Date: 20090316

Docket: IMM-3127-08

Citation: 2009 FC 268

Ottawa, Ontario, March 16, 2009

PRESENT: The Honourable Mr. Justice Russell

BETWEEN:

JOSE ALBERTO RODRIGUEZ GALLEGOS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application pursuant to subsection 72 (1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) for judicial review of a decision of a Pre-Removal Risk Assessment (PRRA) officer (Officer), dated May 20, 2008 (Decision), that the Applicant would not be subject to risk if returned to Mexico.

BACKGROUND

[2] The Applicant was born in Mexico on July 24, 1971 and is a gay man. He claims to have been harassed and assaulted by his colleagues at his work places (Applebee's and Popeye's

Restaurants) in Tamaulipas, Mexico. He also alleges that he was denied entry into a prestigious university in Tamaulipas because of his sexual orientation.

[3] The Applicant claims that Mexico is a very homophobic country and discrimination against gays is widely accepted. He also claims that the police do not follow up or prosecute cases dealing with the discrimination of gay people.

[4] The Applicant left Mexico because he claims he could not develop a healthy life as an openly gay man, nor find a place where he would not be harassed or suffer discrimination.

[5] He arrived in Canada as a visitor on February 8, 2005 and made a refugee claim. A hearing took place on May 31, 2006 and the Refugee Protection Division (RPD) found that, although the harassment by the Applicant's co-workers was plausible and believable, the Applicant had not rebutted the presumption that state protection was available to him in Mexico. The RPD thought that the Applicant had made no effort to seek state protection in Mexico and that he was not in a position to say whether or not state protection was available to him. On July 4, 2006, the Applicant's claim was denied and it was determined that he was not a Convention refugee or a person in need of protection.

[6] The Applicant applied for judicial review of his refugee decision on July 6, 2006, but his application was dismissed on October 10, 2006, as the Court did not find any reviewable errors in the decision.

[7] The Applicant filed a PRRA application on August 2, 2007.

DECISION UNDER REVIEW

[8] The Officer rejected the Applicant's PRRA application and found that he would not be subject to risk of persecution, danger of torture, risk to life or risk of cruel and unusual treatment or punishment if returned to his country of nationality or habitual residence.

[9] The Officer relied upon section 113 of the Act which requires that only new evidence can be raised once a refugee claim has been rejected. The Officer also relied on subsection 161(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations) which provides that the person who makes written submissions must identify the evidence that meets the requirements of paragraph 113(a) of the Act and show how that evidence is relevant to them.

[10] The Officer noted that the documents submitted by the Applicant that post-dated the RPD's rejection did not pass the test for new evidence set out in section 113(a) of the Act simply because it post-dated the Decision. In cases where the evidence pre-dates the hearing, an applicant must show how the evidence meets the requirements of section 113(a), in that the evidence arose after the rejection, was not reasonably available, or that the applicant could not reasonably have been expected to have presented it at the time of the rejection.

[11] The Officer noted that the Applicant did not explain how the documentary evidence presented was not reasonably available or could not have reasonably been presented to the RPD panel at the time of his RPD hearing. Therefore, the Officer did not consider the Applicant's documents that pre-dated the original RPD hearing date of the Applicant. The remaining documentation was considered with the PRRA application.

[12] In the Officer's assessment of risk he noted that he could not re-visit or find errors with the reasons and findings of the RPD: *H.K. v. Canada (Minister of Citizenship and Immigration)* 2004 FC 1612 and *Kaybaki v. Canada (Solicitor General of Canada)* 2004 FC 32.

[13] Counsel for the Applicant requested that the Officer assess the Applicant under section 25 of the Act on the basis of humanitarian and compassionate considerations in the event that he did not meet the assessment criteria. Counsel presented evidence about how the Applicant had met his common-law partner in Canada and how they lived their daily lives. The Officer felt that all of the evidence about the Applicant's common-law relationship that was presented would be better suited for an application to remain in Canada based on humanitarian and compassionate grounds than as documentation to support the Applicant's assertion that he would be at risk should he return to Mexico. The Officer pointed out that a PRRA does not include an assessment of humanitarian and compassionate factors. Consequently, the Officer did not consider such information in his assessment.

[14] The Officer concluded that the Applicant had presented the same facts and risk factors that had already been assessed by the RPD at his refugee hearing on May 31, 2006. The Officer reviewed the documentary evidence and concluded that the Applicant had not provided sufficient documentary evidence or information to persuade the Officer to reach a different conclusion from that of the RPD.

ISSUES

[15] The Applicant raises the following issues on this application:

1) What is the standard of review governing PRRA refusals?

2) Was the Officer's finding in respect to the availability of state protection made without regard to the evidence, unreasonable and rendered with unclear reasons?

STATUTORY PROVISIONS

[16] The following provisions of the Act are applicable in these proceedings:

Convention refugee	**Définition de « réfugié »**
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,	**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*) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themself 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.

