Federal Court

Cour fédérale

Date: 20100407

Docket: IMM-1396-10

Citation: 2010 FC 367

BETWEEN:

ZEF SHPATI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER

HARRINGTON J.

[1] On 17 March 2010, I heard three motions on behalf of Mr. Shpati to stay his removal to Albania scheduled for 22 March 2010, until his applications for leave and for judicial review of three negative administrative decisions are dealt with by this Court. The first was a negative pre-removal risk assessment (court docket no. IMM-6518-09); the second the rejection of his request to apply for permanent residency from within Canada on humanitarian and compassionate grounds (court docket no. IMM-6522-09); and the third was the refusal of an enforcement officer, under

section 48 of the *Immigration and Refugee Protection Act* (IRPA), to defer his removal until after the outcome of the first two applications (court docket no. IMM-1396-10). After taking the matter under advisement, I granted a stay on 19 March 2010 in this matter, *i.e.* the decision of the enforcement officer not to defer removal. I dismissed the other two motions on the grounds of mootness.

[2] In my Order granting the stay, I stated that reasons would follow.

THE FACTS

[3] Mr. Shpati submits that he would be at risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment should he be returned to Albania. So far, he has unable to persuade any Canadian decision-maker to his way of thinking.

[4] His claim for refugee status was denied by the Refugee Protection Division of the Immigration and Refugee Board. This Court granted him leave to apply for judicial review, which was later dismissed on the merits by Madam Justice Snider.

[5] Mr. Shpati was born and spent the first 25 years of his life in a labour camp in Albania. In 1991, he was recognized as a "person of concern" by the United Nations High Commissioner for Refugees, and was granted permanent resident status in the United States. However, he was subsequently deported to Albania in 2005 for illegal use of his wife's green card. He immediately left Albania and came to Canada to make a refugee claim. The RPD invoked section 108 of IRPA

and rejected his claim on the basis that the reasons for which he sought protection had ceased to exist. The judicial review of that decision was dismissed as Madam Justice Snider found that that decision was not patently unreasonable. Her decision, reported at 2007 FC 237, was issued before *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, abolished the patent unreasonableness standard in judicial review.

[6] Thereafter, both his subsequent pre-removal risk assessment and his application to remain in Canada on humanitarian and compassionate grounds were also unsuccessful, but they are still alive in the sense that applications for leave to have the decisions judicially reviewed by this Court are pending.

THE ENFORCEMENT OFFICER'S DECISION

[7] The enforcement officer decided on 8 March 2010 not to defer the execution of the removal order. He wrote as follows:

> The Canada Border Services Agency (CBSA) has an obligation under section 48 of the *Immigration and Refugee Protection Act* to carry out removal orders as soon as reasonably practicable. Having considered all available information, I am not satisfied that a deferral of the execution of the removal order is appropriate in the circumstances of this case.

[8] The officer's notes to file comprise four pages. It is well-established that such notes constitute the reasons for a decision (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, 1 Imm. L.R. (3d) 1 at para. 44).

[9] The officer accurately noted that the request was on the basis of the pending litigation before this Court, his risk upon returning to Albania, his establishment in Canada, as well as the best interests of his wife and children.

[10] With respect to the two outstanding applications for leave and for judicial review he noted, quite correctly, that the mere filing of those applications does not preclude the Minister's officials from enforcing IRPA, including the execution of removal orders. He added:

> I note that the enforcement of Mr. Shpati's removal order does not negate him the right to have PRRA/H&C reassessed, if judicial review is granted by the Federal Court.

[11] He concluded that a deferral on the basis of the pending applications for leave and for judicial review was not warranted. As to the risk to Mr. Shpati on returning to Albania, he noted that the Refugee Protection Division had found him not to be a Convention refugee or a person in need of protection, and also that the PRRA officer had concluded that there were mechanisms in place in Albania to provide him with adequate, although not necessarily perfect, protection. On this point he concluded: "I am not satisfied that any new or significant personalized risk exists." It is not clear whether the officer was referring to risks subsequent to the rejection of Mr. Shpati's refugee claim, or subsequent to his negative PRRA decision.

[12] He added:

> I note that both the PRRA and H&C applications were made to, and decided by, competent bodies that have reviewed the evidence brought forth and have already made a determination with regards to risk and undue hardship.

[13] Finally he considered the best interests of Mr. Shpati's wife and children, who, through rather unusual circumstances, are currently in the United States. He was of the view that insufficient evidence had been submitted to justify a deferral on those grounds.

