Federal Court  Cour fédérale

Date: 20111129

Docket: IMM-7299-11

Citation: 2011 FC 1380

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, November 29, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JOSEPH GOSHEN
ANAIT GOSHEN

Applicants

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary

[1] The applicants, who came to Canada four years ago, have exhausted all of the recourses available to remain in the country: a refugee claim to the Refugee Protection Division (RPD), a

pre-removal risk assessment (PRRA) application and an application made on humanitarian and compassionate (H&C) grounds. These applications were all refused because they did not establish the existence of a fear in their country of origin, Israel.

[2] With respect to this stay motion, the applicants have failed to establish the existence of a serious issue with respect to the officer's decision to refuse their H&C application.

[3] As the reasons in the decision on the H&C application indicate, the same fears were assessed by the RPD and it had found that the applicants were not credible. Furthermore, the same fear was reiterated in the PRRA application.

[4] The Federal Court dismissed the application for leave and judicial review (ALJR) of the RPD's decision and the applicants do not seem to have applied for judicial review of the PRRA decision.

[5] In their written submissions in support of this motion, the applicants reiterate the same risks and fears.

[6] It is well settled that the risks alleged before the RPD, the PRRA officer and the H&C officer were all found to be unsatisfactory and cannot constitute irreparable harm. This Court recently pointed this out in *Eid v Canada (Minister of Citizenship and Immigration)*, 2010 FC 639:

> [85] It is well settled that risk allegations that have already been assessed and determined to be unfounded cannot constitute irreparable harm for the purposes of a stay motion. The same narrative proposed to this Court, with no supporting evidence whatsoever, cannot show irreparable harm:

> [42] The remarks of this Court in this regard are relevant:
>
> > [55] The risks of return were already assessed in two administrative proceedings, by the panel and by the officer, and both made the same findings. Further, this Court confirmed the reasonableness of the Board's decision refusing the ALJR against the Board's decision. Since the order of this Court, the situation has not changed, as the PRRA confirmed.
> >
> > [56] This Court has often held that allegations of risk determined to be unfounded by both the Board and the PRRA cannot serve as a basis for establishing irreparable harm in the context of an application to stay (*Singh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 145, 137 A.C.W.S. (3d) 156). This principle relative to credibility is adaptable in the context of the failure to reverse the presumption of state protection. [Emphasis in original.]

(Also, *Jozsefne v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 1411, 348 FTR 233; *Malagon v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1068 at paragraph 56; *Tchoumbou v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 1399 at paragraphs 1 and 45.)

[7] According to the stay motion record, each decision from each decision-maker submitted into evidence rejected the applicants' allegations of a risk to their lives or safety if they were to return to Israel.

II. Introduction

[8] The applicants are submitting a motion for a stay of the removal order scheduled for December 12, 2011.

[9] This motion is incidental to an ALJR refusing the applicants an exemption on H&C grounds from the requirement to obtain a permanent resident visa outside of Canada, dated October 4, 2011.

III. Preliminary comment: amendment to the style of cause

[10] The applicants brought their proceeding only against the "Minister of Citizenship and Immigration". Because the "Minister of Public Safety and Emergency Preparedness" is the Minister responsible for the execution of removal orders, he should also be named as a respondent. For this reason, the style of cause in this case must be amended to add the Minister of Public Safety and Emergency Preparedness as a respondent, along with the Minister of Citizenship and Immigration.

IV. Facts

[11] The applicants, Joseph Goshen and Anait Goshen, are a couple. She is 52 years old and he is 61 years old. They are Israeli citizens and their families, including three children, are still in Israel.

[12] Four years ago, more specifically on December 13, 2007, the applicants arrived in Canada and claimed refugee protection. They based their refugee claim on their fear of persecution by the Israeli police because of their friendship with an Arab family and their refusal to become collaborators. They also alleged that they were victims of racism because they are not considered to be Jews and fear mistreatment because of the male applicant's Iranian origins.

[13] On July 26, 2010, the RPD rejected the applicants' refugee claim on the ground that their account lacked credibility. To support that argument, the RPD identified several omissions, inconsistencies and implausibilities in the evidence submitted.

