

LEARNING TOOL

DON QUIXOTE

Date: 20151228

Docket: IMM-DC-2015

Citation: 2015 FC XXXX

Ottawa, Ontario, December 28, 2015

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

**DON QUIXOTE
AND
SANCHO PANZA**

Applicants

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

JUDGMENT AND REASONS

**(Learning tool developed in close cooperation
with Sara Pedroso, law clerk, 2014-15)**

I. For Discovery

The Impossible Dream

To dream the impossible
dream
To fight the unbeatable foe
To bear with unbearable

La quête

Rêver un impossible rêve
Porter le chagrin des départs
Brûler d'une possible fièvre

sorrow	Partir où personne ne part
To run where the brave dare not go	Aimer jusqu'à la déchirure Aimer, même trop, même mal,
To right the unrightable wrong	Tenter, sans force et sans
To love pure and chaste from afar	armure, D'atteindre l'inaccessible
To try when your arms are too weary	étoile
To reach the unreachable star	Telle est ma quête, Suivre l'étoile
This is my quest	Peu m'importent mes chances
To follow that star	Peu m'importe le temps
No matter how hopeless	Ou ma désespérance
No matter how far	
To reach the unreachable star	Et puis lutter toujours Sans questions ni repos
To fight for the right	Se damner
Without question or pause	Pour l'or d'un mot d'amour
To be willing to march into Hell	Je ne sais si je serai ce héros
For a heavenly cause	Mais mon cœur serait tranquille
And I know if I'll only be true	Et les villes s'éclabousseraient
To this glorious quest	de bleu
That my heart will lie peaceful and calm	Parce qu'un malheureux
When I'm laid to my rest	Brûle encore, bien qu'ayant tout brûlé
And the world will be better for this	Brûle encore, même trop, même mal
That one man, scorned and covered with scars	Pour atteindre à s'en écarteler
Still strove with his last ounce of courage	Pour atteindre l'inaccessible étoile

II. Introduction

[1] The aim of this text is to imagine an approach that could be deployed by the Federal Court, tasked with a judicial review of the refugee claims of two heroes, whose courage and sincere bravery continue to inspire dreamers the world over.

[2] The Court's exceptional mandate is to decide the claim of Don Quixote de La Mancha and his faithful squire, Sancho Panza, who are contesting a decision wherein the Refugee Protection Division (RPD) of the Immigration and Refugee Board of Canada (IRB) rejected their refugee protection claim under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[3] The application is made under subsection 72(1) of the IRPA, which provides for the possibility of application for judicial review for any decisions made under this Act by filing an application for leave beforehand with the Federal Court. It should be noted that the powers of the Federal Court are defined in subsection 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

III. Context

[4] Each application for judicial review begins with a story. The account highlighting the facts in our case comes from an *hidalgo*, a dreamer and an idealist, and from his faithful companion.

[5] Like many of their contemporaries who were subject to the Kingdom's iron hand, the refugee protection claimants were forced to flee their native land. Born in a climate of intolerance and persecution, times were tough for dreamers.

[6] Therefore, on the basis of persecution for their political opinions, the applicants are claiming refugee status in Canada under section 96 of the IRPA. Their reasonable apprehension

on these grounds forms the basis of their claim. The applicants also argue that they fall under section 97 of this Act, as a “person in need of protection.”

[7] The record and the evidence show that the applicants are filled with a deep sense of duty, inherent to their very existence, to see justice done at all costs. This thirst for justice, the desire to give a voice to those without voices, burns within them like an eternal flame.

[8] Before examining the merits of the claim, it is important to explore the factual and procedural background that led to this application for judicial review.

IV. Facts

[9] The principal applicant in this case, Don Quixote de La Mancha, is from a small village in La Mancha, Villa Esperanza. Sancho Panza, who is Don Quixote’s neighbour, is described as a naive peasant and a “good man.” The respective applicants are nearing the age of fifty (Certified Tribunal Record, at pages 224 and 421).

[10] One morning, before the dawning of the day (which was one of the hottest of the month of July), Don Quixote decided that it had become necessary “to make a knight-errant of himself, roaming the world over . . . and putting in practice himself all that he had read of as being the usual practices of knights-errant; righting every kind of wrong” (Certified Tribunal Record, at page 19; *Don Quixote de La Mancha*, Volume 1, Chapter 1, First published in 1605, Translation by John Ormsby.

