

Federal Court



Cour fédérale

**Date: 20160225**

**Docket: IMM-715-16**

**Citation: 2016 FC 247**

**Ottawa, Ontario, February 25, 2016**

**PRESENT: The Honourable Mr. Justice Annis**

**BETWEEN:**

**SYL MARKAJ**

**Applicant**

**and**

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

**Respondent**

**ORDER AND REASONS**

[1] The Applicant seeks an Order staying his removal to Albania, scheduled to take place on February 27, 2016, pending a determination by this Court of his application for leave and for judicial review of the decision of an inland enforcement officer [the Officer] dated February 18, 2016 refusing his request for a deferral of removal.

[2] The Applicant, a citizen of Albania, entered Canada on October 1, 2012 and submitted a refugee claim based on his fear of returning to Albania, because as a homosexual, he alleges that he will be subject to maltreatment, and the authorities will not, or cannot provide him with the necessary protection.

[3] The Applicant's claim for protection was ultimately refused by the Refugee Protection Board [RPD] on March 16, 2015. It found the Applicant, as a homosexual, would have access to state protection in Albania. The Applicant's subsequent application for leave and judicial review of the RPD decision was denied by this Court on June 27, 2015.

[4] The Applicant requested a deferral of his removal so as to allow him to be eligible to file a Pre-Removal Risk Assessment [PRRA] in three weeks' time, and because he presented new evidence that confirms his risk as a homosexual, if removed to Albania.

[5] The new evidence tendered by the Applicant consists of a forensic report of an expert retained by the Applicant, who upon reviewing the country conditions documentation and based upon his own experience and knowledge of conditions in Albania, opined that a genuine risk exists for homosexuals in Albania.

[6] A stay motion is governed by the tripartite test in *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123 (FCA): "that there is a serious issue to be tried, that the applicant would suffer irreparable harm by reason of his or her

deportation, and that the balance of convenience lies in the applicant's favour, and that the applicant must satisfy each branch of the test."

[7] An elevated standard for the establishment of a serious issue applies to set aside a decision of a removals officer, whereby the applicant must show a likelihood of success in the underlying request for leave and for judicial review of the decision to refuse a deferral of removal: *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FC 682 at para 11. Moreover, the Officer's discretion to defer a person's removal is limited, except where the failure to defer will expose the applicant to a risk of death, extreme sanctions or inhumane treatment, or where there are special considerations of a threat to personal safety. The standard of review of an enforcement officer's decision is that of reasonableness (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311 at para 51).

[8] I conclude that the Officer's decision refusing to defer removal based upon the Applicant's pending eligibility to apply for a PRRA in three weeks' time is reasonable. Under section 48 of the *Immigration and Refugee Protection Act* [IRPA], the Officer is required to enforce removal orders as soon as possible, which includes prior to the one year period barring PRRA applications described in section 112(2)(b.1) of the Act.

[9] Moreover, there is no basis for a section 7 Charter application as alleged by the Applicant in respect of the constitutionality of section 112(2)(b.1) of the IRPA, in light of the recent decision of the Federal Court of Appeal in *Peter v Canada (Minister of Public Security and*

*Emergency Preparedness*), 2016 FCA 51 [*Peter*], which upheld the decision in *Peter v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1073. The facts alleged in this matter are similar in their nature and degree of risk to those that the Court of Appeal found in *Peter* were insufficient to provide factual foundation for a section 7 Charter application.

[10] The Officer's decision concluding that he did not have the authority to assess the merits of a decision by the RPD in the context of the expert opinion introduced by the Applicant is also reasonable. In terms of expertise, the RPD is considered an expert in the assessment of state protection. Accordingly, its decisions are owed significant deference by this Court. Moreover, the Applicant sought leave from this Court for an application of judicial review of the RPD's decision, which was refused, meaning that the decision is final and not subject to a collateral attack.

[11] In such circumstances, the Officer should not have admitted, nor given consideration to a report by a forensic expert retained by the Applicant to provide an opinion, in effect, that the RPD erred in finding adequate state protection for the Applicant in Albania based upon the same country condition reports that were before the RPD and the expert's personal knowledge of circumstances of risk to homosexuals in Albania.

[12] The expert's opinion evidence perhaps, could have been led before the RPD, although always subject to the Board's discretion to refuse to admit opinion evidence on the very issue that it must decide with respect to the adequacy of state protection of the Applicant. In any event, the RPD would not be bound by such opinions concerning the adequacy of state protection.

[13] At the stage of a request for a deferral of removal however, the expert opinion does not constitute new evidence that could not have been led before the RPD. Moreover, the Officer had no jurisdiction to assess the expert's opinion, which is in the nature of a collateral attack on a final decision of the RPD concerning the state protection afforded the Applicant in Albania.

[14] Accordingly, the Applicant has not established the existence of a serious issue, with the result that the motion for the stay of his removal is dismissed.

**THIS COURT ORDERS** that the motion for a stay of removal is dismissed.

“PeterAnnis”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-715-16

**STYLE OF CAUSE:** SYL MARKAJ v THE MINISTER OF PUBLIC SAFETY  
AND EMERGENCY PREPAREDNESS

**PLACE OF HEARING:** TORONTO, ONTARIO

**DATE OF HEARING:** FEBRUARY 22, 2016

**JUDGMENT AND REASONS:** ANNIS J.

**DATED:** FEBRUARY 25, 2016

**APPEARANCES:**

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