Federal Court of Appeal | Cour d'appel fédérale

Date: 20111018

Docket: A-451-10

Citation: 2011 FCA 286

CORAM: **SEXTON J.A.**
EVANS J.A.
STRATAS J.A.

BETWEEN:

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Appellant

and

ZEF SHPATI

Respondent

Heard at Toronto, Ontario, on October 4, 2011.

Judgment delivered at Toronto, Ontario, on October 18, 2011.

REASONS FOR JUDGMENT BY: EVANS J.A.

CONCURRED IN BY: SEXTON J.A.
STRATAS J.A.

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REASONS FOR JUDGMENT

EVANS J.A.

A. *INTRODUCTION*

[1] Is the Federal Court or an immigration enforcement officer the principal decision-maker when foreign nationals request the deferral of their removal from Canada pending the disposition of an application for judicial review of a negative Pre-Risk Removal Assessment (PRRA)?

[2] That is the question underlying the present appeal by the Minister of Public Safety and Emergency Preparedness (Minister) of a decision of the Federal Court, reported as *Shpati v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 1046. In that decision, Justice

Harrington (Judge) granted an application for judicial review by Zef Shpati and declared invalid an enforcement officer's refusal to defer his removal from Canada.

[3] The Minister says that, in the absence of a statutory stay, the Federal Court is normally the proper forum for individuals seeking to stay their removal, by showing that they meet the tripartite test for granting an interlocutory injunction: the existence of a serious question to be decided in the pending judicial review proceeding, irreparable harm to the applicant if a stay is not granted, and the balance of convenience.

[4] The Minister notes that section 48 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) obliges a person subject to an enforceable removal order to leave Canada immediately and requires that the order be enforced as soon as is reasonably practicable. He argues that these provisions indicate that the scope of an enforcement officer's discretion to defer removal is narrow.

48. (1) A removal order is enforceable if it has come into force and is not stayed;	48. (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable.	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.

[5] On the other hand, Mr Shpati argues that enforcement officers should normally defer removal pending the disposition of an application for judicial review of a negative PRRA if satisfied that the application was timely and made in good faith. Otherwise, he says, an individual's statutory right to seek judicial review of a negative PRRA determination would be rendered nugatory. This is because, once an individual is removed from Canada, the judicial review of the PRRA becomes moot, and the PRRA itself cannot be reassessed. Moreover, Mr Shpati submits that it would be inefficient to bifurcate deferral decisions between the Federal Court and immigration officials by limiting the scope of enforcement officers' discretion under section 48 as suggested by the Minister.

[6] In my opinion, the Minister's view is more consistent than that of Mr Shpati with the text of section 48, the scheme of the IRPA, and the jurisprudence. For the reasons that follow, I would allow the Minister's appeal and dismiss Mr Shpati's application for judicial review of the enforcement officer's refusal to defer his removal.

B. *FACTUAL BACKGROUND*

[7] Zef Shpati is a national of Albania, where he spent twenty-five years in a labour camp. After escaping from Albania in 1991 he was identified by the United Nations High Commissioner for Refugees as a person of concern and was issued travel documents to the United States, where he was re-settled, and he and his family became permanent residents.

[8] In March or April 2005, Mr Shpati was deported to Albania from the United States for immigration fraud, namely, attempting to smuggle his sister-in-law into the country on his wife's

Green Card. In May, he left Europe for Canada and applied for Convention refugee status on his arrival. Finding Mr Shpati not to be credible, a panel of the Refugee Protection Division of the Immigration and Refugee Board (Board) dismissed his claim on March 16, 2006. A year later, the Federal Court (2007 FC 237) upheld the Board's decision.

[9] In September 2006, Mr Shpati applied for permanent residence from within Canada on humanitarian and compassionate grounds (H&C). This application was refused on January 28, 2009.

[10] In June 2009, he also applied for a PRRA, which automatically stayed his removal**:** *Immigration and Refugee Protection Regulations*, SOR/2001-227, section 232 (Regulations). In a decision dated October 1, 2009, the PRRA officer rejected the application. He concluded that Mr Shpati was unlikely to be at risk of torture, persecution, death, or cruel and unusual treatment or punishment if returned to Albania. As a result, the statutory stay of removal lapsed and Mr Shpati could be removed from Canada: Regulations, paragraph 232(*c*).

[11] On December 21, 2009, Mr Shpati applied to the Federal Court for leave and for judicial review of the PRRA and the H&C decision. On February 4, 2010, he requested an enforcement officer to defer his removal (then apparently scheduled for February 26, 2010) pending the Court's disposition of his judicial review applications. The request was refused on March 8, 2010, and Mr Shpati was advised that he was expected to report for removal on March 22, 2010. He applied for

leave and for judicial review of the denial of the deferral as well. This is the decision that has led to the present appeal and is described more fully below.

