

Federal Court



Cour fédérale

Date: 20100809

Docket: IMM-4591-09

Citation: 2010 FC 812

Ottawa, Ontario, August 9, 2010

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

SILVIA ADRIANA MARZANA GARCIA

Applicant

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 of the Immigration and Refugee Board (RPD), dated August 6, 2009 (Decision), which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a citizen of Mexico. She married her husband (Olvera) in 1994 when she was 17. Olvera became violent in 1995 and beat the Applicant several times to the extent that medical treatment was required. The Applicant left Olvera in 1998. However, he followed her, abducted her, beat her, sexually assaulted her, and threatened to kill her and her family and to take away their children if she did not return to him. She complied with his demands and returned. Olvera was arrested on several occasions, but was released and returned to the family home.

[3] The Applicant fled Mexico with Olvera and their two children in November, 2004. The Applicant made an initial refugee claim with Olvera that was based on fear of harm from their former employer, Bernardo Ochoa, because the Applicant and Olvera had been successful in launching an unjust dismissal complaint against Mr. Ochoa.

[4] The initial refugee claim cited numerous incidents alleged by the Applicant. For example, she said that in one instance men dressed as police tried to abduct her and Olvera. She believed that these men were sent by Mr. Ochoa to intimidate them into dropping their labour complaint. These men released the Applicant when private security officers who were nearby came to her assistance.

[5] Another incident occurred in which the same men dressed as police attempted to pick the children up from school. When other police arrived, they spoke to the men but let them go, and

warned the Applicant not to continue her complaint. She alleges further that two years later her family was forced out of their car at gunpoint.

[6] Olvera, along with the Applicant, made a claim for protection in January, 2005. This claim was refused but they were granted a new hearing.

[7] During this time, Olvera had again become abusive. The Toronto Police Service and the Catholic Children's Aid Society both became involved in the situation. The Applicant separated and reunited with Olvera again, before finally leaving him.

[8] The Applicant's and Olvera's claims for protection were separated, and the Applicant added fear of Olvera to her fears of returning to Mexico.

DECISION UNDER REVIEW

[9] In considering this claim, the RPD referred to the *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution: Guidelines Issued by the Chairperson Pursuant to Section 65(3) of the Immigration Act (Gender Guidelines)*, and determined that the Gender Guidelines should be used to "help understand and apply the added sensitivities necessary to properly assess whether any credibility issues are the result of such difficulties or an attempt to fabricate evidence."

Section 96 analysis

[10] In considering the domestic abuse alleged by the Applicant, the RPD concluded that the determinative issue with regard to a section 96 analysis was state protection. The RPD determined that the Applicant had not rebutted the presumption of state protection. According to the RPD, “while the effectiveness of the protection is a relevant consideration, the test is whether the protection offered is adequate.”

[11] While the Applicant said she had been attacked by Olvera on numerous occasions, the RPD noted that she could not provide accurate details or documents for all of the events. The Applicant was only able to recover a police report from February 2001 and a medical report from December 1998. However, in considering the length of time that has passed and the difficulties women may face in general given these circumstances, the RPD did not draw an adverse inference from this fact.

[12] The Applicant alleged that she went to the police several times and that on some occasions her attempts to get help were met by crude remarks by the authorities who suggested that she was to blame for the attacks, or that she deserved them. On other occasions, the police were not informative with regard to what action the Applicant could pursue to prevent the continuation of the abuse by Olvera.

[13] The RPD noted that Olvera was arrested on numerous occasions, in Cuernavaca, Morelos and Acapulco, Guerrero. The Applicant alleges that he was released in Cuernavaca, Morelos after his family paid the authorities a bribe.

[14] The RPD determined that “although the claimant believes authorities did nothing to protect her from Olvera and she may have been disappointed that more could not be done, the facts suggest that the authorities did act on some occasions.” The RPD noted further that “sadly, even in countries with the best resourced police, perfect protection is not possible.”

[15] While the Applicant had experienced mixed results when seeking the protection of authorities in Mexico from 1995-2002, the RPD noted that documentary evidence indicates that there have been changes with regard to gender violence in Mexico since this time. According to the RPD, “while protection offered to women victims of violence in Mexico is far from perfect there are laws in Mexico to help protect women.” The RPD then canvassed some laws and programs put into place, including the *General Law on Women’s Access to a Life Free of Violence*, which aim to prevent, punish and eradicate violence against women. According to the RPD, while progress is slow, the efforts of the state are serious.

