

Federal Court



Cour fédérale

Date: 20120208

Docket: IMM-4501-11

Citation: 2012 FC 181

Ottawa, Ontario, February 8, 2012

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

CARMEN ROSA PINTO PONCE

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is an application under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB), dated 13 June 2011 (Decision), which refused the Applicant's application to be deemed a Convention refugee or a person in need of protection under sections 96 and 97 of the Act.

BACKGROUND

[2] The Applicant is a 38-year-old citizen of Bolivia. She currently lives in Toronto and has a one-year-old daughter. The Applicant's daughter is a Canadian citizen by birth and is not a party to this application.

[3] In 2004, the Applicant met her former common-law husband, Manuel Rodriguez (Manuel). Shortly after they met, the couple moved into a house together in Cliza, Bolivia. After they moved in together, Manuel began to physically and sexually abuse the Applicant. He often came home drunk and forbade the Applicant from seeing her family. On 4 May 2005, Manuel threw the Applicant to the floor of their home and kicked her. After this assault, the Applicant went to the police in Cliza.

[4] When the Applicant went to the police station, the police officer who took her complaint laughed at her. He said that if Manuel was abusing her she should be a better wife and stop blaming her husband for her problems. The police officer then went into an office and made a telephone call. The Applicant heard the police officer tell the other party that a woman was making a complaint against Manuel. The police officer returned and told the Applicant that he had spoken with Demetrio Rodriguez – Manuel's uncle and a senior police officer (Demetrio). The police officer told the Applicant that Demetrio said she should go home and stop wasting police time. Demetrio also said that the police were there to solve real crimes, not the complaints of a woman who could not keep her husband happy.

[5] On the same day that the Applicant went to the police station, she also saw a doctor. The doctor gave her a report on 6 May 2005 which documented the injuries Manuel had inflicted on her. The Applicant did not return to the police station with this report.

[6] The Applicant did not tell Manuel about her visit to the police station. Nevertheless, the next day, Manuel came home in a rage. He told the Applicant that she was making a fool of him to his uncle and that what went on under his roof was his business and no one else's. To show the Applicant that he was in charge, he beat and raped her.

[7] By July 2005, the Applicant found her situation unbearable. She quit her job and fled the home while Manuel was at work. She left Cliza and went to live with her brother in Cochabamba, Belize. Manuel hunted the Applicant down in Cochabamba. One day, he found the Applicant in a market in there; he grabbed her by the hair, dragged her to the ground, and kicked her. He said she would come back to him whether she liked it or not. Other people who were at the market intervened to stop the violence. Manuel told the Applicant it was not over between them and left.

[8] After Manuel attacked her in the market, the Applicant went to see a doctor in Cliza. This doctor also provided her with a report setting out the injuries she had suffered. The Applicant then returned to the same police station in Cliza she had gone to before to file a report. She went there because she believed she had to report in the jurisdiction where Manuel lived. On this second occasion, the Applicant spoke with a different police officer than she had on her first visit. This police officer gave her a form to complete. After the Applicant completed the form, the police officer stamped her form and gave her a letter with a stamp on it. He also told her that the police would call Manuel, so she gave the police Manuel's contact information. She also gave the police her parents' contact information in Cochabamba, but she did not provide the police with a copy of

the report from the doctor she had obtained earlier that day. The Applicant left the police station and returned to Cochabamba.

[9] Because she thought she could not stay in Cochabamba, and believed that Manuel would find her there again, the Applicant went to La Paz, Bolivia, to live with her uncle. While she was in La Paz, she did not leave her uncle's house for fear that Manuel would find her as he had in Cochabamba. During this time, the Applicant's parents told her that the Manuel was still looking for her and the police were not investigating her complaint against him.

[10] The Applicant's uncle advised her to leave Bolivia because he thought there was no safe place for her there. She left Bolivia on 22 August 2005 and travelled to Managua, Nicaragua. In Managua, the Applicant hired a smuggler who, for \$1300 US, took her to Guatemala. A second smuggler took her to Mexico, and a third smuggler took her to Texas, in the United States of America (USA). From Texas, the Applicant travelled to Arlington, Virginia. She lived and worked around Arlington until 20 December 2009, when she came to Canada.

[11] In July 2009, the Applicant learned of Canada's refugee protection system. She hired a smuggler who brought her across the Canada-USA border to Sherbrooke, Quebec on 20 December 2009. The Applicant claimed protection on 22 December 2009.

