

Federal Court



Cour fédérale

**Date: 20130509**

**Docket: IMM-9599-12**

**Citation: 2013 FC 490**

**Montreal, Quebec, May 9, 2013**

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

**BETWEEN:**

**GILBERTO MIGUEL ROMERO OJEDA**

**partie demanderesse**

**et**

**LE MINISTRE DE LA CITOYENNETÉ  
ET DE L'IMMIGRATION**

**partie défenderesse**

**REASONS FOR JUDGMENT AND JUDGMENT**

**I. Introduction**

[1] The Applicant seeks judicial review of a decision by the Refugee Protection Division of the Immigration and Refugee Board [RPD], wherein, it was determined that he is not a Convention refugee nor a person in need of protection under section 96 and subsection 97(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

## II. Judicial Procedure

[2] This is an application under subsection 72(1) of the *IRPA* for judicial review of a RPD decision, dated April 26, 2012.

## III. Background

[3] The Applicant, Mr. Gilberto Miguel Romero Ojeda, a citizen of Mexico, was born in 1984 in Guadalajara.

[4] The Applicant worked at a bar called Krudalia in Cuernavaca where, in May 2007, he was asked to sell alcohol to minors. He was fired for refusing but an Arbitration Council Commission reinstated him and awarded him lost wages.

[5] In June 2008, a new owner of Krudalia instructed the Applicant to sell alcohol and drugs to a minor. He was beaten and intimidated for refusing.

[6] On July 4, 2008, municipal authorities closed Krudalia for 20 days for serving alcohol to minors. A newspaper clipping before the RPD showed that the authorities fined Krudalia 9,000 pesos for this infraction (Certified Tribunal Record [CTR] at p 127).

[7] The Applicant's attempts to resign were refused. He was threatened and hit by two men, who (even though he claimed ignorance) told him to stop informing against Krudalia and to declare that Krudalia did not serve alcohol to minors.

[8] On August 5, 2008, the Applicant began to receive death threats over the telephone.

[9] On August 7, 2008, the Applicant complained to the Attorney General of Justice of the State of Morelos; a copy of the complaint was before the RPD (CTR at pp 85-87).

[10] On August 9, 2008, the Applicant followed up on the August 7, 2008 complaint.

[11] On August 10, 2008, the Applicant moved to Jojutla, a city two hours from Cuernavaca. He was hired on probation at another bar after presenting his resume, which listed his work experience at Krudalia.

[12] On August 29, 2008, the new employer questioned the Applicant regarding his employment history. Upon learning of the events at Krudalia, his new employer said that he did not like rebels.

[13] On August 30, 2008, the Applicant saw his new employer with his former employer. He fled his place of employment and continued to receive threats.

[14] On September 16, 2008, the Applicant complained to the Attorney General of Justice of the State of Morelos; a copy of the complaint was before the RPD (CTR at p 106-114). On September 18, 2008, a man followed the Applicant through Jojutla and threatened him before he could escape.

[15] On September 20, 2008, the Applicant moved to Mexico City where, on or about September 22, 2008, a child gave him a threatening note.

[16] On September 24, 2008, the Applicant left Mexico for Canada.

[17] In April 2011, the authorities again temporarily closed Krudalia after a surprise inspection. The Applicant presented a newspaper article corroborating the raid and temporary closure of Krudalia (CTR at p 125).

#### IV. Decision under Review

[18] The RPD found that the Applicant was neither a Convention refugee nor a person in need of protection since he did not rebut the presumption of state protection with clear and convincing evidence. Noting that the burden of proof in rebutting this presumption is directly proportionate to the level of democracy in the state in question and that Mexico is an emerging democracy with corruption problems, the RPD concluded that the Applicant had not established that the state would be unable or unwilling to adequately protect him from his former employer.

