Federal Court  Cour fédérale

Date: 20150417

Dockets: IMM-6238-13
IMM-6239-13

Citation: 2015 FC 490

Ottawa, Ontario, April 17, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

Docket: IMM-6238-13

BETWEEN:

ROSA DELIA GONZALEZ TOVAR

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-6239-13

AND BETWEEN:

ROSA DELIA GONZALEZ TOVAR

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

JUDGMENT AND REASONS

I. Introduction

[1] The Applicant (Ms. Tovar) is from Mexico. She entered Canada in May 2007 on a three-month temporary resident permit. Shortly after her arrival, she made a refugee protection claim under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act) on the basis that she feared her ex-boyfriend, an alleged drug addict and alcoholic, upon return to Mexico. Her claim was dismissed by the Refugee Protection Division of the Immigration and Refugee Board of Canada (the RPD) on February 10, 2010, and leave to review that decision was denied by the Court on June 23, 2010.

[2] On August 28, 2010, Ms. Tovar married a Mr. Navarro who had been granted Convention refugee status a few months prior to the marriage. In December 2010, Mr. Navarro applied for permanent residence for himself as a member of the Protected Persons Class and for Ms. Tovar as his dependent.

[3] In April 2011, Ms. Tovar received a Pre-Removal Risk Assessment (PRRA) application kit that she filled and returned to Citizenship and Immigration Canada. The evidence she filed in support of her PRRA application consisted of a copy of her marriage certificate and of a letter addressed to Mr. Navarro, dated April 7, 2011, regarding the processing of his application for permanent residence.

[4] As Ms. Tovar had already applied for permanent residence as a dependant, the processing of her PRRA application was put on hold because there would have been no need to process it if she had landed as a dependant under Mr. Navarro's application.

[5] By letter dated May 1, 2013, Mr. Navarro was informed that his application for permanent residence and that of Ms. Tovar as his dependant had been rejected. The next day, Ms. Tovar's PRRA application was referred to a PRRA officer for determination and on June 26, 2013, it was also rejected.

[6] The Canada Border Services Agency (CBSA) was then informed of the negative PRRA decision and requested Ms. Tovar to attend a pre-removal interview at a CBSA office in Montreal on September 17, 2013, at which time she was informed of the negative PRRA decision and that she was scheduled for removal on October 15, 2013.

[7] At the time of the interview, Ms. Tovar had long ceased living with Mr. Navarro and had a new common-law partner, Mr. Peralta, who had two children who lived with them and whose mother had just passed away. On September 14, 2013, that is three days prior to her interview with a CBSA officer, Ms. Tovar filed an application for permanent residence as a member of the Spouse or Common-law Partner Class. A copy of her application for permanent residence was handed to the CBSA officer in support of what Ms. Tovar claims to be an oral request for deferral of the removal order. CBSA denies that such a request was ever made during the interview or at any other time.

[8] CBSA's removal order was stayed by the Court on October 8, 2013.

[9] The Applicant challenges both the negative PRRA decision (Docket IMM-6238-13) and CBSA's removal order (Docket IMM-6239-13). She claims that by assessing her PRRA application two years after its filing without providing her with an opportunity to update the application, the PRRA officer breached the principles of fairness and natural justice and deprived her, as a result, of a timely and current risks assessment.

[10] With respect to CBSA's removal order, Mr. Tovar contends that the removal officer breached the principles of fairness and natural justice by failing to accept her documentary evidence in support of her alleged oral request for deferral. She also claims that the officer erred in law in failing to consider, even in a limited manner, the best interests of Mr. Peralta's children who had just lost their mother.

[11] For the reasons that follow, both challenges are dismissed.

[12] As the two cases were heard together, the present Judgment and Reasons are filed in both Dockets IMM-6238-13 and IMM-6239-13.

II. Issues and Standard of Review

[13] Both the challenge to the PRRA negative decision and to the removal order raise the issue of whether there has been a breach of procedural fairness. As is well settled, such issues attract the standard of review of correctness, which means that no deference is owed to the

decision-maker (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 43, [2009] 1 SCR 339; *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 50, [2008] 1 SCR 190; *Chekroun v Canada (Minister of Citizenship and Immigration)*, 2013 FC 737, at para 37, 436 FTR 1; *Gonzalez v Canada (Minister of Public Safety and Emergency Preparedness)*, 2013 FC 153, at para 46, [2013] FCJ No 150 (QL)).

