Date: 20070202

Docket: IMM-287-07

Citation: 2007 FC 109

Montréal, Quebec, the 2nd day of February 2007

Present: The Honourable Mr. Justice Shore

BETWEEN:

SEYDOU KANTE

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] Before this Court, the applicant is once again making the same arguments as those considered fully by the RPD (which found the applicant's story to be invented and not credible), the pre-removal risk assessment (PRRA) officer and the H&C (humanitarian and compassionate considerations) officer, but he did not succeed in establishing irreparable harm.

[2] In *Akyol*, Mr. Justice Luc Martineau wrote the following:

[6] First, there is no evidence of any likelihood of jeopardy to the applicants' life or safety: *Kerrutt* v. *Canada (Minister of Employment and Immigration)* (1992), 53 F.T.R. 93; *Atakora* v. *Canada (Minister of Employment and Immigration)* (1993), 68 F.T.R. 122 ("Atakora"); *Kaberuka* v. *Canada (Minister of Employment and Immigration)* (1994), 27 Imm. L.R. (2d) 201 (F.C.T.D.); *Calderon* v. *Canada (Minister of Citizenship and Immigration)* (1995), 92 F.T.R. 107; and *Duve* v. *Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 387 (F.C.T.D.).

[7] Second, irreparable harm must not be speculative nor can it be based on a series of possibilities. The Court must be satisfied that the irreparable harm will occur if the relief sought is not granted: *Atakora, supra*, at para. 12; *Syntex Inc.* v. *Novopharm Inc.* (1991), 36 C.P.R. (3d) 129 at 135 (F.C.A.); and *Molnar* v. *Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 559, 2001 FCT 325 at para. 15.

[8] **Third, the Court notes that the risk to the applicants upon their return to Turkey has been assessed <u>twice</u> - once by the Refugee Division, and a second time by the PRRA officer.** Both administrative tribunals made findings of fact that the applicants would <u>not be at risk</u>. **In the case at bar, the Refugee Division clearly called into question the applicants' credibility** as it found, based on the applicants' behaviour over a prolonged period, that they lacked the subjective fear of persecution that was the very basis of their claim. **This Court has held that where an applicant's account was found not to be credible by the Refugee Division, this account cannot serve as a basis for an argument supporting irreparable harm in a stay application**: *Saibu* v. *Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 151, 2002 FCT 103 at para. 11; *Hussain* v. *Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 751 at para. 12; and *Ahmed* v. *Canada (Minister of Citizenship and Immigration)*, [2001] 1 F.C. 483 at 492-93 (T.D.).

[Emphasis added.]

(*Akyol v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 931, [2003] F.C.J. No. 1182 (QL).)

JUDICIAL PROCEEDINGS

[3] The applicant has filed in this Court a motion to stay a removal order made against him, said motion being joined to an application for leave challenging the "decision" of an immigration officer of the Canada Border Services Agency (CBSA), (removal officer), dated January 10, 2007, scheduling the applicant's removal from Canada to Mali for February 3, 2007.

PRELIMINARY COMMENTS

Style of cause

[4] The respondent notes that the applicant brought his proceeding (both the application for leave and the stay motion, which was joined to it) against the "Minister of Citizenship and Immigration".

[5] The style of cause of the application for leave and the stay motion is amended so as to name the "Minister of Public Safety and Emergency Preparedness", who is the minister in charge of enforcing removal orders, as respondent instead, pursuant to the *Department of Public Safety and Emergency Preparedness Act*, S.C. 2005, c. 10, and to the order in council made on April 4, 2005 (P.C. 2005-0482).

Stay motion – Jurisdiction of this Court

[6] The applicant chose to bring a stay motion only with respect to the application for leave No. IMM-287-07, challenging the decision dated January 10, 2007, of the removal officer, who scheduled the applicant's removal from Canada for February 3, 2007, to enforce the order made against him on April 5, 2004.

[7] On the basis of the principle that a stay motion is incidental to a principal proceeding—in this case, an application for leave contesting the decision of January 10, 2007, setting the date of the applicant's removal—the applicant may only request that the Court, if it rules that his motion has merit, order a stay until this application for leave is decided and, if it is allowed, until the application for judicial review is decided by this Court. (Section 18.2 of the *Federal Courts Act*, R.S. 1985, c. F-7.)

[8] In other words, there is no stay motion before the Court in connection with the application for leave challenging the negative PRRA decision (No. IMM-286-07) and the application for leave challenging the negative H&C decision (No. IMM-285-07). Accordingly, the applicant cannot validly request, as he has done in his submissions in support of the stay motion, a stay of the removal order until the other two distinct applications for leave have been decided by the Court. The jurisdiction of this Court covers the stay motion and the underlying application for leave.

