

Federal Court



Cour fédérale

Date: 20100721

Docket: IMM-5420-09

Citation: 2010 FC 763

Ottawa, Ontario, July 21, 2010

PRESENT: The Honourable Mr. Justice Kelen

BETWEEN:

**CARMEN ALICIA BELTRAN ESPINOZA and
JOCELYN BELTRAN BELTRAN**

Applicants

and

**THE MINISTER OF
CITIZENSHIP AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision of the Refugee Protection Division of the Immigration and Refugee Board (the RPD) dated September 24, 2009 concluding that the applicants are not Convention refugees or persons in need of protection pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act* (IRPA), S.C. 2001, c. 27 because of credibility concerns, the availability of state protection and an internal flight alternative (IFA) in Mexico City.

FACTS

Background

[2] The two applicants are citizens of Mexico. Ms. Carmen Alicia Beltran Espinoza is forty-six (46) years old, a widow, and the mother of the second applicant, her fifteen (15) year old daughter, Jocelyn Beltran Beltran. Ms. Espinoza has two additional sons who are not parties to these proceedings, and a deceased step-son. Twenty-four (24) year old Edgar Beltran Beltran is one of Ms. Espinoza's sons. He was initially a party to these proceedings but filed a notice of withdrawal. Twenty-seven (27) year old Rogelio Beltran Beltran is Ms. Espinoza's eldest son and is presently held in a U.S. jail for drug crimes. Abel Beltran Leyva is the deceased step-son of Ms. Espinoza's. He was murdered in a drive-by machine-gun shooting.

[3] The applicants entered Canada on May 8, 2007 through the Lester B. Pearson International Airport and claimed refugee status on July 5, 2007. Their claim was heard by a panel of the RPD in three sittings starting on April 28, 2009.

[4] The applicants are residents of the city of Culiacan, located in the state of Sinaloa in north western Mexico. Ms. Espinoza owned a bottling business which is presently run by her brother. Her allegations are as follows: Ms. Espinoza's step-son, Abel, associated with the Sinaloa drug cartel was kidnapped in 2006 because he or his step-brother Rogelio owed drug money to the drug cartel. Ms. Espinoza has limited direct knowledge of the background facts surrounding Abel's kidnapping but states that:

- Rogelio is arrested on drug charges in the U.S., gives information to the U.S. authorities, and loses hundreds of thousands of dollars of drug money and drugs, which the Sinaloa cartel entrusted him with;
- Abel is kidnapped in November 2006;
- the applicant mother was confronted by cartel members who requested she pay a ransom for Abel;
- the applicant mother agreed to transfer ownership of her two houses to the cartel as payment;
- the transactions could not go through because of ownership defects;
- Abel was released in December 2006 after it was agreed he would settle the debt;
- Abel fled to Europe in January or February 2007. He returned to Mexico a year and half later where upon he was murdered on July 24, 2008; and
- An employee in the Public Prosecutor's Office contacted the applicant shortly after Abel's kidnapping and indicated Rogelio owed money to someone in the cartel and requested that the applicant mother meet with that person but she refused (that person is referred to as a "rogue police officer").

[5] In February 2007 a next door neighbour of the applicants who was the chief of the municipal police force suffered an attempt on his life. The applicants and Edgar heard the shots next door and became fearful for their lives. They fled Mexico on May 8, 2007. The applicants claimed refugee status on July 5, 2007 but Edgar chose to return to Mexico on October 2007. He re-entered Canada on September 13, 2008 after Abel was killed and claimed refugee protection.

Decision under review

[6] The refugee claim was dismissed by the RPD on September 24, 2009 because of credibility concerns, the availability of state protection and an internal flight alternative.

[7] The hearing before RPD had a number of heated exchanges between the applicant mother and the Refugee Protection Officer (RPO). The RPD member acknowledged in the decision that the RPO's demeanour was hostile and at one point condescending. The RPD considered *Guideline 8 - Guideline on Procedures with Respect to Vulnerable Persons Appearing Before the IRB* (Guideline 8) in assessing the applicants' evidence.