[19] The RPD accepted that drug cartels trouble authorities in Mexico, where corruption exists, but did not accept that the new owner of Krudalia had infiltrated the authorities or was connected with a drug cartel that could influence them. The RPD reasoned that the new owner had no influence because the authorities closed his business twice for an infraction, fined the new owner, and had insufficient access to determine who had actually reported Krudalia to the authorities. The RPD did not accept the Applicant's argument that the short duration of Krudalia's closure reflected

a relationship between the new owner and the authorities since the Applicant only speculated on how long a business in a similar situation would have remained closed under habitual circumstances. The publicity surrounding the April 2011 closure of Krudalia further suggested that its owner probably had no connection to the authorities.

[20] The RPD also did not accept that there was a causal link between the Applicant's denunciation of the new owner of Krudalia and the threats against him. The Applicant's Personal Information Form [PIF] and testimony showed that he was threatened on August 5, 2008 and reported these threats on August 7, 2008; neither mentioned an increase in threats following the denunciation.

[21] The RPD also did not consider that continued threats by his former employer in Jojutla established that Krudalia had a wide network or connections with the authorities. The RPD reasoned that he obtained a position at a bar in Jojutla, presenting a resume describing his employment with Krudalia. It was likely that the Applicant's former employer learned of his presence in Jojutla when his new employer confirmed his employment history.

[22] The threats in Mexico City did not suggest that the Applicant's former employer at Krudalia had links to authorities in Mexico City. Since he received the threatening note only two days after he arrived in Mexico City, it was more likely that he was closely followed from Jojutla to Mexico City.

[23] His former employer's continued enquiries regarding the Applicant did not suggest that state protection was unavailable. The RPD reasoned that the former employer asked the Applicant's friend directly about him; this was inconsistent with allegations that the former employer was connected with a powerful network or the authorities.

[24] Noting that Mexico was required to provide the Applicant with effective, but not perfect, state protection, the RPD found that the Applicant did not give the authorities a reasonable opportunity to provide him with protection. The RPD found that the Applicant did not avail himself of state protection in Mexico City, even though he had documentary evidence of his former employer's threats in the form of a note. The RPD also noted that the Applicant fled Cuernavaca and Jojutla shortly after approaching the authorities for assistance. From this, the RPD reasoned that the Applicant did not give the authorities sufficient time to investigate the threats.

#### V. Issue

[25] Was the RPD's state protection analysis reasonable?

#### VI. Relevant Legislative Provisions

[26] The following legislative provisions of the *IRPA* are relevant:

##### **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,

##### **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) 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

(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.

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) 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,

### **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) 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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

(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) 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) 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**

(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.

#### **Personne à protéger**

(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.

### **VII. Position of the Parties**

[27] The Applicant submits it was unreasonable to find that, on a balance of probabilities, he had not rebutted the presumption of state protection in Mexico because: (i) the country condition evidence corroborated his testimony that state protection would not be forthcoming, that the authorities are susceptible to corruption, and that state efforts to combat corruption have been ineffective; (ii) the RPD did not assess the availability of state protection in light of the country



condition evidence on corruption; and (iii) the RPD disregarded his evidence of corruption in Mexico.

[28] From the alleged inconsistency between the state protection finding and the country condition evidence, the Applicant infers that the RPD did not look to the country condition evidence on the record.

[29] The Respondent counters that the state protection finding was reasonable because: (i) the Applicant did not give Mexican authorities a reasonable opportunity to provide him with protection; and (ii) his agent of persecution did not have influence with the authorities. In these circumstances, it was reasonable for the RPD to decide that state protection would have been forthcoming and effective and that the Applicant did not rebut the presumption of state protection with clear and convincing evidence.

#### VIII. Analysis

[30] The RPD's state protection analysis is reviewable on the standard of reasonableness (*Smirnova v Canada (Minister of Citizenship and Immigration)*, 2013 FC 347).

[31] The RPD could reasonably find that state protection was available to the Applicant, who failed to establish that Mexican authorities would be unwilling or unable to protect him from his agent of persecution - his former employer.

