

Federal Court



Cour fédérale

**Date: 20110902**

**Docket: IMM-5050-10**

**Citation: 2011 FC 1040**

**Ottawa, Ontario, September 2, 2011**

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

**BETWEEN:**

**ERIKA DAFNE GONZALEZ PALOMINO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

I. Overview

[1] Ms. Erika Dafne Gonzalez Palomino endured an abusive marriage in Mexico for five years before she fled to Canada. She sought refugee protection but was turned down by a panel of the Immigration and Refugee Board. The Board concluded that Ms. Gonzalez Palomino had access to

state protection in Mexico and, therefore, her fear of persecution by her former spouse, Eduardo, was not well-founded.

[2] Ms. Gonzalez Palomino argues that the Board erred in its analysis of state protection and, in so doing, rendered an unreasonable decision. I agree. I must, therefore, allow this application for judicial review.

[3] The issue is whether the Board's conclusion that state protection was available to Ms. Gonzalez Palomino was unreasonable.

## II. Factual Background

[4] In 2005, after they were both assaulted by Eduardo, Ms. Gonzalez Palomino and her mother went to the Public Ministry to file a denunciation. Officials would only take a complaint from her mother as her injuries were more serious and she was not married to Eduardo. Later, Eduardo filed opposing denunciations against Ms. Gonzalez Palomino and her mother. All three appeared before a judge, who dismissed all of the complaints. Ms. Gonzalez Palomino believes that Eduardo bribed the judge.

[5] In 2006, Ms. Gonzalez Palomino sought the assistance of an organization called DIF, which specializes in family matters, to begin divorce proceedings and obtain a protection order. The DIF helped her file a divorce petition, but Eduardo refused to sign the papers.

[6] Eduardo continued to threaten and assault Ms. Gonzalez Palomino over the ensuing years. She complained to police, but they did not respond. In 2008, she began a same-sex relationship. Eduardo assaulted and threatened to kill her partner if he saw the two women together. Ms. Gonzalez Palomino and her partner attempted to report this incident to the police, but they were told they had attended at the wrong precinct. They attempted to file a complaint at the proper precinct, but the police just laughed at them.

[7] In 2009, Ms. Gonzalez Palomino and her partner obtained passports and left Mexico for Canada.

### III. The Board's Decision

[8] The Board found that Ms. Gonzalez Palomino had not established that the judge she appeared before had been bribed. Therefore, that incident did not contradict the existence of state protection.

[9] Similarly, the Board found that her difficulty in getting a divorce was the result of her own lack of time and financial resources to pursue the matter. This was not evidence of a failure of state protection.

[10] With respect to the allegation of ongoing assaults and threats, and the apparent absence of police response, the Board found Ms. Gonzalez Palomino's evidence not to be credible. Had she possessed evidence of these alleged events, a family court in Mexico would have granted her

divorce petition. As a law student, Ms. Gonzalez Palomino would have been aware of the evidentiary burden on her, yet she failed to marshal the necessary proof. However, the Board accepted her evidence that Eduardo was verbally aggressive and would sometimes grab her arm when he confronted her on the street.

[11] Further, the Board believed Ms. Gonzalez Palomino had not made sufficient efforts to obtain protection. She had only made two formal complaints to the police. While she proved that she had sought a protection order as part of her divorce petition, this was the only occasion on which she had sought court protection. She did not appear to complain to the DIF about the lack of police response to her circumstances. Nor did she seek the assistance of the numerous other state agencies which exist to help women who are victims of domestic violence, or the bodies that deal with complaints of police inaction.

[12] The Board pointed out that Mexico is a democracy and has enacted laws to protect women from violence. It conceded, however, that the laws are not necessarily enforced. Still, the existence of those laws suggests that Mexico is making serious efforts to deal with the problem.

[13] In conclusion, the Board found that Ms. Gonzalez Palomino had not taken all reasonable steps to obtain protection in Mexico. Accordingly, she did not present clear and convincing evidence that would rebut the presumption that states are willing and able to protect their citizens.

#### IV. Was the Board's Conclusion that State Protection was Available Unreasonable?

1. *Basic principles relating to state protection*

[14] There are a number of well-established principles that apply to the issue of state protection.

[15] A refugee is a person with a well-founded fear of persecution who is either unable to obtain protection from that persecution from his or her country of origin, or is prevented from doing so for fear of further persecution (*Immigration and Refugee Protection Act, SC 2001 c 27 [IRPA]*, s 96 – see Annex for statutory references).

[16] A well-founded fear means a reasonable chance of persecution. A refugee must subjectively fear persecution, and that fear must objectively be reasonable.

[17] The evidentiary burden and the burden of proof fall on refugee claimants to show that they come within the definition of a refugee. They must prove on the balance of probabilities that there is a reasonable chance they will be persecuted if returned to their country of origin.

[18] Often, the question of state protection is not an issue in refugee cases because the alleged agent of persecution is the state itself. It is self-evident in those circumstances that the state is unable or unwilling to protect the persons it is persecuting.

[19] Where state protection is an issue, the claimant will meet the definition of a refugee if he or she shows a well-founded fear of persecution and presents clear and convincing evidence establishing on a balance of probabilities that state protection is inadequate.

[20] Where clear and convincing evidence establishes that the state lacks the capacity or the will to protect persons in the claimant's circumstances, the claimant will have proved that he or she is unable to obtain state protection; that is, that state protection is inadequate. However, the fact that the state might not always succeed does not in itself mean that state protection is inadequate.