[12] On March 17, 2010, the Judge heard motions brought by Mr Shpati for a stay of his removal pending the Court's determination of his applications for leave and for judicial review of the PRRA, the H&C decision, and the enforcement officer's refusal to defer his removal. In a decision, dated April 7, 2010 (2010 FC 367), the Judge granted the motion to stay the refusal to defer on the basis of the tripartite test. He dismissed the other two motions as moot.

C. *DECISION OF THE ENFORCEMENT OFFICER*

[13] The enforcement officer started his careful reasons for decision by noting that the statutory obligation imposed by section 48 of the IRPA to execute a removal order "as soon as is reasonably practicable" gives officers "little discretion to defer removal". He then addressed each of the submissions made on Mr Shpati's behalf.

[14] Turning first to the submission that Mr Shpati's removal should be deferred because of the outstanding applications for leave and for judicial review of the PRRA and the H&C decision, he said:

> I note that the enforcement of Mr Shpati's removal order does not negate him the right to have his PRRA/H&C reassessed, if judicial review is granted by the Federal Court.

[15] He then correctly noted that the IRPA stays removals in certain circumstances, which did not apply in Mr Shpati's case. Absent a statutory stay, "immigration proceedings are not automatically suspended where pending court applications exist", although an applicant may apply to the Federal Court for a temporary stay of the execution of a removal order. Consequently, he declined to defer Mr Shpati's removal on the basis of his outstanding judicial review applications to the Federal Court.

[16] Second, the officer found that deferral was not warranted because of a serious risk of harm to Mr Shpati if he were returned to Albania. The enforcement officer noted that the Board, and the PRRA and H&C officers, had already assessed risk and found that he was not a refugee or a person in need of protection. And, since the officer was not satisfied that "any new or personalized risk exists", the allegations of risk on return did not warrant deferring Mr Shpati's removal.

[17] Third, he declined to defer removal because either Mr Shpati was established in Canada, or the best interests of his wife and children in the United States so required.

D. ***FEDERAL COURT DECISION***

[18] The Judge heard the judicial review of the enforcement officer's refusal to defer, together with the judicial review applications relating to the PRRA and the H&C decision. He upheld the PRRA decision, but set aside the H&C decision for lack of adequate reasons, and remitted it for re-determination. Once the Judge had rendered these decisions, Mr Shpati's application for judicial

review of the enforcement officer's refusal to defer his removal pending the Federal Court's disposition of the applications to review the PRRA and the H&C decision arguably became moot.

[19] However, the Judge decided to hear the application for judicial review of the deferral decision in the circumstances of the present case, whether or not it was moot (paras. 31 and 36). He reasoned (at para. 31) that there was still a live controversy between the parties because Mr Shpati wished to remain in Canada pending the re-determination of his H&C application. The Judge stated that, even if the application to review the refusal of a deferral were granted, he could not remit the matter to the officer to re-decide because the Court had already judicially reviewed the PRRA and H&C decisions. However, he said, a declaration that the refusal to defer was invalid would be an available remedy.

[20] This was the remedy that the Judge granted, having found (at para. 47) that

> … the enforcement officer erred in law in stating that if successful in his PRRA, Mr Shpati would be entitled to return to Canada.

The Judge stated that, in so concluding, the officer must have overlooked *Perez v. Canada (Minister of Citizenship and Immigration),* 2009 FCA 171, 82 Imm. L.R. (3d) 167 (*Perez*), where it was held that if a person leaves Canada after a negative PRRA decision, whether voluntarily or not, an application for judicial review of that decision becomes moot and the PRRA itself cannot be reassessed.

[21] Earlier in his reasons (at para. 42), the Judge had repeated and endorsed the following statement in his reasons for decision in the stay motions:

> Although an application for leave and for judicial review of a negative PRRA does not automatically result in a stay, I find it difficult to accept that Parliament intended that it was "reasonably practicable", for an enforcement officer, who is not trained in these matters, to deprive an applicant of the very recourse Parliament had given him.

[22] As for the scope of the enforcement officer's discretion to defer removal, the Judge stated (at para. 45):

> … an enforcement officer has not been empowered to opine on decisions already rendered on PRRA or H&C applications with risk elements. Nor is he or she in a position to opine on whether an applicant will be successful in an application for leave and for judicial review already filed. I accept that the officer has jurisdiction to defer removal on the basis that a decision will soon be rendered by the Court. However, it is also open to the officer to refuse, leaving it to the applicant to seek a stay from a judge of this Court.

