Federal Court  Cour fédérale

Date: 20110204

Docket: IMM-3050-10

Citation: 2011 FC 129

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, February 4, 2011

PRESENT: The Honourable Mr. Justice Boivin

BETWEEN:

FERNANDO ALBERTO HERNANDEZ MALVAEZ
ALEJANDRA BERENICE FLORES SANCHEZ
MARIA CONCEPTION MALVAEZ OLIVARES

Applicants

and

THE MINISTER OF CITIZENSHIP
/AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review in accordance with subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (Act), of the decision dated March 31, 2010, of the pre-removal risk assessment officer (PRRA officer), who rejected the applicants' application for permanent residence from within Canada based on humanitarian and compassionate considerations (H&C application).

Factual background

[2] The principal applicant, Fernando Alberto Hernandez Malvaez, his spouse, Alejandra Berenice Flores Sanchez, and his mother, Maria Concepcion Malvaez Olivares, are all Mexican nationals.

[3] Before the Immigration and Refugee Board, Refugee Protection Division (RPD), Mr. Malvaez alleged that in January 2006, the director of the collections division for the Mexican Social Insurance Institute, where he worked, had approached him and asked him to collect 500,000 pesos and secretly give this amount to the director.

[4] Mr. Malvaez stated that he had resigned from his position in February 2006 and that he had purportedly tried twice to file a complaint. In March 2006, he was allegedly hired by the company from which he collected the 500,000 pesos. He then learned that his boss had recommended him for the purpose of trafficking premiums. Mr. Malvaez therefore apparently quit his job under the threat that he would regret having refused to make money and that death would ensue.

[5] In May 2006, Mr. Malvaez purportedly received several threats. The company in question purportedly belonged to Senator Medina Placencia and there was apparently an agreement between the Senator and employees of the Institute to misappropriate funds paid to the Institute. On July 20, 2006, Mr. Malvaez allegedly tried to file a complaint against the company, but was told by the Leon office of the Public Prosecutor that no one could file a complaint against a senator and he could be killed as a rebel.

[6] Mr. Malvaez purportedly insisted and was told to come back the next day to retrieve his complaint. That same evening, he apparently received death threats on his cellular phone.

[7] Upon their arrival in Canada on July 24, 2006, Mr. Malvaez and his spouse immediately claimed refugee protection. As for the principal applicant's mother, she came to join her son in Canada on September 22, 2007. She also claimed refugee protection upon her arrival in Canada, alleging that she had also received threats and had been physically assaulted by individuals looking for her son.

[8] Further to a hearing before the Immigration and Refugee Board on February 7, 2008, and May 26, 2008, the applicants received, on May 28, 2008, a negative decision by the RPD to the effect that they were not Convention refugees or persons in need of protection.

[9] On May 1, 2009, the applicants filed an application for permanent residence based on humanitarian and compassionate considerations.

[10] On July 29, 2009, the applicants submitted a PRRA application (Docket IMM-2981-10).

[11] On March 31, 2010, the H&C application was rejected. That decision is the subject of this application for judicial review.

Impugned decision

[12] When she rejected the applicants' application, the officer, in charge of assessing H&C considerations, took the following factors into account:

a. the establishment of the applicants in Canada; and
b. their fear of returning to Mexico.

[13] The officer noted that Mr. Malvaez and his spouse had taken a francization program and that Mr. Malvaez had taken training in safe lift truck driving. Ms. Sanchez has worked as a housekeeper since July 2008. The officer also noted that the applicants have been registered as volunteers at a centre since December 2008, but that the letter supporting this does not mention their number of volunteering hours.

[14] As for Mr. Malvaez's mother, she also took francization courses and volunteers at the ABC centre.

[15] The officer referred to the numerous letters of support in their file and the fact that the couple works and volunteers. However, the officer found that even though these are positive elements for their application, these are not determinative factors in granting an exemption from filing their application for permanent residence abroad.

[16] The officer went on to indicate that she attached little weight to the principal applicant's allegations of fears as he had not demonstrated having been employed from August 2003 to February 2006 by the Mexican Social Insurance Institute or the company allegedly belonging to Senator Medina Placencia.

