Federal Court  Cour fédérale

Date: 20160804

Docket: IMM-517-16

Citation: 2016 FC 897

Ottawa, Ontario, August 4, 2016

PRESENT: The Honourable Mr. Justice Fothergill

BETWEEN:

ERIKA SOFIA AYALA ESCALANTE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

I. Introduction

[1] Erika Sofia Ayala Escalante is 30 years old and a citizen of El Salvador. She has brought an application for judicial review of a decision of an enforcement officer [the Officer] with the Canada Border Services Agency [CBSA]. The Officer refused her request for deferral of her removal from Canada. Ms. Escalante says that her risk upon returning to El Salvador was never

fully assessed by a competent body, and the Officer should therefore have deferred her removal until a pre-removal risk assessment [PRRA] could be completed.

[2] For the reasons that follow, I have concluded that the Officer's decision was reasonable, and consistent with the limited discretion afforded to enforcement officers by the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. The application for judicial review is therefore dismissed.

II. Background

[3] Ms. Escalante and her sister left El Salvador on June 24, 2012. They claimed to fear for their lives because they had received threats from a woman named Martha Vasquez. Ms. Vasquez had purchased the Escalante family home in 2010, but had paid only the deposit. Ms. Escalante's father initiated legal proceedings against Ms. Vasquez to recover the outstanding balance. According to Ms. Escalante, Ms. Vasquez was involved in drug trafficking and organized crime, and sent unidentified, armed men to threaten Ms. Escalante's family in retaliation for commencing legal proceedings against her. Ms. Escalante says that she narrowly escaped an armed assault in an automobile in May 2012.

[4] On June 24, 2012, Ms. Escalante and her sister fled to the United States of America with the intention of seeking asylum in that country. United States border officials detained Ms. Escalante and her sister upon their arrival. Following their release on July 13, 2012, Ms. Escalante and her sister travelled to Canada. They made a claim for refugee protection when they arrived on July 26, 2012.

[5] The Refugee Protection Division [RPD] of the Immigration and Refugee Board heard the claims of Ms. Escalante and her sister in May 2015. In a decision dated August 13, 2015, the RPD determined that they were neither Convention refugees nor persons in need of protection pursuant to ss 96 and 97 of the IRPA. The RPD based its decision on adverse findings of credibility. Specifically, the RPD found that there were numerous contradictions between the claims they made in the United States and those they made in Canada. The RPD also noted numerous inconsistencies and implausibilities in their testimony.

[6] This Court denied Ms. Escalante's application for leave to seek judicial review of the RPD's decision on December 2, 2015.

[7] On January 26, 2016, the CBSA informed Ms. Escalante that her removal from Canada had been scheduled for February 6, 2016.

[8] On January 27, 2016, Ms. Escalante's sister obtained a deferral of her removal from Canada pending determination of a spousal sponsorship application submitted by her husband.

[9] On January 29, 2016, Ms. Escalante requested that her removal be deferred for a period of six months to permit her to request a PRRA and apply for permanent residence on humanitarian and compassionate [H&C] grounds.

[10] In support of her deferral request, Ms. Escalante submitted documents describing the high incidence of violence experienced by women in El Salvador. She said that as a young,

unaccompanied woman returning to El Salvador, she could become a victim of "feminicide", a term used to describe the killing of women simply because they are women. Ms. Escalante said that she had lost contact with her parents, and there were no immediate family members who could offer her protection in El Salvador.

III. Decision under Review

[11] The Officer denied Ms. Escalante's request for deferral of her removal from Canada in a decision dated February 2, 2016. The Officer reviewed the documents submitted by Ms. Escalante, but found that none of the information disclosed any specific threat to Ms. Escalante. Moreover, the Officer noted that the RPD had previously assessed any risk that Ms. Escalante may face as a woman returning to El Salvador. The Officer was not persuaded that a lack of support in El Salvador warranted a deferral of Ms. Escalante's removal. The Officer noted that Ms. Escalante would be free to make arrangements to ensure her safety, and also noted that her family members in Canada could offer financial support to assist in her re-establishment.

IV. Issue

[12] The sole issue raised by this application for judicial review is whether the Officer's decision was reasonable.

V. Analysis

[13] An enforcement officer's decision whether to defer removal from Canada is entitled to deference, and is reviewable against the standard of reasonableness (*Tovar v Canada (Minister of*

Citizenship and Immigration), 2015 FC 490 at para 14; *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 25). This Court will intervene only if the enforcement officer's decision lacks justification, transparency and intelligibility, or falls outside the range of possible, acceptable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

[14] Pursuant to s 48(2) of the IRPA, a foreign national against whom a removal order has been issued must leave Canada immediately. Enforcement officers have an obligation to enforce removal orders "as soon as possible". This may result in removal prior to the expiration of the one year "PRRA bar" described in s 112(2)(b.1) of the IRPA.

[15] An enforcement officer has only a narrow jurisdiction to consider deferral requests. In *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 at para 48, [2001] 3 FC 682 [*Wang*], Justice Pelletier held that a "deferral should be reserved for those applications or processes where the failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment …". In *Canada (Minister of Public Safety and Emergency Preparedness)v Shpati* , 2011 FCA 286 at paragraph 45 [*Shpati*], the Federal Court of Appeal confirmed that an enforcement officer's functions are limited and deferrals are intended to be temporary; they are not intended to make, or to re-make, PRRA decisions or H&C decisions.

