Federal Court  Cour fédérale

Date: 20110330

Docket: IMM-2482-10

Citation: 2011 FC 388

Ottawa, Ontario, March 30, 2011

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

MAGALY TORALES BOLANOS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of the decision of the Refugee Protection Division (RPD) of the Immigration and Refugee Board, dated 30 March 2010 (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 citizen of Mexico. She and her husband, Salvador Garcia, were married in 2006 and, shortly thereafter, he began to verbally and physically abuse her. She never reported the abuse to authorities in Mexico, believing that they would not assist female victims of domestic violence.

[3] Her husband came to Canada in August 2007 and filed a refugee claim based on alleged persecution by his employer in Mexico. The Applicant came to Canada in October 2007 and joined his refugee claim. A daughter was born of the marriage in December 2007. In February 2008, the Applicant's husband recommenced his abusive conduct on a once- or twice-weekly basis. On October 2008, the Applicant called the police. Her husband was arrested and charged with assault, but the charges were withdrawn when the Applicant failed to appear in court. The parties separated. It was determined that the child would reside with the Applicant and that the husband would have visiting rights. The joint refugee hearing took place in February 2009; the Applicant's husband instructed her not to speak during the hearing and she obeyed. A negative decision was rendered on 28 April 2009.

[4] The Applicant claims that her estranged husband threatened her on at least five occasions following his arrest. She did not report these threats to the police. On 25 October 2009, a motion to re-open the Applicant's refugee claim was granted on the basis of a well-founded fear of domestic abuse from her husband and a well-founded fear that he would abduct their child. (In September 2009, the husband had returned the child home late; in October 2009, he took the child without the

Applicant's permission.) To the best of the Applicant's knowledge, her husband returned to Mexico on 30 December 2009.

[5] The Applicant's refugee hearing took place on 30 March 2010. The RPD rejected the Applicant's claim for refugee protection based on the witness' lack of credibility and the availability of state protection and an internal flight alternative (IFA) in Mexico. This is the Decision under review.

DECISION UNDER REVIEW

Credibility

[6] The RPD accepted that the Applicant had been abused by her estranged husband. It commented that the Applicant submitted three PIFs, two of which were filed on time and a third which was not filed in accordance with the RPD Rules but which was nonetheless accepted, given its relevance. Notwithstanding these three PIFs, omissions came out in testimony, the most significant being the reason for the Applicant's escape to Canada. The RPD noted that these omissions cast doubt on the veracity of her claim.

State Protection

[7] The RPD reviewed the jurisprudence on state protection, including the presumption that a state is capable of protecting its citizens, that an applicant has a duty to approach the state for

protection where protection might be reasonably forthcoming, and that the onus is on an applicant to rebut that presumption with clear and convincing evidence.

[8] Applying these principles to the Applicant's claim, the RPD concluded that: Mexico is in control of its territory; it has federal, state and municipal security forces; and that the laws provide redress for complainants who are dissatisfied with the treatment of their complaints. The RPD reviewed the Mexican legislation prohibiting domestic abuse, the government agencies that have been established to assist victims of domestic abuse, and the conflicting documentary evidence regarding the current situation of domestic abuse in that country. It concluded that the Mexican state is making efforts to combat the problems of domestic abuse and corruption within its security forces and that, ultimately, "there is effective and adequate state protection in Mexico." If the Applicant were to return to Mexico today, state protection would be reasonably forthcoming.

[9] The RPD considered the steps taken by the Applicant to access state protection both in Canada and in Mexico. It recognized that, even though Mexico is a "well-established democracy," the Applicant had not accessed state protection in that country because both her mother and her cousin's wife had attempted to do so and the police refused to assist them. The RPD afforded little weight to the documentation concerning the abuse of the Applicant's mother in Mexico. It referred to the affidavit of Pamela Cross (Cross Affidavit) and the documentary evidence, which pertain to the cycle of abuse affecting victims of domestic abuse, the discrimination faced by women in Mexican society, and the availability of assistance to the women included in these groups.