STAYS IN IMMIGRATION MATTERS

[14] The process undergone by Mr. Shpati is fairly typical of that undergone by refugee claimants who are not suspected of being inadmissible due to serious criminality or other grounds. It begins with an assertion by a person that he or she is a refugee within the meaning of the United Nations Convention or is otherwise in need of Canada's protection, as contemplated by sections 96 and 97 of IRPA. On arrival in Canada, a removal order is issued but stayed by operation of law until the claim is dealt with. If the decision by the RPD is not favourable, the person has the right to apply to this Court for leave and for judicial review. If successful, the application is referred back to the RPD for a fresh determination by another decision maker. If unsuccessful, the person has the opportunity to apply for a PRRA.

[15] Sections 112 and following of IRPA provide that a person such as Mr. Shpati, even if he had not made a refugee claim in the first place, is entitled to apply to the Minister for protection. In the case of a failed refugee claimant, the issue is whether there are new risks. Until a negative decision is rendered on the PRRA, section 232 of the Immigration and Refugee Protection Regulations provides that the applicant cannot be removed from Canada. However, once a negative PRRA assessment has issued, a removal order is enforceable. Section 48 of IRPA provides: "The foreign national against whom it was made must leave Canada immediately and it must be enforced as is

reasonably practicable." The removal order is enforceable even if the applicant makes a fresh application for a PRRA.

[16] An H&C application never in and of itself has the effect of staying a removal order.

[17] However, this Court in the exercise of its equitable jurisdiction may, in its discretion, stay a removal order. Such a stay has as its purpose the maintenance of the *status quo ante* pending the resolution of an application currently before the Court.

[18] The test applied by the Court for an interlocutory stay is the same as that for an interlocutory injunction. There must be a serious issue in the underlying proceedings before the Court, the applicant would suffer irreparable harm if the stay were not granted, and the balance of convenience must not favour the Minister (*Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302, 6 Imm. L.R. (2d) 123; *RJR - MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311).

[19] The general rule, as enunciated in *RJR MacDonald*, is that an issue is serious if it is neither frivolous nor vexatious. However, when the granting of the stay would in effect determine the outcome of the underlying proceedings, then the issue is not serious unless the Court assesses the likelihood of success (*Wang v. Canada (Minister of Citizenship and Immigration),* 2001 FCT 148, [2001] 3 F.C. 642, 13 Imm. L.R. (3d) 289).

THE MOTION HEARING

[20] A good part of the hearing dealt with the Court's concern over the implications of the decision of the Federal Court of Appeal in *Perez v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 171, 82 Imm. L.R. (3d) 167, and the range of discretion afforded an enforcement officer to defer removal. For all intents and purposes, *Wang* has been elevated to the status of a decision of the Federal Court of Appeal, given the ringing endorsement thereof by Mr. Justice Nadon in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness),* 2009 FCA 81, 79 Imm. L.R. (3d) 157. Nevertheless the stay motions in all three underlying applications were fully argued. However, I stated that if I granted a stay with respect to the decision of the enforcement officer I would in all likelihood dismiss the other two motions on the grounds of mootness, without coming to any conclusion as to the merits thereof. My reasoning is that the enforcement officer did not refuse to grant a deferment on the basis that the requests went beyond his narrow range of discretion under Section 48 of IRPA and that Mr. Shpati should have come directly to this Court. Rather, he took a look at both the PRRA and H&C decisions.

[21] It was open to Mr. Shpati to have only sought a stay of the enforcement officer's decision. Although it was undoubtedly wise for him to seek a stay in all three court files, particularly since the assessment of the serious issue aspect of an interim stay may be more elevated when the decision at issue is one of an enforcement officer not to defer, as opposed to a decision in a PRRA or H&C matter, the fact remains that having decided to grant a stay in one, I did not consider it necessary or appropriate to assess the merits of the other two.

[22] As the matter was both heard and decided on an urgent basis, I said I would provide reasons later. However the parties already have an outline of what I am about to say as a result of my speaking order in *Simbolon v. Canada (Minister of Citizenship and Immigration)*, court docket IMM-1193-10, issued 18 March 2010.

PEREZ

[23] In *Perez,* the underlying application for leave and for judicial review was with respect to a negative pre-removal risk assessment, not a decision of an enforcement officer not to defer removal. While that application for leave was pending, the authorities decided to enforce the removal order. The resulting motion for a stay was dismissed and Mr. Perez was returned to Mexico. However, leave to apply for judicial review was thereafter granted.

[24] At the hearing of the judicial review on the merits, Mr. Justice Martineau dismissed the application on the grounds that the matter was moot as Mr. Perez was no longer in Canada. Section 112 of IRPA, in Division 3 thereof, which deals with pre-removal risk assessments, provides that "…a person in Canada … may apply to the Minister for protection…"

[25] The matter went to the Federal Court of Appeal on a certified question. In a judgment delivered from the Bench, Mr. Justice Noël agreed that the issue was moot. He said at paras. 5 and 6:

> [5] […] a review of a negative decision of a PRRA officer after the subject person has been removed from Canada, is without object.