New evidence subsequent to the decision dated January 10, 2007

[9] The respondent notes that the letter dated January 24, 2007, annexed as Exhibit "F" to the applicant's affidavit (Applicant's stay motion record, page 34), is new evidence that did not exist at the time of the January 10, 2007 decision, which is the subject of the application for leave. Accordingly, this Court should not take it into consideration in dealing with the application for leave or in considering the merits of a motion incidental to this application, such as the stay motion.

[10] In *Isomi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1394, [2006] F.C.J. No. 1753 (QL), Mr. Justice Simon Noël wrote the following:

> [6] In its case law, this Court has clearly established that, on judicial review, the Court may only examine the evidence that was adduced before the initial decision-maker (*Lemiecha (Litigation Guardian) v. Canada (Minister of Citizenship and Immigration)* (1993), 72 F.T.R. 49 at paragraph 4; *Wood v. Canada (A.G.)*(2001), 199 F.T.R. 133 at paragraph 34; *Han v. Canada (Minister of Citizenship and Immigration,)* 2006 FC 432 at paragraph 11). In *Gallardo v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 45 at paragraphs 8 and 9, a case concerning a claim for refugee protection based on humanitarian and compassionate considerations, Mr. Justice Kelen wrote:
>
> > The Court cannot consider this information in making its decision. It is trite law that judicial review of a decision should proceed only on the basis of the evidence before the decision-maker.
> >
> > The Court cannot weigh new evidence and substitute its decision for that of the immigration officer. The Court does not decide H&C [humanitarian and compassionate considerations] applications. The Court judicially reviews such decisions to ensure they are made in accordance with the law.
>
> [7] In addition, in *Zolotareva v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1274 at paragraph 36, in deciding an application for judicial review of a decision of a PRRA officer, Mr. Justice Martineau wrote the following:
>
> > It is unfortunate that the psychologist's report was not available to the PRRA Officer at the time of the determination. Considering that the psychologist's opinion was not presented before the decision maker who refused her application, the applicant cannot rely on this new evidence. This Court has recognized on numerous occasions that the judicial review of a decision has to be made in light of the evidence that was submitted before the decision maker: see *Noor v. Canada (Human Resource Development)*, [2000] F.C.J. No. 574 at para. 6 (C.A.) (QL); *Rodbom v. Canada (Minister of Employment and Immigration)*, [1999] F.C.J. No. 636 (C.A.) (QL); *Bara v. Canada (Minister of*

Citizenship and Immigration), [1998] F.C.J. No. 992 at para. 12 (T.D.) (QL); *Khchinat v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 954 at para. 18 (T.D.) (QL); *LGS Group Inc. v. Canada (Attorney General)*, [1995] 3 F.C. 474 at 495 (T.D.); *Quintero v. Canada (Minister of Citizenship and Immigration)*, (1995) 90 F.T.R. 251 at paras. 30-33; *Franz v. Canada (Minister of Employment and Immigration)*, [1994] 80 F.T.R. 79; *Asafov v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J. No. 713.

FACTS

[11] The applicant, a citizen of Mali, is 28 years of age.

[12] In November 2000, the applicant arrived in Dorval, Quebec, on a student permit valid until March 31, 2003. In April 2002, he stopped studying, and in June 2002, he left Canada for the United States, where he tried to obtain an extension of his student visa to come back to Canada but was refused because he was no longer considered to be a student. In December 2002, on his second entry into Canada, at Lacolle, Quebec, his student permit was seized by Citizenship and Immigration Canada, and he was given a visitor record valid until January 15, 2003.

[13] On March 29, 2004, the applicant made a claim for refugee protection with the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB).

[14] On April 5, 2004, the applicant was the subject of a report pursuant to section 44 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), and a departure order was made against him on that date.

[15] In January 2005, the RPD rejected the applicant's claim for refugee protection. The applicant essentially alleged that he feared reprisals from his father, who was a member of an

fundamentalist religious group, the Hamalites, because the applicant had disobeyed his father by not returning to Mali. He feared being forcibly enrolled in this group and being subject to reprisals from this group because he had disobeyed his father. The RPD found the claimant and his story to be not credible and ruled that the other evidence, including documentation about the situation in Mali, could not lead it to conclude that the claimant was a “refugee” or a “person in need of protection.” The RPD concluded that state protection was available in Mali.

[16] On May 12, 2005, the Federal Court dismissed the application for leave brought by the applicant against the decision of the RPD.

[17] On October 21, 2005, the applicant applied for permanent residence in Canada on humanitarian and compassionate considerations (H&C). In support of his application, the applicant essentially invoked his integration in Canada, his relationship with a Canadian citizen, and the risk to the integrity of his person, his safety and his life if he returned to Mali. The allegations concerning the risks were the same as those made before the RPD.

[18] On September 5, 2006, the applicant applied for a PRRA. He based his application on the same allegations as those submitted to the RPD. The applicant submitted new evidence which was not before the RPD.