[8] The RPD found that Ms. Espinoza's evidence with respect to Abel's kidnapping and murder lacked credibility for the following reasons:

- it was implausible that Ms. Espinoza was never privy to the exact amounts of ransom demanded by the kidnappers considering the extent of her contact with the kidnappers;
- the evidence, on the balance of probabilities, does not establish who murdered Abel or if the murder was connected to the Sinaloa cartel;
- it is unclear whether the gunmen were aiming to kill Abel, his friend, or both;
- there is no mention of the Sinaloa cartel in the media reports of the murder; and
- police statements made by Abel's wife make no mention of any trouble Abel may have been involved with including that he had been kidnapped.

The RPD determined based on the above reasons that Abel was not the victim of the Sinaloa cartel but rather the victim of generalized crime. The RPD further found that there is no link between Abel's murder and the applicants' allegations, and that the Abel's story was added to bolster the refugee claim.

[9] The RPD found that the applicants never attempted to contact the police or other forms of authority. The RPD acknowledged the serious issues of impunity and corruption in Mexico's justice system and accepted that they may have come in contact with a rogue police officer. However, the RPD determined that the applicants could not rebut the presumption of state protection with "clear and convincing" evidence because they did not access any of Mexico's avenues for state protection.

[10] The RPD further found that Mexico City was a viable IFA because it is far from Culiacan, is located in a different state, and it has law enforcement institutions and forces which could offer the applicants relief from local police corruption and offer them state protection. The RPD determined that the failures of the state of Mexico in the areas of corruption, impunity, and criminality do not form a broader pattern of state instability or refusal to provide protection. Adequate state protection was therefore available in the IFA. The claim for refugee status was therefore dismissed.

LEGISLATION

[11] Section 96 of IRPA grants protection to Convention refugees:

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race,	96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d'être
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religion, nationality, membership in a particular social group or political opinion,

(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.

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) 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.

[12] Section 97 of IRPA grants protection to certain categories of persons:

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,

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 :

because of that risk, unwilling to avail themselves of the protection of that country, (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.

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays, (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.

ISSUES

[13] The applicants raise the following issues:

1. Did the RPD err in its credibility findings?
2. Did the RPD misapprehend or ignore the evidence before it?
3. Did the RPD err in its state protection analysis?
4. Did the RPD err in its internal flight alternative analysis?

STANDARD OF REVIEW

[14] In *Dunsmuir v. New Brunswick*, 2008 SCC 9, 372 N.R. 1, the Supreme Court of Canada held at paragraph 62 that the first step in conducting a standard of review analysis is to “ascertain whether the jurisprudence has already determined in a satisfactory manner the degree of

(deference) to be accorded with regard to a particular category of question”: see also *Khosa v. Canada (MCI)*, 2009 SCC 12, per Justice Binnie at para. 53.

[15] Questions of credibility, state protection and IFA concern determinations of fact and mix fact and law. It is clear that as a result of *Dunsmuir* and *Khosa* such issues are to be reviewed on a standard of reasonableness. Recent case law has reaffirmed that the standard of review for determining whether the applicant has a valid IFA is reasonableness: *Mejia v. Canada (MCI)*, 2009 FC 354, per Justice Russell at para. 29; *Syvryyn v. Canada (MCI)*, 2009 FC 1027, 84 Imm. L.R. (3d) 316, per Justice Snider at para. 3; and my decision in *Perea v. Canada (MCI)*, 2009 FC 1173 at para. 23.

[16] In reviewing the Board's decision using a standard of reasonableness, the Court will consider "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *Dunsmuir, supra*, at paragraph 47; *Khosa, supra*, at para. 59.

Issue No. 1: Did the RPD err in its credibility findings?

[17] The applicants submit that it was not reasonably open to the RPD to render adverse credibility findings based on the following factors:

1. lack of evidence of the involvement of the Sinaloa cartel in the applicants’ persecution;

2. Ms. Espinoza's lack of knowledge as to the exact amount of ransom demanded for Abel's release;
3. Ms. Espinoza's testimony in response to the RPO's questions without first considering the psychological report and the effect of the RPO's demeanour on the testimony;
4. it was unclear whether the gunmen were aiming to kill Abel, his friend, or both;
5. the fact that the newspaper account of Abel's drive-by machine-gun killing did not attribute blame to the cartel;
6. the fact that Abel's wife did not indicate that the Sinaloa cartel was responsible for Abel's murder when she made her statement to the police; and
7. Edgar chose to re-avail himself in Mexico after he originally entered Canada with the applicants in May 2007.