[11] Shortly thereafter, Don Quixote, self-declared hero, met Sancho Panza, who agreed to accompany him in his quest. At the hearing, Sancho Panza described the principal applicant's daring determination in these words:

He did not care to put off any longer the execution of his design, urged on to it by the thought of all the world was losing by his delay, seeing what wrongs he intended to right, grievances to redress, injustices to repair, abuses to remove, and duties to discharge.

(Record of proceedings, Tribunal Record, at page 643;
Don Quixote de La Mancha, Volume I, Chapter II, First published in 1605, Translation by John Ormsby.

[12] The moment of departure, which coincided with Don Quixote's realization of his ultimate goal of seeking adventure to enact justice, is described by Don Quixote's uncle in his affidavit submitted in evidence before the RPD.

Over conceits of this sort the poor gentleman lost his wits, and used to lie awake striving to understand them and worm the meaning out of them; what Aristotle himself could not have made out or extracted had he come to life again for that special purpose.

...

In short, his wits being quite gone, he hit upon the strangest notion that ever madman in this world hit upon, and that was that he fancied it was right and requisite, as well for the support of his own honour as for the service of his country, that he should make a knight-errant of himself, roaming the world over in full armour and on horseback in quest of adventures, and putting in practice himself all that he had read of as being the usual practices of knights-errant; righting every kind of wrong, and exposing himself to peril and danger from which, in the issue, he was to reap eternal renown and fame.

(Affidavit of Don Quixote's uncle, Tribunal Record, at page 242;
Don Quixote de La Mancha, Volume I, Chapter II, First published in 1605, Translation by John Ormsby.

[13] The day after this revelation, Don Quixote and Sancho Panza took to the road with their equestrian companion, Rocinante.

[14] Following the roads of old, the applicants met a variety of persons and easily forged friendships thanks to their pure and, at times, naive, personalities. Through these encounters, the applicants heard many tales of repression, censorship, torture, imprisonment and other means of oppression used by the Kingdom to punish acts deviating from the dominant strict religious ideology. The applicants faced injustice themselves, and were accused of heresy due to their refusal to submit to an indoctrination that conflicted with their beliefs.

[15] Realizing the danger they faced as an errant duo enacting peace and justice, the applicants fled the Kingdom in order to claim refugee protection in Canada upon their arrival at the Montreal airport.

[16] Several weeks later, a hearing was held before the RPD, during which the applicants had the chance to orally express the basis of their fear of persecution. The applicants were represented at the hearing by their attorney, the celebrated poet, novelist and playwright, Miguel de Cervantes Saavedra.

[17] In its decision, the RPD rejected the refugee claim on the grounds that they had not demonstrated that they were covered by section 96 of the IRPA.

[18] After granting the applicants' application for leave and judicial review, the Court had the privilege of hearing the eloquent submission from Mr. Cervantes.

V. Issues in Dispute

[19] The issues highlighted in this application for judicial review are as follows:

- i. Did the RPD commit an unreasonable error in concluding that the applicants are not covered by section 96 of the IRPA, particularly in its analysis of the grounds of political opinion?
- ii. Did the RPD err in its analysis of state protection?

VI. Statutory Provisions

[20] The provisions for determining refugee status are set out in sections 96 and 97 of the IRPA.

Convention refugee

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 opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

Définition de « réfugié »

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 appartenance à un groupe social ou de ses opinions politiques :

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.

Person in need of protection

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

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(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,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused

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.

Personne à protéger

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) 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) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(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) 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) la menace ou le risque

by the inability of that country to provide adequate health or medical care.	ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.
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(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.
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VII. Standard of Review

[21] Unlike an appeal, a judicial review of a decision requires that a reviewing or appellate court exercise deference regarding the decision process of a lower court (*Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, at paragraph 15 [*Newfoundland Nurses*]; *Dunsmuir v. New Brunswick*, 2008 SCC 9, at paragraph 48 [*Dunsmuir*]). In other words, the Court's role is not to replace the RPD's reasoning (*Newfoundland Nurses*, above, at paragraph 15).

[22] One of the two standards can be applied to a judicial review of a decision: the standard of reasonableness, which requires a higher degree of deference, and the standard of correctness.

[23] The RPD's conclusions relating to the reason for persecution under section 96 of the IRPA raise mixed questions of fact and law, which falls under the RPD's expertise. Thus, case law provides that the applicable standard of review is reasonableness. This same standard applies to determinations of the RPD relating to state protection (*Dunsmuir*, above, at paragraphs 47 and 53; *Ruszo v. Canada (Citizenship and Immigration)*, 2013 FC 1004, at paragraph 22).