[19] On December 6, 2006, the officer rejected the PRRA application. The officer concluded that the applicant did not establish objectively identifiable and personalized risks if he returned to his country of citizenship, Mali.

[20] On December 6, 2006, the H&C application was rejected by the officer. The officer's notes regarding the H&C decision, notes of which the applicant says he does not have a copy, were submitted by the respondent.

[21] The officer's decision to reject the H&C application is on page 5 of his notes to file:

> [TRANSLATION]
> The applicant did not establish that he was sufficiently integrated in Canada or that he had a significant attachment. He did not establish that his life or safety would be in danger if he were to return to Mali. The specific circumstances of his case are not exceptional and are such that his having to apply from abroad for a waiver of the visa requirement would not constitute unusual and undeserved or disproportionate hardship. His application is rejected.

[22] On January 10, 2007, the applicant had an interview with a removal officer who handed him the negative decision on his PRRA and the negative decision on his HC application. In addition, the officer advised the applicant that the date for his removal from Canada to Mali was scheduled for February 3, 2007 and he handed him a notice to that effect.

[23] The interview notes of the CBSA officer, dated January 10, 2007 mentioned the following:

> [TRANSLATION]
> Met the subject—I gave him a negative PRRA and H&C answer. The subject clearly stated that he wanted to co-operate. I asked him if he had someone to help him once he arrives in Mali, and he answered yes. He stated that the parents of his cousins could take him in and help him. The subject also stated that he did

not have money to pay for his ticket; I explained that we would purchase the ticket for him.

Departure on February 3, 2007.

ANALYSIS

[24] To assess the merits of the stay motion, this Court must determine if the applicant meets the tests established by the Federal Court of Appeal in *Toth v. Canada (Minister of Employment and Immigration)*, 86 N.R. 302 (F.C.A.), [1988] F.C.J. No. 587 (QL).

[25] In that case, the Court of Appeal adopted three tests which it borrowed from case law concerning injunctions, more specifically, from the judgment of the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110.

These three tests are as follows:

A - the existence of a serious question;
B - irreparable harm;
C - and an assessment of the balance of convenience.

[26] Accordingly, in the absence of a statutory stay, it is up to the Court to determine whether the applicant has shown that there is a serious question in his case, that he would suffer irreparable harm if he were removed to Mali, and that his inconvenience would be greater than what the Minister might sustain if the removal were not enforced and if the provisions of the IRPA were not respected. The three tests must be met for this Court to grant the requested stay. If even one of these tests is not met, this Court cannot allow the requested stay.

A – SERIOUS QUESTION

[27] First of all, it is trite law that a stay motion is incidental to a principal proceeding. In this case, the only proceeding before this Court to which this stay motion is attached is the application for leave in IMM-287-07 challenging the decision of the removal officer dated January 10, 2007, scheduling the removal of the applicant for February 3, 2007. (Section 18.2 of the *Federal Courts Act*.)

[28] The assessment by this Court of whether there is a serious question in this file may be made only in connection with the decision dated January 10, 2007, and not in connection with the other decisions which are the subject of distinct applications for leave in which no stay motions have been filed, namely, the negative PRRA and H&C decisions.

Applicant did not challenge validity of removal order

[29] The applicant is not in any way challenging the validity of the removal order made against him on April 5, 2004. In fact, the time limit for challenging this order has long since expired.

Decision dated January 10, 2007, scheduling removal from Canada

[30] The applicant failed to establish the existence of a serious question with regard to the decision of the removal officer, dated January 10, 2007, scheduling the removal for February 3, 2007. In this case, the officer acted within his very limited discretion, in compliance with the law. The applicant did not in any way establish the contrary. (Section 48 *et seq.* of the IRPA; *Wang v.*

Canada (Minister of Citizenship and Immigration), 2001 FCT 148, [2001] F.C.J. No. 295 (QL) (*per* Pelletier J.).)

[31] With regard to the decision dated January 10, 2007, setting the removal date, in his affidavit or written submissions, the applicant does not allege any valid specific criticism of the removal officer that could establish that there is a serious question.

[32] In his written submissions, the applicant alleges that at the interview on January 10, 2007, during which the removal officer handed him the decision confirming the date of his removal, [TRANSLATION] "no voluntary removal option was offered to the applicant". However, this allegation is gratuitous, as it is not supported by the applicant's affidavit, which was silent on this point. In addition, the notes from the removal officer's interview on January 10, 2007, mentioned the following:

> [TRANSLATION]
> Met the subject—I gave him a negative PRRA and H&C answer. The subject clearly stated that he wanted to co-operate. I asked him if he had someone to help him once he arrives in Mali, and he answered yes. He stated that the parents of his cousins could take him in and help him. The subject also stated that he did not have money to pay for his ticket; I explained that we would purchase the ticket for him.
>
> Departure on February 3, 2007.