[12] The RPD heard the Applicant's claim on 30 May 2011. At the hearing, the Applicant, her lawyer, a Refugee Protection Officer, a translator, and the RPD panel member were present. After the hearing, the RPD considered the Applicant's claim. On 13 June 2011, the RPD denied her claim for protection and gave her notice of the Decision on 28 June 2011.

DECISION UNDER REVIEW

[13] The RPD determined the Applicant's claim solely on the availability of state protection and found that she had not rebutted the presumption of state protection.

[14] The RPD reviewed the Applicant's allegations of abuse by Manuel, her attempts to get help from the Bolivian police, and her travel from Bolivia to Canada. It noted that it had considered the IRB Chairperson's guideline *Women Refugee Claimants Fearing Gender-Related Persecution*. The RPD also said that it had considered all the evidence before it, including a psychological report prepared by Dr. Judith Pilowsky, a clinical and rehabilitation psychologist practising in Toronto, the Applicant's testimony, and counsel's submissions.

State Protection

[15] Following *Canada (Attorney General) v Ward*, [1993] 2 SCR 689, the RPD noted that states are presumed to be able to protect their citizens and that international protection only comes into play when a claimant's own state is unable to provide protection. Though the Applicant is from Bolivia, the RPD found that Costa Rica is in control of its territory and has a functioning security force in place. The RPD also noted that *Carillo v Canada (Minister of Citizenship and Immigration)* 2008 FCA 94 establishes that, to rebut the presumption of state protection, a claimant must provide reliable and probative evidence to satisfy the RPD, on a balance of probabilities, that state protection is inadequate. Further, the RPD noted that a claimant cannot assert subjective reluctance to engage the state in order to rebut the presumption (see *Camacho v Canada (Minister of Citizenship and Immigration)* 2007 FC 830 at paragraph 10) and that the burden of proof on a claimant increases directly with the level of democracy in the state against which protection is claimed.

[16] Because Bolivia is a democracy, the RPD said that the Applicant had to show more than that she went to the police for protection and that her efforts to get protection were not successful. The RPD pointed out that no government is expected to provide perfect protection and that local failures in providing protection are not enough to rebut the presumption of state protection.

Country Condition Evidence

[17] The RPD reviewed the evidence before it and concluded that Bolivia is a multi-party democracy, in which President Evo Morales was elected in 2009 after free and fair elections. It also found that Bolivia faced some human rights problems, including killings by security forces, harsh prison conditions, and a corrupt judiciary. The RPD also found that rape is a serious and underreported problem in Bolivia, even though it is a criminal offence. In addition, the RPD found that spousal rape is not a crime in Bolivia and that violence against women is a pervasive and underreported problem; laws against domestic violence in Bolivia were enforced irregularly and the government took few meaningful steps to combat domestic violence. The RPD noted that, to November 2010, the Family Protection Unit (FPU) had handled 70,792 cases of domestic violence. The FPU is a police authority established to handle cases of assault which are not crimes under the Bolivian Penal Code and has sub-units in many regions of Bolivia.

[18] Though services for women who experience domestic violence are limited, the RPD found that Bolivia was taking steps to address the issue. The Bolivian government had rewritten a law (Law 1674) to address the roles of FPUs, municipal legal services, and non-governmental organizations in combating domestic violence, though this law had not fulfilled expectations. Municipalities in Bolivia are required by law to provide support shelters for women. Although, at the time the Decision was rendered, only thirteen shelters for women existed, the RPD found that

more were going to be established within a short time. Victims of domestic violence in Bolivia can record complaints against abusers with the FPU, family courts, and public health centres. An ombudsman is also in place to handle complaints about the reporting service if a victim was not satisfied with the response received.

The Applicant's Efforts

[19] The RPD found that, after the Applicant had attempted to file a complaint against Manuel on 4 May 2005, she did not pursue further action when the police officer laughed at her and told her to go home. She also did not give the police a copy of the report she had obtained from her doctor at that time. The RPD found that the Applicant was speculating when she said that the police officer had telephoned Demetrio and that her first attempt to get protection against Manuel was not a credible rebuttal of the presumption of state protection because it was a local failure and was based on speculation.

[20] The RPD also examined the Applicant's second report to the police, after Manuel attacked her in the Cochabamba market. The RPD noted that the second police officer took her complaint and provided her with a stamped letter, even though he worked at the same station she had reported to before without success. After going to the police a second time, the Applicant fled to La Paz and then left Bolivia. The RPD further noted that, during her second complaint, she had not given the police an address at which she could be contacted in La Paz and had not informed them of her departure from Bolivia. The RPD found that these events were not enough to rebut the presumption of state protection because her departure from Bolivia had effectively ended the police investigation into Manuel's attack on her.

