

Federal Court



Cour fédérale

**Date: 20090528**

**Docket: IMM-2412-09**

**Citation: 2009 FC 556**

**BETWEEN:**

**CASSANDRA GRIFFITH**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**Docket: IMM-2451-09**

**BETWEEN:**

**SHAWN FORDYCE**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER**

**Lemieux J.**

**Introduction and Background**

[1] On Friday evening, May 15, 2009, I heard together two applications for a stay of the Applicants who are citizens of Guyana, whose deportation was scheduled for the next day, Saturday, May 16, 2009, at 10:00 a.m. I issued the two stays and here are the reasons why.

Facts

[2] Cassandra Griffith is 18 years old and Shawn Fordyce is 25 years old. They are cousins. They arrived at Pierre Elliott Trudeau Airport on May 9, 2009 on false St. Lucia passports provided by a smuggler. No entry visa into Canada was necessary with a passport from St. Lucia but was required if the person held a Guyanese passport.

[3] Each of them saw a different Custom Officer who referred them for questioning by an Immigration Officer who suspected their passports were false. After initially lying about the authenticity of their passports and about not knowing each other, they admitted their passports were false, that they were citizens of Guyana and were cousins.

[4] At this point Miss Griffith told the Officer she was scared to return to Guyana. The Officer asked why. In her affidavit in support of the stay, she says she did not answer because she “felt too ashamed and embarrassed to say to the hearing of everyone in the interview room that my stepfather was sexually abusing me”. In her affidavit she states her stepfather is rich and powerful.

[5] For his part, Mr. Fordyce, in his affidavit in support of the stay, says the Officer asked him if he was claiming “Refugee Protection”, to which he answered no because he did not understand the term refugee to be synonymous with “asylum”. In his affidavit, he says he is under threat from his rich and influential stepfather, who eventually pulled a gun on him when he tried to intervene when his stepfather was abusing his mother.

[6] The Officer wrote separate section 44 reports to the Minister's delegate at the airport. He recommended an exclusion order be issued against each Applicant. Before the Minister's delegate issued the exclusion orders, he specifically asked each of the Applicants whether they wanted to claim Canada's protection and each answered "no". Both were immediately detained and were told they would be returned to Guyana, via St. Lucia, the next Saturday, May 16, 2009.

[7] In her affidavit, Miss Griffith says, after the exclusion order was made, she "afterwards ... asked for protection in Canada and my counsel then ... also made a formal request to CBSA for an administrative stay of removal". She refers to Exhibit "A" of her affidavit which is a letter from her former counsel, dated May 13, 2009, to CBSA Montreal, requesting an administrative stay stating he was seeking leave and judicial review in respect of the exclusion order; he also asked to receive a Pre-Removal Risk Assessment (PRRA) application and to grant her a stay pending the decision by the PRRA Officer.

[8] Mr. Fordyce is more direct in his affidavit. At paragraph 7, he states that on May 13, 2009 he was interviewed by an Immigration Officer "where I then asked for protection in Canada", which was denied. He refers to Exhibit A-1 to his affidavit which is a letter from current counsel Mr. Amana, dated May 13, 2009, faxed to the CBSA Supervisor in Montreal, the CBSA Hearing Officer and Enforcement Officer. That letter is marked urgent. Mr. Amana writes his client is afraid to go back to Guyana because of risks to his life and risks to cruel and inhuman treatment and punishment. Mr. Amana recognizes Mr. Fordyce may not have asked for Refugee Protection *ab-initio* "but he is still entitled to a PRRA as so long as he alleges a risk of return before removal". He asked for an answer the next day, May 14, 2009, before 5:00 p.m. as the removal

was scheduled for May 16<sup>th</sup>. No answer was received. On May 14, 2009, an application for leave and judicial review was filed by Mr. Amana, attacking the decision of the Immigration Officer in refusing to give Mr. Fordyce a PRRA assessment application before his removal. On May 15, 2009, Mr. Amana launched Mr. Fordyce's stay application.

[9] The record before me indicates that, on May 13, 2009, Miss Griffith's former counsel filed an application for leave and judicial review challenging the exclusion order. That record also indicates, on May 13, 2009, Mr. Amana advised CBSA he was Miss Griffith's new solicitor on the file. On May 15, 2009, he also launched a stay application on her behalf. His notice of motion focuses on the fact her former counsel asked for an administrative stay pending a PRRA assessment, which the Officer has neglected or omitted to grant. Mr. Amana states, in making his decision, the Officer denied the Applicant the right to a due process available at law – a right to a Pre-Removal Risk Assessment since the Applicant had alleged a risk of return.

