

Federal Court



Cour fédérale

**Date: 20110330**

**Docket: IMM-379-10**

**Citation: 2011 FC 391**

**Ottawa, Ontario, March 30, 2011**

**PRESENT: The Honourable Mr. Justice O'Keefe**

**BETWEEN:**

**GABRIELA PEREZ VARGAS  
ALEX ERNESTO AGUILAR PEREZ**

**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*, SC 2001, c 27 (the Act) for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the Board), dated December 30, 2009, wherein the applicants were determined not to be Convention refugees or persons in need of protection under

sections 96 and 97 of the Act. This conclusion was based on the Board's finding that state protection was available to the applicants.

[2] The applicants request that the decision of the Board be set aside and the claim remitted for redetermination by a different member of the Board in accordance with such directions as the Court considers appropriate.

### **Background**

[3] Gabriela Perez Vargas is the principal applicant in this application, along with her son, Alex Ernesto Aguilar Perez. The principal applicant was born on June 4, 1981 and is a citizen of Mexico.

[4] The principal applicant was sexually assaulted by her brother-in-law and godfather when she was a child. She only realized this after attending counselling as an adult.

[5] In February 2003, the principal applicant, along with her common-law spouse, moved from Mexico City to the State of Oaxaca where she gave birth to their child. The principal applicant's spouse bought a restaurant in which she assisted. At this restaurant, local police and army men in uniforms would often refuse to pay, claiming that they knew the previous owner. In one incident, several of these men carrying guns became enraged after they were refused service at the restaurant. In another incident, one man from a group of five threatened the principal applicant at gunpoint telling her that she "would pay for it" if she did not serve him for free.

[6] During this time, the principal applicant moved back and forth several times between Mexico City and Oaxaca because her relationship with her spouse was breaking down as she questioned his sexual orientation. In September 2004, the principal applicant ended the relationship with her spouse.

[7] The principal applicant's ex-spouse left Mexico in February 2006 after being threatened with death and beaten by army men in Tlaxcala.

[8] The principal applicant alleges that in January 2007, she was pulled into a police car. She was held on the floor of the car and driven away. The perpetrators asked about the location of her ex-spouse. The five men in the car each raped the principal applicant before taking her purse and abandoning her. She recognized one of the men as the man who threatened her with a gun in the restaurant.

[9] The principal applicant went to a doctor after the incident but did not get a medical report or report the incident to the police. The principal applicant stayed at her aunt's home following the assault while she arranged to come to Canada where she then claimed refugee status.

### **Board's Decision**

[10] The Board found that the principal applicant was neither a Convention refugee nor a person in need of protection because she does not have a well-founded fear of persecution and her removal

to Mexico would not subject her personally to a risk to life, risk of cruel and unusual treatment or punishment or a danger of torture.

[11] The Board found that there is a presumption of state protection which the principal applicant could rebut by providing clear and convincing evidence of the state's inability to protect its citizens. The Board found that the onus is on the principal applicant to approach the state where protection might reasonably be forthcoming. This burden is proportional to the level of democracy in a state. What steps the principal applicant is required to have taken depends on the context of the country of origin and the principal applicant's interactions with the authorities. The Board found that the principal applicant had not provided clear and convincing evidence of the inadequacy of state protection in Mexico.

[12] The Board found that the principal applicant did not report any of the sexual assaults to the police. The principal applicant's reason for not seeking police assistance regarding the most recent assault was that the military and police work together and if she denounced them they would kill her and her family. The Board found that this reason was based on speculation. The Board found that an applicant cannot rebut the presumption of state protection simply through showing subjective fear. The Board found that where agents of the state are the source of persecution, the presumption of state protection still applies but can be rebutted without exhausting all avenues of recourse in the country.

[13] The Board found that the principal applicant's psychologist's report referred to the attackers as a gang and not military men. Since the psychologist had accurately described the principal applicant's other sexual assaults, the Board found it implausible that the psychologist incorrectly

described this assault. Therefore, the Board found that the principal applicant did not tell her psychologist that she was attacked by the military. Further, there was no corroborating evidence to support the principal applicant's claim that she was sexually assaulted apart from a prescription note. The Board rejected the principal applicant's allegation that she was raped at all in January 2007.

[14] The Board accepted that the principal applicant may have been sexually assaulted as a child but found that there was no persuasive authority that the Mexican authorities would not assist her in Mexico against these perpetrators. The Board found that there have been recent laws enacted in Mexico to combat violence against women and that the Mexican government is making serious efforts to address bribery and corruption within the security forces and public sector.

### **Issues**

[15] The applicants submitted the following issues for consideration:

1. Whether the Board erred in its credibility findings by ignoring relevant evidence that was before it.
2. Whether the Board erred in its credibility findings by making perverse and capricious findings and by drawing a negative inference from the lack of corroborative documents in view of the principal applicant's explanations.
3. Whether the Board ignored relevant evidence and erred in its findings concerning the availability of state protection for this principal applicant in Mexico?

