

Federal Court



Cour fédérale

**Date: 20110110**

**Docket: IMM-1757-10**

**Citation: 2011 FC 13**

**Ottawa, Ontario, January 10, 2011**

**PRESENT: The Honourable Mr. Justice Russell**

**BETWEEN:**

**CESIA MONTOYA MARTINEZ  
and  
MIRIAM LIVIER REAL RAMIREZ**

**Applicants**

**and**

**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 (IRB), dated 5 March 2010 (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 and biological women. Cesia Montoya Martinez (Montoya Martinez) identifies as a transgender man, Miriam Livier Real Ramirez (Real Ramirez) as a lesbian. They are a couple. They have come to Canada seeking protection from persecution and from discrimination amounting to persecution as women, as lesbians and as a transgender couple; Montoya Martinez also seeks protection as a pre-operative transgender man. They wish to live as a transgender couple and have children, but they claim that they cannot do this in Mexico.

[3] Both Applicants have been victims of domestic violence. In 1997 Real Ramirez witnessed, after the fact, the murder of her mother by her father. To the best of the Applicants' knowledge, the father remains incarcerated for that crime. Montoya Martinez was physically abused by his mother, verbally abused by his father and eventually banished from his family for acting and dressing like a male.

[4] The Applicants met in Mexico and began living together in Guadalajara in February 2003. In July 2005, they began receiving threatening phone calls from Real Ramirez's father and her brother-in-law, who are friendly with each other. The brother-in-law, who had been arrested for assaulting his daughter, began to harass Real Ramirez's sister (his wife) and their children upon his release from custody. Real Ramirez's sister approached the police for protection from her husband but the officers told her nothing could be done to help her.

[5] During these phone calls, Real Ramirez's father and brother-in-law demanded that the Applicants end their "dirty relationship." The men initially directed their threats at Montoya Martinez but, in time, the father threatened to murder Real Ramirez as he did her mother. In consequence, the Applicants moved house. On 17 February 2007, Real Ramirez's brother-in-law physically attacked Montoya Martinez. He told the Applicants that he was delivering a message from Real Ramirez's father: this is what they deserve for being lesbians and that, the next time, he would kill them.

[6] The Applicants claim that they left Mexico to escape persecution from these two men. They also claim that, in Mexico, they had no support and had to hide the true nature of their relationship and who they are. They arrived in Canada on 5 June 2008 and made their refugee claims on 16 June 2008.

[7] The Applicants' claims were first scheduled to be heard before the RPD on 9 April 2009. On that date, exhibits were entered into evidence and marked. However, following a motion by the Applicants, the member presiding over that hearing recused himself. A *de novo* proceeding began on 15 September 2009, and the evidence for the 9 April hearing was purportedly entered into evidence for the 15 September hearing.

## DECISION UNDER REVIEW

[8] The Applicants' claims were joined. Their hearing before the RPD took place on 15 September 2009 and 12 December 2009. They were represented by counsel and an interpreter was present.

[9] The RPD rejected their claims. Based on the evidence, the RPD concluded that the state of Mexico is capable of protecting the Applicants from the kind of harassment and assaults they allegedly suffered in Mexico. The onus was on the Applicants to take all reasonable steps to avail themselves of state protection before coming to Canada, but they never did. In the absence of clear and convincing evidence to rebut the presumption of state protection, the RPD found that the Applicants' claims were not objectively reasonable. For this reason, the RPD determined that the Applicants were neither Convention refugees nor persons in need of protection under the Act.

[10] In the course of its decision-making, the RPD made several material findings. First of all, it found that Mexico is a strong democracy. The burden on the Applicants to show an absence of state protection is proportional to the level of democracy in the state and is, in this case, a heavy one. No state can guarantee perfect protection for its citizens. According to *Ortiz v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1365, to prove the absence of state protection, a claimant must do more than demonstrate that he or she went to the police and that those efforts were unsuccessful. In the instant case, due to fear of their relationship being disclosed or mocked and their mistrust in the authorities, the Applicants did even less than this.