[14] On November 25, 2010, the Federal Court dismissed the ALJR submitted by the applicants against the RPD's decision.

[15] On January 20, 2011, the applicants submitted their H&C application.

[16] On April 7, 2011, the applicants submitted a PRRA application.

[17] On July 5, 2011, their PRRA application was rejected. The applicants do not seem to have submitted an application against the PRRA decision.

[18] On October 4, 2011, the applicants' H&C application was refused.

[19] On October 20, 2011, the applicants filed an ALJR against the H&C decision. That ALJR is incidental to this motion.

[20] On November 10, 2011, the applicants were interviewed by an enforcement officer. During the interview, they were informed that they had to leave Canada. The applicants stated that they were ready to leave but that they did not have the means to pay for their plane tickets. The officer therefore issued plane tickets for a December 12, 2011 departure with Royal Jordanian.

[21] However, on November 16, 2011, the applicants appeared at the removal officer's office to inquire as to whether they could buy their own plane tickets. This request was accepted.

[22] On November 21, 2011, the applicants appeared at the removal officer's office with plane tickets for a December 11, 2011 departure with Air Canada. This itinerary was accepted by the removal officer.

[23] On November 23, 2011, the applicants served on the respondent and submitted to the registry of this Court this stay motion, which is accompanied by the ALJR of the H&C decision and which seeks the stay of their removal scheduled for December 12, 2011.

[24] Therefore, the applicants, who have been in Canada for four years, have exhausted all of the recourses available to remain in the country: a RPD refugee claim, a PRRA application and an H&C application. These applications were all refused because they did not establish the existence of a fear in their country of origin, Israel.

[25] Furthermore, the applicants told the removal officer that they were ready to leave and even bought their plane tickets for a December 11, 2011 departure.

V. Issue

[26] In its assessment of the merits of this stay motion, the Federal Court must determine whether the applicants satisfied the three jurisprudential criteria established by the Federal Court of Appeal in *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA), which are the following:

a. the existence of a serious issue to be tried in the underlying proceeding;

b. the existence of irreparable harm if the stay is not granted; and,

c. that the balance of convenience favours them.

[27] Because it is a conjunctive test, the applicants' failure to establish only one of these three criteria will result in the dismissal of the stay motion (*Jaziri v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1086 at paragraph 3; *Cardoza Quinteros v Canada (Minister of Citizenship and Immigration)*, 2009 FC 11 at paragraph 36).

VI. Analysis

[28] The Court agrees with the respondents that none of the criteria in the *Toth* test were satisfied.

A. *Serious issue*

[29] None of the issues raised by the applicants in their submissions constitutes a serious issue with respect to the officer's decision to refuse their H&C application.

(1) Statutory framework

[30] It is a fundamental principle that people who wish to obtain permanent resident status in Canada must apply abroad. This is clearly stated in subsection 11(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA). Section 6 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, repeats this requirement.

[31] However, subsection 25(1) of the IRPA states that the Minister has the discretionary authority to exempt a foreign national from any applicable criteria or obligations of the IRPA and grant the foreign national permanent resident status if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national. This is clearly meant to be a discretionary exemption (*Paz v Canada (Minister of Citizenship and Immigration)*, 2009 FC 412 at paragraphs 12, 15 and 17; *Singh v Canada (Minister of Citizenship and Immigration)*, 2009 FC 11, 340 FTR 29 at paragraphs 1, 14 and 17).

[32] To obtain this exemption, the applicants had the burden of demonstrating that the hardship they would face if they had to file their application for permanent residence outside of Canada would be unusual and undeserved or disproportionate (*Paz*, above, at paragraph 15; *Jakhu v Canada (Minister of Citizenship and Immigration)*, 2009 FC 159; *Singh*, above, at paragraph 18; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817). The applicants were not entitled to a specific result. To successfully challenge the H&C decision, they must demonstrate that the officer committed an error of law, acted in bad faith or applied the wrong principle.

