Federal Court  Cour fédérale

Date: 20100722

Docket: IMM-3774-10

Citation: 2010 FC 775

Ottawa, Ontario, July 22, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

FAVIO CRUZ UGALDE
ALEJANDRA GUTIERREZ BARBA
ALEXA BERENICE CRUZ GUTIERREZ
FAVIO CRUZ GUTIERREZ

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

REASONS FOR ORDER AND ORDER

I. Overview

[1] In each immigration or refugee case the country of origin context can only be understood through its country conditions. This means that an understanding of an encyclopaedia of references, a dictionary of terms, a gallery of portraits and even a background music to the life of a country is

essential. It is the means by which to determine whether a harmony or a modicum of harmony exists therein or whether a cacophony muffles certain individual voices which cry out for help to no avail.

[2] To understand the voice of a country through its people, individual voices, if authentic in light of the evidence, must be heard. That is to recognize how they resound in respect of the country condition context. To ensure that decision-makers, tribunals and courts hear those specific individual voices, without preconceived notions, requires an understanding of the country condition context which is essential to each case; otherwise, a deaf ear is turned to country conditions and nothing will have been heard or understood. It is only thereby that the human condition through jurisprudence can be understood; and, only then on a basis of the evidence can a decision be said to be reasonable.

[3] The Federal Court of Appeal, in a judgment penned by Justice Karen Sharlow, clearly made a significant finding in this regard:

> [12] A PRRA application by a failed refugee claimant is not an appeal or reconsideration of the decision of the RPD to reject a claim for refugee protection. Nevertheless, it may require consideration of some or all of the same factual and legal issues as a claim for refugee protection…

(*Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, 162 A.C.W.S. (3d) 1013).

II. Preliminary Remarks

[4] The Style of Cause is amended to change the name of the third Applicant, Alejandra CRUZ GUTIERREZ, to Alexa Berenice CRUZ GUTIERREZ.

[5] Also, in the Style of Cause, the Minister of Public Safety and Emergency Preparedness is added as a Respondent together with the Minister of Citizenship and Immigration.

III. Introduction

[6] The Applicants are citizens of Mexico. They are a family unit composed of a husband and wife and two minor children. They are scheduled to be removed to Mexico on **24 July 2010 at 5h30 a.m**. This motion is ancillary to an application for leave and judicial review of a negative decision of an application for protection under ss. 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), under the Pre-Removal Risk Assessment (PRRA) program. They seek an Order of this Court staying their removal until the disposition of that application.

IV. Background

[7] The family is in Canada because it fears for its life in Mexico.

[8] Mr. Favio Cruz Ugalde, the principal applicant (regarding the risks allegations) is a jeweller by profession. Both in Mexico and in Canada he worked/works, as a jeweller.

[9] In Mexico, the applicant was employed by Mr. Jack Aseo Gottlieb. Together they had worked on a special order for custom made jewels for the wife and mother of the Governor of the state of Guanajuato, Mr. Juan Manuel Oliva Ramirez.

[10] Mr. Oliva Ramirez paid for the jewels with counterfeit money.

[11] Mr. Cruz Ugalde's employer decided to go to the media with this story.

[12] Mr. Aseo Gottlieb's decision to meet with a journalist was a fatal one. Armed men arrived at the store. Mr. Cruz Ugalde, who was there alone at the time, was able to escape through a secret door.

[13] A journalist contacted Mr. Cruz Ugalde to alert him that state security agents were looking for him. He also told him that the store had been broken into and robbed of its contents.

[14] The journalist informed the Applicant that the mother of the governor had become ill and had died as a result of the stress of potentially having the corrupt acts exposed in the media. This was an aggravating factor. As Mr. Cruz Ugalde worked very closely with Mr. Aseo Gottlieb, agents were under the impression that he was also behind the plan to speak to the media. The journalist also informed the Applicant that his employer had been 'neutralised'.

[15] The Applicants, while accustomed to significant security risks in Mexico, had decided that this event was extremely serious. They went into hiding until they left Mexico for Canada.

