Date: 20051031

Docket: IMM-456-05

Citation: 2005 FC 1475

OTTAWA, Ontario, the 31st of October 2005

PRESENT: THE HONOURABLE MR. JUSTICE TEITELBAUM

BETWEEN:

ÉDITH LOR DJOTSA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Ms. Djosta filed an application for judicial review of a decision by the pre-removal risk assessment officer (the PRRA officer) of November 9, 2004 whereby she dismissed the PRRA application of Ms. Djosta (the applicant) on the ground that she was neither a "Convention refugee" nor a "person in need of protection" within the meaning of sections 96 and 97 respectively of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the IRPA).

[2] The applicant was born in the town of Yaounde, Cameroon, on February 12, 1975 and is a citizen of Cameroon.

[3] In April 2000 the applicant had an abortion following a pregnancy caused by Jean, her father's cousin. Jean had raped the applicant; despite this, her parents wanted their daughter to marry Jean for financial reasons. Jean threatened to report her to the Cameroon authorities for her abortion if she did not become his wife.

[4] The applicant was admitted to Canada as a student in September 9, 2000. She met her future husband, Darnier Bernier, in a restaurant in Montreal on October 6, 2000. They became engaged on December 24, 2000 and were married on January 28, 2001. The couple separated in January 2004.

[5] In August 2001 the applicant filed an application for permanent residence accompanied by a sponsorship application by her husband. On June 3, 2004 the permanent residence application was denied as there were inadequate humanitarian grounds and because it was doubted that the spouses had married in good faith.

[6] The applicant informed the Immigration authorities in August 2004 that she feared persecution and wished to claim refugee status. She was told that her refugee application was inadmissible as an enforceable deportation order had been made against her on July 7, 2004.

[7] The applicant filed her PRRA application on September 14, 2004; her application was denied on November 9, 2004.

[8] As a result of her abortion and the certainty of forced marriage to Jean on her return to Cameroon, the applicant said she feared for her physical security and her safety if she returned to Cameroon.

[9] Although she arrived as a student, the applicant never completed her university studies: she lacked the necessary funds.

[10] The applicant sought a stay pursuant to section 50(*a*) of the IRPA. In an order issued on February 10, 2005, Pinard J. refused to grant the stay requested: he had serious doubts about the existence of a serious question and the applicant had not established any irreparable harm if she returned to Cameroon.

[11] On the other hand, on July 6, 2005, de Montigny J. agreed to grant the applicant leave to apply for judicial review of her PRRA.

[12] It is worth mentioning that the applicant is still in Canada, but hiding from the respondent.

[13] The issues are the following:

1. The application for a stay was denied. Then the leave to file an application for judicial review was approved. Is the application for judicial review moot?

2. Can the application for judicial review be dismissed on the sole basis of the clean hands doctrine?

3. Did the PRRA officer make a patently unreasonable decision when she concluded that the applicant lacked credibility and lacked subjective fear?

4. Did the PRRA officer make a decision based on an erroneous finding of fact made in a perverse or capricious manner or without regard for the material before her?

[14] The applicant made two main submissions.

1. The findings of the PRRA officer are patently unreasonable since she improperly disregarded important evidence

[15] The PRRA officer found that the applicant could rely on the exception described in article 339 of the Cameroon Penal Code. She submitted that such was not the case since her abortion took place in secret.

[16] Under section 172(2)(*a*) of the *Immigration and Refugee Protection Regulations* and section 97 of the IRPA, the PRRA officer has to provide written reasons in support of an assessment dealing with the personal risk of the person in need of protection.

[17] This finding is improbable, since Ms. Calvès indicated that abortion is generally available in Cameroon.

[18] The PRRA officer did not examine the risk of return to Cameroon in the light of the documentary evidence filed by the applicant.

