Date: 20060608

Docket: IMM-5107-05

Citation: 2006 FC 726

Vancouver, British Columbia, June 8, 2006

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

Atillio Rigoberto QUINTANILLA

Berta Lilian AVALOS

Carolina QUINTANILLA

Katya QUINTANILLA

Luis QUINTANILLA

Applicants

and

THE MINISTER OF CITIZENSHIP

AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicants are citizens of El Salvador. They have lost their permanent resident status and now face removal from Canada. The Applicants contest the validity of the direction to report for removal issued to them on August, 10, 2005, on the ground that they are protected from *refoulement.*

[2] In December 1995, the Applicants were granted permanent resident status in Canada under the *Political Prisoners and Oppressed Persons Designated Class Regulations,* SOR/82-977 (the *PPOP Regulations*). The *PPOP Regulations* permitted citizens of named countries to be selected as immigrants in accordance with the criteria applicable to Convention refugees, notwithstanding the fact that they were residing in their country of origin and therefore were technically not Convention refugees. El Salvador was one of the countries listed in the schedule of the *PPOP Regulations*.

[3] In the case at bar, the Applicants had sought re-settlement in Canada on the basis of a well-founded fear of persecution on a Convention ground, which is

included in the definition of the PPOP Designated Class. The visa officer accepted that the main Applicant, Mr. Atillio Rigoberto Quintanilla, who at the time was a judge with the Civil Court in San Salvador, had his life threatened in 1995 by an armed illegal group called "La Sombra Negra", and that the government of El Salvador could not protect him and his family.

[4] Four months after their arrival in Canada as permanent residents in December 1995, the Applicants returned to El Salvador. They stayed more than six years in El Salvador until their second return to Canadain June 2002.

[5] In July 2002, the Applicants were issued removal orders for failing to comply with their residency obligations. The Applicants' appeals of these removal orders were denied by the Immigration Appeal Division (IAD) in July 2003. As a result, the Applicants lost their permanent residence status and the removal orders came into force.

[6] In July 2005, L.R. Devries, Pre-Removal Risk Assessment Officer, Citizenship and Immigration Canada (the PRRA Officer) determined that the Applicants would not be subject to a risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if returned to El Salvador (the PRRA decision).

[7] On August 10, 2005, the Applicants attended at the Canadian Border Services Agency (CBSA) and were given the PRRA officer's decision. At the meeting, C. Parsons, Enforcement Officer (Immigration), Canada Border Services Agency (the CBSA Officer), advised them that their removal orders were now enforceable and directed them to report to the Canadian Immigration Centre at Vancouver International Airport on Wednesday, September 5, 2005, at 7:30 p.m. to complete departure requirements (the decision under review).

[8] Pending determination of the present judicial review application, the Respondent has agreed to stay the execution of the removal orders. The parties submit that the legality of the decision under review should be assessed on a correctness standard. I accept this proposition based on the applicable functional and pragmatic analysis and the fact that this application essentially involves questions of law: see *Adviento v. Canada(Minister of Citizenship and Immigration)*,2003 FC 1430.

[9] Despite the Applicants' counsel's able argument that the Applicants are protected from *refoulement* under the applicable legislation or regulations, the present application must fail. For the following reasons, I conclude that the decision under review is valid in law and that the Applicants can be removed from Canada to El Salvador.

[10] As a starting point, it must be said that the Applicants were never determined to be Convention refugees and that, prior to the coming into force of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the *IRPA*), protection from *refoulement* was only given to persons who were actually determined to be Convention refugees: section 53 of the *Immigration Act*, R.S.C. 1985, c. I-2, as amended (the former *Immigration Act*). Therefore, members of the PPOP Designated Class were not protected from *refoulement* under the former *Immigration Act.*

[11] That being said, the Applicants' main contention in this case is that, when the *IRPA* came into force on June 28, 2002, the protection from *refoulement* was extended to persons in "similar circumstances" to that of persons who have been determined to be Convention refugees (paragraph 95(1)(a), subsection 95(2) and subsection 115(1) of the *IRPA*). Since they benefited from DC1 visas and were landed in Canada in December 1995 as members of the PPOP Designated Class, the Applicants submit that, as "protected persons", they cannot be removed from Canada. The Applicants further submit that the CBSA officer erred in law in assuming that refugee protection is not conferred to the Applicants under section 338 of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 (the *IRP Regulations*).

[12] Sections 95 and 115 of the *IRPA* and section 338 of the *IRP Regulations* are reproduced as an annex at the end of these reasons.