[21] The RPD also noted that the Applicant had lived in the USA for four years between her flight from Bolivia and her claim in Canada. It found that her continuing fear of Manuel was based on her mother and sister's experiences of abuse and her belief that the police in Bolivia do not take domestic violence seriously. Although Bolivia had difficulty protecting women from abuse in the past, the RPD found that the country is demonstrating an awareness of its past problems and is making advances in protecting women from domestic violence.

Conclusion

[22] The RPD found that there was no persuasive evidence that the Applicant faced persecution in Bolivia. It also found that the Applicant would not face a risk to her life, or of cruel and unusual treatment or punishment, or a risk of torture if she returned to Bolivia. The RPD concluded that the Applicant is not a Convention refugee or a person in need of protection and denied her claim.

ISSUES

[23] The Applicant raises the following issues in this application:

- a. Whether the RPD's state protection finding was reasonable;
- b. Whether the RPD provided adequate reasons;
- c. Whether the RPD applied the correct test for state protection.

STANDARD OF REVIEW

[24] The Supreme Court of Canada in *Dunsmuir v New Brunswick*, 2008 SCC 9, held that a standard of review analysis need not be conducted in every instance. Instead, where the standard of

review applicable to a particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[25] In *Carillo*, above, the Federal Court of Appeal held at paragraph 36 that the standard of review on a state protection finding is reasonableness. This approach was followed by Justice Leonard Mandamin in *Lozada v Canada (Minister of Citizenship and Immigration)* 2008 FC 397, at paragraph 17. Further, in *Chaves v Canada (Minister of Citizenship and Immigration)* 2005 FC 193, Justice Danièle Tremblay-Lamer held at paragraph 11 that the standard of review on a state protection finding is reasonableness. The standard of review on the first issue is reasonableness.

[26] Recently, in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)* 2011 SCC 62, the Supreme Court of Canada held at paragraph 14 that the adequacy of reasons is not a stand-alone basis for quashing a decision. Rather, “the reasons must be read together with the outcome and serve the purpose of showing whether the result falls within a range of possible outcomes.” The adequacy of the reasons will be analysed along with the reasonableness of the Decision as a whole.

[27] When reviewing a decision on the standard of reasonableness, the analysis will be concerned with “the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.” See *Dunsmuir*, above, at paragraph 47, and *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at paragraph 59. Put another way, the Court should intervene only if the Decision was unreasonable in the sense that

it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

[28] On the third issue, Justice Michael Kelen held in *Ramotar v Canada (Minister of Citizenship and Immigration)* 2009 FC 362 at paragraph 12 that, where an applicant asserts that an officer applied the wrong test, the standard of correctness applies. Further, in *Saeed v Canada (Minister of Citizenship and Immigration)* 2006 FC 1016, Justice Yves de Montigny held at paragraph 35 that, when examining the RPD’s application of the test for state protection, the appropriate standard of review is correctness. Justice Paul Crampton made a similar finding in *Cosgun v Canada (Minister of Citizenship and Immigration)* 2010 FC 400 at paragraph 30. The standard of review on the third issue is correctness.

[29] In *Dunsmuir*, above, at paragraph 50, the Supreme Court of Canada held that

When applying the correctness standard, a reviewing court will not show deference to the decision maker’s reasoning process; it will rather undertake its own analysis of the question. The analysis will bring the court to decide whether it agrees with the determination of the decision maker; if not, the court will substitute its own view and provide the correct answer. From the outset, the court must ask whether the tribunal’s decision was correct.

STATUTORY PROVISIONS

[30] The following provisions of the Act are applicable in this application:

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

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

social group or political opinion,

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

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

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

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

[...]

(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.

[...]

ARGUMENTS

The Applicant

The RPD Accepted Her Evidence

[31] The RPD did not make any adverse credibility findings in the Decision. As such, the Applicant says that the RPD must have accepted her account of the abuse she suffered in Bolivia and her attempts to seek protection there. She also says that the RPD accepted as credible the evidence she submitted to support her belief that Manuel still pursues her.

The State Protection Finding was Unreasonable

The RPD Ignored Evidence

[32] The Applicant argues that, when it relied on country condition evidence in making the Decision, the RPD improperly relied on older pieces of evidence which it preferred over more recent evidence.