[33] The respondent submits that the removal officer had no obligation in this case to offer voluntary departure. In fact, the applicant himself stated that he could not leave voluntarily because he did not have the money to pay for his airline ticket back to Mali. Furthermore, there is nothing in

the applicant's affidavit to indicate that he asked the removal officer for the option of a voluntary departure.

[34] At no point in his affidavit does the applicant mention that he asked the removal officer, either verbally or in writing, to postpone his removal from Canada for any reason whatsoever, nor does he allege in his affidavit that he gave the removal officer any documents during the interview.

[35] The interview notes appear to confirm that the applicant did not ask the removal officer about the possibility of postponing his removal to Mali to a date after February 3, 2007.

[36] Pursuant to subsection 48(2) of the IRPA, the Minister must enforce a valid removal order "as soon as it is reasonably practicable". In the absence of valid justification for doing so, a removal officer cannot consider deferring the enforcement of the removal order, because he or she must obey a positive obligation imposed by the Act. (*Wang*, *supra*)

[37] The applicant alleges that the removal officer's decision was premature. On this point, the respondent submits the following:

- The removal order was issued on April 5, 2004. It is enforceable and not subject to a statutory stay—subsection 48(1) IRPA;
- The Minister must enforce an enforceable removal order "as soon as is reasonably practicable"—subsection 48(2) IRPA;
- The applicant had every opportunity to make a claim for refugee protection, an H&C application and a PRRA application, and all three were rejected;
- The interview with the removal officer during which the date of the removal was scheduled took place **after** Officer Beaulac assessed the applicant's allegations

> about the risk of returning to Mali and possible humanitarian and compassionate considerations and rendered the negative PRRA and H&C decisions.

[38] Even if the Court had to assess the merits of the serious question on the basis of the applicant's allegations concerning the negative PRRA and H&C decisions, the Court would reach the following conclusions.

PRRA decision

[39] A meticulous study of the decision and the notes of the PRRA officer shows the following:

- The officer took into consideration and studied all the allegations and evidence submitted;
- The officer properly understood the basis of the fear or risk invoked by the applicant;
- The officer correctly noted that the RPD [TRANSLATION] "found the applicant's testimony on the whole to be implausible, invented, and not credible";
- The officer assessed the new evidence within the meaning of paragraph 113(*a*) of the IRPA, as well as recent objective documentation;
- The officer gave clear and intelligible reasons underlying the inferences supporting the negative decision, rendered in compliance with the applicable legal principles.

[40] In his general allegations, the applicant does not show any serious reason which would warrant intervention by this Court.

[41] In fact, the applicant alleged that, in general, the decision is patently unreasonable, but did not submit any valid argument supported by evidence which would warrant intervention by this Court. Instead, the applicant is trying to repeat his story and substitute his own opinion for that of

the decision-maker with regard to the assessment of the credibility, weight, sufficiency or relevancy of the evidence submitted. The applicant's disagreement with the inferences drawn by the PRRA officer in connection with the evidence before her is not sufficient to establish that the PRRA officer did not analyze in detail the new evidence he submitted.

[42] The assessment of the evidence by the tribunal is a question of fact. In *Tharumarasah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 211, [2004] F.C.J. No. 258 (QL), the Court described in the following terms the standard of review applicable to decisions of a PRRA officer, which command considerable deference:

> [6] Decisions of PRRA officers are to be given significant deference. Where there is nothing unreasonable in the PRRA decision, there will be no serious issue. In this case, the PRRA officer clearly considered Ms. Tharumarasan's submissions and supporting documentary evidence with respect to ongoing human rights abuses in Sri Lanka. What Ms. Tharumarasah is asking the Court to do is to re-weigh the evidence that was before the PRRA officer. While Ms. Tharumarasah may not agree with the PRRA decision, **she has not demonstrated that it was arguably either unreasonable or perverse, and accordingly no serious issue arises here.** [Emphasis added.]

[43] The applicant's criticism to the effect that the PRRA officer did not allude to his relationship with a Canadian citizen in the PRRA decision or in his notes is unfounded. The PRRA application assesses the risks in the applicant's return, as he is the person subject to removal to his country. The PRRA application does not assess humanitarian and compassionate considerations based on his relationship with a Canadian citizen. These considerations, including separation of the couple in case of removal, were considered and fully assessed in the applicant's H&C application (Affidavit of H. Exantus – Exhibit D: Notes to file, dated December 6, 2006).

[44] With regard to the allegation that the PRRA decision did not respect the principles of impartiality, fundamental justice and procedural fairness, the applicant did not specify in any way how the officer did not respect these principles or how the applicant was unable to make his case. Such a vague and general allegation without any basis in the evidence cannot succeed in establishing a serious question.

H&C (humanitarian and compassionate considerations) decision

[45] The preceding paragraph also applies to the H&C decision.