[16] Since arriving in Canada, the Applicants' relatives throughout Mexico have continuously been questioned and have received threats from individuals looking for the Applicant.

[17] The Applicants' hearing before the Refugee Protection Division (RPD) concluded in a finding of a lack of credibility. Findings of state protection or an internal flight alternative were **not** made by the Board.

[18] The RPD's credibility finding was based on four factors which were specifically challenged in a judicial review application filed with the Federal Court. This Court, nevertheless, denied leave.

[19] While respecting the Court's decision, the Applicants filed an application for permanent residence on humanitarian and compassionate grounds (H&C) and later filed a PRRA.

[20] In the applications, the Applicants maintained throughout that their story is credible and explained the circumstances of their continuous efforts to find evidence to support their contentions.

[21] It is important to mention that the evidence on the record confirms that the persecuting agent is a state governor, accused of committing abuses, and who is considering running for president.

[22] The Applicants were able to tender evidence with the Minister of continuous threats to their lives if they were to be required to return to Mexico. Namely, evidence from:

a) The mother of Alejandra GUTIERREZ BARBA (the principal Applicant's wife) who lives in Leon, Guanajuato. In her 2009 letter, she mentions having seen on several occasions, state agents parked in front of her home. Her residence had been broken into. She had spoken to the police who suggested that more money be paid to the local police for protection. The

mother, due to her fear, did not file an official complaint with the police. Photographic evidence of the break-in was also tendered;

b) In a 2009 letter, the mother of the principal Applicant who lives in Acapulco, stated that she received suspicious and threatening telephone calls from an unidentified person looking for her son;

c) The sister of the principal Applicant who lives in Mexico City, also in a 2009 letter, specifies having received suspicious and threatening telephone calls from an unidentified person looking for her brother;

d) Letter from a Mexican judge who stated in November 2009, that the people who are looking for the principal Applicant are both dangerous and powerful and that the principal Applicant could not be protected anywhere in the country;

e) Letter from a lawyer in Mexico who stated in November 2009, that the Applicants would be in danger throughout Mexico;

f) A second lawyer stated in August 2009, that protection for the family would not be possible.

[23] By way of affidavit evidence dated August 2009, the principal Applicant:

a) Re-filed the statement that he made in his Personal Information Form (PIF) and the exhibits which were filed before the Board. He made it clear that he maintains that his story is true.

b) Also explained that he had spoken with a lawyer in Mexico about his situation and was told that there was nothing that could be done to protect him;

c) Explained that he was unable to find any information regarding the whereabouts of either his former employer or the journalist with whom he had spoken;

d) Explained that he understood the dangers that he faced in Mexico, but that these very recent events forced him and his family to leave the country.

[24] In January 2010, the Applicant filed another affidavit to explain:

a) that, with the help of his current lawyer, he tried to find further evidence in support of his claim but that many individuals are still very much afraid to provide him with evidence regarding Mr. Oliva Ramirez because of his powerful position;

b) that family members in Mexico were still receiving threatening telephone calls from individuals who were looking for him;

[25] In light of this new evidence, the Applicants had filed cogent new evidence to refute the Board's earlier credibility findings (As stated in *Raza*, above, at paragraph 13(3), by Justice Sharlow for the Federal Court of Appeal, new evidence can be filed to refute a previous negative credibility finding). The Applicants, therefore, requested protection from a removal to Mexico.

[26] The same PRRA officer denied both the PRRA and the H&C applications. Applications for leave and for judicial review were filed on 2 July 2010.

[27] Therefore, the Applicants seek an order from this Court staying the removal until the application for leave, and if granted, the judicial review application is decided by this Court.

[28] The country condition information does demonstrate that certain corrupt officials have the capacity to bring about the situation in which the Applicants find themselves. That is, in a narrative,

they have maintained throughout, which narrative bears itself out in a careful reading of the country conditions.

[29] The officer denied the application of the Applicants. In her reasons, she acknowledges that serious problems of corruption and human rights abuses do exist in Mexico (last para. at p. 8 of the reasons, p.142 of the Motion Record (MR)). The officer's concerns remain in regard to the negative credibility finding of the RPD. She finds that the evidence presented is insufficient to give probative weight to the Applicants' narrative.

