

**Date: 20060426**

**Docket: IMM-3310-05**

**Citation: 2006 FC 512**

**BETWEEN:**

**VICTOR HUGO ARREOLA DE LA CRUZ  
ROSA HILDA PEREZ PADILLA  
JESSICA VIRIDIANA PEREZ PADILLA  
(a.k.a. JESSICA VIRIDIA ARREOLA PEREZ)  
VICTOR HUGO ARREOLA PEREZ  
NATALIA GUADALUPE ARREOLA PEREZ  
(a.k.a. NATALIA GUADALU ARREOLA PEREZ)**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER**

**GIBSON J.**

**INTRODUCTION**

[1] The Applicants are a family and citizens of Mexico. Victor Hugo Arreola de la Cruz is the principal Applicant. The Applicants fled Mexico on the 27<sup>th</sup> of May, 2004 and arrived in Canada on the same day. On arrival, or shortly thereafter, the Applicants claimed Convention refugee status or like protection. They based their claim on a fear of a highly placed government official and police officers who supported him. They alleged that, because of the power and influence of the highly placed government official, state protection was not available to them in Mexico.

[2] In a decision dated the 10<sup>th</sup> of May, 2005, the Refugee Protection Division (the “RPD”) of the Immigration and Refugee Board rejected the Applicants’ claims for protection. The Applicants sought judicial review of that decision. These reasons follow the hearing of the Applicants’ application for judicial review.

## **BACKGROUND**

[3] In January of 2000, the principal Applicant began driving a taxi that was licensed through Galaxy Group. He and other taxi drivers within the same Group were offered an opportunity to purchase their own permits and plates. The principal Applicant and a number of his colleagues took advantage of the offer and paid deposits toward the full permit and plate costs. The permit and plates, that would have been issued under the authority of the highly placed government official that the Applicants allege they now fear, were never delivered.

[4] On the 8<sup>th</sup> of January, 2003, the Applicants participated in a protest demonstration with others, demanding that the taxi permits and plates that had been offered to them, and on which they had paid deposits, be delivered. The protesters were confronted by police. Violence erupted and shots were fired. The adult female Applicant and the youngest of the minor Applicants were injured. Both were hospitalized.

[5] In August of 2003, the principal Applicant left Galaxy Group and joined another similar organization. He found that the same offer that had been made to Galaxy Group drivers was being made to drivers in the group he joined. The principal Applicant alleges that he warned his new colleagues that the offer being made to them was a fraud.

[6] In mid-February of 2004, the principal Applicant alleges that he was confronted and threatened by men that he believed to be police. He alleges that in early May of 2004, while he was en route to a police station to report his problems and fears, he was assaulted and again threatened, once again by men he believed to be police. As a result of the assault, he was hospitalized for some four (4) days.

[7] In mid-May of 2004, shots were fired into the Applicants' house when all of the family members, other than the principal Applicant himself, were inside. The Applicants moved to a different municipality.

[8] Finally, on the 20<sup>th</sup> of May, 2004, the Applicants were advised that police were looking for them with an "apprehension order" for the principal Applicant. The Applicants again changed their residence. Shortly thereafter, the Applicants fled to Canada.

[9] None of the incidents that led to the Applicants' flight were ever reported to the police or to any other agency that might have been able to aid the Applicants in obtaining state protection.

## **THE DECISION UNDER REVIEW**

[10] At the opening of its reasons, the RPD wrote:

The claimants [here the Applicants] fear Francisco Garduno..., the Secretary of Transport and Roads; the police who support Garduno in Mexico, and the lack of adequate state protection for them in Mexico.

It is worthy of note that the RPD did not indicate that the Applicants fear all police, but rather only those who "support Garduno" and there was evidence before the Tribunal that, at least by a time

shortly after the Applicants left Mexico, Garduno himself was under investigation. Garduno is the “highly placed government official” referred to earlier in these reasons.

[11] The RPD further noted:

The determinative issue in these claims is if there is adequate state protection available for the claimants in the federal republic of Mexico today.

