Date: 20080205

Docket: IMM-2613-07

Citation: 2008 FC 135

Ottawa, Ontario, February 5, 2008

Present: The Honourable Mr. Justice Shore

BETWEEN:

DAVID ANTONIO GARZA GALAN

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] The pre-removal risk assessment officer (PRRA) recognized that Guatemala is a country which has faced political upheaval for more than half a century and which has very serious problems with street gang violence. However, he disregarded the fact that the applicant is an active member of a religious community and that he had been a member of a youth group, teaching alternatives to delinquency and gang membership. Accordingly, this position made him a person who was targeted more than the rest of the population already at significant risk (see "Human Rights Watch, January 2007, Country Summary", which is part of the record: this document raises a

serious doubt about the State protection referred to by the PRRA officer in support of his decision in this case).

LEGAL PROCEEDING

[2] This is an application for leave and for judicial review of a decision by the PRRA officer dated May 8, 2007, dismissing the application filed by the applicant.

FACTS

[3] The applicant, David Antonio Garza Galan, is a citizen of Guatemala. He alleges that he has a fear of persecution by a group of criminals known by the name of Maras Salvatruchas.

[4] In support of his application, Mr. Garza Galan submitted only two documents, as appears from page 3 of the reasons of the PRRA decision.

[5] The first document was a “Human Rights Watch” report on the general conditions in Guatemala. The second document was a report, “American Association for the Advancement of Science”, bearing on violence in general in Guatemala.

[6] The PRRA officer dismissed the application after determining that Mr. Garza Galan had not satisfied his burden of establishing that his removal would put him at risk.

[7] Further, the PRRA officer also determined that there was adequate State protection in Guatemala.

ISSUE

[8] The issue is whether the PRRA officer made a reviewable error when he failed to call the applicant to a hearing, taking into account the circumstances of the conditions in the country which were not considered, as the applicant had never been heard before at any hearing (this is an individual case because of the facts).

ANALYSIS

[9] The PRRA officer decided that Mr. Garza Galan had not adduced sufficient evidence so that his situation could be considered in the event that he were to return to Guatemala. He proceeded with an improper analysis of the PRRA application in that he did not carefully analyze the facts and context of the country.

[10] Mr. Garza Galan explained in his PRRA application that, from a very young age, he assumed the leadership of his family following his father's assassination. The PRRA officer did not consider the tumultuous context of the country in which Mr. Garza Galan spent his youth.

[11] Further, Mr. Garza Galan indicated that he was targeted by the Maras because he is a member of a religious group; that he was responsible for a youth group, implementing social

programs and improving living conditions, *inter alia* giving them alternatives to delinquency and gang membership.

[12] Mr. Garza Galan also stated that he had received threatening phone calls, that he was physically and mentally tortured and that he had been shot at in an attempt to kill him.

[13] The PRRA office did not assign any weight to Mr. Garza Galan's story because, in essence, it was not supported by documentary evidence.

[14] The applicant submits that the PRRA officer erred in failing to hold a hearing pursuant to paragraph 113(*b*) of the *Immigration and Refugee Protection Act* , S.C. 2001, c. 27 (IRPA) and section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations). In fact, the applicant submitted that he satisfied the criteria set out in section 167 for a hearing to be held, namely the existence of the elements set out in sections 96 and 97 of the IRPA raising a serious issue about the applicant's credibility.

[15] Section 113 of the IRPA reads as follows:

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

reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

ou, s'ils l'étaient, qu'il n'était pas 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 the 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

(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

applicant constitutes to the security of Canada.	sécurité du Canada.

[16] Section 167 of the Regulations reads as follows:

167. For the purpose of determining whether a hearing is required under paragraph 113(*b*) of the Act, the factors are the following:	**167.** Pour l'application de l'alinéa 113*b*) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise:
(*a*) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	*a*) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(*b*) whether the evidence is central to the decision with respect to the application for protection; and	*b*) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(*c*) whether the evidence, if accepted, would justify allowing the application for protection.	*c*) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[17] Mr. Garza Galan was never heard by a panel or by administrative authority.

[18] In fact, Mr. Garza Galan arrived at the Canadian border on January 30, 2006, and he was told that he was ineligible because he did not qualify under 101(1)(*e*) of the IRPA (i.e. "safe third country").

