Date: 20071227

Docket: IMM-5399-07

Citation: 2007 FC 1369

Ottawa, Ontario, December 27, 2007

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

HOANG HUY BUI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

OVERVIEW

[1] It was clearly **not** the intent of Parliament to allow all negative Pre-Removal Risk Assessment (PRRA) recipients to remain in Canada, pending the outcome of any litigation related to their PRRA decisions. Parliament chose to provide a statutory stay of removal pending the outcome of an application for leave of a negative refugee decision by the Refugee Protection Division (RPD). Parliament further envisioned statutory stays in certain specified circumstances related to PRRAs, as set out in Section 232 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations), none of which included applications for leave challenging negative PRRA decisions.

[2] Parliament clearly intended that persons whose PRRA applications had been rejected could be removed. This is also consistent with section 48 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), which provides that the Minister is obligated to effect valid removal orders as soon as practically possible. Any other interpretation would place the rights of an unsuccessful PRRA applicant, ahead of the legal obligation on the Minister, rights and obligations which Parliament has intentionally balanced through the statutory provisions in the IRPA.

[3] This Court and the Court of Appeal routinely dismiss stays where there are outstanding applications for leave and for judicial review or appeals, including applications or appeals of negative PRRAs. (*Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, [2004] F.C.J. No. 1200 (F.C.A.) (QL); *El Ouardi v. Canda (Solicitor General)*, 2005 FCA 42, [2005] F.C.J. No. 189 (QL); *Sivagnanansuntharam v. Canada (M.C.I.)*, (February 16, 2004, Docket A-384-03) (F.C.A.); *Tesoro v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 148 (F.C.A.), [2005] F.C.J. No. 698 (QL).)

INTRODUCTION

[4] This is a motion for an order staying the execution of a deportation to Hanoi on December 28, 2007, issued against the Applicant.

JUDICIAL PROCEDURE

[5] The Applicant arrived in Canada on a merchant vessel in May 2005. In November 2005, he initiated a refugee claim which was denied in October 2006 based primarily on his lack of credibility and reavailment. He challenged that decision, but leave was denied in February 2007. In the meantime, in December 2006, the Applicant married a Canadian citizen. In July 2007, the Applicant exercised his right and sought a PRRA which was rejected on October 31, 2007.

[6] Despite all of the discussion in the Applicant's materials with regard to his being duped by Mr. Thomas Pham on a Spouse in Canada Class application, who allegedly purported to have credentials that he apparently did not have, this case really concerns a negative PRRA decision. The Applicant does not find any problem with the final determination or the rationale used to substantiate it.

FACTS

[7] The Applicant, a national of Vietnam and a seaman, arrived in Canada at Point Tupper, Nova Scotia, on May 28, 2005, where he deserted the ship.

[8] The Applicant's claim for Convention refugee status was initiated, on November 15, 2005, which was rejected by the RPD, on October 12, 2006 on the basis of lack of credibility and reavailment of the Applicant. He challenged that decision at the Federal Court, but leave was denied, on February 7, 2007.

[9] The Applicant availed himself of the opportunity to make an application for a PRRA, on July 27, 2007.

[10] On October 31, 2007, the Applicant was found not to be at risk in his PRRA.

ISSUE

[11] Has the Applicant met the tri-partite test for warranting a stay of removal?

ANALYSIS

The Test for granting a stay

[12] The Supreme Court of Canada has established a tri-partite conjunctive test for determining whether interlocutory injunctions should be granted pending a determination of a case on its merits, namely: (i) whether there is a serious issue to be tried; (ii) whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm; and, (iii) in whose favour the balance of convenience lies (specifically which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits). (*R.J.R.-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.)

SERIOUS ISSUE

[13] The PRRA Officer's principal objective is to assess the weight of the evidence. Justice Luc Martineau confirmed in *Rajz v. Canada (M.C.I.)*, Doc. No. IMM-5263-03 (15 July 2003) "that the PRRA officer has sole jurisdiction over the facts. The Court should not enter into re-weighing of

evidence." (*Gonzalez v. Canada (M.C.I.)*, Doc. No. IMM-3659-03 (30 May 2003); *Mekolli v. Canada (M.C.I.)*, Doc. IMM-4974-03 (9 September 2003); *Karaman v. Canada (M.C.I.)*, Doc. IMM-6676-03 (9 September 2003).)

