

Federal Court



Cour fédérale

**Date: 20130215**

**Docket: IMM-7429-12**

**Citation: 2013 FC 165**

**Vancouver, British Columbia, February 15, 2013**

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

**BETWEEN:**

**JESUS ROGELIO GUTIERREZ TORRES  
LAURA LORENA PORTILLO DE GUTIERREZ  
KENIA VALERIA GUTIERREZ PORTILLO**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

[1] The Applicants, Jesus Rogelio Gutierrez Torres (the Principal Applicant), his wife Laura Lorena Gutierrez de Portillo, and their daughter Kenia Valeria Gutierrez Portillo, are a family of Mexican citizens from the northern state of Chihuahua.

[2] The Applicants seek judicial review pursuant to section 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of a decision by the Refugee Protection Division

(RPD) of the Immigration and Refugee Board, dated July 4, 2012, wherein the RPD determined that the Principal Applicant, Jesus Rogelio Gutierrez Torres, is excluded from refugee protection pursuant to Article 1F(b) of the Schedule to the Convention Relating to Status of Refugees (the “Convention”) and that the Principal Applicant’s wife, Laura Lorena Gutierrez De Portillo and their daughter, Kenia Valeria Gutierrez Portillo are neither Convention refugees nor persons in need of protection.

[3] The Applicants ask that the decision as it applies to Ms. Gutierrez de Portillo and Kenia, the Principal Applicant’s wife and daughter, be quashed or set aside and referred back for re-determination. The finding excluding the Principal Applicant is not contested.

#### *OVERVIEW*

[4] The Applicants allege a well-founded fear of persecution by the Juarez cartel, which operates in their home state of Chihuahua.

[5] At the hearing of their claim before the RPD, the Applicants abandoned their section 96 claim and seek protection under subsection 97(1) because they claim to face a risk to their lives or a risk of cruel and unusual treatment or punishment if they return to Mexico.

[6] The RPD found that the Applicants had an Internal Flight Alternative (IFA) and that they had not rebutted the presumption of state protection.

*FACTS*

[7] The Applicants rely on the Principal Applicant's narrative in support of their claim.

[8] Mr. Gutierrez left Mexico for work in the United States in January 2002. Shortly after his arrival in Denver, Colorado he agreed to transport drugs for a man nicknamed "El Toro". He was apprehended while attempting to deliver 2 kilograms of cocaine.

[9] "El Toro" was arrested with Mr. Gutierrez. While they were being processed, "El Toro" warned him to be careful what he said about the drugs because they belonged to a man named Geraldo Balderrama, a representative of the Juarez drug cartel (also known as the Vicente Corrillo Fuentes Organization) based in Chihuahua State.

[10] "El Toro" allegedly threatened Mr. Gutierrez and his family if he shared information about the Juarez cartel with United States authorities. Mr. Gutierrez kept silent.

[11] In November 2002, Mr. Gutierrez was sentenced to 16 years in prison. His wife and daughter moved to the United States in December 2002 to be closer to Mr. Gutierrez. They stayed at his wife's uncle's house, and his wife visited him every two weeks until she was detained by United States immigration authorities.

[12] Mr. Gutierrez's wife and daughter returned to Chihuahua by a voluntary deportation order in October 2006. On his release from jail, Mr. Gutierrez was deported to Mexico in April 2009 and rejoined his family in Chihuahua.

[13] On April 15, 2009, two weeks after his return to Mexico, Mr. Gutierrez was allegedly intercepted by "El Toro" and two armed men and forced into an SUV. He was told to pay the value of the cocaine he lost (\$30,000) when arrested in 2002 or "do favours" for the Juarez cartel. One of the armed men said that the "enforcers" for the cartel called "La Linea" would be watching the Applicants.

[14] Mr. Gutierrez was released, and for the first time told his wife about the threats from the drug cartel dating back to 2002. A few days later, Mr. Gutierrez was again abducted at his mother's house and forced into an SUV, where he met Mr. Geraldo Balderrama. Mr. Gutierrez refused to work for the cartel, but he was released when he told his abductors he needed time to get the money.

[15] The Applicants decided to leave Mexico. They explain that they discussed moving elsewhere in Mexico, but they feared that the cartel would find them no matter where they went. They also claim that they feared going to the police because many officers had been corrupted by gangs, and they did not want to take the risk of reporting to a corrupt police officer.

[16] The Applicants arrived in Canada on April 27, 2009 and made a claim for refugee protection the next day.

*DECISION*

[17] Since the exclusion finding is not contested on this review, I will turn to the RPD's findings relating to the remaining claims of Ms. Portillo de Gutierrez and Kenia, the Principal Applicant's wife and daughter.

[18] The RPD found there to be an IFA for the remaining Applicants in Queretaro located in central Mexico.

