Date: 20090501

Docket: IMM-4256-08

Citation: 2009 FC 443

Ottawa, Ontario, May 1, 2009

PRESENT: The Honourable Mr. Justice Beaudry

BETWEEN:

DAVID ANTONIO GARZA GALAN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (Act), of a decision dated July 3, 2008, that the pre-removal risk assessment officer, Mélanie Daigle (Officer), dismissed the applicant's pre-removal risk assessment (PRRA) application.

Issues

[2] Did the PRRA Officer fail to follow the reasons of the Court in 2007 FC 749 and 2008 FC 135?

[3] For the following reasons, the application for judicial review will be allowed.

[4] The applicant, 28 years of age, is a citizen of Guatemala. He arrived in Canada on January 30, 2006, at the border at Lacolle from the United States and claimed refugee status. Having arrived directly from a "safe third country", the applicant's refugee claim was not considered valid under paragraph 101(1)(*e*) of the Act and the applicant returned to the United States the same day.

[5] On July 20, 2006, he appeared with his wife (a Canadian citizen) at the point of entry of St-Armand and repeated his claim. Again, the claim was not considered valid under paragraph 101(1)(*b*), but a PRRA form was given to him.

[6] On August 25, 2006, he filed a PRRA application. He benefited from the analysis of his application despite the fact that he did not meet the requirements of subsection 112(2) of the Act. On May 8, 2007, his application was dismissed.

[7] On July 13, 2007, a first application to stay the removal order was allowed by Mr. Justice Shore (*Galan v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 749, [2007] F.C.J. No.

998 (QL) (*Galan*, 2007)). In his reasons for judgment, Shore J. stated the following in paragraphs 9 and 10:

> With the knowledge that the applicant had never been heard by a panel or an administrative authority, it would have been necessary, in this rare case, to seek clarifications about the possible danger to the applicant.
>
> As the evidence indicated the possibility of direct danger targeting the applicant, according to the principle of natural justice in this particular case, some clarifications would have been essential to test the applicant's claims and therefore to ensure that there was procedural fairness.

[8] On February 5, 2008, the application for judicial review of the decision by the PRRA Officer was allowed by Shore J. The matter was referred for redetermination (*Galan v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 135, [2008] F.C.J. No. 166 (QL) (*Galan*, 2008)). The judge repeated that the applicant was never heard by a panel or an administrative authority (paragraph 17) and that the credibility of the applicant was never assessed or determined by any authority or panel (paragraph 20).

[9] On July 3, 2008, another PRRA officer dismissed the applicant's application. This is the decision under review in this proceeding.

[10] On September 30, 2008, the applicant filed an application for leave and an application for judicial review challenging this negative decision.

[11] Considering the reasons for judgment of Shore J. in *Galan*, 2007 and *Galan*, 2008, in which he states that the applicant should be subject to an interview by the PRRA officer in this matter which he describes as unique and special and considering that the PRRA officer did not proceed with the applicant's interview and did not explain her reasons for not following the reasons of Shore J., a second application to stay was allowed by the Chief Justice of this Court on October 20, 2008. The Chief Justice also granted, on February 10, 2009, the applicant's application for leave even though it was late. The respondent submits that the application for judicial review should be dismissed because the application was filed 12 days late. This issue was already subject to written submissions during the application to stay in October 2008.

[12] Given that it was the Chief Justice who heard the application to stay and who himself granted the application for leave, I presume that he took this argument into account and nonetheless granted leave. The facts in this case can be distinguished from those in *Deng v. Canada (Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness)*, 2008 FC 603, [2008] F.C.J. No. 774 (QL).

[13] In her decision, the new officer stated that on February 5, 2008, the application for judicial review of the decision by the PRRA officer was allowed by Shore J. of the Federal Court and that the application was referred for redetermination.

[14] She did not set up an interview with the applicant or comment on or explain in any way why she did not follow the reasons of Shore J.

[15] Based on the same set of facts, the Court has no other choice than to refer the matter for redetermination by a different officer with instructions to meet with the applicant so that he is heard and can present his case.

[16] No question for certification was proposed by the parties and this application does not give rise to any.

JUDGMENT

THE COURT ORDERS that the application for judicial review be allowed and that the matter be referred for redetermination by a different officer with instructions to meet with the applicant so that he can be heard and present his case. No question is certified.