[14] Significant reference is made by the PRRA officer to the RPD decision wherein the officer stated:

> The RPD provided a comprehensive analysis of the applicant's testimony given at his refugee hearing on 02 August 2006. The RPD noted the following:
>
> > In the case of Sheik, the Federal Court held that a general finding of a lack of credibility on the part of the applicant may conceivably extend to all relevant evidence emanating from his testimony. The gravity of the inconsistencies and implausibilities in the absence of a reasonable explanation, coupled with the element of delay in claiming refugee status in Canada, as well as re-availment in such that it leads the panel to find that this lack of credibility extends to all relevant evidence emanating from the claimant and renders his entire testimony not credible.
> >
> > The panel on a balance of probabilities, that the claimant has fabricated the allegations in the narrative to extend a refugee claim. His lack of credibility has undermined his subjective fear.

[15] The review of the case law confirms that a PRRA officer's decision attracts significant deference. The determination of risk on return to a particular country is a "fact-driven inquiry" and this determination attracts considerable deference. As the Supreme Court stated in *Ahani v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 72:

> [17] … we conclude that the court may intervene only if the Minister's decision is not supported on the evidence, or fails to consider the appropriate factors. The reviewing court should also recognize that the nature of the inquiry may limit the evidence required. While the issue of deportation to risk of torture engages s. 7 of the Charter and hence possesses a constitutional dimension, the Minister's decision is largely fact-based. The inquiry into whether Ahani faces a substantial risk of torture

> involves consideration of the human rights record of the home state, the personal risk faced by the claimant, any assurances that the claimant will not be tortured and their worth and, in that respect, the ability of the home state to control its own security forces, and more. Such issues are largely outside the realm of expertise of reviewing courts and possess a negligible legal dimension. **Considerable deference is therefore required.** (Emphasis added.)

(Reference is also made to *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3, para. 39.)

[16] The Applicant asserts in his affidavit and in the Notice of Motion that a PRRA application on his behalf was completed in "consultation with" or "submitted by" Mr. Pham. Mr. Pham apparently is not authorized to be an immigration representative and the Applicant claims that he was duped by Mr. Pham into retaining his services. Consequently, the Applicant argues that the stay should be granted so that another PRRA application can be filed.

[17] There is no requirement that PRRA applicants must have legal counsel to prepare their documents. In any event, with regard to the Applicant's argument, the jurisprudence is consistent that, generally, a person is bound by the actions of their counsel whether the counsel is a lawyer or not; therefore, the Applicant's complaints are without merit. In *Cove v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 266, [2001] F.C.J. No. 482 (QL), Justice Denis Pelletier held:

> [6] It is a fact that, generally speaking, applicants will be held to the consequences of their choice of advisor even when that advisor is a lawyer. Madam Justice Reed put it this way in *Williams v. Canada (Minister of Employment and Immigration)*, [1994] F.C.J No. 258, (1994) 74 F.T.R. 34:
>
> > [20] ...The general rule, in the courts, is that a client is considered to have authorized and be bound by the representations made on his or

> her behalf by counsel. The system cannot operate if this is not so. In my view, to grant a stay in circumstances where the only prejudice the applicant can demonstrate is that he may or may not have grounds for judicial review, but does not know because his former counsel did not properly prepare his case, would create an unworkable precedent. It is the professional accreditation bodies, such as the Law Society, not the courts, which have the mandate to regulate the professional performance of their members.
>
> …
>
> [9] If the applicant were in these straits because of her lawyer's error, that error would be held against her. Why should the errors or her consultants not be held against her? To accept this argument would create a positive incentive for individuals to use consultants in preference to lawyers so that if things went badly, relief could be obtained by blaming the inadequacy of the consultant. This is not conducive to a rational use of legal and judicial resources.
>
> [10] If individuals are going to hold themselves out as skilled in immigration matters and, as is increasingly the case, adopt the designation of "counsel", then they will be held to the same standard as those who customarily appear before the Court. The consequences to their clients of non-performance will be the same as it is for clients of the immigration bar. There is no reason why the Court should shelter consultants from negligence claims by overlooking their mistakes. Members of the immigration bar pay large liability insurance premiums for coverage which is subject to being called upon every time a court refuses to gloss over their mistakes. To apply a different standard to consultants is to subsidize their competition with the immigration bar.
>
> [11] It is not for this Court to decide who clients can consult about their immigration problems. If there were not a need and a demand for immigration consultants, they would not exist. But it is equally not for this Court to disadvantage its own officers by applying a different standard to those who would displace them.

