Federal Court  Cour fédérale

Date: 20070712

Docket: IMM-2604-07

Citation: 2007 FC 738

Ottawa, Ontario, July 12, 2007

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MENDOZA DURAN Beatriz Eugenia

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

PREAMBLE

[1] The Court has established that removals officers have limited discretion to defer a removal **by reason of special or compelling circumstances**.

> [37] It is well-established law that the discretion to defer a removal is very limited. It would be contrary to the purposes and objects to the Act to expand, by judicial declaration, a removal officer's limited discretion so as to mandate a "mini H&C" review prior to removal (*Davis v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1628 paragraph 4 (T.D.) (QL); *John v. Canada (Minister of Citizenship and Immigration)* 2003 F.C.J. No. 583 (T.D.) (QL)).

(*Adviento v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1837, paragraph 45 (QL), 2003 FC 1430; See also: *Simoes v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 936, paragraph 12 (QL) (FC); *Williams v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 853, [2002] F.C.J. No. 1133, paragraph 21 (QL); *Prasad v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 614**,** [2003] F.C.J. No. 805, paragraph 32 (QL); *Griffith v. Canada (Solicitor General)*, 2006 FC 127, [2006] F.C.J. No. 182, paragraph 26 (QL).)

[2] The applicant did not demonstrate that she had submitted evidence to the removals officer that could constitute sufficient justification for the officer to exercise his discretion, which is limited to deferring a removal **by reason of special or compelling circumstances**:

> [45] The order whose deferral is in issue is a mandatory order which the Minister is bound by law to execute. **The exercise of deferral requires justification for failing to obey a positive obligation imposed by statute**. That justification must be found in the statute or in some other legal obligation imposed on the Minister which is of sufficient importance to relieve the Minister from compliance with section 48 of the Act [*Immigration Act*, R.S.C. 1985, c. 1-2]. (Emphasis added.)

(*Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] F.C.J. No. 295, paragraph 45 (QL))

INTRODUCTION

[3] The applicant, a Mexican citizen, has brought a motion to stay the removal order against her. The motion is attached to an application for leave and judicial review (ALJR) of the removals officer's refusal to defer her removal.

[4] A motion for a stay of the removal order was also filed in docket IMM-2603-07, attached to an ALJR of the negative decision dated on May 17, 2007, on the applicant's application for a pre-removal risk assessment.

FACTS

[5] The applicant is a Mexican citizen who claimed refugee status in Canada on June 22, 2004 (page 2, "Risks identified by the Applicant", Notes to file − Pre-removal Risk Assessment, (PRRA Reasons), Exhibit D to the Affidavit of Francine Lauzé).

[6] The applicant alleges that she is afraid in her country because of her homosexuality. (See the Reasons for Decision issued January 6, 2005, by the Refugee Protection Division (RPD), Exhibit E to the Affidavit of Francine Lauzé.)

[7] The RPD of the Immigration and Refugee Board (IRB) heard the refugee claim on January 6, 2005, and refused it because the applicant lacked credibility. The applicant did not file an ALJR of that decision.

[8] The applicant applied for a pre-removal risk assessment on February 25, 2007 (application for a Pre-Removal Risk Assessment (PRRA Application), Exhibit F to the Affidavit of

Francine Lauzé). A negative decision was issued on May 17, 2007 (PRRA Reasons, Exhibit D to the Affidavit of Francine Lauzé).

[9] The applicant is currently in a common-law relationship with a man, according to the affidavits of the applicant and her spouse, and applied for permanent residence as a spouse in Canada on February 9, 2007.

[10] The negative decision on the PRRA application was sent to the applicant on June 9, 2007. An ALJR of that decision was filed on June 28, 2007, in docket IMM-2603-07. (See "Notice of Interview for June 9, 2007", Exhibit A to the Affidavit of Francine Lauzé and after "Officer's Notes dated June 9, 2007", Exhibit B to the Affidavit of Francine Lauzé.)

[11] At the meeting on June 9, 2007, the applicant received a letter telling her that she **had to go** to the Canada Border Services Agency (CBSA) **no later than July 4**, **2007**, in possession of a plane ticket with a departure date of July 13, 2007, or earlier.

[12] The applicant **failed to appear on July 4, 2007,** and the CBSA issued an arrest warrant against the applicant. Because the applicant had not shown up, no departure date could be set. (See the note to file signed by Éric Gagnon, dated 05-07-2007, Exhibit L to the Affidavit of Francine Lauzé.)