[18] The Court finds that the involvement of the Sinaloa cartel is central to the applicants' claim. The applicants could not furnish direct evidence which implicates the involvement of the Sinaloa cartel. Edgar's un-contradicted testimony at pages 37-38 of transcript of the July 15, 2009 sitting clarifies the basis of the applicants' belief that their persecution is at the hands of the Sinaloa cartel:

MEMBER: So, what I need to establish is, what is the basis of your guess or speculation that the people who murdered Abel and/or the kidnappers and/or the people who are demanding money or properties in exchange belonged to the Sinaloa Cartel? That's what I need to understand. Like, what is the basis of your guess or speculation?

CLAIMANT (Mr. BELTRAN BELTRAN): Because of the money that Rogelio owes, it belongs to the cartel.

MEMBER: Did Rogelio tell you that he had a relationship or some kind of, you know, activity going on with the Sinaloa Cartel himself? Or, in other words, did you learn from Rogelio that he had dealings with the Sinaloa Cartel?

CLAIMANT (Mr. BELTRAN BELTRAN): He said it indirectly because he said we shouldn't be living in Mexico anymore.

MEMBER: That's doesn't say -- that doesn't tell me that he told you that he had dealings with Sinaloa Cartel.

CLAIMANT (Mr. BELTRAN BELTRAN): But there are(sic) the information, the reports about the capture.

MEMBER: Capture of who?

CLAIMANT (Mr. BELTRAN BELTRAN): Of Rogelio.

MEMBER: And what does it--does it say that it's because of his relationship with-- dealings with Sinaloa Cartel?

[...]

CLAIMANT (Mr. BELTRAN BELTRAN): I think so.

[...]

MEMBER: Now, this, this particular letter doesn't mention Sinaloa Cartel. It talks about narcotics activity in Mexico. Do you know of any other information that is making you, you know, make this guess that Rogelio owed money to the Sinaloa cartel?

CLAIMANT (Mr. BELTRAN BELTRAN): No, I don't.

Edgar's inability to provide direct evidence of the cartel's involvement led the RPD to determine that the applicants' allegations in that regard were based on speculation. In my view it was not reasonably open to the RPD to conclude that the applicants were not credible on this basis.

[19] The Court finds that direct evidence of the involvement of a particular drug cartel's involvement in a campaign of persecution is not normally documented, and that the applicants reasonably inferred that they were targeted by the Sinaloa cartel based on the following factors:

1. Sinaloa state is the birth place of the Sinaloa drug cartel which is a dominant organized crime group;

2. Rogelio was involved with this drug cartel in Mexico and the U.S., and is afraid to return home after he is released from U.S. prison because of his cooperation with U.S. authorities and his loss of the cartel's money and drugs;
3. Abel was involved with drug crime which led to his abduction by a cartel for the non-payment of debts by Rogelio;
4. the newspaper account reporting on Abel's murder would not reasonably be expected to identify the killers as the drug cartel. A newspaper does not speculate as to who the killers are without direct evidence. In my view it would be obvious to the reader that this "drive-by" machine-gun killing in front of the police station was perpetrated by an organized drug crime group;
5. it is likely the murderers were aiming for Abel, as opposed to, or as well as, his friend, because Abel had already been kidnapped by the cartel and had recently returned from a one and a half year stay in Europe where he hid from the drug cartel; and
6. police would not identify in official documentation the Sinaloa cartel as the perpetrators of Abel's murder without evidence and because of the widespread corruption within the police ranks.

As I discuss below in the context of state protection, the evidence indicates that the Sinaloa state is awash with drug crime, drug money, and police corruption. The overall influence of the Sinaloa drug cartels controls every aspect of life. It was not unreasonable for Abel's wife, contrary to the

finding by the RPD, not to mention the drug cartel when she met with the police to identify Abel's body. It was undoubtedly obvious to the police that this was a drug killing.