[24] The case law establishes that the RPD is not obliged to reach an explicit conclusion in each part of its reasoning; it is sufficient that the reasons “allow the reviewing court to understand why the panel made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes” (*Newfoundland Nurses*, above, at paragraph 16). Furthermore, the judicial review of the decision under review must be carried out on the basis of the evidence presented before the RPD (*Runchey v. Canada (Attorney General)*, 2013 FCA 16, at paragraph 31).

[25] In view of these principles, the Court can only intervene if the RPD’s reasons do not, on the one hand, show the existence of justification, transparency and intelligibility and, on the other, do not fall within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at paragraph 47; *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339, at paragraphs 59 and 72; *Hinzman v. Canada (Minister of Citizenship and Immigration)*, [2007] F.C.J. No. 584, at paragraphs 38 [*Hinzman*]).

VIII. Decision under Judicial Review

[26] With regard to its reasons, the RPD first concluded that the applicants’ testimony is credible. The RPD determined that the applicants testified in a consistent manner and that their account was true to their statements found in the record.

[27] However, the RPD determined that the applicants did not establish that they were exposed to a serious possibility of persecution for one of the reasons specified in section 96 of the IRPA. More specifically, the RPD concluded that the applicants did not demonstrate that the

applicants' adherence to the ideal of justice constitutes a "political opinion" and that they would face persecution for this reason. The RPD argued that the applicants never clearly and openly expressed their political opinions and therefore could not criticize the Kingdom for persecuting them on these grounds.

[28] Lastly, the RPD concluded that the applicants did not discharge the burden of disproving through clear and convincing evidence the presumption that the Kingdom is able to offer the applicants adequate protection (RPD decision, at paragraphs 32-44).

IX. Analysis

A. *Persecution for Political Opinion*

[29] According to the Canadian legislative scheme with regard to determining refugee status, "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 opinion," (IRPA, section 96).

[30] This wording is drawn from the *1951 Convention Relating to the Status of Refugees*, July 28, 1951, [1969] RT Can. 6, which is the key document governing the legal status of refugees globally.

[31] As a first point of debate, the applicants criticized the RPD for applying an analysis of their political opinions that was too restrictive and psychopathological. By failing to recognize

the applicants' political opinions in the eyes of their persecutors and in light of the context, the applicants claim that the RPD committed an unreasonable error, thereby justifying the intervention of the Court.

[32] In its reasoning, the RPD concluded that the principal applicant suffers from the "errant-knight disease" which, according to the RPD, cannot be recognized as a real "political opinion" for the purposes of analysis under section 96 of the IRPA.

[33] The Supreme Court of Canada stated in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 [*Ward*] that, for analysis under section 96 of the IRPA, it is not necessary for the political opinions in question to be expressed outright by the applicants. The case law recognizes that refugee protection claimants are not always able to openly express their beliefs. As Justice La Forest stated in the *Ward* judgment:

Often the claimant is not even given the opportunity to articulate his or her beliefs; often they are imputed to the claimant from his or her actions. The political opinion ascribed to the claimant and for which he or she fears persecution need not necessarily conform to the claimant's true beliefs. The examination of the circumstances should be approached from the perspective of the persecutor, since that is the perspective that is determinative in inciting the persecution. Similar considerations apply to other bases of persecution.

(*Ward*, above, at paragraph 82)

[34] In addition, the political opinions ascribed by an agent of persecution do not have to be fully consistent with the applicants' deep convictions (*Ward*, above, at paragraph 82). It follows that the opinions and actions of the applicants, for which they allege a reasonable fear of persecution, must be examined in light of the circumstances in which they are expressed. The

RPD's mandate in this context is to examine the specific facts in each case in the light of the objective documentary evidence available concerning the state or, in this case, the Kingdom, in question.

[35] The *Handbook on Procedures and Criteria for Determining Refugee Status* by the United Nations High Commissioner for Refugees (UNHCR Handbook), which establishes the interpretive guidelines for examining refugee status claims, states, for example, that:

The political opinions of a teacher or writer may be more manifest than those of a person in a less exposed position. The relative importance or tenacity of the applicant's opinions – in so far as this can be established from all the circumstances of the case – will also be relevant.