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.

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 themself of the protection of that country,

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) 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

(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.

Personne à protéger

(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

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

Examen de la demande

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

(*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

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

been expected in the circumstances to have presented, at the time of the rejection;	raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;
(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	*b*) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;
(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;	*c*) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;
(*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	*d*) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part :
(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	(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,
(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.	(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.

[17] The following provision of the Regulations is applicable in this proceeding:

New evidence	**Nouveaux éléments de preuve**
161(2) A person who makes written submissions must identify the evidence presented that meets the requirements of paragraph 113(*a*) of the Act and indicate how that evidence relates to them.	**161(2)** Il désigne, dans ses observations écrites, les éléments de preuve qui satisfont aux exigences prévues à l'alinéa 113*a*) de la Loi et indique dans quelle mesure ils s'appliquent dans son cas.

STANDARD OF REVIEW

[18] In *Dunsmuir v. New Brunswick*, 2008 SCC 9 (*Dunsmuir*), the Supreme Court of Canada recognized that, although the reasonableness *simpliciter* and patent unreasonableness standards are theoretically different, "the analytical problems that arise in trying to apply the different standards undercut any conceptual usefulness created by the inherently greater flexibility of having multiple standards of review": *Dunsmuir* at paragraph 44. Consequently, the Supreme Court of Canada held that the two reasonableness standards should be collapsed into a single form of "reasonableness" review.

[19] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

[20] *Fi v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1125 at paragraph 6 held that the standard of review on a PRRA decision is reasonableness *simpliciter*. However, particular findings of fact should not be disturbed unless made in a perverse or capricious manner or without regards to the evidence before the PRRA officer.

[21] *Elezi v. Canada (Minister of Citizenship and Immigration)* 2007 FC 240 held as follows:

> When assessing the issue of new evidence under subsection 113(a), two separate questions must be addressed. The first one is whether the officer erred in interpreting the section itself. This is a question of law, which must be reviewed against a standard of correctness. If he made no mistake interpreting the provision, the Court must still determine whether he erred in his application of the section to the particular facts of this case. This is a question of mixed fact and law, to be reviewed on a standard of reasonableness.

[22] The Applicant submits that the adequacy of state protection raises questions of "mixed fact and law" which are reviewed against a standard of reasonableness: *Hinzman v. Canada (Minister of Citizenship and Immigration)* 2007 FCA 171 (*Hinzman*). I agree with this submission.

[23] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the issues of the Officer's application of section 113(a) and state protection in this case is reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir* at paragraph 47. Put another way, the Court should only

intervene if the Decision was unreasonable in the sense that it falls outside the “range of possible, acceptable outcomes which are defensible in respect of the facts and law.”

ANALYSIS

[24] The Applicant says that if he were to go back to Mexico and live as an openly gay man he would suffer persecution and section 97 risk against which the state of Mexico will not protect him.

[25] The Applicant has never tried to avail himself of state protection in Mexico. When he lived there, he did not reveal his sexual orientation. Instead, he came to Canada and sought refugee protection. The RPD rejected his refugee claim on the basis that he had not shown that state protection was not available to him in Mexico.

[26] For purposes of his PRRA application, the Applicant had no new evidence of risk based upon personal experience because he has been residing in Canada. But he says that there was new documentary evidence before the PRRA Officer showing he would face more than discrimination if returned to Mexico. He points to the well-established principle from *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at paragraph 48 that he should not have to put his life at risk just to demonstrate that state protection is not available to him.

[27] There were no negative credibility issues in this case and the PRRA Officer did not raise or consider an IFA.

[28] The Decision makes it clear that the PRRA Officer closely examined the new documentation in question. He refers to each document and summarizes in the Decision his conclusions on what is revealed.

[29] After going through each document in turn the Officer concludes as follows:

> This current information, along with the documentation provided by the applicant, shows real evidence of legal and social change. Notwithstanding, the situation in Mexico is not all favourable as there is evidence that discrimination based on sexual orientation still persists in some regions of Mexico. However, I must also consider all the evidence in light of the findings of the RPD that state protection is available to the applicant and that the applicant had the onus to demonstrate otherwise.
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> The applicant's evidence is that when he experienced discrimination at one place of employment, he quit and sought employment elsewhere. He experienced the same problems at his second place of employment. He also experienced discrimination when applying for university entrance. His evidence is that he did not attempt to make a report to the police or judicial authorities in Mexico. His resolution was to come to Canada.
>
> After reviewing all the information before me, I am persuaded today, as was the Refugee Protection Division in August 2006 that adequate, though not necessarily perfect, state protection is still available to the applicant should he return home; and while my own research on current country conditions indicates that the situation in Mexico is not all favourable, the applicant has not provided sufficient documentary evidence or information to persuade me otherwise.