[16] I would rephrase the issues as follows:

1. What is the appropriate standard of review?
2. Did the Board base its decision on an erroneous finding of fact that the principal applicant was not sexually assaulted in January 2007 that it made in a perverse manner and without regard to the material before it?

### **Applicants' Written Submissions**

[17] The applicants submit that the Board erred in finding that the principal applicant was not sexually assaulted by members of the military. The Board requested and received a letter from the principal applicant's psychologist clarifying her use of the term "gang group" and confirming that the principal applicant told her that she was attacked by military men. The applicants submit that the Board ignored this evidence.

[18] The applicants submit that the Board erred in drawing a negative inference from the lack of corroborating evidence of her assault. The principal applicant provided a reasonable explanation for the lack of a medical report; that she told the doctor that she was afraid to go to the police. The applicants submit that the Board's finding that the principal applicant was not raped in January 2007 was perverse and capricious.

[19] The applicants submit that the Board erred in finding that state protection was available to the principal applicant. The Board's state protection findings were based partially on its error in finding that the principal applicant was not raped by agents of the state. Moreover, the Board failed

to analyze the documentary evidence which supported the applicants' position. Specifically, that Mexico routinely fails to protect female victims of abuse. While Mexico may be making efforts to combat this problem, the applicants submit that this does not equate with adequate state protection. The Board also failed to analyze who the principal applicant's agents of persecution were. The Board's state protection findings should be set aside.

### **Respondent's Written Submissions**

[20] The respondent submits that the applicants did not rebut the presumption of state protection. Mexico is a functioning democracy and the applicants were required to take all reasonable steps to seek state protection in Mexico. It was open to the Board to find that it was unreasonable for the applicants not to seek state protection. The Board also made a reasonable assessment of the country conditions and concluded that state protection was available.

[21] The Board's finding that the principal applicant was not sexually assaulted is not a reviewable error because even if the Board found that she was assaulted, there was sufficient evidence that the applicants had failed to rebut the presumption of state protection.

### **Analysis and Decision**

[22] **Issue 1**

What is the appropriate standard of review?

Where previous jurisprudence has determined the standard of review applicable to a particular issue before the court, the reviewing court may adopt that standard (see *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190 at paragraph 57).

[23] It is established law that in reviewing assessments of credibility, the applicable standard of review is that of reasonableness (see *Dunsmuir* above; *Gaymes v Canada (Minister of Citizenship and Immigration)*, 2010 FC 801 at paragraph 8). Assessments of credibility are essentially pure findings of fact and it was Parliament's express intention that administrative fact finding would command this high degree of deference (see *Khosa v Canada (Minister of Citizenship and Immigration)*, 2009 SCC 12, [2009] 1 SCR 339 at paragraph 46).

[24] Likewise, the adequacy of state protection raises questions of mixed fact and law and is also reviewable against a standard of reasonableness (see *Hinzman, Re*, 2007 FCA 171 at paragraph 38).

[25] In reviewing the Board's decision using a standard of reasonableness, the Court should not intervene on judicial review unless the Board has come to a conclusion that is not transparent, justifiable and intelligible and within the range of acceptable outcomes based on the evidence before it (see *Dunsmuir* above, at paragraph 47).

[26] **Issue 2**

Did the Board base its decision on an erroneous finding of fact that the principal applicant was not sexually assaulted in January 2007 that it made in a perverse manner and without regard to the material before it?



The Board rejected the principal applicant's testimony that she had been physically and sexually assaulted in January 2007. The Board stated that:

[It] does not believe that the claimant was raped on January 29, 2007 and rejects the allegation that she was raped. The panel believes the claimant claimed to have been raped by military men to enhance her claim for refugee protection through embellishments and exaggerations.

[27] The Board's rationale for this rejection was two-fold. First, it found that "in the psychological report, her attackers were referred to as *gang* and not military men." Since the psychologist had accurately portrayed the principal applicant's previous attackers, the Board found that there was no reason to believe she incorrectly identified the perpetrators of this alleged attack.

[28] However, in the report the psychologist refers to the attackers as a "gang group". The principal applicant submitted, and I would agree, that the term gang group and a group of military men are not mutually exclusive.

[29] Moreover, the psychologist clarified this point in a letter submitted to the Board subsequent to the hearing. During the hearing, the Board requested that the principal applicant submit further clarification from the psychologist regarding what she meant:

REFUGEE PROTECTION OFFICER: ...Presiding Member could ask if the claimant could get an explanation from the doctor in that the claimant said that she said to the doctor that these were military people (inaudible). So what did she actually say --you know -- to the doctor?

COUNSEL FOR CLAIMANTS: It is possible, we just don't know.

REFUGEE PROTECTION OFFICER: Yeah we don't know. So that the claimant --- when counsel send in his submissions the

Presiding Member also may be willing to accept a further update from the psychologist.