[11] The RPD acknowledged that domestic violence, gender discrimination and homophobia are serious problems in Mexico, and that concerns remain regarding corruption of public officials. However, it found that the Mexican government is making “serious and concerted efforts” to address these problems nationwide through a combination of legislative initiatives and through the establishment of appropriate programs and state agencies, which the RPD described. The RPD also recognized the Mexican government’s efforts to effect changes in societal attitudes regarding sexual orientation. All of these efforts are bearing fruit, particularly in urban areas, such as Guadalajara, where the Applicants lived. The RPD asked Montoya Martinez if he was aware of any of these government initiatives and he replied in the negative. As for other social organizations, Montoya Martinez replied that he was not aware of women’s organizations helping lesbians and that gay and lesbian organizations were primarily interested in having marches and collecting donations to grow their membership.

[12] The RPD found that, although there were inconsistencies in the documentary evidence regarding the adequacy of state protection, the preponderance of the evidence suggests that there is adequate protection for the Applicants in Mexico. The RPD assigned greater weight to this objective evidence than to the evidence of the Applicants, who have an interest in the outcome of the matter.

## **ISSUES**

[13] The Applicants raise the following issues:

1. Whether the RPD erred in finding Montoya Martinez to be a transgender woman when he is a transgender man;
2. Whether the RPD assessed the availability of state protection for the wrong protected group and, in consequence, ignored relevant evidence on lack of state protection;
3. Whether the RPD breached the principles of natural justice and procedural fairness in failing to have before it all evidence fundamental to the Applicants' case;
4. Whether the RPD misapplied the *Gender Guidelines*;
5. Whether the RPD failed to adjudicate the Applicants' claim that they face discrimination amounting to persecution based on their gender identity, sexual orientation and gender presentation.

## STATUTORY PROVISIONS

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

(a) is outside each of their countries of nationality and is unable or, by reason of that

### Définition de « réfugié »

**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) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette

fear, unwilling to avail themselves of the protection of each of those countries; or

(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.

crainte, ne veut se réclamer de la protection de chacun de ces pays;

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**

**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

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

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

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

(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,

### **Personne à protéger**

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

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

(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**

[15] 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.

[16] The first issue is one of fact and therefore is reviewable on a standard of reasonableness.



[17] The second issue concerns the alleged failure of the RPD to apply its state protection analysis to the “singular protected group” identified in the Applicants’ claims and its consequent failure to consider evidence relevant to a proper analysis. This Court has held that failure of a tribunal to recognize one of the bases of an applicant’s claim is reviewable on the reasonableness standard. See *Klemp v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 901. The Court also has held that a fundamental misconception of the basis of the claim demands that the decision be set aside. See *Adamjee v. Canada (Minister of Citizenship Immigration)*, [1997] F.C.J. No. 1815 (QL). Moreover, a failure to mention facts that are a basis for the claim also constitutes a reviewable error. See *Fainshtein v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 941 (QL).

[18] The fourth issue concerns the proper application of the *Gender Guidelines*. This is reviewable on a standard of reasonableness. See *Correa Juarez v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 890 at paragraph 12.

[19] 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. 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.”

[20] The third issue is one of procedural fairness, specifically whether all evidence fundamental to the application was considered by the RPD and whether the Applicants were provided an opportunity to respond to the RPD's questions and concerns. This issue is reviewable on a standard of correctness. See *Suresh v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at paragraphs 115 and 123.

[21] The fifth issue concerns the alleged failure of the RPD to make findings regarding one of the grounds cited in the Applicants' claims for refugee status. This touches upon the adequacy of the Decision and as such is reviewable under a standard of correctness. See *Emangongo v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 208 at paragraph 14; *Jabari v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 225 at paragraph 12; *Via Rail Canada Inc. v. Canada (National Transportation Agency)*, [2001] 2 F.C. 25 (C.A.) (QL) at paragraph 22.

## **ARGUMENTS**

### **The Applicants**

#### **RPD Erred in Identifying the Particular Social Group**

[22] It is clear from his amended PIF, the transcript of the hearing and his psychological assessment that Montoya Martinez identifies as a transgender man, not a lesbian and not a transgender woman. His preference is to be addressed using masculine pronouns.

[23] The Decision refers to Montoya Martinez as a transgender woman and uses feminine pronouns. The Applicants argue that this represents not only a factual error but also a fundamental

problem in this Decision: the RPD is confused about the nature of the particular social group involved in these claims and, therefore, could not possibly have made reliable findings regarding the risk analysis and could not have decided the matter properly.