[17] The officer mentioned that the file contained a statement of earnings dated August 2005, an employment contract and an employee card. However, the employment contract stipulated that the principal applicant had been hired by the company for a fixed term from August 4, 2005, to August 31, 2005; the statement of earnings showed earnings for 28 days of work performed in August 2005; and the employee card confirmed that Mr. Malvaez was a fiscal notification officer and the card was issued on January 6, 2005, and expired on January 15, 2006.

[18] Mr. Malvaez has been in Canada since 2006. The officer is of the opinion that he had the opportunity to document these facts, especially since this was mentioned to him during his hearing with the RPD. Because Mr. Malvaez was unable to demonstrate that he was an employee of the Institute in January and February 2006, the officer attached little weight to Mr. Malvaez's allegations of threats by his director, which were purportedly made during this period.

[19] The officer raised certain contradictions between the statements made by Mr. Malvaez in his PIF and those made during his interview on July 24, 2006. First, Mr. Malvaez stated that he feared a company threatening him with death, and then he accepted an employment contract with this same company a month later.

[20] The officer raised the fact that Mr. Malvaez had bought plane tickets for Canada on May 31, 2006, but that his departure was not until July 24, 2006. Thus, the officer found that she attached little weight to the fears alleged by Mr. Malvaez and that consequently, they did not represent unusual and undeserved or disproportionate hardship.

[21] Furthermore, the officer also raised the fact that Mr. Malvaez had filed a complaint with the Attorney General of Justice's Office on July 20, 2006. However, the information indicated on the form led the officer to conclude that there was no tangible information to support the allegations that Mr. Malvaez had filed a complaint against the company and its alleged owner, Senator Carlos Medina Placencia. Furthermore, the officer stated that, after researching on-line, Senator Carlos Medina Placencia no longer appeared on the list of 101 senators on the official site of the Mexican senate. She therefore attached little weight to the alleged fears.

[22] The officer went on to assess the additional evidence submitted regarding the accident that Ms. Estrada Chavez, Mr. Malvaez's immediate superior at the Institute, allegedly experienced. The officer found that the documents submitted do not show that Ms. Estrada Chavez's accident was directly caused by the threats allegedly made by her bosses.

[23] In conclusion, the officer attached little weight to Ms. Estrada Chavez's testimony and found that her situation did not support Mr. Malvaez's allegations.

Relevant provision

[24] Section 25 of the *Immigration and Refugee Protection Act* applies to this application:

Humanitarian and compassionate considerations - request of foreign national	Séjour pour motif d'ordre humanitaire à la demande de l'étranger
25. (1) The Minister must, on request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on request of a foreign	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, sur demande d'un

national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	étranger se trouvant hors du Canada, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

Issue

[25] In this application for judicial review, the issue is whether the PRRA officer erred in rendering her decision on the applicants' H&C application. More specifically, did the officer err by failing to complete the proper analysis and applying the wrong test to the assessment of the risks raised?

Standard of review

[26] In *Kim v Canada (Minister of Citizenship and Immigration)* 2008 FC 632, [2008] FCJ No 824, at para 24, Justice O'Keefe stated that the appropriate standard of review for H&C decisions is reasonableness (see *Barzegaran v Canada (Minister of Citizenship and Immigration)*, 2008 FC 681, [2008] FCJ No 867, at paras 15 to 20, and *Zambrano v Canada (Minister of Citizenship and Immigration)*, 2008 FC 481, [2008] FCJ No 601, at para 31):

> [24] . . . the appropriate standard of review for H&C decisions is reasonableness based on the authority of *Baker*, above. . . .

[27] The question of whether an officer applied the correct test in assessing risk in a humanitarian and compassionate application is a question of law, and it has been held to be reviewable on the standard of correctness (see *Pinter v Canada (Minister of Citizenship and Immigration)*, 2005 FC 296, [2005] FCJ No 366, at paras 3 to 5).

Analysis

[28] For an assessment of humanitarian and compassionate considerations, it is up to the applicant to prove to the decision-maker that his or her particular case is such that the hardship of having to obtain a permanent resident visa from outside Canada would be either unusual and undeserved or disproportionate. In the context of an H&C assessment involving fears of return, the risk factor is assessed as a whole and the test to apply is to define whether the risks experienced by the applicant are such that they are equivalent to unusual and undeserved or disproportionate hardship justifying an exemption from applying for permanent residence abroad in accordance with subsection 11(1) of the Act.

