

Federal Court		Cour fédérale
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Date: 20100429

Docket: IMM-5022-09

Citation: 2010 FC 469

Toronto, Ontario, April 29, 2010

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

**JOSE LUIS MIRAMONTES-HERNANDEZ
SILVIA ELENA SEVERA-CRUZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] The present Application concerns a husband and wife who fled Mexico to claim refugee protection in Canada under both s.96 and s.97 of the *IRPA*. The Refugee Protection Division (RPD) rejected the Applicants' claim on the basis that they failed to seek state protection in Mexico. In so finding, the credibility of both Applicants was not in issue.

[2] The details of the Applicants' claim and the reasons for rejection are outlined in the RPD's decision as follows:

[2] Miramontes [the husband] and Severa [the wife] fear for their lives at the hands of Pedro Chavez Gomez (hereinafter referred to as "Chavez"), Severa's former boyfriend, a judicial police officer, who in the past, verbally and physically abused Severa and afterwards physically assaulted and threatened Miramontes. Severa alleges Chavez verbally and physically assaulted her on a number of occasions during their thirteen month relationship. After the relationship ended, Severa met Miramontes and they began a relationship. Chavez found out about this relationship and threatened both claimants on a number of occasions. The claimants allege Chavez and another judicial police officer physically assaulted them in December, 2007. In May 2008, Miramontes alleges Chavez with two other judicial police officers, kidnapped him and beat him and told him to leave the female claimant, then threatened to kill him, and told him to quit his job, where he was working with Severa. The claimants fled to Canada on September 9, 2008 and made a claim for refugee protection that same day.

[...]

[17] In this particular case, the claimants were questioned as to what efforts they made to seek state protection before fleeing Mexico. Severa testified she did not go to the police to report Chavez for physically harming her, neither during their relationship, nor afterwards, because Chavez threatened he would harm her if she reported him to the police. Miramontes testified after he was kidnapped and beaten and his life threatened by Chavez and two other individuals, who he identified as police officers, he sought advice from the National Human Rights Commission. Miramontes testified a lawyer from the Commission interviewed him and was very helpful. Miramontes decided not to pursue his complaint against Chavez, because he did not have witnesses who saw Chavez physically assault him and he feared Chavez's threats against his life.

[18] The claimants allege a fear of persecution by Chavez, a member of the Judicial Police. Other than making one inquiry to the National Human Rights Commission, the claimants did not attempt

to seek state protection at all. Therefore, I find that the claimants did not make every possible effort to obtain state protection. When state officials are behind the persecution, the applicant does not have to exhaust all possible avenues of recourse in the country (*Chaves, Carrillo*); however, it is stretching a point to say that he or she no longer has to seek protection from his country (*Singh*). A corrupt police officer does not constitute a situation in which the state itself is the agent of persecution. The efforts made by the claimant were insufficient. The general principle that persecuted individuals must seek protection from their state before seeking protection from another state applied (*Ward*).

[...]

[20] The claimants were questioned about their views on state protection in Mexico. Severa testified that due to her fears that Chavez would carry out his threats against the claimants, and because he was a police officer who would be protected by his fellow policemen, she did not believe state protection would be available to her. I found the claimant's response regarding the effectiveness of state protection to be not objectively well-founded, since they were largely unsubstantiated and contradict the documentary evidence.

[...]

[23] I find that the claimants, in the circumstances of this case, have failed to rebut the presumption of state protection with clear and convincing evidence. Therefore, I am not persuaded that the state of Mexico would not be reasonably forthcoming with state protection, should the claimants seek it.

[3] It is correct that a claimant will not meet the definition of "Convention refugee" where it is objectively unreasonable for the claimant not to have sought the protection of his or her home authorities (*Hinzman v. Canada (Minister of Citizenship and Immigration)* (2007), F.C.J. No. 584 (F.C.A.) at para. 56). However, Counsel for the Applicants argues that the RPD's state protection finding is made in reviewable error because no qualitative analysis was made with respect to whether the unwillingness of the Applicants to seek state protection was objectively reasonable.

Counsel for the Applicants argues that the claim under s.96 is a gender-based claim given the relationship between Severa and her violent ex-boyfriend. I agree with these submissions.

[4] Counsel for the Applicants also argues that, as a gender-based claim, the RPD should have taken the Chairperson's Guidelines *Women Refugee Claimants Fearing Gender-Related Persecution (November 13, 1996)* into consideration, the relevant feature of which is the following direction:

2. Decision-makers should consider evidence indicating a failure of state protection if the state or its agents in the claimant's country of origin are unwilling or unable to provide adequate protection from gender-related persecution. If the claimant can demonstrate that it was objectively unreasonable for her to seek the protection of her state, then her failure to approach the state for protection will not defeat her claim. Also, the fact that the claimant did or did not seek protection from non-government groups is irrelevant to the assessment of the availability of state protection.

(Applicants' Book of Authorities, Tab 1, p. 8 of 19)

While Counsel for the Applicants did not squarely place this argument before the RPD at the hearing of the Applicants' claim, nevertheless, I agree with the submission that the obligation to correctly identify the essence of the claim produced as a gender-based is the responsibility of the RPD.

[5] On this basis I find that the RPD was required to do a proper analysis of the Applicants' reasons for not claiming protection with the *Guidelines* in mind. The fear held by the Applicants was a fear of reprisal for making a report to the police about serious violent crime committed by a member of the police, and aided by other members of the police. The RPD was called upon to empathetically determine whether the subjective unwillingness of the Applicants was objectively

reasonable in the circumstances. This requirement was not met. As a result, I find that the decision is unreasonable.

ORDER

Accordingly, I set aside the decision under review and refer the matter back to a differently constituted panel for re-determination.

There is no question to certify.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5022-09

STYLE OF CAUSE: JOSE LUIS MIRAMONTES-HERNANDEZ,
SILVIA ELENA SEVERA-CRUZ v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: April 28, 2010

**REASONS FOR ORDER
AND ORDER:** CAMPBELL J.

DATED: April 29, 2010

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