

Date: 20090507

Docket: IMM-2117-09

Citation: 2009 FC 472

Ottawa, Ontario, May 7, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

GULSUM KOCA

Applicant

and

**THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This is a motion brought with respect to the application for leave and for judicial review of the negative Humanitarian and Compassionate (H&C) decision which was rendered against the Applicant, on March 17, 2009. The Applicant, Ms. Gulsum Koca, a citizen of Turkey, seeks an order staying her removal from Canada until such time as the underlying application for leave and for judicial review is finally determined.

[2] There are several serious issues in the H&C decision. In particular, that the Officer failed to consider the medical evidence and erred in assessing hardship due to Ms. Koca's conversion to

Evangelical Christianity and to her family's attitude in that regard. On return, Ms. Koca faces irreparable harm based on both risks to her life and safety, as well as risks based on her precarious mental and physical disabilities. Finally, in these circumstances, the balance of convenience favours Ms. Koca.

III. Background

[3] Ms. Koca, was born on December 3, 1970, in Turkey. She came to Canada in 2002 and made a refugee claim based on being an Alevi Muslim. The Refugee Protection Division of the Immigration and Refugee Board (Board) refused her claim, in 2004.

[4] Ms. Koca met Mr. Andrew Koshelanyic, in 2002, and married him, in 2004. Her husband was extremely abusive from early on in their relationship. Details of the abuse that she endured were included in her H&C application. Ms. Koca also describes the abuse she endured in her narrative submitted to the Criminal Injuries Compensation Board, which was submitted in support of her H&C application. At one point, she attempted suicide. She describes one of the many incidents of abuse as follows:

...One day, he decided to go out to get cigarettes. I told him I wanted to go with him to get some fresh air and exercise. He refused and got very angry. He tried to pick a fight. I told him I only wanted to talk. Then he put me in a headlock and started punching me in the head. Still holding me in a headlock, he dragged me around the apartment until I fell down. Then he began to kick me. I tried to walk towards the door, but it was a very narrow hallway and he caught me again and began to kick me again in the back and lower hips. I curled up on the ground and tried to protect my head. By that time, my head was hurting very badly. While I was on the floor, he lost it completely. He started punching and kicking me continuously. He was swearing at me. I couldn't understand everything he said because I was in a state of shock...

Finally, he stopped and asked himself repeatedly: What have I done? I stood up and asked “How could you do this to me?” Then I noticed that my nose was bleeding. He was frightened and brought a cloth to wipe my nose. Noticing his show of affection, I asked him to apologize. He did so, and promised that it would never happen again. This happened during the first week of January 2003...

(Motion Record (MR), Applicant’s narrative at pp. 118-121).

[5] The abuse did not end and Ms. Koca’s husband sponsored her. A few months after Ms. Koca married her husband, in 2004, she left him. Included in Ms. Koca’s H&C application is a letter of support from Blanca Alvarado of the Barbra Schlifer Commemorative Clinic, which provides assistance to women who are survivors of domestic abuse. This letter also describes the abuse that Ms. Koca experienced in her relationship with her husband (MR, Applicant’s narrative at p. 120; Letter from Barbra Schlifer Commemorative Clinic at pp. 32-34).

[6] In October 2004, Ms. Koca applied for Permanent Residence on Humanitarian and Compassionate grounds. In 2006, Ms. Koca applied for a Pre-Removal Risk Assessment (PRRA) (MR: Affidavit of Gulsum Koca at pp. 4-5).

[7] In 2006, Ms. Koca re-married her ex-husband. During that time, he applied to sponsor her in Canada; however, due to his abuse, she left him again and he withdrew the sponsorship application. The behaviour points to the battered wife syndrome as is set out in documentation specifying the domestic abuse Ms. Koca suffered (as described below).

[8] As a result of her ex-husband's abuse, Ms. Koca developed serious physical and mental health problems. She has been diagnosed with chronic depression, post-traumatic stress disorder, neuro-musculoskeletal pain syndromes, chronic lumbar sprain, chronic cervical sprain, tinnitus among others. She has been seeing a psychiatrist since 2007 on a monthly basis (MR: Medical documents at pp. 107-116, 134-140).

