

Federal Court



Cour fédérale

Date: 20100224

Docket: IMM-780-09

Citation: 2010 FC 216

Ottawa, Ontario, February 24, 2010

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

**ALEJANDRA BEATRIZ PEREYRA AGUILAR  
DAMIAN ALEJANDRO ROMERO PEREYRA**

**Applicants**

**And**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

**O'KEEFE J.**

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (RPD or Board), dated January 21,

2009, wherein the applicants were determined to be neither Convention refugees nor persons in need of protection under sections 96 and 97 of the Act.

[2] The applicants request that the decision be set aside and the matter referred to a newly constituted panel of the Board for redetermination.

### **Background**

[3] The applicants, Alejandra Beatriz Pereyra Aguilar (the principal applicant) and Damian Alejandro Romero Pereya (the minor applicant), are mother and son. Both are citizens of Mexico who lived in the Federal District of Mexico. The applicants came to Canada in April of 2008, seeking international protection from the principal applicant's abusive spouse.

[4] In 1997, the principal applicant married Rodolfo Romero Santa Maria (Romero), a successful businessman in the arts and entertainment business. After the marriage, Romero became abusive. By 1998, Romero began abusing the principal applicant physically and emotionally, controlling the principal applicant. He would also disappear for days at a time, but would always subsequently apologize and they would reconcile. This pattern continued for five years, with the principal applicant occasionally requiring medical treatment. During the principal applicant's pregnancy with the minor applicant, Romero was especially abusive. The principal applicant never reported the abuse because her mother had told her that that is a woman's lot in life and because she feared further abuse.

[5] The minor applicant was born in 2002, but Romero's behaviour did not change. Romero became abusive to the minor applicant as well, telling him he was not his father and pushing him out of the way on one occasion.

[6] In December 2005, Romero threatened to kill both applicants. A few weeks after an incident of physical abuse, the principal applicant moved out of their home and went to the Public Ministry. A report was taken and then she was referred to the Centre of Attention to Intrafamily Violence (CAVI), a department of the Attorney General's office. There she received counselling and legal advice. Romero participated on one occasion but then became uncooperative.

[7] Later in 2006, the minor applicant required surgery. Romero's consent was required. After meeting on this occasion, the principal applicant and Romero decided to try living together again for the sake of the minor applicant. Things were fine for about two months, but then Romero became abusive again after the principal applicant caught him kissing another woman in February of 2007. By May of 2007, the abuse had caused the applicants to move in with the principal applicant's parents. In June 2007, Romero appeared at the minor applicant's school and assaulted the principal applicant. The principal applicant did not go to the police. The principal applicant moved with her parents to a new area, but she alleged that she was still concerned that Romero would be able to "track her down" through his friends in the police.

[8] By March of 2008, the principal applicant had decided to come to Canada to escape Romero. The principal applicant was able to get a passport for her son by telling Romero that she was just taking the him on a trip to Spain and would return.

[9] Romero continued to contact the principal applicant after her arrival in Canada, by calling and sending text messages. In the hearing, the principal applicant remarked that Romero wants them back "...he wants us back, but when he has us, he treats us terribly."

### **Board's Decision**

[10] The Board began by discussing the gendered nature of the claim. The Chairperson's *Guidelines on Women Refugee Claimants Fearing Gender-Related Persecution* (the Guidelines) highlights that women claimants may face special problems in demonstrating their claims. The Board noted that the Guidelines are helpful considering the added sensitivities of these claims.

[11] The Board then noted that the determinative issue in the case was whether the applicants had rebutted the presumption of state protection.

[12] The Board noted that the principal applicant went to the police only once, in 2005, that the police had taken her request for help seriously and had provided service. In the weeks that followed, the principal applicant completed paper work required by CAVI. The CAVI process included mediation, and if that was unsuccessful, divorce. By June 2006, Romero had ceased cooperating,

and the CAVI lawyers told the principal applicant that there was nothing else they could do, besides a divorce. The next month, the principal applicant reconciled with Romero. The relationship, however, became abusive again. Romero has since told the principal applicant that he would cooperate in a divorce.

[13] The Board was unsatisfied with the principal applicant's explanation of why she did not go back to the Public Ministry or CAVI to report further abuse, given that she received attention the first time she reported abuse.

[14] The Board discussed Mexican laws that address violence against women and domestic violence. These laws apply even if the victims have not suffered physical injuries. The Board also discussed Mexican policies, laws and initiatives requiring the recording, investigation, prevention and punishment of domestic violence. Medical staff are also being trained to recognize and report domestic violence. The Board also noted that the Federal District of Mexico (FD) is the most progressive area in implementing some of the newer laws. The FD also provides women's shelters.

