Federal Court  Cour fédérale

Date: 20100601

Docket: IMM-5663-09

Citation: 2010 FC 570

Ottawa, Ontario, June 1, 2010

PRESENT: The Honourable Mr. Justice Pinard

BETWEEN:

Guadalupe HERRERA RIVERA
Karla Esperanza Renteria HERRERA
Diego Renteria HERRERA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review of a decision, dated October 27, 2009, of a pre-removal risk assessment officer (the officer) under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. (2001), c. 27 (the Act), by Guadalupe Herrera Rivera (the applicant) and her children, Karla Esperanza Renteria Herrera and Diego Renteria Herrera. The officer refused their application for permanent residence on humanitarian and compassionate grounds (‘‘H&C application’’).

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[2] The applicants are Mexican citizens. They arrived in Canada in September 2006, accompanied by Jose Wenceslao Renteria Valerio, who was the applicant's spouse at the time and who is the father of her children. A few days later they claimed refugee protection. Their claim for refugee protection was judged not to be credible. An application for leave and judicial review of that decision was dismissed.

[3] On April 19, 2008, the applicant was the victim of an incident of conjugal violence on the part of her spouse. She met with the police about the incident but did not file a complaint. She did, however, leave her husband and from April 25 to August 1, 2008, she and her children stayed at a shelter for victims of conjugal violence. She stated that, in fact, her spouse, from whom she is now divorced, had been violent with her from the first year of their marriage and had continued to be abusive toward her afterwards. After having waived a pre-removal risk assessment (PRRA) following the rejection of their refugee claim, the applicant's former spouse was deported and is now living in Los Reyes de la Paz, the same city where the family lived prior to coming to Canada.

[4] On October 27, 2008, the applicants filed an H&C application based on their establishment in Canada, on the children's best interests, on the conjugal violence, and on the risk they might face in Mexico.

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[5] The officer dismissed this application, concluding that the applicants would not face unusual and undeserved or disproportionate hardship if they were to return.

[6] The officer noted that the applicants had only been in Canada for three years, which was not a significant amount of time for the applicant, even though it would be for the children. Other than the fact that the applicant was taking French courses, there was little else in terms of information regarding their establishment. The officer recognized that the applicants' integration may have been delayed by their stay at the shelter, but found that, given their few ties to Canada, returning to Mexico would not cause them unusual and undeserved or disproportionate hardship.

[7] The officer also recognized that the family situation [TRANSLATION] ''may have been and might continue to be difficult for the young children concerned'', given that their parents' separation had been a difficult experience for them to live through. In addition, being separated from their friends and having to adjust to the Mexican school system would probably be stressful for the children. However, the officer reasoned that [TRANSLATION] ''the impact on their education and future development would be limited because, most importantly, they would be with their mother''. The officer also concluded that since the applicant's former spouse had never been violent toward the children and that it is she who has sole custody of them, their [TRANSLATION] ''leaving Canada would not have a negative impact on their physical and psychological health''.

[8] Subsequent to this, while recognizing that the applicant had been the victim of violence and threats on the part of her former spouse and being aware of the fact that the applicants had to seek refuge in a shelter, the officer noted that such shelters also exist Mexico. Furthermore, the applicants

could establish themselves in a city other than the one in which they had been living before leaving that country.

[9] Lastly, as for the risk the applicants would face in Mexico, the officer rejected the allegations that they had already submitted in support of their refugee claim. These were allegations regarding, on the one hand, police extortion against the applicant's former husband, a businessman, and on the other hand, his supposed persecution by the family of a man he had killed in an automobile accident. These allegations were found not to be credible. Furthermore, in spite of the fact that the documentary evidence on Mexico shows that there are problems with regard to human rights, and specifically, problems of conjugal violence, the officer concluded that the applicant and her children would not be at risk because they would be able to rely on their family and on numerous organizations for help. In addition, they could move to a part of Mexico City other than the area where the applicant's former spouse lives, and there is nothing to indicate that he would have the resources to find them in that vast city or elsewhere in Mexico.

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[10] The issues that arise from this application for judicial review are as follows:

1) Did the officer apply the wrong test in reviewing the H&C application?
2) Did the officer err in concluding that the applicants would not face unusual and undeserved or disproportionate hardship, in particular by making his decision without regard for the evidence before him?

[11] The first issue, regarding the test applied by the officer, is a question of law and is reviewable on a standard of correctness (see, for example, *Aboudaia v. The Minister of Citizenship and Immigration*, 2009 FC 1169; *Singh v. The Minister of Citizenship and Immigration*, 2008 FC 1263).

[12] However, the officer's decision with regard to the merits of the application is discretionary and depends on his or her assessment of the evidence; therefore, the applicable standard of review is reasonableness (see *Kisana v. The Minister of Citizenship and Immigration*, 2009 FCA 189 at paragraph 18, and the case law cited therein).

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Test applicable to an H&C application

[13] The applicants submit that the officer applied the wrong test when he assessed their H&C application. They criticized him for having mentioned the [TRANSLATION] ''objectively identifiable personalized […] risk to their lives or safety'' as the test applicable to an H&C application. They submit that an officer charged with reviewing an H&C application must consider different kinds of risk, and that it is not only the risk to the applicant's life or the risk of being subjected to cruel and unusual treatment or punishment that is relevant when reviewing a claim for protection under section 97 of the Act or a PRRA application.

