

Date: 20090415

Docket: IMM-4509-08

Citation: 2009 FC 376

Ottawa, Ontario, April 15, 2009

PRESENT: The Honourable Mr. Justice Phelan

BETWEEN:

**SERGIO ROMERO MENDOZA
GUADALUPE DE MONSERRAT MARTINEZ CABRIALES
AIMEE ALEJANDRA ROMERO MARTINEZ
LAURA GUADALUPE ROMERO MARTINEZ
KARINA DE MONSERRAT ROMERO MARTINEZ**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. INTRODUCTION

[1] The Applicants, a father, mother, and three female children, citizens of Mexico, seek judicial review of a Refugee Protection Division (RPD) decision rejecting their claims for refugee status

(pursuant to s. 96 of the Immigration and Refugee Protection Act [IRPA]) and for protection (pursuant to s. 97 of the IRPA).

[2] Counsel for the Applicants raises the interesting and potentially important issue of whether the test of “clear and convincing” evidence to rebut the presumption of state protection sets a standard of proof inconsistent with the Supreme Court’s decision in *F.H. v. McDougall*, 2008 SCC 53. However, as the issue is not determinative of this judicial review, the question will not be certified in this case.

II. BACKGROUND

[3] The male Applicant claimed that, on June 2, 2007, he witnessed the abduction of his neighbour by two masked men. The kidnappers allegedly threatened him with a gun and warned him not to report the incident to the police. The neighbour was reported as having been murdered.

[4] Thereafter, the eldest daughter was told to warn her father that he was being watched. The father claimed that black trucks were parked near his store and this confirmed his suspicions that he was under surveillance.

[5] On August 6, 2007, the family moved to Tampico from their home city of Altamira and stayed with relatives at different locations for approximately one month. The father, however, left the day after arriving in Tampico to make his way to Canada where he made his claim.

[6] The rest of the family left Tampico after a month and returned home. Two months later a rock was thrown through their window.

[7] Finally, on April 14, 2008, armed men entered the mother's store and threatened to kill her unless she told of her husband's whereabouts. The men left the family unharmed, and shortly thereafter the family came to Canada and were added to the husband's refugee protection claim.

[8] Despite all of the incidents cited by the Applicants, not once did they approach the police. The Applicants' argument was that they were fearful of the police because the wife believed that police cars (identified as such by the absence of licence plates) were present in the three areas she moved to. It was acknowledged that these were high crime areas.

[9] The RPD assessed the central allegation of fear of death threats and mischief from local criminals and found that there was no nexus to s. 96 grounds.

[10] As to the claim for protection, the RPD found that the Applicants had not shown that there was no state protection in Mexico. The RPD further found that they had not taken all reasonable steps to engage state protection and had acted unreasonably in not reporting something to one of the multiple levels of police in the areas where they lived or visited.

[11] The RPD did a detailed analysis of the circumstances of state protection, including the speculative nature of the Applicants' assertion of police involvement in surveillance.

III. ANALYSIS

[12] State protection is reviewable on a standard of reasonableness (*Huerta v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 586). As such, the examination goes to “the existence of justification, transparency and intelligibility within the decision-making process” and also to whether the decision as a whole “falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v. New Brunswick*, 2008 SCC 9 at paragraph 47).

[13] As a preliminary matter, the Applicants argued that the eldest daughter’s claim stands alone, and is not derivative, because she was personally threatened. Nothing turns on this matter because all aspects of the Applicants’ claim were assessed. In any event, the daughter, like her parents, did not seek state protection nor show that it was unavailable to her.

[14] I can find no unreasonableness in the assessment of state protection. The Applicants had the burden of proof, on a balance of probabilities, to show that state protection was unavailable. They failed to discharge this burden.

[15] There were logical explanations for police presence in their home area – a police officer lived six houses away and it was a high crime area. Even if one police force was problematic, this was not enough to establish the absence of state protection in a democratic country with multiple organs of redress.

[16] Not having sought out police protection, even on incidents for which there was no alleged connection to police, and not having shown a convincing reason why seeking state protection would endanger them, the Applicants have not met their burden of proof.

[17] Counsel for the Applicants argued that the test of “clear and convincing” proof of inadequate state protection as set in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, either is inconsistent with *F.H.*, above, which sets only one standard for civil proof or alternatively, the *Ward* test is misunderstood by RPD members as imposing a greater burden than balance of probability.

[18] However, in this case, the decision does not turn on the sufficiency of proof; it turns on the absence of any proof that state protection is unavailable. The failure of the Applicants to seek state protection or to provide any real basis for fearing to engage state protection renders this interesting issue irrelevant in this case.

IV. CONCLUSION

[19] For these reasons, this judicial review will be dismissed.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this application for judicial review is dismissed.

“Michael L. Phelan”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4509-08

STYLE OF CAUSE: SERGIO ROMERO MENDOZA, GUADALUPE DE
MONSERRAT MARTINEZ CABRIALES, AIMEE
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and

THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Toronto, Ontario

DATE OF HEARING: March 25, 2009

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

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