[12] The RPD, in its reasons, expressed a concern that the principal Applicant was not of such a profile in his protests against the alleged taxi permit and plates “scam” as to attract the particular attention of Garduno and the violent actions of police who supported him. Indeed, the evidence on which the principal Applicant relied to conclude that those who threatened and assaulted him were police would appear to have amounted to nothing more than speculation. The RPD wrote:

Despite all these concerns related to the credibility of the claim that he [the principal Applicant] was perceived to be a political agitator by the Secretary of Transport and Roads because he protested the fraud where money was collected under false pretence, the determinative issue is the failure of the claimant to provide clear and convincing evidence to rebut the presumption that the federal republic of Mexico can protect its citizens today. The claimants [Applicants] did not report their problems to any police station or officer and they did not even seek legal advice or recourse to recover the [deposit paid], nor did they report their problems to either [of the taxi groups or agencies with whom the principal Applicant had been associated].

[13] The RPD then turned to a brief review of the documentary evidence before it regarding Mexico’s capacity to protect its citizens. After finally noting that the principal Applicant “...did not even make an effort to learn the names or the identities of his agents of persecution”, the RPD concluded:

The burden of proof to establish absence of state protection is directly proportional to the level of democracy [and lies on an applicant] to rebut the presumption with credible and trustworthy evidence that the democracy of Mexico can protect its citizens.

The RPD determined that the Applicants had not met the burden of proof that lay on them.

## **THE ISSUES**

[14] In the memorandum of fact and law filed on behalf of the Applicants, counsel identified the issues on this application for judicial review in the following terms: first, whether the RPD erred in failing to consider whether approaching the police would have put the Applicants at further risk; and secondly, whether the RPD erred by applying the wrong test in its state protection analysis. Before the Court the foregoing issues were argued essentially as a single issue, that being, whether, against the appropriate standard of review, the RPD erred in a reviewable manner in concluding that the Applicants had failed to rebut the presumption that state protection was available to them, in their particular circumstances, in Mexico.

[15] In a further memorandum of argument filed after leave on this application for leave and for judicial review was granted, counsel raised on behalf of the Applicants the issue of whether or not the RPD denied fairness or natural justice to the Applicants in conducting the hearing before it on the basis of “reverse order questioning”, that is, with the RPD itself commencing the questioning and with counsel for the Applicants only having an opportunity to question the Applicants after the RPD itself had completed its questioning.

## **ANALYSIS**

[16] I will deal first, and briefly, with the issue of reverse order questioning.

[17] It was not in dispute that no objection was made in advance of, at the beginning of, or during the course of, the hearing before the RPD, with respect to the order of questioning. Indeed, as earlier noted, the issue was not even raised before this Court in the application for leave and for

judicial review or in the memorandum of argument that was before my colleague who granted leave in this matter.

[18] In *Benitez v. The Minister of Citizenship and Immigration*<sup>1</sup>, my colleague Justice Mosley concluded with respect to the “reverse order questioning” or Chairperson’s Guideline 7 issue, at paragraph 235 of his reasons:

...If the issue of Guideline 7 is only raised in a further memorandum of fact and law filed subsequent to the granting of leave, there has been an implied waiver and the applicants are restricted to the issues identified in the initial application and memorandum.

While there is conflicting authority on this issue in this Court, I adopt the foregoing conclusion as my own.

[19] Justice Mosley certified the following question with regard to his quoted conclusion:

When must an applicant raise an objection to Guideline 7 in order to be able to raise it upon judicial review?

[20] In light of the conflicting authority in this Court, I will certify the same question with respect to this matter.

[21] Turning then to the issue of state protection, and it was not in dispute before the Court in this matter that the Applicants made no effort to seek state protection, in *Chaves v. Canada (Minister of Citizenship and Immigration)*<sup>2</sup>, my colleague Justice Tremblay-Lamer concluded that the appropriate standard of review is reasonableness *simpliciter*, such a determination being a question

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<sup>1</sup> 2006 FC 461, April 10, 2006.