[33] The weighing of these factors remains the responsibility of those officers. This Court must confirm the decision even if it would have assessed the factors differently. Even if it would have come to another conclusion, this Court must confirm the decision if the officer considered the relevant factors and complied with the limits imposed by the applicable criteria and procedures (*Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125, [2002] 4 FC 358 at paragraph 11; *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1, [2002] 1

SCR 3 at paragraphs 34-37; *Kisana v Canada (Minister of Citizenship and Immigration)*, 2008 FC 307, [2010] 1 FCR 360 at paragraph 26, aff'd. 2009 FCA 189).

[34] No one factor taken into consideration by an immigration officer in examining an H&C application is determinative (*Legault*, above; *Kawtharani v Canada (Minister of Citizenship and Immigration)*, 2006 FC 162 at paragraph 20).

(2) H&C grounds submitted by the applicants

[35] In support of their H&C application, the applicants argued their degree of establishment in Canada and a risk of return to Israel.

[36] A plain reading of the reasons for the decision by the officer demonstrates that the officer considered and analyzed all of the allegations and evidence submitted by the applicants.

(3) Assessment of the risks of return

[37] For their H&C application, the applicants submitted the same fears and risks of return as those submitted before the RPD and in their PRRA application, namely the following: 1) fear of persecution by the Israeli police based on their refusal to become collaborators and their friendship with an Arab family; 2) fear of being victims of racism because they are not considered Jewish; and, 3) fear of mistreatment because of the male applicant's Iranian origins.

[38] In their written submissions in support of this motion, the applicants reiterate, once again, the same risks and fears.

[39] As indicated in the reasons for the H&C decision, those fears were assessed by the RPD and it determined that the applicants were not credible. Moreover, the same fear was reiterated in the PRRA application.

[40] However, the Federal Court dismissed the ALJR of the RPD's decision and the applicants do not seem to have applied for judicial review of the PRRA decision.

[41] Furthermore, the officer conducted her own review of the allegations of fear with respect to the evidence submitted. The H&C officer noted the following:

> [TRANSLATION]
>
> Regarding the male applicant's surname, I note that it is Goshen, not Mansour. The male applicant stated in his PIF, which was submitted for his refugee protection claim, that he and his family had changed their name to Goshen in 1992. I note that the male applicant's surname is Goshen on his identity documents, that is, his marriage certificate, passport and record of civil status. The male applicant is listed as Jewish on his marriage certificate and record of civil status. The male applicant also speaks Hebrew and served in the army. The documentary evidence states that one must be Jewish to serve in the military. Considering these elements, I find, on a balance of probabilities, that the applicant is recognized as Jewish in Israel and that his surname has been established as Goshen. In conclusion, the male applicant did not adequately establish that his Iranian origins and surname caused him problems.

[42] These findings are reasonable and based on the evidence submitted. Consequently, the applicants failed to demonstrate the existence of a risk of return for their country of origin, Israel.

(4) Degree of establishment in Canada

[43] The applicants left their country of origin in December 2007, that is, barely four years ago. The H&C officer noted that the applicants:

- are 52 and 62 years old and have spent most of their lives in Israel;
- have members of their respective families in that country and have no family in Canada;
- speak several languages, including Hebrew;
- both held several jobs in Israel. Furthermore, the male applicant served in the military and is entitled to a pension. The female applicant, a citizen of Israel, will be entitled to a pension at retirement. Consequently, the applicants would be able to support themselves in Israel.

[44] The H&C officer also noted that the documents submitted by the applicants demonstrated a certain degree of establishment in Canada. The officer noted that the applicants:

- demonstrated a certain degree of integration;
- had taken English and French classes. They had made an effort to learn Canada's two official languages;
- had each held a job in Canada. The applicants had been unemployed for their first two years in Canada;
- had developed friendships in Canada.

[45] In light of all of the evidence submitted before her, the H&C officer found that the factor of the applicants' establishment in Canada was insufficient for granting an exemption. In fact, the officer found that the applicants had failed to demonstrate that their ties in Canada were significant enough for their departure from the country to constitute a disproportionate hardship.

[46] The applicants' integration was the result of personal choices they made despite their uncertain immigration situation in Canada.