#### The Statutory Scheme

[10] The *Immigration and Refugee Protection Act (IRPA)* is clear on the following points:

1. Subsection 44(1) of the *IRPA* provides an Immigration Officer who is of the opinion a foreign national in Canada is inadmissible may prepare a report to the Minister (or his delegate) with subsection 44(2), stating if the Minister is of the opinion the report is well founded, the Minister may make a removal order in the circumstances provided for in the *Regulations*.

2. Paragraph 228(1)(c)(iii) of the *Immigration and Refugee Protection Regulations (IRPR)* stipulates the Minister shall not refer for hearing to the Immigration Division a well founded section 44 report in the case of a foreign national who does not hold a required visa, but rather shall make an exclusion order.
3. Subsection 99(3) of *IRPA* bars a person inside Canada from making a refugee claim if that person is subject to a removal order.
4. Section 166 of *IRPR* is entitled: “Application at port of entry”. It says: “An application for protection by a foreign national against whom a removal order is made at a port of entry as a result of a determination of inadmissibility on entry into Canada must, if the order is in force, be received as soon as the removal order is made. ... For greater certainty, the application does not result in a stay of the removal order.”

### Analysis

[11] It is trite law an Application for a stay of a removal order must establish three conjunctive elements: (1) serious issue to be tried; (2) irreparable harm; and, (3) balance of convenience.

#### a) Serious issue

[12] Counsel for the Applicants argued a serious issue arises because, under section 112 of *IRPA*, a person in Canada other than a person referred to in subsection 115(1) may, in accordance with the *Regulations*, apply to the Minister for protection if they are subject to a removal order that is in force.

[13] The PRRA scheme, under *IRPA*, is to the effect, a risk assessment should be conducted before a removal is enforced. Sections 160 and 166 of the *IRPR* pose a particular challenge when the expulsion order is made at a point of entry.

[14] There is no evidence before me the Applicants were offered the opportunity to make a PRRA application which is a different process than making a refugee claim.

[15] Miss Griffith apparently told the Immigration Officer she was scared to return to Guyana, but failed to say why when asked by the Immigration Officer. Ms. Griffith, who is only 18 years old alleges sexual abuse over a two year period, understandably has guilt feelings.

[16] In any event, counsel for the Applicant specifically asked for PRRA evaluation on May 13, 2009. It appears from a letter dated May 14, 2009, which is not in the record, faxed to former counsel for Miss Griffith, an official at CBSA or CIC said a PRRA application could be made but removal would not be deferred.

[17] I see the following serious issues arising out of the application for leave:

1. In the circumstances of this case, was there a breach of section 166 of the *IRPR* when the Applicants were not offered a PRRA application?
2. Were the expulsion orders reasonable in the circumstances particularly in the case of Miss Griffith, who seemingly stated she was afraid of returning to Guyana?

3. In the circumstances of this case, did the authorities act precipitously in scheduling their return for the following Saturday considering they were going to be detained and did this action cause them to deny the Applicants specific request for PRRA applications?

b) Irreparable harm

[18] In my view, irreparable harm has been met and is not speculative. The irreparable harm flows from the fact the Applicants have not had their risk of return assessed. In the normal course, such return without a risk assessment is a breach of the statutory scheme laid out in *IRPA*.

[19] Having said this, I am very aware that the Applicants' individual stories may be completely fabricated, but I am not in a position to assess their credibility. That is the task of a PRRA Officer, who will interview them.

c) The balance of convenience

[20] In the circumstances, the balance of convenience favours the Applicants.

[21] A copy of these reasons is to be placed in each file.

“François Lemieux”

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Judge

Ottawa, Ontario  
May 28, 2009

**FEDERAL COURT**

**SOLICITORS OF RECORD**

**DOCKETS:** IMM-2412-09 and IMM-2451-09

**STYLE OF CAUSE:** CASSANDRA GRIFFITH v. THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

AND BETWEEN

SHAWN FORDYCE v. THE MINISTER OF  
CITIZENSHIP AND IMMIGRATION

**PLACE OF HEARING:** Ottawa, Ontario

**DATE OF HEARING:** May 15, 2009

**REASONS FOR ORDER:** Lemieux J.

**DATED:** May 28, 2009

**APPEARANCES:**

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