[16] While the Applicant may feel safer in Canada, the RPD noted that her experiences — which occurred long before Mexico had adopted its new laws — showed that the authorities had offered some protection. Moreover, as a result of the changes the RPD felt that the situation has **[had?]** improved, including expansion of public awareness campaigns and improvement of police training

and responses, legal requirement for advice and counseling and for medical assistance, protection orders, and an increase in the number of shelters. Indeed, the RPD determined that, in this instance, considering the changes that have occurred since the Applicant left Mexico, state protection, although not perfect, would be adequate and would likely be available to her.

[17] With regard to the threats made by Ochoa, the RPD held that the determinative issue was one of nexus, since victims of crime, corruption or vendettas generally fail to establish the necessary link between their fear of persecution and one of the Convention grounds.

[18] While the Applicant fears the activities of Ochoa, who continues to seek revenge, this revenge is not based upon race, religion, nationality, political opinion, or membership in a particular social group. As such, the RPD determined the Applicant to be “a victim of a personal vendetta and a victim of crime which does not provide her with a link to a Convention ground.”

Section 97 analysis

[19] The determinative issue with regard to the section 97 analysis was whether the Applicant faces a prospective fear upon her return to Mexico, and whether she rebutted the presumption of state protection.

Prospective fear

[20] While the Applicant continues to fear the threats made by Ochoa, the RPD held that the claimant has also been in touch with her family in Mexico and over the last four years Ochoa has made no effort to harass or even contact them in an effort to intimidate or locate her.

Because the matter is settled, Ochoa's property has been seized, and he has shown little or no interest in the Applicant, the RPD held that it was not likely that Ochoa would cause the Applicant harm upon her return to Mexico.

State protection

[21] Even if Ochoa were still interested in harming the Applicant, the RPD held that there is adequate state protection available to the Applicant.

[22] Although the Applicant contends that she reported the first incident – when the men dressed as police intimidated her – the RPD determined that her evidence as to what happened to the report of this incident was inconsistent and unreliable.

[23] The Applicant did not produce any copies of police reports for the alleged incidents. The RPD drew a negative inference from the lack of production of these documents, and found that the Applicant did not report any of the alleged incidents.

[24] According to the RPD,

It is incumbent upon a claimant to at least try to obtain state protection where it is reasonably forthcoming and it would have been reasonable to do so. In this case the claimant believed that police were involved with Ochoa. However, if the claimant believes corrupt police were involved there is recourse available in Mexico to address corruption and crime.

[25] Furthermore, the RPD found that the burden on the Applicant to seek state protection was high because Mexico is a “functioning democracy with democratic institutions, a functioning political and judicial system and apparatus that provides a measure of protection to its citizens including a functioning police force and military.”

[26] Moreover, the RPD felt that the documentary evidence demonstrates that Mexico is not in a state of collapse and has been making, and continues to make, serious efforts to fight crime and corruption. Such efforts include, according to the RPD, a number of vehicles for reporting crime and corruption as well. What is more, the RPD noted that state authorities are willing to take steps to protect victims of crime and corruption. Mexico has also been cooperating with its U.S. law enforcement counterparts more than ever in a serious effort to combat its problems with crime. The RPD concluded on this issue as follows:

There is no doubt that crime and corruption are serious problems in Mexico. The challenges faced by Mexico are formidable. However, the preponderance of evidence indicates Mexico is making serious efforts to combat crime and corruption and while progress is not as swift as many would like, there is progress.

As a result, the RPD determined that the Applicant had not availed herself of state protection, and that it is reasonable to believe that protection would be forthcoming. As such, if the Applicant were to return to Mexico, there would be adequate protection available.

ISSUES

[27] The Applicant submits the following issues on this application:

1. Did the RPD commit a breach of natural justice by making a specific negative credibility finding about reports to the Mexican police after stating to counsel at the hearing that credibility was not an issue for counsel to address in written submissions?
2. Did the RPD err in determining that there was adequate state protection available to the Applicant for each aspect of the claim?
3. Did the RPD err in determining that there was no prospective fear with respect to Mr. Ochoa?