2. The decision is capricious as it was not based on all the evidence submitted to the PRRA officer

[19] I do not think it is necessary to discuss the two main submissions of the applicant because she did not argue that the findings by the PRRA officer on her lack of credibility and her lack of a subjective fear were patently unreasonable. The PRRA officer first found that the applicant lacked credibility, and this conclusion had an impact on all the other conclusions. For example, the officer doubted that she had had a child with her father's cousin since she indicated that the rapes occurred AFTER she became pregnant. This is an entirely reasonable conclusion based on the facts and the evidence.

[20] In *Masimov v. MCI*, 2004 FC 859, at paragraph 5, Pinard J. indicated that:

> [5] . . . the tribunal's perception that an applicant is not a credible witness may well result in a finding that there is no credible evidence on which the claim could be based.

[21] The respondent made two submissions:

1. Exclusion of new evidence

[22] Exhibit F of the applicant's affidavit was offered in evidence to the PRRA officer. Exhibit F is a judgment ordering her to serve a term of nine months' imprisonment together with a fine of Fr. 50,000 for being found guilty of abortion. The judgment dates from February 26, 2003.

[23] It is clear that this new evidence cannot be admitted by this Court, as the applicant did not file it before the PRRA officer so that she could make the necessary verifications and draw the appropriate conclusions.

[24] In short, the applicant filed her PRRA application on September 14, 2004: her application was denied on November 9, 2004. The Cameroon judgment against her was rendered on February 26, 2003. Accordingly, she had plenty of time to file it in to the record and for whatever reason did not do so.

[25] New evidence cannot be admitted by this Court.

2. Applicant's lack of credibility and of subjective fear

[26] The applicant did not challenge the validity of the findings regarding her lack of credibility and of a subjective fear of persecution.

[27] Findings of fact cannot be reviewed by this Court unless they are patently unreasonable. The applicant did not argue that the PRRA officer's findings in this regard were patently unreasonable.

[28] I will first proceed to discuss the issue of mootness so as to determine whether I should hear this application for judicial review.

[29] I will then assess the relevance of the clean hands doctrine in this case and determine whether the PRRA officer's finding that the applicant lacked credibility and lacked subjective fear was patently unreasonable.

I. Mootness and exercise of discretion

[30] It is very important in the case at bar to fully understand the doctrine of mootness and that of the exercise of discretion; they are distinct and should not be confused. I will proceed to describe both, on the basis of *Borowski v. A.G.C.*, [1989] 1 S.C.R. 342.

[31] The case defining mootness comes from the Supreme Court of Canada, in *Borowski*. Sopinka J. defined the test for determining the mootness of a case at page 353:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case. The cases do not always make it clear whether the term "moot" applies to cases that do not present a concrete controversy or whether the term applies only to such of those cases as the court declines to hear. In the interest of clarity, I consider that a case is moot if it fails to meet the "live controversy" test. A court may nonetheless elect to address a moot issue if the circumstances warrant.

[32] In order to determine whether a case is moot, the live controversy test must be applied, as explained by the Supreme Court of Canada hereinabove.

[33] However, a court may exercise its discretion and elect to hear an application for judicial review that is moot if the circumstances warrant. At this second stage are considered the three "bas[es] upon which this Court should exercise its discretion either to hear or to decline to hear this appeal": *Borowski*, at page 358. These three bases are (see *Borowski*, at pages 358 to 363 for a full discussion):

1. The existence of an adversary situation
2. A concern for judicial economy
3. The Court must demonstrate a measure of awareness of its judicial function and not trench on the legislative function

[34] In discussing the applicant's situation, I will rely on four recent judgments of this Court:

1. *Figurado v. MCI*, 2005 FC 347, March 10, 2005, *per* Martineau J.;
2. *Nalliah v. MCI*, 2005 FC 759, May 27, 2005, *per* Gibson J.;
3. *Thamotharampillai v. Canada (S.G.C.)*, 2005 FC 756, May 27, 2005, *per* Gibson J.;
4. *Alfred v. MCI*, 2005 FC 1134, August 18, 2005, *per* Dawson J.

[35] I will first indicate the holdings of these judgments and then apply them or distinguish them from the case at bar.