[20] The applicants submit that the RPD erred in failing to recognize the machismo culture of Mexico when it determined that Ms. Espinoza was not credible because she did not know the amount which Abel's kidnappers demanded as ransom. This Court has held that credibility findings made without regard to the socio-political context of the country of origin are unreasonable: *Baines v. Canada (MEI)* (1993), 63 F.T.R. 312 (F.C.A.); *Sun v. Canada (MEI)* (1993), 24 Imm. L.R. (2d) 226. The applicants submit that it was reasonable for the applicant mother to simply be asked to turn over the properties as ransom payment without knowing the exact demands while the men in her family were privy to the exact amounts demanded. The evidence indicates that it was Abel who requested Ms. Espinoza put up her houses for sale. Ms. Espinoza's testimony that she never knew the exact amount of the ransom is consistent with the Sinaloan culture of fear discussed in a *Los Angeles Times* newspaper article dated December 22, 2008 which is at page 991 of the Certified Tribunal Record:

Gradually, law-abiding people learned a new code of conduct: keep your head down, don't ask too many questions, keep away from the restaurants and luxury boutiques where gangsters hang out. Family gatherings end early; everyone wants to get home soon after sunset.

[21] After the discovery of ownership defects in the property demanded, the real estate transactions fell through and Abel fled to Europe for a year and a half to avoid the kidnappers. It was following his departure and following the assassination attempt against her neighbour (the chief of police) that Ms. Espinoza fled for fear of her life, even before her daughter was able to conclude

the school year. (The applicants left in May 2007 and the school year ended in June 2007.) I note that her son Abel was murdered after she fled.

[22] However, the Court finds that the RPD reasonably found the applicants were not presented with a continuing demand after Ms. Espinoza's ownership defects of her houses were detected and after Abel left to Europe. The evidence before the RPD is that Ms. Espinoza is listing two properties for sale and no demand has been made to turn them over to the cartel. This part of the applicants' claim raises some concern. However, in view of the above-mentioned credibility findings which the Court finds were not reasonably open to the RPD to make, the Court cannot uphold the RPD's decision on this basis alone.

[23] The Court is deferential to the RPD's credibility findings as long as the RPD provides a rationale for those findings. In this case, after considerable deliberations, the Court has concluded, for the reasons above, that it was not reasonably open to the RPD to impeach the applicants' credibility in view of the above evidence. The RPD's credibility findings cannot stand.

Court's comment with respect to issues number 2 and 4

[24] Because of the Court's findings with respect to issue number 1 and the Court's findings below with respect to issue number 3 regarding state protection, the Court will not need to consider issues number 2 and 4. The RPD's errors with respect to issues number 1 and 3 are so material and significant that they infect the whole decision and cannot stand.

Issue No. 3: Did the RPD err in its state protection analysis?

[25] The applicants submit that the RPD erred in its state protection analysis by ignoring relevant evidence of police corruption and drug crime impunity in the state of Sinaloa and by failing to consider the applicants' personal circumstances.

[26] In *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, the Court held that refugee protection is a form of "surrogate protection" intended only in cases where protection from the home state is unavailable. As Mr. Justice La Forest held at page 709:

... International refugee law was formulated to serve as a back-up to the protection one expects from the state of which an individual is a national. It was meant to come into play only in situations when that protection is unavailable, and then only in certain situations. The international community intended that persecuted individuals be required to approach their home state for protection before the responsibility of other states becomes engaged. ...

Further, the Court held that, except in situations where there has been a complete breakdown of the state apparatus, there is a general presumption that a state is capable of protecting its citizens.

[27] While the presumption of state protection may be rebutted, this can only occur where the refugee claimant provides "clear and convincing" evidence confirming the state's inability to provide protection. Such evidence can include testimony of similarly situated individuals let down by the state protection arrangement, or the refugee claimant's own testimony of past incidents in which state protection was not provided: *Ward, supra*, pp. 724-725. Refugee claimants must make "reasonable efforts" at seeking out state protection, and that the burden on the

claimant increases where the state in question is democratic: *Kadenko v. Canada (Solicitor General)* (1996), 206 N.R. 272 (F.C.A.), at para. 5.

[28] The Federal Court of Appeal recently clarified the presumption of state protection in *Carillo v. Canada (MCI)*, 2008 FCA 94, 69 Imm. L.R. (3d) 309, per Justice Létourneau. The Court engaged in a detailed discussion at paragraphs 16-30 on the distinctions between “*burden of proof, standard of proof and quality of evidence*”. The Court held at paragraphs 33-35 that the RPD’s assessment of Mexico’s state protection was reasonably open to it based on the facts before it:

¶33 The Board found that the respondent had failed to make determined efforts to seek protection. She reported to police only once during more than four years of alleged abuse...

