Date: 20070729

Docket: IMM-2938-07

Citation: 2007 FC 792

Ottawa, Ontario, July 29, 2007

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MONICA STREANGA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

I. OVERVIEW

[1] The affirmative responses to addressing the fragility of the human condition must be weighed or balanced to ensure that the integrity of the immigration system is not compromised by the protection it offers to individuals who claim but may not be at risk.

[2] Human cargo "shipped" for the sex trade is composed of individuals who become pawns of which Canada becomes the recipient; thus, the one question of each respective individual who often

remains voiceless in that human cargo is simply formulated as, could such an individual be at risk from the “recruiting agent” or agents, if returned?

[3] The evidence before the Pre-Removal Risk Assessment (PRRA) Officer showed that individuals in similar situations, who have escaped from their human traffickers, are often recaptured even when they seek refuge in women’s shelters. (Institute for War and Peace Reporting No. 460)

[4] In addition, the evidence demonstrates that the European Parliament has expressed its concern at the serious and continuing problem of violence against women which is having major implications in terms of trafficking in women and their sexual exploitation inside and outside of their countries of origin. (800,000 annual known victims in the human trafficking cartel according to statistics – Motion - European Parliament Resolution on Accession of Romania to the European Union, 2006/2115 (INI)

II. INTRODUCTION

[5] This is a motion heard with respect to an Application for Leave and for Judicial Review of the decision of a PRRA Officer in which he found that the Applicant is not a person in need of protection. The Applicant seeks an order staying her removal until such time as the Application for Leave and for Judicial Review is determined.

III. ISSUES

[6] Whether or not this application for an order, staying the execution of the removal order made against the Applicant, meets the tripartite test for the granting of a stay, in that:

- the Applicant has raised a serious issue;
- the Applicant would suffer irreparable harm if deported from Canada; and
- that, on the balance of convenience, giving consideration to both parties, the stay should be ordered. (*Toth v. Canada (MEI)* (1988), 6 Imm. L.R. (2d) 123 (F.C.A.))

IV. ANALYSIS

A. *Serious Issue*

[7] The Court has consistently established a low threshold for a finding of "serious issue to be tried" in the context of stay motions. The Court has held that it is merely necessary to show that the application before the Court is not frivolous and vexatious. (*North American Gateway Inc. v. Canada (Canadian Radio-Television and Telecommunications Commission)*, [1997] F.C.J. No. 628 (C.A.) (QL))

[8] "Serious issue" has also been described as an issue which is "not frivolous and vexatious." This Court has held that whether the issue or issues meet the test for leave need not be determined at this stage. (*Sowkey v. Canada (M.C.I.)*, [2004] F.C.J. No. 51 (QL)

[9] In *Brown v. Canada (MCI)*, 2006 FC 1250, the Court noted that the test concerning a serious issue on an application for a stay, is that there be an issue that is not frivolous or vexatious, this being a lower test than the test applied at the leave stage, namely whether there is a "fairly arguable case."

[10] The PRRA Officer concluded that since the Romanian government has "taken serious measures" to punish those responsible for trafficking, that state protection would be available to the Applicant upon her return. The Officer has applied the wrong legal test to state protection, and instead has not asked himself whether the Romanian state can provide effective protection to victims of human trafficking who fear retribution from their past traffickers. (Motion Record, pages 170-171)

[11] Federal Court jurisprudence has indicated that a willingness to provide adequate protection to victims of gender violence is not enough for a finding of state protection to be considered reasonable. The PRRA Officer relies on the fact that the government "worked with domestic and international NGOs to build public awareness of trafficking and to improve and expand services offered to victims. Public officials, including the president, made public statements during the year about the trafficking problem." (Motion Record, page 171)

[12] The Officer relies on a "National Anti-trafficking Agency (ANTIP)" which the United States Department of State (DOS) Report states during 2005 "…*focused on* ***hiring*** *staff and* ***worked to become operational***." This quoted section of the DOS Report also refers to the fact that the

