IMM-1650-97

Between:

ZEYNAL CIRAHAN,

Applicant,

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION,

Respondent.

REASONS FOR ORDER

Muldoon J.

This is an application for a stay of execution of a departure order dated October 16, 1997. The applicant is scheduled to be removed from Canada on October 30, 1997 at 7:25 p.m. The departure order was issued after the Convention Refugee Determination Division (CRDD) decided that the applicant had abandoned his claim to Convention refugee status. In its reasons the CRDD stated that the applicant had not filed his Personal Information Form in a timely manner and could provide no good reason for the delay. The CRDD apparently relied on Rule 14 of the CRDD Rules and subsections 46.03(2), 65(1) and 69.1(6) of the ***Immigration Act***. Under subsection 65(1) the CRDD, subject to the approval of Governor in Council, is allowed to make its own rules on proceedings before it. Specifically, paragraph (***a***) of subsection 65(1) allows the Immigration & Refugee Board to make rules:

> (a) governing the activities of, and the practice and procedure in, the Refugee Division and the Adjudication Division, including the functions of counsel employed by the Board.

Rule 14(2)(***b***)(iii) of the CRDD Rules states that the applicant must file the PIF within 28 days of personal service and within 35 days after service "where the information is filed by prepaid regular mail." Pursuant to subsection

69.1(6) of the Act, non-compliance with the rules allows the CRDD to find the proceedings abandoned. Subsection 69.1(6) of the Act reads as follows:

> (6) Where a person who claims to be a Convention refugee
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> (*a*) fails to appear at the time and place set by the Refugee Division for the hearing into the claim,
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> (*b*) fails to provide the Refugee Division with the information referred to in subsection 46.03(2), or
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> (*c*) in the opinion of the Division, is otherwise in default in the prosecution of the claim,
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> the Refugee Division may, after giving the person a reasonable opportunity to be heard, declare the claim to have been abandoned and, where it does so, the Refugee Division shall send a written notice of its decision to the person and to the Minister.

On April 7, 1997 the CRDD issued a Notice of Abandonment Decision on Convention Refugee Claim. This notice informed the applicant that on March 26, 1997 the CRDD found the applicant to have abandoned his claim for not providing the PIF in a timely manner.

The applicant asks for a stay of execution of his impending removal from Canada. The grounds for the stay are the usual: ***Toth v. Minister of Employment and Immigration***, (1988), 86 N.R. 302 (F.C/A): serious issue to be tried; irreparable harm, and balance of convenience.

The CRDD Rules, ***Immigration Act Regulations*** and the Act itself grant significant discretion to the CRDD in deciding these matters. In this matter the CRDD had the discretion to decide whether the applicant had sufficient reasons why he did not comply with the seemingly inflexible rules of the CRDD. It found that he did not and thus made its finding of abandonment. Its reasons were simple. Merely, that it did not believe that the applicant, having been in Canada for ten years, could not have known what was expected of him. Perhaps the applicant should have been more diligent in his efforts to ensure that information was filed in a more timely manner, however, how could he if he never received proper notice as he has argued? The discretion of the CRDD to find proceedings abandoned should be subject to serious scrutiny when such punctilious decision- making results in the expulsion of a person in the applicant's position to a country from which his brother and sisters have been found to be refugees. The CRDD's decision is not supported by any relevant evidence on file.

It simply inferred by the applicant's length of stay in Canada that he should have received notice of the PIF and of the abandonment hearing. Nonsensical is not the only adjective that comes to mind when reading this decision. No evidence to contradict application when he says he didn't receive the PIF, only the CRDD's assertion that he must have!

The applicant, his wife and child are all Convention refugee applicants. The applicant's brother and his sisters and family were all found to be Convention refugees as mentioned and there is no reason to believe that the applicant will not be found likewise.

Considering the applicant's position and situation in Canada it is apparent that the balance of convenience and issue of irreparable harm fall in favour of the applicant. The CRDD's leap of logic as was expressed in its reasons clearly establishes that there is a serious issue to be tried. Moreover, the CRDD's pushing on with the hearing of March 24, 1997 when the applicant had specifically asked for a Turkish interpreter, and revealed on the transcript that he was labouring under considerable difficulty understanding the questions posed to him by the CRDD members raises the serious question of why they forced their hearing along to an alleged conclusion in light of the applicant's difficulties. No thanks are due to the applicant's lawyer who fortunately did not represent him on the present hearing. Counsel here did her best to represent her client, and with much more competence than what was evinced by the lawyer who prepared the applicant's documents and faultily appeared for him before the CRDD.