[46] The applicant alleges that [TRANSLATION] "the immigration officer erred in rendering her decision by not taking into consideration the objectives of the new public policy on immigration". This general criticism is unfounded in this case. The officer's notes, filed as "**Exhibit D**" in the affidavit of H. Exantus, show that she concluded that the applicant did not qualify under this policy and that his application should be assessed on the basis of subsection 25(1) of the IRPA. The notes to file mention the following:

> [TRANSLATION]
>
> He has been living with a Canadian citizen since July 2006. This is less than one year, and they cannot be considered to be common-law partners. There is no sponsorship in this file either.

(H&C notes, page 2, part 4, question no. 2)

> [TRANSLATION]
>
> . . . Applications made in Canada must meet the criteria of the classes described in section 72 of the Regulations. The applicant cannot be assessed in a class; accordingly, I consider the humanitarian grounds of his application for exemption

> from the requirements of a class under subsection 25(1) of the IRPA concerning cases not provided for in the Act.

(H&C notes, page 4, part 5, 2nd paragraph)

> [TRANSLATION]
>
> As mentioned, the applicant has been living with his common-law partner since July 2006, which is less than one year, and no application for sponsorship has been made. Therefore, he cannot be considered under the directives dated February 18, 2005, concerning common-law partners. He has been living with his Canadian girlfriend, Marilyne Lachapelle, since July 2006, but has been going out with her for many months.

(H&C notes, page 4, part 5, 5th paragraph)

B – IRREPARABLE HARM

[47] In *Kerrutt v. Canada (Minister of Employment and Immigration)*, (1992) 53 F.T.R. 93, [1992] F.C.J. No. 237 (QL), Mr. Justice Andrew MacKay of this Court wrote the following about the notion of irreparable harm:

> [15] Assuming for purposes of this application that a serious issue is to be tried, will the applicant suffer irreparable harm if the application for a stay is not granted? I have no doubt that the applicant will suffer serious personal inconvenience, and no doubt difficulty, should he be deported before the application for leave to commence proceedings for judicial review is determined. His family ties with his sisters and their families in Canada which have apparently meant much to him in his rehabilitation from alcohol addiction and from incarceration, will be strained. He currently has regular employment in Canada and no job prospects if he is returned to Guyana. Nor does he have any immediate family there. It will be more difficult for him to communicate with counsel concerning his application for leave. Nevertheless, I do not believe these personal difficulties constitute irreparable harm, as serious as they may be for the applicant. He will not be returned to a country where his safety or his life is in jeopardy. If leave is granted on his application for judicial review, if the orders sought in that application are granted, and if the respondent on further review should determine that there are sufficient humanitarian and compassionate grounds for him to remain in Canada, the deportation order now outstanding and to be

> implemented on March 23, 1992, may also be questionable and it will not be beyond the imagination of the respondent to arrange to admit the applicant to Canada should he seek to return.

[48] The *Kerrutt* decision was followed by Madam Justice Sandra Simpson in *Calderon v. Canada (Minister of Citizenship and Immigration),* (1995) 92 F.T.R. 107, [1995] F.C.J. No. 393 (QL), in which she added the following regarding the definition of irreparable harm:

> This is a very strict test and I accept its premise that irreparable harm must be very grave and more than the unfortunate hardship associated with the breakup or relocation of a family.

[49] The main irreparable harm alleged by the applicant concerns his fear for the integrity of his person, his safety or his life if he returns to Mali for the reasons submitted to the RPD, the PRRA officer and the H&C officer.

[50] However, none of these decision-makers rendered a decision in the applicant's favour, as the only credible evidence which he submitted was insufficient to meet the applicable criteria under sections 96 and 97 or subsection 25(1) of the IRPA.

[51] The Court notes that the RPD concluded that the applicant and his fabricated story were not credible and that state protection was available in this case. This Court dismissed the application for leave concerning the decision of the RPD.

[52] The PRRA officer also concluded that the applicant had not established objectively identifiable and personal risks if he were to return to his country of citizenship, Mali, and that state protection was available in this case.

[53] This Court has acknowledged, in the context of a stay motion, the validity of the assessments of risk made by other decision-makers. In *Wang*, *supra*, this Court wrote the following:

> [53] In my view, the issues raised by the applicant's H&C application do not refer to a legal obligation which would justify the Minister in not performing her statutory duty. The enforced separation from his wife, while regrettable, is not such as to require intervention. **The applicant has had the benefit of a PDRCC assessment which found no significant risk in the event of his return to China**.
>
> [54] To put the matter in terms of the analysis developed above, the applicant is subject to a valid removal order. The applicant has asked that the execution of the removal be deferred pending the processing of the H&C application. That application is based upon the fact of marriage and the distress caused by enforced separation. The applicant has had the benefit of a PDRCC assessment which found no appreciable risk of harm in the event of his return to China. In the result, this is not sufficient justification for not complying with the requirements of section 48 of the *Act*. In the circumstances, I find that there is no serious issue sufficient to justify the granting of a stay.
> [Emphasis added.]

