply a matter of what weight will be applied to the evidence. So long as it is clear that the RPD considered the conflicting evidence in respect of state protection and its decision comes within the range of acceptable outcomes, the Court should not interfere.

[91] In *Campos v Canada (Minister of Citizenship and Immigration)*, 2010 FC 842, the RPD had faulted the applicant for not following up on a complaint that she filed with police regarding one of the ex-husband's attacks and for not seeking further redress. Justice Richard Boivin found that "the panel did not disregard the documentary evidence and referred specifically to that evidence, which is that the spousal violence situation is not ideal but certain recourses and services are still available."

[92] Similarly, in *Fuentes v Canada (Minister of Citizenship and Immigration)*, 2010 FC 457, a female applicant feared sexual abuse from her uncle in Mexico. Justice Yvon Pinard indicated that "the applicant is required to seek protection from protective agencies other than police because those agencies are set up to protect women in the position of the applicant. The law is now settled

that local failures to provide effective policing do not amount to a lack of state protection and that an applicant may seek redress and protection from protection agencies other than police ….” This, in my view, is directly on point with the present case, where the Applicants failed to seek protection or redress from agencies set up specifically to address police corruption and drug trafficking.

[93] In *C.J.H.*, above, Justice Phelan found that the applicant had not diligently discharged her obligation to approach the state for protection. He observed at paragraph 10 that

> The presumption of the existence of state protection in Mexico has become a troublesome principle; however, it remains just that - a presumption rebuttable on the evidence. There is evidence of significant problems in certain areas and with certain governmental authorities. However, it was not unreasonable to find that the presumption of state protection applies to Mexico; it is a democracy in control of its territory with functioning government organizations. It depends on the facts in each case whether that presumption is rebutted in respect of that individual or group or in respect of the offending actions alleged.

[94] In *Cruz v Canada (Minister of Citizenship and Immigration)*, 2010 FC 929, Justice Paul Crampton considered the case of two applicants who fled Mexico for fear of the female applicant’s former husband, who was a Major in the Mexican army. The Major had abducted the male applicant on four separate occasions. The applicants did not contact the police after the first abduction because they were told that the Major would find out. After the second abduction, they went to the local police, but nothing was done. The applicants made no further complaints after the third, and fled after the fourth. The RPD found that the presumption of state protection had not been rebutted and it faulted the applicants for not seeking redress at a higher level (i.e. the state police). Justice Crampton found the RPD’s decision was based on the evidence, which demonstrated that there were authorities in Mexico who would assist members of the public with corrupt officials; recent

initiatives to address corruption have had a marked effect and the police in Mexico are both willing and able to protect victims of crime. This also, in my view, is directly on point with respect to the present case.

[95] Finally, in *Dosantos v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1174, Justice Judith Snider consider the case of an applicant who feared an individual with connections to the state attorney general's office. The applicant had complained to the local police but believed nothing was being done. The RPD found that the local police were responding appropriately and, in any event, the applicant was obligated to seek redress at the state level before fleeing. Justice Snider accepted as reasonable the RPD's conclusion that the "preponderance of the objective evidence regarding current country conditions suggests that, although not perfect, there is adequate state protection in Mexico for victims of crime…" The Court was satisfied with the RPD's conclusion that "the claimant received police attention every time [he] approached the authorities." Ultimately, Justice Snider concluded that the applicant's evidence fell short of being sufficient to demonstrate that state protection was not available for him in Mexico. This case is also on point with respect to the instant case in which the Applicants admit that they received police attention each time they approached the authorities but nonetheless they failed to seek at the state level assistance from agencies that had been established specifically for complaints such as theirs, namely corruption of public officials and drug trafficking.

Conclusions

[96] I think the jurisprudence in this Court concerning the availability of state protection in Mexico ultimately boils down to the specific facts and the treatment of the available evidence in each case. As Justice Phelan said in *C.J.H.*, above, it "depends on the facts in each case whether [the presumption of state protection] is rebutted in respect of that individual or group or in respect of the offending actions alleged." As long as the RPD addresses the full context, the Court will be reluctant to interfere. In the present case, given that the Applicants made no attempt to access state protection and that state agencies have been established to address corruption and drug trafficking, and that the RPD examined the full context, it seems to me that the RPD's Decision is reasonable and within the *Dunsmuir* range. The Court should not interfere.

[97] The parties agree there is no issue for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification.

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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