[33] The RPD relied on the IRB's Response to Information Request (RIR) BOL102093.FE, dated 15 December 2006 (RIR 2006), which established that Law 1674 had not lived up to its promises. RIR 2006 also established that not all the regional FPU's recorded domestic violence complaints. Further, RIR 2006 shows that Law 1674 is preventative, rather than punitive and that, although domestic violence victims can complain to the Municipal Legal Services, only 39% of municipalities have such services. The RPD also referred to a 2009 report (CIDA Report) from the Canadian International Development Agency (CIDA) which said that CIDA was going to support a shelter for women in Bolivia.

[34] The RPD improperly preferred these two pieces of evidence over a more recent report from the USA Department of State, written in 2011 and entitled *Bolivia: Country Reports on Human Rights Practices for 2010* (DOS Report). The DOS Report establishes that domestic violence is prevalent in Bolivia and that the situation there has not improved. The RPD's conclusion on state protection was unreasonable because it relied on older evidence rather than the most recent evidence available. Had the RPD properly used the most current evidence, it would have concluded that state protection is not available for abused women in Bolivia, including the Applicant. It cannot be that

the RPD considered all the evidence before it when it relied on older evidence for a conclusion which is contradicted by newer evidence.

[35] In *Cepeda-Gutierrez v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 1425, Justice John Evans held at paragraph 17 that:

[...] the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

[36] The Applicant says that the documentary evidence before the RPD clearly shows that the Bolivian police are not capable of accepting and acting upon domestic abuse complaints. The RPD's conclusion that the Applicant did not provide clear and convincing evidence to rebut the presumption of state protection was unreasonable.

Future Changes do not Amount to State Protection

[37] The Applicant also says that the RPD improperly looked at what will happen in Bolivia with respect to protection against domestic violence, rather than at what actually is happening. The DOS Report, which shows the current state of affairs, contradicts the RPD's conclusion. The RPD

unreasonably relied on unrealized change to support its conclusion that state protection is available to the Applicant.

The Treatment of the Applicant's Evidence was Unreasonable

[38] After she went to the police on 4 May 2005 and was laughed at, the Applicant did not complain to a senior officer. The Applicant says that the RPD downplayed the significance of her encounter with the police officer who laughed at her. The RPD's finding that she should have approached a senior officer to complain was unrealistic because Demetrio is a high-ranking police officer. Both Demetrio and the police officer she spoke to on this occasion refused to help her. Further, although the RPD found that she was speculating when she said the police officer who laughed at her spoke to Demetrio, this finding was unreasonable. That police officer told the Applicant that he had spoken to Demetrio. Also, the fact that Manuel beat the Applicant after she went to the police shows that the police officer called Demetrio.

[39] The RPD's conclusion that her departure ended the police investigation into her second complaint ignored several pieces of evidence:

- a. She gave the police her parents' address but the police never contacted anyone;
- b. Manuel continues to harass her family and friends, which shows the police took no action against him;
- c. She was afraid Manuel would find out her address if she gave it to the police;
- d. There was no police investigation into the complaint she filed against Manuel.

The RPD did not Consider Similarly Situated Individuals

[40] At the hearing, the Applicant testified that her sister had also experienced domestic abuse in Bolivia; her testimony also established that her sister had been turned away by the police when she had tried to report the abuse. The Applicant argues that, when the RPD concluded that she should have gone to a higher authority to complain about her treatment by the police, it ignored this evidence. Her sister's treatment by the police and the documentary evidence before the RPD establish that it is pointless to go to the police for protection from domestic abuse in Bolivia.

The RPD Considered the Wrong Country

[41] The RPD's statement that "Costa Rica is in effective control of its territory and has in place a functioning security force to uphold the laws and constitution" shows that it considered country documents from the wrong country. This means the Decision is unreasonable.

The Reasons are Inadequate

[42] The Applicant says that the RPD failed to make a finding as to whether the state protection available in Bolivia was adequate, so the reasons it gave for the Decision are inadequate. When it held that Bolivia was aware of its problems and was making advances, the RPD failed to consider whether these advances actually resulted in adequate state protection (see *E.Y.M.V. v Canada (Minister of Citizenship and Immigration)* 2011 FC 1364).

The RPD Applied the Wrong Test for State Protection

[43] The RPD based its conclusion on state protection in part on legislation Bolivia had enacted.

