Date: 20080228

Docket: IMM-4744-07

Citation: 2008 FC 256

Ottawa, Ontario, February 28, 2008

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

LOUISE MARIE ADAMS
KUNTA ADAMS
MALACHI ADAMS
ATILA ADAMS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
and
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

1. Introduction

[1] In Canada since 1999, the Applicants received a decision to report for removal twenty-two months ago and did nothing about it for nineteen months. They simply failed to appear. The Applicants came to the attention of the Respondents eighteen months later, simply, because, the Principal Applicant was under investigation by the police for theft. The Applicants have, repeatedly, frustrated the Respondents' attempt to remove them from Canada "as soon as reasonably

practicable" and have only sought to challenge the Pre-Removal Risk Assessment (PRRA) decision after their arrest by Canada Border Services Agency (CBSA): clear prejudice to the operations of the Respondents, exist.

[2] It is well established that remedies on judicial review, including on a motion for a stay of removal, are discretionary. An applicant is required to come to Court with clean hands. (*Khalil v. Canada (Secretary of State)*, [1999] 4 F.C. 661, [1999] F.C.J. No. 1093 (QL), par. 15; *Homes Reality and Development Co. v. Wyoming (Village)*, [1980] 2 S.C.R. 1011; *Wojciechowski v. Canada (M.C.I.)*, IMM-1986-02 (May 6, 2002).)

[3] The Applicants received their PRRA in April 2006, together with Directions to Report for removal on May 20, 2006. Rather than challenging the PRRA then, and seeking a stay of removal from this Court, the Applicants ignored the consequence of not obeying their removal orders and simply decided not to appear for removal. The Applicants ought not be permitted to benefit from their disregard for the laws of Canada. Where an applicant has not seen fit to respect Canada's immigration laws, and is subject to a warrant for arrest, no entitlement to relief exists. (*Chen v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1464, [2003] F.C.J. No. (QL), paras. 2, 4; *Singh v. Canada (M.C.I.)*, IMM-5144-05 (August 29, 2005).) Nevertheless, it was decided that the merits of the matter will be heard and considered, subsequent to the lengthy period of time that the Applicants have spent in Canada, and, therefore, the following:

2. Preliminary

[4] Given the Applicants seek that the Minister of Public Safety and Emergency Preparedness be ordered to stay the execution of their valid removal orders, this Minister is added to the Style of Cause.

3. Issues

[5] The Supreme Court of Canada has established a tri-partite test for determining whether interlocutory injunctions should be granted pending determination of a case on its merits:

(i) whether there is a serious question to be tried;

(ii) whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm; and

(iii) a determination on the balance of convenience, in terms of which of the two parties will suffer the greater harm from an interlocutory injunction, being either granted or refused, pending a decision on the merits.

(*Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.); *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.)

[6] The requirements of the tripartite test are conjunctive; that is, the applicant must satisfy all three branches of the test before this Court can grant a stay of proceedings.

4. Analysis

(a) Serious Issue

[7] The Principal Applicant and her sons made a claim for protection to the Refugee Protection Division (RPD). She based her claim on the alleged abuse experienced by her at the hands of her ex-husband. On the basis of the following, the claim was refused:

- Inconsistencies and implausibilities in the Principal Applicant's evidence, in addition to the delay in claiming protection, led to serious credibility concerns;
- No reliable evidence that the ex-husband would have any interest in the Principal Applicant; and
- The Applicants' failure to rebut the presumption of state protection.

(Applicants' Record, PRRA decision, p. 12.)

[8] Notably, Atila, a child of the Applicant, made a separate claim. This was also refused and leave for judicially review of that decision, was dismissed. It is also recognized that the Principal Applicant and her sons did not challenge the RPD decision for nineteen months.

(i) No serious issue: Principal Applicant sought protection on a new basis, particularly, due to the August 2005 hurricane and not, specifically, from her ex-husband

[9] In the decision, the PRRA Officer noted:

> … the applicants have not provided any additional[sic] submissions to rebut the panel's findings in its decision. Instead, the applicants have presented new risks, stating that they cannot return as they have lived in Canada for 5 years and have no home to return to as a result of the hurricane that swept through St. Vincent in August 2005. (Emphasis added.)