[36] In *Nalliah v. MCI*, Gibson J. held at paragraph 15 as follows:

> [15]…I conclude that any judicial review application directed against a negative PRRA decision is moot where the Applicant for judicial review has been removed from, or has voluntarily left Canada following a finding by a judge of this Court that the Applicant is not entitled to a stay of removal by reason that he or she has failed to meet the "irreparable harm" element of the tripartite test for a stay of removal.

[37] In *Thamotharampillai v. Canada (S.G.C.)*, rendered the same day as *Nalliah v. MCI*, Gibson J. reached the same conclusion as in *Nalliah*.

[38] At paragraph 12 of *Thamotharampillai v. Canada (S.G.C.)*, Gibson J. approved the analysis of Martineau J. in *Figurado v. MCI*, 2005 FC 347:

> [12] As did Justice Martineau on the basis of an extensive analysis in *Figurado*, I consider that this matter is moot in that it fails to meet the "live controversy" test. Justice Martineau wrote at paragraph [41]:
>
> The fact that PRRA applicants receive a statutory stay of removal under section 232 of the IRPA Regulations is indicative of the legislative intent to have PRRAs completed before applicants are to be returned to face the risks they allege. The PRRA's fundamental purpose is to determine whether or not a person can safely be removed from Canada without being subject to persecution, torture or inhumane treatment. This purpose ceases to exist upon removal. Further, if the applicant returned and suffered persecution, torture or inhumane treatment, the redetermination of the PRRA may not have any practical effect. In this context, it is understandable that judges of various jurisdiction have stated that in such cases, where a serious issue is raised, a stay should be granted to prevent irreparable harm. As was decided by Lane J. of the Ontario Court (General Division) in *Suresh v. R.* ..., where "the evidence shows that [the applicant] will almost certainly be detained and questioned and exposed to the risks of torture and extra-judicial execution ... there is a strong probability that it will be impossible for the Canadian courts to influence the situation at all. His application will become moot, for any relief he might obtain would be unenforceable". ... It follows that the refusal by the Court to grant an applicant a stay pending the determination of his

> judicial review application "decides the whole case against him" and certainly constitutes an irreparable harm in such circumstances. [citation omitted]
>
> [13] …Justice Martineau continued in paragraph [43] of his reasons in *Figurado*:
>
> ... The primary purpose of an application for protection made under section 112 of the IRPA is not to gain permanent resident status or to obtain a permanent resident visa once removal has been affected [sic]. It certainly becomes more difficult, if not impossible, for Canada to effectively protect an individual who is outside its boundaries pending a redetermination of an application for protection following the Court's conclusion that a negative PRRA decision should be set aside. Therefore, I find that there is considerable force in the applicant's counsel's submission that any ensuing judicial review application directed against a negative PRRA decision becomes somewhat moot once an individual is removed from Canada….
>
> [14] I agree entirely with Justice Martineau's conclusion in the last sentence of the foregoing quotation except that I am not sure whether there is any such thing as "somewhat moot". I conclude that any judicial review application directed against a negative PRRA decision is moot where the Applicant for judicial review has been removed from Canada following a finding by a judge of this Court that the Applicant is not entitled to a stay of removal by reason that he or she has failed to meet the "irreparable harm" element of the tripartite test for a stay of removal.

[39] I must distinguish the case at bar from *Nalliah and Thamotharampillai*: Gibson J. refused to hear the application for judicial review on the ground that it was moot. In both cases, the applicant was no longer in Canada. In *Alfred*, the applicant was no longer in Canada: he was in Sri Lanka.

[40] In the case at bar. the applicant is still in Canada, presumably somewhere in the province of Quebec. Accordingly, I feel that her application for judicial review is not moot as, by still living in Canada, she meets the live controversy test.

[41] Therefore, I feel that she can still have her PRRA decision reviewed even though Pinard J. did not grant her a stay of the removal order. *Inter alia*, the applicant did not show she would suffer irreparable harm if she were to return to Cameroon. The harm was purely speculative since it was related to future events the occurrence of which the PRRA officer in any case quite reasonably doubted.