[10] The RPD asked the Applicant why she had followed her abusive husband to Canada, but it was dissatisfied with her response, which was that she was just nineteen years old; she believed he would mend his ways and she feared her husband's employer. The RPD commented that the third reason was not mentioned in any of the Applicant's three PIFs. The RPD stated that, although her youth and the experiences of similarly situated persons may explain her failure to approach the Mexican state for protection, the situation in Canada was different. She knew that she could access protection here and yet she sought protection only once.

[11] The RPD noted that the Applicant's estranged husband, whose whereabouts are uncertain, is not a high-profile individual nor is he connected to anyone in authority. There is no evidence that his pursuit of the Applicant is ongoing. For these reasons, the RPD found that the Applicant had failed to rebut the presumption of state protection.

Existence of an Internal Flight Alternative

[12] The RPD also turned its attention to whether or not an IFA was available to the Applicant, a young woman who has experience living on her own. It applied the two-pronged test from *Rasaratnam v Canada (Minister of Employment and Immigration)* (1991), [1992] 1 FC 706, 140 NR 138 (CA) and found that an IFA existed in Guadalajara. It rejected the Applicant's assertion that her husband, a truck driver, would be able to locate her anywhere in Mexico. The RPD referred to documentary evidence suggesting that it was "highly unlikely" that one individual could easily locate another in Mexico due to the confidentiality of public records. It also observed that Guadalajara is a large city and that the Applicant's estrangement from her family would make it

unlikely that she would be pursued by her husband. For this reason, relocating there would not constitute an undue hardship.

ISSUE

[13] The Applicant raises the following issue:

Whether the RPD was duly attentive to the *Gender Guidelines* in hearing and deciding the Applicant's claim, particularly with respect to:

i. the expert evidence of Pamela Cross on a woman's motivations for staying with an abuser;

ii. the need to be sensitive to the vulnerability of a woman suffering from battered woman syndrome;

iii. the role of gender in the "similarly situated" analysis;

iv. the RPD's lack of familiarity with the evidence; and

v. the RPD's state protection and internal flight alternative analyses.

STATUTORY PROVISIONS

[14] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
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	**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

opinion,

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 themself 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 themself 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 accepted international standards, and	(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) 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.

STANDARD OF REVIEW

[15] 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 the 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.

[16] The single issue raised by the Applicant concerns the proper application of the *Gender Guidelines.* This is reviewable on a standard of reasonableness. See *Correa Juarez v Canada (Citizenship and Immigration)*, 2010 FC 890 at paragraph 12. As part of this analysis, the Court will review the RPD's credibility findings as well as its treatment of the evidence, for which the appropriate standard is reasonableness. See *Aguebor v Canada (Minister of Employment and Immigration)* (1993), 160 NR 315, 42 ACWS (3d) 886 (FCA); *Aguirre v Canada (Minister of Citizenship and Immigration)*, 2008 FC 571 at paragraphs 13-14; *Dunsmuir*, above, at paragraphs 51 and 53; and *Sittampalam v Canada (Minister of Citizenship and Immigration)*, 2009 FC 65.

[17] 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."

ARGUMENTS

The Applicant

Overview

[18] The Applicant asserts that the RPD's findings regarding credibility, state protection and IFA were made without proper consideration and application of the *Gender Guidelines* and therefore are unreasonable. Although the RPD stated that the *Guidelines* were considered, it is clear that they were not. As Justice Danièle Tremblay-Lamer stated in *Keleta v Canada (Minister of Citizenship and Immigration)*, 2005 FC 56 at paragraph 15:

> … substance prevails over form when considering whether the principles in the guidelines were properly applied and thus the fact that the guidelines were mentioned at the outset of the Board's decision in the present application does not preclude *a priori* an attack on the decision on this basis.