[23] The Judge noted (at para. 44) that he had also dealt with the scope of the officer's discretion to defer in paragraph 47 of his reasons for granting the stay motions, where he had said:

> Nor do I rule out the possibility that an enforcement officer may defer in circumstances in which new events have occurred after the negative PRRA decision, such as natural disasters in the form of tsunamis or earthquakes or political upheavals such as "coup d'états."

[24] The Judge certified the following two questions, proposed by the Minister, pursuant to IRPA, paragraph 74(*d*):

> a. When a foreign national has a negatively determined PRRA, has filed an application for leave and judicial review of that PRRA decision, but continues to maintain the same allegation of risk in a request to defer removal, does an enforcement officer have the discretion to defer removal on

that basis alone or must a judicial stay based on the PRRA application for leave and for judicial review be sought in Federal Court?

b. Does the potential mootness of an applicant's PRRA litigation upon removal warrant a deferral of removal pending resolution of this same litigation?

[25] No questions were certified regarding the Judge's dismissal of Mr Shpati's judicial review of the PRRA, or his setting aside of the H&C decision and its pending re-determination. They are therefore not considered in this appeal.

E. *ISSUES AND ANALYSIS*

Issue 1: Standard of review

[26] The Minister observed that the Judge seems not to have articulated the standard of review applicable to the enforcement officer's refusal to defer Mr Shpati's removal. I agree.

[27] In my view, the officer's decision under section 48 is reviewable on a standard of reasonableness because it involves either the exercise of discretion, or the application to the facts of the words of section 48, "as soon as is reasonably practicable". However, any question of law on which the officer based his decision (such as the scope of the statutory authority to defer) is reviewable on a standard of correctness: *Patel v. Canada (Citizenship and Immigration)*, 2011 FCA 187 at paras. 26-27. Enforcement officers have no delegated legal power to decide questions of law.

[28] Since the issue in this appeal is whether the officer's decision was either unreasonable or based on an erroneous view of the law, the Court effectively steps into the shoes of the Judge of the Federal Court who heard Mr Shpati's application for judicial review: see, for example, *Acid Prairie*

Rain Coalition v. Canada (Minister of Fisheries and Oceans), 2006 FCA 31; *Canada Revenue Agency v. Telfer*, 2009 FCA 23.

Issue 2: Did the enforcement officer err in law by failing to take into account the fact that Mr Shpati's application for judicial review of the PRRA was potentially moot if he was removed before it was decided?

[29] Contrary to the view expressed by the Judge (at para. 47), the officer did not state that if Mr Shpati were successful in his application for judicial review of the PRRA, "he would be entitled to return to Canada." What the enforcement officer wrote was more nuanced:

> … the enforcement of Mr Shpati's removal order does not negate him the right to have his PRRA/H&C reassessed, if judicial review is granted by the Federal Court.

In my respectful opinion, the refusal to defer should not have been set aside as erroneous in law on the basis of this statement.

[30] First, even though an applicant's removal from Canada renders her or his application for judicial review of a PRRA moot, the Court may nonetheless exercise its discretion to hear it on the basis of the factors set out in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342. If the Court decides to hear the application despite its mootness and subsequently sets aside the PRRA decision, the Minister could permit the applicant to return to Canada pending the re-determination of the PRRA. In these circumstances, the PRRA application would not be moot. Hence, the officer's statement of the law could be characterized as elliptical and incomplete, rather than as demonstrating that he misunderstood the law.

[31] Second, the written submissions to the enforcement officer by Mr Shpati's counsel requesting that his removal be deferred pending the determination of the applications of leave and for judicial review made no mention of the implications of *Perez*. Not surprisingly, therefore, the officer's reasons for refusing to defer focus principally on the fact that, absent a stay by the Federal Court or a statutory stay, an application for judicial review of a PRRA does not automatically stay a removal. I see no error in this statement of the law. Thus, even if the enforcement officer did misstate the law as found by the Judge, it is not clear to me that the impugned sentence in the officer's reasons was the basis of his refusal to defer Mr Shpati's removal because of the outstanding judicial review application.

[32] The materiality of the officer's alleged error of law is further reduced by his conclusion that, in view of the prior negative decisions by the Board, and by the PRRA and H&C officers, and in the absence of information about a new risk, the officer was not satisfied that Mr Shpati's removal should be deferred because he would be at risk if returned to Albania. The officer also concluded that neither Mr Shpati's establishment in Canada nor the best interests of his children warranted a deferral.

