

CANADA / JUDGMENT

VB9-09209

COURT

Refugee Appeal Division

DECIDED

25 February 2020

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RAD File / Dossier de la SAR : VB9-09209 / VB9-09210

VB9-09211 / VB9-09212 / VB9-09213

Private Proceeding / Huis clos

Reasons and decision ? Motifs et décision

Persons who are the subject of the appeal

XXXX XXXX XXXX XXXXXXXXXXX XXXX XXXX XXXXXXXXXXX XXXX XXXX XXXXXXXXXXX XXXX
XXXXXXXX XXXX XXXX

Personnes en cause

Appeal considered / heard at

Vancouver, BC

Appel instruit / entendu à

Date of decision

February 25, 2020

Date de la décision

Panel

Paula Faber

Tribunal

Counsel for the persons who are the subject of the appeal

Nathalia Murgas L Arosa

Conseil des personnes en cause

Designated representative

XXXX XXXX XXXX XXXX XXXXXXXXXXX XXXX XXXX XXXXXXXXXXX XXXX

Représentant(e) désigné(e)

Counsel for the Minister

N/A

Conseil du ministre

REASONS FOR DECISION

OVERVIEW

- [1] These are my reasons for dismissing the appeal of XXXX XXXX XXXX (Principal Appellant), her husband XXXX XXXX XXXX (Adult Associate Appellant) and their three children XXXX XXXX XXXX, XXXX XXXX (Minor Associate Appellants) and XXXX XXXX XXXX (Adult Associate Appellant). All Appellants are citizens of Argentina.
- [2] They appeal a decision of the Refugee Protection Division (RPD) rejecting their claim for refugee protection.
- [3] The allegations as outlined in the Principal Appellant's Basis of Claim form (BOC) have been adopted by the Associate Appellants. In summary, the Appellants fear trade union representatives in Argentina because of the Principal Appellant's disagreement with strike action in XXXX XXXX. Ms. XXXX is a XXXX XXXX XXXX who was threatened and harassed for continuing to work during strikes in 2018. In XXXX 2018, the Principal Appellant describes being taken by force into a vehicle by union members. She was blindfolded and threatened about her activities before being dropped off at her home. The problems the Principal Appellant was having were reported to the police but they did not help.
- [4] The parents and the two Minor Associate Appellants left Argentina on XXXX XXXX, 2018. Their eldest daughter XXXX (Adult Associate Appellant) joined her family in Canada in XXXX 2018 after receiving a threatening phone call.
- [5] The Minister of Public Safety intervened at the RPD by filing documents. The Minister argued that the Principal Appellant's husband had previously made a refugee claim in Australia.
- [6] The hearing before the RPD took place on October 15, 2019. In the decision dated November 7, 2019, the RPD found that the Appellants failed to rebut the presumption of state protection with clear and convincing evidence.

APPELLANT ARGUMENTS

- [7] The Appellants argue that the RPD failed to comply with the Code of Conduct for Members of the Immigration and Refugee Board of Canada.¹
- [8] It is also argued that the RPD erred in its state protection analysis as its findings are based on speculation.

ANALYSIS

[9] My role is to look at all the evidence and decide if the RPD made the correct decision.²

No breach of natural justice

[10] The Appellants argue that the RPD failed in applying principles of conduct and natural justice stipulated in the Code of Conduct for the members of the Immigration and Refugee Board (IRB) which affected its decision.

[11] I have considered the Appellants' submissions to the extent that they argue that the RPD's behaviour led to a breach of natural justice. However, this is not the appropriate forum to determine whether the RPD breached the Code of Conduct. It is open to the Appellants to make a separate complaint under the IRB Procedures for Making a Complaint about a Member, which can be found on the IRB website.

[12] The Appellants also argue that the RPD took an intimidating attitude towards the Appellants' Counsel at the beginning of the hearing creating a tense atmosphere for the Appellants. I have listened to the entire audio recording of the RPD hearing and I find that the RPD did not breach natural justice.

[13] I find that the RPD set a friendly and professional tone at the beginning of the hearing including through the introductions and other preliminary matters.

[14] The incident causing some tension that the Appellants are referring to took place when the RPD Member identified the relevant issues in the claim. Among the issues raised was the Minister's intervention in the claim. Counsel for the Appellants requested that the Minister's intervention should be dismissed because it was based on mistakes and wrong information.

