Federal Court  Cour fédérale

Date: 20110705

Docket: IMM-4241-11

Citation: 2011 FC 820

Montréal, Quebec, July 5, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

CAESAR BEVERLY YVONNE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant is scheduled to be removed to Saint Vincent and the Grenadines on July 9, 2011. On June 20, 2011, the applicant filed an application to stay her removal.

[2] The evidence shows that the applicant was advised of her removal date in person on May 12, 2011.

[3] On June 23, 2011, the Removals Officer denied the request to defer the removal.

[4] The Court is in complete accord with the position of the respondent subsequent to the factual evidence, statutory requirements and the interpretation of the jurisprudence.

Background

[5] The applicant arrived in Canada on December 16, 1998. She had no visa and claimed no status.

[6] On November 28, 2007, the applicant claimed refugee status. The claim was denied by the Immigration and Refugee Board (IRB) on November 18, 2009.

[7] An application for leave was commenced against this decision. This application was denied at leave stage on April 1, 2010.

[8] In October 2010, the applicant filed for a Pre-removal risk assessment (PRRA). It was denied on March 9, 2011.

[9] An application for leave was commenced against this decision. This application was denied at leave stage.

[10] On April 26, 2011, a Removals Officer met with the applicant to prepare her departure. She advised him that she did not yet have Canadian passports for her children. As a result, the Removals

Officer provided the applicant with extra time to prepare such documents or make arrangements with the father of the children.

[11] On May 12, 2011, the Removals Officer advised the applicant that her removal was scheduled for July 9, 2011, and that she needed to arrange for care of her children if she decided they were to remain in Canada.

[12] At this time, she was also advised that her removal would not be postponed.

[13] On June 20, 2011, the applicant filed an application to obtain permanent residence from within Canada on humanitarian and compassionate considerations (hereinafter H&C) pursuant to section 25 of the *Immigration and Refugee Protection Act*.

[14] On June 23, 2011, the Removals Officer office denied a formal request to defer the applicant's removal.

[15] On June 28, 2011, an application for leave was commenced against this decision.

Issues

[16] The only issue at bar is whether the applicant meets the tri-partite test confirmed by the Federal Court of Appeal in *Toth v Canada (Minister of Employment and Immigration*)(1988), 86 N.R. 302 (FCA).

[17] More specifically, the Court must determine whether:

(a) there is a serious issue to be tried in the underlying proceeding;

(b) the applicant will suffer irreparable harm if the deportation order is executed; and

(c) the balance of convenience favours the applicant instead of the Minister.

[18] This test being conjunctive, the applicant's failure to meet any one of its three criteria must result in the denial of her Motion.

No serious issue to be tried

[19] It is trite law that the discretion of an Officer when considering a request to defer removal is limited. As noted in *Perez v MPSEP*, 2007 FC 627, the Officer does not sit in judicial review or appeal of previous RPD, PRRA or H&C decisions:

> [34] A removals officer cannot defer removal for just any proceeding in the IRPA, for which he/she is not the mandated decision-maker. The removals officer does not have the jurisdiction to make a renewed refugee assessment, nor a PRRA, nor a decision on H&C grounds, nor, is he mandated to determine judicial reviews or appeals of any of the preceding or other procedures. A removals officer is solely mandated with the discretion to defer removal for reasons associated with the challenges of arranging international travel.

[20] In *Baron v Canada (MPSEP)*, 2009 FCA 81; the Federal Court of Appeal endorsed the decision of this Court in *Simoes* and concluded that enforcement of removal was mandated by section 48 of the *Immigration and Refugee Protection Act* and that only issues such as illness, impediments to travel and, possibly, long-pending H&C applications may warrant deferral.

> [49] It is trite law that an enforcement officer's discretion to defer removal is limited. I expressed that opinion in *Simoes v. Canada*

(M.C.I.), [2000] F.C.J. No. 936 (T.D.) (QL), 7 Imm.L.R. (3d) 141, at paragraph 12:

> [12] In my opinion, the discretion that a removal officer may exercise is very limited, and in any case, is restricted to when a removal order will be executed. **In deciding when it is "reasonably practicable" for a removal order to be executed, a removal officer may consider various factors such as illness, other impediments to travelling, and pending H & C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system.** For instance, in this case, the removal of the Applicant scheduled for May 10, 2000 was deferred due to medical reasons, and was rescheduled for May 31, 2000. Furthermore, in my view, it was within the removal officer's discretion to defer removal until the Applicant's eight-year old child terminated her school year.– our emphasis

[21] None of these elements, and no similar factor, occurs in the context of this application for a stay.