### **RPD Ignored Evidence on State Protection for Transgender Men and Couples**

[24] The Applicants' claims were based on their membership in a singular group: biological women in transgender relationships who may be perceived as lesbians or as transgressing gender-presentation roles as transgender men and who are dealing with male familial violence and discrimination, both as a transgender couple and as lesbians. The RPD broke this group into three groups: women facing domestic abuse, lesbians facing homophobic violence, and transgender people. It assessed the evidence on state protection with respect to groups one and two but ignored the evidence on state protection with respect to group three: transgender men and transgender couples. The Applicants argue that the RPD erred in arriving at its conclusion without ever considering the group that was identified in their claims.

[25] The RPD found that the *Gender Guidelines* applied to this matter because both Montoya Martinez and Real Ramirez are victims of domestic violence. The Applicants argue, however, that all elements of the Applicants' claims come under the *Gender Guidelines*, not just their claim related to domestic abuse. They are, or are perceived as, lesbians. They are subverting gender-based social norms. The RPD fundamentally misunderstands the claim. It does not understand what it means for Montoya Martinez to be a transgender man or even that he is one. The Decision's limited

application of the *Gender Guidelines* indicates that the RPD was simply paying lip service to the *Guidelines* and did not understand their “spirit and role.”

### **Not All Relevant Evidence Was Before the RPD at the Hearing**

[26] The RPD received documents on 9 April 2009, which were then admitted into evidence at the first part of the hearing on 15 September 2009. These documents were marked “Exhibit C-4.” In the Decision, however, the RPD notes that some of those documents, to which counsel referred in her post-hearing written submissions, were missing. The RPD, on its own motion, subsequently admitted the missing evidence—whether in whole or in part the Applicants do not know—as post-hearing evidence.

[27] The Applicants submit that the missing evidence constitutes 52 pages of “personalized documentary evidence filed by the Applicants in support of their claims,” including: two letters of support from Mexico, addressing the issue of homophobia, discrimination, and familial abuse and violence and raising the issue of transphobia; and the psychological assessments of both Applicants. They argue that they filed the evidence well within the 20-day period prior to the hearing and that they were entitled to have all evidence before the RPD during the hearing so that they could present their full case and rely on the evidence in its totality. Although the evidence was admitted post-hearing, the Applicants were deprived of the opportunity to respond and perhaps satisfy the RPD on any questions these documents may have raised in the RPD’s mind, which may have resulted in a different decision.

[28] The Applicants argue that there was no proper reason for the RPD's failure to admit this evidence at the time of the hearing. The RPD's actions violated its own procedures and breached the principles of fairness and natural justice. The appropriate response is for the tribunal to start afresh. See *Chandler v. Alberta Association of Architects*, [1989] 2 S.C.R. 848.

### **Objectively Reasonable for Applicants Not to Seek State Protection**

[29] The Applicants argue that the RPD ignored evidence that demonstrated the reasonableness of not seeking state protection in Mexico. First, they had witnessed other victims' futile attempts to obtain police protection. For example, the authorities had not been helpful to Real Ramirez's sister when she complained that her husband (Real Ramirez's brother-in-law) was harassing her and her family. Nor had the authorities intervened to assist Real Ramirez's mother, who had been murdered. These examples are consistent with 2008 and 2009 Human Rights Watch and Amnesty International reports on the ineffectiveness of Mexican laws and law enforcement agencies against domestic abuse. Second, the Applicants had witnessed police humiliation of gays and transvestites.

[30] The Applicants cite 12 cases in which the Federal Court and the Federal Court of Appeal have rejected RPD decisions on the grounds that the tribunal ignored evidence of domestic violence.

[31] The Applicants argue that the RPD erred in concluding that the Applicants' failure to demonstrate sufficient efforts to seek out protection determines the state protection analysis. The RPD ought to have considered the "actual likelihood" that efforts would result in a helpful response. See *Mejia Ballesteros v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1246;

*Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1336; *Medina v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 728; *Hernandez v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1211 at paragraph 27. In the instant case, the RPD set an “arbitrary standard” as to what constitutes sufficient efforts.

### **RPD Failed to Adjudicate Discrimination Claim in Its Totality**

[32] The RPD accepted that Montoya Martinez would not have access to health care or employment in Mexico due to his gender presentation and identity. It also accepted that the Applicants would not be able to live in Mexico as a transgender couple with children of their own. However, it found “little evidence” regarding the treatment of transgender people in Mexico. In consequence, it concluded that there was no persuasive evidence to show that transgender people face discrimination amounting to persecution and that state protection is unavailable to them. Therefore, the presumption of state protection was not rebutted.

