

Federal Court



Cour fédérale

Date: 20110204

Docket: IMM-2981-10

Citation: 2011 FC 128

[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 a decision dated March 29, 2010, by the pre-removal risk assessment officer (PRRA officer) of Citizenship and Immigration Canada.

The PRRA officer found that the applicants would not be subjected to a danger of torture or persecution were they to be removed to Mexico.

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 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 (Docket IMM-3050-10).

[10] On July 29, 2009, the applicants submitted a PRRA application.

Impugned decision

[11] The officer noted that, in the PRRA application, Mr. Malvaez reiterated the same allegations that were submitted to the RPD during his refugee claim hearing. However, he added that one of his work colleagues had been the victim of a car accident resulting from threats she allegedly also received from the company's corrupt bosses.

[12] The officer noted that there was therefore new evidence in the file. However, she found that the documents submitted in support thereof (P2 to P12) would not meet the requirements of paragraph 113(a) of the Act because they preceded the rejection of the application by the RPD on May 28, 2008. The officer also stated that these documents were available when the applicants were seen and heard by the RPD.

[13] The officer noted that document P6 was irrelevant as it contained a photo of the Senator of Guanajuato and that documents P8 to P13 were in Spanish and submitted without a French or English translation. The officer therefore rejected the admission of these documents. However, the officer considered as new evidence documents P1, a letter by Mr. Malvaez's work colleague dated July 9, 2009, and P5, this colleague's appearance before the Leon office of the Public Prosecutor on May 26, 2008.

[14] Mr. Malvaez's work colleague, Laura Estrada Chavez, was Mr. Malvaez's immediate superior. In March 2007, she was the victim of a car accident and thus obtained a disability pension.

[15] In the statement she produced for Mr. Malvaez, she stated that she had often been subject to threats from her superiors and that her car accident was the direct result of their threats put into action.

[16] The officer found that Ms. Estrada Chavez's statement did not demonstrate that her accident was the direct result of the threats she was subjected to. The officer noted that Ms. Estrada Chavez had never submitted or even mentioned submitting any complaints or taken any legal action following this accident.

[17] However, the officer stated that, further to threatening phone calls, Ms. Estrada Chavez had complained to the Leon office of the Public Prosecutor on May 26, 2008, the day of the applicants' hearing with the IRB. The Leon office of the Public Prosecutor refused to open an investigation on the grounds that the facts set out by Ms. Estrada Chavez lacked substance.

[18] The officer noted that Ms. Estrada Chavez had carefully filed a complaint for telephone threats, but not for the accident she said was criminal and that she was the victim of. The officer found that Ms. Estrada Chavez's behaviour was not the behaviour expected of a person who was allegedly a victim of a reprehensible criminal act by the authorities.

[19] The officer thus found that Ms. Estrada Chavez's testimony had little probative value in establishing the personalized risk put forward by Mr. Malvaez.

Relevant provisions

[20] Sections 96, 97 and 113 of the *Immigration and Refugee Protection Act* apply to this application:

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

(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

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

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

(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,

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

(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) the risk is not caused by the inability of that country to provide adequate health or medical care.

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

Person in need of protection

Personne à protéger

(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.

Consideration of application

Examen de la demande

113. Consideration of an application for protection shall be as follows:

113. Il est disposé de la demande comme il suit :

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| <p>(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;</p> | <p>a) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;</p> |
| <p>(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;</p> | <p>b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;</p> |
| <p>(c) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;</p> | <p>c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;</p> |
| <p>(d) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and</p> | <p>d) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part :</p> |
| <p>(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or</p> | <p>(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,</p> |
| <p>(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.</p> | <p>(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.</p> |

Issue

[21] The only issue in this application for judicial review is the following: Did the PRRA officer err in applying paragraph 113(a) of the Act to exclude the new evidence submitted in support of the PRRA application?

Standard of review

[22] The standard of review that applies to a PRRA officer's findings of fact and to questions of mixed fact and law is that of reasonableness because the PRRA officer's determination of pre-removal risk is an appreciation of the facts to which this Court must show great deference (see *Martinez v Canada (Minister of Citizenship and Immigration)*, 2010 FC 31, [2010] FCJ No 41; *Erdogu v Canada (Minister of Citizenship and Immigration)*, 2008 FC 407, [2008] FCJ No 546; and *Elezi v Canada (Minister of Citizenship and Immigration)*, 2007 FC 240, [2007] FCJ No 357).

[23] In *Ramanathan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 843, [2008] FCJ No 1064, at para 18, it was decided that when an applicant raises doubts as to whether a PRRA officer had proper regard to all of the evidence when rendering a decision, the standard of review that applies is that of reasonableness.

[24] Consequently, the Court will review the PRRA officer's findings having regard to "... the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible,

acceptable outcomes which are defensible in respect of the facts and law” (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] SCJ No 9, at para 47).

Analysis

[25] The Minister points out that a simple reading of the decision’s reasons shows that the officer carefully reviewed all of the evidence before her, and clearly gave the reasons for which certain documents could not be considered.

[26] According to the principal applicant, the officer rejected documents P2 to P12 on the grounds that they contained a date preceding that of the rejection of the refugee claim and that there was no assessment on whether it was reasonable to expect the applicants to present this evidence at the hearing. The principal applicant alleges that it was impossible for him to obtain the documents that the officer refused to admit because he was not informed of Ms. Estrada Chavez’s situation before his RPD hearing.

[27] In fact, the officer refused to admit the evidence confirming Ms. Estrada Chavez’s employment, her medical records and the pension documents for her disability because they were available before the RPD decision. That being said, the Court is of the opinion that even if the officer had admitted these documents, they would not have had evidentiary weight given all of the facts and evidence admitted.

[28] Under these circumstances, the officer admitted Ms. Estrada Chavez’s statement and determined that there was no connection between her accident and the allegations of threats that she

purportedly received further to the corruption of her bosses. The Court is of the opinion that the officer's analysis of the facts with respect to Ms. Estrada Chavez's situation is reasonable. To establish the relevance of the exhibits submitted by the principal applicant in connection to Ms. Estrada Chavez's situation, the officer had to analyze the context surrounding Ms. Estrada Chavez's situation, including her behaviour.

[29] After assessing the evidence in the record, the Court is of the opinion that it was not unreasonable for the officer to find that the documents submitted and considered by the officer do not demonstrate a connection to the applicants' situation and their alleged personalized risk. It was also not unreasonable to find that these documents do not establish the alleged risks and are not in any way personal to the applicants.

[30] In this case, it was up to the applicants to demonstrate that they would be subjected to a danger of torture or persecution, or to a risk of cruel or unusual treatment, or to a risk to their lives. This was not done as the documents submitted to the officer had no connection to the applicants and did not demonstrate any risk for them.

[31] In light of the foregoing, the officer's decision was not unreasonable (*Dunsmuir*). Consequently, the application for judicial review will be dismissed.

JUDGMENT

THE COURT ORDERS AND ADJUDGES that this application be dismissed. There is no question for certification.

“Richard Boivin”

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2981-10

STYLE OF CAUSE: FERNANDO ALBERTO HERNANDEZ MALVAEZ et al
v. THE MINISTER OF CITIZENSHIP AND
IMMIGRATION

PLACE OF HEARING: Montréal, Quebec

DATE OF HEARING: January 26, 2011

REASONS FOR JUDGMENT: BOIVIN J.

DATED: February 4, 2011

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