[14] The challenge to the removal order also raises the issue of whether the removal officer properly exercised her discretion. Decisions made by removal officers, who only have limited discretion to defer removal orders, are to be reviewed on a standard of reasonableness (*Gonzalez*, above, at para 47; *Ortiz v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 18, at para 39, [2012] FCJ No 11 (QL); *Cortes v Canada (Minister of Citizenship and Immigration)*, 2007 FC 78, at paras 5-6, 308 FTR 69). This means that deference is owed to the officer's exercise of discretion and the Court shall only interfere if the officer's findings lack justification, transparency and intelligibility or fall outside the range of possible, acceptable outcomes, defensible in fact and in law (*Dunsmuir*, above, at para 47).

III. Analysis

A. *The Negative PRRA Decision*

[15] The PRRA process is provided for under sections 112 and 113 of the Act. These provisions empower the Minister of Citizenship and Immigration – or his delegate – to determine whether a person who faces a removal order is in need of protection. A PRRA analysis is

conducted on the grounds set out in sections 96 and 97 of the Act. The effect of a positive PRRA determination is to stay the removal order.

[16] Where, as is the case here, the PPRA application comes from a failed refugee claimant, the law is clear that the PPRA process is not to become another refugee determination process. This means that the PPRA claimant who has been rejected as a refugee "bears the onus of demonstrating that country conditions or personal circumstances have changed since the RPD decision such that the claimant, who was held not to be at risk by the RPD, is now at risk" and that if he or she fails to meet that burden, "the PPRA application will (or should) fail" (*Cupid v Canada (Minister of Citizenship and Immigration*) 2007 FC 176, at para 4, [2007] FCJ No 244 (QL); see also *Ponniah v Canada (Minister of Citizenship and Immigration*), 2013 FC 386, at para 27, 431 FTR 71; *Kaybaki v Canada (Minister of Citizenship and Immigration)*, 2004 FC 32 at para 11, [2004] FCJ No 27 (QL); *Nam v Canada (Minister of Citizenship and Immigration)*, 2011 FC 1298 at para 22, [2011] FCJ No 1578 (QL)).

[17] Therefore, a PPRA officer can only interfere with the RPD's findings, and, as a result, re-litigate the negative RPD decision, if there is new evidence within the meaning of section 113(a) of the Act before him or her. Otherwise, it is not open for a PPRA officer to depart from the findings of the RPD and to embark on a section 96 or 97 analysis (*Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385, at paras 11-13, 370 NR 344).

[18] Here, it is clear that Ms. Tovar's PRRA application, as it stood when it was assessed in June 2013, was bound to fail as the sections of the PRRA application form dealing with any new

risks were left blank and the only documents listed in support of her application were the certificate of her marriage to Mr. Navarro along with a letter from Citizenship and Immigration Canada regarding her permanent residence application. In other words, Ms. Tovar advanced no risk at all and simply informed the PRRA officer that she was being processed for landing as a dependent of a Protected Person.

[19] Ms. Tovar contends that she was prejudiced by the two-year delay between the filing and the assessment of her PRRA application. She claims that in such context, the PRRA officer had the duty to provide her with an opportunity to update her PRRA application so that she could benefit from a timely and current PRRA assessment as required by the Act. Ms. Tovar submits that had that opportunity been provided to her, she would have informed the PRRA officer about the death of Mr. Peralta's children's biological mother and of the possibility of having to return to Mexico with the two children, resulting in an increased risk of persecution in Mexico at the hands of her ex-boyfriend.

[20] There are a number of problems with the Applicant's proposition.

[21] First, as a matter of principle, there is no duty on a PRRA officer to seek up-dated submissions. As indicated previously, the onus is on a PRRA applicant to ensure that all relevant evidence is before the PRRA officer. As a result, a PRRA officer is only obliged to consider evidence that is before him or her and is not required to solicit the applicant for better or additional evidence (*Ormankaya v Canada (Minister of Citizenship and immigration*), 2010 FC

1089, at paras 31-32, [2010] FCJ No 1362 (QL); *Selliah v Canada (Minister of Citizenship and Immigration*), 2004 FC 872, at para 22, 256 FTR 53).