The RPD Was Insensitive to Battered Woman Syndrome

[19] The Applicant argues that the RPD demonstrated no sensitivity to her gender-related persecution, particularly with respect to its questions regarding her reasons for coming to Canada. The RPD's puzzlement as to why the Applicant followed her abusive husband to Canada disregards the Supreme Court of Canada's analysis of battered woman syndrome in *R v Lavallee* (1990), [1990] 1 SCR 852, 76 CR (3d) 329, as well as expert evidence in the Cross Affidavit that the Applicant's desire to reunite with her husband and accept his promises to change are entirely predictable. The Decision betrays the RPD's ignorance of the cycle of abuse and its restrictive

reading of the expert evidence. Although the RPD says that it considered the *Gender Guidelines* in this respect, it merely paid them lip service.

[20] While it is true that the Applicant did not specify in her PIF that she felt endangered by the threats of her husband's Mexican employer, and she did give numerous reasons for coming to Canada; none of these reasons contradict each other and all are reasonable in the circumstances. The RPD's repetitive and complicated manner of questioning the Applicant shows no sensitivity to or understanding of her confusion concerning her own motives for coming to Canada; it is essentially an effort to "trip her up" in telling her story. See *Dena Hernandez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 179 at paragraph 51. The RPD is careful to state that the Applicant's omissions, while they do not support a negative decision, do cast "some doubt as to the veracity of the claim." The Applicant asserts that it is unfair for the RPD to impugn her credibility in this way.

[21] The RPD disputed with the Applicant whether her husband pushed her to the ground or to the floor. It stated that the Applicant filed three PIFs when, in fact, she filed one PIF which was amended twice. It asked her whether her husband had ever breached the conditions of his bail and then interjected and interrupted so much that the RPD itself became confused as to her reply and blamed the Applicant for giving conflicting answers. The Applicant contends that this type of interaction shows a complete disregard for the *Gender Guidelines* and, moreover, constitutes the kind of "microscopic examination of the evidence" that was discouraged by Justice François Lemieux in *Alfonso v Canada (Minister of Citizenship and Immigration)*, 2007 FC 51 at paragraph 25. The jurisprudence of this Court clearly states that a tribunal must "at all times be attentive and

sensitive to claimants." See *Dena Hernandez*, above, at paragraph 54. The RPD's conduct at the hearing raises a reasonable apprehension of bias.

The RPD Lacked Familiarity with the Evidence

[22] The Applicant states that, early in the proceedings, it became clear that the RPD had not read, or even seen, the Applicant's original PIF, the first amendment to the PIF or any of the supporting personal and country documentation submitted prior to the hearing. The Applicant quotes at length from the transcript to demonstrate that this lack of preparation resulted in the RPD asking ill-informed questions, which confused and intimidated her. This ignorance of the Applicant's personal history amounted not just to insensitive treatment but to a breach of natural justice.

The "Similarly Situated" Analysis Was Flawed

[23] The Applicant states that, according to the *Gender Guidelines*, the central factor in an assessment of a gender-related persecution claim is the circumstances of the claimant in relation to the human rights record of her country and the experience of other similarly situated women. Her own evidence of similarly situated women included her mother's experience of domestic abuse in Mexico. The RPD dismisses this evidence as "not relevant." The Applicant argues that this evidence is highly relevant, as it concerns the central female figure in her life and, as the submissions indicate, this experience normalized the cycle of abuse and suggested to the Applicant that victims

of domestic abuse could not expect to secure police protection. The Applicant posits that this dismissal of important evidence negatively impacted the RPD's similarly situated analysis.

State Protection and IFA Not Assessed Using the *Gender Guidelines*

[24] The RPD infers that the Applicant will not properly pursue protection in Mexico because she did not call the police more than once in Canada. The Applicant submits that she saw no need to contact the police regarding her husband's threats while in Canada because he himself had told her that he could not do anything to her in this country but, once they were back in Mexico, he would take their daughter away. The Applicant contends that the RPD erred in drawing a negative inference from her inaction in Canada. Furthermore, with respect to her failure to contact police in Mexico, the Applicant states that the RPD's insensitivity to the power dynamics between her and her husband renders unreliable its finding that she should have sought state protection. See *Rivas Montanez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 460 at paragraph 4. Finally, the RPD's conclusion that, because no one had heard from the husband in three months, he must no longer be a threat is unreasonable.