[33] Hence, if one looks beyond the officer's reasons to the outcome of the process, I am not persuaded that his decision falls outside the range of those reasonably open to him on the facts and the law.

[34] This, in my opinion, is sufficient to dispose of the appeal. However, in case I am wrong, and in order to attempt to reduce uncertainty in the law, it is appropriate for this Court to address the issue raised in the certified question: does the potential mootness of the pending PRRA litigation warrant deferral of removal?

[35] In my view, the answer to this question is no. If it were otherwise, deferral would be virtually automatic whenever an individual facing removal had instituted judicial review proceedings in respect of a negative PRRA. This would be tantamount to implying a statutory stay in addition to those expressly prescribed by the IRPA, and would thus be contrary to the statutory scheme.

[36] Indeed, counsel for Mr Shpati were not prepared to go this far. Their position and, perhaps, that of the Judge (at para. 42) was that the potential mootness of the PRRA litigation was not determinative in every case, but that it is an error of law for an enforcement officer not to take it into account when determining requests for the deferral of removal pending the disposition of judicial review proceedings challenging a PRRA.

[37] I disagree with this argument. First, the potential mootness of the PRRA litigation would be a factor whenever an enforcement officer is asked to defer a removal pending the determination of a judicial review of a negative PRRA. As a result, it would be formalistic to insist that officers' reasons must refer to it in every case as a condition precedent of the validity of their decision.

[38] Second, the potential mootness of the underlying judicial review application resulting from the removal of the applicant does not necessarily constitute irreparable harm to the applicant under the tripartite test so as to warrant the grant of a judicial stay: *El Ouardi v. Canada (Solicitor General)*, 2005 FCA 42 at para. 8; *Palka v. Canada (Minister of Public Safety and Emergency Preparedness)* 2008 FCA 165 at para. 20. However, the Judge's decision granting Mr Shpati's motion for a stay seems to have given rise to divergent views in the Federal Court: see paras. 37-40 of his reasons for the decision that is the subject of the present appeal.

[39] If mootness does not in itself amount to irreparable harm for the purpose of the tripartite test for the grant of a judicial stay of removal, I see no reason why enforcement officers should always be legally required to consider it when determining a request for deferral pending the disposition of PRRA litigation.

[40] Consequently, in my opinion, the enforcement officer in the present case could refuse to defer Mr Shpati's removal from Canada without considering the implications of *Perez*, especially since the submissions made to the officer on Mr Shpati's behalf made no mention of *Perez* and the potential mootness of the pending applications for leave and for judicial review. Potential mootness is a consideration that the Federal Court is better placed to take into account when weighing all the factors relevant under the tripartite test for determining a motion for a judicial stay.

Issue 3: When determining a request for removal, is an enforcement officer required to consider the risk to the applicant if his removal were not deferred pending the disposition of PRRA litigation?

[41] As already noted, the officer rejected Mr Shpati's argument on risk by pointing out that the Board had rejected his claim for refugee status, a decision upheld by the Federal Court, and that his PRRA application had also been dismissed. The officer further stated that he was refusing to defer on the ground of risk because Mr Shpati had produced no evidence of some new (that is, *post*-PRRA) risk to which he would be exposed it returned to Albania. I infer from this that if Mr Shpati had such evidence, the officer would have considered whether it warranted deferral and exercised his discretion accordingly.

[42] In my view, this is an accurate statement of the law. It is consistent with the position adopted by this Court in *Baron v. Canada (Minister of Public Safety and Emergency Preparednes*), 2009 FCA 81, [2010] 2 F.C.R. 311 (*Baron*). *Baron* concerned an enforcement officer's power to defer removal pending the determination of an H&C application. The present case is analogous to *Baron* in that there is no statutory stay of removal pending the determination of either an H&C application or a judicial review application with respect to a negative PRRA.

[43] In *Baron* (at para. 51), Justice Nadon indicated the kinds of new risk that an enforcement officer may consider when deciding whether to defer a removal. Paraphrasing Justice Pelletier, then of the Federal Court, in *Wang v. Canada (Minister of Citizenship and Immigration*), 2001 FCT 148, [2001] 3 F.C. 682, also a case dealing with a request to an enforcement officer for a deferral pending the determination of an H&C application, Justice Nadon said:

> In order to respect the policy of the Act which imposes a positive obligation on the Minister, while allowing for some discretion with respect to the timing of a removal, deferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment .With respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety.