(Applicants' Record, PRRA decision, p. 12.)

[10] The Applicants had not challenged the Officer's decision regarding the risk alleged for more than a year.

[11] The Applicants cannot, after failing, in the past, to have had a credible claim before the RPD, now allege, before this Court, a risk arising from the Principal Applicant's ex-husband and contend that the PRRA officer erred by not having considered that risk.

[12] Exhibits A, C, D and K, all postdate the PRRA decision and, therefore, could not have been considered by that decision-maker. In addition, Exhibits E, F. and G are undated: no evidence exists as to whether these documents were ever before the Officer to consider. Exhibit B predates the PRRA decision, but the Applicants did not submit this document to the Officer for his consideration. With respect to the PRRA, the Officer noted that domestic violence was neither raised as a risk by the Applicants nor did they produce any new evidence on the subject. The PRRA Officer could not have ignored documents that were not even before him; and, therefore, made no reviewable error. (Applicants' Record, pp. 19-23, 28, 29-32, 33-35, 44.)

[13] It is trite law that a judicial review of a decision of a tribunal should proceed only on the basis of the evidence that was before the decision-maker. In the present context, it is not open to the Applicants to supplement the record with new documents and ask this Court to make new findings of fact. (*Lemiecha (Litigation guardian of) v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 1333 (QL), para. 4.)

[14] The Officer reviewed the U.S. Department of State, February 28, 2005 "Country Reports on Human Rights Practices – 2004 - St. Vincent and the Grenadines" and determined that there was "no more than a mere possibility of the applicants being persecuted." The Applicants cannot now allege the Officer erred by not doing further research on domestic violence when they neither submitted any evidence on the subject, nor raised their fears in that context. (Applicants' Record, PRRA decision, p. 13.)

(ii) No serious issue in respect of the PRRA Officer not having considered Humanitarian and Compassionate (H&C) grounds as no application had been made

[15] Aside from the fact that an outstanding H&C is irrelevant to a PRRA, the H&C application of the Principal Applicant and her sons was not made until November 21, 2006, ten months after the PRRA decision was made, and nine months after the Applicants failed to appear for removal.

[16] Contrary to the Applicants' submissions, no serious issue arises from the fact that the Officer did not consider an H&C application that had not, as yet, been made. (Affidavit of Tom Heinze; Applicants' Record, Memorandum of Argument, p. 48.)

(iii) Clerical error not a serious issue when read in context of the decision

[17] Finally, the Applicants allege the Officer erred by determining that they are not at risk of persecution if returned to Portugal, when, in fact, they are being returned to St. Vincent.

[18] This is obviously an inadvertent clerical error. The PRRA Officer clearly identified their country of nationality as St. Vincent, referred to the risks raised by the Applicants with respect to the hurricane in St. Vincent, stated that he conducted a "review of documentary evidence on country conditions in St. Vincent", and only cited documentary evidence from St. Vincent as having been consulted. (Applicants' Record, PRRA decision, pp. 10-14.)

(iv) Ultimately, Applicants failed to provide new evidence to the PRRA Officer regarding domestic violence upon which a positive decision could have been made

[19] Paragraph 113(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), indicates that consideration of a PRRA shall be limited:

(*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection; (Emphasis added.)	*a*) le demandeur d'asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet.

[20] The Applicants did not present any new evidence that the Principal Applicant's ex-husband posed any risk to her, nor, for that matter, even any interest in her; thus, any information regarding state protection in St. Vincent would have been irrelevant to their PRRA application.

[21] It must be recalled that a PRRA is not an appeal or a rehearing on the merits of a decision of the RPD. It is not in the mandate of the PRRA Officer to reassess an original claim. (*Khaliq v.*

Canada (Solicitor General), 2004 FC 1561, [2004] F.C.J. No. 1889(QL); *Klais v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 783, [2004] F.C.J. No. 949 (QL); *Kaybaki v. Canada (Solicitor General of Canada))*, 2004 FC 32, [2004] F.C.J. No. 27 (QL).)