[30] Simply reading the pith and substance of the analysis of the officer's reasons, the principal concern of the officer is the relationship between the witnesses and the Applicants.

[31] The officer is empowered with discretion, and a mandate to independently decide whether Applicants meet the requirements for a protective application to be granted. As such, deference is owed to the factual conclusions of decision-makers. The Courts have consistently held that if a first instance decision-maker's factual reasoning follows a logical basis, even if not shared by the Court, the decision may still remain reasonable. For these same reasons, however, if there is **any** error in a first instance decision-maker's line of reasoning, the Courts' intervention is necessary.

[32] Credibility has become the material factor in this application. Yet, the fact pattern of the subjective evidence in this case, specific unto itself (cas d'espèce), does appear to have an inherent logic when read together with the specific country condition record with which the PRRA officer agrees. (*Mykhaylov v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1189, 118

A.C.W.S. (3d) 704 at par. 29). The personal evidence of the Applicants, continuously maintained at its core, does not in any manner contradict the country condition evidence. To the contrary, it rings harmoniously throughout.

[33] Therefore, the determinative question arising in the judicial review application is whether the officer's treatment of the probative value of the evidence was reasonable or not.

V. Issue

[34] To grant an application for a stay of removal, the Court must be satisfied:

a) the Applicants raise a serious issue in the underlying application for judicial review;
b) irreparable harm would occur if the Applicants are removed from Canada; and
c) on a balance of convenience, giving consideration to both parties, that the stay of deportation is warranted.

(*Toth v. Canada (Minister of Employment and Immigration)* (1988), 56 N.R. 302 (C.A.F.)).

VI. Analysis

[35] On the basis of its specific merits (cas d'espèce), the Court fully agrees with the position of the Applicants.

A. Serious Issue

[36] The courts, in the context of a motion for a stay, have consistently established a low threshold for a finding of a "serious issue to be tried". This Court is to assess whether the serious issues raised by the Applicants, on their face, are either frivolous or vexatious):

> [6] The jurisprudence of this Court shows that it is necessary only to demonstrate that applicant's case is neither frivolous nor vexatious, in order to obtain a stay of removal. This principle is illustrated in *Turbo Resources Ltd. v. Petro-Canada Inc.*, [1989] 2 F.C. 451, a unanimous decision of the Court of Appeal.

(*Williams v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 851, 107 A.C.W.S. (3d) 838).

[37] Serious errors did occur in the treatment of the evidence.

[38] The **principal** reason given by the officer for dismissing the evidence in the written submissions is that their authors have close ties with the Applicants:

> [...] Je considère ces lettres partisanes et en raison des liens étroits qui unissent les auteurs aux demandeurs, je considère que ces documents ne sont pas désintéressées et je leur accorde peu de valeur probante pour appuyer les risques allégués par le demandeur.
> [...]
> Il est à constater que les documents ont été produits à la requête du demandeur et ainsi ne sont pas désintéressés, pour cette raison je leur accorde peu de valeur probante pour appuyer les risques avancés au sein de cette demande. (Emphasis added). (TRANSLATION NOT AVAILABLE)

(Decision at p. 141 of the MR).

[39] The case law from this Court is patently clear: decision-makers cannot place undue weight by which to diminish the probative value of a witness because of a relationship to an applicant in specific situations wherein such evidence appears valid.

[40] The Supreme Court of Canada, in a unanimous decision, has specified:

> [11] The fact that a witness has an interest in the outcome of the proceedings is, as a matter of common sense, a relevant factor, among others, to take into account when assessing the credibility of the witness's testimony. A trier of fact, however, should not place undue weight on the status of a person in the proceedings as a factor going to credibility. For example, it would be improper to base a finding of credibility regarding a parent's or a spouse's testimony solely on the basis of the witness's relationship to the complainant or to the accused. Regard should be given to all relevant factors in assessing credibility. (Emphasis added).