However the Court's decision is based on the CRDD's failures, despite the lawyer's lack of competence. As to failure to engage an interpreter, there is jurisprudence authored by Messrs. Justices Rothstein and McKeown which emphasized the crucial importance of such services: ***Garcia v. M.E.I.***, (1993) 70 F.T.R. 211 at p. 212 and ***Boateng v. M.E.I.***, (1993) 71 F.T.R. 161 (both, Rothstein J) and ***Azofeifa v. M.C.I.***, (1994) 89 F.T.R. 147 (McKeown J.). In the latter decision, the Court wrote and is recorded at pp. 149-50:

> [6] The Board has an ongoing obligation during the hearing to ensure that an applicant does not require an interpreter. There are examples in the transcript of instances where the applicant appears to have trouble in understanding the questions, however, the Board pursued these matters until it was satisfied that she properly understood them. At no stage during the hearing did the applicant state that she was having problems with English. The first time the question is raised is in her affidavit in support of her application for judicial review. There are also contradictions between the affidavits of the refugee hearing officer (RHO), who is Spanish speaking, and the applicant. In telephone conversations and meetings outside the hearing the applicant sometimes spoke English and sometimes spoke Spanish. The applicant states the RHO was not satisfactory in Spanish while the RHO states that she spoke Spanish at home and was fluent. While the applicant had been attending an English school for three and one-half years - grades 9 to 12. If the applicant had given any indication on the record of wanting an interpreter there would have been reversible error, but the Board and the RHO were never informed that the applicant had any problems. The applicant also did not set out any evidence which she might have given had an interpreter been available, nor did she correct any of her evidence at the hearing.

The Federal Court of Appeal has also emphasized the importance to natural justice of proper interpretation before the CRDD: ***Ming v. M.E.I.***, [1990] 2 F.C. 336, (1990) 107 N.R. 296, ***Tung v. M.E.I.***, (1991) 124 N.R. 388, and ***Mosa v. M.E.I.***, (1993) 154 N.R. 200. The strong statement of principle in ***Ming*** appears at pp. 343 and 344, and ends with this passage about the importance of proper interpretation: "This factor assumes special importance in light of the reliance of the [CRDD] panel on the applicant's credibility in arriving at its conclusion". So be it also in the instance of the present applicant's abandonment hearing wherein the panel just flatly disbelieved the applicant with no good basis for doing so.

That the request for an interpreter be visible on the record is, of course, desirable, but such request may not be doubted here. Although the applicant's lawyer neglected to file, in Court, either as an exhibit to any of the filed affidavits, or in the applicant's record, a copy of the Personal Information Form (PIF), yet both counsel had a copy and they agreed that the request for an interpreter was expressed therein, and that the PIF had been completed with the help of a Turkish-speaking person. Further the applicant's lawyer who attended the abandonment hearing also made the request just before the hearing opened, and it is not recorded in the transcript. The applicant responded to the presiding member's question to the effect that he understood, but his performance clearly indicated that he could not understand the abandonment proceedings at the CRDD. What is frustrating is that, despite the applicant's clear difficulties, his lawyer was dumb on the issue, and never intervened when the applicant was in so

much difficulty. Of course, the Court must not be influenced much, or at all, by the poor representational aptitudes of a lawyer of meagre competence, lest every applicant want one!

During the hearing, one of the CRDD members allowed that the applicant's status in Canada is "blurry", yet the CRDD insisted on continuing with the hearing. Consequently, the CRDD failed in its ongoing duty to accord to the applicant a fair hearing.

The applicant's lawyer, in drafting or reviewing the applicant's affidavit, omitted some important times and dates, and failed to have the applicant disclose his conviction of November 14, 1995, shown as exhibit B to Michel Geoffroy's affidavit, filed by the respondent with no second page, only a first and third. However, this matter evinces urgency, if it is not to be moot.

In circumstances such as mentioned, it was unfair and unnecessary to drive the applicant right into the ground, as the CRDD did. It would not have killed them to adjourn his hearing for a couple of weeks so as to make his request for an interpreter timely, for then he would have complied with the limit of at least 15 days before the hearing in which to make the request. Unfortunately, the applicant's lawyer, still "asleep at the switch", neglected to propose any such adjournment, despite the applicant's obvious difficulties, but that was not the applicant's fault and it ought not to prejudice him.