[19] When Mr. Garza Galan returned to the border with his wife on July 20, 2006, his refugee claim application was refused under paragraph 101(1)(*b*) of the IRPA. However, he was given the PRRA documents, which he submitted to Immigration Canada on August 25, 2006.

[20] Mr. Garza Galan's credibility was never assessed or determined by any authority or panel.

[21] In *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, the Supreme Court of Canada points out:

> These principles do not impose an oral hearing in all cases. The procedural content required by fundamental justice in any given case depends on the nature of the legal rights at issue and on the severity of the consequences to the individuals concerned. With respect to the type of hearing warranted in the circumstances, threats to life or liberty by a foreign power are relevant.
>
> Appellants' claims to refugee status have been denied without their being afforded a full oral hearing at a single stage of the proceedings before any of the bodies or officials empowered to adjudicate upon their claims on the merits. In order to comply with s. 2(*e*), such a hearing had to be held. Under the *Immigration Act, 1976*, a Convention refugee has the right to "remain" in Canada or, if a Minister's permit cannot be obtained, at least the right not to be removed to a country where life and freedom is threatened, and to re-enter Canada if no safe country is willing to accept him. These rights are of vital importance to the appellants. Moreover, where life or liberty may depend on findings of fact and credibility, the opportunity to make written submissions, even if coupled with an opportunity to reply in writing to allegations of fact and law against interest, is not sufficient.

[22] In *Vlad v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 260, [2004] F.C.J. 292 (QL), Madam Justice Anne Mactavish, adopting the comments of Mr. Justice Yvon Pinard, stated as follows:

> [29] ... In this regard, I adopt the comments of Justice Pinard in *Canada (M.C.I.) v. Dhaliwal-Williams* [1997] F.C.J. No. 567, where he stated that "It is ... well established that procedural fairness means at a minimum allowing each side to present its case and providing both parties with the opportunity to be heard".

[23] In this matter, the applicant submits that the PRRA officer should have required a hearing. The applicant contends that he satisfied all of the conditions of section 167 of the Regulations for holding a hearing. First, there is evidence regarding the elements referred to in sections 96 and 97 of the IRPA which raise a serious issue regarding the applicant's credibility. Second, this evidence is important to the decision on the refugee claim. In fact, without hearing the applicant, it is impossible to determine his credibility. Third, if this evidence is admitted, it would justify granting protection.

[24] The pre-removal risk assessment officer (PRRA) recognized that Guatemala is a country which has faced political upheaval for more than half a century and which has very serious problems with street gang violence. However, he disregarded the fact that the applicant is an active member of a religious community and that he had been a member of a youth group, teaching alternatives to delinquency and gang membership. Accordingly, this position made him a person who was targeted more than the rest of the population already at significant risk (see "Human Rights Watch, January 2007, Country Summary", which is part of the record: this document raises a serious doubt about the State protection referred to by the PRRA officer in support of his decision in this case).

[25] This matter is a special case and, as stated in *Galan v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 749, [2007] F.C.J. 998 (QL):

> [1] ... Given that quasi-judicial decisions cannot be made on an assembly line, a unique case requires reflection, patience, active listening and an open mind. To ensure that natural justice prevails and that procedural fairness be apparent, it is dangerous to draw general conclusions from a particular premise.
>
> [TRANSLATION]
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> ... in *Harrison v. Carswell*, Mr. Justice Laskin describes *Peters* as an *individual case* indisputably tied to the particular facts submitted to him from which, as a result, a general statement cannot be formulated as a precedent. As the *individual case* is not contemplated by the law, it requires the court to examine it in light of specific rules which do not necessarily govern the general rules. *"it is up to the courts to determine in individual cases whether the right to counsel is infringed, and, if so, what remedy, if any, is appropriate in the circumstances. (Juridictionnaire, last update, 2006-07-27.)*

CONCLUSION

[26] For all of these reasons, the application for judicial review is allowed and the matter is referred for redetermination by another officer.

JUDGMENT

THE COURT ORDERS that the application for judicial review be allowed and the matter referred for redetermination by another officer.

"Michel M.J. Shore"
Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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