Romanian government has "approved a new national strategy against trafficking in November, and plans for implementation of that strategy continued at year's end. " Contrary to the finding of the PRRA Officer, the existence of this agency is not evidence of effective state protection, as it is too soon to know whether such initiatives have really taken hold and are truly an effective mechanism to protect women from human trafficking. This agency is still hiring staff and is not yet operational. (Motion Record, pages 170-171)

[13] Moreover, the jurisprudence does not require an Applicant to seek protection from non-state actors, such as NGOs, who cannot be expected to provide the actual protection from agents of persecution that the police should be providing. (*Molnar v. Canada (MCI)*, [2002] F.C.J. No. 1425 (T.D.) (QL); *Singh v. Canada (MCI)*, [2004] F.C.J. No. 1016 (T.D.) (QL))

[14] Public pronouncements and public awareness, as well as services for women who have already been victimized, do not amount to state protection. In light of the evidence of the serious inadequacies of the Romanian police (particularly concerning the amount of corruption in the police force) in combating and preventing human trafficking, the PRRA Officer's reliance on the standard of "serious measures" is wrong.

[15] The Applicant submits that the PRRA Officer has erred in viewing the legal test as one of "serious measures". The Federal Court in *Elcock v. Canada (MCI)*, [1999] F.C.J. No. 1438 (T.D.) (QL), at paragraph 15, established, that for adequate state protection to exist, a government must have both the will and the capacity to effectively implement its legislation and programs:

> Ability of a state must be seen to comprehend not only the existence of an effective legislative and procedural framework but the capacity and the will to effectively implement that framework.

[16] In *Mitchell v. Canada (MCI)*, 2006 FC 133, the Federal Court determined that the evaluation of state protection involves evaluating a state's "real capacity" to protect its citizens. The Court noted that it is an error to look to a state's good intentions and initiatives, if the real capacity of the state to protect women from violence was still inadequate.

[17] In *Garcia v. Canada (MCI)*, 2007 FC 79, the Federal Court held that a state's "serious efforts" to protect women from the harm of domestic violence are not met by simply undertaking good faith initiatives. The Court stated at paragraph 14:

> It cannot be said that a state is making "serious efforts" to protect women, merely by making due diligence preparations to do so, such as conducting commissions of inquiry into the reality of violence against women, the creation of ombudspersons to take women's complaints of police failure, or gender equality education seminars for police officers. **Such efforts are not evidence of effective state protection which must be understood as the current ability of a state to protect women…**

Garcia elaborates on the meaning of "serious efforts" at paragraph 16:

> … **the test for "serious efforts" will only be met where it is established that the force's capability and expertise is developed well enough to make a credible, earnest attempt to** do so, from both the perspective of the woman involved, and the concerned community. The same test applies to the help that a woman might be expected to receive at the complaint counter at a local police station. That is, are the police capable of accepting and acting on her complaint in a credible and earnest manner? Indeed, in my opinion, this is the test that should not only be applied to a state's "serious

> efforts" to protect women, but should be accepted as the appropriate test with respect to all protection contexts.

[18] Justice La Forest stated in *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at 724 that "it would seem to defeat the purpose of international protection if a claimant would be required to risk his or her life seeking ineffective protection of a state, merely to demonstrate that ineffectiveness."

[19] Evidence of improvement and progress by the state is not evidence that the current response amounts to adequate, effective protection. As held in the Federal Court decision of *Balogh v. Canada (MCI)*, [2002] F.C.J. No. 1080 (QL) at paragraph 37, a state's willingness to provide protection is not enough:

> I am of the view that the tribunal erred when it suggested a willingness to address the situation…can be equated to adequate state protection.

[20] In reasoning that since the Romanian state had prosecuted the men who had trafficked her in the past, this would mean that the Applicant would be able to access state protection "as she did previously", the PRRA Officer misapprehends that even though her traffickers were eventually prosecuted and spent some time in jail, that she would not be at additional risk now from her traffickers, in that they would want to seek retribution against her for her role in their imprisonment. The PRRA Officer does not analyze this aspect of her fear in considering whether she would face a risk to her life, or risk of cruel and unusual treatment or punishment.

[21] It is important to note that the PRRA Officer made no credibility findings concerning the Applicant's affidavit or the new evidence.