[42] The function of the PRRA officer was to determine the risks the applicant would be exposed to if she returned to Cameroon. Since the PRRA decision involves considering risks BEFORE removal, judicial review is possible if the applicant has not been removed from Canada.

[43] In my view, this Court can still review the PRRA decision to determine whether it is reasonable and fair under procedural rules. If the decision of the PRRA officer is unreasonable, the Court may remedy this injustice by allowing the application for judicial review.

[44] In *Alfred v. MCI,* Dawson J. relied on *Nalliah v. MCI* and *Thamotharampillai v. S.G.C.* to hold that the applicant's case was moot. At the same time, she chose to exercise her discretion and hear the application for judicial review; she discussed the three points in *Borowski* in her judgment, at paragraphs 19 to 30.

[45] I set out below the relevant paragraphs:

> [21] The Minister, relying upon the decision of this Court in *Nalliah, supra*, argues that it is not appropriate for the Court to address this adversarial context because to do so would be to sit in review of the merits of the decision of my colleague who denied Mr. Alfred a stay of removal because Mr. Alfred had failed to establish that he would suffer irreparable harm if removed. The Minister argues that, as the Court of Appeal noted in *Canada (Solicitor General) v. Bubla*, [1995] 2 F.C. 680, there is no inherent power in one judge to review, either directly or collaterally, the merits of a decision made by a colleague.
>
> [22] In my view, no authority need be cited for that proposition. However, I conclude that the determination that Mr. Alfred had not established irreparable harm is a separate determination from that now before the Court as to the reasonableness or propriety of the negative PRRA decision. They are different in the following respects.
>
> [23] First, while the question of risk was before both the officer and the judge who dealt with the motion for a stay, this is not the question now before the Court. In this application, the Court is confined to determining whether the officer breached the rules of procedural fairness or otherwise committed a reviewable error when he decided to reject the PRRA application.

> [24] Second, to the extent that, in the course of reviewing the officer's decision, the Court must consider whether any error arose in the officer's assessment of risk, in my view what the officer was required to consider was qualitatively different from what was relevant and before the Court on the motion for a stay.
>
> [25] In dismissing the motion for a stay, my colleague found no *prima facie* case that Mr. Alfred "would suffer irreparable harm" because he considered that irreparable harm "must involve the likelihood of jeopardy to [Mr. Alfred's] life or safety". It is settled law that, because a stay is an exceptional remedy, a party seeking a stay must establish, on a balance of probabilities, a clear, convincing and non-speculative risk of harm that cannot be remedied. There is some jurisprudence to the effect that an applicant for a stay must go so far as to establish jeopardy to a person's life or jeopardy (for example, *Calderon v. Canada (Minister of Citizenship and Immigration)* (1995), 92 F.T.R. 107). Other jurisprudence applies a less stringent test of irreparable harm (for example, *Calabrese v. Canada (Minister of Citizenship and Immigration)* (1996), 115 F.T.R. 213). The test for irreparable harm, particularly as expressed in its more stringent form, and as applied in this case on the motion for a stay, is not the test the officer was obliged to apply when conducting the PRRA. Therefore, the test for irreparable harm is not the test, the application of which is to be reviewed by the Court on this application. The differences between what must be established to show irreparable harm on a motion for a stay, and what is necessary in order to obtain a favourable PRRA include the following:
>
> (i) A person may establish themselves to be in need of protection if they come within the definition of a Convention refugee. One may fall within that definition without being able to establish irreparable harm in the sense of a likelihood of jeopardy to one's life or safety in at least two circumstances: first, where country conditions have changed but compelling reasons exist, arising out of past persecution, torture, treatment or punishment, for refusing to avail oneself of state protection; and second, where persecution is established on the basis of the cumulative effect of conduct that is, by itself, harassment but not persecution.
>
> (ii) The existence of irreparable harm must be established on a balance of probabilities. On the other hand, the assessment of the likelihood of future persecutory treatment is to be based on the lower standard of a reasonable possibility.
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> (iii) The existence of irreparable harm is to be assessed only from the time of the motion for a stay until the underlying application for judicial review is determined. On the other hand, risk is to be assessed on a PRRA on a forward looking basis that is not so time-limited.
>
> . . . . .
>
> [28] These considerations illustrate, I believe, that the Court may judicially review the negative PRRA assessment without incidentally reviewing or collaterally attacking the decision that Mr. Alfred had not established irreparable harm when he moved for a stay of his removal.