STATUTORY PROVISIONS

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

Convention refugee

96. A Convention refugee is a person who, by reason of a

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le

well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

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 themselves 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

b) soit à une menace à sa vie ou au risque de traitements ou

treatment or punishment if

peines cruels et inusités dans le cas suivant :

(i) the person is unable or, because of that risk, unwilling to avail themselves 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 qualifié 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

[29] The Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 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.

[30] The Applicant has alleged that the RPD committed a breach of natural justice. This is reviewable on a standard of correctness. See *Sketchley v. Canada (Attorney General)*, 2005 FCA 404, [2005] F.C.J. No. 2056 at paragraph 46, and *Dunsmuir*, above, at paragraphs 126 and 129. Accordingly, a standard of correctness is appropriate when determining whether the RPD committed a breach of natural justice by making a specific negative credibility finding after stating to counsel at the hearing that credibility was not at issue.

[31] The issue of state protection is reviewable on a standard of reasonableness. See *Song v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 467, [2008] F.C.J. No. 591 at paragraph 6.

[32] The Applicant has also alleged that the RPD erred in determining that there was no prospective fear with respect to Mr. Ochoa. This is an issue concerning the RPD's application of the

legal test to the facts of the case at hand. As such, this is reviewable on a standard of reasonableness.

See *Dunsmuir*, above, at paragraph 164

[33] 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”: *Dunsmuir* at paragraph 47. Put another way, the Court should only intervene 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.”

ARGUMENTS

The Applicant

Fear of Mr. Ochoa

[34] The RPD determined that Mr. Ochoa was not as interested in the Applicant because the labour issue was settled, his properties had been seized, and he had shown little or no interest in her.

[35] However, this finding is contradicted by the Applicant’s evidence that her lawyer told her that Mr. Ochoa had said that the matter was still not over and that he would make every effort to recover his property. Hence, the Applicant says there is evidence that the matter is still a live issue for Mr. Ochoa.

[36] Moreover, the Applicant did not live with her parents. As such, it was of no significance that Mr. Ochoa had not approached them within the last four years. The Applicant contends that Mr. Ochoa could have used other methods to determine whether she was present at her parents' house, such as having the house watched; or he may have learned through others that the Applicant had left the country.

[37] The Applicant submits that the RPD's finding on this point was a finding of implausibility. While adverse findings of credibility can be made based on the implausibility of an applicant's story where the inferences drawn can reasonably be said to exist, the Applicant submits that this is not such a case. Furthermore, plausibility findings should only be made in the clearest of cases. See, for example, *Elezi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 210, [2003] F.C.J. No. 275.

Natural Justice

[38] The RPD determined that the Applicant did not report any of the incidents concerning Mr. Ochoa to the police and that she did not make an effort to access state protection.

[39] The Applicant says that the RPD's determination in this regard resulted in a breach of natural justice, since it was a significant finding of fact based on an adverse credibility finding, and the RPD told Applicant's counsel that credibility need not be addressed in counsel's submissions. Furthermore, Applicant's counsel made the RPD aware that she had relied on his assurance in her

post-hearing written submissions. A similar error was made in the case of *Griffith v. Canada (Minister of Citizenship and Immigration)*, 171 F.T.R. 240, [1999] F.C.J. No. 1142 in which it was held that it was a breach of natural justice to not adhere to a previous representation that credibility was not at issue and then reject the claim, in part, on grounds of credibility.

Conditions in Mexico

[40] The Applicant submits that country condition documentation does not support the RPD's finding that Mexico is a fully-developed democracy so that the presumption of state protection applies. Rather, according to the Applicant, the documentation shows that conditions have "deteriorated in the last two years because of the government's war with the drug cartels so that the government's control is weakened." She says that, despite the government's attempts to fight corruption, the situation has worsened due to the bold attacks the drug cartels are making on the government and the police, as well as the infiltration of the authorities by drug cartels. Consequently, the RPD erred in applying the presumption of state protection in the face of country documentation to the contrary. As a result, the RPD erred in finding that state protection is available to the Applicant.

[41] Moreover, some Federal Court decisions support the Applicant's argument that, based on recent country documentation, Mexico should be considered a less-developed democracy. See, for example, *De Leon v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1307, [2007]

F.C.J. No. 1684 and *Capitaine v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 98, [2008] F.C.J. No. 181.