[15] The Minister had filed a Notice of Intervention by way of documents on October 9, 2019, six days before the RPD hearing.³ The submissions provided by the Minister addressed the issues of the Appellants' credibility and state protection. The Minister included disclosure suggesting that the Adult Associate Appellant had made a previous asylum claim in Australia and had failed to report it. Counsel responded to the Minister's intervention with a 59-page disclosure package including a sworn declaration from the Associate Appellant declaring that he had never visited Australia or made any immigration process before any authority in that country. Also included was his passport. This package was admitted by the RPD into evidence.⁴

[16] Despite Counsel's insistence that the RPD dismiss the Minister's intervention, the RPD Member explained that she could not dismiss the Minister's intervention as it was the Minister's right to intervene in matters before the RPD.

- [17] Counsel persisted stating that the intervention would influence the decision being made by the RPD and that the hearing should be rescheduled. The RPD Member replied stating that the Minister is indeed trying to influence the RPD with submissions and evidence, but the RPD Member is an "objective decision maker" and the "facts will come out in the evidence."⁵ The RPD Member also explained that just because the Minister has provided evidence does not mean that it is persuasive.
- [18] The exchange that took place between Counsel and the RPD Member is approximately 4 minutes in length.
- [19] It is clear from the audio recording that there was frustration with respect to Counsel's reluctance to drop the issue, even though the RPD Member stated at one point that she, "did not care if the Associate Appellant had ever been to Australia or made a protection claim."⁶
- [20] While the exchange between the RPD Member and Counsel may have briefly created a tense atmosphere, I do not find that it resulted in a breach of natural justice as is argued by the Appellants.
- [21] Having reviewed the recording, I find that the RPD Member was trying to move through the preliminary matters. When the RPD Member's frustration grew, she immediately and appropriately stated that she was going to take a break.
- [22] It is not clear from the audio recording how long the break was, however, when the recording resumed the atmosphere in the hearing room was calm. The RPD Member was able to quickly move through the remaining issues and preliminary matters, and the hearing into the merits of the claim was able to begin.
- [23] The Appellants argue that the incident prevented the RPD from being impartial and objective. I do not find that this has been established by the evidence. I agree that the hearing may not have started as smoothly as it could have, however, it is the RPD's responsibility to control the hearing and to keep things moving so that the hearing can conclude within the scheduled time. The record does not show that the RPD Member failed to act in an impartial and objective manner in this case.
- [24] Counsel's concerns with respect to a possible breach of the principle of natural justice were not raised by Counsel during the hearing or during submissions. Having considered the oral evidence before me, I do not find that the principle of natural justice has been breached.
- [25] The determinative issue for the RPD was that the Appellants had failed to rebut the presumption of state protection in Argentina. Counsel was under the belief that the Associate Appellant's credibility was being impugned because of the Minister's false allegation that he made an asylum claim in Australia and failing to declare it. I do not agree that the Associate Appellant's credibility was negatively impacted by the Minister's disclosure with respect to Australia.

[26] The RPD Member informed Counsel during the preliminary portion of the hearing that she was not interested in whether or not the Adult Associate Appellant had been in Australia. In its decision, the RPD deals with the Minister's intervention briefly, stating that the evidence from the Minister has little probity. The RPD concludes that it is more likely than not that the Minister's evidence is an error, and the Adult Associate Appellant never travelled to or made an asylum claim in Australia. The RPD goes on to indicate that no negative inference with respect to the credibility of the Appellants has been made. I find that the RPD was correct in not rescheduling the hearing because of the Minister's intervention and disclosure, as requested by Counsel for the Appellants. I find that the Minister's documents in no way prevented the refugee claim from being examined in a procedurally fair manner.

State Protection is available for the Appellants in Argentina

- [27] The Appellants' argue that the RPD's finding with respect to state protection is based on speculation. They also argue that they should not have to put themselves in danger to demonstrate that protection would not be forthcoming.
- [28] Except in situations where the state is in a state of complete breakdown, states must be presumed capable of protecting their citizens. This presumption can be rebutted by "clear and convincing" evidence of the state's inability to protect.⁷
- [29] In my independent assessment of the evidence, I agree with the RPD that the Appellants have failed to rebut the presumption of state protection. I find that the RPD decision is based on the evidence before it and not on speculation. I concur with the RPD's decision for the same reasons.
- [30] The burden of showing the absence of state protection is on the Appellants.⁸ Appellants are required to approach their state for protection in situations in which protection might be forthcoming. In my review of the objective documents, I find that protection would be reasonably forthcoming for the Appellants in Argentina should they seek it.
- [31] Appellants must show that they have taken all steps reasonable in the circumstances, taking into account the context of the country of origin, the steps taken, and the Appellants' interactions with the authorities.⁹ I agree with the Appellants that they are not required to risk their lives seeking ineffective protection of a state, merely to demonstrate that ineffectiveness.¹⁰ However, I find that the minimal effort made by the Appellants at seeking state protection does not establish that protection is not available to the Appellants in Argentina.
- [32] The Principal Appellant describes having gone to the police twice. In oral testimony she states that the first time she went to the police was XXXX XXXX XXXX 2018, and the second time was a couple of days before leaving Argentina on XXXX XXXX, 2018. Copies of the two police reports were provided to the RPD, and are included in the record before me.¹¹

