

Federal Court



Cour fédérale

Date: 20110310

Docket: IMM-4996-10

Citation: 2011 FC 283

Ottawa, Ontario, March 10, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

SLETZA ELIZABETH NEGRETE GUDINO

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] “[T]he applicant lived, and her family continues to live, in Mexico City, where the most developed services for abused women exist”, as was stated in a decision by the Pre-Removal Risk Assessment (PRRA) Officer. After examining the documentary evidence, the PRRA Officer

determined that “there are means of protection other than simply reporting abuse to disinterested or corrupt police”. The PRRA decision underscores the range of protective measures available to victims of domestic abuse in Mexico, especially in the Federal District:

The report notes that “the Federal District established the Centre for Victims of Domestic Violence (*Centro Atención a Víctimas for Violencia Familiar*) to provide legal, psychological and social assistance to victims.” It refers to special domestic violence units in urban areas and the National System for Integral Family Development (*Desarrollo Integral de la Familia*, or DIF), which “provides important support and assistance to many minors and adults at risk.”

(PRRA Decision at 5 and 7).

II. Judicial Procedure

[2] This is an application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], for judicial review of a decision of a PRRA Officer, dated July 26, 2010, wherein the Applicant was determined to be neither a Convention refugee within the meaning of section 96 of the *IRPA* nor a person in need of protection, as defined in subsection 97(1) of the *IRPA*.

III. Background

[3] The Applicant, Ms. Sletza Elizabeth Negrete Gudino, was born on August 13, 1990, and is a citizen of Mexico. Ms. Negrete Gudino met her husband, Mr. German Garfias Martinez, approximately 20 years her senior, when she was 15 years old. Ms. Negrete Gudino alleges that she became, soon thereafter, a victim of physical, emotional, verbal and sexual abuse.

[4] In May 2007, Ms. Negrete Gudino learned that she was pregnant with Mr. Martinez’s child. In July 2007, during an altercation, Mr. Martinez kicked her in the stomach, two months pregnant at

the time, in proximity of a subway station. Ms. Negrete Gudino had requested assistance from police in a patrol car parked near the subway station. Both Ms. Negrete Gudino and Mr. Martinez were taken to the police station, and as Ms. Negrete Gudino was a minor at the time, a police officer called her mother. As for Mr. Martinez, he was arrested.

[5] Approximately two months later, Mr. Martinez visited Ms. Negrete Gudino who was now living at her mother's house and convinced her to move back with him. In the following months, Mr. Martinez also convinced Ms. Negrete Gudino to marry him and to come live with him in Canada. Ms. Negrete Gudino's mother signed the wedding papers for her minor daughter and the couple was married on January 8, 2008. Ms. Negrete Gudino's father refused to sign the papers. On January 23, 2008, Ms. Negrete Gudino entered Canada with her husband, who sought refugee status in respect of persecution for a political opinion. Ms. Negrete Gudino's claim for refugee protection was based upon her husband's claim.

[6] Ms. Negrete Gudino alleges that her husband continued to abuse her physically, sexually, emotionally and verbally while they were living in Canada. In October 2008, Ms. Negrete Gudino alleges that her husband pushed her violently, tried to strangle her and punched her in the stomach. Ms. Negrete Gudino managed to call the police, but immediately hung up. The police arrived soon after the missed call and interviewed them. The physical abuse was not disclosed, but Mr. Martinez was told to leave the house for the night.

[7] In January 2009, Ms. Negrete Gudino alleges that Mr. Martinez pushed her, which caused her to slip on the bathroom floor. She woke up in the hospital and realized, subsequently, on the

basis of a police report, that Mr. Martinez had told the hospital staff that she had attempted to commit suicide. She was sent back home with her husband.

[8] Later that year, Mr. Martinez withdrew his refugee claim; he then told Ms. Negrete Gudino that she could return to live with her mother if she returned to Mexico; however, she decided to remain in Canada for fear of what Mr. Martinez would do to her and their son if they were to return with him. Ms. Negrete Gudino attended her refugee hearing alone and was very confused by what was required of her during the hearing. The Refugee Protection Division (RPD) made a negative determination of her claim for Convention refugee status (RPD Decision, September 11, 2009, Tribunal Record (TR) at 355).

[9] Ms. Negrete Gudino submitted a PRRA application and received a negative decision in this regard, on July 26, 2010. She now lives in Canada with her common law spouse, Mr. Raul Avila, a Canadian citizen, her first Canadian-born son, Felix Ajax Garfias Negrete, and her second Canadian-born child, who is Mr. Avila's child.

IV. Decision under Review

[10] In his decision, the PRRA Officer reviewed several documents in evidence provided by Ms. Negrete Gudino in support of her application: one police report from Mexico, one medical report, two police reports from Canada, and a recent letter written by her mother (PRRA Decision at 3). The PRRA Officer concluded that Ms. Negrete Gudino's corroborative evidence was at odds with her sworn statement in her affidavit and that there was little evidence which would demonstrate that her husband would continue to try to harm her if she was to return to Mexico.

