

Federal Court



Cour fédérale

**Date: 20110127**

**Docket: IMM-2893-10**

**Citation: 2011 FC 96**

**[UNREVISED ENGLISH CERTIFIED TRANSLATION]**

**Montréal, Quebec, January 27, 2011**

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

**BETWEEN:**

**GLADYS ARROYO GURROLA  
JONATHAN CASTILLO ARROYO  
JORGE SADAMI CASTILLO ARROYO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION**

**Respondent**

**REASONS FOR JUDGMENT AND JUDGMENT**

[1] This is an application for judicial review in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (Act), of a decision by the Refugee Protection Division of the Immigration and Refugee Board (panel), dated April 26, 2010. In its decision, the panel found that the applicants were neither Convention refugees nor persons in need of protection within the meaning of sections 96 and 97 of the Act.

Factual background

[2] The principal applicant, Gladys Arroyo Gurrola, her spouse, Ricardo Castillo Frausto, and their two minor children, Jonathan Castillo Arroyo and Jorge Sadami Castillo Arroyo, are citizens of Mexico. They arrived in Canada on February 5, 2008. They claimed refugee protection on the same day.

[3] Since their arrival in Canada, the applicants separated and the children are in their mother's custody. Consequently, this application concerns only Ms. Arroyo Gurrola and her two sons.

[4] The applicants claimed refugee protection, alleging a fear of being killed by Senator Manuel Bartlett Diaz and his men on the grounds that Ms. Arroyo Gurrola's half-brother, Omar, witnessed corruption and money laundering by these men.

[5] Omar allegedly worked for a private company as an information technology manager. In December 2004, he apparently discovered that large sums of money had been transferred to three people, including the Senator. A few days after speaking with the company's accountant, he was purportedly the target of a planned attack by the Senator. He therefore left Mexico in January 2005 for Canada, where he claimed refugee protection.

[6] In May 2005, Omar's mother and father came to join him in Canada. Their refugee claims were allowed.

[7] In March 2006, Ms. Arroyo Gurrola's sister, Elizabeth, and her family came to Canada and their refugee claim was allowed based on the fact that Elizabeth's husband was allegedly beaten because of Omar.

[8] As for Ms. Arroyo Gurrola, she and her family purportedly started to have problems around December 2005. While living in Guadalajara, in the State of Jalisco, her son Jonathan was apparently being followed. The family then allegedly moved to Tultitlan in the State of Mexico.

[9] In January 2006, Jonathan was allegedly hit by an unlicensed black van. The family apparently then moved to Querétaro, in the State that bears the same name, and stayed there until April 30, 2006. The family then purportedly went to stay in Coacalco in the State of Mexico.

[10] In January 2008, Ms. Arroyo Gurrola and her husband were riding a motorcycle. They allegedly received a ticket from a police officer after running a red light. Two days later, the applicants apparently received anonymous threatening telephone calls telling them that they had been found. There was allegedly a reference made about Omar and that even though Jonathan had pulled through, the whole family would be targeted.

[11] The family then moved to Aculco, still in the State of Mexico. They then left Mexico for Canada on February 5, 2008.

Impugned decision

[12] The panel first found that the claimants' story was not plausible. In fact, the panel noted that even if the incidents experienced by Ms. Arroyo Gurrola's half-brother were true, it was surprising, if not incredible, that his persecutors would still be looking to seek revenge on him.

[13] The panel raised the point that the claimants never explained on what basis they were making a connection between Ms. Arroyo Gurrola's half-brother's problems in 2004-2005 and the two incidents experienced by Jonathan in 2005 and 2006. When the panel asked Ms. Arroyo Gurrola about this, she replied that she did not know. The panel therefore found that there was no serious evidence to establish the basis of the applicants' allegations.

[14] The panel also found the female claimant's explanation of the reasons why Omar's persecutors suddenly decided to go after her family in 2008 not credible. The panel emphasized that five years had elapsed since the initial events at the heart of the refugee claim and that it was therefore highly unlikely that Omar's persecutors would "wake the cat who had been sleeping" by going after a family that is in no way in possession of any information that could incriminate Senator Bartlett Diaz or his entourage.

[15] For these reasons, the panel found that it did not believe that the claimants were subject to threats by Senator Bartlett Diaz or his associates so that they could seek revenge on Omar.

[16] The panel also found that the claimants did not satisfy their obligation to seek protection from the Mexican authorities. In fact, the panel noted that the claimants stated that they had never

asked the authorities in their country to protect them from Senator Bartlett Diaz and his associates. The claimants explained that they had failed to ask for protection because of fear and because they did not trust that they would support and protect them.

[17] Consequently, the panel found that adequacy of state protection cannot be based solely on a claimant's subjective fear (see *Martinez v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1050, [2005] FCJ No 1297).

[18] The panel admitted that the state apparatus is not free of corruption. However, on the basis of documentary evidence, it found that the claimants had many means at their disposal but chose not to make use of them.

#### Relevant statutory provisions

[19] The following provisions of the Act apply to this proceeding:

##### 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,

(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

##### 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) 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.

Person in need of protection

Personne à protéger

**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

**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) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

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) 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

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles

accepted international standards, and

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.

Person in need of protection

Personne à protéger

(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.

Issue

[20] In this judicial review, the only issue is whether the panel's findings on the lack of credibility and state protection are reasonable.

Standard of review

[21] The Supreme Court of Canada recognized, in *Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at paragraph 51, that "... questions of fact, discretion and policy as well as questions where the legal issues cannot be easily separated from the factual issues generally attract a standard of reasonableness ...".