[29] The H&C decision-making process is entirely discretionary as it considers whether the granting of an exemption is warranted (see *Paz v Canada (Minister of Citizenship and Immigration)* 2009 FC 412, [2009] FCJ No 497, at para 17).

[30] Chapter IP 5, “Immigration Applications in Canada made on Humanitarian or Compassionate Grounds”, of the Inland Processing Manual by Citizenship and Immigration Canada contains a definition of “unusual and undeserved” and “disproportionate” hardship:

5.6. The assessment of hardship

The assessment of hardship in an H&C application is a means by which CIC decision-makers may determine whether there are sufficient H&C grounds to justify granting the requested exemption(s).

Individual H&C factors put forward by the applicant should not be considered in isolation when determining the hardship that an applicant would face; rather, hardship is determined as a result of a global assessment of H&C considerations put forth by the applicant. In other words, hardship is assessed by weighing together all of the H&C considerations submitted by the applicant.

Unusual and undeserved hardship

The hardship faced by the applicant (if they were not granted the requested exemption) would be, in most cases, unusual. In other words, a hardship not anticipated by the Act or Regulations; **and**

The hardship faced by the applicant (if they were not granted the requested exemption) would be, in most cases, the result of circumstances beyond the person's control.

OR

Disproportionate hardship

Sufficient humanitarian and compassionate grounds may also exist in cases that would not meet the "unusual and undeserved" criteria but where the hardship of not being granted the requested exemption(s) would have an unreasonable impact on the applicant due to their personal circumstances.

[31] In this case, the reasons alleged in support of the H&C application read as follows:

> [TRANSLATION]
> Corruption in Mexico has increased considerably. This corruption even infiltrates the Mexican authorities. I fear for my life and the lives of my family members, if we were to return to Mexico, I am certain that they would kill us because my problem is connected to a member of parliament. [Court Record, decision page 6]

[32] According to the applicants, the officer focussed on the “risk” aspect of their H&C application. They are also alleging that, even though she mentioned the appropriate test (the existence of unusual and undeserved or disproportionate hardship), the wrong test was applied.

[33] The Court notes that the officer clearly indicated the correct test to be applied and that her analysis was conducted in two parts. First, she assessed the establishment of the applicants in Canada, and then their alleged risks in Mexico.

[34] In assessing the evidence on the degree to which the applicants are established in Canada, the officer emphasized the applicants’ efforts with respect to their work, volunteering and training/courses. Moreover, she found that these were positive elements. However, she concluded that these were not determinative elements in themselves.

[35] As the Minister pointed out, the case law has repeatedly established that the degree of establishment in itself is not a determinative factor and is not sufficient in demonstrating unusual and undeserved or disproportionate hardship. The principal applicant disagrees with the weight the officer attached to the evidence. The degree of establishment is merely one of several factors the officer must consider, and the lack of an explicit finding on the degree of establishment is not a reviewable error (see *Lee v Canada (Minister of Citizenship and Immigration)* 2005 FC 413, [2005] FCJ No 507, at para 9, and *Singh v Canada (Minister of Citizenship and Immigration)* 2009 FC 11, [2009] FCJ No 4).

[36] Contrary to the principal applicant's claims, the Court is of the opinion that the officer not only reviewed the evidence and arguments, but also demonstrated why she did not attach any weight to them. In this case, the officer assessed the documents submitted and drew the necessary inferences.

[37] Furthermore, this Court has repeatedly stated that the documentary evidence on the situation of a country is not sufficient in demonstrating an applicant's allegations (*Maichibi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 138, [2008] FCJ No 168, at paras 23-24).

[38] The applicants are claiming that the officer applied the wrong assessment test. It is apparent in reading the reasons that the officer applied the proper test and that she truly had it in mind. She also referred to it five (5) times in her decision.

[39] In this case, the Court is therefore of the opinion that it was not unreasonable for the officer to find that none of the documents submitted demonstrated that the alleged risks would cause unusual and undeserved or disproportionate hardship.

[40] In light of the foregoing, the Court finds that the officer did not err in rendering her decision. Consequently, the application for judicial review will be dismissed. No question for certification was proposed and this application does not give rise to any.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that the application for judicial review be dismissed. No question is to be certified.

"Richard Boivin"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3050-10
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