[54] The notion of irreparable harm was defined in *Kerrutt*, *supra*, cited in *Akyol*, *supra*, for example, as being a removal of an applicant to a country where there is a risk to his or her life or safety.

[55] In *Akyol*, *supra*, Mr. Justice Luc Martineau wrote the following:

> [6] First, there is no evidence of any likelihood of jeopardy to the applicants' life or safety: *Kerrutt* v. *Canada (Minister of Employment and Immigration)* (1992), 53 F.T.R. 93; *Atakora* v. *Canada (Minister of Employment and Immigration)* (1993), 68 F.T.R. 122 ("Atakora"); *Kaberuka* v. *Canada (Minister of Employment and Immigration)* (1994), 27 Imm. L.R. (2d) 201 (F.C.T.D.); *Calderon* v. *Canada (Minister of Citizenship and Immigration)* (1995), 92 F.T.R. 107; and *Duve* v. *Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 387 (F.C.T.D.).

> [7] Second, irreparable harm must not be speculative nor can it be based on a series of possibilities. The Court must be satisfied that the irreparable harm will occur if the relief sought is not granted: *Atakora*, *supra*, at para. 12; *Syntex Inc.* v. *Novopharm Inc.* (1991), 36 C.P.R. (3d) 129 at 135 (F.C.A.); and *Molnar* v. *Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 559, 2001 FCT 325 at para. 15.
>
> [8] **Third, the Court notes that the risk to the applicants upon their return to Turkey has been assessed twice - once by the Refugee Division, and a second time by the PRRA officer. Both administrative tribunals made findings of fact that the applicants would not be at risk. In the case at bar, the Refugee Division clearly called into question the applicants' credibility as it found, based on the applicants' behaviour over a prolonged period, that they lacked the subjective fear of persecution that was the very basis of their claim. This Court has held that where an applicant's account was found not to be credible by the Refugee Division, this account cannot serve as a basis for an argument supporting irreparable harm in a stay application: *Saibu* v. *Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 151, 2002 FCT 103 at para. 11; *Hussain* v. *Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 751 at para. 12; and *Ahmed* v. *Canada (Minister of Citizenship and Immigration)*, [2001] 1 F.C. 483 at 492-93 (T.D.).**
>
> [Emphasis added.]

[56] In light of the preceding, the applicant, who is once again making the same allegations before this Court as those considered on the merits by the RPD (which found the applicant's story to be fabricated and not credible), the PRRA officer and the H&C officer, has not succeeded in establishing irreparable harm.

Other inconveniences alleged

[57] This Court has concluded on many occasions that inconvenience which is a normal consequence of the removal of a person from Canada (for example, family separation, loss of

employment, property to liquidated, etc.) would not in itself establish the existence of irreparable harm. See *Kerrutt* and *Akyol*, *supra*:

> [12] In conclusion, I find that there is nothing about the applicants' case which takes it beyond the usual results of deportation (*Melo* v. *Canada (Minister of Citizenship and Immigration)* (2000), 188 F.T.R. 39 at para. 21). Under such circumstances, the balance of convenience is in favour of the respondent as public interest requires that the removal order be executed as soon as is reasonably practicable (*Celis* v. *Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1679, 2002 FCT 1231 at para. 4).

[58] See also *Thirunavukkarasu v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1075, [2003] F.C.J. No. 1350 (QL):

> [6] . . . There exists a plethora of case law from this court wherein family separation has been held to constitute an unfortunate but inevitable consequence of deportation . . . .

[59] In *Celis v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1231, [2002] F.C.J. No. 1679 (QL), Mr. Justice Yvon Pinard wrote the following:

> [3] Second, family separation *per se* is not irreparable harm because it is within the normal consequences of deportation (see, *i.e.*, *Asomadu-Acheampong v. M.E.I.* (March 22, 1993), IMM-1008-93; *Boda v. M.E.I.* (1992), 56 F.T.R. 106; *Mobley v. M.C.I.* (June 12, 1995), IMM-107-95; *Jones v. M.C.I.* (June 12, 1995), IMM-454-95; *Ram v. Canada (M.C.I.)*, [1996] F.C.J. No. 883 (QL); *Mario Ernesto Huezo et al. v. M.C.I.* (April 21, 1997), IMM-1491-97; *William Geovany Castro v. M.C.I.* (October 14, 1997), IMM-2729-97; *Melo v. Canada (M.C.I.)* (2000), 188 F.T.R. 39, and *Kaur v. Canada (M.C.I.)*, [2002] F.C.J. No. 766 (QL)). There is nothing about the applicant's case which takes it beyond the usual result of deportation.