[14] The respondent, for his part, asserts that the officer repeatedly cited the applicable test, namely, the ''unusual and undeserved or disproportionate hardship'' test, and that he applied this test. He noted that the officer specifically mentioned the fact that [TRANSLATION] '' [t]he H&C

process is not based on the same criteria [as a refugee protection claim] for risk assessment''. Finally, the respondent submits that the officer was aware that risk was one of several factors that he had to consider, and that this was what he did.

[15] I concur with the respondent. The officer was familiar with the ''unusual and undeserved or disproportionate hardship'' test. He was also aware that the risk could be one of the causes of such hardship for an applicant. However, for a risk to cause hardship to an applicant, logic dictates that the applicant would necessarily be exposed to that risk. The officer inquired as to whether this was the case in the file he was reviewing and, in doing so, committed no error.

Merits of the decision

[16] According to the applicants, the officer erred in his assessment of the risk they would face in Mexico, in particular by failing to consider relevant evidence.

[17] In this regard, I cannot accept any of the applicants' arguments.

[18] First, I agree with the respondent that the officer's error regarding the applicants' place of residence prior to their departure is not determinative. As the Supreme Court explained in *Law Society of New Brunswick v. Ryan*, 2003 SCC 20, [2003] 1 S.C.R. 247 at paragraph 56, an unreasonable finding made by an administrative decision-maker does not render his or her decision unreasonable in itself if ''the reasons, taken as a whole, are tenable as support for the decision''. In my view, that is the case here. The officer was of the view that the applicants could move to another part of the Federal District than the one they were living in before they left for Canada. *A fortiori*, if

they had been living in a neighbouring city beforehand, they could move to the Federal District itself and benefit from the protection of its more advanced laws and regulations, and live in relative anonymity.

[19] Secondly, the officer's finding that the applicants could have availed themselves of this internal flight alternative was not unreasonable. In *Thirunavukkarasu v. Canada (Minister of Employment and Immigration)*, [1994] 1 F.C. 589, the Federal Court of Appeal clearly stated that ''[a]n IFA cannot be speculative or theoretical only; it must be a realistic, attainable option. Essentially, this means that the alternative place of safety must be realistically accessible to the claimant'' (emphasis added). Furthermore, it is a matter of ''whether one should be expected to make do in that location'' (*ibid*.). The question as to whether the Federal District would be accessible to the applicants in the event of their removal from Canada must, by all accounts, be answered in the affirmative. As to whether the applicants would be able to make do there, the officer explained his finding in this regard by noting that the applicant would be able to find suitable work for herself.

[20] Moreover, I cannot accept the applicants' argument that the officer made his decision without regard to the evidence. It is settled law that the onus is on the person making an H&C application to submit the necessary evidence in support of the application (see, for example, *Sharma v. The Minister of Citizenship and Immigration*, 2009 FC 1006 at paragraph 9 and the numerous decisions cited therein). Had the applicants wished to draw the officer's attention to a particular document, they could have introduced it in evidence.

[21] At any rate, the documents the officer allegedly neglected to consult or discuss do not have the importance attached to them by the applicants. As for the Immigration and Refugee Board's document, the information it contains about the State of Mexico is not determinative because the officer had concluded that the applicants would be able to move to the Federal District. As for the information about the proposed adoption of regulations that would implement legislation to fight violence against women, it was already out of date at the time the officer made his decision. With regard to documents from Amnesty International, *Freedom House* and *US Country Reports*, the officer duly acknowledged that they revealed the existence of human rights problems in Mexico. He specifically noted that conjugal violence was one of these problems. It was not necessary for him to cite a specific passage from the documentary evidence in support of this observation. For him to have done so would have added nothing to his analysis.

[22] The officer simply concluded that the measures taken by Mexico would help ensure that the problems he had acknowledged would not cause the applicants to face unusual and undeserved or disproportionate hardship. In other words, if the applicants were to have problems with the applicant's former spouse, they could probably rely on the help of the authorities or non-governmental organizations. (It is from this perspective that the officer's references to the possibility of the applicants seeking refuge in a shelter should be understood. He certainly did not expect the applicants to remain in such a shelter permanently.) The officer's reasoning is transparent, intelligible and justified, and the Court's intervention would not be warranted (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190 at paragraph 47).

[23] Lastly, the officer adequately considered the best interests of the applicant's children. He took into account all of the relevant factors that arose from the evidence that was before him. If this was insufficient, it was up to the applicants to submit additional evidence which might have satisfied the officer.

[24] In short, the applicants are asking the Court to re-examine their application and to substitute its opinion for that of the officer. That is not the function of a judicial review. For the foregoing reasons, there is no reason that would justify this Court's intervention.

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[25] Accordingly, the application for judicial review is dismissed.

JUDGMENT

The application for judicial review of the decision of the pre-removal risk assessment officer, dated October 27, 2009, is dismissed.

''Yvon Pinard''
Judge

Certified true translation

Sebastian Desbarats, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5663-09
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