[19] The RPD found that the remaining Applicants would be of limited interest to the Juarez Cartel in the IFA on the basis of the following findings:

- a. They are not members of a criminal organization or cartel and do not pose a threat to their criminal business;
- b. They are not high-profile community leaders known throughout Mexico;
- c. The Principal Applicant did as he was told when arrested;
- d. No member of Principal Applicant's family was approached, threatened or hurt by the cartel during his incarceration;
- e. The only contact with the Applicants were inquiries in December 2010 when "suspicious" persons made inquiries of their neighbours and Ms. Portillo de Gutierrez's mother;

- f. The Principal Applicant's case was different from that of his wife's brother-in-law who was allegedly murdered by the cartel. He had refused to take the fall for Mr. Balderrama who, as a result, spent two years in prison;
- g. With respect to the alleged threat, the RPD found that given the other major existential threats facing the Juarez cartel from competitors and government security forces, it was unlikely that the pursuit of these claimants has a high, if any, priority. The RPD concludes that the power of the Juarez cartel, according to the documentary evidence, is significantly diminished and only influential in the north, where it is fighting for its existence with the Sinaloa cartel.

[20] In making the above findings, the RPD considers the country reports on drug cartels as well as the expert evidence of Steven Dudley. Given the numerous reports contradicting certain aspects of Mr. Dudley's opinions relating to the Juarez cartel's activities in Queretaro, the RPD prefers the evidence of the reports.

[21] The RPD finds that the Applicants did not rebut the presumption of state protection, particularly in Queretaro. While the RPD accepts that there is police corruption in Mexico, it also accepts the evidence that the police "have maintained their bitter battle with the cartels over recent years" and "the claimants have offered no probative evidence that it is likely that the Juarez cartel would have the police at their beck and call in Queretaro."

## *ISSUES*

[22] The following issues are raised in this application:

- a. Was the RPD's finding that the Applicants have an internal flight alternative in Queretaro reasonable?
- b. Was the RPD's finding that the Applicants failed to rebut the presumption of state protection reasonable?

## *ANALYSIS*

[23] The parties do not dispute the applicable standard of review. On both issues, the decision is to be reviewed on the reasonableness standard.

[24] The Applicants challenge the internal flight alternative and state protection findings of the RPD's decision. They argue that several findings by the RPD are unreasonable.

### *Internal Flight Alternative*

[25] When an IFA is raised, a two-prong test must be applied: the onus is on applicants to demonstrate, on a balance of probabilities, that there is a serious possibility they will be persecuted in the proposed IFA location and that in all the circumstances, it would be objectively unreasonable for them to seek refuge there. See: *Rasaratnam v. Canada (Minister of Employment &*

*Immigration*), [1992] 1 F.C. 706 at para. 13 (C.A.); *Berber v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 497 at para. 37.

[26] The Applicants contend that the RPD erred in finding that Mr. Gutierrez was not a member of the Juarez cartel. I accept the Applicant's argument that membership must be defined broadly in accordance with *Poshteh v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 85 at paragraph 27. In my view, Mr. Gutierrez may satisfy the "institutional link" requirement of *Sinnaiah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1576 at paragraph 6 because the RPD found that he knowingly participated in organized crime.

[27] However, whether or not Mr. Gutierrez was a member of the Juarez cartel would likely not change the cartel's desire to take revenge on him for "losing" \$30,000 worth of cocaine if they were so inclined. If he was indeed a member, he was not a particularly active or high-profile member as there is no evidence of him working for the cartel or associating with it beyond his involvement in two "drug-runs" in Colorado. His situation is not analogous to the involvement and personal relationship Ms. Portillo de Gutierrez's brother-in-law had with Gerardo Balderrama. Consequently, his membership status would be of no moment to the IFA finding.

[28] The second finding challenged by the Applicants is that the Juarez cartel does not have a significant interest in the family because there were a few inquiries into the family's whereabouts in December 2010. The RPD found that these inquiries were made many months after they left Mexico for Canada in late April 2009. The Applicants contend that this is not so because the evidence points to an inquiry that would have occurred in early 2009. I agree with the Applicants



that since an incident involving a suspicious person inquiring at the house of Mr. Gutierrez's mother was reported in the June 16, 2009 PIF, it could not have been one of the incidents noted by the RPD, which happened in December 2010.

[29] I agree with the Applicants that the RPD failed to mention this early 2009 in its reasons. I also agree that there is evidence these suspicious persons may have been from the Juarez cartel, in that Mr. Gutierrez testified that they used the nickname he had at the time of his drug trafficking in the United States, "Coque."