[18] There is evidence to suggest that the Applicant is not being forthcoming concerning his relationship with Mr. Pham. The Removals Officer indicates that she met the Applicant and Mr. Pham on three occasions and that, when she inquired about their relationship, she was advised that Mr. Pham was a friend who was acting as the Applicant's interpreter. Furthermore, the allegation that Mr. Pham did not submit the Applicant's Spouse in Canada class claim is

undermined by the Officer's entry in her Notes to File where she indicates that the Applicant stated that he was awaiting the PRRA results before submitting a spousal sponsorship. Thus, the Applicant's credibility on this issue is in question. (Affidavit of Lisa Levy, sworn December 24, 2007; Notes to File of Removals Officer, Kristen Gale; Officer's Statutory Declaration, dated December 24, 2007, attached to the affidavit of Lisa Levy as Exhibit "A".)

[19] The Court is in receipt of information from the Respondent based on notes of Enforcement Officer V. Ducas that Mr. Bui has attended the Greater Toronto Enforcement Centre (GTEC), accompanied by a Mr. Pham on the following dates: 27NOV2007, 13DEC2007, 14DEC2007. Mr. Bui had also advised that Mr. Pam was a friend and interpreter. Any potential investigations into this matter, do not have any effect on Mr. Bui's removal order or his direction to report for removal. The Court is not satisfied that a deferral of the execution of removal order is appropriate in the circumstances of this case.

IRREPARABLE HARM

[20] The Applicant asserts that irreparable harm would result if he was removed because he would be unable to recoup the monies improperly taken from him by Mr. Pham.

[21] If there is any legal action that the Applicant feels should be taken against Mr. Pham with regard to monies that were allegedly taken improperly, the Applicant's spouse is in a position to direct whatever legal action is necessary. The Applicant's physical presence in Canada is not required.

[22] It is unsubstantiated, on the basis of all the evidence presented, how the Applicant's allegations of wrong doing on the part of a specific individual in the Applicant's PRRA would, in any case, in regard to the Applicant's stay application, demonstrate a ground of irreparable harm.

[23] The Applicant suggests that his underlying application for judicial review will be rendered nugatory if a stay is not granted. This is not the case.

[24] As Justice James O'Reilly found in *Kim v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 321, [2003] F.C.J. No. 452 (QL): "…nothing in the Act or the Rules that would interfere with the entitlement of a PRRA applicant, who has been removed from Canada and who is successful on judicial review, to have that application reconsidered." Further, as Justice Martineau decided in *Akyol v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 931, [2003] F.C.J. No. 452 (QL):

> [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…

(Reference is also made to *Ryan v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1413, [2001] F.C.J. No. 1939 (QL), para. 8.)

[25] This Court and the Court of Appeal routinely dismiss stays where there are outstanding applications for leave and for judicial review or appeals, including applications or appeals of negative PRRAs. (*Selliah*, above; *El Ouardi*, above; *Sivagnanansuntharam*, above; *Tesoro*, above.)

[26] The proper, persuasive, and authoritative approach is the one articulated by the Federal Court of Appeal that has held that removing an applicant from Canada while his appeal of his negative PRRA is pending, does not render his/her rights nugatory. In ***Selliah,*** above, Justice John Maxwell Evans stated:

> [20] Since the appeal can be ably conducted by experienced counsel in the absence of the appellants and since, if the appeal is successful, the appellants will probably be permitted to return to Canada at public expense, I cannot accept that removal renders their right of appeal nugatory.

[27] Further, Justice Snider considered but rejected a similar argument to the one advanced by the Applicant and ultimately concluded that the application is **not** rendered nugatory by removal. Justice Snider relied on *Kim*, above, and on the Court of Appeal's decision in *Selliah*, and noted in *Nalliah v. Canada (Solicitor General)*, 2004 FC 1649, [2004] F.C.J. No. 2005 (QL):

> [30] The second branch of Mr. Nalliah's argument is that the loss of the right to continue the litigation constitutes irreparable harm. Contrary to these submissions, if the injunction is refused, their right to an effective remedy will not be rendered nugatory. As Mr. Justice O'Reilly stated in *Kim v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 452, 2003 FCT 321, at para. 9: "[n]othing in the Act or the Regulations interferes with the entitlement of a PRRA Applicant, who has been removed from Canada and who is successful on judicial review, to have her application reconsidered".
>
> [31] In *Selliah v. Canada (Minister of Citizenship and Immigration)* [2004] F.C.J. No. 1200, at para. 20, (F.C.A.) (QL), Justice Evans of the Court of Appeal stated:
>
> > Since the appeal can be ably conducted by experienced counsel in the absence of the appellants and since, if the appeal is successful,