[22] The evidence before the PRRA Officer showed that other Romanian women who have escaped their traffickers are often recaptured by them when they seek refuge in women's shelters. The Applicant has attested that she fears her former traffickers will indeed find and put her at serious risk. (Motion Record, pages 6, 18 and 141)

[23] No basis in the evidence exists to assume the Romanian police have developed sufficient capability and expertise to make a credible, earnest attempt to arrive in time to protect a person, such as the Applicant, from her traffickers before she is subjected to harm. (*Garcia, supra*)

[24] The PRRA Officer has erred in failing to recognize that while the Romanian state has made some commendable efforts in its attempt to stem human trafficking, and enacted laws to prosecute traffickers, the documentary evidence treating the scale of trafficking in women and children in Romania indicates that sample prison terms, in and of themselves, simply, are not effectively addressing the problem and protecting women in the Applicant's position.

[25] When one considers the ratio of traffickers convicted—146—to the number of identified trafficking victims of 2, 250, this constitutes a small proportion. This figure of trafficking victims is likely much lower than in reality, as it comprises only the victims that have been identified and counted by official statistics. Given that trafficking involves degradation and sexually based

offences, the actual number of victims is much higher, with many women not reporting their abuse and ordeals to the police. (Motion Record, pages 131-132, 169 and 171)

[26] The Officer fails to provide any analysis of the issue of corruption in the police force, identified as rampant in several of the sources, and how this would effect the ability of the Applicant to receive on-the-ground protection, at the local level, from the individuals she fears. The DOS Report cites police corruption as being a major obstacle in effectively protecting women in the Applicant's position. The DOS Report states: "**Corruption in the police, <u>particularly local forces</u>, contributed to trafficking. There were frequent allegations that border police and customs agency officials accepted bribes to ignore cases of trafficking.**" [emphasis added]

[27] The Officer mentions this noted serious deficiency, but then fails to provide any reasoning as to how it applies to his state protection finding. In this sense, in addition to not analysing this evidence, the Officer's reasons are also inadequate.

[28] Amnesty International concludes that the law against trafficking in Romania has not led to any noticeable improvement in the serious problem of human trafficking. In reported cases, law enforcement officers failed to take effective action to protect women. Other sources note the endemic problem looms large. Although prosecutions are taking place, these do not include the "coordinators of the criminal networks". (Motion Record, pages 82, 94 and 154)

[29] The Officer does not address this evidence. Instead, the Officer refers to only one documentary source in his reasons, the DOS Report for Romania, quoting large sections of it. No weighing of the evidence or reference to other sources of evidence that support the Applicant's submissions about police corruption and lack of police effectiveness is mentioned by the PRRA Officer. (Motion Record, pages 169-170)

[30] The PRRA Officer also fails to address the Applicant's fears that:

- Constantin is described as a ***recidivist*** criminal in the Romanian Court judgment, indicating that previous criminal punishment did not deter him from committing further crimes.
- Constantin demonstrated that he was not afraid of the police in yelling out a death threat against the Applicant, at the police station, in front of police officers.
- Constantin's men continued to visit the Applicant and her mother after she was able to escape from them. After she gave her statement to the police, they continued to look for her subsequent to her departure from Romania for Hungary, and after members of the trafficking ring were convicted on April 25, 1998.
- The Applicant's mother has learned from a friend of the Applicant, Maia, that Constantin has returned and is living in Arad; furthermore, there is a connection to Constantin as Maia's ex-boyfriend was in jail with Constantin and is still known to him.

- Constantin and the other men, convicted in 1998, have a new and strong reason to take issue with the Applicant and to cause her harm. (Motion Record, pages 6, 11, 17 and 32)

[31] This information should have been addressed in assessing state protection. At a minimum, a need exists for the matter to be considered. As no reference is made to this evidence, it appears to have been ignored. (*Cepeda-Gutierrez v. Canada (MCI)*, [1998] F.C.J. No. 1425 (T.D.)(QL))

[32] As stated by Justice Evans in *Cepeda-Gutierrez*, *supra*, at paragraphs 15 and 17:

> **The Court may infer that the administrative agency under review made the erroneous finding of fact "without regard to the evidence" from the agency's failure to mention in its reasons some evidence before it that was relevant to the finding, and pointed to a different conclusion from that reached by the agency.** …
>
> …
>
> However, the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": Bains v. Canada (MEI) (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. Thus, a blanket statement that the agency has considered all the evidence will not suffice when the evidence omitted from any discussion in the reasons appears squarely to contradict the agency's finding of fact. **Moreover, when the agency refers in some detail to evidence supporting its finding, but is silent on evidence pointing to the opposite conclusion, it may be easier to infer that the agency overlooked the contradictory evidence when making its finding of fact.**
>
> [Emphasis added]

[33] This has been found to be a reviewable error by this Court. As held by Justice Lemieux in *Man v .Canada (MCI)*, 2004 FC 258, the failure of the PRRA Officer to demonstrate a resolution in respect of conflicting evidence on an important risk issue was considered to be a serious issue in the context of the stay motion.

[34] In *Ahmad v. Canada (MCI)*, 2003 FC 1295, the Court held that "there was some objective evidence contrary to that found by the PRRA officer in certain of the documents before her which were not referred to in her decision. Thus, a key basis of her decision, and whether that basis was patently unreasonable on the evidence before her, is raised as an issue by the underlying Application for Judicial Review".

[35] In *Resulaj v. Canada (MCI)*, 2003 FC 1168, the Court concluded that a serious issue existed because, "looking at the officer's reasons as a whole, I am satisfied that Ms. Resulaj has raised a serious issue; namely, whether the PRRA officer's conclusion that she did not satisfy any of the grounds for protection was supported by the evidence."

[36] The Officer should have, at minimum, addressed the evidence cited in the above paragraphs and provided an explanation as to why it did not carry any weight in his determination. The Officer's reasons instead are silent on why these factors did not affect her finding on state protection. (*Ali v. Canada (Solicitor General)*, [2006] F.C.J. No. 322 (QL))

B. *Irreparable Harm*

[37] If deported to Romania, it would seem that the Applicant would suffer irreparable harm. This is due to a serious risk to her life or cruel and unusual treatment at the hands of the men who formerly trafficked her into prostitution.

[38] In the *Figurado* decision, in addition to the harm that would flow from the judicial review being rendered nugatory, the Federal Court held that where a serious issue has been demonstrated with respect to a negative PRRA decision, irreparable harm "will necessarily result" and the balance of convenience will normally favour the applicant because of the issues at stake with a PRRA—that an applicant would be exposed to a risk to her life or cruel or unusual treatment or punishment if removed prior to a judicial review dealing with serious issues concerning that risk. (*Figurado v. Canada (MCI)*, [2005] 4 F.C.R. 387 at paragraph 45)

[39] Moreover, in the decisions of *Carlos Urbina Linares v. MCI & MPSEP*, May 11, 2005, IMM-2873-05, *Marva Coombs v. MCI*, January 30, 2007, IMM-339-07 and in *Keturah Laverne Cupid v. MCI*, April 11, 2006, IMM-1737-06, Justices Dawson and Gibson respectively, applied *Figurado* and held that applicants who had demonstrated serious issues to be tried with respect to judicial review applications of PRRA decisions, had necessarily established irreparable harm.

[40] This Court has ruled that where a Applicant has raised a serious issue in the context of a PRRA officer's decision, the test of irreparable harm will be met. In *Resulaj, supra,* this Court stated:

> This case involves the question whether the assessment of personal risk to Ms. Resulaj was adequate. Removing her to face that potential risk while the legal issue in her case is explored before the court would render nugatory any legal remedy that might ultimately be available to her. Such circumstances constitute irreparable harm.

[41] Similarly in *Ahmad*, *supra*, at paragraph 8, this Court stated that:

> Moreover, the nature of that serious issue [an error in the PRRA] is such that if the Applicant were to be removed and the findings of the PRRA officer were in error, the Applicant would indeed be exposed to risk if he were now returned to Pakistan. That risk is such that his opportunity for consideration of the risk that concerns him, should he be successful in his Application for Leave and for Judicial Review, could not be raised. Thus, his right to raise a claim would be lost. That loss, in my view, constitutes irreparable harm.

