Date: 20070914

Docket: IMM-3618-07

Citation: 2007 FC 909

Ottawa, Ontario, September 14th 2007

PRESENT: The Honourable Mr. Orville Frenette

BETWEEN:

NAIR FATIMA BABOLIM

Applicant

and

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

Respondents

REASONS FOR ORDER AND ORDER

UPON motion of the applicant for an order staying the execution of an order requiring her to leave Canada for Brazil on September 16th 2007;

AND UPON reviewing the written materials submitted by the parties;

AND UPON having heard the counsels' oral submissions by telephone conference;

AND UPON taking account of the following:

(i) *Introduction*

The applicant seeks and order for a stay of removal scheduled for Sunday, September 16th 2007, pending an application for leave if granted, for judicial review.

(ii) *The decision of the enforcement officer*

The decision of the enforcement officer for Canada Border Services Agency (CBSA) rendered on September 5th 2007 refusing an administrative deferral of the removal of the applicant is very brief, in the form of a letter, with few reasons, if any.

The applicant alleges exceptional circumstances which should have led the officer to exercise her discretion to defer removal until her Humanitarian and Compassionate (H&C) application is decided.

Without encroaching upon the subsequent Court's decision upon the application for judicial review, I cannot ignore the consequences flowing from the facts documented in the file.

(iii) *Statement of facts*

The applicant is a 40 year-old female national of Brazil.

In 2003, she met a man named “Vincent Randall” at a beach in Brazil, who said he was a Canadian on vacation in Brazil.

He remained in Brazil until February 2004, when he returned to Canada. The parties fell in love; they were engaged to be married on May 6th 2004; she followed him to Canada in May 2004 entering as a visitor. They married in Toronto on September 11th 2004. In 2005, he sponsored her as a spouse and she applied for permanent residence in Canada. He then became abusive, mentally and physically assaulted her, warning her not to call the police and threatened to kill her.

On December 21st 2005, Citizenship and Immigration Canada (CIC) enforcement officers arrested both parties, as illegal residents. The applicant was advised by the police that “Vincent Randall” was a false name, that his real name was “Carlos Batista Carpes”, a Brazilian resident. He was removed back to Brazil in January 2006. The applicant was allowed to remain in Canada. According to the evidence filed in the Record, Carlos contacted the applicant’s family in Brazil, threatening to harm the applicant or her daughter (who resides in Brazil), blaming her for his expulsion from Canada. He threatened to kill her if she went back to Brazil.

The family reported the threat to the Brazilian Police who did not act upon it. The evidence in the file reveals that some of the Brazilian Police are corrupt and will not protect domestic complainants. Reputable International Organization reports conclude that there is undisputed violence and killings committed by state police (military and civil). In 2006, according to a report in

Human Rights practices, 3000 prisoners were killed by police in Rio de Janeiro, Brazil, during the year.

The applicant fears for her life and that of her family and daughter, is she is forced to return to Brazil. This risk was reported to the deferral officers together with the documents about police services in Brazil.

(iv) *The applicable law*

The Supreme Court of Canada has introduced a tri-partite test to determine whether an interlocutory injunction should be granted pending a determination of a case on its merits namely:

1. Whether there is a serious question to be tried;

2. Whether the litigant, would, unless the interlocutory injunction was granted, suffer irreparable harm;

3. The balance of inconvenience, in terms of which of the two parties would suffer the greater harm from the granting or the refusal of an interlocutory injunction pending a decision on the merits.

Manitoba (Attorney General) v. Metropolitan Stores Ltd., [1987] 1 S.C.R. 110; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311

a test applied by the Federal Court of Appeal in stays of removal on deportation in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.).

(v) *Analysis*

1- Is there a serious issue?

In a stay motion, there is an elevated standard to constitute a serious issue and the Court must closely examine, if, on its merits, the underlying issue is likely to succeed.

Wang v. Canada (MCI), 2001 FCT 148

Further "[…] If there is a valid and enforceable removal order, immediate removal should be the rule and deferral the exception" […].