[25] The RPD's IFA analysis is unreasonable under the second prong of the *Rasaratnam* test, above. As Justice Judith Snider stated in *Syvyryn v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1027 at paragraphs 7-8, the *Gender Guidelines* require that a tribunal assessing the reasonableness of an IFA consider the ability of a woman to travel to the proposed IFA and stay there without undue hardship, bearing in mind pertinent religious, economic and cultural factors. The Applicant argues that the RPD did not appreciate that, as a single mother, she

will face significant economic and cultural challenges that will be exacerbated by the fact that her child has never lived in Mexico and the Applicant is not familiar with Guadalajara. Indeed, the RPD makes no mention of the Applicant or her daughter in the IFA analysis.

The Respondent

The *Gender Guidelines* Were Appropriately Applied

[26] The Respondent submits that there is nothing in the record to suggest that the RPD did not take the *Gender Guidelines* into account or to overcome the presumption that the RPD considered all of the evidence in a fair manner, as it stated. The RPD demonstrated no insensitivity to the Applicant's circumstances. The Respondent submits that the *Guidelines* are directed toward the conduct of the hearing and that the onus remains on the applicant to make out her claim; the *Guidelines* cannot serve as a cure for a deficient claim. See *Newton v Canada (Minister of Citizenship and Immigration)* (2000), 182 FTR 294, [2000] FCJ No 738 (QL) at paragraph 17.

[27] Further, there was no indication in the record that the Applicant had any difficulty testifying before the tribunal or raised any concerns about the manner in which the hearing was being conducted. The Applicant alleges that the hearing was unfair, prejudicial and tainted by the RPD's failure to read certain documents prior to the hearing. The Respondent contends that the Applicant should have requested an adjournment if she felt prejudiced but, as she did not do so, she cannot complain now. See *Keranda v Canada (Minister of Citizenship and Immigration)*, 2009 FC 125 at paragraph 23.

[28] The Respondent, in commenting on the Applicant's assertions that the RPD was unreasonable in questioning her, states that the tribunal, as the trier of fact, is fully entitled to delve into discrepancies and seek clarification; the *Guidelines* do not require the RPD to refrain from asking questions, repeatedly if necessary.

[29] The Respondent also argues that the RPD's findings of credibility and its treatment of the evidence were reasonable. The RPD was entitled to draw a negative credibility finding from the Applicant's failure to mention in all three versions of her PIF one of the reasons for her coming to Canada. In addition, the Applicant's discontent with the weight given to the Cross Affidavit is an inappropriate request for this Court to re-weigh the evidence. The RPD was not required to accept the Applicant's view of how this document should be interpreted.

State Protection Is Available in Mexico

[30] The Respondent notes that the Applicant alleged a fear that her husband would take their daughter away but at no time did she contact the police regarding these concerns. The Applicant's failure to seek state protection is relevant to the analysis. The onus is on her to rebut the presumption of state protection by providing proof that she has exhausted all available protections; only in special circumstances will an applicant be exempted from this duty. See *Hinzman v Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 at paragraphs 56-57. The Respondent submits that the Applicant in the instant case has not discharged this onus. The RPD reviewed the documentary evidence concerning state protection in Mexico and its findings accord with the

jurisprudence of this Court, which has held on numerous occasions that state protection is available to the citizens of Mexico.

IFA Available in Guadalajara

[31] The Respondent states that an applicant cannot be deemed a Convention refugee if a viable IFA exists within her country. The question to be asked is whether it would be unduly harsh to expect the Applicant to move to a less hostile part of Mexico before seeking refugee status in Canada. See *Thirunavukkarasu v Canada (Minister of Employment and Immigration)* (1993), [1994] 1 FC 589, 109 DLR (4th) 682 at 687 (FCA). The RPD reasonably concluded that the Applicant could relocate to Guadalajara and that it was highly unlikely that her husband would find her there, given the passage of time and the Applicant's estrangement from her family.