[15] The Board did note that there is a gap between some legal initiatives and actual practice, and that there were serious problems reported in various states, but that none were reported in the FD. Progress is being made on the national front, with the CAVI helping 22,000 women each year in the FD alone, and that criminal proceedings are now more common. In summary, the Board concluded that the principal applicant failed to access these avenues open to her despite getting help the first time.

[16] The Board discussed the doctor's psychological report on the principal applicant, but did not find that it rebutted the presumption of state protection. The report noted that the principal applicant was nervous and anxious, and would benefit from treatment. There was no evidence that treatment would be lacking in Mexico.

[17] The Board also noted the principal applicant's post hearing affidavit which detailed Romero's attempt to enter Canada. Romero was not allowed to enter Canada, but persuaded the principal applicant to visit him at the airport in order that he could see the minor applicant and deliver Christmas presents. It was a stressful event, and the principal applicant reported that Romero got into an altercation with a Border Services guard. The Board did not feel that this evidence was determinative with respect to the issue of state protection.

[18] In the end, the Board felt that adequate but not perfect state protection was and is available to the applicants, should it be required, and that the applicants did not exhaust all courses of action that were reasonably open to them.

### **Issues**

[19] In my view, the issues that need to be resolved are as follows:

1. What is the standard of review?
2. Did the Board commit a reviewable error with respect to its finding that the presumption of state protection had not been rebutted?

### **Applicants' Written Submissions**

[20] The applicant submits that the Board failed to accord proper weight to the following:

- Romero's arrogance and aggressive behaviour, including his attempt to enter Canada;
- Romero's ability to find the applicants in Mexico as a man with connections; and
- Medical reports from instances of Romero's violence, including a broken nose.

[21] The applicants submit that the presumption of state protection can be rebutted with testimony of similarly situated individuals let down by the state protection arrangement or the applicants' testimony of past personal incidents in which state protection did not materialize, or some evidence of a state's inability to protect.

[22] The applicants submit that there is clear evidence that the state has not protected the applicants, or similar women in the principal applicant's place. Referring the principal applicant to CAVI was not providing her with service. CAVI cannot be considered an agency for providing state protection.

[23] The applicants submit that when assessing the obligation to seek protection, the overall picture must be looked at to determine if it was reasonable. The Board must explain why it prefers other sources over the applicants' evidence, and here the applicants provided cogent evidence of

police corruption in Mexico, and the failure of Mexican government programs. The evidence also showed that in Mexico, protection is not reasonably available for abused women.

[24] The applicants submit that there is evidence that Mexican laws do not adequately protect women and girls from domestic violence and sexual abuse (see *Zamora v. Canada*, 2008 FC 586, *Trianna Aguirre v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 571, at paragraph 24).

[25] The applicants submit that in rebutting the presumption of state protection, it is the effectiveness of the protection that counts, not state initiatives. Here the state did not effectively respond. Moreover, the Board is required to assess the level of democracy in Mexico, which they did not do. The Board must give regard to the corruption, drug trafficking and kidnapping that occurs in Mexico when assessing the level of democracy.

[26] The applicants submitted many documents, both personal documents and documents with respect to country conditions. The Board was required to explain why it preferred other evidence over that provided in those documents.

[27] The applicants submit that Board reasons must show that the Board was alive to the sensitivity required by the Guidelines, in context of the particular circumstances of the applicants. The Board must balance its expectations against the realities of the applicants' situation. These



requirements are not satisfied merely by the Board stating that it considered all the documentary evidence. Here, the Board did not assess the psychological evidence or the medical evidence.

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

[28] The applicants seek to revisit the weighing of the evidence and challenge findings of fact made by the Board. The respondent submits that there is nothing before the Court which shows the Board failed to consider all of the evidence. The Board reviewed all the allegations, and the state protection apparatus in Mexico, with its strengths and weaknesses. It is open to the Board to decide what weight to give each piece of evidence. The applicants have not rebutted the presumption that the Board considered all the evidence in front of it.

[29] A refugee claimant must provide clear and convincing evidence of the state's inability to protect. It is not enough for a claimant to show that the state is not always effective at protecting persons in a similar situation. The failure or corruption of some members of the police is insufficient to demonstrate a want of state protection. The Federal Court of Appeal has ruled that the test is adequacy of protection, rather than effectiveness *per se* (see *Canada (Minister of Citizenship and Immigration) v. Carrillo*, 2008 FCA 94).

[30] The respondent submits that a number of recent decisions have found Mexico to be capable of providing adequate state protection, even where the persecutor is highly-ranked or otherwise an agent of the state, and in cases where domestic violence against a female claimant has occurred (see

*Flores v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 723). The respondent also submits that the new standard of reasonableness is to be applied to state protection findings.