COUNSEL FOR CLAIMANTS: I think I can do that, if you would like.

[...]

MEMBER: Well you can do that as much as a comprehensive submission as you possibly can, and I will see what weight I put on any new evidence.

[30] The principal applicant did submit a further letter to the Board from her psychologist. In this letter, dated October 28, 2009, the psychologist stated:

In order to clarify the previously reported psychological assessment, I want to add the following information:

1. The abovementioned gang were members of the military, as reported;
2. I was clinically referring to a group of perpetrators;
3. My patient Gabriela Perez Vargas did in fact specify that such individuals were members of the military.

This raises serious concerns as to the reasonableness of the Board's rationale for finding that the principal applicant was not assaulted by members of the military.

[31] Secondly, the Board rejected that the principal applicant had been sexually assaulted at all in January 2007 because she did not submit corroborating documentary evidence of the assault. The Board relied on the case *Sinnathamby v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 473, for the proposition that where the Board has put its credibility concerns to an applicant, it may require the applicant to produce corroborating evidence to support her testimony (see

paragraph 24). However, the Board's credibility concerns arose directly from its misapprehension of the evidence of the psychologist's report.

[32] In addition, in *Isakova v Canada (Minister of Citizenship and Immigration)*, 2008 FC 149, 322 FTR 276 at paragraph 23, Mr. Justice Douglas Campbell held that the *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (Gender Guidelines) require "a contextual approach which takes into account the trauma of a sexual assault." The principal applicant provided an explanation for the absence of a medical report; that she told the doctor she feared going to the police. The Board's dismissal of this explanation and the requirement of a medical report as corroborating evidence does not take into account the affect of the principal applicant's fear produced by the trauma of sexual assault. As such, it was inconsistent with the Gender Guidelines.

[33] Thus, the Board's finding of fact that the principal applicant was not sexually assaulted in January 2007 was made in a perverse manner and without regard to the material before it.

[34] The respondent submits that this is not fatal to the Board's decision because even if the Board had accepted that the principal applicant was raped by members of the military, the principal applicant did not provide clear and convincing evidence of the inability to the state to protect her. This cannot be the case as the state protection analysis differs when the state is the agent of persecution. In *Silva v Canada (Minister of Employment and Immigration)* (1994), 82 FTR 100 (FCTD), Mr. Justice Pierre Denault held at paragraph 4 that where the state is itself the agent of persecution, the inquiry shifts from the willingness of the state to protect to the willingness of the applicant to seek the protection of the state. This understanding was reiterated by Chief Justice

Lutfy in *Yokota v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1226. At paragraph 5, Chief Justice Lutfy endorsed *Silva* above, and added that:

If the agents of persecution were indeed the state, the Refugee Protection Division should have considered whether the applicants' unwillingness to seek the protection of the state was based on a well-founded fear of persecution rather than whether the state was willing or able to protect the applicants.

[35] Similarly in *Chaves v Canada (Minister of Citizenship and Immigration)*, 2005 FC 193, 45 Imm LR (3d), Madam Justice Danièle Tremblay-Lamer held at paragraph 15 that:

...[W]here agents of the state are themselves the source of the persecution in question, and where the applicant's credibility is not undermined, the applicant can successfully rebut the presumption of state protection without exhausting every conceivable recourse in the country. The very fact that the agents of the state are the alleged perpetrators of persecution undercuts the apparent democratic nature of the state's institutions, and correspondingly, the burden of proof.

[36] The Board's finding that the principal applicant was not sexually assaulted by members of the military was perverse and made without regard to the material before it. This finding directly impacted on the Board's analysis of the availability of state protection. Among other examples, the Board did not analyze whether the principal applicant's failure to go to the police was reasonable given her interactions with the authorities.

[37] As the availability of state protection was the only issue raised by the Board to reject the applicants' refugee claim, I believe that this matter should be sent back for redetermination by a differently constituted Board taking into consideration the letter from the psychologist indicating that the principal applicant did tell her that she was raped and physically assaulted by members of the military.

[38] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

**JUDGMENT**

[39] **IT IS ORDERED that** the application for judicial review is allowed, the decision of the Board is set aside and the matter is referred to a different panel of the Board for redetermination.

“John A. O’Keefe”

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Judge

## ANNEX

**Relevant Statutory Provisions***Immigration and Refugee Protection Act, S.C. 2001, c. 27*

72.(1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	72.(1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
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 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.
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	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

former habitual residence,  
would subject them personally

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 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.



**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-379-10

**STYLE OF CAUSE:** GABRIELA PEREZ VARGAS  
ALEX ERNESTO AGUILAR PEREZ

- and -

THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** October 14, 2010

**REASONS FOR JUDGMENT  
AND JUDGMENT OF:** O'KEEFE J.

**DATED:** March 30, 2011

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