(UNHCR Handbook, at paragraph 80)

[36] Furthermore, according to case law, political opinion "is not confined to partisan opinion or membership in parties and movements and does not refer exclusively to national, political or municipal state politics" (*Marino Gonzalez v. Canada (Citizenship and Immigration)*, 2011 FC 389, at paragraph 59).

[37] The principles set out in the UNHCR Handbook provide additional interpretive guidelines in this matter:

81. While the definition speaks of persecution "for reasons of political opinion" it may not always be possible to establish a causal link between the opinion expressed and the related measures suffered or feared by the applicant. Such measures have only rarely been based expressly on "opinion". More frequently, such measures take the form of sanctions for alleged criminal acts against the ruling power. It will, therefore, be necessary to establish the applicant's political opinion, which is at the root of

his behaviour, and the fact that it has led or may lead to the persecution that he claims to fear.

82. As indicated above, persecution “for reasons of political opinion” implies that an applicant holds an opinion that either has been expressed or has come to the attention of the authorities. There may, however, also be situations in which the applicant has not given any expression to his opinions. Due to the strength of his convictions, however, it may be reasonable to assume that his opinions will sooner or later find expression and that the applicant will, as a result, come into conflict with the authorities. Where this can reasonably be assumed, the applicant can be considered to have fear of persecution for reasons of political opinion.

[38] In certain cases, the appearance of neutrality or the refusal to adhere to an ideology can constitute an opinion in itself, which can be interpreted as opposition or a deliberate choice to rally around a cause, which then takes on a very political meaning. It is unnecessary for the political opinion imputed to conform to the claimant’s true beliefs (*Ward*, above, at page 747).

[39] Just as every piece of music requires spaces between the notes to exist, sometimes silence can be worth a thousand words.

[40] First, in view of the established principles, the Court finds that it is unreasonable for the RPD to conclude that the applicants’ political ideals cannot constitute political opinions simply because they have not been clearly expressed, because they sound like madness or are not part of an established partisan movement.

[41] The certified record shows that the beliefs of Don Quixote and Sancho Panza are as inherent and essential to them as the air they breathe. For example, in his Personal Information Form (PIF), the principal applicant presents himself as an undoer of injustices: “I, Don Quixote,

undoer of wrongs and injustices. I want to revive knight-errantry” (Applicant’s PIF, Tribunal Record, at page 124).

[42] Dulcinea, the lady love of Don Quixote, describes the humanism of the principal applicant:

He wanted nothing from me. It was the first time that I was truly seen as a human being. Where others see difference and distinctions, Don Quixote sees a common denominator within each human being. For Don Quixote, the loveless knight-errant is like a tree without leaves and fruit, a body without a soul.

(Affidavit of Dulcinea, Certified Tribunal Record, at page 212)

[43] The evidence shows that the applicant is obsessed by the promise of a fair and equitable world, and that he is driven by a passion for life which, for him, is a never-ending adventure. The applicants’ submission at the hearing before the RPD allows for a better understanding of their aspirations of peace and justice, which are in opposition to those of the Kingdom:

Don Quixote:

Hear me now
 Oh thou bleak and unbearable
 world,
 Thou art base and debauched
 as can be;
 And a knight with his banners
 all bravely unfurled
 Now hurls down his gauntlet to
 thee!
 I am I, Don Quixote,
 The Lord of La Mancha,
 My destiny calls and I go,
 And the wild winds of fortune
 Will carry me onward,
 Oh whithersoever they blow.
 Whithersoever they blow,

Don Quichotte :

Pauvre monde, insupportable
 monde
 C’en est trop, tu es tombé trop
 bas
 Tu es trop gris, tu es trop laid
 Abominable monde,
 écoute-moi
 Un chevalier te défie.
 Oui c’est moi, Don Quichotte
 Seigneur de la Mancha
 Pour toujours au servic’ de
 l’honneur
 Car j’ai l’honneur d’être moi
 Don Quichotte sans peur
 Et le vent de l’histor’ chante
 en moi
 D’ailleurs qu’importe l’histoire

Onward to glory I go!

Pourvu qu'elle mène à la gloire.

Sancho Panza:

I'm Sancho! Yes, I'm Sancho!
I'll follow my master till the end.
I'll tell all the world proudly
I'm his squire! I'm his friend!

