

Date: 20090507

Docket: IMM-2118-09

Citation: 2009 FC 473

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 Pre-Removal Risk Assessment (PRRA) 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] Under the heading of serious issue, the PRRA Officer failed to consider the Ms. Koca's conversion to an evangelical form of Christianity when assessing the risks on return.

II. 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 Humanitarian and Compassionate (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. The behaviour points to the battered wife syndrome (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 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.

[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, the 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 decided to go and 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.

III. Issues

[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.)).

IV. 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] In the case at bar, the PRRA Officer failed to consider Ms. Koca's conversion to an evangelical form of Christianity when assessing the risks to Christians in Turkey, and, as such, her conclusion with regard to risk of persecution and risk to life and cruel and unusual treatment or punishment was made in error and unreasonable.

Errors in PRRA Decision

[16] In the PRRA decision the PRRA officer stated:

The applicant has identified her Christian faith as a new risk development. The applicant has provided a letter from the New Beginning Fellowship dated April 24, 2008, which confirms that she was baptized as Christian in January 2005. I accept the applicant is a Christian, however I find there is insufficient objective evidence she would face more than a mere possibility of persecution under 96 or more likely than not face a risk as defined under section 97 of IRPA, I acknowledge Turkey restricts freedom of religion, and there are societal abuses and discrimination based on religious affiliation, belief and practice as evidenced in the documentation provided by the applicant and my own independent research. However, I find there is insufficient evidence that discrimination in Turkey toward religious minorities amounts to persecution or a risk to life as defined in section 96 or 97 of IRPA.

I note in the documentation,

The Constitution provides for freedom of religion and generally respected religious freedom in practice; Christian and Baha'is faced a few restrictions and occasional harassment for alleged proselytizing or holding unauthorized meetings;

The U.S. Government discusses religious freedom with the Government and state institutions as part of its overall policy to promote human rights. Embassy and consular representatives met frequently with government officials and

representatives of religious groups during the reporting period to discuss matters relating to religious minorities.

Police occasionally barred Christians from holding services in private apartments, and prosecutors have opened cases against Christians for holding unauthorized gatherings.

Jews and Christians from most denominations freely practiced their religions and reported little discrimination in daily life; however, citizens who converted from Islam to another religion often experienced some form of social harassment or pressure from family and neighbours.

Additional documents indicate,

Reports of attacks on persons practicing Christian faiths dropped. Authorities took measures during the year to implement a June 2007 Ministry of Interior circular to governors requesting action to prevent violence against non-Muslims. Non-Muslims in Ankara, Izmir, and Trabzon reported that police took extra security measures during special religious services.

I acknowledge the applicant may face discrimination and possible harassment however I find there is insufficient objective evidence that it would amount to persecution as defined in section 96 or that she would likely than not face a risk to life as defined in section 97 of IRPA.

(MR: PRRA Reasons at pp. 248-249).

[17] The PRRA officer failed to consider the evidence that Ms. Koca had converted to an evangelical form of Christianity and was a born again Christian. Part of being a born again Christian is that it is very important for Ms. Koca to spread His (God's) word to the world. Ms. Koca had stated that she would be killed in Turkey for spreading God's word and that her family would never accept her conversion.

[18] The distinction between the treatment of Christians and Evangelical Christians in Turkey is crucial when considering a person's risks. The PRRA Officer's failure to appreciate this difference raises a serious issue.

[19] The PRRA Officer stated that "Reports of attacks on persons practicing Christian faiths dropped," however, in that same report, on the same page, the PRRA Officer did not discuss the detailed information on attacks on Protestant Churches in Turkey during the same reporting period.

[20] Overall, the PRRA Officer failed to consider the evidence that persons such as Ms. Koca, born again Christians who proselytize are targeted for physical abuse and mistreatment: One report indicates that "Istanbul police beat two Protestant converts in their early twenties and told them they could not be both Turks and Christians."

[21] The documents further state:

Violent attacks and continued threats against non-Muslim during the reporting period created an atmosphere of pressure and diminished freedom for some non-Muslim communities. Religious pluralism was widely viewed as a threat to Islam and to "national unity"

(Motion record at p. 301).

[22] By failing to appreciate the particular abuses by evangelical Christians, the PRRA Officer's treatment of the documentary evidence raises a serious issue.

B. Irreparable Harm

Risk to life and risk of cruel and unusual treatment

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

[24] The documentary evidence, referred to in the above submissions, demonstrates that Ms. Koca 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

[25] 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 her, taking this case outside the realm of the “usual consequences of deportation.”

Judicial review rendered nugatory

[26] This Court has ruled that where an 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 v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1168, 126 A.C.W.S. (3d) 305, this Court stated:

[5] 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...

[27] Similarly in *Ahmad v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 129, 126 A.C.W.S. (3d) 843, this Court stated:

[8] Moreover, the nature of that serious issue is such that if the Applicant were to be removed and the finding 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 effectively be raised. Thus, his right to raise a claim would be lost. That loss, in my view, constitutes irreparable harm.

[28] In the *Figuardo v. Canada (Solicitor General)*, 2005 FC 347, [2005] 4 F.C.R. 387, decision, at paragraph 45, in addition to the irreparable 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. The Court held this to be the case because of the issues at stake with a PRRA, namely that the Applicant would be exposed to a risk to her life or cruel or unusual treatment or punishment if removed prior to a judicial review concerning the risk. (Reference is also made to: *Linares v. Canada (MCI & MPSEP)* (May 11, 2005), IMM-2873-05, per Justice Eleanor Dawson, and *Cupid v. Canada (MCI)* (April 11, 2006), IMM-1737-06, per Justice Frederick Gibson).

[29] In the recent *Perez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 663, 328 F.T.R. 290 (Order signed June 26, 2008) case, the Federal Court recently certified the following questions:

1. Is an application for judicial review of a Pre-Removal Risk Assessment moot where the individual who is the subject of the decision has been removed from or has left Canada after an application for stay of removal has been rejected?
2. What factors or criteria, if different or additional to those elucidated in *Borowski v. Canada (Attorney General)*, (1989) 1 S.C.R. 342 at p. 358-363, should the Court consider in the exercise of its discretion to hear an application for judicial review that is moot?
3. If a judicial review of a Pre-Removal Risk Assessment is successful after the applicant has been removed from or has left Canada, does the Court have the authority to order the Minister to return the applicant to Canada pending re-determination and, as the case may be, at the cost of the government?

[30] Given that the issue of risk to Ms. Koca's physical safety is at the core of the challenged PRRA decision, her removal to Turkey now would effectively render her application for leave and for judicial review moot. In light of the jurisprudence regarding irreparable harm, the execution of a deportation order, prior to a final determination concerning Ms. Koca's application for leave and judicial review, constitutes irreparable harm.

B. Balance of Convenience

[31] The 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).

[32] 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.

[33] The balance of convenience rests with Ms. Koca. Deporting prior to avail thereby risks irreparable harm to the Applicant who may succeed or have serious issues to be tried by this Court (*Membrano-Garcia v Canada (Minister of Employment and Immigration)* (1992), 55 F.T.R. 104, 34 A.C.W.S. (3d) 313).

V. Conclusion

[34] For all of the above reasons, the Applicant's motion for a stay of the execution of the removal is granted pending a final determination of her application for leave and for judicial review of the negative PRRA decision in her regard.

JUDGMENT

THIS COURT ORDERS that the Applicant's motion for a stay of the execution of the removal be granted pending a final determination of her application for leave and for judicial review of the negative PRRA decision in her regard.

"Michel M.J. Shore"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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AND EMERGENCY PREPAREDNESS

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