[13] I must agree with the Respondent that the Applicants are not "protected persons" within the meaning of section 95 of the *IRPA.* This provision does not contemplate determinations made prior to the coming into force of the *IRPA*. More particularly, I note that paragraph 95(1)(a) of the *IRPA* is only meant to apply to persons who become permanent or temporary residents under the *IRPA*. It speaks in the present tense: "Refugee protection is conferred when ... the person ... becomes a permanent resident or a temporary resident ...; the Board determines ...; or the Minister allows ...." Further, the provision refers to types of status and applications which only came into existence when the *IRPA* came into force. That is, "temporary resident" status did not exist prior to the *IRPA* nor did "applications for protection."

[14] I also note that paragraph 95(1)(a) refers to a determination made pursuant to a visa application that a person is either a Convention refugee or a person in similar circumstances. This can only mean a determination made after the coming into force of the *IRPA* and the *IRP Regulations*. Under subsection 12(3) of the *IRPA*, "a foreign national, inside or outside Canada, may be selected as a person who under this Act is a Convention refugee or as a person in similar circumstances". Indeed, the expression "a person in similar circumstances" is defined in section 146 of the *IRP Regulations* as a member of the "Humanitarian Protected Persons Abroad Classes," which did not exist before under the former *Immigration Act* regime. In addition, subsection 95(2) of the *IRPA* only refers to the provisions for cessation and vacation of refugee status under the *IRPA* (i.e. subsections 108(3), 109(3) and 114(4) of the *IRPA*). Accordingly, it would be contrary to the text and object of the *IRPA* and the *IRP Regulations* to treat members of the PPOP Designated Class as "persons in similar circumstances" for the purpose of sections 95 and 115 of the *IRPA.*

[15] The statutory interpretation above accords with the fact that under section 274 of the *IRPA,* the former *Immigration Act* was repealed, and that under section 201, matters concerning the transition from the former *Immigration Act* to the *IRPA*, including enforcement measures are to be governed by the regulations. In this regard, section 338 of the *IRP Regulations* specifically provides that refugee protection under the *IRPA* is conferred only on those persons who, before the *IRPA* came into force, were: (1) determined to be Convention refugees in Canada; (2) granted landing after being issued a visa under section 7 of the *Immigration Regulations, 1978*, SOR/78-172 as amended (the former *Immigration Regulations)*, or section 4 of the

Humanitarian Designated Classes Regulations, SOR/97-183 (the *HDC Regulations*); or (3) determined to be members of the Post-Determination Refugee Claimants in Canada Class (the PDRCC).

[16] I note that the Applicants were not landed under section 7 of the former *Immigration Regulations* (i.e. as persons seeking admission to Canada as Convention refugees seeking re-settlement). Indeed, the *PPOP Regulations* expressly exempted the Applicants from the application of section 7 of the former *Immigration Regulations*. Nor were the Applicants issued a visa under section 4 of the *HDC Regulations*, which did not come into force until two years after they were landed. Furthermore, the Applicants were not determined to be Convention refugees, nor are they members of the PRDCC. Clearly, the Applicants do not come within section 338 of the *IRP Regulations* and are not accordingly conferred refugee protection under the *IRPA.*

[17] By the time of their return to Canada in June 2002, the Applicants' status as members of the PPOP Designated Class was an historical fact. That class no longer existed. This is evidenced by the fact that on May 1, 1997, the *PPOP Regulations* were repealed, and when the *HDC Regulations* came into force, members of the former PPOP Designated Class did not become members of the Humanitarian Designated Classes (i.e. the Source Country Class or the Country of Asylum Class). While the definition of membership in the Source Country Class incorporated the concepts that had been included in the former PPOP Designated Class definition, it added a third alternative criterion - that of being seriously and personally affected by civil war or armed conflict. The *HDC Regulations* were later repealed when the *IRPA* came into force and the Humanitarian Designated Classes were replaced by the Humanitarian-Protected Persons Abroad Classes in the *IRP Regulations* (i.e. the Country of Asylum Class and the Source Country Class). Again, members of the former PPOP Designated Class did not become members of these classes.

[18] I also conclude that the Applicants do not have a vested right not to be returned to El Salvador. The concept of "protected person" was created by the *IRPA* in June 2002. The determinative fact is that the Applicants entered Canada in 1995 as permanent residents under the PPOP Designated Class. The Applicants were subject to the same rights and obligations as any other permanent resident. In 1996, the Applicants voluntarily returned to El Salvadorand remained there for more than six years. The only right the Applicants acquired under the *PPOP Regulations* was permanent resident status and that status was lost in light of the Applicants' failure to comply with their residency requirements. Upon their second entry to Canada, the Applicants were found to be inadmissible and, as a result, removal orders were issued against them in July 2002. The validity of those orders was confirmed a year later by the IAD.

