Federal Court Cour fédérale

Date: 20130821

Docket: IMM-5501-13

Citation: 2013 FC 890

Ottawa, Ontario, August 21, 2013

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

KHURSHID BEGUM AWAN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

[1] Inherent values of life, human worth and dignity are fully reflected in Canada's legislation. It is, therefore, important that a mockery, not be made of the legal system, its legal process (by an abuse of such process) and that of the immigration legislative framework.

[2] This matter cannot possibly be understood unless the chronology of the voluminous paper trail of files emanating from both respective parties is comprehensively comprehended.

[3] Although the computer age often relies on twitter communiqués or sensational headlines to transmit information, this matter requires a most comprehensive and considerable amount of background reading and analysis, not suitable for quick fixes of a sensational variety.

[4] Without reading the full background to this matter and the multiple files themselves, the essence is totally missed and, thus, susceptible to a major miscomprehension. From the outset of the case of the Applicant, a complete lack of credibility is immediately apparent upon reading the decision of the Immigration and Refugee Board, Refugee Determination Section, dated November 2, 2012, in files MB103153 and MB103155. From the outset to the present, if the full record is simply read, a clear picture emerges that is most different than that brought forward by the Applicant. In *Hussain v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 751 (QL/Lexis), Justice Marc Nadon stated:

> [12] … The Applicants seem to be of the view that if they continue to add documents to the record, the credibility findings of the Refugee Board are somehow going to be "reversed" or "forgotten"…

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[5] The present matter before the Court is that of a motion, submitted to the Federal Court only yesterday evening, August 20, 2013, in regard to a removal order in respect of the Applicant scheduled for today.

[6] An extensive reading of the file draws note of the following: two respective judges of this Court, Justice Simon Noël and Justice Jocelyne Gagné, have only most recently rendered two respective judgments in this matter. Both draw upon a full recognition, acknowledgment and

understanding of the intricacies of the matter subsequent to interim stays having been granted to ensure that the matter will have been fully comprehended. (The two orders of both judges are provided as annexed.)

[7] Exhibit B1 demonstrates that as of July 22, 2013, Dr. Maxime Labelle at the Montreal General Hospital wrote in respect of the Applicant that "the patient is safe to travel by any mode of transportation and is safe to resume all baseline activities of daily living".

[8] No new evidence of substance has arisen since that time to warrant a change in situation. As a matter of fact, no doctor had submitted an affidavit, as was indicated by Justice Noël for the purposes that would have been previously required for substantiation.

[9] The history of the file clearly demonstrates that, presently, hospitalization occurs an hour before hearings are to take place; and, that in the past, reoccurrent hospitalization, also, was apparent hours before or within days of hearings to be conducted.

[10] The present matter, in its saga, before the Court is, yet, of another motion to stay the removal of the Applicant.

[11] It is important to note that medical attention was offered, will be provided and present on the flight on which the Applicant is to be returned: an accompanying nurse, wheelchair access and a recognition that the country to which the Applicant is returning does have the needed medical attention in such regard.

[12] The matter in respect of the present third motion for a stay of removal (in addition to the interim stay orders granted on motions previously) will not be heard, yet, again, to ensure that a mockery of the immigration system does not ensue; thus, an abuse of process is not perpetuated, due to the lack of "clean hands" by the Applicant as described by the jurisprudence in that regard (*El Ouardi v Canada (Solicitor General)*, 2005 FCJ No. 189 (QL/Lexis) of Justice Marshall Rothstein; and, also, *Mjia v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1256).

[13] As two judges of this Court have rendered decisions, a continuation of the process, dependent on the same basic premised evidence, would simply constitute novelty, not betterment, without any greater substantiation to the evidence. On such evidence to render a different decision, all that would be accomplished, would be, in effect, a negation and a setting aside of the decisions of judges, when nothing will have substantially changed in regard to the state in which the Applicant presently finds herself. It is recognized that an affidavit from a medical doctor as specified by Justice Noël had not been forthcoming prior to even this present moment as the decision was being written.

[14] It is recalled that a stay of execution, an injunction, as requested, is an extraordinary measure, or remedy in law. It calls for applicants to come to Court with "clean hands", meaning that credibility and respect of the law of Canada be abided by rather than flaunted; that is not the case in this matter; a careful reading of the Court record fully demonstrates itself as such.

[15] Therefore, for all of the above reasons, the motion for a stay of removal will not be entertained.