The Applicant's Reply

[32] The Applicant contends that the Respondent failed to engage with her argument that the RPD did not apply the *Gender Guidelines* in a manner that demonstrated an understanding of the Applicant's circumstances as a victim of domestic violence. The Respondent's assertion that she must rebut a presumption of fair consideration of the *Guidelines* is not supported by any authority. It is the substance of the Decision that will or will not evidence a proper application of the *Guidelines*. See *Keleta*, above, at paragraph 15. The Applicant also disputes the Respondent's statement that the *Guidelines* are merely procedural, as this is inconsistent with the Court's analysis in *Keleta*, above, at paragraphs 14, 18 and 21.

[33] The Respondent takes umbrage at the Applicant's submissions and infers that she would like to see the RPD ask fewer questions. This mischaracterizes the Applicant's argument, which accepts that questions will be asked but posits that they should be asked in a straightforward, informed and respectful manner. The RPD's aggressive questioning creates an arguable issue for judicial review.

[34] The Applicant also states that both the RPD and the Respondent are confused with respect to her reasons for coming to Canada. She initially came here because she feared reprisals from her husband's former employer. Her re-opened claim was based on the violence she suffered at the hands of her husband here and in Mexico.

[35] The Applicant also states that she is not asking the Court to re-weigh the evidence but rather to recognize that the RPD did not engage with the Cross Affidavit and other highly relevant evidence and yet offered no explanation for not doing so.

[36] In addressing the RPD's failure to review the evidence prior to the hearing, the Applicant did not raise breach of natural justice as an issue warranting judicial review. Instead, she submits that such instances of unfairness warrant judicial intervention. The Respondent's statement that the Applicant ought to have objected at the hearing suggests that the RPD need not be held responsible for its lack of preparation. This is unreasonable.

[37] Finally, the Applicant notes that the Respondent failed to answer her submissions regarding the importance of evidence concerning similarly situated persons and the RPD's insensitivity to the

Gender Guidelines in assessing IFA and state protection. With respect to the latter, she submits that this Court in *Erdogu v Canada (Minister of Citizenship and Immigration)*, 2008 FC 407 at paragraph 28, acknowledged that the capacity of the state to implement protections for victims of domestic violence is as important as the adequacy of the legislative infrastructure. As laudatory as Mexico's efforts may be, intention to protect does not necessarily translate into ability to protect. It is the Applicant's submission that the state is currently incapable of adequately protecting her as a victim of domestic violence.

The Respondent's Further Memo

[38] The Respondent submits that it is clear from the Decision that the RPD considered the *Gender Guidelines* and was sensitive to the Applicant's circumstances as a victim of domestic abuse. First, the Decision states that the *Guidelines* were considered. Second, the RPD recognized the Applicant's "possible hesitancy to discuss delicate matters" and the fact that she was young and "perhaps easily influenced by past experiences with family members." Third, it considered the letters corroborating the Applicant's evidence that she was abused by her husband. Fourth, it referred to the Cross Affidavit and its evidence regarding the "fears of women who have grown up in certain social, religious and legal cultures and their fears of leaving abusive relationships." Fifth, the RPD referred to evidence on the country conditions in Mexico with respect to violence against women, macho culture and availability of shelters.

[39] The Respondent further argues that the Decision is not rendered unreasonable by the fact that the RPD gave little weight to the evidence of abuse suffered by the Applicant's mother or by

the fact that it did not discuss in detail the Cross Affidavit. The RPD weighed the evidence in a manner that it believed appropriate, and there is no legal basis on which the Court should intervene.