- [33] The Principal Appellant testified that the police took down the complaint and filed it, but there was no response. She also testified that she did not report her kidnapping to the police and she did not provide the police with the names of those who had threatened her, because she did not know their names.
- [34] I find that the Appellants have not demonstrated that state protection is not available in Argentina given the minimal effort made at seeking protection. They left the country within a couple of weeks of first approaching the police and a couple of days after going to the police a second time. I find that it would be unreasonable to expect that reported threats made by unnamed individuals would result in immediate arrests or convictions.
- [35] The Federal Court has held that a decision to flee the country before police have had an opportunity to respond to and investigate a transgression does not amount to a lack of state protection, and I do not find that the Appellants afforded an opportunity for the authorities to help them given their departure from Argentina almost immediately after going to the authorities.
- [36] There is no evidence before me to suggest that the police were not genuinely trying to help the Appellants, but any efforts by the police were likely hindered by the fact that Appellants left the country shortly after making the reports. There has also been no follow up on the part of the Appellants with respect to any police investigation. I agree with the RPD's finding that the Appellants had unrealistic expectations of police protection against threats from unknown persons.
- [37] No state offers perfect protection, and there will always be instances of persons who were not able to obtain adequate or any protection. The level necessary to show "adequate" state protection is a level where it is more likely than not that the individual will be protected.¹²

Objective Evidence

- [38] The same 2018 Human Rights Report for Argentina is contained within both the March 29, 2019 National Documentation Package (NDP) before the RPD,¹³ and the updated January 31, 2020 NDP before me on appeal.
- [39] Excerpts from this report state that:
- Argentina is a federal constitutional republic. Mauricio Macri was elected president in 2015 in elections generally considered free and fair. Civilian authorities maintained effective control over the security forces. There were no reports that the government or its agents committed arbitrary or unlawful killings.
- [40] Civilian authorities maintained effective control over the federal and provincial police forces, the armed forces, and other federal police authorities including the airport security police, the Gendarmerie, the Coast Guard, and the Bureau of Prisons. The federal police generally have jurisdiction for maintaining law and order in the federal capital and for federal crimes in the provinces. All federal police forces fall under the authority of the

Ministry of Security. Each province, including the city of Buenos Aires, also has its own police force that responds to a provincial (or municipal) security ministry or secretariat.

[41] The federal government can file complaints about alleged abuses with the federal courts, and provincial governments can do the same for provincial security forces. Members of security forces convicted of a crime were subject to stiff penalties. Authorities generally administratively suspended officers accused of wrongdoing until their investigations were completed.¹⁴

[42] Also, in the NDPs is a United Nations report which provides a general framework for the protection and promotion of human rights in Argentina. Excerpts from this report include:

* Politically speaking, the Republic of Argentina has a representative, federal, republican form of government, as laid down in its National Constitution. The system of government is presidential, with power divided among the legislature, the executive and the judiciary. The executive branch is headed by the President of the Nation.

* The judicial power of the nation is exercised by the Supreme Court of Justice and by the other lower courts established by the Congress in the national territory. In no case can the President exercise judicial functions, assume jurisdiction over pending cases or reopen one that has been closed.

* The Public Legal Service is an independent body with functional and financial autonomy, whose function is to promote the administration of justice in defence of the general interests of society, in coordination with the other state authorities. It consists of the Attorney-General of the Nation; the Chief Public Defender of the Nation and such other members as are provided by law.

* The Secretariat for Human Rights, under the authority of the Ministry of Justice and Human Rights, is the competent authority for human rights at national level. The Secretariat includes the following units:

o National Directorate of Legal Affairs in respect of Human Rights, Reparations Policy Directorate, National Directorate of Services to Vulnerable Groups, Dr. Fernando Ulloa Assistance Centre for Victims of Human Rights Violations, Federal Human Rights Council.