[22] Assessing credibility and weighing the evidence fall within the jurisdiction of the administrative tribunal called upon to assess the allegation of a subjective fear by a refugee

claimant. The Court will intervene only if the panel based its decision on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before it (*Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, 157 FTR 35, [1998] FCJ No 1425, at para 14; *Aguebor v Canada (Minister of Employment and Immigration)*, (1993), 160 NR 315, 42 ACWS (3d) 886 (FCA); *Perez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 345, [2010] FCJ No 579).

[23] Furthermore, this Court stated that the panel's findings on matters of state protection are reviewable under the reasonableness standard (see *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, [2007] FCJ No 584, at para 38; *Huerta v Canada (Minister of Citizenship and Immigration)*, 2008 FC 586, [2008] FCJ No 737, at para 14; *Chagoya v Canada (Minister of Citizenship and Immigration)*, 2008 FC 721, [2008] FCJ No 908, at para 3).

### Analysis

[24] In the case under review, the Court notes that the panel's decision is founded on two distinct findings: credibility and state protection. The applicants must therefore establish the existence of an unreasonable error in each of these findings.

[25] At the outset, the applicants submitted that the panel made an unreasonable finding in attacking the credibility of the alleged facts since these facts had been recognized in the protection claims of Omar, his mother and stepfather as well as that of his sister and her family. This argument is not determinative in itself since the panel focused on the credibility of the facts surrounding the claim of the applicants and not that of Omar.



[26] The Minister argued that it is well established that it is up to the panel, which has sole jurisdiction over the facts, to assess the credibility of an account. While the Court recognizes that the panel is in a better position than the Court to determine whether the applicants' allegations are plausible, it is nevertheless clear in reading and analyzing the decision in this case that the panel made omissions in analyzing the credibility of the facts.

[27] More specifically, the panel failed to consider the fact that the applicants received an anonymous telephone call two days after having been stopped by the police for running a red light. Furthermore, the applicants submitted that during the call, threats were uttered and Omar's name was mentioned. The persecutors allegedly told the applicants that they had found them again.

[28] The panel did not consider this important fact, that is, the mention of the name "Omar". Instead, it limited its analysis to the two incidents involving Jonathan. While it is possible that these two incidents were coincidences, the evidence suggests that the telephone call was connected with Omar and their persecution. The Court is of the opinion that the failure to analyze this important fact, a connection to Omar (whose refugee claim was allowed in Canada), is an error on the part of the panel.

[29] With regard to the panel's finding on state protection, counsel for the respondent emphasized to the Court that even if the panel had found that the applicants' account was credible, the refugee claim could not have been allowed on the grounds that the applicants did not satisfy their obligation to seek protection from the Mexican authorities.

[30] The Court agrees with the argument by the respondent's counsel on this point.

[31] In fact, on matters of state protection, the Federal Court of Appeal found in *Carrillo v Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, [2008] FCJ No 399, at paragraph 38, that the burden of proof, the standard of proof and the quality of the evidence of an allegation of inadequate or non-existent state protection towards one of its citizens is defined as follows:

[38] . . . A refugee who claims that the state protection is inadequate or non-existent bears the evidentiary burden of adducing evidence to that effect and the legal burden of persuading the trier of fact that his or her claim in this respect is founded. The standard of proof applicable is the balance of probabilities and there is no requirement of a higher degree of probability than what that standard usually requires. As for the quality of the evidence required to rebut the presumption of state protection, the presumption is rebutted by clear and convincing evidence that the state protection is inadequate or non-existent.

[32] The case law is consistent that when the state in question is a democratic State, such as Mexico, the applicant's responsibility to seek state protection increases. It is up to the applicants to rebut the presumption of state protection with clear and convincing evidence (*Canada (Attorney General) v Ward*, 2 SCR 689). The applicants must show that they exhausted all the remedies available to them to obtain the necessary protection (see *Kadenko v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1376, 68 ACWS (3d) 334).

[33] In this case, the evidence on record is that the applicants did not seek state protection. They made no effort to seek protection. Under the circumstances, this factor alone is sufficient for finding

that the panel, on this point, did not err in concluding that the applicants did not demonstrate the non-existence of state protection. The panel's finding on this point is therefore well founded.

[34] Finally, with a lack of any effort on the part of the applicants to obtain state protection, the argument that the remedies proposed by the panel do not apply to the applicants on the grounds that they are not victims of corruption by federal government officials turns out to be irrelevant and inconclusive.

[35] It is therefore apparent that the applicants did not demonstrate the existence of an unreasonable error in each of the panel's two findings.

[36] For these reasons, the Court's intervention is not warranted. The application for judicial review is dismissed. There is no question to certify.

**JUDGMENT**

**THE COURT ORDERS AND ADJUDGES** that the application for judicial review is dismissed. No question is certified.

“Richard Boivin”

---

Judge

Certified true translation  
Janine Anderson, Translator

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

**DOCKET:** IMM-2893-10

**STYLE OF CAUSE:** GLADYS ARROYO GURROLA ET AL.  
v.  
THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** Montréal, Quebec

**DATE OF HEARING:** January 25, 2011

**REASONS FOR JUDGMENT  
AND JUDGMENT:** BOIVIN J.

**DATED:** January 27, 2011

**APPEARANCES:**

Claudette Menghile FOR THE APPLICANT

Suzon Létourneau FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Claudette Menghile FOR THE APPLICANT  
Montréal, Quebec

Myles J. Kirvan FOR THE RESPONDENT  
Deputy Attorney General of Canada