(**N.B**. This decision was just about to be rendered in the French language by the undersigned judge; however, as noted in the present Court record, the counsel for the Applicants (also, the Applicant's husband, who, previously had been returned to their country of origin), prior to the present motion, pleaded in the English language before the Court; and, only in regard to the present motion has he pleaded in the French language. It is also noted that the Applicant has knowledge of English.

This decision, as self-evident, is drafted in the English language and will become available in its French translation as soon as possible. It is reiterated that the undersigned judge, who, when beginning to draft this decision, drafted in the French language, only to change languages to ensure that the file, as set out in its original language, would also ensure a judicial response in the same language that the Applicant's counsel conducted the matter from the outset, together with that of the bulk of the documentation submitted.

Changing languages in pleadings on the same matter by the same counsel, does not necessarily change judges which, is sometimes thought, to enable receiving a change in judges.

The previous recent decisions of the two fully bilingual judges, Justice Noël and Justice Gagné, who both speak and render decisions in both languages, were, nevertheless, rendered in the English language, also, to accommodate counsel of the Applicant and the Applicant. This is of significance as the decision would have otherwise been rendered in the French language.)

ORDER

THIS COURT ORDERS that the motion for a stay of removal will not be entertained.

"Michel M.J. Shore"

Judge

ANNEX "A"

Date: 20130403

Docket: IMM-2369-13

Ottawa, Ontario, April 3, 2013

PRESENT: The Honourable Madam Justice Gagné

BETWEEN:

KHURSHID BEGUM AWAN
MUHAMMAD KHALIL AWAN

Applicants

and

THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

Respondent

ORDER

UPON motion on behalf of the applicants presented this day for a stay of execution of their removal order, also scheduled this day, from Canada to Pakistan;

AND UPON considering the affidavit and written submissions by the applicants' and by the respondent's counsel;

AND UPON hearing the parties' oral submissions by way of a teleconference;

AND UPON considering that the present motion is accessory to an application for leave and judicial review (ALJR) of a negative decision from the Canadian Boarder Services Agency (Removal officer), dated April 2, 2013, refusing the applicants motion for an administrative stay of their removal;

AND UPON considering the tri-partite test in *Toth v Canada (Minister of Employment and Immigration*) (1988), 86 NR 302 (FCA), according to which it must be demonstrated that:

(i) a serious issue exists;
(ii) the applicants would suffer irreparable harm if their removal was not stayed; and

(iii) the balance of convenience favours staying their removal.

AND UPON considering that in order to succeed with the present motion, the applicants must demonstrate that they have a good probability of success with their ALJR, since a favorable order would effectively give them the substantive remedy which they seek in their ALJR (*Baron v Canada (Minister of Citizenship and Immigration*), 2009 FCA 81);

AND UPON considering that the applicants argue that a serious issue lies in the facts that:

(i) There is a risk of death or cruel treatment at the hands of Islamic terrorists and at the hands of their former son in law should they return to Pakistan;
(ii) The removal officer has not properly assessed the best interest of the applicants' grandson who now lives with his mother in Canada;
(iii) The applicants' medical condition – particularly the female applicant's heart condition – prevents them from traveling;

AND UPON considering that by its decision dated November 22, 2012, the Immigration and Refugee Board, Refugee Protection Division (RPD) assessed the applicants' alleged fear of persecution in Pakistan, that the applicants have been found not credible with respect to the principal aspects of their refugee claim and that consequently, said factual basis should not be used as an allegedly serious issue (*Padda v Canada (Minister of Citizenship and Immigration)*, 2009 FC 738);

AND UPON considering that the best interest of the child was not argued before the removal officer, that the applicants have not filed an application for permanent residence based on humanitarian and compassionate considerations and that, in any event, the removal officer's discretion with respect to the best interest of the child was limited to considering his short term interests or factors such as illness, impediments to travel and other compelling or special circumstances (*Simoes v Canada (Minister of Citizenship and Immigration)*, (2000) 187 FTR 219, *Wang v Canada (Minister of Citizenship and Immigration),* 2001 FCT 148);

AND UPON considering that in the present case, the minor child is to remain in Canada with his mother;

AND UPON considering, with respect to the medical condition of the applicants:

(i) The absence of affidavit on behalf of the applicants (the only affidavit filed in support of the motion is the applicants' daughter's affidavit);
(ii) The absence of any evidence as to the alleged medical condition of the male applicant;
(iii) The absence of evidence that the female applicant's heart condition has worsened since she left Pakistan, where she had her pacemaker installed and where she suffered her two heart attacks;
(iv) The evidence filed by the respondent that the female applicant's condition is stable, that her medical condition does not prevent her from traveling and that medical services are available in Pakistan;

AND UPON considering that the Court is not satisfied that the applicants have met the first prong of the *Toth* test;

AND UPON considering that the *Toth* test is conjunctive;

THIS COURT ORDERS that the applicants motion for a stay of their removal order be dismissed.