[19] I also dismiss the argument made by the Applicants that members of the PPOP Designated Class are permanently protected from *refoulement*, unless steps are taken by the Minister to cease or vacate their status under subsection 108(3) or 109(3) of the *IRPA*. Apart from the fact that those provisions only apply to cases where refugee protection has been conferred under subsection 95(1) of the *IRPA*, the repeal of the *PPOP Regulations* in 1997 abolished the PPOP Designated Class. While I am ready to recognize that there may be members of the former PPOP Designated Class

who would still today suffer persecution or section 97 risks, I note that the PRRA assessment is designed to prevent such an eventuality: see *Kim v. Canada (Minister of Citizenship and Immigration),* 2005 FC 437 at para. 39.

[20] In their further memorandum of argument, the Applicants also assert that the doctrine of legitimate expectation applies to the case at bar. Following some discussion between the Applicants' previous counsel and Canadian immigration and CBSA officials, the former received a letter dated March 30, 2004, in which CBSA stated that the Applicants, having benefited from DC1 visas (i.e. as members of the PPOP Designated Class), were considered to be "persons in similar circumstances to Convention refugees" and therefore "protected persons" under the *IRPA*. As a result, the Applicants were informed that they would not be removed from Canada. However, in February 2005, CBSA retracted that opinion by claiming that it was made in error. Rather, the Applicants were not considered "protected persons" and were subject to removal from Canada. At the hearing before this Court, counsel for the Applicant stated that the Applicants were no longer making the argument that the doctrine of legitimate expectation applies in this case. This accords with the Respondent's position that the doctrine of legitimate expectation does not create substantive rights: see *Baker v. Canada(Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817 at para. 26; and *Mount Sinai HospitalCenter v. Quebec(Minister of Health and Social Services),* [2001] 2 S.C.R. 281 at para. 35.

[21] Finally, I am comforted by the fact that, in February 2005, the Applicants were offered the opportunity to make a PRRA application in accordance with section 112 of the *IRPA*. The Applicants had the burden of adducing sufficient evidence to the PRRA Officer of the risk they now allege. A decision was made in this regard in July 2005. If the Applicants are unhappy with the negative finding made by the PRRA Officer or if, as they claim, the Officer misunderstood the nature of the Applicants' PRRA application, they can always make a subsequent PRRA application. They can also make an application on Humanitarian and Compassionate grounds, which I understand they recently did, and that risk elements were raised by counsel.

[22] In conclusion, the Applicants have failed to satisfy this Court that the CBSA Officer made a reviewable error in determining that the removal orders first issued in July 2002 are now enforceable and in ordering the Applicants to report to the Vancouver airport on September 5, 2005, to complete departure requirements. Accordingly, the present application shall be dismissed.

[23] Further to the submissions I received from counsel on both sides, I will certify the following question which is of general importance and would be determinative:

Under the *Immigration and Refugee Protection Act* and *Regulations*, is "refugee protection" conferred on a person who was landed in Canada as a member of the Political Prisoners and Oppressed Persons Designated Class but who has never been determined to be a Convention refugee or a person in need of protection?

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.

2. The following question is certified:

Under the *Immigration and Refugee Protection Act* and *Regulations*, is "refugee protection" conferred on a person who was landed in Canada as a member of the Political Prisoners and Oppressed Persons Designated Class but who has never been determined to be a Convention refugee or a person in need of protection?

"Luc Martineau"

Judge

ANNEX

Immigration and Refugee Protection Act	Loi sur l'immigration et la protection des réfugiés
95. (1) Refugee protection is conferred on a person when	**95.** (1) L'asile est la protection conférée à toute personne dès lors que, selon le cas :
(a) the person has been determined to be a Convention refugee or a person in similar circumstances under a visa application and becomes a permanent resident under the visa or a temporary resident under a temporary resident permit for protection reasons;	a) sur constat qu'elle est, à la suite d'une demande de visa, un réfugié ou une personne en situation semblable, elle devient soit un résident permanent au titre du visa, soit un résident temporaire au titre d'un permis de séjour délivré en vue de sa protection;
(b) the Board determines the person to be a Convention refugee or a person in need of protection; or	b) la Commission lui reconnaît la qualité de réfugié ou celle de personne à protéger;
(c) except in the case of a person described in subsection 112(3), the Minister allows an application for protection.	c) le ministre accorde la demande de protection, sauf si la personne est visée au paragraphe 112(3).
(2) A protected person is a person on whom refugee protection is conferred under subsection (1), and whose claim or application has not subsequently been deemed to be rejected under subsection 108(3), 109(3) or 114(4).	(2) Est appelée personne protégée la personne à qui l'asile est conféré et dont la demande n'est pas ensuite réputée rejetée au titre des paragraphes 108(3), 109(3) ou 114(4).
	115. (1) Ne peut être renvoyée dans un