[40] Finally, the Respondent contends that the Applicant has not demonstrated that a reasonably informed bystander would perceive bias on the part of the RPD based on its manner of questioning the Applicant. See *Newfoundland Telephone Co. v Newfoundland (Board of Commissioners of Public Utilities)* (1992), [1992] 1 SCR 623 at 636, [1992] SCJ No 21 (QL) at paragraph 22. The threshold for finding a real or perceived bias is high; mere suspicion is insufficient. See *R v S (RD)* (1997), [1997] 3 SCR 484, [1997] SCJ No 84 at paragraph 113. The RPD must be allowed reasonable latitude in questioning a claimant; extensive, repetitive and energetic questioning and intervention will not demonstrate lack of impartiality. See *Bankole v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1581 at paragraph 23.

ANALYSIS

Incomplete Record – Preliminary Issue

[41] The Applicant has brought to the Court's attention, and has raised as an additional ground of review, that the Certified Tribunal Record (CTR) is incomplete.

[42] The missing documents are the first PIF amendment that was submitted to the RPD on 9 March 2010 and the written submissions submitted by counsel at the hearing.

[43] The Applicant says that, as a result of these omissions from the CTR, the Court cannot be confident that the RPD read the full record before reaching its Decision.

[44] It is clear from paragraph 21 of the Decision that the RPD reviewed and took into account all three of the Applicant's PIFs.

[45] As regards counsel's written submissions, the RPD does say in paragraph 21 of its Decision that it has "considered all the documents submitted by counsel …." The RPD also confirms at paragraph 24 that is has "considered both the documentation and submissions of counsel." The Applicant says that this does not mean that the RPD considered counsel's written submissions.

[46] It is clear from the transcript of the hearing that counsel for the Applicant agreed with the Member to keep her oral submissions fairly brief because everything was in the written submissions and it was clearly understood that, in addition to any oral submissions, the Member would review the written submissions.

[47] The oral submissions are brief but they are also fairly comprehensive and refer to the main points regarding state protection and Internal Flight Alternative, which are the determinative issues in the Decision.

[48] The Applicant is now asking the Court to find that, notwithstanding what was said at the hearing and what appears in the Decision about the RPD having considered the submissions of counsel, the RPD did not consider the written submissions that were left with the Member.

[49] I find this very hard to accept because it would mean, in effect, that the Member either lied or did not carry through with her commitment to read the written submissions.

[50] To support this submission, the Applicant says that the Decision itself reveals that the written submissions were not considered because the RPD does not specifically refer to documentation cited by the Applicant that addresses state protection, but relies upon earlier documentation. This omission would require me to find that the Member is lying in the Decision when she says at paragraph 21 that she has "considered all the documents submitted by counsel" and at paragraph 24 when she says she "has considered both the documentation and submissions of counsel."

[51] Other than the Applicant's present complaints about some of the ways in which the hearing was handled (which complaints were not raised or objected to at the hearing), the Court has no grounds upon which to find that the Member is lying, or is even being inadvertently inaccurate, when she says that she has considered all of the documentation. I also note that in the oral submissions on state protection a summary of the documentation that the Applicant believes supports her case is given and that January 2010 Human Rights Watch reports are specifically cited as stating that "the general law is not effective." Therefore, the Member clearly was alert to the adverse documentation; and the transcript of the hearing, which contains the oral submissions, is part of the CTR.

[52] All in all, I cannot accept that the gaps in the CTR reveal that the RPD did not look at all of the documentation submitted or at the written submissions of counsel. Hence, in my view, the

RPD's Decision is before the Court because the Applicant has reproduced the gaps in the CTR as part of her record. This means that I can review and assess the documentation and information that was before the RPD when this Decision was made. Justice Barbara Reed in *Parveen v Canada (Minister of Citizenship and Immigration)* (1999), 168 FTR 103, 1 Imm. L.R. (3d) 205 at paragraph 9 pointed out that "an incomplete record alone could be grounds, in some circumstances, for setting aside a decision under review." While this Court has subsequently cited and followed Justice Reed on this point – see, for example, the decision of Justice Elizabeth Heneghan in *MacDonald v Canada (Attorney General)*, 2007 FC 809 – the circumstances of the present case do not give rise to a problem because the record shows that the RPD did consider all of the Applicant's PIF amendments and counsel's submissions, and the missing pages from the CTR are before the Court in the Applicant's record.