[13] On July 4, 2007, the applicant served and filed motions for stays of the removal order in this docket and in docket IMM-2603-07.

[14] On July 6, 2007, the applicant finally went to the CBSA offices and since she had in her possession a plane ticket for July 13, 2007, the departure date was scheduled for July 13, 2007. (See the "Officer's Notes", dated July 6, 2007, Exhibit G to the Affidavit of Francine Lauzé and the confirmation of the departure date of July 13, 2007, dated July 6, 2007, Exhibit H to the Affidavit of Francine Lauzé.)

ANALYSIS

[15] In order to assess the merits of the stay motion, this Court must determine whether the applicant meets the tests delineated by the Federal Court of Appeal in *Toth v. Canada (Minister of Employment and Immigration)*, 86 N.R. 302 (C.A.).

[16] In that case, the Federal Court of Appeal adopted three tests that it imported from the case law on injunctions, specifically the Supreme Court of Canada decision in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110. The three tests are

(1) serious issue;

(2) irreparable harm; and

(3) assessment of the balance of convenience.

[17] All three tests must be met for this Court to grant the stay. If one of them is not satisfied, the Court cannot grant the stay.

[18] In this case, the applicant has not demonstrated that there is a serious issue to be tried on the ALJR of the officer's decision on the application based on humanitarian and compassionate grounds; she has not established irreparable harm and, last, the inconvenience to the applicant is not superior to the public interest in having the removal order enforced as soon as is practicable in accordance with paragraph 48(2) of the IRPA.

SERIOUS ISSUE

[19] The applicant did not demonstrate that there is a serious issue to be tried by this Court.

[20] The applicant must show that she has a reasonable chance of succeeding on her main application, i.e., the ALJR of the officer's decision.

LIMITED DISCRETION OF REMOVALS OFFICER

[21] The Court has established that removals officers have limited discretion to defer a removal **by reason of special or compelling circumstances**.

> [37] It is well-established law that the discretion to defer a removal is very limited. It would be contrary to the purposes and objects to the Act to expand, by judicial declaration, a removal officer's limited discretion so as to mandate a "mini H&C" review prior to removal (*Davis v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1628 paragraph 4 (T.D.) (QL); *John v. Canada (Minister of Citizenship and Immigration)* 2003 F.C.J. No. 583 (T.D.) (QL).

(*Adviento*, above; See also: *Simoes*, above; *Williams*, above; *Prasad*, above; *Griffith*, above.)

[22] The applicant did not demonstrate that she had submitted evidence to the removals officer that could constitute sufficient justification for the officer to exercise his discretion, which is limited to deferring a removal **by reason of special or compelling circumstances:**

> [45] The order whose deferral is in issue is a mandatory order which the Minister is bound by law to execute. **The exercise of deferral requires justification for failing to obey a positive obligation imposed by statute**. That justification must be found in the statute or in some other legal obligation imposed on the Minister which is of sufficient importance to relieve the Minister from compliance with section 48 of the Act [*Immigration Act*, R.S.C. 1985, c. 1-2]. (Emphasis added.)

(*Wang*, above)

[23] The applicant simply states in her affidavit that the officer [TRANSLATION] "refused to stay the removal despite the fact that I told him about the ongoing sponsorship proceedings" (paragraph 16, Affidavit of the Applicant, page 12 of the **Motion Record**).

[24] It is settled law that a pending sponsorship application is not *per se* an obstacle to removal.

> [52] Turning to the issue in the underlying judicial review, the Removal Officer's refusal to defer the removal pending the disposition of the H & C application, I find no serious issue with regard to the Removal Officer's conduct. As set out above, a pending H & C application on grounds of family separation is not itself grounds for delaying a removal. To treat it as such would be to create a statutory stay which Parliament declined to enact. *Green v. Canada (Minister of Employment and Immigration)*, [1984] 1 F.C. 441 (C.A.), (1983) 49 N.R. 225, cited in *Cohen v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 589, (1995), 31 Imm. L.R. (2d) 134, per Noël J. (as he then was).

(*Wang*, above; See also: *Banwait v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 522, paragraphs 17 to 19 (T.D.) (QL).)

[25] The applicant clearly did not submit any evidence that could constitute justification for the removals officer to defer the removal.

