Federal Court  Cour fédérale

Date: 20211223

Dockets: IMM-6245-20
IMM-6246-20

Citation: 2021 FC 1467

Ottawa, Ontario, December 23, 2021

PRESENT: The Honourable Madam Justice Walker

Docket: IMM-6245-20

BETWEEN:

ALIAH CONTRERAS LUEVANO, aka
LUIS ALBERTO CONTRERAS LUEVANO,
BELEN ALICIA HINOJOS DURAN,
LUIS ALBERTO CONTRERAS HINOJOS,
AND LIAM CONTRERAS

Applicants

and

MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

Docket: IMM-6246-20

AND BETWEEN:

ALIAH CONTRERAS LUEVANO, aka
LUIS ALBERTO CONTRERAS LUEVANO

Applicant

and

MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This judgment addresses two applications for judicial review by a family who fear returning to Mexico: the parents and one son are citizens of Mexico, a second son is a citizen of the United States and the youngest son is a citizen of Canada. The Principal Applicant, Aliah Luevano, seeks the Court's review of a negative pre-removal risk assessment (PRRA Decision) and the Applicants (all family members except the youngest son) request a review of the refusal of their application for permanent residence based on humanitarian and compassionate (H&C) grounds (H&C Decision). I refer to the PRRA and H&C Decisions collectively in this judgment as the Decisions. The Decisions are dated October 30, 2020 and were made by the same senior immigration officer pursuant to section 112 and subsection 25(1), respectively, of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA).

[2] For ease of reference, the applications and my references to the underlying Decisions are:

1. IMM-6245-20: the H&C Decision; and
2. IMM-6246-20: the Principal Applicant's PRRA Decision.

[3] On April 13, 2021, Justice Fothergill ordered that the Applicants' requests for judicial review be heard together on July 12, 2021 and the hearing was assigned to me. I address both applications in this judgment and a copy of my judgment will be placed on the Court file for each application.

[4] For the reasons that follow, neither the PRRA Decision nor the H&C Decision meet the standards required of a reasonable decision. The Decisions each lack justification for material

negative inferences and conclusions drawn by the officer, and the applications for judicial review of the two Decisions will be allowed.

I. Context

[5] The Applicants arrived in Canada in 2017 and claimed refugee protection. They alleged risk of death and serious harm in Mexico due to extortion and threats directed towards the Principal Applicant following a brief period of coerced employment by La Linea, a criminal faction of the Juarez cartel.

[6] The Principal Applicant is a transgender woman who uses the pronouns she/her and they/them. She has been undergoing a gender transition through hormone therapy since arriving in Canada. The Principal Applicant did not live openly as transgender in Mexico but was subjected to violence and harassment for being too “feminine”.

[7] The Principal Applicant entered the United States illegally with her mother when she was seven years old. At the age of 22, she was deported back to Mexico where she lived with her family for a number of years without incident. In 2015, the Principal Applicant reluctantly agreed to sell her truck to a man she subsequently learned was linked to La Linea. The sale terms included a monetary payment and a municipal maintenance job. When the Principal Applicant later refused to work as a hitman for the cartel, the man began to threaten and harass her. In early 2016, other men from La Linea began recruiting her for a number of jobs, including the transportation of drugs to the U.S. The Principal Applicant refused and, following additional threats and intimidation, she and her family moved within Mexico to Cancún and elsewhere to

escape La Linea but to no avail. After a house in which the Principal Applicant was renting an apartment was set on fire, she fled Mexico and entered Canada on June 16, 2017. The Principal Applicant's family followed shortly thereafter from the U.S. where they had earlier sought refuge.

[8] In October 2018, the Refugee Protection Division (RPD) concluded that the Principal Applicant was excluded from refugee protection under Article 1F(b) of the *United Nations Convention Relating to the Status of Refugees* (Convention) and section 98 of the IRPA for committing serious non-political crimes in the U.S. based on criminal charges that included attempted murder. Although the charges were eventually dismissed, the RPD found that the Principal Applicant's testimony denying the attempted murder charge was not credible and that it contradicted police reports in the record. The RPD also rejected the refugee claims of the other Applicants.

[9] The Applicants' appeal of the RPD decision was dismissed by the Refugee Appeal Division (RAD) on April 17, 2019 and their application to the Court for judicial review of the RAD decision was dismissed at leave.

[10] On October 4, 2019, the Principal Applicant submitted a PRRA application based on risk to her life and of cruel and unusual treatment or punishment in Mexico from La Linea.