(b) Irreparable harm

[22] Even if this Court determines that there is a serious issue with respect to the PRRA, it is not automatically determinative of the issue of irreparable harm. Rather, irreparable harm is still a matter to be weighed independently. (*Onojaefe v. Canada (M.C.I.)*, IMM-2294-06 (May 10, 2006), paras. 11-16; *Akyol v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 931, [2003] F.C.J. No. 1182 (QL), para. 8; *Kazmi et al v. Canada (S.G.C.)*, IMM-2126-04 (March 16, 2004).)

[23] The evidence in support of harm must be clear and non-speculative. (*John v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 915 (QL); *Wade v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 579 (QL).)

[24] As noted in *Gray v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 42, at paragraph 14, this Court will be reluctant to overturn, on an interlocutory motion, the findings of decision-makers, on evidence that had been before the decisions-makers, who have considered risk, and to substitute its evaluation of risk without clear and convincing evidence that the decision-makers were in error. (Reference is also made to *Raza v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 42, [2004] F.C.J. No. 31 (QL).)

[25] Moreover, to demonstrate irreparable harm, the Applicants must demonstrate that if removed from Canada, they would suffer irreparable harm between now and the time at which any positive decision is made on their application for leave and for judicial review. The Applicants have not done so. (*Reddy v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 644 (QL); *Bandzar v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 772 (QL); *Ramirez-Perez v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 724 (QL).)

[26] It is noted that the Principal Applicant had alleged, in her original RPD claim, that she had been severely injured in 1982 by her ex-husband; however, she had only married him years after the alleged incident. While the Principal Applicant asserts that she would endure the same abuse which she alleged at her RPD hearing, at the time, no evidence, whatsoever, was adduced to support this assertion. Rather, the RPD stated, in 2003, that there was no evidence that her ex-husband would have any interest in her. The only reliable documentary evidence concerning their relationship is the absolute decree of divorce, made on May 1, 2001, at the request of her ex-husband. They have been separated since July 1996, for nearly ten years. (Applicant's Record, p. 42.)

[27] While there are challenges in returning to one's country of nationality after five years abroad, this does not constitute irreparable harm. For the purposes of a stay of removal, "irreparable harm" is a very strict test. It implies a serious likelihood of jeopardy to the Applicants' life or safety. Irreparable harm is very grave. The Applicants' one year old application for permanent residence on H&C grounds will continue to be processed, although made after the Applicants' failure to report

for removal. The Applicants may still make further submissions to support that application, if they wish. (*Duve v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 387 (QL).)

(c) Balance of Convenience

[28] The public interest is to be taken into account when considering the balance of convenience and weighing the interests of private litigants. The balance of any inconvenience that the Applicants might suffer as a result of their removal from Canada does not outweigh the public interest which the Ministers seek to maintain in the application of the IRPA, specifically, the interest in executing removal orders as soon as reasonably practicable. (*Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, para. 146; IRPA, ss. 48(2).)

[29] The Federal Court of Appeal has confirmed that the Minister's obligation to remove is "not simply a question of administrative convenience, but implicates the integrity and fairness of, and public confidence in, Canada's system of immigration control." (*Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, [2004] F.C.J. No. 1200 (QL), para. 22.)

[30] All of the Applicants have had the benefit of a RPD hearing and of a PRRA; Atila has also received a decision on her H&C application, and, had made an application for leave and for judicial review of her RPD decision. This Court has held in similar cases that "it is in the public interest, in light of this history, to provide finality to the process" such that the balance of convenience lies with the Respondents. (*Park Lee v. Canada (M.C.I.)*, IMM-1122-05 and IMM-1182-05 (February 28, 2005), by Justice Judith Snider.)

[31] The balance of convenience does not favour anyone who seeks a stay of removal only after being arrested for failing to appear for removal: the public's interest in promoting respect for Canadian immigration laws and executing removal orders as soon as reasonably practicable outweighs the Applicants' interests. (*Petrovych v. Canada (M.C.I.)*, IMM-4413-05 (August 3, 2005), by Justice Snider.)

5. Conclusion

[32] For all of the above reasons, the Applicants' motion to stay the execution of the removal order is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicants' motion to stay the execution of the removal order be dismissed.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	LOUISE MARIE ADAMS KUNTA ADAMS MALACHI ADAMS ATILA ADAMS v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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