"Michel Beaudry"
Judge

Certified true translation
Janine Anderson, Translator

SCHEDULE A

Relevant Legislation

Immigration and Refugee Protection Act, S.C. 2001, c. 27:

72. (1) Judicial review by the Federal Court with respect to any matter — a decision, determination or order made, a measure taken or a question raised — under this Act is commenced by making an application for leave to the Court.	**72.** (1) Le contrôle judiciaire par la Cour fédérale de toute mesure — décision, ordonnance, question ou affaire — prise dans le cadre de la présente loi est subordonné au dépôt d'une demande d'autorisation.
(2) The following provisions govern an application under subsection (1):	(2) Les dispositions suivantes s'appliquent à la demande d'autorisation :
(a) the application may not be made until any right of appeal that may be provided by this Act is exhausted;	a) elle ne peut être présentée tant que les voies d'appel ne sont pas épuisées;
(b) subject to paragraph 169(f), notice of the application shall be served on the other party and the application shall be filed in the Registry of the Federal Court ("the Court") within 15 days, in the case of a matter arising in Canada, or within 60 days, in the case of a matter arising outside Canada, after the day on which the applicant is notified of or otherwise becomes aware of the matter;	b) elle doit être signifiée à l'autre partie puis déposée au greffe de la Cour fédérale — la Cour — dans les quinze ou soixante jours, selon que la mesure attaquée a été rendue au Canada ou non, suivant, sous réserve de l'alinéa 169f), la date où le demandeur en est avisé ou en a eu connaissance;
(c) a judge of the Court may, for special reasons, allow an extended time for filing and	c) le délai peut toutefois être prorogé, pour motifs valables, par un juge de la Cour;

serving the application or notice;

(d) a judge of the Court shall dispose of the application without delay and in a summary way and, unless a judge of the Court directs otherwise, without personal appearance; and

d) il est statué sur la demande à bref délai et selon la procédure sommaire et, sauf autorisation d'un juge de la Cour, sans comparution en personne;

(e) no appeal lies from the decision of the Court with respect to the application or with respect to an interlocutory judgment.

e) le jugement sur la demande et toute décision interlocutoire ne sont pas susceptibles d'appel.

101. (1) A claim is ineligible to be referred to the Refugee Protection Division if

101. (1) La demande est irrecevable dans les cas suivants:

(a) refugee protection has been conferred on the claimant under this Act;

a) l'asile a été conféré au demandeur au titre de la présente loi;

(b) a claim for refugee protection by the claimant has been rejected by the Board;

b) rejet antérieur de la demande d'asile par la Commission;

(c) a prior claim by the claimant was determined to be ineligible to be referred to the Refugee Protection Division, or to have been withdrawn or abandoned;

c) décision prononçant l'irrecevabilité, le désistement ou le retrait d'une demande antérieure;

(d) the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country;

d) reconnaissance de la qualité de réfugié par un pays vers lequel il peut être renvoyé;

(e) the claimant came directly or indirectly to Canada from a country designated by the

e) arrivée, directement ou indirectement, d'un pays désigné par règlement autre que

regulations, other than a country of their nationality or their former habitual residence; or	celui dont il a la nationalité ou dans lequel il avait sa résidence habituelle;
(f) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(c).	f) prononcé d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux — exception faite des personnes interdites de territoire au seul titre de l'alinéa 35(1)c) — , grande criminalité ou criminalité organisée.
112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).	**112.** (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).
(2) Despite subsection (1), a person may not apply for protection if	(2) Elle n'est pas admise à demander la protection dans les cas suivants :
(b) they have made a claim to refugee protection that has been determined under paragraph 101(1)(e) to be ineligible;	b) sa demande d'asile a été jugée irrecevable au titre de l'alinéa 101(1)e);
113. Consideration of an application for protection shall be as follows:	**113.** Il est disposé de la demande comme il suit :
(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is	b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

required;

Immigration and Refugee Protection Regulations, S.O.R./2002-227:

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 113b) 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.

Federal Court Immigration and Refugee Protection Rules, S.O.R./93-22:

10. (2) The applicant shall serve on every respondent who has filed and served a notice of appearance, a record containing the following, on consecutively numbered pages, and in the following order	**10.** (2) Le demandeur signifie à chacun des défendeurs qui a déposé et signifié un avis de comparution un dossier composé des pièces suivantes, disposées dans l'ordre suivant sur des pages numérotées consécutivement :
(d) one or more supporting affidavits verifying the facts	d) un ou plusieurs affidavits établissant les faits invoqués à

relied on by the applicant in support of the application, and and file it, together with proof of service.

l'appui de sa demande,
et le dépose avec la preuve de la signification.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	**IMM-4256-08**
STYLE OF CAUSE:	**DAVID ANTONIO GARZA GALAN and THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**
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APPEARANCES:

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Steve Bell	FOR THE RESPONDENTS

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