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Dockets: IMM-6500-05
IMM-6501-05
IMM-6503-05

Citation: 2006 FC 722

Ottawa, Ontario, June 8, 2006

Present: The Honourable Mr. Justice Harrington

BETWEEN:

PAY PAY MUNDE

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR ORDER

[1] The applicant, Mr. Pay Pay, is in an entirely unique situation. Unable to return to the Democratic Republic of the Congo (DRC), he is now before this Court in order to argue three applications for judicial review. Although these applications are all different, they must all be decided at the same time: one application for humanitarian and compassionate considerations, a pre-removal risk assessment (PRRA), and an application to review the removal officer's decision not to stay his removal to the United States.

[2] Mr. Pay Pay left the DRC in 1997 and claimed refugee status in Canada on the basis that he was related to Pierre Pay Pay, his uncle and adoptive father, the political history of Pierre Pay Pay and the risk of persecution created by his perceived political opinions and his membership in a social group. This claim was denied.

[3] One of the steps that a number of people take in like situations is a PRRA application, formerly known as the Post Determination Refugee Claimants in Canada application (PDRCC). However, Mr. Pay Pay did not initiate this process pursuant to the general administrative stay now provided under section 230 of the *Immigration and Refugee Protection Regulations* (IRPR) for the DRC. This section provides for a general administrative stay in particular situations, for example, after the Tsunami in Sri Lanka.

[4] An administrative stay, as state above, does not apply to certain classes of persons, such as persons inadmissible for serious criminality. Since Mr. Pay Pay had been found guilty of driving while impaired and causing bodily injury under subsection 255(2) of the *Criminal Code*, he is therefore inadmissible for a general administrative stay on the grounds of serious criminality under paragraph 36(1)(*a*) of the *Immigration and Refugee Protection Act* (IRPA). Mr. Pay Pay is therefore not in a position where he can benefit from an administrative stay.

[5] In the meantime, the applicant also filed an application for humanitarian and compassionate considerations (HC) and a PRRA application pursuant to sections 25 and 112 of the IRPA.

[6] To summarize, after his HC and PRRA applications were refused, Mr. Pay Pay asked the removal officer to defer his removal to the United States since he had filed an application for judicial review in regard to these matters. Further, he alleges that the removal officer's decision was discriminatory because his criminal record was the determinative factor in the refusal of his application.

[7] In fact, he submits that paragraph 230(3)(*c*) should be inoperative since it infringes his rights under section 15 of the *Canadian Charter of Rights and Freedoms*. He therefore raised a constitutional question on this point bearing on the removal officer's refusal to defer his removal to the United States, namely:

> [TRANSLATION]
>
> . . . that the regulatory provision lifting the stay of the removal in his case breaches section 15 of the Charter and articles 7, 9 and 26 of the *International Covenant on Civil and Political Rights.*

[8] This Court must now decide the three applications for judicial review following this procedural history.

ANALYSIS

[9] In order to conduct a logical analysis of the issues, this Court will address the matters in the following order:

- The HC application;
- The PRRA application; and
- The removal decision.

[10] With regard to the HC application, the standard of judicial review is that of reasonableness *simpliciter* (*Baker v. Canada (Minister of Citizenship and Immigration),* [1999] 2 S.C.R. 817). Since the constitutional question is not applicable to such an application and since the officer carried out a reasonable and logical analysis of the evidence, the officer's decision was not unreasonable. The application for judicial review is therefore dismissed.

[11] With regard to the PRRA application, it is important to note that this Court finds the officer's analysis disturbing on three points in particular, namely:

- The officer determined that Mr. Pay Pay lacked a subjective fear of persecution based on the fact that he had committed a crime. In other words, the officer determined that causing bodily injury to another person was a conscious and premeditated choice. This argument has no logical basis;

- The officer also decided that based on the status of the applicant's adoptive father, the applicant would benefit from more protection. He seems to be alluding to the fact that the applicant would be at an advantage based on his adoptive father's political status. However, there is no analysis about how this protection would occur. This analysis falls short since the officer appears to suggest that this protection that his adoptive father is able to provide could be the protection available because of a criminal association given his political status;

- Finally, the officer's decision is based on the existence of an internal flight alternative for Mr. Pay Pay, based on the fact that he is a native of the geographic area of Kivu. The officer relied on a British report stating that there was in effect a war in Kivu, a province of the DRC. This same report was silent however about whether people from Kivu were mistreated in other parts of the country. It was on this premise that the officer tried to allege that because the report did not refer to harassment against the people of Kivu elsewhere in the country, Mr. Pay Pay had an internal flight alternative elsewhere.

