

Federal Court



Cour fédérale

Date: 20161130

Docket: IMM-2838-16

Citation: 2016 FC 1330

Toronto, Ontario, November 30, 2016

PRESENT: The Honourable Mr. Justice Campbell

BETWEEN:

**JOSE RIGOBERTO DINARTES
(A.K.A. JOSE RIGOBERTO DINARTE)**

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

JUDGMENT AND REASONS

[1] The Applicant is a citizen of El Salvador whose claim for refugee protection from gang violence in El Salvador was rejected by the Refugee Protection Division (RPD) in a decision dated March 3, 2016. The rejection was based on the RPD's finding that the Applicant's claim had no credible basis because, on a negative credibility finding with respect to his evidence of identity, he failed to establish his identity. On the record before the RPD was evidence that, because the Applicant's sister, Ms. Iris Dinarte, is at risk of gang violence in El Salvador, the

Applicant would also be at risk. However, because the Applicant failed to establish his identity, the RPD did not conduct an assessment of whether the Applicant would face risk pursuant to s. 97 of the *IRPA* if he were to return to El Salvador.

[2] On March 29, 2016 the Applicant applied for leave and judicial review of the RPD decision. On March 30th, a removal order came into force resulting in the Applicant's removal from Canada being scheduled for April 25th. The Applicant's pending removal resulted in a sequence of deferral and judicial review litigation. On June 16th the litigation was resolved by an agreement between Counsel for the Applicant and Respondent that the evidence of risk to the Applicant should he return to El Salvador would be placed before a Deferral Officer (Officer) for consideration pursuant to the Respondent's Operational Bulletin PRG-2014-22 (Bulletin).

[3] The Bulletin sets out the following procedure:

The following process is intended to be used where an Inland Enforcement Officer (IEO) has determined, in the context of a request to defer removal, that the new allegations of risk being raised by a foreign national meet the test set out in the Federal Court of Appeal (FCA) decisions of *Baron* (2009) and *Shpati* (2011). The foreign national must be the subject of an enforceable removal order following the rejection or withdrawal of a refugee protection claim or application for protection [...]

[...]

In the case of *Shpati*, the FCA confirmed that deferral should be reserved for those applications where:

-failure to defer removal will expose the applicant to the risk of death, extreme sanction or inhumane treatment;

-any risk relied upon must have arisen since the last Pre-Removal Risk Assessment (PRRA) (or since the last risk assessment); and,

-the alleged risk is of serious personal harm.

[...]

Note: The IEO is NOT to conduct a full assessment of the alleged risk, nor come to a conclusion on whether the person is at risk. The IEO is to consider/assess the evidence submitted, when there are allegations of risk to the applicant upon execution of their removal order.

In circumstances where an officer concludes that a temporary deferral of removal is warranted, the following steps should be followed:

Actions required:

Step 1: Using the attached template letter, the IEO prepares and sends the notification to the principal applicant that, in light of the allegations of risk raised: (i) the removal has been temporarily deferred, (ii) the file will be brought to the attention of Citizenship and Immigration Canada (CIC) for a possible consideration under section 25.1 of the IRPA, (iii) the removal may be rescheduled in accordance with the law, and (iv) there is no action required on the part of the principal applicant until the Canada Border Services Agency (CBSA) notifies of a date to attend a CBSA office.

[...]

(Certified Tribunal Record, pp.52 - 53)

[4] The decision presently under review is the result of the Officer's application of the Bulletin. The following passages from the Officer's decision describes the decision-making process under review:

According to the deferral request, counsel submits that Mr. Dinartes' risk has never been assessed by a competent body in Canada and that the new evidence included in the deferral request establishes that the removal of Mr. Dinartes would expose him to a risk of death, extreme sanction or inhumane treatment. Deferral of removal is thus requested on the basis that a new assessment, as set out in the CBSA operational Bulletin, PRG-2014-22 should be applied in Mr. Dinartes' case.

[...]

In the context of a request to defer removal, my limited discretion is centred on new and compelling evidence of plausible detriment resulting from the enforcement of the removal order as scheduled. My decision is a written exercise of my discretion to defer removal; it should not be interpreted as an adjunct risk assessment. I do not have the delegated authority to conduct risk assessments. I am tasked with assessing whether compelling new evidence to justify the delay of Mr. Dinartes' removal has been presented for further risk assessment.

[...]

[Emphasis added]

(Decision, p. 2)

[5] A usual application of the Bulletin assumes that a risk assessment has been conducted and no risk was found to exist. Thus, the focus is usually on whether compelling new evidence of risk warrants a deferral. However, in the present case, because a risk assessment had not been conducted by the RPD, the Officer was required to assess whether all the evidence of risk, being the evidence on the record before the RPD as well as the “new” evidence submitted, warrants a deferral.

[6] However, the focus of the Officer’s assessment was only on the new evidence submitted. I find that this result is due to an error of fact: the RPD has conducted a risk assessment and no risk was found to exist.

[7] As a result of the error, I find that the Officer’s decision is unreasonable.

JUDGMENT

THIS COURT'S JUDGMENT is that the decision under review is set aside and the matter is referred back to a different decision-maker for redetermination in accordance the reasons herein.

“Douglas R. Campbell”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2838-16

STYLE OF CAUSE: JOSE RIGOBERTO DINARTES (A.K.A. JOSE RIGOBERTO DINARTE) v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

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