[42] Furthermore, the RPD erred in finding that the effectiveness of state protection was simply a relevant factor for consideration, while the appropriate test is one of adequacy. The Applicant submits that the appropriate test is one of effectiveness. See, for example, *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, [1993] S.C.J. No. 74, and *Hinzman v. Canada (Minister of Citizenship and Immigration)*; *Hughey v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, [2007] F.C.J. No. 584. The Applicant contends that consideration of state protection must include “not only the existence of an effective legislative and procedural framework but the capacity and will to effectively implement that framework.” See *Elcock v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 1438 as cited in *Skelly v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1244, [2004] F.C.J. No. 1503 at paragraph 45. Further, the presumption of state protection can be defeated by past personal experience, or the experience of similarly situated individuals, or other evidence of a lack of state protection. See, for example, *Molnar v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1081, [2002] F.C.J. No. 1425.

[43] Despite the large volume of country documentation submitted by the Applicant with regard to state protection and domestic violence, the RPD only mentioned two items in its reasons. The Applicant submits that the RPD erred in using the country documentation selectively and ignoring evidence that contradicted its conclusions. See *Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, 157 F.T.R. 35, [1998] F.C.J. No. 1425.

[44] The evidence before the RPD demonstrated that state protection would not be available for the Applicant with regard to the threats from Mr. Ochoa and his agents. The Applicant submits that the consequences of the existence of the powerful drug cartels and corruption in the justice system have weakened the state's institutions so that protection is almost non-existent for citizens of Mexico. See, for example, the 2008 U.S. Department of State Country Reports on Human Rights Practices (U.S. DOS Report), the Human Rights Watch 2008 World Report, and Amnesty International's report titled "Mexico: Laws without justice: Human rights violations and impunity in the public security and criminal justice system."

[45] The RPD neglected to discuss the failures of the criminal justice system of Mexico and instead focused on statistics and the existence of complaint mechanisms for corrupt public officials. However, it is the criminal justice system itself that is relevant to the Applicant in her situation with Mr. Ochoa.

[46] The RPD erred in ignoring the evidence before it. Although the RPD need not mention all of the evidence, the Applicant submits that it should at the very least comment on documentation that supports the Applicant's position and advise if the evidence is accepted, or rejected and the reasons why. See *Cepeda-Gutierrez*, above.

Domestic Abuse

[47] The RPD also erred in its treatment of the Applicant's claim based on domestic abuse. The Applicant submits that the RPD failed to properly consider her evidence with regard to the involvement of police.

[48] Despite the Applicant's testimony and evidence in her narrative, the RPD determined that the Applicant could not explain why her husband was released. The Applicant contends that this is an example of the RPD imposing too high a standard on her. Moreover, the Applicant also testified that her husband's family was wealthy, that money was paid, and that the police are corrupt. Indeed, the Applicant was aware of the attitude of the police when she made her reports against her husband. These facts, in combination, provide more than a reasonable ground to conclude that the police were bribed to release the Applicant's husband. Furthermore, the Applicant submits that the arrests were simply a way to extort money, and were made without any intention of assisting the Applicant. As such, it was unreasonable for the RPD to find on the facts that the police provided protection because they "acted on some occasions."

[49] Moreover, the existence of laws in Mexico that theoretically provide protection to women is not sufficient for a finding that state protection is available. The Applicant submits that the evidence demonstrates that state protection for victims of domestic violence in Mexico is ineffective. As a result, state protection in Mexico is inadequate. The RPD erred in finding otherwise.

[50] The RPD further erred in citing evidence out of context. While the RPD cites the 12% increase in complaints against the police as being a positive indicator of state protection, the experts within the documents cited take a contrary view of this evidence. Indeed, in the article “Macho culture stymies help for Mexican Women,” the president of Mexico City’s Commission on Human Rights reported that complaints by women of enforcement agencies in Mexico City failing to respond to complaints rose 12% after the passage of the law. Indeed, the same article notes that violence against women is engrained in Mexican culture. According to the Applicant “the very men they turn to for help could themselves be abusers, so they are more interested in trying to justify abuse than help the victims.”