> [6] We also cannot detect any error in Martineau J.'s exercise of discretion in deciding not to hear the application despite its mootness.

[26] Thus, a person such as Mr. Shpati, who had the right to come to this Court to seek leave and, if granted leave, apply for judicial review of a negative pre-removal risk assessment, loses that right if removed from Canada against his will.

[27] There is currently a fundamental distinction between the enforcement of a removal order while a PRRA is pending, and when an H&C application is pending. Notwithstanding that the typical H&C application is for permission to apply for permanent resident status from within Canada, rather than from one's own country, as contemplated by section 11 of the Regulations, it has been held that the removal does not render that application nugatory (*Shchelkanov v. Canada (Minister of Employment and Immigration)* (1994), 76 F.T.R. 151, a decision of Mr. Justice Strayer, at para. 9; *Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, a decision of Mr. Justice Evans, at para. 20).

[28] No mention of this distinction was made in *Perez*. Perhaps the distinction lies in the fact that the Minister is empowered by section 25 of IRPA to grant permanent resident status if justified by H&C considerations, without any geographical limitation. On the other hand, section 112 of IRPA requires the applicant in a pre-removal risk assessment to be in Canada.

[29] Obviously the enforcement officer was not instructed on the implications of *Perez*. If he had, he could not possibly have said that the enforcement of the removal order did not negate Mr. Shpati's right to have the PRRA reassessed, if judicial review were granted. He erred in law.

[30] However, it is not enough to find that he erred in law. The Court of Appeal instructs us that we must also consider whether the reasoning of the decision shows that the law was actually followed (*Okoloubu v. Canada (Minister of Citizenship and Immigration)*, 2008 FCA 326, [2009] 3 F.C.R. 294, 75 Imm. L.R. (3d) 1). This brings us to Mr. Justice Pelletier's decision in *Wang* via *Baron*.

BARON

[31] *Baron* was on appeal to the Federal Court of Appeal on a certified question which was:

> Where an applicant has filed an application for leave and judicial review challenging a refusal to defer removal pending a decision on an outstanding application for landing, and a stay of removal is granted so that the person is not removed from Canada, does the fact that a decision on the underlying application for landing remains outstanding at the date the Court considers the application for judicial review maintain a "live controversy" between the parties, or is the matter rendered moot by the passing of scheduled removal date?

[32] In that case, unlike this one, the H&C application under section 25 of IRPA had not yet been decided. The Court held that the application for judicial review was not moot as a live controversy still existed. Mr. Justice Nadon fully endorsed Mr. Justice Pelletier's reasons in *Wang.* At paragraphs 66 and 67 he noted that the discretion an enforcement officer has to defer removal is limited, that the standard of review is reasonableness and that on the serious issue prong of the tri-

partite test in *Toth*, above. It is not enough that an issue be neither frivolous nor vexatious, "the Judge should take a hard look at the issue raised in the underlying application."

WANG

[33] The facts in *Wang* were also very different from the facts in this case. When Mr. Wang's temporary visa expired a year after his arrival here, he made a refugee claim. That claim was dismissed, as was his subsequent claim for consideration as a member of the Post-Determination Refugee Claimants in Canada Class (those entitled to a PRRA under the current Act). No application for leave and for judicial review was made of either decision. After being arrested on an immigration warrant arising from his failure to report for a removal interview, he married and then applied for permanent residence within Canada, with his wife's sponsorship. When the enforcement officer refused to defer his removal, there was no underlying application before this Court. What there was, was a very recent application to the Minister for permanent residency based on H&C grounds; those grounds being family unification, not personal risk.

[34] Mr. Justice Pelletier did not depart from the tripartite test applicable for interlocutory injunctions and interlocutory stays, but rather emphasized that the serious issue aspect "…becomes the likelihood of success on the underlying application since granting the relief sought in the interlocutory application would give the applicant the relief sought in the application for judicial review" (para. 11). Had a stay been granted in that case, the application for leave and for judicial review would have become pointless. However, in this case, the relief sought has many stages. In both the PRRA and H&C applications, leave must first be obtained. If not, that is the end of the

matter. If leave is obtained, then Mr. Shpati may or may not be successful in his applications for judicial review. It is only if he is successful that he will be entitled to a new PRRA or H&C review, as the case may be.

[35] Furthermore, the stay granted in this case may become moot if leave is not granted in the H&C or the PRRA applications. Thus, the stay might only be for three months, rather than the three years or so it takes to process an initial H&C, at least one in which the applicant resides in the Toronto area.