[11] In November 2019, the Applicants submitted their H&C application based on their establishment in Canada, the best interests of the children (BIOC) and adverse country conditions in Mexico.

[12] Upon receipt of the negative PRRA and H&C Decisions, the Applicants filed the present applications for judicial review on December 1, 2020.

II. Analysis

1. *Standard of Review of the Decisions*

[13] The Applicants argue that the officer's analysis in each of the Decisions was flawed and that the Decisions must be set aside. Their arguments challenge the merits of the Decisions and the standard of review is that of reasonableness (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 10, 23 (*Vavilov*); *Senay v Canada (Citizenship and Immigration)*, 2021 FC 200 at para 12).

2. *The PRRA Decision*

[14] The Principal Applicant is a person described in paragraph 112(3)(c) of the IRPA because she was refused refugee protection on the basis of Article 1F of the Convention. As such, her PRRA application was reviewed based on the factors set out for persons in need of protection in section 97 of the IRPA. The officer acknowledged that the Principal Applicant's risk allegations were not assessed by the RPD and considered all of the evidence submitted in respect of those allegations.

[15] The officer's negative PRRA Decision rests on two findings: (1) the Principal Applicant provided insufficient evidence to establish a forward looking risk due to the absence of corroborative evidence of the threats and intimidation she endured at the hands of La Linea members; and (2) the Principal Applicant did not present clear and convincing evidence to rebut the presumption of state protection in Mexico had the risk to her been established.

(a) Corroborative evidence

[16] The Principal Applicant submits that the officer considered her PRRA application on the erroneous premise that corroboration of her first-hand narrative was required. She states that the officer set out a list of documents that could have been provided but did not explain why corroboration was required.

[17] I agree with the Principal Applicant. The officer failed to explain why the evidence before them was not sufficient to establish the events underlying the PRRA application without corroborative evidence. As a result, I find that the officer's reasoning and conclusions regarding insufficiency of evidence are not justified. The Respondent's argument that the officer was merely noting obvious evidentiary shortfalls in the Principal Applicant's application is not persuasive in light of the recent jurisprudence of this Court.

[18] The officer acknowledged that the Principal Applicant filed her RPD and RAD files, excerpts from Mexican police reports and files, and country condition documentation but stated that she did not provide specific evidence in support of her written narrative. The officer found that the nature and quality of the evidence before them was insufficient to discharge the Principal

Applicant's burden of proof. The officer noted the absence of additional evidence regarding the transport of the Principal Applicant's truck from the U.S. to Mexico, the sale of her truck, her complaint to the city arbitrator for unpaid wages, and the transmission of threatening messages in 2016. The officer also noted that the PRRA application did not include written statements from family members or evidence connecting the incidents in Cancún or the arson that ultimately led to her departure from Mexico to La Linea.

[19] My colleague, Justice Grammond, recently reviewed the general principles relating to the requirement for corroboration in immigration and refugee cases in *Senadheerage v Canada (Citizenship and Immigration)*, 2020 FC 968. A decision-maker may require corroborative evidence if (at para 36):

> 1. The decision-maker clearly sets out an independent reason for requiring corroboration, such as doubts regarding the applicant's credibility, implausibility of the applicant's testimony or the fact that a large portion of the claim is based on hearsay;
>
> 2. The evidence could reasonably be expected to be available and, after being given an opportunity to do so, the applicant failed to provide a reasonable explanation for not obtaining it.

[20] An officer must identify and provide a reason for requiring corroboration of an applicant's evidence. The officer in this case did not do so, stating only that the evidence was insufficient. I find that the failure to set out their concerns regarding the Principal Applicant's narrative and evidence, other than with reference to missing corroboration, is a reviewable error in the PRRA Decision sufficient to warrant the Court's intervention.

[21] The officer made no adverse credibility findings nor did they suggest that the events in Mexico recounted by the Principal Applicant were implausible. There were no contradictions within the Principal Applicant's narrative or arising out of the information in the RPD and RAD files, and this is not a case that rests largely on hearsay accounts of the events central to the Principal Applicant's narrative. Finally, the officer made no reference to other reasons for which corroboration of the events recounted by the Principal Applicant was required or could be expected, nor are any such reasons evident from the analysis in the PRRA Decision.

(b) State protection

[22] The Principal Applicant submits that the officer erred in their state protection analysis (1) by relying on the Mexican government's efforts to combat criminal and cartel violence and government corruption; and (2) by failing to take into consideration the fact that the Principal Applicant would be approaching the police for protection against cartel violence as an indigenous transgender woman.