The Merits

[53] The Applicant has provided a great deal of argument concerning: the RPD's failure to be open and sympathetic to the *Gender Guidelines*; to appreciate expert evidence on the issue of domestic violence; and to consider the role of gender in its similarly situated analysis; the RPD's insensitivity to the Applicant's particular circumstances and to the vulnerable state of women suffering from battered woman syndrome; and aggressive and intimidating questioning at the hearing. While the views behind these arguments are of extreme importance in general, much of what is put forward seems to me to be wide of the mark when dealing with a Decision that is based upon adequate state protection and a viable and reasonable IFA. As the RPD makes clear at paragraphs 21-22 of its Decision, any doubts as to veracity are "insufficient to cause the claim to

fail"; "it is state protection which the Board addresses both in Mexico and in Canada and, in the alternative, Internal Flight Alternative (IFA) to Guadalajara or the Federal District."

[54] My review of the Decision leads me to conclude that the RPD accepted that the Applicant had been abused by her spouse and was fully aware of her vulnerabilities as a young mother who fears to return to Mexico with her daughter because she may again be confronted by an abusive spouse who may harm her and her daughter. Notwithstanding these fears and vulnerabilities, the RPD felt that the state would and could offer her protection and/or that she had a reasonable and viable IFA in Guadalajara or the Federal District. The focus for this review, then, is whether, given the Applicant's particular fears, vulnerabilities and circumstances, the RPD's state protection and IFA analyses were reasonable.

[55] The Applicant does address these issues in her submissions and says that the RPD erred when it failed to analyze state protection and Internal Flight Alternative through the lens of the *Gender Guidelines*.

[56] The Applicant cites and censures the following statement by the RPD:

> We have concluded that the claimant was not diligent in pursuing state protection in Mexico. We concur that the claimant was young and perhaps easily influenced by past experiences with family members. However, in Canada, where she knew that she could access state protection, it was only on one occasion that she did so.

[57] The Applicant criticizes this statement for its inference that "the Applicant's failure to call the police multiple times in Canada suggests that she will not properly pursue protection in Mexico."

[58] The Applicant points out that she saw no need to contact Canadian authorities because her spouse has only threatened to harm her in Mexico where she will not have the protection she has in Canada.

[59] I think this misses the point that the RPD makes in the Decision. First, the RPD is pointing out that, for whatever reason, the Applicant was not diligent in pursuing state protection in Mexico in the past, so that her past experiences in Mexico provide no indication of what will occur if she returns and does seek state protection there. Second, in Canada, she sought police protection only on one occasion, so she is obviously reluctant to seek state protection even when it is available to her. The paragraph makes it clear that the RPD keeps in mind her particular vulnerabilities. She is not censored for her failure.

[60] The adequacy of state protection in Mexico cannot be assessed on the basis of the Applicant's reluctance or failure to seek it. The point is that, should she decide to seek it, it will be available to her. The Applicant cannot, in my view, argue that state protection is inadequate in Mexico because, as a vulnerable woman, she is reluctant to seek it. She may well have subjective fears in this regard, but if the state can, objectively speaking, provide adequate protection for women in her position then she has not rebutted the basic presumption that state protection is available to her.

[61] The Applicant also argues that the RPD shows a lack of understanding of her concerns:

> She is not interested in seeing Mr. Garcia go to jail for every indiscretion or instance of abuse; rather, she is interested in feeling that she and her daughter are safe. She attained that feeling in Canada after calling the police once, and a properly sensitive assessment of

> her particular situation would not have made negative inferences from her subsequent inactivity.