[26] Considering all of the foregoing, the applicant failed to raise a serious issue in support of her motion. The motion for a stay of removal could be dismissed on this ground alone.

THE APPLICANT NOT ENTITLED TO ADMINISTRATIVE DEFERRAL

[27] The applicant was invited by letter dated January 22, 2007, to meet with an IRPA enforcement officer on February 10, 2007, to bring her file up-to-date for a possible removal from Canada (interview letter for pre-removal interview, dated January 22, 2007, Exhibit I to the Affidavit of Francine Lauzé).

[28] It was only after receiving the letter that the applicant submitted an application for permanent residence as a spouse in Canada. In fact, the application was filed on February 9, 2007.

[29] The applicant could only have benefited from the policy if her sponsorship application had been submitted before she was invited to an interview:

> **When is a client removal ready?**
> For the purposes of this public policy, by the time an applicant attends a pre-removal interview, he/she is generally removal ready. **This means that a client who has been called to a pre-removal interview by any means (letter,**

> **call etc.) and who has not already applied as a spousal H&C applicant or a *Spouse or Common-law Partner in Canada* class applicant, cannot, from the point they are called to the interview forward, benefit from an administrative deferral of removal as outlined in this public policy** except in the limited circumstances outlined below (transitional cases). (Emphasis added.)

(page 60, "**F. ADMINISTRATIVE DEFERRAL OF REMOVAL**", Appendix H—Public Policy Under 25(1) of IRPA to Facilitate Processing in accordance with the Regulations of the Spouse or Common-Law Partner in Canada Class, **Manual IP8: Spouse or Common-Law Partner in Canada Class**, Exhibit J to the Affidavit of Francine Lauzé)

[30] The applicant was, therefore, not eligible for the policy since her application was submitted after she had been invited to the pre-removal interview. Moreover, the administrative deferral lasts for 60 days and, if it had been applicable, would have expired by now.

IRREPARABLE HARM

[31] The Court defined irreparable harm in *Kerrutt v. Canada (Minister of Employment and Immigration)*, (1992) 53 F.T.R. 93, [1992] F.C.J. No. 237, paragraph 15 (QL) (T.D.) as **returning a person to a country where his safety or his life is in jeopardy**.

[32] In *Calderon v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 393, paragraph 22 (QL), Madam Justice Sandra J. Simpson stated the following about the definition of irreparable harm in *Kerrutt*, above:

> [22] In *Kerrutt v. M.E.I.* (1992), 53 F.T.R. 93 (F.C.T.D.) Mr. Justice MacKay concluded that, for the purposes of a stay application, **irreparable harm implies the serious likelihood of jeopardy to an applicant's life or safety. 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. (Emphasis added.)

[33] The applicant repeats in part what she already stated in the refugee claim and the PRRA application about her alleged homosexuality while she was living in Mexico.

[34] The RPD denied the applicant's refugee claim on January 6, 2005, and concluded that it did not believe the applicant's allegations. The applicant did not file an ALJR of that decision (RPD Reasons, Exhibit E to the Affidavit of Francine Lauzé).

[35] On the other hand, the risks identified by the applicant on her PRRA application are based on allegations about her homosexuality when she was living in Mexico. She does not want to return to Mexico and relive what she endured.

[36] The PRRA officer found that the applicant would not be at risk should she return to Mexico (PRRA Reasons, Exhibit D to the Affidavit of Francine Lauzé).

[37] The applicant explained that she now realizes that she was not really homosexual but that she acted that way to show that she was eccentric. Besides, she is now openly, and with her family's knowledge, in a relationship with a man.

[38] On a motion for a stay of a removal order, an applicant cannot allege the same risks that were dismissed at the RPD and PRRA stages.

> [2] . . . Moreover, his allegations on that point are substantially the same as the ones raised when his claim was before the Immigration and Refugee Board. His allegations— then assessed and dismissed because they were not credible— cannot be the basis of an allegation of irreparable harm (see, for example, *Akyol v. The Minister of Citizenship and Immigration*, [2003] F.C.J. No. 1182, 2003 FC 931).

(*Dimouamoua v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 940,

[2005] F.C.J. No. 1172 (QL))

[39] In support of her stay motion, the applicant also states that her spouse is a Muslim, that his parents have disowned him and that she fears for her [TRANSLATION] "future, reputation and safety" if returned to Mexico (paragraphs 28 and 30, Affidavit of the Applicant, page 13 of the **Motion Record**).