[23] The officer noted that Mexico is a democracy and that the authorities have generally maintained effective control over security forces but acknowledged the well-documented issues of violence by organized criminals and corruption of government officials. The officer emphasized that the Principal Applicant did not report the threats and intimidation from La Linea recounted in her narrative in any of the three cities in which they occurred. The officer stated that she could not rebut the presumption of state protection in a democracy by asserting a subjective reluctance to engage with the state and concluded that the Principal Applicant should have approached the authorities to test the availability of protection.

[24] The fact that Mexico is a democracy does not ensure protection for its citizens, nor is it sufficient justification for a PRRA officer to conclude that state protection will be provided (*Lakatos v Canada (Citizenship and Immigration)*, 2018 FC 367 at para 19). An officer is required to consider the scope and strength of the authorities' control in the country and assess the operational adequacy of the available state protection. While the state's efforts are relevant to an assessment of state protection, those efforts must translate into operationally adequate measures (*Magonza v Canada (Citizenship and Immigration)*, 2019 FC 14 at paras 72, 75 (*Magonza*); *Giraldo v Canada (Citizenship and Immigration)*, 2020 FC 1052 at para 14).

[25] I agree with the Principal Applicant that the officer failed to assess the operational ability of the Mexican authorities to adequately protect her against intimidation and violence by members of La Linea. The officer referred to country documentation for Mexico and the fact that its President has made the fight against corruption a main priority and has taken legislative action in this regard:

> […] I also note that the president has made the fight against corruption a main priority. The same report mentions that the: *"President Lopez Obrador has taken specific legislative and political actions to combat Mexico's endemic corruption, including new asset forfeiture regulations and legislation to convert the Office of the Attorney General (PGR) into the more independent [Fiscalía General de la República, FGR]. Many Mexican stakeholders see the creation of the FGR as an opportunity to reset the prosecutorial system, combat corruption, and support rule of law."* Therefore, from the evidence before me, I find that the state protection in Mexico is adequate. In fact, I did not find evidence of a complete breakdown of state, but rather that (i) the state has maintained effective control of its territory, (ii) has military, police and civil authority in place, and (iii) made serious efforts to protect its citizen[s].

[26] A PRRA applicant is required to demonstrate that they have tested the ability of their home country to provide protection prior to seeking international refuge but this requirement presupposes the existence of state protection. An officer must first satisfy themselves of the operational adequacy of that protection before considering an applicant's efforts to seek that protection. Here, the officer relied on the Mexican government's efforts to improve the protection of its citizens against violence and corruption, without balancing the documentary evidence detailing cartel violence and government corruption. In so doing, the officer applied the wrong test to the question of state protection which results in an unreasonable PRRA Decision (*Magonza* at paras 74-75).

[27] I also find that the officer misinterpreted the Principal Applicant's submission that any available police protection from cartel violence would be further compromised given her identity as an indigenous transgender woman. The Principal Applicant submits that there was significant documentary evidence before the officer regarding the prevalence of discrimination and violence in Mexico against all LGBT individuals and against transgender women specifically.

[28] The officer stated that the risk identified by the Principal Applicant in her application was that of cartel violence. As the Principal Applicant was not reporting a crime against her as a non-binary individual and had not provided evidence in her PRRA application in support of her submissions, the officer concluded they could not meaningfully assess any additional barriers to state protection.

[29] Although the Principal Applicant's fear of returning to Mexico is that of cartel violence, the availability of state protection from that violence may be compromised by the fact that she would be approaching the Mexican authorities as an indigenous transgender woman. In other words, the nature or source of the underlying fear is not necessarily determinative of the analysis. The question before the officer was whether adequate police and state protection was likely to be forthcoming for the Principal Applicant as a transgender woman (*A.B. v Canada (Citizenship and Immigration)*, 2018 FC 237 at para 18). The officer's error lies in their failure to consider the impact of the Principal Applicant's personal circumstances on her ability to secure adequate protection in Mexico.

[30] In summary, I conclude that the PRRA Decision suffers from a number of significant errors that unreasonably compromise the officer's analysis and justification for refusing the PRRA application (*Vavilov* at para 85). The PRRA Decision will be set aside and returned to another officer for re-consideration.