* Several programs within the Ministry of Justice and Human Rights are identified. There is also a Victims against Violence programme which provides assistance to victims of abuse or ill-treatment caused by any kind of violence, in a spirit of support, safety and guarantee of rights.

* The Crime Victims Assistance Office is part of the Public Prosecution Service and is responsible for giving legal advice to crime victims about their opportunities for state assistance, particularly for those with limited resources, and advising crime victims with particularly complicated social backgrounds with a view to guiding them through state and non-governmental welfare support mechanisms.

* Kidnappings for Ransom and Human Trafficking Unit provides assistance to prosecution services throughout the country in kidnapping and trafficking cases. The assistance is provided at the request of the prosecutor in the case and under his or her instructions. It also coordinates training tasks and manages a database of kidnappings for ransom and trafficking.¹⁵

[43] Another United Nations Report in the NDP is a joint submission to the United National Human Rights Council. Stakeholder groups indicated that, public security policies pursued in recent years had focused on hiring more police, stepping up random checks of individuals and vehicles, and massive police operations in poor districts.¹⁶

[44] In its decision the RPD found that the relationship between the current government and trade unions has been described as complicated. The Freedom in the World 2018 report states that union influence has decreased in recent years. However, freedom of assembly and association are generally respected, and citizens organize protests to make their voices heard. In 2017, there were numerous reports of abuses of protesters by police at demonstrations in the capital; such incidents were reported at a demonstration marking International Women's Day in March; a protest organized by striking teachers in April, and an anti-austerity protest in December.¹⁷

[45] I find that there is insufficient evidence to support that the police or the government would protect unionists over victims, and given the objective evidence, there were problems reported between the authorities and striking teachers. I find that state protection would be available to a teacher, and her family, who was choosing to teach rather than strike.

CONCLUSION

[46] No government is expected to guarantee perfect protection to all of its citizens at all times, and the fact that a state is not always successful in protecting its citizens, is not enough to justify a claim, especially where a state is in effective control of its territory, has military, police and civil authorities in place and is making serious efforts to protect its citizens. Less than perfect protection is not a basis to determine that a state is either unwilling or unable to offer reasonable protection.

[47] I have reviewed the Appellants' testimony, documentary evidence, arguments, and have undertaken my own analysis to find that the RPD did not err when it found that the Appellants had failed to rebut the presumption of state protection. I therefore find that protection would be reasonably available by the authorities in Argentina should the Appellants seek it.

[48] I dismiss the appeal and confirm the decision of the RPD that the Appellants are neither Convention refugees nor persons in need of protection.

(signed)

"Paula Faber"

Paula Faber

February 25, 2020

2

Date

1 <https://irb-cisr.gc.ca/en/members/Pages/MemComCode.aspx>.

2 Canada (Citizenship and Immigration) v. Huruglica, 2016 FCA 93, at para 103.

3 Exhibit RPD-1, RPD Record, RPD Exhibit 5.

4 Exhibit RPD-1, RPD Record, RPD Exhibit 6.

5 RPD Hearing Audio, 5:30 min.

6 RPD Hearing Audio, 7:46 min.

7 Canada (Attorney General) v. Ward [1993] 2 SCR 689.

8 Segura Cortes v. M.C.I. (F.C., no. IMM-951-06.

9 Peralta, Gloria Del Carmen v. Canada (Minister of Citizenship and Immigration), 2006 FC 1487.

10 Canada (Attorney General) v. Ward [1993] 2 SCR 689.

11 Exhibit RPD-1, RPD Record at p. 249-256, Police Complaint dated June 15, 2018 and June 28, 2918.

12 Sandoval Salamanca v. Canada (Citizenship and Immigration), 2012 FC 780.

13 National Documentation Package (NDP) for Argentina (29 March 2019), Item 2.1; NDP for Argentina (31 January 2020), Item 2.1.

14 NDP for Argentina (29 March 2019), Item 2.1; NDP for Argentina (31 January 2020), Item 2.1.

15 NDP for Argentina (29 March 2019) (31 January 2020), Item 1.4.

16 NDP for Argentina (29 March 2019) (31 January 2020), Item 2.7.

17 NDP for Argentina (29 March 2019) (31 January 2020), Item 2.4.

RAD File / Dossier de la SAR : VB9-09209 / VB9-09210

VB9-09211 / VB9-09212 / VB9-09213

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2

Immigration and Refugee

Board of Canada

Refugee Appeal Division

Commission de l'immigration

et du statut de réfugié du Canada

Section d'appel des réfugiés

RAD.25.02 (January, 2020)

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