[22] Thus, it was up to Ms. Tovar to provide any additional information she saw fit in support of her PRRA application and it was open to her to do so at any point up to and until the date of the PRRA officer's decision (*Arumugam v Canada (Minister of Citizenship and Immigration*), 2001 FCT 985, at para 17, 211 FTR 65; *Souici v Canada (Minister of Citizenship and Immigration)*, 2007 FC 66, at paras 50-51, 308 FTR 111). She failed to do so and must bear the consequences of her inaction.

[23] Second, it is unfair, in my view, to impute on the PRAA officer, as does Ms. Tovar, the two-year delay in processing the PRRA application. It is true that the Ms. Tovar's PRAA application was put on hold pending the outcome of Mr. Navarro's application for permanent residence. However, there is no evidence on record that Ms. Tovar informed the PRRA officer that Mr. Navarro and her had ceased to live as husband and wife as early as April 2011 or that she was living with another man as of May 2012 and that, as a result, she was no longer a dependent of Mr. Navarro for the purposes of the then pending application for permanent residence. Had the PRRA officer been so informed, Ms. Tovar's PRRA application would in all likelihood have been processed much sooner. Again, Ms. Tovar must bear in large part the consequences of her inaction.

[24] Third, the alleged new risk, which Ms. Tovar would have put before the PRRA officer had the opportunity to do so been presented to her, is highly problematic for a number of

reasons. As the Respondent points out, the RPD concluded that Ms. Tovar could safely move to other regions of Mexico where her ex-boyfriend would not be able or have the means to locate her. It is also rather highly implausible that Mr. Peralta would allow Ms. Tovar to take his daughters to Mexico if this was to increase the risks of persecution not only for Ms. Tovar but for his daughters too. Finally, and more importantly, Mr. Peralta signed an affidavit in support of Ms. Tovar's challenge to the removal order stating that if Ms. Tovar was to be deported, his two daughters would be staying with him in Canada. Ms. Tovar cannot have it both ways: use these children as a risk increasing factor if she were to be removed to Mexico and use their presence here in Canada to resist the removal order on the ground that it is in their best interest that she remains in Canada.

[25] Even assuming, therefore, that the opportunity to submit this alleged new risk to the PRRA officer had presented itself to Ms. Tovar, this, in my view, could not possibly have changed the outcome of the PRRA decision. When considered in light of all the circumstances of this case, this new risk simply has no basis.

[26] Ms. Tovar complains that she was kept in the dark between April 2011 and September 2103 about her immigration status, depriving her of any opportunity to inform the PRRA officer of the alleged new risk. She claims to have been the subject of "un-transparent coordination efforts" between the PRRA officer and CBSA as a result of getting both the negative PRRA decision and the removal order at the removal interview on September 17, 2013.

[27] These arguments, in the circumstances of this case, have no merit. First, according to the evidence on record, Ms. Tovar would not have been notified of the negative permanent residence decision rendered against Mr. Navarro as only the principle applicant – and not the dependents – are notified of such decisions. As indicated above, Ms. Tovar is largely responsible for this state of affairs as she failed to disclose she was no longer in a relationship with Mr. Navarro and failed to submit a formal change of address when she left Mr. Navarro's place of residence at the time she filed her PRRA application.

[28] Second, the so-called "un-transparent coordination efforts" to provide the negative PRRA decision and the removal order at the same time, is standard procedure. According to the Enforcement Removal Manual, whether a PRRA decision is positive or negative, the PRRA applicant is asked to attend an interview at a CBSA office where he or she is informed of the decision. When the decision is positive, the applicant is also counselled to apply for landing within 180 days. When the decision is negative, the applicant is also informed of the removal date and of the benefits of a voluntary removal. In any event, in order to be relevant, any breach of procedural fairness regarding the negative PRRA decision would have to have occurred on or before the date that decision was rendered. As I indicated above, no such breach was established by Ms. Tovar as nothing prevented her from submitting further evidence and submissions in support of her PRRA application, let alone inquiring about the status of that application or informing the authorities concerned that she was no longer a dependent of Mr. Navarro.

[29] Finally the cases of *Hassan v Canada (Solicitor General),* 2004 FC 564, [2004] FCJ No 707 (QL) and *Varga v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394, [2007]

4 FCR 3 are of no assistance to Ms. Tovar. *Varga* confirmed that the children's interest can only be taken into account, in a deferral request, in terms of short term impact. It has no bearing on this case to the extent the validity of the negative PRRA decision is concerned. As for *Hassan*, unlike the present case, it dealt with a risk arising in the time period between the date of the negative PRRA decision and the date the decision was delivered to the applicant by the removal officer in the context of a stay of removal, something which would normally be addressed by the removal officer, not the PRRA officer.