3. *The H&C Decision*

[31] Subsection 25(1) of the IRPA permits the Minister to grant relief to a foreign national seeking permanent resident status who is inadmissible or otherwise does not meet the requirements of the Act. Relief will only be granted if the Minister is satisfied that it is justified on H&C grounds. The provision is grounded on equitable considerations and is intended to provide flexibility to mitigate the effects of a rigid application of the law in appropriate cases, while not establishing an alternate immigration system (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at paras 19, 23 (*Kanthasamy*)). The question in each

subsection 25(1) application is whether an exception ought to be made to the usual operation of the law (*Reducto v Canada (Citizenship and Immigration)*, 2020 FC 511 at para 43, citing *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at paras 16-22). Decision makers must consider and weigh all relevant facts and H&C factors and consider whether those factors when "established by the evidence, […] would excite in a reasonable [person] in a civilized community a desire to relieve the misfortunes of another – so long as these misfortunes 'warrant the granting of special relief' from the effect of the provisions of the Immigration Act" (*Kanthasamy* at para 13, citing *Chirwa v Canada (Minister of Citizenship and Immigration)* (1970), 4 IAC 338).

[32] The officer's negative H&C Decision addresses: (1) the Applicants' establishment in Canada; (2) the best interests of the three children; and (3) the country conditions in Mexico.

[33] Briefly, the officer's BIOC analysis is compromised by their failure to adequately consider the Applicants' submissions regarding the impact on the children of the discrimination and violence feared by the Principal Applicant as a transgender individual and parent in Mexico. Otherwise, I find that the Applicants' submissions and evidence do not establish a reviewable error in the BIOC analysis. The officer identified and considered the best interests of each of the three children and was alert to the fact that their interests would differ in certain respects due to their respective ages and citizenship status. I will return to the impact on the children of living in Mexico with a transgender parent in my consideration of the country conditions in Mexico.

(a) Establishment in Canada

[34] The officer's assessment of the Applicants' establishment in Canada suffers from a reviewable error in its treatment of the Principal Applicant's Canadian immigration history. The officer characterized the Applicants' establishment as positive overall but found that the Principal Applicant was subject to an enforceable departure order as of August 7, 2019. She subsequently had opportunity to regularize her status but failed to do so. As a result, the officer drew a negative inference based on the Principal Applicant's unwillingness to abide by Canadian laws and voluntarily return to Mexico. This negative inference, coupled with intermittent financial stability in Canada and the Applicants' strong ties to the U.S. and Mexico, resulted in the officer determining their level of establishment in Canada to be low.

[35] A departure order was issued against the Principal Applicant in June 2017 and became enforceable on August 7, 2019 when her application for leave and judicial review of the RAD's decision was dismissed (subsection 49(2) of the IRPA and subsection 231(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPRs)). The officer's analysis is correct to this point. However, the Principal Applicant was offered a PRRA on September 19, 2019, and filed her PRRA application on October 4, 2019. Section 232 of the IRPRs provides that the Principal Applicant's departure order was stayed when she was notified of her ability to make the PRRA application.

[36] The Respondent argues that the officer's analysis of the enforceability of the departure order contains no error because there was a window of time, between August 7, 2019 and September 19, 2019, when the departure order was enforceable.

[37] Subsection 25(1) presupposes an applicant has failed to comply with one or more of the provisions of the IRPA. The nature and extent of the non-compliance at issue is a relevant consideration in each case but must be reasonably weighed against all other relevant H&C factors (*Lopez Bidart v Canada (Citizenship and Immigration)*, 2020 FC 307 at para 32). In the present case, the officer's reliance on the Principal Applicant's failure to comply with an enforceable departure order was unqualified. They stated only that the departure order "was enforceable starting August 7, 2019". The officer's reasons suggest no appreciation of the very brief period during which the departure order was enforceable and provide no explanation of the opportunities the Principal Applicant had to regularize her status. In my view, the fact that the Principal Applicant was subject to an enforceable departure order for just over one month before Canadian authorities offered her a PRRA, which she filed on a timely basis, is reasonably characterized as minor non-compliance.

[38] I find that the officer's unqualified reliance on that non-compliance to draw a negative inference is a material error. The officer gave low weight to the Applicants' establishment based on the Principal Applicant's immigration history and the Applicants' inability to demonstrate financial stability in Canada due in part to circumstances beyond their control. These two factors were used in counterpoint to an overall finding of positive establishment by the family. It is not

possible for the Court to assess the impact of the officer's failure to reasonably consider the Principal Applicant's immigration history on their conclusion regarding establishment.

