Date: 20060802

Docket: IMM-4132-06

Citation: 2006 FC 951

BETWEEN:

NUREDDIN SOLMAZ, SULTAN SOLMAZ, TAYYAR SOLMAZ, FATIH SOLMAZ (by his litigation guardian, NUREDDIN SOLMAZ) and KUBRA SOLMAZ (by her litigation guardian, NURREDIN SOLMAZ)

Applicants

and

THE MINISTER OF PUBLIC SAFETY & EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER

[1] These are the reasons why I stayed the administrative order removing the Solmaz family from Canada yesterday.

[2] Mr. and Mrs. Solmaz, together with three of their four minor children, were found not to be Convention refugees from Turkey. Thereafter, they went through a Pre-Removal Risk Assessment (PRRA). The officer determined that there was no more than a mere possibility of persecution should they return to Turkey, and so ruled against them. That decision is now the subject of an application for leave and for judicial review under Federal Court docket number IMM-3915-06.

Until the negative PRRA decision was handed down, the *Immigration and Refugee Protection Act (IRPA)*, and the regulations thereunder, prevented the authorities from removing the Solmazs from Canada. However, following the negative PRRA decision, the details of their return to Turkey were assigned to an enforcement officer who, under Section 48 of IRPA, was required to see to their removal from Canada "as soon as is reasonably practical".

[3] Apart from the fact that the Solmazs had a pending application for leave and for judicial review of the negative PRRA decision, they asked the enforcement officer to defer their removal for a number of other reasons, including the fact that Mrs. Solmaz was scheduled to undergo a laparoscopic cholecystectomy on 27 July 2006. This is a treatment for gallstones. Their departure from Canada was scheduled to take place the following day. They also requested a deferment because of the best interests of their children, the youngest of whom was born in Canada and who is not subject to removal, and alleged irreparable economic harm to them, as well as to others Mr. Solmaz employed in his business in Toronto.

[4] In the interim, for administrative reasons their departure date was moved back to 2 August 2006.

[5] All the enforcement officer said in his negative decision was "having considered your requests, I do not feel that a deferral of the execution of the removal order is appropriate in the circumstances of this case."

[6] The Solmazs filed an application for leave and for judicial review of that decision, and in both this docket number and docket number IMM-3915-06, which relates to the negative PRRA decision, they sought a judicial stay of their removal pending the outcome of their applications. The motion was heard on 1 August 2006, the day before their rescheduled departure. I dismissed the motion for a stay in the PRRA matter, but granted a stay pending the outcome of the application for leave and for judicial review of the decision of the enforcement officer.

[7] When he made his decision, the enforcement officer was on notice that if Mrs. Solmaz's medical procedure took place, her specialist surgeon was on record as stating that she would need one month for post-operative recovery and monitoring. Although the operation is routine "there are several complications that can arise from the procedure. Such complications include: bleeding from the liver, infections, bile duct injury, a morbid complication. Post-operative care is necessary after the procedure as a medical professional must watch for jaundice, right upper quadrant pain, epigastric pain, nausea, vomiting, fever without localising signs, or dyspepsia as indicators of problems secondary to gallstone disease."

[8] However, he acted on the assumption that Mrs. Solmaz would not undergo the operation. Without telling her, he conferred with a doctor and was advised that the contemplated procedure was semi-elective and non-urgent. The procedure was presumably available in the United States where they were being removed over the short term, and also in Turkey. However, his notes to file do not indicate that he consulted with the doctor with respect to post-operative care.

[9] As it turns out, the Court was informed that the operation did take place and that the post-operative examination is scheduled for 8 September 2006.

ANALYSIS

[10] Mrs. Solmaz was under no obligation to defer her operation, and it would be patently unreasonable to deny a post-operative examination by her own doctor. I must emphasize that this is a case in which the operation had been scheduled prior to the negative PRRA decision. The circumstances might well have been different had there been evidence that Mrs. Solmaz was able to manipulate the medical system in such a way so as to schedule a procedure in order to defer her removal.

[11] The enforcement officer is just that. He is not a doctor and it is not up to him to decide that Mrs. Solmaz should have deferred the operation. That was a matter between her and her doctor. Furthermore, the information he obtained from medical sources was beyond the scope of the record and should have been shared with the Solmazs so they would have had the opportunity to respond.

[12] These are serious underlying issues. Irrespective of the limits upon the discretion of an enforcement officer to defer removal, medical circumstances is certainly one reason. The decision not to defer put her at risk of irreparable harm. The balance of convenience rested with her, and her family.

[13] Quite apart from the unfair hearing with respect to the medical operation, the Solmazs had, through counsel, faxed a letter to the enforcement officer which contained representations on the

other issues mentioned above including the best interests of the children and irreparable economic harm. That letter was sent by fax and identified twelve attachments which were being sent by courier. The decision was made on the basis of the letter, before the attachments were received. I was asked to assume that the enforcement officer accepted all the written representations in that letter, and therefore it was unnecessary to consider the attachments. I am not prepared to make such an assumption. There is a presumption in these matters that the decision maker has reviewed all the material. In this case he did not. The *audi alteram partem* aspect of natural justice requires that the Solmazs had an opportunity to fully present their case. It has been said that even God did not remove Adam and Eve from the Garden of Eden without a full hearing. Who was the enforcement officer to do otherwise? (*The King v. the Chancellor, & c., of Cambridge*, (1723) 1 Stra. 557; *Cooper v. The Wandsworth Board of Works* (1863), 143 E.R. 414 at p. 420; and *Matondo v. Canada (Minister of Citizenship and Immigration)* (2005) 44 Imm. L.R. (3d) 225, 2005 FC 416, [2005] F.C.J. No. 509 (QL)).

"Sean Harrington"

Judge

Ottawa, Ontario
August 2, 2006

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4132-06
STYLE OF CAUSE:	NUREDDIN SOLMAZ, SULTAN SOLMAZ, TAYYAR SOLMAZ, FATIH SOLMAZ (by his litigation guardian, NUREDDIN SOLMAZ) and KUBRA SOLMAZ (by her litigation guardian, NURREDIN SOLMAZ) v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	August 1, 2006
REASONS FOR ORDER:	Harrington J.
DATED:	August 2, 2006

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