However, the Applicant says that the documentary evidence before the RPD showed that these laws are ineffective in practice. Further, in *Garcia v Canada (Minister of Citizenship and Immigration)*

2007 FC 79, Justice Douglas Campbell held at paragraph 14 that

It cannot be said that a state is making “serious efforts” to protect women, merely by making due diligence preparations to do so, such as conducting commissions of inquiry into the reality of violence against women, the creation of ombudspersons to take women's complaints of police failure, or gender equality education seminars for police officers. Such efforts are not evidence of effective state protection which must be understood as the current ability of a state to protect women. [Emphasis in original]

[44] In *Elcock v Canada (Minister of Citizenship and Immigration)*, [1999] FCJ No 1438, Justice

Frederick Gibson held at paragraph 15 that

[The] ability of a state to protect must be seen to comprehend not only the existence of an effective legislative and procedural framework but the capacity and the will to effectively implement that framework.

[45] Although the RPD in this case found that counselling services, legal aid, medical assistance, and shelters existed in Bolivia, these do not meet the required standard of adequate state protection.

There is legislation in place in Bolivia to protect victims of domestic violence, but *Garcia* and *Elcock*, above, show that legislation alone is not enough; legislation must translate into adequate protection on the ground. When it failed to look at the adequacy of state protection, the RPD applied the wrong test, so the Decision must be returned for reconsideration.

The Respondent

The RPD Considered all the Evidence

[46] Although the Applicant has argued that the RPD did not consider the DOS Report, the Respondent notes that the RPD specifically referred to this report at paragraphs 10 to 12 of the Decision. Since the RPD considered the DOS Report, which went against its conclusions, *Cepeda-Gutierrez*, above, has no application here.

The Applicant did not Rebut the Presumption of State Protection

[47] *Ward* and *Carillo*, above, establish that state protection is presumed and that this presumption can only be displaced on clear and convincing evidence. *Kadenko v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 1376 establishes that it is not enough to show that the government of a state is not always successful in protecting its citizens. In this case there was clear evidence that Bolivia is a democracy, and so the Applicant bore a heavy onus to rebut the presumption of state protection. She did not discharge this onus.

[48] The evidence before the RPD was that the Applicant had sought state protection on two occasions, and was unsuccessful the first time she went to the police. The second time she approached the police, she was issued a formal complaint, but she left Bolivia before the police process could be completed. Based on the evidence before it, the RPD reasonably concluded that the Applicant had made only minimal efforts to seek state protection. Although she testified that her parents had followed up with the police, this is not supported by the affidavit the Applicant's mother produced and which the Applicant submitted to the RPD.

[49] The documentary evidence before the RPD was sufficient to ground a finding that the Applicant had not rebutted the presumption of state protection. The RPD referred to evidence which showed that the FPU's handled 70,792 cases of domestic violence up to 2010. Although the Applicant has argued that this shows inadequate protection, the Respondent notes that *Canada (Minister of Citizenship and Immigration) v Villafranca*, [1992] FCJ No 1189 (FCA) teaches that imperfect protection does not rebut the presumption of state protection.

[50] The Respondent also points to evidence before the RPD to show that the FPU's, to which victims of domestic violence or their families could complain, are present in many regions of Bolivia. Although the Applicant has said that FPU's are not available in all areas, the Respondent says that she has not shown that they are not available in the area where she lived. The limited implementation of FPU's in Bolivia cannot, on its own, rebut the presumption of state protection.

[51] The Bolivian government has also passed legislation to combat domestic violence. The existence of a legal framework is an appropriate indicator of a state's efforts to provide protection. The RPD considered the application of the laws which are in place and not simply their existence.

[52] The Respondent acknowledges that domestic violence is prevalent in Bolivia, but he points to *Cho v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1371, at paragraph 16, where Justice Gibson held that

In *Canada (Minister of Employment and Immigration) v. Villafranca*, Mr. Justice Hugessen wrote:

No government that makes any claim to democratic values or protection of human rights can guarantee the protection of all of its citizens at all times. Thus, it is not enough for a claimant merely to show that his government has not always been effective at

protecting persons in his particular situation. Terrorism in the name of one warped ideology or another is a scourge afflicting many societies today; its victims, however much they may merit our sympathy, do not become Convention refugees simply because their governments have been unable to suppress the evil.

Precisely the same can be said about the evil of family violence.

[53] The Applicant's arguments amount only to an invitation to the Court to re-weigh the evidence which is not the proper function of the Court. Because the RPD considered the evidence and drew a reasonable conclusion, the Decision should stand.