[30] However, even taking into account the early 2009 inquiry and the possibility that the persons making the inquiries came from the Juarez cartel, it was still open to the RPD to find on the evidence that there was no "sustained interest" in Mr. Gutierrez and the Applicants. There is no evidence of threats or violence against the family since April 2009. On the evidence, the RPD's finding was reasonably open to it.

[31] The Applicants also challenge the RPD's finding that the Juarez cartel is not active in Queretaro. They argue that the finding is unreasonable because it does not take into account the most recent country condition reports relating to the cartel's alliances, particularly with the Los Zetas cartel. The Applicants point in particular to a National Documentation Package on Mexico released on June 8, 2012. It is argued the RPD has a duty to rely on the most current relevant evidence on country conditions. In support of their contention they rely the jurisprudence of this Court, including *Sivapathasuntharam v. Canada (Minister of Citizenship and Immigration)*, 2012 FC 486.

[32] A review of the information in the June 8, 2012 package discloses no new facts that contradict the RPD's findings, which distinguishes this case from *Sivapathasuntharam*. Evidence of the influence of an allied cartel is not evidence of the influence of the Juarez cartel. There is no evidence to suggest that Los Zetas would carry out revenge on a perceived enemy of the Juarez cartel. Further, the RPD references Los Zetas at length in the decision (paragraphs 51-55), relying on the evidence that described Los Zetas as an ally of the Juarez cartel mainly in its fight against the stronger Sinaloa cartel. In the circumstances, failure to consider the information in the June 8, 2012 package does not constitute a reviewable error. The RPD's finding was reasonably open to it on the evidence.

[33] The Applicants also argue that the RPD erred by giving little weight to Steven Dudley's report on the basis that his expertise is not particularly strong with respect to Mexico. A review of Mr. Dudley's report shows that he has significant Mexican experience, but his CV is clearly focused on Colombia.

[34] The more important consideration is that Mr. Dudley's opinion against the proposed IFAs runs against the rest of the documentary evidence. There was significant evidence on the record to the effect that the Juarez cartel was diminished by its rivalry with the Sinaloa cartel and was focused on Chihuahua and the corridor from Juarez to the United States. Mr. Dudley does not disagree with this, but he is the only one to speak of a "corridor" including Puebla and Queretaro over which Juarez still has influence. Mr. Dudley also claims the Juarez cartel is a "national cartel," but the National Documentation Packages, even the June 8, 2012 Package, indicate that it is not

[35] The Applicants take issue with how the RPD weighed the evidence. In my view, the RPD with its expertise in this area is best placed to weigh such evidence. In light of the contradictory evidence on the record, it was reasonably open to the RPD to weigh Mr. Dudley's evidence as it did. It was entitled to prefer the other evidence.

[36] I find that it was open to the RPD to conclude that the Applicants have failed to establish that there is a serious possibility they will be persecuted in the proposed IFA location and that, in all the circumstances, it would be objectively unreasonable for them to seek refuge there.

#### *State Protection*

[37] The Applicants take issue with the RPD's finding on state protection. They argue that its analysis of state protection "is perfunctory at best" and "is predicated on the fact that the Applicants can safely relocate to Queretaro."

[38] "... [A] claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate." See: *Flores Carrillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94 at paragraph 30.

[39] The RPD at paragraph 68 of its reasons concludes "[e]ven if I accept that some Federal Police may have been involved in Chihuahua, the claimants have offered no probative evidence that it is likely that the Juarez cartel would have similar police at their beck and call in Queretaro." The

record supports this finding. The RPD cites numerous documents adduced to show that Mexico has made significant efforts at reform, targeting cartels and police corruption.

[40] Further, the Applicants did not seek protection from the police at any time when they were in Mexico, and there is no evidence on the record of the Juarez cartel's involvement with the police in Queretaro. The Applicants have failed to adduce relevant, reliable, convincing evidence to establish on a balance of probabilities that state protection was not available.

[41] It was therefore reasonable for the RPD to conclude that the Applicants failed to discharge their onus to rebut the presumption of state protection.

### *CONCLUSION*

[42] For the above reasons, I find the July 4, 2012 decision rendered by the RPD to be reasonable. As a result, the application will be dismissed.

[43] The parties have had the opportunity to raise a serious question of general importance as contemplated by paragraph 74(d) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, and have not done so. I am satisfied that no serious question of general importance arises on this record. I do not propose to certify a question.

**ORDER**

**THIS COURT ORDERS that:**

1. The application for judicial review is dismissed.
2. No question of general importance is certified.

“Edmond P. Blanchard”

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Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKET:** IMM-7429-12

**STYLE OF CAUSE:** JESUS ROGELIO GUTIERREZ TORRES  
et al v THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION

**PLACE OF HEARING:** Vancouver, BC

**DATE OF HEARING:** February 7, 2013

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

**DATED:** February 15, 2013

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