[9] Ms. Koca was convoked for a pre-removal interview at the Greater Toronto Enforcement Centre, on April 15, 2009. When she attended on that date, she was served with a negative PRRA decision and a negative H&C decision, both of which were dated March 17, 2009. She was told to come back, on April 20, 2009, for removal arrangements.

[10] As a result of the April 15, 2009 interview and in anticipation of deportation, Ms. Koca's mental health destabilized. She describes her reaction as follows:

..she explained the decision to me and I felt like I was going to fall. I was in shock. I felt an emptiness and couldn't understand the consequences of what she was saying. A couple of days later, when I was home alone, I started feel like everything was crashing. That night, when a friend explained to me the seriousness of my situation, that I was on the edge of deportation, I became overwhelmed with fear. I couldn't sleep for a few nights. I felt like I was having a nervous breakdown. I had a panic attack and couldn't breathe.

(MR: Affidavit of Gulsum Koca at pp. 5-6).

[11] Ms. Koca was extremely concerned after the attack and decided to see a psychiatrist the next day, which was Monday, April 20, 2009. Her appointment with the Greater Toronto Enforcement Centre CIC (GTEC) was therefore rescheduled, to April 22, 2009. On that day, she was given a Direction to Report for Removal, on Saturday, May 9, 2009.

IV. Issue

[12] Whether or not this application for an order, staying the execution of the removal order made against Ms. Koca meets the tripartite test for the granting of a stay, in regard to the following factors to be considered:

- a. a serious issue;
- b. irreparable harm if deported from Canada;
- c. the balance of convenience, whether in her favour.

(*Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302, 11 A.C.W.S. (3d) 440 (F.C.A.)).

V. Analysis

A. Serious Issue

[13] An injunctive remedy constitutes an awareness by the Courts that there can be a value in maintaining the status quo while issues are argued before the Courts, the outcome of which are not at all certain, at the preliminary stage of the proceedings. The role of a Court at an interlocutory and preliminary stage of the proceeding has been clarified by the Supreme Court of Canada. In *American Cyanamid Co. v. Ethicon Ltd.*, [1975] A.C. 396, [1975] UKHL 1, Lord Diplock described the limited role of the Court at the interlocutory stage:

It is no part of the court's function at this stage of the litigation to try to resolve conflicts of evidence on affidavit as to facts on which the claims of either party may ultimately depend nor to decide difficult questions of law which call for detailed argument and mature considerations. These are matters to be dealt with at the trial.

(*Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 at para. 41).

[14] 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** (*Turbo Resources Ltd. v. Petro Canada Inc.*, [1989] 2 F.C. 451, 13 A.C.W.S. (3d) 371 (C.A.); *North American Gateway Inc. v. Canada* (1997), 74 C.P.R. (3d) 156, 71 A.C.W.S. (3d) 867 (C.A.); *Copello v. Canada (Minister of Foreign Affairs)* (1998), 152 F.T.R. 110, 82 A.C.W.S. (3d) 773 (T.D.); *Sowkey v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 67, 128 A.C.W.S. (3d) 777; *Brown v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1250, 152 A.C.W.S. (3d) 487).

[15] There are several serious issues raised in the H&C and PRRA decisions. With regard to the H&C decision, the Officer erred first in failing to have regard to CIC’s IP-5 operations manual regarding applicants who have experienced family violence, which failure led to an unreasonable decision. Second, the Officer failed to consider the medical evidence submitted in support of the Ms. Koca’s application. Third, the PRRA Officer’s assessment of hardship caused by Ms. Koca’s conversion to Evangelical Christianity and to her family in that regard, is unreasonable.

[16] With regard to the PRRA decision, the Officer failed to consider Ms. Koca’s conversion to an evangelical form of Christianity.