Chowdhury v. S.G.C., 2006 FC 663 at para 4

In the present case, we have the deciding officer's note, although this is not legally compulsory, yet we do not know exactly the reasons refusing to defer the removal. It is true that the leading jurisprudence on this matter, hold that such an administrative decision does not require formal, written reasons to satisfy the limited purpose of removals officers pursuant to section 48 of the Act.

Tran v. M.P.S.E.P., 2006 FC 1240 at para 16;
Boniowski v. MCI, 2004 FC 1161 at para 11

An enforcement officer has limited discretion to delay removal but he may take into account "factors affecting the personal safety or health of the person removed", see: *Prasad v. Canada (M.C.I.)*, 2003 FCT 614; *Wang v. Canada (M.C.I.)*, 2001 FCT 148. The standard of review equates patent unreasonableness, see: *Harb v. Canada (M.C.I.)*, 2003 FCA 39 at para 14; *Chir v. Canada (M.P.S.E.P.)*, 2006 FC 242.

In sum, even if the officer's discretion is limited, when factors such as illness or othern issues to travel exist and there is a pending H&C application, unresolved due to backlogs in the system, a deferral should be granted.

Simoes v. M.C.I., IMM-2775-00, June 16, 2000 at para 11

In this present case, there is an H&C application filed 20 months ago and it seems to me that in the circumstances described previously, there exists a serious question to debate concerning the risk in Brazil and the officer did not refer to it. In such a case of potential risk, as Justice Barnes wrote in *Perea v. Canada (M.C.I.)*, IMM-3090-07, August 08, 2007, seeing the seriousness of the allegations of death threats, a judge should ensure caution. I therefore believe there is a serious risk to be addressed in this case.

2- Irreparable Harm

The applicant must satisfy the requirement of irreparable harm. It has been held that "irreparable harm must not be speculative nor can it be based on a series of possiblities.

Akoyl v. Canada (M.C.I.) 2003 FC 931 at para 6-7

In my view, the applicant has demonstrated that she is likely to face irreparable harm if she returns to Brazil. She has been a victim of domestic violence in the hand of her spouse. He has threatened her with death threats, threats to her daughter and family in Brazil, justifying a complaint to the police which have not acted to date. The Law in Brazil prohibits domestic violence but in fact according to documentary evidence, it is widespread and underreported. Furthermore, documentary

evidence shows that the police in Brazil have a reputation of being violent and unlawfully killing people. Therefore, in my opinion, the test re: irreparable harm to the applicant has been satisfied.

3- Balance of Convenience

This third test is a determination of which of the two parties would suffer the greater harm from the granting or the refusal of a stay order. On one hand, there is no doubt that under section 48 of the IRPA, an enforceable removal order must be enforced as soon as possible.

On the other hand, the applicant has no criminal record, she poses no danger to the public or to the security of Canada. She could suffer irreparable harm if she is returned to Brazil before the application for judicial review is decided.

Singh v. Canada (Minister of Citizenship and Immigration), [1995] F.C.J. no. 1440 (QL)
Smith v. Canada (Minister of Employment and Immigration), [1992] F.C.J. no. 1069 (QL)

Therefore, the conditions required have been met.

FOR ALL THESE REASONS, THIS COURT ORDERS that:

- The application for a stay of the removal order of September 16th 2007, be granted, until the applicant's underlying for leave and judicial review is finally determined.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-3618-07
STYLE OF CAUSE:	NAIR FATIMA BABOLIM v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION ET AL.
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	September 13, 2007
REASONS FOR ORDER. AND ORDER BY:	The Honourable Mr. Orville Frenette
DATED:	September 14, 2007

APPEARANCES:

Mr. Robert Blanshay	FOR THE APPLICANT(S)
Ms. Angela Marinos	FOR THE RESPONDENT(S)

SOLICITORS OF RECORD:

Mr. Robert Blanshay Toronto, Ontario	FOR THE APPLICANT(S)
JOHN H. SIMS Q.C. Deputy Minister of Justice and Deputy Attorney General	FOR THE RESPONDENT(S)