[33] The Applicants argue that the RPD arrived at this conclusion, having disregarded the oral evidence and affidavit evidence of Montoya Martinez, a transgender man, as well as three other items of documentary evidence. The risk of harm here was completely unexplored.

## **The Respondent**

### **RPD Considered the Correct Social Group**

[34] Despite the RPD's use of the term "transgender woman," it is clear from the Decision that the RPD understood Montoya Martinez's situation clearly: that he is a biological woman who felt from a young age that he was a male and who now identifies as a man. The RPD considered the Applicants' claims of risk based on the correct social group and no reviewable error was made.

### **RPD Assessed Evidence on State Protection for Transgender Men and Couples**

[35] The RPD commented on the lack of evidence in the country conditions documents regarding the treatment of transgender men and couples. However, it reviewed that evidence and concluded that it was insufficient to rebut the presumption of state protection. The Applicants have failed to identify any specific documentary evidence on transgender men or couples or to point to specific evidence that they believe was ignored.

### **All Evidence Was Before the RPD**

[36] The RPD explained that it became aware, after reading counsel's written submissions, that some of the documents—particularly the psychological assessments—were not admitted into evidence. Applicants' counsel was contacted and it became clear that Applicants' counsel herself had erred in failing to admit the documents into evidence at the time of the hearing. She corrected this error on 19 February 2010. The RPD explicitly deals with the psychological reports in the

Decision. Therefore, it is clear that all evidence was before the RPD and that the Applicants were not denied the right to rely on these documents.

### ***Gender Guidelines Properly Applied***

[37] The *Gender Guidelines* are designed to sensitize RPD members to the particular difficulties women may have in proving their claims due to differing societal, cultural and legal norms that apply to women in other nations. The *Guidelines* are not a cure-all for deficiencies in the evidence or the claims.

[38] The Applicants had the burden of demonstrating a well-founded fear of persecution and lack of state protection. The RPD assessed, in light of the documentary evidence, the Applicants' claims both as women and perceived lesbians, and it assessed Montoya Martinez's claim as a transgender person. It was reasonable for the RPD to find that state protection was available to them and that they had failed to rebut the presumption of state protection because they had never approached the police.

### **RPD Considered Objective Reasonableness of Applicants' Refusal to Seek State Protection**

[39] The Applicants' submission that the RPD failed to ask if it was objectively reasonable for the Applicants not to seek state protection is without merit. The RPD described in detail the Applicants' reasons for not seeking state protection before leaving Mexico. There followed a thorough review of the positive and negative documentary evidence regarding domestic violence,



police corruption and homophobia in Mexico. Based on this review, the RPD reasonably concluded that it was not objectively reasonable for the Applicants not to seek state protection before coming to Canada. The fact that the Federal Court and Federal Court of Appeal have rejected RPD decisions on the grounds that the tribunal ignored evidence is irrelevant in the instant case where the RPD did not ignore relevant evidence.

### **State Protection Analysis Is Correct**

[40] The Applicants argue that the RPD erred in finding that the failure to seek out protection determines the state protection analysis. This argument is flawed. In *Samuel v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 762 at paragraph 13, Justice Maurice Lagacé of this Court held as follows:

As for the question of whether the appropriate test for assessing state protection is one of adequacy or effectiveness, the Court finds that the former is the correct approach. To require full effectiveness of foreign police and judicial systems would be to insist on a standard for other states which we, in Canada, are not always able to achieve ourselves. Where there is strong evidence to show that the police and judicial systems of democratic states are so ineffective as to be inadequate, that might be a reason for finding that state protection is not available.

[41] The Applicants' burden was to adduce "reliable and probative," or "clear and convincing," evidence to rebut the presumption of state protection. See *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 (*Carillo*). Justice Michael Phelan in *Guzman v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 490 at paragraph 15, stated that an

applicant must establish that the police refused or were unable to investigate a complaint before the test in *Carillo* can be met.

[42] In the instant case, the RPD acted reasonably in finding that the Applicants' reasons for failing to seek state protection, namely the unsatisfactory experiences of two other victims of domestic abuse, were insufficient to meet the test in *Carillo*.