Officer failed to have regard to IP-5 leading to unreasonable decision

[17] Ms. Koca was involved in an extremely abusive relationship which has had a tremendous and lifelong impact on her mental and physical health. She was able to finally leave her abusive ex-

husband and he, accordingly, withdrew his sponsorship of her. Her application was, therefore, considered only on H&C grounds.

[18] Ms. Koca's situation is not unique, and CIC has developed guidelines to assist H&C decision-makers in processing such applications. Section 13.10 of the IP-5 entitled "Family violence", offers the following assisted guidance to immigration officers:

Family members in Canada, particularly spouses, who are in abusive relationships and are not permanent residents or Canadian citizens, may feel compelled to stay in the relationship or abusive situation in order to remain in Canada; this could put them at risk. Officers should be sensitive to situations where the spouse (or other family member) of a Canadian citizen or permanent resident leaves an abusive situation and, as a result, does not have an approved sponsorship.

Officers should consider the following factors:

- information indicating there was abuse such as police incident reports, charges or convictions, reports from shelters for abused women, medical reports, etc.;

Les membres de la famille au Canada (surtout les époux) qui se retrouvent dans des relations abusives et ne sont pas résidents permanents ni citoyens canadiens peuvent se sentir obligés de demeurer dans cette relation ou cette situation abusive pour demeurer au Canada, ce qui peut leur faire courir un risque.

L'agent doit être sensible aux situations où l'époux (ou un autre membre de la famille) d'un citoyen canadien ou d'un résident permanent sort d'une situation abusive et, par conséquent, n'a pas de parrainage approuvé.

L'agent doit tenir compte des facteurs qui suivent :

- les renseignements qui indiquent qu'il y a eu violence, par exemple rapports de police, mises en accusation ou déclarations de culpabilité, rapports de maisons d'hébergement pour femmes victimes de violence, rapports

	médicaux, etc.;
• whether there is a significant degree of establishment in Canada (see Section 11.2, Assessing the applicant's degree of establishment in Canada);	• la preuve d'un degré appréciable d'établissement au Canada (voir la Section 11.2, Évaluation du degré d'établissement au Canada);
• the hardship that would result if the applicant had to leave Canada;	• la difficulté qui résulterait, si le demandeur devait quitter le Canada;
• the customs and culture in the applicant's country of origin;	• les us et coutumes du pays d'origine du demandeur;
• support of relatives and friends in the applicant's home country;	• le soutien de parents et d'amis dans le pays d'origine du demandeur;
• whether the applicant is pregnant;	• est-ce que la personne qui fait la demande est enceinte?
• whether the applicant has a child in Canada;	• est-ce que cette personne a un enfant au Canada?
• the length of time in Canada;	• la durée du séjour au Canada;
• whether the marriage or relationship was genuine; and	• est-ce que le mariage ou la relation était authentique?
• any other factors relevant to the H&C decision.	• tout autre facteur qui serait pertinent pour la décision CH.

[19] The Officer's reasons demonstrate either a failure to have consulted the operations manual or a failure to appreciate the guidance contained within that manual. The Officer concludes that Ms. Koca would not face hardship in Turkey because she was able to integrate herself into Canada so successfully and finds that there is insufficient evidence that she will not receive "adequate care" in Turkey, concluding that "the applicant has provided insufficient evidence the circumstances with

respect to her physical and mental condition are such that she would face hardship that is unusual and undeserved.” (MR: H&C Reasons at p. 151; *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 at paras. 15-17; *Agot v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 436, 232 F.T.R. 101 at para. 10-11; *Laplante v. Canada (Canadian Food Inspection Agency)*, 2004 FC 1345, 263 F.T.R. 22 at para. 24).

[20] No doubt the Officer did not mean to suggest that the circumstances leading to Ms. Koca’s physical and mental condition (the abuse) was deserved; however, the Officer’s choice of words highlights a need to consider Ms. Koca’s situation. Almost all of the factors in the operations manual would suggest that Ms. Koca’s situation deserves consideration of H&C exemption from the normal processing requirements. The reasons for concluding that Ms. Koca would not face unusual or undeserved hardship demonstrate a failure to consider and apply the guidelines when coming to her decision.