[11] The PRRA Officer also found that Ms. Negrete Gudino failed to rebut the presumption of state protection. He concluded that, even if domestic abuse is a pervasive problem in Mexico, many existing means of protection, especially in the Federal District, were accessible for Ms. Negrete Gudino.

V. Position of the Parties

[12] The Applicant submits that her claim should not be rejected where there is evidence that state protection is not effective with regard to gender-related abuse. She also argues that the PRRA Officer found her to be not credible without providing her with an oral hearing, which she considers a procedural fairness error.

[13] The Respondent argues that the PRRA Officer's decision is reasonable. The Respondent submits that the PRRA Officer's decision was based on the weight of the evidence presented and not on a negative credibility finding; moreover, the Respondent submits that it was reasonable for the PRRA Officer to find that the Applicant did not rebut the presumption of state protection available to her in Mexico.

VI. Issues

- [14] (1) Did the PRRA Officer err by not allowing the Applicant an oral hearing?
- (2) Did the PRRA Officer err in his assessment of the availability of adequate state protection?

VII. Pertinent Legislative Provisions

[15] Section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, provides:

Hearing — prescribed factors	Facteurs pour la tenue d'une audience
<p>167. For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:</p> <p>(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;</p> <p>(b) whether the evidence is central to the decision with respect to the application for protection; and</p> <p>(c) whether the evidence, if accepted, would justify allowing the application for protection.</p>	<p>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 :</p> <p>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;</p> <p>b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;</p> <p>c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.</p>

VIII. Standard of Review

[16] The applicable standard of review with regard to a finding of state protection is that of reasonableness (*Ferguson v Canada (Minister of Citizenship and Immigration)*, 2008 FC 903 at para 8, 169 ACWS (3d) 629; *Bautista v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1187 at para 25). The PRRA Officer's findings will only be interfered with on judicial review if

they fall outside of the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190).

[17] As for the oral hearing issue, it refers to the procedural fairness of the impugned decision and is to be determined on the standard of correctness (*Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 983 at para 16, 169 ACWS (3d) 173; *Prieto v Canada (Minister of Citizenship and Immigration)*, 2010 FC 253 [*Prieto*]).

IX. Analysis

(1) Did the PRRA Officer err by not allowing the Applicant an oral hearing?

[18] This Court has already examined section 167 of the *Federal Courts Rules*, SOR/98-106, with regard to the necessity of an oral hearing at the PRRA level:

[29] In *Tekie v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 27, 50 Imm. L.R. (3d) 306, Mr. Justice Phelan at paragraph 16, held that section 167 becomes operative where credibility is an issue which could result in a negative PRRA decision and that the intent of the provision is to allow an applicant to face any credibility concern which may be put in issue. After reviewing *Tekie* above, I held in *Ortega v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 601, [2007] F.C.J. No. 816 at paragraph 29, that an oral hearing was required because in that case, “The officer found that absent the principal applicant’s lack of credibility before the Board, the circumstances were such that the state would not be able to protect the applicants.”

[30] In my opinion, section 167 describes two types of circumstances where issues of credibility will require an oral hearing. Paragraph (a) relates to the situation where evidence before the officer directly contradicts an applicant’s story. Paragraphs (b) and (c), on the other hand, essentially outline a test whereby one is to consider whether a positive decision would have resulted but for the applicant’s credibility. In other words, one needs to consider whether full and complete acceptance of the applicant’s version of events would necessarily result in a positive decision. If either test is met, an oral hearing is required.

(*Prieto*, above).

[19] The present case does not meet either test; moreover, the credibility issue is not “central to the decision in question” (*Prieto*, above at para 26). The PRRA Officer’s central reason for rejecting Ms. Negrete Gudino’s claim is the ability of the state of Mexico to adequately protect her. The PRRA Officer examined that issue “[f]rom the perspective of the fears set out by the Applicant [in her] application” (*Jessamy v Canada (Minister of Citizenship and Immigration)*, 2009 FC 20 at para 68, 342 FTR 250); thus, an oral hearing was not required.

(2) Did the PRRA Officer err in his assessment of the availability of adequate state protection?

[20] The Applicant has the onus to rebut the presumption that a state can protect its citizens (*Canada (Attorney General) v Ward*, [1993] 2 SCR 689, 103 DLR (4th) 1). In a state protection issue, an applicant must put forth clear and convincing confirmation of inadequate state protection:

[7] The Federal Court of Appeal in *Carillo v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 94, in considering the issue of state protection wrote at paragraphs 17 to 19 that the Applicant bears the burden of adducing evidence of inadequate state protection and the burden of persuading the trier of fact that such evidence demonstrates that state protection is inadequate. At paragraphs 20 to 26 the Court wrote that the trier of fact is to consider the evidence on a standard of proof which is not higher than that established by the normal standard of balance of probabilities.

(*Gonzalez v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1259, in a judicial review of a RPD decision).

[21] The more democratic a state’s institution is, the greater an applicant’s burden to prove that all avenues of protection available were exhausted (*Kadenko v Canada (Minister of Citizenship and Immigration)* (1996), 143 DLR (4th) 532 at para 5, 68 ACWS (3d) 334 (FCA)).