Sancho Panza :

Et moi je suis Sancho
Sancho, Sancho
Son valet, son fils. son frère
Sancho, son seul amigo
Son seul suivant mais pour toujours
Et j'en suis fier.

Don Quixote:

Hear me, heathens and wizards
And serpents of sin!
All your dastardly doings are past,
For a holy endeavor is now to begin
And virtue shall triumph at last!

Don Quichotte :

Regardez-moi
Vous les dragons, les sorciers,
les sorcières
Votre règne se meurt
aujourd'hui
Regardez-moi
La vertu flambe dans ma bannière
Regardez-moi
Un chevalier vous défie.

(Record of proceedings before the RPD, Certified Tribunal Record, at page 454; Musical comedy *Man of La Mancha*, Joe Darion/Mitch Leigh (1965))

[44] A letter in the Tribunal Record, written by Don Quixote to Dulcinea, who remains central to the applicants' claims, was not considered by the RPD. The Court considers it appropriate to reproduce an excerpt below:

My goal is to light the way with starlight and moonlight, which will help my brothers and sisters leave the darkness in which we have lived for centuries, to pluck the rod from the hand of the oppressor so that we may, together, arrive at our destination at dawn with the emergence of the sun.

I will never accept injustice, corruption, tyranny or hatred. I will defend unto my death justice, truth, transparency, honesty,

trustworthiness and democracy, and I will encourage the women and men who will kindle the future and spread love.

(Letter to Dulcinea, Certified Tribunal Record, at page 321)

[45] For his part, during the hearing, Sancho Panza declared that he was ready to die to defend the ideas of justice he learned through his noble companion:

I like him, I really like him. Don't ask me for why or wherefore. I'll yell to the sky, I like him, I like him! Though I can't tell you why, I really like him.

(Record of proceedings before the RPD, Certified Tribunal Record, at page 445; Musical comedy *Man of La Mancha*, Joe Darion/Mitch Leigh (1965))

[46] Through their adventures on the roads of long ago, the applicants strengthened their political ideals, and shared them, directly or indirectly, with those who crossed their path. The values and principles reflect a life philosophy, a dialectic between reason and passion. According to the expert report submitted to the RPD by the applicants as evidence, "just like Socrates sought the truth through an examination of conscience, the applicants were looking for the truth through their quest, which took them on a long and arduous journey" (Expert report, Tribunal Record, at page 231).

[47] The idealist opinions of the applicants, who aspire to peace through their perpetual quest for justice, must then be considered in their historical and political context. The evidence on file shows that the applicants lived at the time of the Inquisition, which created an environment of terror and censorship. Those refusing to adhere to the dominant ideology were often accused of blasphemy, apostasy or witchcraft, which put them at risk of torture and death. Public burnings

mandated by the Kingdom were common and well-documented in the evidence (File on country conditions, Certified Tribunal Record, at pages 452-789).

[48] The evidence also shows that the Kingdom considered those who did not adhere to the dominant faith to be *heretics* because of their actions, their comments or their social status (File on country conditions, Certified Tribunal Record, at pages 799-893). Furthermore, these accusations gradually increased during the applicants' lifetime, which coincided with the Kingdom becoming a world power (Archival documents, Certified Tribunal Record, at page 421).

[49] The Court finds the RPD's analysis regarding the reason for persecution due to political opinion to be unreasonable. The RPD not only failed to analyze the political ideals imputed to the applicants from the perspective of the agents of persecution, it also failed in its analysis to consider pieces of evidence that are fundamental to the applicants' claim, making it possible to shed light on the content of their political opinion and the associated risk.

B. *State Protection*

[50] The legislative and case-law scheme that applies to refugees aims to respond to the failure of the state to protect its citizens (*Zhuravlev v. Canada (Minister of Citizenship and Immigration)*, [2000] 4 FCR 3, at paragraph 24).

[51] To obtain refugee status from the IRB, applicants must "first satisfy the court that they sought, but were unable to obtain, protection from their home state, or alternatively, that their

home state, on an objective basis, could not be expected to provide protection” (*Hinzman*, above, at paragraph 37). This statement stems from the accepted principle in international and Canadian law, wherein refugee status is only granted as a form of surrogate protection in the absence of state protection (*Ward*, above, at page 709; *Hinzman*, above, at paragraph 41).

[52] The applicants criticize the RPD for erring in its conclusion that the applicants did not demonstrate the Kingdom’s inability to provide them with state protection.