[21] The Officer’s conclusions regarding hardship are as a consequence unreasonable in the context of Ms. Koca’s history of abuse and the acute physical and psychiatric condition, she now suffers; these are recognized by the community which gives her moral support in Canada, and is absent in Turkey due to her situation in its specific context. Given the particular vulnerability of Ms. Koca, which vulnerability the operations manual seeks to address, the Officer’s failure to have regard to IP-5 raises a serious issue.

Officer failed to consider the medical evidence

[22] Ms. Koca provided several medical documents setting out her serious physical and mental problems. She has been diagnosed with chronic depression, post-traumatic stress disorder, neuro-musculoskeletal pain syndromes, chronic lumbar sprain, chronic cervical sprain, tinnitus among others. Ms. Koca has been seeing a psychiatrist since 2007 on a monthly basis and she is not able to work as the result of her disabilities. All of this information was clearly set out in her H&C package (MR: Medical documents at pp. 107-116, 134-140).

[23] The Officer, however, concluded that "...the applicant has not provided any details of her health other than a prescription note which states she is in treatment for a serious mental disorder and needs continual care for the next 2 years. No other details were provided..." Given the detailed medical evidence that was before the Officer, this conclusion demonstrates that the evidence was simply not considered. Given the materiality of this evidence to Ms. Koca's H&C application, the Officer's failure to consider it raises a serious issue (MR: H&C Reasons at pp. 151-152).

Hardship as a result of conversion to Christianity

[24] The Officer's conclusions that Ms. Koca does not face unusual, undeserved or disproportionate hardship on account of her conversion to Evangelical Christianity, is unreasonable for two reasons. First, as will be discussed with regard to the Officer's PRRA decision, she failed to appreciate the distinction between treatment of Christians and the more severe and abusive treatment of Evangelical Christians in Turkey.

[25] Second, the Officer's conclusion that the lack of family support in Turkey as a result of Ms. Koca's conversion to Evangelical Christianity will have a tremendous impact on her given her physical and mental health. In Canada, Ms. Koca is surrounded by supportive community. On return, as the evidence demonstrates a risk of abusive and discriminatory treatment on account of her faith, which treatment will only be compounded by her health concerns and her lack of family support.

B. Irreparable Harm

[26] If deported, Ms. Koca would suffer irreparable harm in that she will face risk to her life and risk of cruel and unusual treatment and because her judicial review applications will become moot.

Risk to life and risk of cruel and unusual treatment

[27] This Court has recognized that, where a person establishes, on a balance of probabilities, that she is likely to face serious harm in the country of origin, the irreparable harm test can be considered to be met.

[28] The documentary evidence demonstrates that she faces a risk to her life and safety as a Christian convert and in particular as an Evangelical Christian.

Irreparable harm caused by mental and physical disabilities.

[29] The evidence describes the serious hardship Ms. Koca faces, given her particular physical and mental disabilities, if she is forced to leave the supportive community she has in Canada to

return to a country where she has no familial or other support. Given her precarious mental health, deportation will be disproportionately felt by Ms. Koca, taking this case outside the realm of the “usual consequences of deportation.”

C. Balance of Convenience

[30] This Federal Court has recently defined balance of convenience as being an assessment of which party will suffer most: “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” (*Copello*, above).

[31] The balance of convenience clearly favours Ms. Koca and does not hinder the interests of the Minister in awaiting the response of this Court in its final determination on the application for leave and for judicial review of the above specified decision.

[32] The balance of convenience rests with Ms. Koca to ensure that the administration of justice is not placed into disrepute by allowing for leave to review (*Membrano-Garcia v Canada (Minister of Employment and Immigration)* (1992), 55 F.T.R. 104, 34 A.C.W.S. (3d) 313).

VI. Conclusion

[33] For all of the above reasons, Ms. Koca’s application for a stay of execution is granted pending a final determination of her application for leave and for judicial review of the negative H&C decision.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for a stay of execution be granted pending a final determination of her application for leave and for judicial review of the negative Humanitarian and Compassionate decision.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2117-09

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v. THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

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