[44] When, as in the present appeal, an officer is requested to defer removal after a negative PRRA, any risk relied on must have arisen after the PRRA. In addition to new risk of harm, other personal exigencies have been held to warrant a deferral because removal at that time would not be reasonably practicable: see, for example, *Simoes v. Canada (Minister of Citizenship and Immigration*) (2000), 7 Imm. L.R. (3d) 141 (F.C.T.D.) at para. 12; *Ramada v. Canada (Solicitor General)*, 2005 FC 1112, 53 Imm. L. R. (3d) 74 at para. 3 (requests for deferral pending H&C decisions).

[45] It is not possible to provide a complete list of the considerations capable of rendering removal not "reasonably practicable". However, both the primary statutory duty to remove, and the language chosen by Parliament to confine enforcement officers' discretion (« *les circonstances le permettent* » in the French version of the text), indicate that the range is relatively narrow. Their functions are limited, and deferrals are intended to be temporary. Enforcement officers are not intended to make, or to re-make, PRRAs or H&C decisions.

[46] In response to the above analysis, Mr Shpati argues that enforcement officers must be able to defer removal on the basis that a pending application for leave and for judicial review was made in good faith. Otherwise, he says, applicants would be effectively denied the benefit of the statutory

right of judicial review conferred by section 18.1 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, because PRRA litigation is potentially moot after their removal. He says that the right to apply for judicial review of a decision of a "federal board, commission or other tribunal" under section 18.1 includes decisions of an enforcement officer under section 48. In addition, the judicial review provisions in IRPA, section 72 apply to all decisions taken under the Act.

[47] This may have been what the Judge had in mind when he said (at para. 42) :

> Although an application for leave and for judicial review of a negative PRRA does not automatically result in a stay, I find it difficult to accept that Parliament intended that it was "reasonably practicable", for an enforcement officer, who is not trained in these matters, to deprive an applicant of the very recourse Parliament had given him.

[48] I do not agree with this argument. First, because good faith in this context is a very low threshold, a deferral would tend to be granted in most cases where an applicant had made an application for judicial review of a negative PRRA. The adoption of Mr Shpati's argument would be almost tantamount to providing a statutory stay on removal in a situation which is not one of those expressly provided by the IRPA, and would therefore be inconsistent with the scheme enacted by Parliament and section 48 in particular.

[49] Second, the fact that an individual's removal renders PRRA litigation potentially moot does not abrogate that person's right under section 18.1 to make an application for judicial review of the enforcement officer's refusal to defer because the Court may exercise its discretion to hear the matter despite its mootness. Nonetheless, removal does make it more difficult for an applicant to

obtain redress. However, the answer to this is that an applicant can always apply to the Federal Court for a stay of removal pending the disposition of the judicial review application.

[50] Hence, limiting the scope of the enforcement officer's discretion in the manner set out in these reasons does no violence to the integrity of the Federal Court's jurisdiction under section 18.1 and accords with the policy of the IRPA that foreign nationals must leave Canada immediately after a departure order becomes enforceable and that the order must be executed as soon as is reasonably practicable.

[51] The Federal Court can often consider a request for a stay more comprehensively than an enforcement officer can a deferral. This may result in a degree of bifurcation between the Federal Court and enforcement officers. However, in my opinion, it is the decision-making scheme that Parliament has enacted.

F. *CONCLUSIONS*

[52] For the above reasons, I would allow the Minister's appeal, dismiss Mr Shpati's application for judicial review, and answer the certified questions as follows:

> **Question 1:** When a foreign national has a negatively determined PRRA, has filed an application for leave and judicial review of that PRRA decision, but continues to maintain the same allegation of risk in a request to defer removal, does an enforcement officer have the discretion to defer removal on that basis alone or must a judicial stay based on the PRRA application for leave and for judicial review be sought in Federal Court?

Answer: An enforcement officer may temporarily defer removal when the foreign national provides evidence that events after the PRRA expose the applicant to a risk of serious personal harm if returned. Otherwise, the applicant may seek a judicial stay in the Federal Court.

Question 2: Does the potential mootness of an applicant's PRRA litigation upon removal warrant a deferral of removal pending resolution of this same litigation?

Answer: The potential mootness of an applicant's PRRA litigation does not, in and of itself, warrant a deferral of removal.

"John M. Evans"

J.A.

"I agree
J. Edgar Sexton J.A."

"I agree
David Stratas J.A."

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	A-451-10
(APPEAL FROM A JUDGMENT OF THE HONOURABLE JUSTICE HARRINGTON, OF THE FEDERAL COURT, DATED OCTOBER 25, 2010, FILE NO. IMM-1396-10))	
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DATED:	October 18, 2011

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