[62] Once again, I think the Applicant is missing the point. The RPD finds that whatever protection she may require against Mr. Garcia in Mexico will be available to her there. There are no negative inferences from her past conduct and the RPD clearly says so in the Decision:

> Her husband was subsequently charged and detained a few days pending a Court date. The claimant was summoned to the court, but did not appear and the charges were withdrawn. The Board does not fault her for not appearing. In her own words, initially she wanted the police to apprehend him, however, later realized that this was not her intention.

[63] The purpose of the RPD's looking at the Applicant's past conduct is to show that she now knows how to consult the police when she wants to, and her failure in the past to consult them in Mexico should not be taken as an indication that they would not provide protection in the future upon her return.

[64] The Applicant pursues the point further:

> Furthermore, the Board's finding that the Applicant did not diligently pursue state protection while within Mexico is questionable on two grounds. First, as submitted above, this finding was arrived at after highly significant information about a similarly situated woman was declared "not relevant." Second, the particular circumstances of a domestic violence victim require a specific sensitivity that was lacking in the Board's analysis. The state protection determination recalls the recent decision of Justice Campbell in *Rivas Montanez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 460 at paragraph 4:
>
> > [T]he RPD did not demonstrate a sensitive understanding of the power dynamics in play between an abused and captive wife at the hands of a violent and jealous husband in order to fairly determine whether, in the Applicant's circumstances, it was

> objectively unreasonable for her to have not sought state protection.

[65] First of all, the Applicant is not a captive wife. She and her husband have separated and there is no indication that she is going back to him or that he will try to force her to live with him again. In fact, it is not entirely clear where he is.

[66] Apart from this, the Applicant does not explain what "specific sensitivity" was lacking in this case when state protection was examined.

[67] The similarly situated women put forward by the Applicant were her mother and her cousin's wife.

[68] The Applicant acknowledged that she was only 13 years of age when she went to the police in Mexico with her mother, and she could not recall the date of the incident with her cousin. It is difficult to see, therefore, how these women were similarly situated to the Applicant, who is now fully alive to what she must do if she wants protection in Mexico and who has available to her the recent reforms referred to by the RPD, which show that the state of Mexico takes domestic violence seriously these days and is willing and able to act.

[69] The Applicant also questions the RPD's assessment of the current risk posed by Mr. Garcia if she returns. However, the RPD gives clear reasons for its views on this issue and its conclusions fall within the *Dunsmuir* range. Just because the Applicant is fearful and disagrees with the RPD does not render the Decision unreasonable.

[70] The same can be said for the Applicant's criticism of the RPD's IFA analysis which is, in any event, an alternative finding; the reasonable state protection analysis stands alone and justifies the Decision. The Applicant raised at the hearing before me that the RPD did not deal adequately with the Applicant's daughter when considering state protection. As the Decision makes clear, the RPD was fully aware that the Applicant feared for her daughter as well as herself. The RPD's state protection analysis is equally applicable to both of them.

[71] The RPD acknowledged that all was not well in Mexico and that there are conflicting reports as to whether the new legislation is effective. Overall, however, the RPD concluded that the objective evidence supported an adequate state protection finding. The RPD's conclusions in this case are not out of line with other recent similar Decisions of this Court. See, for example, *Navarro Canseco v Canada (Minister of Citizenship and Immigration)*, 2007 FC 73; *Hernandez v Canada (Minister of Citizenship and Immigration)*, 2009 FC 106; *Correa Juarez*, above; and *Monjaras v Canada (Minister of Citizenship and Immigration)*, 2010 FC 771.

[72] Notwithstanding the Applicant's understandable fears and the emphasis she places upon her gender, her vulnerability and her daughter's safety, she has not convinced me that, when this Decision is examined from the perspective of its true grounds – i.e., state protection and IFA – it is in any way unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that

1. The application is dismissed.

2. There is no question for certification

"James Russell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Ms. Kristin Marshall	FOR THE APPLICANT
Ms. Nicole Paduraru	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Downtown Legal Services Kristin Marshall Barrister & Solicitor Toronto, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada	FOR THE RESPONDENT