Now, the validity of the deportation order herein is not challenged by the applicant, and the jurisprudence is divided as to this Court's jurisdiction to stay execution of this, or any, removal order in such circumstances. On the side of not staying the order's execution are some powerful decisions: ***Ali v. M.E.I.***, 92-T-94 (November 17, 1992), ***Paul v. M.E.I.***, (1993) 61 F.T.R. 111, ***Shchelkanov***, (1994) 76 F.T.R. 151, ***Gomes v. M.C.I.***, (1995) 91 F.T.R. 264, ***Fox v. M.C.I.***, IMM-3135-96 (September 18, 1996). On the side of staying removal orders, despite their validity but on other grounds of basic justice are: ***Idemudia v. M.E.I.***, (1993) Imm.L.R. (2d) 267, ***Haider v. M.E.I.***, (1993) 58 F.T.R. 168, and

***Muñoz v. M.C.I.***, (1996) 30 Imm.L.R. (2d) 166. ***Muñoz*** is the quintessential example of maladministration which created injustice.

It may be noted that although neither party provided a book of authorities (but the respondent hardly had enough time) the respondent's documents, argument and presentation were of good quality. The respondent has no cause to be disappointed by counsel's performance. However the real issue, after all the jurisprudence is argued, is justice - natural or fundamental, however qualified. This judge acknowledges that, as a general principle, execution of a removal order is not to be thwarted if it be a valid order. The only circumstance in which one must not blindly adhere to that principle is one of maladministration or injustice. It is not fair to deport or otherwise remove a person upon a valid or unchallenged removal order in circumstances in which he or she has been treated unlawfully or unjustly. That is maladministration, and that is sufficient basis for staying or quashing the instrument of injustice, even if that instrument be quite valid ***per se***, and whether or not the subject of such treatment be a "good" or "nice" person. Justice is this Court's business and ***raison d'être***. The rules of law are the servants of justice not its dominators, unless Parliament has unambiguously exacted injustice, in which case the judge must either bend as did most of the old judges of the new Third Reich, or having failed to bend the law, resign. No matter how competent and punctilious the arguments of a respondent, if the applicant has suffered injustice, then the Court must alleviate and redress the injustice, as the law of Canada fortunately permits.

This applicant was disbelieved for the reason only that he ought to know that which he could not know, and he was denied the services of an interpreter when he ought to have been granted an adjournment to obtain such services in compliance with the rule. That is unjust treatment. It is maladministration. It resulted from a too-rigid and too-rushed performance by the CRDD panel. This gives good reason to stay the execution of even a valid removal order, until the applicant can put his refugee claim on a proper footing

again. Were it on such proper footing the deportation order could not now be executed.

Here, the applicant not only suffered the insult of a weak lawyer (not his counsel at this emergency hearing, be it remembered) but he also suffered the injury of unjust maladministration at the hands of the CRDD panel who declared that he had abandoned his refugee claim. Perhaps the conclusion would be different if all the rigid dismissal principles were assiduously applied here, but the Court's business is elsewhere.

The applicant's motion is allowed ***ex debito justitiae***. The execution of the deportation order V021240074, made against the applicant and signed on "22/03/96" in Montréal shall be stayed until a judge of this Court makes a decision concerning the applicant's motion for leave and judicial review in this file, IMM-1650-97, filed on April 25, 1997, against the CRDD's finding of abandonment. The said deportation order is further stayed if the judge accords leave until the consequential judicial review be determined and so on, upon favourable results being obtained on his refugee claim, if such be the case, so long as the applicant continues to succeed in exerting his case toward refugee status, but not otherwise. If the applicant succeeds on his refugee claim, this stay shall become permanent.

F. C. Muldoon
Judge

Ottawa, Ontario
October 31, 1997

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAMES OF SOLICITORS AND SOLICITORS ON THE RECORD

COURT FILE NO.: IMM-1650-97

STYLE OF CAUSE: ZEYNAL CIRAHAN v. THE MINISTER OF C CITIZENSHIP AND IMMIGRATION

MOTION DEALT WITH BY WAY OF CONFERENCE CALL

REASONS FOR ORDER OF THE HONOURABLE MR. JUSTICE MULDOON

DATED: October 31, 1997

APPEARANCES:

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| Ms. Edith Savard | FOR THE RESPONDENT |

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