[53] There is a general presumption of the existence of state protection, except in the case of a complete breakdown of state apparatus (*Ward*, above, at page 709; *Celaj v. Canada (Citizenship and Immigration)*, 2014 FC 761, at paragraph 25). To rebut this presumption, the applicants must demonstrate clearly and convincingly that the state was unable to ensure their protection (*Ward*, above, at page 724; *Hinzman*, above, at paragraph 44; *Canada (Minister of Citizenship and Immigration) v. Flores Carrillo*, [2008] 4 FCR 636, at paragraph 30). Even though government protection is not perfect, some protection must exist (*Chagoya v. Canada (Minister of Citizenship and Immigration)*, [2008] F.C.J. No. 908, at paragraph 5 [*Chagoya*]).

[54] Moreover, the burden of proof that rests on the claimants is directly proportional to the level of democracy in the state in question: “The more democratic the state’s institutions, the more the claimant must have done to exhaust all the courses of action open to him or her” (*Marquez Alvarez v. Canada (Citizenship and Immigration)*, 2010 FC 197, at paragraph 20).

[55] It should be noted that even the existence of agents of persecution within a state, as is the case here, does not in itself make it possible to rebut the presumption of the state's ability to ensure the protection of its citizens (*Zepeda v. Canada (Minister of Citizenship and Immigration)*, [2009] 1 FCR 237, at paragraph 14). However, when representatives of the state are themselves the source of the persecution, the presumption of state protection may be rebutted without it being necessary to exhaust all possible courses of action in the country (*Chaves v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 232, at paragraph 15).

[56] To assess the existence of state protection, the RPD must consider not only the effective protective ability of the state, but also its willingness to act. Justice Luc Martineau noted this in *Chagoya*, above:

[6] Assessing whether a state is capable of, and willing to, provide protection to its nationals is not an abstract exercise. The Board must examine the personal situation of each refugee claimant in a practical manner. Its findings in this regard must be evident from reading the decision and must be supported by the evidence in the record. On this point, in *Avila v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 359, [2006] F.C.J. No. 439 (QL) (*Avila*), I myself noted at paragraph 27:

In order to determine whether a refugee protection claimant has discharged his burden of proof, the Board must undertake a proper analysis of the situation in the country and the particular reasons why the protection claimant submits that he is "unable or, because of that risk, unwilling to avail [himself] of the protection" of his country of nationality or habitual residence (paragraphs 96(a) and (b) and subparagraph 97(1)(b)(i) of the Act). The Board must consider not only whether the state is actually capable of providing protection but also whether it is willing to act. In this regard, the legislation and procedures which the applicant may use to obtain state protection may reflect the will of the state. However, they do not suffice in themselves to establish the reality of protection

unless they are given effect in practice: see *Molnar v. Canada (Minister of Citizenship and Immigration)*, 2002 FCTD 1081, [2003] 2 F.C. 339 (F.C.T.D.); *Mohacsi v. Canada (Minister of Citizenship and Immigration)*, 2003 FCTD 429, [2003] 4 F.C. 771 (F.C.T.D.).

[57] To begin with, the RPD criticizes the applicants for not attempting to exhaust all courses of action to obtain the protection of the Kingdom.

[58] Case law has established that refugee claimants are not expected to be courageous or foolhardy in seeking state protection (*Shimokawa v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 555, at paragraph 21). This line of authority recognizes that it is not reasonable to require refugee claimants to put their lives or the lives of their families in danger in order to seek state protection (*Chagoya*, above, at paragraph 5).

[59] As evidence, the applicants submitted numerous documents explaining the danger they allegedly face, including a letter dated January 1583 and addressed to a member of the royal family, which confirms the persecutory practices of the Kingdom (Letter dated 1583, Certified Tribunal Record, at page 676). The evidence demonstrates that the reluctance of applicants to ask for state protection cannot be considered “subjective reluctance,” which would have been insufficient, in itself, to rebut state presumption (*Kim v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 1381, at paragraph 10).

[60] The applicants then argued that the RPD erred in ignoring the documentary evidence showing that they lived in an era when the Kingdom was undergoing a full social transformation, where the Kingdom's intolerance toward all threats, real or perceived, was intensifying.

[61] The Court finds that the RPD committed an error in adopting a "systemic" approach with regard to the protection offered to citizens of the Kingdom, by concluding generally that state protection existed (*Avila v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 439, at paragraph 30). The documentary evidence shows the total absence of institutions able to provide avenues of redress for the applicants, as well as the lack of democracy. These documents, which are central to the applicants' claim, were not considered by the RPD in its analysis.