### **RPD Adjudicated Discrimination Claim in Its Totality**

[43] The Respondent disagrees with the Applicants' assumption that the RPD accepted their oral evidence that Montoya Martinez would be unable to access health care and employment opportunities in Mexico due to his gender presentation and identity and that the Applicants would be unable to live as a couple and have children. While the RPD made no negative credibility finding, it did note that in 2007 several Mexican states passed legislation permitting same-sex unions and granting inheritance and pension benefits to same-sex spouses. Moreover, the Respondent notes that, although this evidence was not referred to by the RPD, Mexico City passed a law granting full marital rights to same-sex couples, including the right to adopt children, in March 2010. Therefore, the Applicants' assertion that they could not be legally married and have a family in Mexico is unfounded.

[44] The Respondent also notes that Montoya Martinez's evidence was that he *might* not receive health insurance paid for by his employer and that health insurance does not pay for gender-reassignment procedures. The Respondent submits that the health care programs in many countries

do not pay for gender-reassignment procedures and that Ontario's health program began doing so only in 2008.

[45] An overview of the Decision demonstrates that the RPD did consider these aspects of the Applicants' discrimination claim, and indeed the discrimination claim in its entirety, and found that the discrimination they faced in Mexico did not amount to persecution.

### **Applicants' Reply**

[46] The Respondent's assertion that the RPD adjudicated the claim of discrimination amounting to persecution based on gender identity, sexual orientation and gender presentation is supported by no evidence from the Decision. Instead, the Respondent provides as support its own analysis of the documentary evidence.

[47] The Respondent's assertions that the RPD did not accept the Applicants' oral evidence regarding the unavailability of health insurance and opportunities to marry and have a family also are unsupported with evidence from the Decision. The Respondent fails to rebut the presumption that the oral evidence was accepted absent a negative credibility finding.

[48] Further, the Respondent's comments regarding the coverage for gender-reassignment procedures in the Province of Ontario and the recent Mexico City legislation permitting same-sex marriage is evidence that was not before the RPD and should be struck from the record.

[49] In addition, the Respondent fails to address the following three arguments in the Applicants' Memorandum:

- a) that the RPD's state protection analysis was applied to the wrong social group;
- b) that the RPD's state protection analysis did not consider the Applicants' group in its totality; and
- c) that the RPD made no finding regarding the application of the *Gender Guidelines* to the Applicants as lesbians or perceived lesbians or to Montoya Martinez as a transgender man.

[50] Finally, although the RPD stated that it had no choice but to rely on the "little evidence" concerning the country conditions for transgender persons in Mexico, the Applicants submit that the RPD ignored evidence that was directly on point, namely the Applicants' own testimony and two other documents listed in their Memorandum.

### **Respondent's Further Memorandum**

[51] The Respondent submits that the RPD did not accept the Applicants' claims that they could not marry or have children in Mexico. The Decision notes that two Mexican states have passed legislation allowing same-sex civil unions which includes rights to inheritance and pensions. One of those states is the Federal District, which the RPD identified as a viable internal flight alternative for these Applicants.

[52] The Respondent also submits that the RPD did not accept the Applicants' claim that they could not have children in Mexico. The country documentation entered into evidence by the Applicants indicates that same-sex couples wishing to begin a family in Mexico or in Canada encounter similar challenges: the low availability of fertility clinics that provide treatment to same-sex couples and the high cost of treatment. The Applicants have failed to demonstrate that the lack of access to free artificial insemination, which is a challenge to be faced in both Canada and Mexico, amounts to persecution.

[53] The Applicants' claim that they would not have access to employment in Mexico is unsupported by their personal history, their oral evidence and the country documentation. The PIFs of both Applicants indicate that they were employed continuously throughout their adult lives. Montoya Martinez was permitted to present himself in a more masculine manner by wearing pants and t-shirts to work when he was employed at a newspaper and at a grocery store. The Respondent contends that the Applicants anticipate having difficulty finding employment in Mexico not due to discrimination or persecution but due to lack of job references.

[54] The Applicants' claim that they would not have access to housing in Mexico is unsupported by the same evidence. The Applicants' PIFs stated that they cohabited in Mexico for five years as a same-sex couple. Montoya Martinez never said that they were denied housing as a same-sex couple. In fact, they never applied for housing as a same-sex couple and therefore are speculating that they would face discrimination if they were to do so. The Respondent contends that, based on the Applicants' own evidence, they believe that they will encounter challenges in finding desirable

housing in Mexico due to lack of funds and social connection, neither of which constitute persecution.