[22] There is an abundance of jurisprudence with regard to gender-related violence in Mexico and the Federal District in particular; each case must be appreciated according to its own specific facts:

[14] There is no dispute that Mexico is a democracy with an elected president and a bicameral legislature. It is in effective control of its territory, institutions, military, police and civilian authorities. The RPD found that it makes serious efforts to protect its citizens and “the mere fact that it is not always successful at doing so is not enough to justify a claim that the victims are unable to avail themselves of such protection”. In my view, that conclusion was reasonably open to the RPD on the evidence before it. I find myself in complete agreement with the reasoning of Mr. Justice Russell in *Ortiz v. Canada (Minister of Citizenship and Immigration)* 2006 FC 1365, F.C.J. 1716 where at paragraphs 43 and 44, he stated:

¶ 43 Let me say at the outset that, having reviewed the evidence and the Decision, it would have been quite reasonable for the Board to have reached a conclusion favourable to the Applicants. But this does not mean that the Board's negative conclusions were patently unreasonable, or even unreasonable, and that is the point of this review.

¶ 44 In the end, the Applicants just find it unbelievable that, given the evidence before the Board, the specifics of this case, and the Gender Guidelines, the Board could have concluded as it did. But this is merely to disagree with the Board, and disagreement with the Board is not a sufficient basis for this Court to interfere with the Decision.

(*Canseco v Canada (Minister of Citizenship and Immigration)*, 2007 FC 73, 154 ACWS (3d) 1182, in a judicial review of a RPD decision).

[23] Prior to stating that Ms. Negrete Gudino failed to rebut the presumption of state protection, the PRRA Officer examined the various reports and country condition documents that he had before him, and assessed her claim and contradictory evidence. In his decision, the PRRA Officer referred to the following documents:

- 1) Amnesty international Report 2010 –Mexico, 28, May 2010;

- 2) Human Rights Watch, World Report 2010 – Mexico, January 20, 2010;
- 3) 2009 Country Reports on Human Rights Practices, March 11, 2010;
- 4) Women’s Struggle for Safety and Justice – Violence in the Family in Mexico, Amnesty International August 2008;
- 5) Responses to Information Requests (RIRs), MEX102926.E, May 26, 2009.

[24] The PRRA Officer specified: “The applicant lived, and her family continues to live, in Mexico City, where the most developed services for abused women exist”. After examining the documentary evidence, the PRRA Officer determined that “there are means of protection other than simply reporting abuse to disinterested or corrupt police”. The PRRA decision underscores the range of protective measures available to victims of domestic abuse in Mexico, especially in the Federal District:

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(PRRA Decision at 5 and 7).

[25] In addition, the PRRA Officer examined the evidence provided with regard to Ms. Negrete Gudino’s attempt to obtain state protection:

The applicant contacted the police after she was assaulted in 2007. Her husband was arrested, but no information regarding the outcome is known, other than the fact he was eventually released. It appears the police did not follow up, but neither did the applicant or her mother. Given the lack of information, I find this does not evidence that state protection is inadequate.

(PRRA Decision at 5).

[26] The police report (Police Report, July 5, 2007, AR at 39-40) specifies that Mr. Martinez had been arrested on the night of the altercation. A police officer contacted Ms. Negrete Gudino's parents, and they did not hear from Mr. Martinez for two months after the incident. It was reasonable for the PRRA Officer to find that the police intervention does not provide sufficient evidence that state protection is inadequate, although it was not possible to determine to what extent the police actually intervened.

[27] Finally, Ms. Negrete Gudino alleges that she is in a relationship with Mr. Raul Avila, Canadian citizen and father to her second child, born in October 2010. Mr. Avila allegedly plans to sign a sponsorship undertaking in support of her application for permanent residence based on humanitarian and compassionate (H&C) grounds (Applicant's Affidavit at para 2). The PRRA Officer addressed that portion of her affidavit in his decision and explained that these factors were more suitable to a H&C application (PRRA Decision at 7) and, as such, must not be considered. The Court agrees that this approach is consistent with the jurisprudence (*Varga v Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394, [2007] 4 FCR 3).

X. Conclusion

[28] It is interesting that neither party spoke of the Gender-Related Guidelines, although they were fully taken into consideration by the positions advocated by both parties. The PRRA Officer reasonably concluded that state protection was available to Ms. Negrete Gudino in Mexico. Although the Court is sympathetic to Ms. Negrete Gudino's circumstances, it finds that the PRRA Officer's decision is justified; consequently, the application for judicial review is dismissed.

JUDGMENT

THIS COURT’S JUDGMENT is that the Applicant’s application for judicial review be dismissed; no question of serious question of general importance for certification.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4996-10

STYLE OF CAUSE: SLETZA ELIZABETH NEGRETE GUDINO
v THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Vancouver, British Columbia

DATE OF HEARING: February 24, 2011

**REASONS FOR JUDGMENT
AND JUDGMENT:** SHORE J.

DATED: March 10, 2011

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