[30] The Applicant's general complaint is that, in going through the new evidence, the Officer simply relied upon the mere legislative framework, on new legislation that has not been fully implemented, and on indications that politicians are now interested in attracting the gay community

in Mexico as a voting block. In other words, the Applicant says the Officer did not address the actual situation in Mexico to examine whether adequate and effective protection exists.

[31] The Applicant cites and relies upon my own decision in *Sanchez v. Canada (Minister of Citizenship and Immigration)* 2008 FC 1336 at paragraphs 85 and 86:

> **85** All in all, there was cogent evidence before the Board that the police in Mexico are corrupt and have extensive involvement with kidnapping gangs, that human rights commissions are ineffective, and that government initiatives to deal with the problem have largely failed. All of this is highly relevant to the issue of why the Principal Applicant did not go to the police.
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> **86** In other words, it was the usual "mixed bag," but in this case the evidence that refuted the Board's conclusions on this point was so cogent and so important to the Applicants' case, that the Board's failure to deal with it and to simply rely upon the usual presumptions of state protection looks more like defending a general position on Mexico than addressing the specifics of the evidence before the Board in this case.

[32] The Applicant also relies, among other cases, upon the decision of Justice Mactavish in *Garcia v. Canada (Minister of Citizenship and Immigration)* 2005 FC 807 at paragraphs 16 and 17:

> **16** The evidence referred to by the Board does not squarely address the incidence of violent crime directed at gays and lesbians in Mexico City because of their sexual orientation. The central issue in this case is whether, given the fact that he is an openly gay man, Mr. Garcia would be able to live safely in Mexico City. As such, evidence relating to homophobic crimes directed against gay men in that city should have been of critical concern to the Board.
>
> **17** While it might have been open to the Board to choose not to ascribe much weight to the Report, given that it was prepared six years before Mr. Garcia's refugee hearing, in all of the circumstances, it was not open to the Board to simply ignore it.

[33] In my view, each of the cases relied upon by the Applicant turn on their particular facts and on what the documentation before the IRD, or a PRRA officer, revealed about the situation in Mexico.

[34] The Applicant says he is not asking the Court to re-weigh the evidence and that, if the new documentation is examined, it will reveal an objective basis for his fears that was not addressed by the Board with anything like an adequate analysis.

[35] I have myself examined the documents in question against the points raised for each document by the Applicant.

[36] It has to be remembered that in this case, the onus was on the Applicant to rebut the presumption of state protection. State protection only needs to be adequate. It also has to be remembered that the Applicant made no effort to seek state protection, so he has no personal evidence to offer in this regard.

[37] Generally speaking, with most of the documents, I think that the Respondent is correct that the Officer either shows he has considered the evidence thoroughly and has taken into consideration the points raised by the Applicant, or relies upon facts so similar that his general statements suffice to show that he knew the evidence.

[38] The one document that concerns me is Response to Information Request (MEX101377.E) from the Research Directorate Immigration and Refugee Board which the Officer summarizes as follows:

> This information shows that a 2005 study found that 94.7 percent of homosexuals interviewed suffered discrimination. It showed that 40 percent felt that they had been treated unfairly at work and 72 percent believed it was more difficult to find employment as a homosexual. Information from the Human Rights Commission of the State of Jalisco (2006) shows that employers justify discriminatory treatment at work.

[39] As this summary makes clear, this kind of discrimination is not evidence that Mexico would not protect the Applicant against risk if he were to seek state protection. But the balance of the document goes on to discuss the incidence of homophobic murders in Mexico and the fact that the authorities "minimize the significance of sexual preference in hate crimes":

> An official with the CEDHJ stated that, when a crime against a member of the homosexual, transsexual or lesbian community is investigated, authorities tend not to consider the fact that the crime has been motivated by "hate". … As a consequence of this attitude, the coordinator of a sexual rights group argued that the effectiveness of investigating and preventing these types of crimes is reduced.

[40] This document does not suggest that homosexual people are not protected. It suggests that the authorities do not identify crimes in a way that would allow them to be identified as hate crimes so that investigation and prevention could be made more effective.

[41] This does not suggest to me that the state will not respond to homosexual fears but, rather, that they could do a better job if they were more open about homophobic motivation in crime.

[42] All in all then, I do not think that the points of concern in the documentation raised by the Applicant are sufficient to show that the Officer failed to consider relevant evidence or that the Officer did not give a reasonable summary of what the documents, collectively, reveal. As always, of course, different conclusions and a different emphasis may well have been justified, but I can see nothing that, when read in its entirety, would take this Decision outside the range of possible, acceptable outcomes which are defensible in respect of the facts and the law.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that

1. This Application is dismissed.
2. There are no questions for certification.

"James Russell"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-3127-08
STYLE OF CAUSE:	JOSE ALBERTO RODRIGUEZ GALLEGOS v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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