[55] The Respondent argues further that the evidence of Montoya Martinez indicates that he was never denied health care because he is a transgender person. By the Applicant's own admission, he never investigated the services that were available to persons who wished to undergo a sex change or to have their breasts removed. Although the Applicant speculated that such treatments would be very expensive, he never made any inquiries regarding them.

[56] The Respondent submits that the affidavit filed by Ibtisam Yusuf, the legal assistant of Applicants' counsel, should be struck. First, it is not based on the personal knowledge of the affiant but rather is a "thinly veiled" attempt to get on record the evidence of Applicants' counsel regarding the missing documentary evidence referred to above as Exhibit C-4. It is improper for counsel to give evidence in a proceeding for which she is counsel of record. See *Ali Akbar v. Canada (Minister of Citizenship and Immigration)* (April 9, 2008), Doc. No. IMM-4701-07; *Butterfield v. Canada (Attorney General)*, 2005 FC 396; *Addo v. OT Africa Line*, 2006 FC 1099.

[57] Second, Applicants' counsel should not be permitted to use this affidavit to shield herself from cross-examination. The affidavit provides hearsay evidence and, to the extent that it does so, it should be given little or no weight. See *Zaman v. Canada (Minister of Citizenship and Immigration)* (1997), 131 F.T.R. 54; *Samuel v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 223 at paragraph 22.

[58] Third, contrary to accepted jurisprudence, the affiant makes legal arguments and draws legal conclusions and, to the extent that she does so, those arguments and conclusions should be struck.

See *Deigan v. Canada (Minister of Industry)* (1996), 206 N.R. 195 at paragraph 2.

[59] With respect to the missing documentary evidence in Exhibit C-4, the Respondent submits that there is no question that this documentary evidence was considered by the RPD before it rendered its Decision. This evidence was filed and marked as Exhibit C-4 on 9 April 2009 for the purposes of the earlier hearing concerning the same claim which was presided over by a different RPD member. When that RPD member recused himself, the Applicants began a *de novo* proceeding. During the pre-hearing conference on 15 September 2009, the RPD referred to Exhibit C-4, noting in error that it contained 49 pieces of country condition evidence. In fact, it contained 49 pieces of documentary evidence and 10 pieces of documentary evidence of a more personal nature. Applicants' counsel did not correct the RPD's error. When later the IRB contacted Applicants' counsel to inquire about the missing documents which she had referenced in her post-hearing submissions, Applicants' counsel could have requested that the hearing be re-opened or that she be given an opportunity to respond to any concerns the RPD might have had regarding these documents. She did not make this request. The Respondent contends that, in so doing, Applicants' counsel waived the right to complain about a breach of procedural fairness.

[60] Most importantly, however, the RPD makes clear that the personalized documents, and indeed all documents marked as Exhibit C-4, were considered prior to the Decision. The RPD refers to two of the personalized documents in its Decision and accepts the evidence contained in all ten

personalized documents. The Respondent submits that, given that Exhibit C-4 was considered in its entirety by the RPD, there was no breach of procedural fairness.

## **ANALYSIS**

[61] This application raises (in my experience at least) somewhat unique challenges in terms of personal and social identity in the context of refugee law, as well as problems associated with assessing the Applicants' subjective experience and concerns about their future against a background of objective evidence that does not directly focus upon what the Applicants see as their particular group: biological women in transgender relationship who may be perceived as transgressing gender-presentation roles and who are dealing with both male familial violence and social discrimination as lesbians and as a transgender couple.

[62] Because of their sexual orientation and their sexual identities, both real and perceived, as well as their distinctive relationship and their past experiences in Mexico, the Applicants inevitably feel that they are treated differently from more conformist individuals and couples. This different treatment has presented them with challenges and will go on doing so. It does not mean, however, that because their lives in Mexico have been, and will continue to be, challenging that they necessarily qualify as Convention refugees or persons in need of Canada's protection. They feel that they can live freer and fuller lives in Canada and do not wish to have to revert to their former lives in Mexico. In this regard, at least, the Applicants are no different from other individuals and families who come before the RPD. The fact that Canada can offer a richer and freer life does not qualify applicants as refugees or persons in need of protection. The RPD is fixed with a much narrower set



of legal parameters within which to work and, inevitably, its conclusions will not please anyone who wants to remain in Canada but who does not legally qualify for that privilege.

