Date: 20090120

Docket: IMM-44-09

Citation: 2009 FC 45

BETWEEN:

ILAVATI NAVINCHANDRA BHAGAT

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER

LEMIEUX J.

Introduction and Background

[1] On January 10, 2009, I granted a stay from the execution of the applicant's removal to India scheduled for the next day. These are my reasons for doing so.

[2] The underlying application for leave and judicial review to which the stay application is grafted is the January 9, 2009 decision of an Enforcement Officer not to defer removal until the sponsored H&C application for permanent residence filed on July 20, 2006 was decided.

[3] Ilavati Navinchandra Bhagat (the applicant) is a 64-year-old widow and a citizen of India. Her husband passed away in April 1984; she raised their two children – a son Amitkumar Bhagat and a daughter Prakruti Bhavsar who both immigrated to this country in April 2002.

[4] Her son and daughter are both Canadian citizens, married with their own children and families. The son, who swore the supporting affidavit for the stay application, has 3 children and his sister has 2. The applicant has no living close relatives in India but has a friend there whom she contacts infrequently. She lives with her son's family and attends to the grandchildren during the day while the son and his wife are working in separate employment.

[5] The record indicates that between 2002 and 2005, the applicant was refused several applications for a visitor's visa by the officials at the Canadian High Commission in New Delhi (the High Commission) and in 2004, her son sponsored her as an immigrant to Canada (the 2004 out of Canada sponsorship application or the 2004 application). There is a convoluted off and on history to the 2004 sponsorship which it would appear is still outstanding at the High Commission but will only be continued to be processed if the applicant returns to India.

[6] On July 20, 2005, the applicant came to Canada on a false passport and made a refugee claim which was denied orally on November 7, 2005, leave to commence a judicial review application from that decision refused on March 2, 2006. In denying the applicant's asylum claim (written reasons dated November 18, 2005, applicant's Motion Record at page 253), the member of the Refugee Protection Division found "the harm she feared does not constitute persecution as to be considered persecution, the mistreatment suffered or anticipated must be serious. I find that the

incidents complained of may amount to harassment but they do not amount to persecution" (applicant's Motion Record, page 256).

[7] The member of the Refugee Protection Division mentioned her counsel, at her hearing, had said the family was sponsoring her to Canada and it might take from four to five years to process; the member added: "there may be in your mind and maybe in the mind of your family and counsel that you have humanitarian or compassionate reasons why you should remain in Canada. However, I do not have the training or authority to make any decision based upon these considerations." (applicant's Motion Record, page 261).

[8] On July 20, 2006, the applicant submitted an H&C application sponsored by her son which was referred on August 14, 2007 to Citizenship and Immigration Canada (CIC) in Scarborough, Ontario for further processing (the 2006 within Canada sponsorship application or the 2006 application).

[9] Her PRRA application filed on August 1, 2006 was refused on July 27, 2007.

[10] While the 2006 within Canada application was being processed, there were developments with her 2004 out of Canada sponsorship application which had apparently either been denied or kept in abeyance by the High Commission because it had no satisfactory proof of the relationship between the applicant and her son.

[11] On March 19, 2007, the High Commission asked the applicant and her son to undergo DNA testing in order to establish the family relationship which they did. Further confusion arose around the sending and receipt by the testing company of the DNA test results at the High Commission which led to a refusal of the 2004 application by the High Commission, but yet, to an apparent reconsideration on July 24, 2007. There was further communication on July 2, 2008 (Applicant's record, page 75) from the High Commission who wrote that the 2004 out of Canada sponsorship application could not be further processed until she returned to India because she was subject to a deportation order and also, because when her 2004 application was made, she was residing in that country and her landing visa to Canada had to be issued to her in India; it could not be issued to her when she was in Canada.

[12] The only other relevant fact is, if the applicant was removed, she would be accompanied by her daughter in law because her family was of the view, backed up by a medical report, she could not cope being returned to India alone with no real support there. It is advanced by the applicant's son the temporary break up of the family unit will have substantiated financial impact on them, but more important, will have a detrimental effect on the children.