[36] Mr. Justice Pelletier pointed out that there are two aspects to deferrals. One is to defer in time or to postpone, and the other is to defer to another process.

[37] Deferrals in time may be justified if removal under section 48 of IRPA is not “reasonably practical” such as if there are difficulties in arranging travel arrangements or the person is currently unfit to travel. There may be other somewhat broader circumstances to justify a temporary deferral such as a scheduled medical procedure or the irretrievable loss of a child’s school year.

[38] In discussing “deferral” in the sense of granting precedence to or yielding to another process, he specifically referred to H&C applications and to what are now known as PRRA applications. If the process is successful, the person acquires the right to apply for landing, subject to meeting admissibility requirements.

[39] Consider his following words, at para. 41:

> In the case of H&C applications, the person making the application may not face threats to their personal safety upon their return to their country of origin, whereas, by definition, members of the PDRCC are subject to a risk to their life, or extreme sanctions or inhumane treatment.

[40] There was no risk element in Mr. Wang's H&C application. Mr. Shpati not only claims risk, which is the very essence of a PRRA, but there is also a risk element in his H&C. Even if the risk did not satisfy the requirements of sections 96 and 97 of IRPA, it might be such that he would face unusual and undeserved or disproportionate hardship if returned to Albania.

[41] The heart of Justice Pelletier's decision is the following:

> [50] The discretion to be exercised does not consist of assessing the risk. The discretion to be exercised is whether or not to defer to another process which may render the removal order ineffective or unenforceable, the object of that process being to determine whether removal of that person would expose him to a risk of death or other extreme sanction. If the process has not been initiated at the time of the request for deferral, or has been initiated as a result of the removal process, the person exercising the discretion could conclude that the conduct of the applicant is inconsistent with an allegation of fear of death or inhumane treatment. This is not a question of assessing the risk but rather of assessing the bona fides of the application.

[42] In this case, unlike *Wang*, the PRRA process is not over in that an application for leave and for judicial review had been initiated prior to the request for deferral. The H&C application was not taken at the last minute, there was a risk element alleged and, as in the PRRA, the process before this Court had already been initiated before the enforcement officer was asked to defer removal.

THE ENFORCEMENT OFFICER'S ERRORS

[43] Apart from failing to realize the implications of *Perez*, which was an error in law, the officer failed to assess the *bona fides* of the H&C and PRRA applications. Rather he seems to have assessed the risk, something which is clearly outside the discretion given to him by section 48 of IRPA, as noted by Mr. Justice Pelletier in paragraph 50 of *Wang*.

[44] I am also disturbed by the officer's comment quoted earlier that the PRRA and H&C applications had been decided by competent bodies. They may well be competent, but may also be wrong. The law which gives those bodies jurisdiction recognizes that they made have erred in law or in fact. That is precisely why the Federal Court has superintending power, which Court in turn may be reversed by the Federal Court of Appeal, which in turn may be reversed by the Supreme Court of Canada.

[45] Although an application for leave and for judicial review of a negative PRRA does not automatically result in a stay, I find it difficult to accept that Parliament intended that it was "reasonably practicable," for an enforcement officer, who is not trained in these matters, to deprive an applicant of the very recourse Parliament had given him.

THE TRIPARTITE TEST

[46] The serious and irreparable harm aspects are intertwined. The Enforcement Officer clearly misunderstood the PRRA process and refused to defer to another process, the application for leave

and for judicial review, notwithstanding that the very basis of a pre-removal risk assessment is the risk of persecution. Unquestionably the balance of convenience favours Mr. Shpati.

[47] I am mindful that words used to resolve a specific issue may possibly be treated as words of general application and used in other contexts. I have deliberately refrained from commenting on the situation, as in *Perez*, where it was a judge of this Court who refused to grant a stay. Nor do I rule out the possibility that an enforcement officer may defer removal in circumstances in which new events have occurred after the negative PPRA decision, such as natural disasters in the form of tsunamis or earthquakes or political upheavals such as "coup d'états."

[48] Nor am I saying an enforcement officer must automatically defer to an existing application for leave and for judicial review of a negative PRRA if satisfied that the process before this Court was instituted in good faith. In the future, enforcement officers should be more aware of *Perez*, and, if I may venture a suggestion, when it comes to requests to him or her to defer pending the outcome of proceedings in this Court relating to PRRAs or H&Cs with a risk element that the request be dismissed on the grounds that the matters in issue are beyond the officer's discretion and that the request for a stay should rather be addressed to this Court.

[49] A copy of these reasons shall be placed in court dockets IMM-6518-09 and IMM-6522-09.

"Sean Harrington"
Judge

Ottawa, Ontario
April 7, 2010

FEDERAL COURT

SOLICITORS OF RECORD

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