[16] More recently, in *Wong v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 966, Justice Shore held that an enforcement officer does not have a "duty to undertake a substantial risk assessment" when faced with a deferral request. However,

he noted that "situations of changed circumstances of increased risk, or where applicants could be exposed to a threat to personal safety, a risk of death, extreme sanction or inhumane treatment could warrant a deferral, in exceptional circumstances" (at para 18, citing *Toth v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 1051 at para 23).

[17] Ms. Escalante argues that enforcement officers must defer removal "where there is a new allegation of risk that has not previously been assessed", and where the new risk exposes the applicant to a risk of death, extreme sanction or inhumane treatment (citing *Atawnah v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 774 [*Atawnah*]). Ms. Escalante says that her inability to contact her parents increases her risk of persecution and constitutes a "material change in her circumstances". She says that she is now an unaccompanied woman returning to El Salvador, and this new risk has never been assessed.

[18] As Justice Mactavish observed in *Atawnah*, the significant evidentiary challenge that confronts most applicants seeking a deferral of removal is that their risk factors will have already been thoroughly evaluated by the RPD or through the PRRA process, or both. Evidence of a significant change in circumstances or an entirely new risk development will therefore usually be required to demonstrate the need for a full risk assessment. However, individuals whose allegations of risk have never been assessed will face a lesser burden in demonstrating that their evidence constitutes new evidence of risk. In the absence of a prior risk assessment, almost any evidence of risk adduced by such an applicant could be considered "new" (*Atawnah* at paras 84-85).

[19] Ms. Escalante relies on Justice Zinn's decision in *Etienne v Canada (Minister of Public Safety and Emergency Preparedness)*, 2015 FC 415 at paragraph 54 [*Etienne*] as follows:

> The risk the enforcement officer must consider is not restricted to a "new" risk in the sense that it arose after a refugee determination or other process. Risks that the enforcement officer is also required to consider include risks that have never been assessed by a competent body.

[20] In this case, the Officer concluded that the documents submitted by Ms. Escalante did not demonstrate that she faced any specific threat upon returning to El Salvador. Moreover, the Officer found that the RPD had already considered the risk of violence to women in El Salvador, based on the following excerpt from the RPD's decision:

> The panel also considered the three reports (or letters) presented regarding the claimants' physical and/or psychological problems … One of these documents also refers to a situation that the claimants could face if they return to El Salvador, namely, violence against women, something for which no specific allegation was made. Having analyzed all of the evidence, the panel considers that the claimants failed to establish a reasonable possibility of persecution if they returned to El Salvador or a risk to their lives or a risk of cruel and unusual treatment or punishment, on a balance of probabilities, if they had to return to their country of origin.

[21] Ms. Escalante says that this excerpt, particularly the words "something for which no specific allegation was made", confirms that her risk as an unaccompanied woman returning to El Salvador was never fully assessed by the RPD. She submits that the RPD was required to consider any ground of risk raised by the evidence, even if she did not specifically mention it in her initial refugee application (citing *Canada (Minister of Citizenship and Immigration) v Nwobi*, 2014 FC 520).

[22] Ms. Escalante's request for leave to bring an application for judicial review of the RPD's decision was denied by this Court. The RPD's decision is not before this Court, and cannot be collaterally attacked in these proceedings. The decision of the RPD was final, and was entitled to deference by the Officer (*Shpati* at paras 41-45). The Officer did not fail to assess a "new risk that had not been previously assessed by a competent body". Rather, the Officer deferred to the risk assessment previously conducted by the RPD, as he was required to do.

[23] The jurisprudence relied upon by Ms. Escalante may be distinguished. In *Atawnah*, the merits of the applicants' refugee claims were never assessed by the RPD because their claims were deemed abandoned. In *Etienne*, the risks initially advanced by the applicants in their refugee applications were never assessed because their claims were rejected on the ground that there was an internal flight alternative available. In both *Atawnah* and *Etienne*, the merits of the applicants' risk allegations had never been assessed at all. This may be contrasted with the present case, where the RPD considered the merits of the claims advanced by Ms. Escalante and her sister.

[24] The RPD specifically acknowledged the risk of violence faced by women in El Salvador, a risk that plainly existed at the time of Ms. Escalante's refugee hearing. Even if Ms. Escalante's request for deferral had been granted, it is far from clear that a PRRA officer would have jurisdiction to re-evaluate this risk, this time bearing in mind that Ms. Escalante may be on her own. As Justice Frenette observed in *Narany v Canada (Minister of Citizenship and Immigration)*, 2008 FC 155 at paragraph 7:

> It is well-established that the PRRA is not an appeal or a reconsideration of the RPD's decision. Section 113(a) of the IRPA

> provides that the decision [of the RPD] with respect to the findings on sections 96 and 97 is final, except where evidence of new, different or additional risks is established which could not have been foreseen by the applicant at the time of the RPD hearing [citation omitted].
>
> [Emphasis in original]

[25] I am satisfied that the Officer considered the risks advanced by Ms. Escalante in support of her request for deferral of her removal from Canada, and reasonably concluded that the documents confirming high rates of violence and "feminicide" in El Salvador did not indicate a specific threat to Ms. Escalante. Ms. Escalante's assertion that she was no longer in touch with her parents was also considered by the Officer, and was found to be insufficient to warrant a deferral of removal. In my view, the Officer's conclusion does not fall outside the range of possible, acceptable outcomes.

VI. Conclusion

[26] For the foregoing reasons, the application for judicial review is dismissed. No question is certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

No question is certified for appeal.

"Simon Fothergill"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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