[46] On the other hand, in the case at bar, I have concluded that the applicant meets the live controversy test by still being in Canada. Accordingly, her application for judicial review is not

moot and I do not need to consider whether this Court should exercise its discretion. I also do not need to discuss the differences between the stay and the application for judicial review, as Dawson J. did at paragraphs 22 to 24.

[47] Consequently, I must proceed with the judicial review and fully discuss the submissions of the parties.

II. The doctrine of clean hands

[48] The question is a simple one: can the applicant seek the judicial review of her PRRA even though she does not have clean hands?

[49] At the hearing in Montreal, the respondent indicated that the applicant was hiding from the Immigration authorities: the authorities did not know where she was (there is no information on her most recent address) and the respondent could not contact the applicant directly.

[50] In addition to the fact that the applicant is not credible and did not demonstrate any subjective fear, the fact that she is living in hiding leads me to hold that she does not have clean hands.

[51] The following old adage applies: “he who has committed Iniquity . . . shall not have Equity” - *Jones v. Lenthal* (1669), 1 Ch. Ca. 154.

[52] The applicant is fleeing the immigration authorities as she fears she will be deported: by hiding, she does not have clean hands.

[53] In general, a Federal Court judge can exercise his or her discretion to refuse to hear an application for judicial review: see *Canadian Pacific Ltd. v. Matsqui Indian Band*, [1995] 1 S.C.R. 3. At pages 28 and 29 of the case, Lamer C.J. made the following remarks:

> The respondents had the right to seek judicial review before the Federal Court, Trial Division. That does not mean, however, that they have a right to require the court to undertake judicial review. There is a long-standing general principle that the relief which a court may grant by way of judicial review is, in essence, discretionary. This principle flows from the fact that the prerogative writs are extraordinary remedies. The extraordinary and discretionary nature of the prerogative writs has been subsumed within the provisions for judicial review set out in s. 18.1 of the *Federal Court Act*. In particular, s. 18.1(3) of the Act states:
>
> 18.1 . . .
>
> (3) On an application for judicial review, the Trial Division may
>
> (*a*) order a federal board, commission or other tribunal to do any act or thing it has unlawfully failed or refused to do or has unreasonably delayed in doing; or
>
> (*b*) declare invalid or unlawful, or quash, set aside or set aside and refer back for determination in accordance with such directions as it considers to be appropriate, prohibit or restrain, a decision, order, act or proceeding of a federal board, commission or other tribunal. [Emphasis added.]
>
> The use of permissive, as opposed to mandatory, language in s. 18.1(3) preserves the traditionally discretionary nature of judicial review. As a result, judges of the Federal Court . . . have discretion in determining whether judicial review should be undertaken.

[54] On the other hand, according to *Mutanda v. MCI*, 2005 FC 1101, August 10, 2005, an immigration case, the application for judicial review should be dismissed.

[55] In *Mutanda*, Blais J. made the following remarks at paragraph 16:

> [TRANSLATION]
>
> Further, the applicant does not have clean hands, since he lied to the officer. This reason in itself would justify the dismissal of the application for judicial review:
>
> > When an applicant applies to this Court for a discretionary order, as is the case here, his conduct must be beyond reproach (*Kouchek v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 323 (T.D.) (QL)) . . .
> >
> > Clearly, the applicant did not come to Court with clean hands, and for this reason alone it is proper for the Court to dismiss the application for judicial review at bar. The Court is not prepared to accept that a refugee claimant who has fabricated a story on the advice of a former representative can seek a new hearing before a panel of different members simply on the basis that he has been badly advised by that person. The applicant cannot profit here from his own turpitude. It must be borne in mind that the applicant has taken an oath to tell the complete truth. He must accordingly bear full responsibility for any perjury he may have committed before the panel.
>
> (*Jaouadi v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1347, [2003] F.C.J. No. 1714, at paragraphs 17 and 19)

[56] Since the applicant is adamantly seeking judicial review, her conduct is relevant and must be beyond reproach. That is not the case. According to the clean hands doctrine, this in itself warrants the dismissal of the application for judicial review.