115. (1) A protected person or a person who is recognized as a Convention refugee by another country to which the person may be returned shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion or at risk of torture or cruel and unusual treatment or punishment.

(2) Subsection (1) does not apply in the case of a person

(a) who is inadmissible on grounds of serious criminality and who constitutes, in the opinion of the Minister, a danger to the public in Canada; or

(b) who is inadmissible on grounds of security, violating human or international rights or organized criminality if, in the opinion of the Minister, the person should not be allowed to remain in Canada on the basis of the nature and severity of acts committed or of danger to the security of Canada.

(3) A person, after a determination under paragraph 101(1)(e) that the person's claim is ineligible, is to be sent to the country from which the person came to Canada, but may be sent to another country if that country is designated under subsection 102(1) or if the country from which the person came to Canada has rejected their claim for refugee protection.

Immigration and Refugee Protection Regulations

338. Refugee protection is conferred under the *Immigration and Refugee Protection Act* on a person who

(a) has been determined in Canada before the coming into force of this section to be a Convention refugee and

(i) no determination was made to vacate

pays où elle risque la persécution du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques, la torture ou des traitements ou peines cruels et inusités, la personne protégée ou la personne dont il est statué que la qualité de réfugié lui a été reconnue par un autre pays vers lequel elle peut être renvoyée.

(2) Le paragraphe (1) ne s'applique pas à l'interdit de territoire :

a) pour grande criminalité qui, selon le ministre, constitue un danger pour le public au Canada;

b) pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée si, selon le ministre, il ne devrait pas être présent au Canada en raison soit de la nature et de la gravité de ses actes passés, soit du danger qu'il constitue pour la sécurité du Canada.

(3) Une personne ne peut, après prononcé d'irrecevabilité au titre de l'alinéa 101(1)e), être renvoyée que vers le pays d'où elle est arrivée au Canada sauf si le pays vers lequel elle sera renvoyée a été désigné au titre du paragraphe 102(1) ou que sa demande d'asile a été rejetée dans le pays d'où elle est arrivée au Canada.

Règlement sur l'immigration et la protection des réfugiés

338. L'asile est la protection conférée sous le régime de la *Loi sur l'immigration et la protection des réfugiés* à la personne :

a) qui s'est vu reconnaître au Canada le statut de réfugié au sens de la Convention avant l'entrée en vigueur du présent article pourvu que, selon le cas :

(i) cette reconnaissance n'ait pas été annulée,

that determination, or

(ii) no determination was made that the person ceased to be a Convention refugee;

(b) as an applicant or an accompanying dependant was granted landing before the coming into force of this section after being issued a visa under

(i) section 7 of the former Regulations, or

(ii) section 4 of the *Humanitarian Designated Classes Regulations*; or

(c) was determined to be a member of the post-determination refugee claimants in Canada class before the coming into force of this section and was granted landing under section 11.4 of the former Regulations or who becomes a permanent resident under subsection 21(2) of the *Immigration and Refugee Protection Act*.

(ii) la personne n'ait pas perdu ce statut;

b) à qui a été accordé le droit d'établissement avant l'entrée en vigueur du présent article, qu'elle soit le demandeur ou une personne à charge accompagnant celle-ci, par suite de la délivrance d'un visa en vertu, selon le cas :

(i) de l'article 7 de l'ancien règlement,

(ii) de l'article 4 du *Règlement sur les catégories d'immigrants précisées pour des motifs d'ordre humanitaire*;

c) à qui la qualité de demandeur non reconnu du statut de réfugié au Canada a été attribuée avant l'entrée en vigueur du présent article et à qui a été accordé le droit d'établissement aux termes de l'article 11.4 de l'ancien règlement ou qui devient résident permanent aux termes du paragraphe 21(2) de la *Loi sur l'immigration et la protection des réfugiés*.