"Jocelyne Gagné"

Judge

ANNEX "B"

Date: 20130627

Docket: IMM-2750-13

Montréal, Quebec, June 27, 2013

PRESENT: The Honourable Mr. Justice Simon Noël

BETWEEN:

KHURSHID BEGUM AWAN
MUHAMMAD KHALIL AWAN

Applicants

and

THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

Respondent

ORDER

HAVING READ the most recent documentation filed by both parties, which included an affidavit of Rosalind Wong, "an activist with solidarity across borders", and the affidavit of Dr. Bruno Benzaquen, cardiologist, a letter signed by counsel for the Applicants dated June 27, 2013 and a further motion record of the Respondent;

UPON having reviewed the evidence filed initially by both parties which includes the medical evidence of Dr. Thériault, Dr. Khadir, a medical resident, Dr. Costi, etc., as well as the medical records file;

CONSIDERING that Gagné J. of this Court dismissed an earlier motion to stay based on almost the same arguments by order dated April 3, 2013, and that this Court initially made it clear that it would deal only with "faits nouveaux" for this second stay motion;

CONSIDERING that this is the fourth hearing dealing with a motion for a stay of removal of the Applicants, where interim stays were granted but only because of medical reasons concerning the wife Applicant;

CONSIDERING that the husband Applicant, although having been requested to show up for his departure to Pakistan on April 17, 2013, did not show up and as a result of that, costs in favour of the Respondent have still not been paid;

CONSIDERING that this hearing deals solely with the wife Applicant's health situation in light of an eventual return to Pakistan as a result of a deportation order;

CONSIDERING the prior medical evidence (including the one of Dr. Costi which does not recommend air travel) and the most recent one of Dr. Benzaquen which concludes after having reviewed a number of medical tests that the Applicant has a health situation that does not preclude air travel but that the use of a wheelchair would aid in her transport;

CONSIDERING the medical evidence of Dr. Thériault which indicates that the wife Applicant is fit to fly to Pakistan and that there are in that country medical services to deal with her health issues and the review of the medical records of the Applicant which the doctor dealt with in detail;

CONSIDERING that Dr. Thériault recommends that the Applicant be accompanied by a nurse during the traveling time from Canada to Pakistan;

CONSIDERING the medical evidence in totality and concluding that the assessment of it favours by preponderance that the health situation of the wife Applicant permits air travel with wheelchair access and the presence of a nurse while traveling from Canada to Pakistan;

CONSIDERING that this Court has been concerned with the health of the wife Applicant since mid-April 2013 while traveling by air but that as of today there is substantial medical evidence (which includes examinations by cardiologists, although contradictory concerning her ability to travel) that shows that she is fit to fly;

CONSIDERING the tripartite test (*Toth v Canada (Minister of Employment and Immigration*) (1988), 86 NR 302 (FCA) and *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311) that there is a serious issue to be tried, that the Applicant will suffer irreparable harm by reason of her deportation to Pakistan and that the balance of convenience is in her favour;

CONSIDERING my favourable comments concerning the decision of the enforcement officer in the order of April 17, 2013 at page 4 and the fact that because of the new medical evidence of the Respondent there is no irreparable harm and that the balance of convenience favours the Respondent;

CONSIDERING that the substantial medical evidence presented does not show there will be irreparable damage to the wife Applicant and that the balance of convenience favours the Respondent;

CONSIDERING the request for further costs by the Respondent and the determination made concerning the wife Applicant's ability to travel by air, no costs will be awarded;

THIS COURT ORDERS that:

1. The granting of the interim stay motion is cancelled and the motion for a stay of deportation is dismissed.

2. The Applicant, when travelling from Canada to Pakistan, will have wheelchair access and will be accompanied by a qualified nurse.

3. No costs to be awarded in this matter.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5501-13
STYLE OF CAUSE:	KHURSHID BEGUM AWAN v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO PURSUANT TO RULE 369

REASONS FOR ORDER: AND ORDER	SHORE J.
DATED:	August 21, 2013

WRITTEN REPRESENTATIONS BY:

Stewart Istvanffy	FOR THE APPLICANT
Mario Blanchard	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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