> the appellants will probably be permitted to return to Canada at public expense, I cannot accept that removal renders their right of appeal nugatory.
>
> [32] The cases of *Suresh*, supra and *Resulaj*, supra referred to by Mr. Nalliah may be distinguished on the basis that, in both of those cases, there was significant evidence supporting a personalized risk. From a review of the jurisprudence, I conclude that irreparable harm cannot be solely founded on difficulty in pursuing legal rights of challenge once removed from Canada.

[28] In addition, it was clearly **not** the intent of Parliament to allow all negative PRRA recipients to remain in Canada, pending the outcome of any litigation related to their PRRA decisions. Parliament chose to provide a statutory stay of removal pending the outcome of an application for leave of a negative refugee decision by the RPD. Parliament further envisioned statutory stays in certain specified circumstances related to PRRAs, as set out in Section 232 of the Regulations, none of which included applications for leave challenging negative PRRA decisions. (Regulations, sections 231 and 232.)

[29] Parliament clearly intended that persons whose PRRA applications had been rejected could be removed. This is also consistent with section 48 of the IRPA, which provides that the Minister is obligated to effect valid removal orders as soon as practically possible. Any other interpretation would place the rights of an unsuccessful PRRA applicant, ahead of the legal obligation on the Minister, rights and obligations which Parliament has intentionally balanced through the statutory provisions in the IRPA. Justice Snider acknowledged this in *Nalliah*, above.

[30] The Applicant has failed to establish demonstrable proof of irreparable harm.

BALANCE OF CONVENIENCE

[31] The public interest is to be taken into account in consideration of the balance of convenience and weighed together with the interests of private litigants. (*Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110.)

[32] In *Dugonitsch v. Canada (Minister of Employment and Immigration)*, 1992 53 F.T.R. 314, [1992] F.C.J. No. 320 (F.C.T.D.) (QL), Justice Andrew MacKay sets out the considerations pertinent to assessing balance of convenience:

> Absent evidence of irreparable harm, it is strictly speaking unnecessary to consider the question of the balance of convenience. Nevertheless, it is useful to recall that in discussing the test for a stay or an interlocutory injunction in the *Metropolitan Stores* case Mr. Justice Beetz stressed the importance of giving appropriate weight to the public interest in a case where a stay is sought against a body acting under public statutes and regulations which have not yet been determined to be invalid or inapplicable to the case at hand. That public interest supports the maintenance of statutory programs and the efforts of those responsible for carrying them out. Only in exceptional cases will the individual's interest, which on the evidence is likely to suffer irreparable harm, outweigh the public interest.

(Reference is also made to *Aquila v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 36 (F.C.T.D.) (QL).)

[33] Furthermore, the Federal Court of Appeal in *Cuskic v. Canada (Minister of Citizenship and Immigration)*, [2001] 2 F.C. 3 (C.A.), [2001] F.C.J. No. 1631 (QL), a case decided under the *Immigration Act*, held that the Minister has a duty in seeing the expeditious and effective execution of a removal order. Similarly, section 48 of the IRPA, imposes upon the Respondent a general duty to execute a removal order as quickly as possible by requiring that it be done as soon as reasonably practicable.

[34] The Applicant has had the benefit of a refugee claim and a risk assessment in Canada. He has had a negative RPD decision based on lack of credibility and reavailment that was upheld by this Court. The Applicant has also had the full and fair benefit of the law to have his risk assessed.

[35] These factors, taken all together, tilt the balance in favour of the Minister. The balance of any inconvenience which the Applicant may suffer as a result of his removal from Canada does not outweigh the public interest which the Respondent seeks to maintain in the application of the IRPA, specifically the interest in executing deportation orders as soon as reasonably practicable.

CONCLUSION

[36] For the reasons listed above, the Applicant’s motion to stay the execution of the removal order is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicant's motion to stay the execution of the removal order be dismissed.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5399-07
STYLE OF CAUSE:	HOANG HUY BUI v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	December 27, 2007 (by telephone conference)
REASONS FOR JUDGMENT AND JUGMENT:	SHORE J.
DATED:	December 27, 2007

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