¶34 In addition, the Board concluded based on the evidence before it that the respondent did not make additional effort to seek protection from the authorities when the local police officers allegedly did not provide the protection she was seeking... She could have sought redress through National or State Human Rights Commissions, the Secretariat of Public Administration, the Program Against Impunity, the General Comptrollers’s Assistance Directorate and the complaints procedure at the office of the Federal Attorney General ...

¶35 Finally, the Board noted the respondent’s omission to make a complaint about the involvement of the abuser’s brother, who allegedly is a federal judicial police officer, when the evidence indicates that substantial, meaningful and often successful efforts have been made at the federal level to combat crime and corruption ...

[29] The applicants in this case failed to approach the police or successive levels of the Mexican state machinery to complain about Abel’s kidnapping, the ransom demands, or the rogue police officer. (The Court refers to this incident earlier in these reasons under the heading “background

facts”).) However, the evidence before the RPD from a *Los Angeles Times* article dated December 22, 2008 cited earlier in these reasons shows that the police in the state of Sinaloa cannot protect their citizens from crimes related to the drug cartels because “the *narcos* have networks meshed into the fabric of business, culture, politics – every corner of life”. According to the article, in 2008 more than 100 policemen in the state were killed, gunned down by the drug cartels. 2008 is the year the applicants sought refuge in Canada. The article also states that it is estimated that 70% of the local police in the state are under the influence of the drug gangs. Many Sinaloa state politicians are corrupted and those who refuse to accept bribes are threatened or murdered. The applicants’ hometown, Culiacan, has become the headquarters for many of the richest cartels members and hosts the now familiar gun battles between rival cartels and frequent assassinations of ranking police officers, politicians, and prosecutors. Accordingly, in the state of Sinaloa, it appears that there has been a “breakdown” of the state’s ability to provide adequate protection to its citizens from drug related crime. Moreover, Ms. Espinoza’s son Abel was machine-gunned down by persons undoubtedly connected to drug crime. The killing took place in front of the police station in the capital of the state.

[30] The reasons given by the RPD are not to be read hypercritically by a court and nor is it required to refer to every piece of evidence that it received that is contrary to its finding, and to explain how it dealt with it: *Cepeda-Gutierrez v. Canada (MCI)* (1998), 157 F.T.R. 35, 83 A.C.W.S. (3d) 264 (F.C.T.D.), per Justice Evans (as he the was) at paragraph 16. However, Justice Evans also held at paragraph 15 that the Court may infer that a finding of fact has been made

without regard to the evidence if the RPD fails to mention an important piece of evidence which is relevant and directly contradicts the Board's finding:

¶15 The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency. Just as a court will only defer to an agency's interpretation of its constituent statute if it provides reasons for its conclusion, so a court will be reluctant to defer to an agency's factual determinations in the absence of express findings, and an analysis of the evidence that shows how the agency reached its result.

[31] In this case, I am satisfied that the RPD erred in failing to explain why the *Los Angeles Times* article about the breakdown of the state's ability to control the drug killings in Sinaloa was not considered or followed. This is one of the most credible newspapers in the U.S., and this article is important, relevant and contradictory evidence. For this reason, the RPD finding that there was adequate state protection for the applicants in the state of Sinaloa is in error and must be set aside because it did not consider this evidence.

CONCLUSION

[32] For these reasons the Court must conclude that the RPD erred with respect to the credibility and state protection issues. Since these errors are significant and material to the whole decision, the decision must be set aside.

CERTIFIED QUESTION

[33] Both parties advised the Court that this case does not raise a serious question of general importance which ought to be certified for an appeal. The Court agrees.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

The application for judicial review is allowed. The RPD decision dated September 24, 2009 is set aside and this refugee claim is remitted to a different panel of the RPD for redetermination.

“Michael A. Kelen”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5420-09

STYLE OF CAUSE: *Carmen Alicia Beltran Espinoza and Jocelyn Beltran
Beltran v. The Minister of Citizenship and Immigration*

PLACE OF HEARING: Toronto, Ontario

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**REASONS FOR JUDGMENT
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DATED: July 21, 2010

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