[40] These allegations of the applicant are vague and provide no details about the irreparable harm she would suffer if returned to Mexico. It is not clear whether the risks would stem from the fact that her spouse is a Muslim or whether they are connected to her homosexuality allegations.

[41] For these reasons, the alleged harm is purely speculative:

> [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).

(*Akyol v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 931,

[2003] F.C.J. No. 1182 (QL))

APPLICANT'S SPOUSE

[42] The applicant's spouse states in his affidavit that he could not go to live with the applicant in Mexico because his family has disowned them.

[43] He also relies on the financial commitments that he and the applicant have entered into together and states that it would be impossible to pay these debts on his own.

[44] The problems raised by the applicant's spouse are the normal consequences of removal. In addition, no details or evidence about these commitments were provided.

[45] Moreover, no details about the relationship were submitted to the Court.

[46] It is settled law that family separation *per se* is not irreparable harm because it is within the normal consequences of removal.

> [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.

(*Celis v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1231,

[2002] F.C.J. No. 1679, paragraph 3 (QL); See also: *Parsons v. Canada (Minister of Citizenship*

and Immigration), 2003 FC 913, [2003] F.C.J. No. 1161, paragraph 10 (QL); *Damiye v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. No. 70, paragraph 24 (QL).)

[47] Separation from a spouse is not the type of harm referred to in the tripartite test to obtain a stay. As stated by Mr. Justice Denis Pelletier in *Melo v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 403 (T.D.) (QL):

> [21] These are all unpleasant and distasteful consequences of deportation. But if the phrase irreparable harm is to retain any meaning at all, it must refer to some prejudice beyond that which is inherent in the notion of deportation itself. To be deported is to lose your job, to be separated from familiar faces and places. It is accompanied by enforced separation and heartbreak. There is nothing in Mr. Melo's circumstances which takes it out of the usual consequences of deportation.

[48] Ultimately, the applicant and her spouse were aware of her precarious status when they took on the financial commitments, which were, moreover, not in evidence before the Court, and they made their decisions with full knowledge of the situation. In the words of Mr. Justice Paul Rouleau, they did so at their peril:

> [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.

(*Banwait v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 522 (T.D.) (QL))

[49] Consequently, absent a serious issue to be tried by this Court, the applicant has not demonstrated irreparable harm.

BALANCE OF CONVENIENCE

[50] In addition to demonstrating that the underlying ALJR raises a serious issue to be tried and that he or she will suffer irreparable harm if the removal is not stayed, the person requesting a stay must establish that, having regard to all the circumstances, the balance of convenience favours granting the stay (*Manitoba (Attorney General) v. Metropolitan Ltd.*, above; *R.J.R. - Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *Toth*, above).

[51] In determining the balance of convenience, the Court must decide which of the two parties will suffer the greater harm from the grant or refusal of the stay (*Manitoba (Attorney General) v. Metropolitan Ltd.*, above).

[52] Absent serious issue and irreparable harm, the balance of convenience favours the Minister, who has an interest in seeing to the effective and timely implementation of the removal order (*Mobley v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 65, paragraph 2 (QL)).

[53] Subsection 48(2) of the Act provides that a removal order must be enforced as soon as is reasonably practicable.

48. (1) **Enforceable Removal Order** - A removal order is enforceable if it has come into force and is not stayed.	**48.** (1) **Mesure de renvoi** - La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.

(2) **Effect -** 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) **Conséquence -** 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.

[54] In *Membreno-Garcia v. Canada (Minister of Employment and Immigration)*, [1992] 3 FC. 306 (T.D.), [1992] F.C.J. No. 535, paragraph 18 (QL), Madam Justice Barbara Reed elaborated on the issue of balance of convenience on stay motions and the public interest that must be taken into consideration:

> [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 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.

[55] The balance of convenience favours the Minister.

CONCLUSION

[56] For all these reasons, the motion for a stay of the removal order is dismissed.

JUDGMENT

THE COURT ORDERS that the motion for a stay of the removal order is dismissed.

"Michel M.J. Shore"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2604-07
STYLE OF CAUSE:	MENDOZA DURAN Beatriz Eugenia v. MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Ottawa, Ontario (by conference call)
DATE OF HEARING:	July 11, 2007
REASONS FOR JUDGMENT BY:	MR. JUSTICE SHORE
DATED:	July 12, 2007

APPEARANCES:

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