[12] It was on these three points that the Court decided the issue of whether the application for judicial review must be allowed.

[13] When it is a question of fact, the appropriate standard of review for a PRRA application is that of patent unreasonableness, see *Kim v. Canada (Minister of Citizenship and Immigration),* [2005] F.C.J. No. 540 at paragraph 19, and *Figurado v. Canada (Solicitor General) (F.C.),* 2005 FC 347, [2005] 4 F.C.R. 387. The officer's decision is clearly patently unreasonable given that he did not consider the test for determining whether there was an internal flight alternative established by the Federal Court of Appeal in *Thirunavukkarasu v. Canada (Minister of Employment and Immigration),* [1994] 1 F.C. 589 (C.A.). The test stated in this case has two parts:

- The Board must be persuaded that, on a balance of probabilities, the applicant does not face a serious possibility of persecution in the area which is alleged to afford an internal flight alternative; and

- Considering all of the circumstances, including those of the individual, the internal flight alternative is such that it is not unreasonable for the applicant to seek refuge there.

[14] The officer did not conduct an analysis of the facts and did not logically assess the existence of an internal flight alternative. The application for judicial review with regard to the PRRA application is therefore allowed.

[15] With regard to the constitutional question, it should be noted that this is submitted pursuant to section 57 of the *Federal Courts Act.* Since a legal provision is considered valid unless shown to be otherwise, the applicant must therefore establish why this question must be answered in the affirmative. The applicant integrated the constitutional issue in the matter bearing on the officer's refusal to defer the removal, and is essentially alleging that there was discrimination with regard to his criminal record.

[16] Despite the applicant's submissions on this point, this Court is of the opinion that the constitutional question must be answered in the negative. The fact that Mr. Pay Pay chose to get behind the wheel in an inebriated state was a choice. The officer did not base his decision to refuse the applicant's requests on an innate characteristic, but rather decided in such a way as to exclude an administrative stay, see *Law v. Canada (Minister of Employment and Immigration),* [1999] 1 S.C.R. 497. There is no discrimination in this situation. An administrative stay is an effect of the advantage conferred to the Minister so that the Minister need not assess each applicant's individual HC circumstances when the conditions of a country are similar. In this context, the fact that Mr. Pay

Pay is not entitled to an administrative stay is such that he is in the same class of any other applicant from any other country that does not benefit from this privilege.

[17] With regard to the matter bearing on the removal officer's refusal to defer the removal, given the determination that paragraph 230(3)(*c*) is valid, the question bearing on its constitutionality in this matter is moot. Further, it is a well known rule of law among my colleagues' decisions, as well as my own, that a removal to the United States, with the possibility of then being removed to one's native country, does not amount to irreparable harm, see *Hassan v. Canada (Solicitor General),* 2004 FC 564. Therefore, the application for judicial review is dismissed.

[18] This Court nevertheless points out that the issue of Mr. Pay Pay's removal to the United States raises a serious issue that the parties should contemplate. The applicant argues that by removing him to the United States, the United States is actually an intermediary because he will then be removed to the DRC. In his opinion, if there is a removal to the DRC, there is therefore the possibility of obtaining a stay. As stated above, the Court stated on many occasions that it is speculative to assume that the individual will be removed to his native country when he is removed to the United States. It is nevertheless just as easy to argue that it is just as speculative to claim that the same individual will remain in the United States without any risk of being removed to his native country. There is no guarantee from the United States that this individual will not be returned to his country. Further, while Mr. Pay Pay may submit a PRRA application involving on his country of origin, namely the DRC, he is not given the opportunity to establish irreparable harm because the removal is to the United States and not to the DRC.

[19] It is very possible that a removal to the Unites States will not result in irreparable harm, but since the parties have not raised any case law from the Federal Court of Appeal to that effect, this Court is prepared to have the parties propose questions to certify on this point of general importance.

[20] In short, the application for judicial review bearing on the HC application is dismissed as well as the application involving the removal officer's decision refusing to defer the removal to the United States. With regard to the matter of the PRRA application, this Court is of the opinion that the officer's decision is patently unreasonable and that the application for judicial review should be allowed. Although this Court answered the constitutional question in the negative, this Court is nevertheless prepared to certify this question. Since the parties agreed at the hearing to circulate the reasons, to give them the opportunity to propose questions for certification, they will have until June 14, 2006, to submit their questions for certification, by clearly identifying the matter to which the questions relate, and until June 19, 2006 to respond.

"Sean Harrington"
Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-6500-05 IMM-6501-05 IMM-6503-05
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