[32] In *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, the Supreme Court of Canada held that a claimant for refugee protection has the burden of rebutting the presumption of state protection by producing “clear and convincing evidence” that the state in question is unwilling or unable to protect that claimant. In *Kadenko v Canada (Minister of Citizenship and Immigration)* (1996), 124 FTR 160, the Federal Court of Appeal held that the “burden of proof that rests on the claimant is, in a way, directly proportional to the level of democracy in the state in question: the more democratic the state's institutions, the more the claimant must have done to exhaust all the courses of action open to him or her” (at para 5).

[33] Justice Leonard Mandamin held in *Horvath v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1350 that a reasonable state protection analysis must be individualized taking into account the Applicant's circumstances (at para 57).

[34] Although there was country condition evidence that Mexican authorities may be unable to protect persons targeted by gang violence and that police corruption and collusion with criminal gangs occurs, the Applicant needed to establish a link between this evidence and his particular circumstances. This Court has consistently held that a successful Applicant for refugee protection must establish a link between the general documentary evidence and his or her personal circumstances (*Tamas v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1361 at para 69-72).

[35] It falls in the range of acceptable, reasonable outcomes to conclude that the Applicant did not establish a link between country condition evidence of gang violence, police corruption,

collusion with criminal gangs and his personal circumstances. First, the authorities had imposed legal sanctions on the Applicant's agent of persecution in the past by temporarily closing and fining Krudalia in July 2008 and April 2011 for serving alcohol to minors. Second, it was reasonable to find that his agent of persecution did not trace him to Jojutla or Mexico City through a gang network or police collusion since he testified that he included Krudalia on a resume that he presented to his employer in Jojutla. Given the short period of time between his departure from Jojutla and the day he received the note in Mexico City, it was also reasonable to find that he had been followed there. Third, it was reasonable to find that there was no casual link between his complaints to the authorities and the death threats against him because those threats preceded the complaints. Fourth, it was also reasonable to find that the Applicant's agent of persecution was not connected with a powerful gang since he inquired of the Applicant's whereabouts from a friend.

[36] The Court also finds that the RPD could reasonably conclude that the authorities were not reluctant to impose fines or legal sanctions on the Applicant's agent of persecution, notwithstanding the relatively short temporary closure of 20 days imposed on Krudalia. The Applicant only speculated on what the normal course of action would be in this situation (CTR at p 235). Rule 7 of the *Refugee Protection Division Rules*, SOR/2002-228 specifies that claimants must provide acceptable documents establishing elements of a claim and, in the absence of these, must explain why they were not provided and what steps were taken to obtain them. The RPD could reasonably expect some documentation outlining the standard procedures in temporarily closing an establishment for serving alcohol to minors since this evidence was central to the Applicant's claim.

[37] Finally, the RPD could reasonably find that the Applicant did not give the authorities an opportunity to protect him by fleeing Cuernavaca three days after his complaint, fleeing Jojutla two days after his second complaint, and fleeing Mexico City without making any complaint. *Ward*, above, holds that claimants must seek state protection unless “it is objectively unreasonable for the claimant not to have sought the protection of his home authorities” (at para 49). Since the authorities had applied legal sanctions to Krudalia in the past and there was no evidence that Krudalia was connected with criminal gangs that might prevent the authorities from acting, it was not objectively unreasonable for the Applicant to seek state protection. It was reasonable to conclude that fleeing immediately after complaining to the authorities did not afford them an opportunity to protect the Applicant (*Buitrago v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1046 at para 27).

#### IX. Conclusion

[38] For all of the above reasons, the Applicant’s application for judicial review is dismissed.

**JUDGMENT**

**THIS COURT ORDERS that** the Applicant's application for judicial review be dismissed with no question of general importance for certification.

"Michel M.J. Shore"

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-9599-12

**STYLE OF CAUSE:** GILBERTO MIGUEL ROMERO OJEDA v  
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AND JUDGMENT:** SHORE J.

**DATED:** May 9, 2013

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