The Applicant Bears the Onus to Rebut the Presumption of State Protection

[54] Although the Applicant has said that the RPD applied an incorrect test for analysing state protection, the Respondent says that the RPD correctly stated the law established by *Ward* and *Carillo*, both above, and *Hinzman v Canada (Minister of Citizenship and Immigration)* 2007 FCA 171. The RPD was not obligated to make a finding on whether or not state protection was adequate. The Applicant simply did not discharge the onus she bore to rebut the presumption of state protection. The RPD clearly applied the correct test when it considered whether the Applicant had rebutted the presumption of state protection.

The Respondent's Further Memorandum

[55] The Respondent further argues that *Newfoundland Nurses' Union*, above, and *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* 2011 SCC 61 establish that the correctness standard is only applicable where the question at issue is one of central

importance to the legal system which is outside the decision-maker's specialized area of expertise. Since the RPD's state protection finding is subject to the reasonableness standard, a failure to mention contradictory evidence cannot render the Decision unreasonable. Rather, the reviewing Court must ask whether "when read in light of the evidence before it and the nature of its statutory task, the tribunal's reasons adequately explain the bases of its decision." (*Newfoundland Nurses' Union* at paragraph 18).

[56] In this case, the Decision was reasonable because it provided clear and intelligible reasons for the conclusion that the Applicant had not rebutted the presumption of state protection. Since the RPD's conclusion falls within the *Dunsmuir* range, this Court should not interfere.

The Applicant did not Adequately Test State Protection

[57] The Respondent says that it is clear that the RPD rejected the Applicant's claim because she did not rebut the presumption of state protection. The RPD concluded that state protection was forthcoming after her second complaint, but the Applicant prematurely ended the investigation into that complaint when she failed to provide a correct address to the police or inform them she was leaving Bolivia. The Applicant made no complaint to a higher authority in Bolivia about the conduct of the first officer she interacted with and only made minimal efforts to seek state protection.

The State Protection Finding was a Possible Outcome

[58] The Applicant failed to follow up with the police on the state of their investigation, and her allegation that her mother followed up on her behalf is not supported by her mother's affidavit.

Further, the Applicant's argument that Manuel's continued freedom shows that state protection is inadequate amounts to a suggestion that the Bolivian police should have imprisoned him without trial, solely on the strength of her allegations.

[59] If the Applicant was correct when she said at the hearing that her parents told her the police said there was nothing they could do about Manuel, this actually supports the RPD's conclusion that her departure ended the investigation into her complaint. Without the Applicant's testimony, the Bolivian police could not do anything. The Applicant's own evidence supports the RPD's conclusion on state protection and, since the record supports the RPD's conclusion, the Court should not interfere with the Decision.

The RPD Appropriately Considered the Evidence

[60] The Applicant challenges the RPD's use of the RIR 2006 at the same time as she uses that document to support her position. At the hearing, the Applicant pointed to this document (see page 206 of the Certified Tribunal Record) and cannot now complain that the RPD relied on it. This document was part of the IRB's National Documentation Package for Bolivia, so it was properly before the RPD.

[61] In the Decision, the RPD pointed to evidence that was contrary to its findings. The RPD also explicitly acknowledged that Bolivia faces difficulties in addressing domestic violence. The objective evidence before the RPD also showed that assault was a crime under the Bolivian Penal Code; the second incident the Applicant complained of was an assault forbidden by the Bolivian Penal Code. Although there was evidence to suggest that laws specifically addressing domestic violence are not enforced, there is no evidence that the Bolivian Penal Code is not being enforced.

[62] Although there was evidence which showed that up to 70% of Bolivian women suffer domestic violence, this does not show a lack of state protection. These statistics show the magnitude of a social problem, but do not speak to Bolivia's ability to protect its citizens. It is not clear that laws on spousal rape were relevant to the Applicant, who was never married to Manuel.

[63] Although the Applicant's mother and sister may have suffered domestic violence, their experiences do not demonstrate a lack of state protection in this case. Apart from the Applicant's testimony, there was no evidence that the sister had sought and been denied state protection. The Applicant's mother did not say in her affidavit that she too had been denied state protection. Neither the mother nor the sister's experiences provided the clear and convincing evidence necessary to displace the presumption of state protection.