(*R. v. Laboucan*, 2010 SCC 12, by Justice Louise Charron).

[41] The same reasoning applies to the decision-maker's statement that the witness evidence was produced at the request of the Applicant. The Applicants have the logical right to seek evidence from people who are willing to **testify to factors related to their case**. In all legal instances, be it a private party or the crown, a case must be presented to demonstrate its validity through available or forthcoming evidence (*Coitinho v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1037, 132 A.C.W.S. (3d) 1154 at paras. 6-7, by Justice Judith Snider). Recognizing that, in the country condition context, significant fear mitigates certain evidence due to the danger to which willing witnesses expose themselves.

[42] Considering that it is that which was a primary ground for lessening the probative value of the evidence, demonstrates that a serious issue does exist.

[43] Further, in an often cited decision, the Federal Court made it patently clear, when a decision-maker fails to refer to significant evidence which opposes its findings, the decision will be quashed:

> [17] However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains* v. *Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency"s burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.

(*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, 83 A.C.W.S. (3d) 264; *Bautista v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 126, [2010] F.C.J. No. 153 (QL) at par. 12, analysis of evidence that contradicts the Tribunal's findings).

[44] There are a few other comments of the officer which are contrary to the evidence presented. The comments, although secondary, to the principal grounds specified, must, nevertheless, be explained as they demonstrate that they are contradictory to the record.

[45] First, the officer remarked that family members in Mexico did not properly advise authorities:

> Cependant les auteurs de ces lettres n'ont pas trouvé bon d'en aviser les autorités policières en bonne et due forme.

(Decision, at p. 141 of the MR).

[46] This statement makes no reference to the fact that evidence was presented to demonstrate that family members were either too afraid to file a complaint or had been informed that the evidentiary basis was not considered satisfactory.

[47] The officer's statements are incongruous with the evidentiary record (The plausibility of the Applicants' testimony accords with the officer's own statements as to the level of corruption in Mexico on the basis of the documentary and testimonial evidence to that effect. For a discussion on plausibility, reference is made to *Valtchev v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 776, 2008 F.T.R. 267 at paras. 6 et seq).

[48] In regard to the letters submitted by the lawyers and the Mexican judge, the officer found that they are vague and do not explain what measures were taken to protect the Applicants. The entire letter from a Mexican judge who puts his life at risk must be read carefully and in a country condition context to understand its importance (MR at p. 80).

[49] The officer's decision is unreasonable as the officer did not consider the context of who the perpetrator is, and the fear that witnesses have in naming him. Both factors are clearly alluded to by the authors of the letters. It is also clear that this evidence buttresses the credibility of the Applicants' fear of a return, due to a lack of state protection and internal flight alternative (as is specifically pointed out in the objective country condition evidence).

[50] The credibility of the authors cannot be so easily dismissed by the officer. It is clear from their position in society and by who the perpetrator is, that they are speaking with circumspect discretion but at the same time with purpose, recognizing the context and country in question (the country condition evidence with which the officer agrees, specifies as much).

[51] As to the steps that have been taken to seek protection for the Applicants, the letters are self-explanatory.

[52] The officer also mentions that a letter in this regard contains contradictions because it reveals that the Applicants had gone into hiding between 3 and 23 September 2007 and that this was: "(...) pas été mentionné ni au PIF ni à la SPR".

[53] Yet, this is in patent contradiction with the evidence on file, which demonstrates that this was, in fact, presented before the Board (as seen in the RPD decision).

[54] The only other "contradiction" raised by the officer is that one letter referred to the fact that the Applicant had been attacked in 2001, a fact which was never previously disclosed.

[55] There is no contradiction. The attack in 2001, although specified that it took place, has nothing to do with the reasons as to why the Applicants are in Canada today; it is irrelevant to the question to be determined why they fear a return to their country at this time.

[56] The Applicants did testify and did demonstrate that they faced dangers in the past in Mexico.

[57] It is clear from the Applicants testimony that the events which led to the family's exile **began in 2007**.