(b) Adverse country conditions in Mexico

[39] The Applicants submit that the officer's analysis of the adverse country conditions in Mexico ignores the objective evidence of widespread violence and discrimination targeted specifically against transgender individuals. They state that the officer relied on excerpts from independent sources that point to progress in certain geographic areas of Mexico but omitted excerpts from the same sources that highlight continued and pervasive violence against gender non-conforming individuals. The Applicants argue that the officer's selective reliance on the positive aspects of those sources provides little context for living conditions in large swaths of Mexican society. They also argue that the officer dismissed the threat of bullying and harassment of the children by virtue of having a transgender parent.

[40] I have reviewed the country condition documentation for Mexico referred to by the parties against their respective submissions and the H&C Decision. I find that the officer's analysis of the country conditions in Mexico for the Principal Applicant and her family is marred by a selective approach to the documentary evidence. The officer's approach cannot be saved by the argument that they are presumed to have reviewed all available evidence.

[41] I also find that the officer's reasoning lacks intelligibility. The officer accepted that discrimination based on sexual orientation and gender identity is prevalent in Mexico and is particularly severe for transgender women but concluded that the Applicants could mitigate any

undue hardship by living in areas of Mexico more accepting towards the LGBT community. The officer failed to reconcile their conclusion with the statistical and anecdotal evidence of harassment and violence against transgender individuals. Instead, the officer relied on discrete examples of progress. Further, there is no consideration in the H&C Decision of the evidence suggesting the Principal Applicant faces additional barriers in accessing support as a member of the indigenous population of Mexico. As a result, I find that the officer's generalized conclusion of available mitigation cannot be regarded as justified and reasonable.

[42] By way of example, the officer relied on a 2017 report from Austria as evidence of positive reform and acceptance in Mexico of LGBT+ and transgender individuals. However, the officer made no reference to the portions of the report that identify escalating rates of violence against transgender women (Austrian Red Cross/Austrian Centre for Country of Origin and Asylum Research and Documentation, *Mexico: Sexual Orientation and Gender Identity (SOGI)*, COI Compilation, May 2017). In addition, the Responses to Information Request MEX106111.E relied on by the officer states that there are "[v]ery few" organizations in Mexico that provide support for gender non-conforming individuals and that indigenous sexual minorities, which include the Principal Applicant, face even greater barriers in accessing support due to discrimination from within the LGBT community against indigenous persons:

> […] LGBT organizations have little concern for the indigenous population and their inclusion is not evident. Within the LGBT community, indigenous persons are discriminated against and segregated due to, among others, their poverty, physical traits, way of dressing, and speech manner.

[43] Finally, the officer acknowledged the Applicants' fear for the children but stated that none of the evidence demonstrated that the children would be subject to harassment or bullying

in Mexico because they have a transgender parent. The officer's very brief statement fails to engage with the evidence of widespread discrimination against transgender individuals, that in at least one report references discrimination directed towards children of same sex couples.

[44] In summary, I find that the officer's analysis of the Applicants' establishment in Canada is not justified due to the lack of nuance in their analysis of the Principal Applicant's immigration history. I also find that the officer relied selectively on the country condition documentation for Mexico to conclude the Applicants could considerably mitigate any undue hardship. The officer's statement is vague and is not supported by an analysis that probes actual living conditions for the Principal Applicant living openly as a transgender woman in the areas identified as progressive.

III. Conclusion

[45] The applications for judicial review of the PRRA Decision and the H&C Decision are allowed.

[46] No question for certification was proposed by the parties and none arises in these applications.

JUDGMENT IN IMM-6245-20 AND IMM-6246-20

THIS COURT'S JUDGMENT is that

1. The application for judicial review of the decision of the immigration officer in Court file IMM-6245-20 (the H&C Decision) is allowed.

2. The application for judicial review of the decision of the immigration officer in Court file IMM-6246-20 (the PRRA Decision) is allowed.

3. A copy of this Judgment and Reasons will be placed on each of the following Court files: IMM-6245-20 and IMM-6246-20.

4. No question of general importance is certified in respect of the applications.

"Elizabeth Walker"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-6245-20 AND IMM-6246-20
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STYLE OF CAUSE:	ALIAH CONTRERAS LUEVANO, AKA LUIS ALBERTO CONTRERAS LUEVANO, BELEN ALICIA HINOJOS DURAN, LUIS ALBERTO CONTRERAS HINOJOS, AND LIAM CONTRERAS v MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-6246-20
STYLE OF CAUSE:	ALIAH CONTRERAS LUEVANO, AKA LUIS ALBERTO CONTRERAS LUEVANO v MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HEAD BY VIDEOCONFERENCE
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DATED:	DECEMBER 23, 2021

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