[51] Such attitudes, and the multiple problems women have in accessing state protection in Mexico were documented in detail in the documentary evidence before the RPD. The RPD ignored this evidence. Moreover, there is evidence in the RPD’s disclosure package that demonstrates the lack of effective state protection for women who are victims of domestic violence. See, for example, the 2008 DOS Report, above, the Immigration and Refugee Board’s 2003 issue paper entitled “Mexico: Domestic Violence and Other Issues Related to the Status of Women,” as well as the Immigration and Refugee Board’s 2007 report entitled “Mexico: Situation of Witnesses to Crime and Corruption, Women Victims of Violence and Victims of Discrimination Based on Sexual Orientation.” According to Amnesty International’s 2006 report entitled “Briefing to the Committee on the Elimination of Discrimination Against Women,”

Official efforts to tackle problems often appear to be superficial and refer to legal procedures or principles supposedly guiding institutional conduct, rather than focusing on the actual experience of women or relatives seeking assistance from the authorities when

reporting violence. These experiences often vary markedly from how such cases are supposed to be treated.

The same document provides examples of women who have experienced torture and other form of mal-treatment by agents of the state:

Amnesty International has continued to receive reports of women suffering sexual abuse, intimidation and humiliation while in the custody of state officials as documented in the cases below. Impunity for human rights violations remains widespread...

The Human Rights Watch World Report 2008 (2008 World Report) also notes that “girls and women who report rape or violence to the authorities are generally met with suspicion, apathy, and disrespect.” The result of this is that “sexual and domestic violence against women and girls continues to be rampant and shrouded in impunity.” See 2008 World Report, above.

[52] The Applicant says that the documentation she provided supports her claim and accords with her personal experiences. However, the RPD failed to address this evidence. The RPD erred in failing to consider the totality of the evidence before it. This resulted in the RPD making erroneous findings of fact.

The Respondent

[53] The Respondent submits that a procedural fairness error with regard to the RPD’s state protection finding in relation to the Applicant’s former employer does not necessarily render the entire Decision invalid. The Supreme Court of Canada has held that if the outcome of a matter is

clear, then the Court should not overturn a decision simply because of a procedural fairness error. See, for example, *Mobile Oil Canada Ltd. v. Canada-Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202, [1994] S.C.J. No. 14. This principle has been applied by the Federal Court of Appeal in deciding that a matter should not be sent back for re-determination, even though there was a breach of procedural fairness, if alternative findings made by the RPD were determinative. See *Yassine v. Canada (Minister of Employment and Immigration)*, 172 N.R. 308, [1994] F.C.J. No. 949 at paragraphs 8-11.

[54] In the case at hand, the RPD noted that its findings with regard to state protection were made in the alternative to its findings with regard to prospective fear. The RPD's findings with regard to prospective fear were reasonable. The RPD noted that the Applicant's former employer has not made any contact with her family for four years and has made no effort to harass them. Furthermore, Mr. Ochoa had shown little to no recent interest in the Applicant. The Respondent submits that this finding was reasonable and that the Court should not interfere with it.

[55] The Applicant has also alleged that the RPD erred by not focusing on the effectiveness of state protection. However, the onus is not on the RPD in this instance. The onus is on the Applicant to provide clear and convincing evidence to establish that state protection is inadequate. See *Samuel v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 762, [2008] F.C.J. No. 963 at paragraph 10. The Respondent submits that, based on the evidence before the RPD, it was reasonable for the RPD to determine that the Applicant had not discharged this burden. See, for

example, *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] F.C.J. No. 399 at paragraphs 18, 30.

[56] The RPD noted that the police had provided assistance to the Applicant on numerous occasions when she experienced domestic abuse. It then considered that state protection for victims of domestic violence has improved considerably since the Applicant fled Mexico. The RPD's findings in this regard were reasonable, and it is not the Court's place to interfere with the RPD's weighing of the evidence. See *Aguebor v. Canada (Minister of Employment and Immigration)*, 160 N.R. 315, [1993] F.C.J. No. 732.

[57] Moreover, the failure to mention some documentary evidence is not fatal to the RPD's Decision, since the RPD is assumed to have considered and weighed all the evidence before it unless the contrary is shown. See *Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 at paragraph 1, and *Velinova v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 268, [2008] F.C.J. No. 340 at paragraph 21.