Analysis

[13] The law is clear the applicant has the burden of demonstrating all of the three elements of the test to obtain a stay: (1) serious question to be tried with the measurement being whether such question indicated a reasonable likelihood a success on the underlying leave and judicial review application i.e. the Enforcement Officer's refusal to defer in the context of a statutory duty that enforceable removal orders must be executed as is reasonably practicable; (2) irreparable harm

would be suffered as a result of the applicant's deportation if the requested stay is not granted; and (3) the balance of convenience favours the applicant.

(a) Serious issue

[14] The parties agree that higher standard applies because to grant this stay is equivalent to a grant of the underlying relief. After hearing the parties on this issue in relation to the facts and the law, I am satisfied the applicant has made out the following serious issues: (1) the Enforcement Officer failed to apply the proper test to gauge the point in time to calculate how long an H&C application was outstanding; (2) the Enforcement Officer failed to take into account the applicant's surrounding compelling personal circumstances; and, (3) the Enforcement Officer misread the medical evidence.

[15] In reaching this conclusion, I am well aware of the settled jurisprudence of this Court which holds the scope of an Enforcement Officer's discretion, under section 48 of the *Immigration and Refugee Protection Act*, is limited. There are recognized factors which a removals officer must examine and these were clearly summarized in Justice O'Reilly' decision in *Ramada v. Canada (Solicitor General)*, 2005 FC 1112, at paragraph 3:

> **3** Enforcement officers have a limited discretion to defer the removal of persons who have been ordered to leave Canada. Generally speaking, officers have an obligation to remove persons as soon as reasonably practicable (s. 48(2), *Immigration and Refugee Protection Act*, S.C. 2001, c. 27; set out in the attached Annex). However, consistent with that duty, officers can consider whether there are good reasons to delay removal. Valid reasons may be related to the person's ability to travel (e.g. illness or a lack of proper travel documents), the need to accommodate other commitments (e.g. school or family obligations), or compelling personal circumstances (e.g. humanitarian and compassionate considerations). (See: *Simoes v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 936 (T.D.) (QL), *Wang v. Canada (Minister of Citizenship and Immigration*), [2001] 3 F.C. 682

> (T.D.) (QL), *Prasad v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 805 (T.D.) (QL); *Padda v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1353 (F.C.) (QL)). It is clear, however, that the mere fact that a person has an outstanding application for humanitarian and compassionate relief is not a sufficient ground to defer removal. On the other hand, an officer must consider whether exigent personal circumstances, particularly those involving children, justify delay.

[16] On the first issue in *Simoes v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 936, Justice Nadon, then of this Court, identified at paragraph 12 as a relevant factor for a removals officer to take into account "… pending H&C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system."

[17] The jurisprudence of this Court has refined the question when an H&C application was brought in a timely manner. In *Harry v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1727, Justice Gibson calculated an H&C application was outstanding in terms of the time lapse between the time the H&C application was filed and when the applicant was scheduled to be removed. Justice Gibson was of the view an H&C application brought one year before removal had been brought in a timely manner and not to weight properly this factor raised a serious issue. In the case at hand, the Enforcement Officer did not properly assess whether the 2006 application had been filed on a timely basis. She wrote in her notes to file:

> "… the Stage 1 Approval processing time for applications once they are transferred to the local Scarborough CIC is approximately 30 months. Therefore based on the above timeframe, the officer concludes that since the application was recently transferred to CIC Scarborough, a final decision on the application is not imminent. The application is in the processing queue and will be dealt with accordingly.
>
> This officer notes that submitting an H&C application in itself is not an impediment to removal, which is clearly stated in the application guide and should therefore not be utilized as a mechanism of impediment to removal.

> This officer has little discretion to defer removal. Noting that this officer does not have training and jurisdiction to make assessment of H&C factors, the officer would defer removal if there were sufficient evidence indication that a decision would be rendered in the near future on the H&C application." [My emphasis.]

[18] It is clear the Enforcement Officer calculated timeliness not in terms of when the H&C application was filed but when it would be decided. This approach raises a serious issue.