[22] In *Thirunavukkarasu v Canada (MCI)*, 2003 FC 1075, at paragraphs 4 to 6, this Court stated that:

> [4] **The applicants argue that because they have submitted an H & C application, section 233 of the Immigration and Refugee Protection Regulations**, SOR/2002-227 (the Regulations) **establishes that the Minister may stay removal if there exist humanitarian and compassionate considerations pursuant to subsection 25(1) of the Immigration and Refugee Protection Act**, S.C. 2001, c. 27 (IRPA) **even before a final decision has been made as to whether or not to grant permanent resident status pursuant to an H & C application**. This subsection, it is argued, requires at least some assessment of the H & C application on the merits and the enforcement officer has a duty to assess, at least on an interim basis, whether H & C considerations exist.
>
> [5] **This submission does not raise a serious issue.** Madam Justice Simpson in *Banik* v. *Minister of Citizenship and Immigration*, IMM-4861-03 stated that "to accept the applicant's interpretation would be to bring the administration of the Act to a

> standstill and without any supporting legislative history or a clear statement in the IRPA that the removal officer's obligations have changed, I am not prepared to conclude that the applicant's submission raises a serious question of law". Madam Justice Simpson concluded that the law that developed limiting a removal officer's discretion under the former Act is still applicable. Similarly, Mr. Justice O'Reilly, in *Firsova* v. *Canada (Minister of Citizenship and Immigration)* 2003 FC 933 (CanLII), 2003 FC 933, F.C.J. No. 1190 concluded that, "The provision simply states that persons who have been granted the exemption shall not be removed until their applications for permanent residence have been decided. It recognizes that officers often deal with requests for humanitarian and compassionate consideration while the applicants are still in Canada". I endorse and adopt the reasoning of my colleagues in this respect.
>
> [6] The failure to establish a serious issue disposes of the motion.

[23] The applicant relies on the future determination of her H&C application to stay her removal. In application of *Thirunavukkarasu,* it appears clear that such an application has no merit and does not raise a serious issue.

[24] As the applicant has not raised a serious issue, the present motion could be dismissed for that sole reason (*Radji v Canada (MCI)*, 2007 FC 100, paragraph 11).

[25] The applicant’s H&C application was not filed on a timely basis. The applicant waited more than one (1) month after being advised of the date of her removal to file an application to obtain permanent residence from within Canada for H&C.

[26] In essence, the applicant is seeking a decision of her H&C from a removals officer – this is not within his purview.

[27] The applicant is relying on the same facts to defer removal as she did on her application for H&C. This appears clear as the applicant attached the document of her H&C to her request for a stay of removal (Applicant's Record, p. 91-92).

[28] Under the jurisdiction applicable to removals officers, the Removals Officer could not exercise this function and rightly rejected the stay of removal.

[29] The applicant also states that the Removals Officer failed to provide reasons for the decision.

[30] This issue is erroneously raised by the applicant. The applicant has not presented any evidence to show that she made a request to receive reasons nor that such a request would have been made in a timely manner.

[31] This Court, in *Thomas v Canada (MCI)*, 2003 FC 1477, paragraphs 10-11, insisted on the importance of a request for reasons as well as its timeliness:

> [10] Counsel for the Applicant sought deferral of the Applicant's removal in a letter dated the 28th of November, 2003 addressed to the Expulsions Officer who provided the Applicant with her "direction to report" for removal. Counsel wrote:
>
> You have the discretion given the extraordinary facts in this case and we ask that you please exercise your discretion to save Ms. Thomas to the unpleasantness of having to face such a psychologically threatening scenario in a current society that would likely expose her to further risk.
>
> The Expulsions Officer refused the deferral citing only the statutory obligation of the Minister to carry out removal "...as soon as is reasonably practicable."
>
> [11] Counsel requested reasons of the Expulsions Officer. The Expulsions Officer denied the request indicating in notes to file appended to her

> affidavit herein that such a request for reasons "...must be made through privacy co-ordinator." I am satisfied that this response raises a serious issue to be tried on the application for leave and for judicial review that underlies the Applicant's motion for a stay of removal.

[32] The applicant has raised no serious issue in her application for a stay of removal.

No irreparable harm

[33] This Court has defined the notion of "irreparable harm" as the removal of a person "*to a country where his safety or his life is in jeopardy*" (*Kerrutt v* Canada (*MEI)*, [1992] F.C.J. No. 237 (Q.L.)).

[34] An irreparable harm: "must […] be much more substantial and more serious than personal inconvenience or hardship. Rather, it must be based on a threat to the life or security of the person, or an obvious threat of ill treatment in the country of origin. Irreparable harm is harm which is irrevocable or permanent" (*Perry v Canada (MPSEP)*, 2006 FC 378, par. 29).