The RPD is not Required to Mention all the Evidence

[64] The Respondent argues that *Newfoundland Nurses' Union*, above, has presumptively overruled *Cepeda-Gutierrez*, above, and any other case which requires a specific finding or line of analysis. He notes that *Cepeda-Gutierrez* was based on *Singh v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1044, which held that the failure to mention a report was an error of law. After *Alberta Teachers' Association*, above, questions of law are no longer presumptively evaluated on the correctness standard. Rather, *Alberta Teachers' Association* establishes that the standard of review in this case is reasonableness; in the context of review on the reasonableness standard, the Applicant's argument that the RPD failed to address contradictory evidence is precisely the kind of formalistic argument the Supreme Court of Canada rejected in *Newfoundland Nurses' Union*. This argument cannot raise a reviewable error.

[65] In the alternative, the Respondent says that *Cepeda-Gutierrez*, above, does not stand for the proposition the Applicant says it does. In that case, Justice Evans concluded that there was no reviewable error with respect to the RPD's conclusion on persecution, notwithstanding that the RPD did not mention one particular piece of contradictory evidence (see paragraph 22). The totality of the evidence established that Cepeda-Gutierrez did not face a risk of persecution. Where the RPD has mentioned evidence to justify an inference that it referred to that evidence, there is no reviewable error (*Cepeda-Gutierrez* at paragraph 28). In this case, the RPD mentioned all the contradictory evidence before it, so the Court can infer that it considered all the evidence.

[66] The Respondent also says that *Nation-Eaton v Canada (Minister of Citizenship and Immigration)* 2008 FC 294, *Shen v Canada (Minister of Citizenship and Immigration)* 2007 FC 1001, *Pena v Canada (Minister of Citizenship and Immigration)* 2011 FC 746 and *Quinatzin v Canada (Minister of Citizenship and Immigration)* 2008 FC 937 establish that *Cepeda-Gutierrez*, above, does not apply to country condition evidence. In *Monjaras v Canada (Minister of Citizenship and Immigration)* 2010 FC 771, at paragraphs 20 to 22, Justice Michael Kelen held that

It is trite law that 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 then was) at paragraph 16. The RPD is presumed to have considered all the evidence, however, the more important the evidence that is not mentioned specifically and analyzed in the RPD's reasons, the more willing a court may be to infer from the silence that the RPD reached its decision without regard to the evidence: *Cepeda-Gutierrez, supra*, at para. 17.

The applicant has cited a number of recent decisions of this Court where the RPD's determinations on state protection were overturned because the RPD selectively analyzed or failed to deal with compelling evidence of a state's inadequate provision of protection: *Gilvaja v. Canada (MCI)*, 2009 FC 598, per Justice

O’Keefe at para. 38; *Mendoza v. Canada (MCI)*, 2008 FC 387, per Justice Dawson at para. 15; *Mejia v. Canada (MCI)*, 2010 FC 530, per Justice Near at para. 17; *Villicana v. Canada (MCI)*, 2009 FC 1205, per Justice Russell at paras. 70-71. In all of the above cases, the RPD failed to explain why it preferred certain documentary evidence over significant and reputable documentary and testimonial evidence which indicated that state protection was inadequate.

In this case, the RPD acknowledged at paragraph 14 of the decision that violence against women was a serious problem in Mexico and that enforcement action against male abusers is sorely lacking:

para14 Counsel's well-crafted submissions point to a number of failings of the Mexican authorities in dealing with gender violence including a culture of acceptance of the practice even among those who are to enforce the laws against it, a culture of impunity for the abusers and obstacles to protection such as corruption, financial resources available to women, judges discretion in deciding what measures to grant, and practical matters such as orders not being effective until they are served on the abuser. Certainly, documentary evidence indicates that Mexico is having an ongoing battle with violence against women, crime and corruption. While the documentary evidence does support some of what the female claimant fears, it is also mixed with information on current efforts Mexico is taking to combat crime, corruption and violence against women,

There is no basis in view of the above excerpt to hold that the RPD ignored contrary evidence. The RPD may not have referred to specific documentation but it is clear from the reasons that the RPD read and considered the applicants' written submissions and the documentary references which they cited.

[67] Here, the RPD considered all the evidence the Applicant cited and addressed all of her arguments. There is therefore no basis to conclude that the Decision is unreasonable.

The Applicant Bore the Onus to Rebut the Presumption of State Protection

[68] When she argues that the RPD failed to establish the adequacy or effectiveness of state protection, the Applicant has improperly shifted the burden of proof to the RPD. At all times, the Applicant bore the onus to establish that state protection was inadequate. The RPD found that state protection was available to the Applicant without limitation or qualification, and the RPD was aware that the appropriate test for protection is adequacy.