[42] Given that the issue of risk to the Applicant's physical safety is at the core of the challenged PRRA decision, removal of the Applicant to Romania, now, would effectively render her application for leave and for judicial review moot, in that she would be exposed to the very risks which she argues in her PRRA would result in her not being deported to Romania. In light of the jurisprudence regarding irreparable harm, execution of a deportation order, prior to a final determination concerning her application for leave and judicial review, constitutes irreparable harm.

[43] The Applicant states that she would have to return to live with her mother in Arad, Romania. That is the only place she has to go, as she is not in a financial position to go anywhere else. She has learned that the former leader of the trafficking ring, Constantin, is now released and living in Arad. (Motion Record, pages 6, and 17-18)

[44] In *Melo v. Canada (MCI)*, [2000] F.C.J. No. 403 (T.D.), the Court states that to find irreparable harm, there must be prejudice beyond that which is inherent in the notion of deportation itself. These circumstances engage interests beyond those which are inherent in the nature of a deportation. The Applicant appears to be at risk of physical and sexual assaults, as well as the possibility of being forced back into prostitution against her will in her country of origin. The documentary evidence supports her fears and sets out the sophisticated manner in which the traffickers operate to hide their operations from the police. (Motion Record, page 142)

[45] In *Brown v. Canada (MCI)*, 2006 FC 1250, the Federal Court emphasized that the test for a stay with respect to irreparable harm, being set out in *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 and *Toth*, *supra*, was met when risk to a woman's life at the hands of her abusive partner was alleged.

[46] The *Brown* decision dealt with an applicant in regard to a negative PRRA decision, who faced serious harm at the hands of a past abusive partner. Justice Harrington compared the risk to a woman's life who feared her former abusive partner's threats to her life if she returned to St. Vincent, with the irreparable harm at stake in the cases of RJR-Macdonald and Toth, both of which dealt with economic interests, and found that those latter cases, simply, did not compare to the applicant's situation, in that the harm contemplated to the applicant was much greater.

[47] In the *Moktari* decision, an applicant for a stay of deportation argued that he would face irreparable harm involving risk to his liberty and life if he were returned to Iran. The Court found that the applicant's evidence concerning irreparable harm was "general and limited," but nevertheless found that he had demonstrated sufficient, uncontradicted evidence that he would face consequences not compensable in damages, and granted a stay of removal. In the present case, the uncontradicted evidence is specific, timely and compelling, and the Applicant has demonstrated that she faces irreparable harm if returned to Romania. (*Moktari v. Canada (MCI)*, [1997] F.C.J. No. 1648 (T.D.) (QL), at paragraphs 11 and 13)

C. *Balance of Convenience*

[48] This Court has defined balance of convenience as being an assessment of which party will suffer most (*Copello v. Canada (Minister of Foreign Affairs)*, [1998] F.C.J. No. 1301 (T.D.), per Hugessen J.):

> In other words, whether the applicant would be more harmed if interim relief were not granted then the respondent will be harmed if it is granted.

[49] The balance of convenience favours the Applicant and does not hinder the interests of the Minister in awaiting the timely response of this Court in deciding her application for leave to judicially review the Officer's decision.

[50] The serious risk to her life that she faces if returned to Romania at this point and the fact that her PRRA judicial review application would be rendered nugatory indicate that she would be more

greatly harmed, in comparison to the Minister, if the requested interlocutory relief is not granted pending a decision on her underlying application for judicial review.

[51] As held by the Federal Court in *Brown*, *supra*, at paragraph 8 concerning the balance of convenience: "if a stay is granted and the underlying application is dismissed, the inconvenience to the Minister is a slight delay in enforcing the removal. If a stay is not granted, the underlying application is successful and a new hearing ordered, it may be moot as in the meantime Ms. Brown may have been murdered in St. Vincent."

ORDER

THIS COURT ORDERS that the execution of the removal order is stayed until the deposition of the leave application and if leave is granted, until such time as the application for judicial review is disposed of by the Court.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Melinda Gayda	FOR THE APPLICANT
Michael Butterfield	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Refugee Law Office Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada John H. Sims, Q.C. Toronto, Ontario	FOR THE RESPONDENT