[31] The applicants here had some success with the first attempt engaging the state apparatus, but chose not to engage the state apparatus when the principal applicant determined that the reconciliation with Romero would not work. The principal applicant did not pursue divorce. Having covered all the facts and then going on at length to discuss Mexico's efforts to provide adequate protection, it was reasonable for the Board to conclude as it did.

### **Analysis and Decision**

#### [32] **Issue 1**

##### What is the standard of review?

The applicants' primary arguments raise issues concerning the Board's application of the test for state protection and the Board's disregard for evidence in doing so. In my opinion, once the law regarding the presumption of state protection is correctly set out, a Board's conclusions thereon will hinge primarily on determinations of fact or mixed fact and law. Parliament entrusted these decisions to the RPD not the courts, and as such, these determinations are reviewable on the standard of reasonableness.

[33] **Issue 2**

Did the Board commit a reviewable error with respect to its finding that the presumption of state protection had not been rebutted?

The principal applicant argued that adequate state protection did not exist for her and her son.

[34] The Board's decision suggests that she should have gone back to the police at the public Ministry as they suggested help for her on a previous occasion and as a result, she would receive state protection.

[35] It is important to note that the applicants' testimony with respect to state protection included the following statements:

PANEL MEMBER: In these various places when he came looking for you did you ever think to go to the state police?

CLAIMANT: The state police, the state police is worse than the state of the federal district.

PANEL MEMBER: Earlier when you went to CAVI back in December, January, I believe it was 2006, you said that your husband told you he was going to get a lawyer. Did he ever get one?

CLAIMANT: I do not know. I never got any documents from anyone.

PANEL MEMBER: There are other organizations in Mexico, in Mexico City in particular outside of CAVI that could help you, or the documentary evidence that we have suggests that they help people who are in situations that you describe to us. If you were not satisfied with what CAVI was able to do for you why would you not go to some other organization or authority?

CLAIMANT: Well I, another authority which would be in the public ministry I had already been there and nothing happened.

PANEL MEMBER: You went there once, that was in December 2005.

CLAIMANT: That is right and they channelled me to CAVI which is the institution that takes care of all that, the divorces and separations and all that.

PANEL MEMBER: Right but if you were fearful that he was going to beat you again or beat your son again, that is a little different. Those are actually physical assaults upon you that could be reported as a crime.

CLAIMANT: Yes.

PANEL MEMBER: But you never reported that to the police.

COUNSEL FOR CLAIMANT: That is not accurate, she reported it to the public ministry.

PANEL MEMBER: I am sorry, outside of this one time in December 2005 you did not go back to the police to report any beatings, is that correct?

CLAIMANT: No I did not go back.

PANEL MEMBER: So I just wanted to be clear. One time you went to the public ministry and that was in December 2005.

CLAIMANT: Yes and that is when they sent me to CAVI because they told me at the public ministry there is nothing they could do for me.

PANEL MEMBER: And just to clarify you did not return to back CAVI when things did not work out between them and your husband not appearing for any of the meetings that they scheduled.

CLAIMANT: I did not go out to CAVI because this lawyer by the name of Rivera you know, kept saying to me well he is not showing up, he is not showing up. And she delayed my case for about three months to see whether you know if he would show up, but he did not.

PANEL MEMBER: Well what was the last thing that this lawyer told you? What did he tell you to do?

INTERPRETER: I think it is a lady.

CLAIMANT: Well she said you know he is not showing up. The only option we have now is to proceed. Well she is using the words necessary divorce.

[36] I have reviewed the Board's decision and I am not satisfied that this evidence was correctly addressed by the Board. What purpose would be served by having the principal applicant go back to the police who had already told her that "there was nothing they could do for her". The police would send her to CAVI who previously could not help the applicant because of the non-cooperation of her husband. The suggested remedy of obtaining a divorce is not akin to offering the applicant state protection.

[37] As a result of my findings, I am of the view that the Board made a reviewable error and therefore, the Board's decision must be set aside and the matter referred to a different panel of the Board for redetermination.

[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 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**

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA):

<p>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,</p> <p>(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</p> <p>(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.</p> <p>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</p> <p>(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of</p>	<p>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 :</p> <p>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;</p> <p>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.</p> <p>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 :</p> <p>a) soit au risque, s’il y a des motifs sérieux de le croire, d’être soumise à la torture au</p>
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Article 1 of the Convention  
Against Torture; or

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.

(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.



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

**DOCKET:** IMM-780-09

**STYLE OF CAUSE:** ALEJANDRA BEATRIZ PEREYRA AGUILAR  
DAMIAN ALEJANDRO ROMERO PEREYRA

- and -

THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** September 23, 2009

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

**DATED:** February 24, 2010

**APPEARANCES:**

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