[69] *Newfoundland Nurses' Union*, above, establishes that a tribunal need not make an explicit finding on the constituent elements leading to its final conclusion. So long as the reasons permit the Court to determine how a result in the acceptable range was reached, the Decision should stand. The Court should not substitute its own view by designating certain omissions from the reasons as fatal (see *Newfoundland Nurses' Union* at paragraph 16).

ANALYSIS

[70] There were no credibility problems in this case, and the RPD based its Decision upon the Applicant's failure to provide "clear and convincing evidence of the state's inability to protect."

[71] The RPD concluded that the Applicant had not herself taken sufficient steps to secure protection, so her experiences did not show that adequate protection would not be there if she reasonably attempted to access it. However, the Applicant also argued and pointed to evidence that there is no protection in Bolivia for women who are the victims of domestic violence and that the state is either unwilling or unable to protect her.

[72] In order to answer this branch of her argument, the RPD reviewed the country condition documents and then reasoned and concluded as follows:

The claimant lived in the United States for the next four years before she made a refugee claim in Canada, but maintains that Manuel still looks for her. The claimant fears the police would not protect her if she returned to Bolivia as “the police do not believe domestic abuse is important. It is normal behaviour.” The claimant bases her opinion, in part, on past experiences of her mother and her sister, who were victims of gender related violence. I accept that Bolivia’s past history of offering protection to women as victims of domestic violence was lamentable combined with societal beliefs that accepted this violence as a way of life. Yet, as this claim is forward looking, I accept that Bolivia is demonstrating an awareness of its past problems and is making advances through legislation, application and continued dialogue within the government, its citizens and foreign countries on further efforts to improve its past weakness related to domestic violence.

[73] In my view, the RPD failed to assess whether, notwithstanding the government initiatives referred in the Decision, there is adequate protection in practice. There was certainly a significant amount of evidence before the RPD that Bolivia’s “lamentable” past history of protecting victims of domestic violence has not changed. This is why it was important for the RPD to look at the situation on the ground and ascertain whether the presumption of adequate state protection had not been overcome in this case.

[74] Several recent decisions of the Court have dealt with this issue but I think it is sufficient to refer to the guidance provided by Justice Mosley in *E.Y.M.V.*, above, at paragraphs 13 and 16, whose words in relation to Honduras could equally apply to the case before me:

The Board outlined the correct legal principles applicable to refugee claimants alleging persecution at the hands of a non-state actor and the presumption of state protection as set out in *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 and *Canada (Minister of Citizenship and Immigration) v. Flores Carillo*, 2008 FCA 94, [2008] F.C.J. No. 399 [*Carillo*]. The claimant “must

adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate” (*Carillo*, above at para 38). State protection need not be perfect, but it must be adequate.

...

The Board did not provide any analysis of the operational adequacy of the efforts undertaken by the government of Honduras and international actors to improve state protection in Honduras. While the state’s efforts are indeed relevant to an assessment of state protection, they are neither determinative nor sufficient (*Jaroslav v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 634, [2011] F.C.J. No. 816 at para 75). Any efforts must have “actually translated into adequate state protection” at the operational level (*Beharry v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 111 at para 9.

[75] In the present case, the RPD relied upon: the evidence from 2006, which shows how the 1995 law on domestic violence was “rewritten”; on the CIDA Report, in which the RPD noted that a shelter was going to be built with funds from CIDA and that things in Bolivia “are about to change.” However, the evidence from the DOS Report suggests that things have not improved and confirms that:

1. Violence against women is pervasive;
2. 70% of women suffer abuse in Bolivia;
3. Spousal rape is not a crime;
4. That the government took few meaningful or concrete steps to combat domestic violence;
5. That the FPU, which are supposed to help women, lack financial and structural support and personnel to follow-up complaints, and that most cases went unreported.

[76] Given this evidence, I think it was unreasonable for the RPD not to assess what Justice Mosley calls “the operational adequacy” of the efforts undertaken by the government of Bolivia before concluding that the Applicant has not rebutted the presumption of state protection. Had the RPD done so, its views of the Applicant’s own efforts might well have been different.

[77] Counsel agree that there is no question for certification and the Court concurs.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is allowed. The Decision is quashed and the matter is returned for reconsideration by a differently constituted RPD.
2. There is no question for certification.

“James Russell”

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-4501-11

STYLE OF CAUSE: CARMEN ROSA PINTO PONCE

Applicant

- and -

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: January 17, 2012

**REASONS FOR JUDGMENT
AND JUDGMENT:** HON. MR. JUSTICE RUSSELL

DATED: February 8, 2012

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