[63] The distinctive nature of the Applicants' claim for protection is reflected in the Decision under review. The RPD took a lot of care over what it was doing and went to considerable pains to make its reasoning transparent. This is a long decision and, in my view, it reveals a determined effort to address the unique challenges inherent in the Applicants' position. The Applicants believe that the RPD either got it wrong or was unreasonable in certain respects but, even if this were the case, it was certainly not for the want of trying.

[64] The Applicants have raised a variety of issues, which they say constitute reviewable errors. I think the best way forward is to simply look at each issue in turn.

### **Error of Fact**

[65] The Applicants say that the RPD refers to Montoya Martinez using feminine pronouns only and finds that he is a "transgender woman" when he sees and presents himself as a transgender man. The Applicants say that this mistake goes to the heart of their claim because it means that the RPD does not understand Montoya Martinez's personal identity and social group, and it does not understand the kind of couple they are.

[66] After reviewing the Decision and the record carefully, I am not convinced that this slip in terminology is material or that it reflects any kind of misunderstanding by the RPD with regard to

Montoya Martinez's personal identity, the problems he has faced in attempting to build a social identity, or the problems that the Applicants face as a couple as a result of their particular identities and orientations.

[67] The RPD goes to considerable lengths and detail to describe Montoya Martinez's experiences and to identify the fears the Applicants have as a consequence of both their distinct individual identities and their relationship.

[68] In my view, the Decision as a whole and the record reveal that no mistake was made by the RPD in this regard. It is, of course, unfortunate that the RPD would refer to Montoya Martinez with terminology that does not reflect his own self-concept, but I cannot say that this slip reflects a misunderstanding of who he is or the risks he claims to face, or that the RPD failed to understand the basis of the Applicants' claims, either individually or as a couple. I see no reviewable error in this regard.

#### **Procedural Fairness – Evidence not before the RPD at the time of the Hearing**

[69] In paragraph 53 of the Decision, the RPD itself addresses Exhibit C-4 and the missing documents and how they were accepted post-hearing.

[70] Applicants' counsel has attempted to challenge the RPD's account of the situation through an affidavit sworn by Ibtisam Yusuf, who is counsel's assistant. At bottom, this affidavit is no more than counsel giving evidence and argument through her assistant in an attempt to avoid what she

knows are the prohibitions against counsel both giving evidence and then arguing a case on the basis of her own evidence. The affiant has no personal knowledge of anything material and the affidavit is full of hearsay and argument. It offends Rule 82 of the *Federal Courts Rules* SOR/98-106, and is improper under the governing jurisprudence. See, for example, *Ali Akbar v. Canada (Minister of Citizenship and Immigration)* (April 9, 2008), Doc. No. IMM-4701-07, where Prothonotary Kevin Aalto discusses the prohibitions against a solicitor acting as both witness and counsel.

[71] In my view, this affidavit is not properly before the Court, and I cannot take it into account.

[72] In any event, there is nothing before me to suggest that the RPD considered anything less than the Applicants' full case. The documents in question were made part of the record before the Decision was rendered and they are referred to in the Decision itself. Counsel was aware of what had happened before the Decision was rendered. She did not ask for any kind of re-hearing in relation to the documents and did not raise any procedural fairness issues. In addition, when the ten documents in question are examined, the RPD appears to have accepted the facts to which the documents speak. There is no evidence before me to suggest that a breach of procedural fairness occurred over this issue or that the Applicants were disadvantaged by the way that the documents in question became part of the record. I can find no reviewable error in this regard.

### **Misapplication of the *Gender Guidelines***

[73] The Applicants say that the RPD failed to assess state protection for their singular group and that it misapplied the *Gender Guidelines*. I address the state protection issue later in these Reasons.

[74] There is simply no evidence before me that the RPD did not appropriately apply the *Gender Guidelines* in this case. The RPD specifically says that it applied them and, in its reasons, it uses language that is taken from the *Gender Guidelines* when it considers the social and economic context of the Applicants' complaint. In fact, the Applicants have not made clear what they think should have been done or how the *Gender Guidelines* could have been applied differently in this case.

[75] I can find no substance to this allegation of reviewable error.

### **Failure to Consider Whether the Applicants Faced Discrimination Amounting to Persecution Because of Their Gender Identity, Sexual Orientation and Gender Presentation**

[76] The Applicants say that, because there was no adverse credibility finding made by the RPD, the member must be taken to have accepted their evidence on discrimination. Having accepted their evidence, they say that the RPD then failed to consider whether the discrimination they had faced was persecutory.