[60] In *Bayemi v. Canada (Minister of Citizenship and Immigration)*, IMM-2348-04, March 23, 2004, Pinard J. stated the following:

> It is well established that irreparable harm connotes harm that results to the applicant, and not to his wife or family (see *Simpson v. Canada (M.E.I.)*, [1993] F.C.J. No. 380). The applicant's separation from his wife, in the present

> circumstances, does not amount to irreparable harm (see *Robinson v. Canada,* [1994] F.C.J. No. 52). Irreparable harm must be serious and more than the unfortunate hardship associated with the break up of family ties or financial constraints (see *Pourghannad v. Canada (M.C.I.),* [1995] F.C.J. No. 13364)).

[61] In the case at bar, the applicant initiated a relationship with his partner while his status was tenuous. In *Banwait v. Canada (Minister of Citizenship and Immigration),* [1998] F.C.R. No. 393 (QL), Mr. Justice Paul Rouleau concluded as follows about an applicant who chose to marry in spite of his tenuous status:

> 16 **I see no transgressions in the conduct of the Minister; no expectations granted the applicant; if he chose to marry while still not having his situation favourably determined by Canadian authorities, it is at his peril, not that of the Minister who has a duty to uphold the laws of Canada.**
>
> ¶ 17 When applicants seek Humanitarian and Compassionate reviews having full knowledge that deportation is imminent, I am not generally prepared to grant a stay.
>
> ¶ 18 Counsel for the applicant suggests that his client was led astray by inefficiencies which he attributes to an unqualified notary public previously retained. I do not find this to be an argument sufficient to persuade this Court to exercise its discretion favourably.
>
> ¶ 19 There is no reason for this Court to delay removal because the M.I.S.A. has not yet been determined. The application for humanitarian and compassionate consideration will eventually be thoroughly considered. If the decision is favourable, the applicant could then be assisted to return to Canada. The subject fear of his removal to India was previously canvassed and it was determined that there was no objective basis for his fear.
>
> [Emphasis added]

[62] In his written submissions, the applicant alleges that he shares the expenses of the conjugal home with his partner and that he would lose his employment and the property he has acquired in

Canada. These allegations are gratuitous, as they are not supported by the applicant's affidavit, which is silent on this subject (except for the loss of his employment, which appears to be an unavoidable consequence of his removal from Canada).

[63] First, in *Bayemi*, *supra*, this Court has already concluded that irreparable harm must be assessed in connection with the person to be removed from Canada and not a third party, including a spouse.

> It is well established that irreparable harm connotes harm that results to the applicant, and not to his wife or family (see *Simpson v. Canada (M.E.I.)*, [1993] F.C.J. No. 380).

[64] Second, the fact that the applicant may sustain economic consequences does not constitute irreparable harm. In *Trusewicz v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 460 (QL), Mr. Justice Allan Lufty stated the following:

> [TRANSLATION]
> [4] The fact that the applicants may suffer economic and social inconvenience does not amount to irreparable harm. (See Kerratt v. M.E.I. (1992), 53 F.T.R. 93; Sora v. M.E.I., IMM-2220-93 (January 14, 1993); Sanchez v. M.E.I., IMM-2884-95 (December 8, 1995); and Khan v. M.E.I. (1992), 58 F.T.R. 98.).

(Also: *Akyol*, *supra*, at paragraph 9).

[65] The respondent notes that at the interview on January 10, 2007, the removal officer asked him [TRANSLATION] "if he had someone to help him once he arrives in Mali" to which the applicant answered yes and stated [TRANSLATION] "the parents of his cousins can take him in and give him help" (Affidavit of H. Exantus – Exhibit E: Interview notes dated January 10, 2007).

[66] Finally, the removal of a person who has an application pending before the Court does not constitute a serious question or irreparable harm. In this case, the applicant is represented by counsel, and the applications for leave may proceed even if the applicant is no longer in Canada. In *Akyol, supra*, the Court stated the following:

> [11] Sixth, the deportation of individuals while they have outstanding leave applications and/or other litigation before the Court, is not a serious issue nor does it constitute irreparable harm: *Ward* v. *Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 86 (T.D.) at para. 12; and *Owusu* v. *Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1166 (T.D.). I also note that the application for leave and judicial review will continue regardless of where the applicants are located, and that they can provide instructions to counsel as to how to proceed with the litigation from the U.S. or, should they end up there, Turkey.

C - BALANCE OF CONVENIENCE

[67] The respondent is of the opinion that the balance of convenience is in the Minister's favour, insofar as the applicant did not establish a serious question or irreparable harm. In *Morris v. Canada (Minister of Citizenship and Immigration)*, IMM-301-97, January 24, 1997 Lutfy J. wrote the following:

> [TRANSLATION]
> Having found no serious question or irreparable harm, I have no difficulty in concluding that the balance of convenience favours the enforcement of the removal order by the Minister in accordance with his obligation under section 48 of the Act.

and in *Akyol, supra*:

> [5] Assuming without deciding that there is a serious issue to be tried in this matter, the requested temporary stay of removal of the applicants from Canada is denied on the ground that no irreparable harm has been established.
>
> . . .