[35] In the present file, there is simply no such evidence (*Louis v Canada (MCI)*, [1999] F.C.J. No. 1101).

[36] Indeed, both the IRB and the PRRA officers concluded that the applicant would not face any risk should she return to her country.

[37] In the irreparable harm section of her written representations, the applicant states that her children would suffer irreparable harm by being sent to Saint Vincent and the Grenadines.

[38] It is important to note that the applicant's children are not subject to removal.

[39] Despite this, the applicant seems to insist that she would choose to bring them with her rather than then leave them with their father whom they see regularly.

[40] This is a choice the applicant may make: the applicant has not submitted evidence showing that the children being left with their father would constitute irreparable harm for her.

[41] To the contrary, the father's affidavit demonstrates that he sees his children regularly, is well aware of the needs of his children and cares for them. Though he may be unemployed, the applicant is unemployed as well.

[42] As for the financial and emotional difficulties to the applicant that will follow her departure, it is well settled in law that the separation from family members, does not constitute, in and of itself, irreparable harm, but a mere consequence of removal (*Camara v Canada (MPSEP*), 2008 FC 1089, par. 36. See also: *Celis v Canada (MCI),* 2002 CFPI 1231; *Parsons v Canada (MCI),* 2003 CF 913; *Selliah v Canada (MCI),* 2004 CAF 261).

[43] As stated by this Court in *Melo v Canada (MCI),* [2000] F.C.J. No. 403 (QL):

> [21] These are all unpleasant and distasteful consequences of deportation. But if the phrase irreparable harm is to retain any meaning at all, it must refer to some prejudice beyond that which is inherent in the notion of deportation itself. To be deported is to lose your job, to be separated from familiar faces and places. It is accompanied by enforced separation and heartbreak. There is nothing in Mr. Melo's circumstances which takes it out of the usual consequences of deportation. […] As unhappy as these circumstances are, they do not engage any interests beyond those which are inherent in the nature of a deportation.

[44] In these circumstances, the applicant did not demonstrate that she would suffer irreparable harm if she were to be returned to St-Vincent:

> [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 (CanLII), 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 (CanLII), 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).) (*Adams* v. *Canada (M.C.I.*), 2008 FC 256) Our emphasis

[45] Finally, the applicant's H&C application will proceed even if the applicant is removed from Canada and if her application is granted, she will be able to return to the country (*Perry v Canada (MPSEP*), 2006 FC 378; *Morello v Canada (MCI*), IMM-6552-05, November 1, 2005; *Lawes v Canada (MCI*), IMM-555-06, February 3, 2006).

[46] The applicant has not shown the presence of irreparable harm. She has clearly not fulfilled her burden of proof and therefore, has not met the second criteria of the *Toth* tripartite test.

The balance of convenience favours the respondent

[47] The applicant remained in Canada without status for approximately nine (9) years prior to claiming refugee status.

[48] She has benefited from a review of her risk allegations by the Refugee Protection Division, this Court and a PRRA Officer.

[49] The applicant was not without knowing that she could be removed. Despite this, she failed to ask for consideration of an H&C until more than one (1) month had passed since being informed of her removal.

[50] Additionally, a removals officer explicitly gave her an extended period of time to prepare for her departure and that of her children should she choose to leave with them.

[51] What she chose to do rather, was file for H&C and to ask that the removals officer act in lieu of an H&C officer until her application for H&C was processed. The removals officer had no jurisdiction to act in this manner.

[52] Paragraph 48(1) of IRPA provides that removals must be enforced as soon as reasonably practicable.

[53] As was said in *Acharige v Canada (MCI)*, 2006 FC 240:

> The circumstances of this case are such that the balance of convenience lies with the Minister. The Minister is under a statutory duty to enforce the Removal Order as soon as is reasonably practicable. There is a public interest in enforcing removal orders in an efficient, expeditious and fair manner. Only in exceptional cases will a person's individual interest outweigh the public interest *(Immigration and Refugee Protection Act*, S.C. 2001, c.27, s. 48; *Akyol* v. *Canada (M.C.I.)*, [2003] F.C.J. No. 1182, 2003 FC 931 at para. 12; *Dugonitsch v. Canada (M.E.I.)*, [1992] F.C.J. No. 320 (T.D.)).

[54] The balance of convenience favours the respondent in this case.

Conclusion

[55] For all these reasons, the applicant’s application for a stay of removal is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the application for a stay of removal be dismissed.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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