[62] There is the presumption that the RPD considered all of the evidence at its disposal. However, it has been established that the more significant the evidence that is not mentioned or heard by the RPD, the more willing the Court will be to infer from this silence that the RPD came to a conclusion without regard to the evidence at its disposal (*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1425, at paragraph 17 [*Cepeda-Gutierrez*]).

[63] In this case, the Court finds that the RPD's decision was unreasonable in consideration of the existence of state protection, especially in light of the fact that the Kingdom is not a democratic state. Furthermore, the failure of the RPD to consider key pieces of documentary evidence concerning the capacity and willingness of the Kingdom to offer such protection

constitutes an unreasonable error, which justifies the intervention of the Court (*Cepeda-Gutierrez*, above).

X. Conclusion

[64] In view of the above analysis, the Court allows the applicants' application for judicial review. Consequently, the case will be referred back to the RPD for reconsideration by a different panel.

[65] The applicants' quest, which seeks to model reality to their ideal of justice, has been echoed over generations and in the homes of anyone who dreams of a just world in which there would be peace and compassion. In closing, the Court considers it appropriate to restate the submission from Mr. Cervantes, which offers an understanding of the applicants' claim:

Is pursuing a dream and working toward a better world not a political opinion? For my client, Don Quixote, making a better world possible for future generations is a true fixation, an obsession. His life is devoted to transforming his society so that it reflects ideals of justice, peace, mutual understanding and a celebration of life. Don Quixote dreams of a world that would allow its citizens to develop fully, and to forever set aside hatred, violence and war.

Neither corruption, bitterness, hatred nor tyranny will discourage Don Quixote and Sancho Panza in pursuing their reason for being, the leitmotiv of their existence, which is the struggle for everyone's greater happiness, so that each person may live fully and achieve their full potential, the full development of every talent, the education of all children, in order to cultivate the happiness of human beings within them.

Don Quixote has often stated that he does not care whether he is given eight reals in small change or a piece of eight. The important thing is to see what unites us all and to celebrate differences as our heritage and wealth.

For my client, Don Quixote, the current political conditions are apparent in the grand illusion and blindness due to a tyrannical minority, rather than a collective dream dreamt by the majority.

As Father Dominique Pire told us in his work *Bâtir la Paix* (1966), disarming the hand is not possible “without disarming the spirit and the heart.”

Your Honour, with regard to my client, Don Quixote, have you begun to disarm your heart and spirit? The RPD has suggested in its reasons that my client is crazy because he is a dreamer and an idealist. Would you characterize Joan of Arc as crazy? Was Gandhi crazy? Was Martin Luther King crazy? And Nelson Mandela? Were not Aleksandr Solzhenitsyn, Sophie Scholl and Anne Frank all crazy? And Franz Kafka? Dietrich Bonhoeffer and Janusz Korczak? Were they not all struck with an illness, an illness of resistance to oppression, of becoming the voice of justice through their political opinion, anchored by morality and a desire for a better world?

An idea that is in the minority is no less true simply because it is not seen as credible by the majority. Only the course of history will make it possible to demonstrate that it is these individuals, who have fought for peace, who have resisted accusations of insanity from authorities, their persecutors and even their allies, and who have persevered and risked their lives, who prove that justice will triumph.

Gandhi and Martin Luther King may have been assassinated, but not their ideas. Their ideas resonate through the dreams and aspirations of the majority wishing for a better world.

Your Honour, must I remind you of the lullabies that our mothers and grandmothers sang to us when we were children, planting a seed in springtime to be harvested throughout our years and into the autumn of our lives.

Like every refugee protection claimant, Don Quixote and Sancho Panza are not mere case numbers. They do not count the human beings around them because, for them, each human being counts. Contrary to the tyrants who seek to conquer lands and riches, the applicants seek to conquer hearts.

Your Honour, for you, does the life of this human being, with all of its hopes, fears, suffering, pains, loves and hopes, joys and fulfilments, not represent the basis of political opinion, fertile ground for the human soul to flourish?

(Record of proceedings before the Court, at page 341)

JUDGMENT

THE COURT ORDERS that this application for judicial review be allowed and that the case be referred back for reconsideration by a different panel. There is no question of importance to certify.

“Michel M.J. Shore”

Judge