> [12] In conclusion, I find that there is nothing about the applicants' case which takes it beyond the usual results of deportation (*Melo* v. *Canada (Minister of Citizenship and Immigration)* (2000), 188 F.T.R. 39 at para. 21). **Under such circumstances, the balance of convenience is in favour of the respondent as public interest requires that the removal order be executed as soon as is reasonably practicable** (*Celis* v. *Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1679, 2002 FCT 1231 at para. 4).
>
> (Emphasis added.)

[68] Under subsection 48(2) of the IRPA, the respondent is obliged to enforce the removal order as soon as is reasonably practicable.

[69] There are numerous decisions by this Court to the effect that in studying the balance of convenience, the public interest must be taken into consideration:

> [17] . . . In considering a stay that would suspend the action of those exercising a public function under statute that public interest must be given appropriate attention (*Manitoba (Attorney General v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110, *per* Beetz J., at pp. 129-146).
>
> [18] In the circumstances of this case the public interest in maintaining a process authorized by statute, which has not yet been found to be flawed in its application in this case, in my view, outweighs the possible harm to the individual. While it is not a factor in my conclusion, the Court is not unmindful of the potential effect of granting a stay in a case where there are no exceptional circumstances, that is, the **possibility of adding to the normal removal process under the Immigration Act a delay not acquiesced in by the Minister who has the responsibility, pending consideration of an application for leave to commence proceedings for judicial review relating to what is generally the penultimate step in those proceedings.**
>
> (Emphasis added.)

In *Kerrutt*, *supra*:

[10] On the issue of balance of convenience, the Court should consider the Public Interest as it relates to the personal harm that could come about in this particular case. Referring to Sopinka J. in *Chiarelli v. Minister of Employment and Immigration* (1992), 135 N.R. 161, though dealing with an extradition case he wrote at page 182:

> The most fundamental principle of immig

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(Emphasis added.)

(*Blum v. Canada (Minister of Citizenship and Immigration)*, (1994) 90 F.T.R. 54, [1994] F.C.J. No. 1990 QL) (Rouleau J.)

[70] Madam Justice Barbara Reed, in *Membreno-Garcia v. Canada (Minister of Employment and Immigration)*, [1992] 3 F.C. 306, [1992] F.C.J. No. 535 (QL), developed in detail the matter of the balance of convenience concerning a stay and the public interest which must be considered:

> [18] What is in issue, however, when considering balance of convenience, is the extent to which the granting of stays might become a practice which thwarts the efficient operation of the immigration legislation. It is well known that the present procedures were put in place because a practice had grown up in which many cases, totally devoid of merit, were initiated in the court, indeed were clogging the court, for the sole purpose of buying the appellants further time in Canada. There is a public interest in having a system which operates in an efficient, expeditious and fair manner and which, to the greatest extent possible, does not lend itself to abusive practices. This is the public interest which in my view must be weighed against the potential harm to the applicant if a stay is not granted.

[71] In the case at bar, the fact that the applicant availed himself of several recourses since his arrival in Canada, all of which were unfavourable to him, may be considered in the assessment of the balance of convenience.

> [21] Counsel says that since the appellants have no criminal record, are not security concerns, and are financially established and socially integrated in Canada, the balance of convenience favours maintaining the *status quo* until their appeal is decided.
>
> [22] I do not agree. They have had three negative administrative decisions, which have all been upheld by the Federal Court. It is nearly four years since they first arrived here. In my view, the balance of convenience does not favour delaying further the discharge of either their duty, as persons subject to an enforceable removal order, to leave Canada immediately, or the Minister's duty to remove them as soon as reasonably practicable: IRPA, subsection 48(2). This is not simply a question of administrative convenience, but implicates the integrity

> and fairness of, and public confidence in, Canada's system of immigration control.

(*Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, [2004] F.C.J. No. 1200 (QL).)

[72] In *Sedarous v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 655 (QL), Mr. Justice Max M. Teitelbaum stated that when the validity of a removal order is not challenged (as in the case at bar), the balance of convenience leans in favour of the public interest in allowing the immigration process under the Act to follow its course:

> [12] . . . If the deportation order was not being contested as it is being contested now on the issue of its validity, I am satisfied and I follow the decision of Mr. Justice Muldoon and the others who have followed Mr. Justice Muldoon's decision that it is in the public interest to execute deportation orders as soon as possible, and that is entirely up to the discretion of the Minister.

[73] Accordingly, the balance of convenience leaves in favour of the public interest in allowing the immigration process under the Act to follow its course.

CONCLUSION

[74] For all these reasons, the applicant’s motion for a stay is dismissed.

JUDGMENT

THE COURT ORDERS that the motion for a stay be dismissed.

"Michel M.J. Shore"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

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