ANALYSIS

[58] I agree with the Applicant (and the Respondent concedes) that the RPD committed a breach of natural justice when it made negative credibility findings with respect to the Applicant's statements about reporting Mr. Ochoa to the police after giving assurances to Applicant's counsel that credibility need not be addressed in submissions. See *Griffith*, above.

[59] However, the state protection finding regarding Mr. Ochoa is clearly an alternative and independent ground for the RPD's rejection of the Applicant's claim regarding Mr. Ochoa. The RPD also found that Mr. Ochoa would no longer be interested in the Applicant and that "on a balance of probabilities, it is not likely Ochoa would cause harm to the claimant should she return to Mexico."

[60] As regards the fear of Mr. Ochoa, then, the issue becomes whether the finding regarding prospective fear was reasonable. My review of the Decision and the transcript of the hearing suggest that the RPD accepted into evidence the Applicant's account of the information she had received from her lawyer in Mexico that Mr. Ochoa had not given up and was still interested in harming her.

[61] Notwithstanding the RPD's acceptance of this evidence it nevertheless concluded that, on a balance of probabilities, Mr. Ochoa was no longer interested in harming her because the property dispute had concluded and because "the claimant has also been in touch with her family in Mexico and over the last four years Ochoa has made no effort to harass or even contact them in an effort to intimidate or locate the claimant." In other words, the evidence from the Applicant's lawyer, which was evidence of recent threats by Mr. Ochoa, was trumped by the conclusion that "Ochoa has shown little or no interest in the claimant" because he had made no effort to contact her family.

[62] The weighing of evidence is, of course, the prerogative of the RPD and the Court cannot intervene just because it disagrees that the most recent evidence of threat from Mr. Ochoa should have been given more weight than the failure of Mr. Ochoa to contact the Applicant's family in

Mexico. However, in this case, there was no evidence before the RPD that Mr. Ochoa knew of the Applicant's parents or where they lived. There was no evidence of any proximity between Mr. Ochoa and the parents, or that he had the means or the will to find them. In other words, there was no factual foundation for a finding that Mr. Ochoa was no longer interested in the Applicant because he had failed to contact her parents in the last four years, and there was no factual foundation to balance against the more recent information from the Applicant's lawyer (accepted by the RPD) that Mr. Ochoa was still threatening to harm the Applicant. Hence, the issue here is not the weighing of evidence but a conclusion reached by the RPD upon a mistake of fact and, in this case, a highly material and conclusive mistake of fact, that renders the Decision on prospective risk from Mr. Ochoa unreasonable.

[63] On this basis alone, then, I think the matter has to be referred back for reconsideration and I do not think it is necessary for me to say anything in detail about the RPD's state protection analysis, in relation to the threat from Mr. Ochoa or the domestic abuse risk. What I will say, however, is that after examining the evidence placed before the RPD against the Decision, I believe that the Applicant is correct that the RPD's analysis of state protection is formulaic, often irrelevant, and is unresponsive to the specifics of this case and the plight of abused women in Mexico when they look for help. The RPD simply disregards the voluminous package of authoritative and trustworthy documentation submitted by the Applicant which contained evidence that directly contradicted the IRB's conclusions that Mexico could provide adequate state protection to the Applicant if she returned. See *Cepeda-Gutierrez*. I am not saying, of course, that the RPD was obliged to accept this evidence, but it had an obligation to refer to it and explain why other evidence

was to be preferred. A reading of the RPD's state protection analysis in this case creates the distinct impression that it did not address the contradictory evidence because that evidence strongly suggests that women such as the Applicant who face abuse from men in the macho culture of Mexico do not have adequate state protection.

[64] In conclusion, then, I find unreasonable errors arise in this case as a result of the RPD's prospective fear analysis in relation to Mr. Ochoa, and in the RPD's analysis of state protection.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. The application is allowed, the decision is quashed, and the matter is returned for reconsideration by a differently constituted RPD.
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-4591-09

STYLE OF CAUSE: SILVIA ADRIANA MARZANA GARCIA

APPLICANT

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

RESPONDENT

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: July 14, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:**

HON. MR. JUSTICE RUSSELL

DATED: August 9, 2010

APPEARANCES:

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APPLICANT

Neal Samson

RESPONDENT

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