[77] To begin with, the recitation and description of the Applicants' "allegations" at paragraphs 3-6 of the Decision cannot be taken as an acceptance by the RPD of the Applicants' assessment that they had faced, and will face, discrimination and/or persecution. The Decision must be read as a whole.

[78] In reviewing the documentary evidence, the RPD acknowledges that "high numbers of gay and bisexual individuals [in Mexico] still suffer from restrictions of a society that is highly homophobic and undergo long periods of isolation before integrating themselves in the homosexual network." However, the RPD goes on to balance the obvious difficulties faced by those who are gay and bisexual with changes that have occurred and with evidence of a growing acceptance of people, regardless of their sexual orientation. "The documentary evidence shows homosexuality has gained greater recognition and acceptance even in places that have not adopted formal anti-discrimination laws." The RPD also discusses the formal recognition of homosexuality and the legitimating of same-sex unions in the Federal District in 2007.

[79] The RPD admits that "homophobia exists in Mexican society" and that "discrimination against homosexuals on the basis of their sexual orientation continues to exist in Mexican society ...". The RPD finds, however, that

the preponderance of the documentary evidence indicates that the Mexican authorities are making serious efforts to provide protection to homosexuals, to root out corruption in the police force, to combat discrimination against homosexuals, to generally fight crime in Mexican society, and to change societal attitudes of homophobia towards homosexuals.

[80] The evidence examined by the RPD was not directed specifically at the Applicants' singular group of biological women in transgender relationships who may be perceived as transgressing gender-presentation roles but, as both sides appear to agree, such specific evidence is not available and was not available to the RPD. Working with what it had, I think the Decision makes clear that without doubting what the Applicants say has happened to them and without specifically addressing what the Applicants say they cannot do in Mexico, the RPD reviewed the documentary record and concluded that the Applicants may well face difficulties and even discrimination, but they can live in Mexico without persecution as a result of the social and legal changes that have occurred in that country. Hence, I do not think it can be said that the RPD failed to consider the discrimination that the Applicants have faced and may well face if they return. For reasons given, however, the RPD did not believe that they faced persecution. It is possible to disagree with this conclusion and to argue about what the evidence reveals about the future of these Applicants. However, given the evidence of discrimination against the Applicants, which they placed before the RPD, as well as the evidence of discrimination that was available in the documentation package, I cannot say that the RPD failed to address this issue or that its conclusions were not reasonable within the terms set by *Dunsmuir*.

### **State Protection**

[81] The Applicants say that the RPD's state protection analysis was flawed and that, in particular, the RPD failed to apply that analysis to their particular group.

[82] Both sides have acknowledged the lack of documentary evidence related to the singular group to which the Applicants belong.

[83] Given the documentary evidence available to the RPD, a reading of the Decision as a whole reveals that the RPD conducted a very detailed state protection analysis and considered both positive and negative factors. All of the Applicants' evidence is noted as well as their reasons for not going to the police. Subjectively, the Applicants believed that they would not receive help, particularly with respect to the threats of violence from the father and brother-in-law of Real Ramirez, and that they would be ridiculed because of their real and perceived sexual orientation and gender presentation. However, they had no personal experience before the authorities and, with respect to their gender and sexual orientation concerns, there was no evidence related to similarly situated persons. Once again, it is possible to disagree with the RPD's conclusions, but I do not think that I can say that the RPD's analysis falls outside of the range of reasonable outcomes posited in *Dunsmuir*.

[84] Justice Robert Barnes in *Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 134 at paragraph 9, citing Justice Michael Phelan in *Kim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1126, stated:

a refugee claimant does not rebut the presumption of state protection in a functioning democracy by asserting only a "subjective reluctance to engage the state."

[85] I realize that the Applicants in the present case gave reasons based upon their observations of what had happened to others, but I do not think that the RPD's conclusions in this case, based upon the evidence before it, can be said to be unreasonable.

**JUDGMENT**

**THIS COURT’S JUDGMENT is that**

1. The application is dismissed;
2. There is no question for certification.

“James Russell”

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Judge



**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-1757-10

**STYLE OF CAUSE:** **CESIA MONTOYA MARTINEZ  
and  
MIRIAM LIVIER REAL RAMIREZ**

Applicants

- and -

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** November 24, 2010

**REASONS FOR JUDGMENT  
AND JUDGMENT:** HON. MR. JUSTICE RUSSELL

**DATED:** January 10, 2011

**APPEARANCES:**

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