[30] For all these reasons, I find that there was no breach of procedural fairness in the dismissal of Ms. Tovar's PRRA application and that therefore, there is no basis to interfere with the PRRA officer's decision.

B. *The Removal Order*

[31] According to subsection 48(2) of the Act, removal orders must be enforced "as soon as possible". As a result, removal officers have limited discretion to defer removal orders and when they opt to exercise that discretion, they must do so while continuing to enforce such orders as soon as possible, that is by addressing temporary practical impediment to removal (*Canada (Minister of Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286, at para 45, [2012] 2 FCR 133; *Griffiths v Canada (Solicitor General)*, 2006 FC 127, at para19, [2006] FCJ No 182 (QL); *Mondelus v Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 1138, at para 46, [2011] FCJ No 1392 (QL); *Uthayakumar v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 998, at para 7, [2007] FCJ No 1318 (QL)).

[32] Ms. Tovar submits that she was not told what the CBSA interview of September 17, 2013 with a CBSA officer was for. When the removal officer informed her of the negative PRRA decision and of the removal date, she claims she requested a deferral, handing in a copy of her new permanent residency application as a member of the Spouse or Common-law Partner Class.

[33] The removal officer would have browsed quickly through the new permanent residence application and returned it to Ms. Tovar. Ms. Tovar claims that in so doing, the removal officer did not consider her special circumstances and the best interest of Mr. Peralta's two children, thereby fettering her discretion under section 48 of the Act. She adds that the death of the biological mother of the two girls just two months before the interview was a special circumstance that should have been considered. The documentation handed to the removal officer during the interview also included the death certificate of the biological mother of the two children, the lease agreement establishing that the blended family lives under the same roof and pictures to establish the truthfulness of the relationship between the girls and Ms. Tovar.

[34] Deferral was allegedly sought until a decision is made on Ms. Tovar's new permanent residence application.

[35] The Respondent, Minister of Public Safety and Emergency Preparedness, contends that Ms. Tovar never asked for deferral of the removal order and that therefore, there is no decision for this Court to review. It claims that when the removal order was stayed, the Court did not have the benefit of the affidavit from the removal officer who was the only individual who could refute Ms. Tovar's assertions but who was not available at the time to swear an affidavit.

[36] The Court is put in the difficult position of having to choose between two inconsistent versions of what took place on September 17, 2013. In the affidavit she swore on November 21, 2013, the removal officer stated that at no point during the interview, did Ms. Tovar ask that her removal be deferred, that the contents of the spousal permanent residence application be reviewed or that these documents be kept. She also stated that at no point during the interview did Ms. Tovar indicate that she considered deferral due to the best interest of the children although Ms. Tovar did indicate that her common-law partner had two children who lived with them.

[37] The removal officer further stated that at no point during the interview did Ms. Tovar indicate that there were any reasons why she now fears returning to Mexico.

[38] The removal officer filed her interview notes as an exhibit to her affidavit and indicated that if any such request would have been made to her by the Applicant during the interview or any fear of returning to Mexico expressed by her, it would have been recorded in the notes.

[39] The two conflicting affidavits were made a month apart and they are both contemporaneous to the removal interview. In *Charles v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1096, [2012] FCJ No 1236 (QL), Justice David G. Near, as he was then, faced a similar set of conflicting evidence and he preferred the affidavit of the removal officer. One of the key factors in his decision was that a request for deferral of a removal order is a significant item to which a removal officer who is familiar with the removal

process would be attuned and which would therefore normally be recorded in the notes entered into the system (*Charles*, above, at paras 21-22).

[40] Here, the removal officer, according to her affidavit, reviewed the permanent residence application materials with a view to determining whether Ms. Tovar was entitled to a 60 day administrative deferral under the Public Policy of section 25(1) of the Act regarding in-land permanent residence applications based on compassionate and humanitarian considerations. She determined that Ms. Tovar was not entitled to this administrative deferral, explained why and returned the materials to Ms. Tovar.

[41] The removal officer's affidavit does not explain why Ms. Tovar handed the permanent residence application materials to the officer. In her notes, the removal officer indicated that Ms. Tovar did not speak or ask any questions during the interview ("*cliente ne parle pas et ne pose aucune question*").