<sup>2</sup> [2005] F.C.J. No. 232, 2005 FC 193, February 8, 2005.

of mixed fact and law. I adopt that standard here.

[22] Justice Tremblay-Lamer went on to write at paragraphs 15 to 18 of her reasons:

In my view, however, Ward,...and Kadenko,...cannot be interpreted to suggest that an individual will be required to exhaust all avenues before the presumption of state protection can be rebutted... . Rather, where agents of the state are themselves the source of the persecution in question, and where the applicant's credibility is not undermined, the applicant can successfully rebut the presumption of state protection without exhausting every conceivable recourse in the country. The very fact that the agents of the state are the alleged perpetrators of persecution undercuts the apparent democratic nature of the state's institutions, and correspondingly, the burden of proof. As I explained in *Molnar v. Canada (Minister of Citizenship and Immigration)*,...Kadenko,...has little application when the "[...] police not only refused to protect the applicants, but were also the perpetrators of the acts of violence"; ....

To require otherwise, escapes reason, as LaForest J., on behalf of the Supreme Court of Canada, clearly indicated in Ward, ...:

[...] it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.

Turning to the case at bar, the RPD determined that the applicant did not adequately seek state protection by going to the police for help; by engaging his lawyer in relation to his difficulties in a more timely fashion; and by seeking the aid of the Ombudsman's Office.

The problem is precisely the one envisaged in *Molnar*,... and underlying LaForest J.'s comments in Ward, ... the police ... were the perpetrators of the applicant's persecution. Thus notwithstanding that not every member of the [police] was implicated in the applicant's persecution, seeking help from the [police] – asking, in effect, the [police] to protect the applicant from itself – would have in all likelihood placed the applicant in greater peril.

[citations omitted]

[23] Here, the principal Applicant alleged that police who supported the highly placed government official who had, once again it is alleged, defrauded the principal Applicant and his fellow taxi drivers, were themselves the direct source of persecution. Those police officers, if indeed they were police officers and the evidence to support such a conclusion is very speculative indeed, were likely very few in number. At least the number that threatened, wounded and assaulted the principal Applicant and members of his family would appear to have been few in number. On the facts of this matter, the principal Applicant's credibility was not directly challenged and it was certainly not challenged in clear and unmistakable terms. As earlier indicated, not only

did the Applicants not go to the police to seek state protection, they sought help in the nature of state protection from no institution and from no one.

[24] On the facts of this matter as determined by the RPD, and against a standard of review on the determination regarding state protection of reasonableness *simpliciter*, I can only conclude that the decision of the RPD was open to it. Here, the Applicants were not held to a standard by the RPD of being required to exhaust all avenues conceivably open to them before the presumption of state protection could be rebutted; rather, they were simply held to a standard of making some efforts to achieve state protection in Mexico. They simply failed to meet that standard.

## **CONCLUSION**

[25] For the foregoing brief reasons, this application for judicial review will be dismissed. As earlier indicated, a question will be certified with regard to the “reverse order questioning” or Guideline 7 issue.

“Frederick E. Gibson”

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JUDGE

Ottawa, Ontario  
April 26, 2006

**FEDERAL COURT**

**NAME OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-3310-05

**STYLE OF CAUSE:** VICTOR HUGO ARREOLA DE LA CRUZ, ROSA HILDA PEREZ PADILLA, JESSICA VIRIDIANA PEREZ PADILLA (a.k.a. JESSICA VIRIDIA ARREOLA PEREZ), VICTOR HUGO ARREOLA PEREZ, NATALIA GUADALUPE ARREOLA PEREZ (a.k.a. NATALIA GUADALU ARREOLA PEREZ)

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** April 13, 2006

**REASONS FOR ORDER:** GIBSON J.

**DATED:** April 26, 2006

**APPEARANCES:**

Ms. Hilary Evans Cameron

FOR THE APPLICANTS

Ms. Rhonda Marquis

FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

VanderVennen Lehrer

FOR THE APPLICANTS

Toronto, Ontario

John H. Sims, Q.C.,

FOR THE RESPONDENT

Deputy Attorney General of Canada

Toronto, Ontario