[21] If the evidence shows that the state has the means and the will to respond to the claimant's circumstances by providing protection against the persecution he or she reasonably fears, the claimant will have failed to make out a claim for refugee protection. His or her fear of persecution will not be well-founded.

[22] Ultimately, given the definition of a refugee, the question to be answered in all refugee claims involving state protection is whether, taking account of all the evidence, including the evidence relating to the state's capacity and willingness to provide protection against persecution, the claimant has shown on the balance of probabilities that there is a reasonable chance that he or she will be subjected to persecution if returned to his or her country of origin. If so, the person merits refugee protection. If not, the person does not satisfy the definition of a refugee.

[23] Similar principles apply to persons in need of protection under s 97 of IRPA, although the burden of proof is higher (*Li v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 1).

## 2. *Application to this case*

[24] Ms. Gonzalez Palomino's main contention is that the Board erred by failing to consider relevant evidence about Mexico's actual ability to protect victims of domestic violence, as compared to the efforts it was making to attempt to provide better protection in the future. Given that failure, she contests the Board's conclusion that she had not taken sufficient steps to obtain state protection.

[25] In particular, Ms. Gonzalez Palomino argues that the Board ignored an affidavit sworn by Professor Guillermo Zepeda Lecouna, in which she reviewed the practical realities of abused women's interactions with the Mexican justice system. The affidavit included the following observations:

- Women seeking protective orders must have a lawyer;
- Protective orders take weeks to obtain;
- Due to corruption in the system, it is the victim who must persistently pursue a protective order and pay money to a court representative to guarantee its issuance;
- If a protective order is violated, the victim must return to the court, not to the police, with her own evidence;

- Judges have discretion whether to proceed with charges concerning breaches of protective orders civilly or criminally, so that the result of a victim's application could be a small fine; and
- The Mexican justice system is overwhelmed, domestic violence cases are not taken seriously, and proceedings rarely come before the criminal courts given that they must be initiated by a prosecutor on referral from the police.

[26] Ms. Gonzalez Palomino also says that the Board erred by not referring to an Amnesty International report which largely confirmed Professor Zepeda Lecouna's analysis, as well as a 2009 Amnesty International publication ("Protection Law Fails Mexican Women") which noted that the new law "has had no impact in the two years since its inception."

[27] In addition, Ms. Gonzalez Palomino points out that while the Board relied on laws on the books in Mexico that might help persons in her situation, it conceded they remained to be implemented. That evidence did not contradict Ms. Gonzalez Palomino's evidence that authorities did not respond in any meaningful way to her complaints of abuse.

[28] Finally, the Board clearly expected Ms. Gonzalez Palomino, a law student, to be in a better position to seek adequate state protection than other victims of domestic violence. In holding this assumption, Ms. Gonzalez Palomino maintains that the Board failed to address the contextual factors of her situation, as required by the Chairperson's Guidelines for Gender Claims, including social, cultural, religious and economic factors. She suggests the Board erred in referring only to her



professional qualifications to the exclusion of her personal circumstances as an abused woman with two young children.

[29] In my view, the Board did not address the ultimate question – did Ms. Gonzalez Palomino show, with clear and convincing evidence, there was a reasonable chance she would be persecuted if she returned to Mexico? The Board accepted that she had not been able to engage the police or the courts to protect her. But it referred to other avenues of redress that appeared to be available - complaints to other agencies and resort to unimplemented statutes. But the question remained, particularly in light of the documentary evidence contradicting the Board's conclusion, whether those potential remedies would have made any real difference.

[30] As I see it, Ms. Gonzalez Palomino presented clear and convincing evidence of a lack of state protection. Indeed, the Board accepted most of it. However, it found that she had, nonetheless, failed to rebut the presumption of state protection because she could have done more. In my view, that conclusion did not take account of the evidence before the Board showing the difficulties of obtaining state protection in Mexico and the apparent inefficacy of well-intentioned statutes whose purposes remain to be realized. The Board cannot conclude that a claimant has failed to meet his or her burden of proof without considering documentary evidence that corroborates the claimant's account of events.

[31] Therefore, I find that the Board's conclusion was unreasonable based on the facts and the evidence before it.

V. Conclusion and Disposition

[32] I find that the Board's conclusion that Ms. Gonzalez Palomino failed to show that state protection was unavailable to her in Mexico was unreasonable. It was not a defensible outcome based on the facts and the law before it. I must, therefore, allow this application for judicial review and order a new hearing before a different panel of the Board. Neither party proposed a question of general importance for me to certify, and none is stated.

**JUDGMENT**

**THIS COURT'S JUDGMENT is that**

1. The application for judicial review is allowed and a new hearing before a different panel of the Board is ordered;
2. No question of general importance is stated.

“James W. O’Reilly”

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Judge

## Annex

*Immigration and Refugee Protection Act, SC 2001 c 27*

*Loi sur l'immigration et la protection des réfugiés, LC 2001, ch 27*

Convention refugee

Définition de « réfugié »

**96.** A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

**96.** A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail 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.

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

**DOCKET:** IMM-5050-10

**STYLE OF CAUSE:** PALOMINO  
v  
THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** April 20, 2011

**REASONS FOR JUDGMENT  
AND JUDGMENT:** O'REILLY J.

**DATED:** September 2, 2011

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