[19] Second, the Enforcement Officer had to properly assess the applicant's personal circumstances. In this case, a relevant factor is her 2004 out of Canada sponsorship application. The Enforcement Officer wrote:

> The applicant was not removed because the applicant presented evidence indicating that the CIC office in New Delhi may have reverse the negative decision rendered on the sponsorship application. Therefore, given that the applicant had taken action to address the issue of non compliance that had ultimately led to the refusal of the sponsorship application, CBSA deferred the applicant's removal in hopes that CIC in New Delhi would revise its decision. There is no information before this officer attesting that the CIC office in New Delhi has agreed to reopen the sponsorship application. In fact, there is information on FOSS (Field Operational Support System) indicating that, on October 18th 2007, the applicant's son withdrew the motion filed to reopen the sponsorship application. [My emphasis.]

[20] It is clear from this passage the Enforcement Officer was of the opinion the 2004 application was not outstanding. Based on the entire record, a serious question arises whether she misapprehended the facts.

[21] Third, in terms of the medical evidence which is found at the applicant's motion record, pages 117 to 120, the Enforcement Officer's notes say:

> The deferral request provides a report signed by Gerald M. Devins, Ph. D, C. Psych, stating that: "Mrs. Bhagat satisfies diagnostic criteria for chronic adjustment disorder

> with mixed anxiety and depressed mood (…) she requires treatment by a mental health professional". The report does not state that the applicant is receiving any medical treatment that would prevent her from completing the airplane trip to India. This officer is not provided with sufficient objective evidence indicating that the applicant's medical condition renders her unfit to fly.
>
> It is acknowledged that anxiety and distress are normal feelings associated with separation, relocation and uncertainty, but that alone does not warrant a deferral of removal. [My emphasis.]

[22] The full complete paragraph of Dr. Devins' clinical impressions is:

> Mrs. Bhagat satisfies diagnostic criteria for chronic adjustment disorder with mixed anxiety and depressed mood (309.28) in the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders* (4th ed., *DSM-IV*). She requires treatment by a mental health professional. Mrs. Bhagat's condition can improve with appropriate care and guaranteed freedom from the threat of deportation. If refused permission to remain in Canada, her symptoms will intensify and her suffering will increase. The deterioration will be exacerbated by the fact that she has no socially supportive network in India. Removal to India will be psychologically devastating for this already highly distressed lady who has a loving and supportive extended family in Canada that can facilitate her resettlement and adaptation.

[23] The serious issue is whether the Enforcement Officer misapprehended the medical evidence when she concluded "anxiety and distress are normal feelings associated with separation, relocation and uncertainty …" A plain reading of the doctor's paragraph suggests otherwise.

(b) Irreparable harm

[24] I am satisfied the applicant has made out irreparable harm if the stay is not granted. In this case, irreparable harm has two aspects: harm to the applicant which is established through the psychological harm which she would experience. This case is similar on this point to my colleague Justice Dawson's decision in *Carvalho v. the Solicitor General of Canada*, Docket: IMM-8160-04, 20040928. I am satisfied from a reading of the medical opinion, the applicant has made out she

would suffer irreparable harm through removal in the unique circumstances which befalls her but mitigated by the fact she would be accompanied on her return by her daughter in law.

[25] The second aspect relates to the harm to the family unit and arises in the circumstance of her being accompanied by a family member who would reside with her. The Federal Court of Appeal in *Toth v. Canada (Minister of Employment and Immigration)*, (1988) 86 N.R. 302 instructs us the impact of the removal on the family unit is a relevant component in the assessment of the existence of irreparable harm.

[26] In this case, the evidence establishes the immediate family unit (her son, daughter in law and their children) will be shattered upon removal of the applicant since either her son or daughter in law will reside with her in India to soften the psychological impact of her returning alone; in my view the evidence establishes such return to India is a matter of necessity and not of choice for the family. The affidavit evidence satisfies me this means a job loss for one of them, substantial negative financial impact in operating two homes and the breakup of support for the children (see *Gelencser v. Canada (Solicitor General)*, 2004 FC 404, at paragraph 12).

Balance of convenience

[27] Having made out irreparable harm and serious question, the balance of convenience favors the applicant, notwithstanding the valiant argument by counsel for the respondent.

[28] For these reasons the stay is granted.

"François Lemieux"

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Judge

Ottawa, Ontario
January 20, 2009

FEDERAL COURT

SOLICITORS OF RECORD

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