[57] Nevertheless, I will determine whether the PRRA officer's decision on credibility and subjective fear is patently unreasonable.

III. The applicant's lack of credibility and subjective fear

[58] In her decision, the PRRA officer concluded that the applicant lacked credibility and subjective fear, and gave adequate reasons in support of her conclusions. Further, the PRRA officer found that the applicant had not proven the objective aspect of her fear of persecution, since she had

largely speculated about, but had not established any connection between the objective fear and her personal situation.

[59] As to the applicant's credibility and lack of subjective fear, the PRRA officer noted that:

[TRANSLATION]

- There were several chronological inaccuracies: for example, the applicant said she was not sexually abused by Jean, her father's cousin, until 2000; at the same time, she said she was pregnant in December 1999, a pregnancy caused by Jean's abuses.
- The applicant arrived in Canada in September 2000: she mentioned her fear of returning to Cameroon for the first time on August 23, 2004.
- On May 28, 2004 the applicant said she had no problem returning to Cameroon. On July 7, 2004, in another interview, she did not mention any risk entailed by her return.
- No mention of fear was made in her permanent residence application form, although the form required it.
- The applicant did not raise the issue of risk until her removal became imminent. She mentioned no fear except after having exhausted her remedies: an extension of her student status was denied, as was her application for permanent residence in Canada, and when the removal order against her became enforceable because of the denial of the stay.

[60] According to the respondent, the applicant did not dispute and did not challenge the validity of the conclusions that there was a lack of credibility and a lack of subjective fear: accordingly, she did not in any way show that the conclusion of a lack of credibility or of a lack of subjective fear was patently unreasonable. I agree.

[61] In *Bilquess v. MCI,* 2004 FC 157, at paragraph 7, Pinard J. said:

> [7] The PRRA officer found, like the panel that preceded her, that the applicants were not credible. The evaluation of credibility is a question of fact and this Court cannot substitute its decision for that of the PRRA officer unless the applicant can show that the decision was based on an erroneous finding of fact that she made in a perverse or capricious manner or without regard for the material before her (see paragraph 18.1(4)(*d*) of the *Federal Court Act*, R.S.C. 1985, c. F-7). The

> PRRA officer has specialised knowledge and the authority to assess the evidence as long as her inferences are not unreasonable (*Aguebor v. Canada (M.E.I.)* (1993), 160 N.R. 315 (F.C.A.)) and her reasons are set out in clear and unmistakable terMs. (*Hilo v. Canada (M.E.I.)* (1991), 15 Imm.L.R. (2d) 199 (F.C.A.)).

[62] As to the applicant's other submissions, the Court does not completely agree with the findings of the PRRA officer, for instance in relation to her discussion pertaining to the Cameroon Penal Code and the provisions regarding abortion. However, there is nothing patently unreasonable, or even unreasonable, in the discussion of the PRRA officer of the facts which led the applicant to have an abortion.

[63] The applicant is not a credible witness and she lacks subjective fear.

[64] The application for judicial review is not moot.

[65] Counsel for the applicant suggested the following question for certification:

> [TRANSLATION]
>
> Does the dismissal of an application to stay a removal order pending judicial review of the case automatically make the application for judicial review doomed to failure?

[66] I reject the question submitted for certification. I see no need to certify it.

ORDER

For the above reasons, the application for judicial review is dismissed.

"Max M. Teitelbaum"
JUDGE

Certified true translation
François Brunet, LL.B., B.C.L.

FEDERAL COURT

SOLICITORS OF RECORD

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