[42] In such context, and not having the benefit of cross-examinations on affidavit, I am inclined to prefer the removal officer's version of events. I am further inclined to prefer her version of events as Ms. Tovar has not been fully forthcoming by not disclosing the fact that she was no longer living with Mr. Navarro while his application for permanent residence, and hers as a dependent of Mr. Navarro, were still being processed. The burden was on Mr. Tovar to establish that she had made an oral request for deferral, at least one in the nature she now claims to have made. That burden was not met, with the result that, as the Minister of Public Safety and Emergency Preparedness contends, there is no decision to review in IMM-6239-13.

[43] In any event, there may be very little practical effects to Mr. Tovar's failure to have the removal order set aside as a new date for her removal will have to be set, providing therefore Ms. Tovar with the possibility to present a fresh request for deferral. This lack of practical effect has prompted some Members of the Court to question the appropriateness of exercising the Court's discretion in favour of reviewing removal orders when removal has been stayed (*Palka v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 342, 71 Imm LR (4th) 239; *Higgins v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 377, 64 Imm LR (3d0 98; *Vu v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1109, [2007] FCJ No 1431 (QL); *Surujdeo v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 76, [2008] FCJ No 1431 (QL); *Madani v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 1168, 66 Imm LR (3d0 156; *Maruthalingam v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 823, 63 Imm LR (3d) 242; *Solmaz v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 607, [2007] FCJ No 819 (QL); *Kovacs v Canada (Minister of Public Safety & Emergency Preparedness)*, 2007 FC 1247, 68 Imm LR (3d) 218; *Amsterdam v Canada (Minister of Citizenship and Immigration)*, 2008 FC 244, [2008] FCJ No 303 (QL)).

[44] Be that as it may, I find that Ms. Tovar has not established having made an oral request for deferral. Therefore, her judicial review application against the removal order is dismissed.

C. *Proposed Question for Certification*

[45] Ms. Tovar proposes the following question for certification:

> Is a PRRA officer conducting an assessment pursuant to s.113 (c) of the IRPR acting within its mandate when deciding to hold a risk assessment in order to await the result of a permanent resident application?
>
> a. Does such PRRA officer owe a duty in fairness to:
>
> i. to inform the foreign national that the risk assessment is being held to await the result of the permanent resident application? Or
>
> ii. to inform the foreign national of the officer's decision to re-activate the risk assessment?
>
> b. Does a failure by a PRRA officer to inform the foreign national that the risk assessment is being held to await the result of the permanent resident application or to inform the foreign national of the officer's decision to re-activate the risk assessment, constitute a breach of the principles of fairness.

[46] The test for certification consists in finding whether there is a serious question of general importance and of broad significance which would be dispositive of the appeal and which transcends the interests of the parties to the litigation (*Zazai v Canada (Minister of Citizenship and Immigration)* 2004 FCA 89 at para 11, 318 NR 365; *Canada (Minister of Citizenship and Immigration) v Liyanagamage* (1994), 176 NR 4, at para 4, [1994] FCJ No. 1637 (QL)).

[47] Ms. Tovar contends that as the decision to hold the determination of her PRRA application was not based on the risk determination itself but on the result of the outcome of an independent permanent residence application, it is important to know whether the PRRA officer erred in law.

[48] In IMM-6238-13, the Minister of Citizenship and Immigration opposes Ms. Tovar's request, claiming, *inter alia*, that the questions proposed by Ms. Tovar would not be dispositive of the appeal. I agree. As the Respondent points out, even if the Court were to find that the PRRA officer was under some kind of duty to inform Ms. Tovar that her PRRA application was being held in abeyance, the outcome of the said application would have been the same as Ms. Tovar's claim relating to the emergence of a new risk has no basis whatsoever in the particular circumstances of this case.

[49] The present matter is very much fact specific and does not lend itself, therefore, to certification.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The judicial review applications in IMM-6238-13 and IMM-6239-13 are dismissed;

2. No question is certified; and

3. A copy of this Judgment and Reasons shall be placed on Dockets IMM-6238-13 and IMM-6239-13.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6238-13
STYLE OF CAUSE:	ROSA DELIA GONZALEZ TOVAR v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-6239-13
STYLE OF CAUSE:	ROSA DELIA GONZALEZ TOVAR v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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