[58] Finally, the officer finds that the photographic evidence lacks probative evidence because, "On ne sait pas à quel endroit ces photos ont été prises et qui est le propriétaire des immeubles montrés".

[59] This element contradicts the evidence on file which clearly states the contrary.

[60] No discussion is carried out by the officer of this evidence, itself, and it is that precisely which appears to be unreasonable. (At the end of the same paragraph in question, the officer also finds that the owner of the house could have filed a complaint with the police. Again, the officer makes no reference to the evidence on this subject).

[61] Important and significant challenges to the officer's analysis exist.

[62] The Applicants have met the threshold to demonstrate that a serious issue does exist in the underlying application.

B. Irreparable Harm

[63] Irreparable harm would occur if the Applicants return to Mexico before final disposition by this Court of their application for leave and judicial review.

[64] Both the officer's own admissions as to the violence and danger in Mexico and from the evidence on record, itself, point to significant evidence of irreparable harm. (Reference is made to: *Moktari v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1648 (QL), 76 A.C.W.S. (3d) 396 at par. 13, penned by Chief Justice Allan Lutfy), certain persons in Mexico are at risk. Such individuals cannot be protected. The officer improperly treated evidence which supports allegations of risk. A removal to Mexico will put the entire family's lives at risk (*Charlton v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1355, 78 Imm. L.R. (3d) 114, Justice François Lemieux).

[65] In *Figurado v. Canada (Solicitor General)*, 2005 FC 347, [2005] 4 F.C.R. 387, Justice Luc Martineau held that a presumption of a serious issue, identified in the underlying application for judicial review of a PRRA, demonstrates a presumption that irreparable harm will occur.

[66] All the factors above demonstrate that irreparable harm would occur.

C. Balance of Convenience

[67] This Court has defined the balance of convenience as being an assessment of which party will suffer most from the decision: "In other words, whether the applicant would be more harmed if interim relief were not granted then the respondent will be harmed if it is granted." (*Copello v.*

Canada (Minister of Foreign Affairs), [1998] F.C.J. No. 1301 (T.D.) (QL), 152 F.T.R. 110, as penned by Justice James K. Hugessen).

[68] The balance of convenience favours the Applicants and does not hinder the interests of the Minister in awaiting the predictable and timely response of this Court in deciding the application for leave and for judicial review of the decision.

[69] The Applicants are not a danger to Canada. They are very well integrated and appreciated by the community of St-Jean-Sur-Richelieu, where they reside. Indeed, a portion of the evidence included in the H&C application demonstrates such. (This evidence does not take into account the hundreds of signatures that the family has received from members of their community in support of their application to remain in Canada. A letter from their local MP is also included; as are letters from teachers regarding the children of the Applicants. Although the public interest component supports the Applicants that, of course, is not conclusive of the evidentiary context. Letters of support by the public of the family at pp. 146 et seq. of the M.R. and in the "facebook" inscriptions at p. 173 of the MR).

[70] It is recognized that a palpable danger does exist in regard to harm which can befall the children of the Applicants should they be removed (*Martinez v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1341, 127 A.C.W.S. (3d) 121, at para. 10 et seq, by Justice Simpson and *par analogie: Mann v. Canada (Public Safety and Emergency Preparedness)*, 2008 FC 612, 169 A.C.W.S. (3d) 395 at para., by Justice Michael Phelan.)

[71] The Applicants have raised significant issues.

[72] The balance of convenience does favour the Applicants.

VII. Conclusion

[73] The *status quo* is to be maintained until this Court decides on the Applicants' application for leave and for judicial review of the decision.

ORDER

THIS COURT ORDERS that the stay of removal of the Applicants be granted and that the stay remain in effect until the disposition of the application for leave and, if leave is granted, until such time as the application is disposed of by the Court.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	FAVIIO CRUZ UGALDE ALEJANDRA GUTIERREZ BARBA ALEXA BERENICE CRUZ GUTIERREZ FAVIO CRUZ GUTIERREZ v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE MINISTER OF CITIZENSHIPAND IMMIGRATION
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