[47] The officer was correct in finding that the applicants had not submitted evidence allowing her to find that they would face unusual and undeserved or disproportionate hardship by filing their application for permanent residence outside Canada.

[48] This decision is reasonable. The fact that the officer did not come to the result the applicants expected does not mean that she erred.

[49] Furthermore, the officer's findings are in line with the jurisprudence of this Court holding that an applicant's establishment is only one of many factors an officer must consider when making a decision. This is not a determinative factor in itself. In other words, establishment does not mean that there are automatically sufficient H&C grounds to allow the application. The officer must do a complete assessment of all of the relevant factors before making a decision (*Tarayao v Canada (Minister of Citizenship and Immigration)*, 2008 FC 350 at paragraph 16; *Buio v Canada (Minister of Citizenship and Immigration)*, 2007 FC 157 at paragraph 37; *Souici v Canada (Minister of Citizenship and Immigration)*, 2007 FC 66, 308 FTR 111 at paragraph 37).

[50] An H&C application is an exception to the general rule in Canada that an application for permanent residence must be made abroad. The H&C process is designed to provide relief from unusual, undeserved or disproportionate hardship, and the degree of establishment is only one of many factors to consider when assessing such an application.

[51] The test is not whether the applicants would be, or are, a welcome addition to the Canadian community, but rather whether a particular situation exists in their country of origin and whether removal may cause undue hardship:

> [20] The test to be applied by an immigration officer when reaching a decision under section 25 of the IRPA is to determine whether the person who requests an exception would suffer unusual, undeserved or disproportionate hardship if he were to follow the normal requirements of the Act. In *Irimie v. Canada (Minister of Citizenship and Immigration)* (2000), 10 Imm. L.R. (3d) 206, [2000] F.C.J. No. 1906 (QL), it is stated:
>
> > [26] I return to my observation that the evidence suggests that the applicants would be a welcome addition to the Canadian community. Unfortunately, that is not the test. To make it the test is to make the H & C process an ex post facto screening device which supplants the screening process contained in the Immigration Act and Regulations. This would encourage gambling on refugee claims in the belief that if someone can stay in Canada long enough to demonstrate that they are the kind of persons Canada wants, they will be allowed to stay. The H & C process is not designed to eliminate hardship; it is designed to provide relief from unusual, undeserved or disproportionate hardship. . . .
>
> [21] The Immigration Officer applied the right test and her assessment of the evidence was reasonable. [Emphasis added.]

(*Lynch v Canada (Minister of Citizenship and Immigration)*, 2009 FC 615; also, *Sharma v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1006 at paragraphs 23-27; *Singh*, above, at paragraph 51; *Mooker v Canada (Minister of Citizenship and Immigration)*, 2008 FC 518 at paragraph 35; *Zambrano v Canada (Minister of Citizenship and Immigration)*, 2008 FC 481, 326 FTR 174 at paragraph 74-75.)

[52] Even if a person is or may be a model in Canadian society, this has little relevance in the examination of an H&C application:

> [34] . . . Simply being employed in Canada and acting as a responsible citizen is not sufficient, and other factors must be present justifying humanitarian and compassionate grounds. . . . [Emphasis added.]

(*Adams v Canada (Minister of Citizenship and Immigration)*, 2009 FC 1193; also, *Jozsefne*, above, at paragraphs 23-24; *Diallo v Canada (Minister of Citizenship and Immigration)*, 2007 FC 1062 at paragraph 32; *Jakhu*, above, at paragraph 29.)

[53] In this case, the H&C decision is reasonable and based on the evidence submitted before the officer. The applicants are not challenging the facts and evidence on which the officer relied to make her decision.

[54] In fact, the applicants show no error in the officer's reasons. In challenging the H&C decision, the applicants argue that their integration in Canada and their alleged risk of return warrant the granting of their H&C application. The applicants are simply substituting their opinion for that of the officer, which is clearly insufficient to demonstrate a serious issue.

[55] Essentially, the applicants are asking this Court to reassess all of the evidence. As this Court has pointed out, assessment of the evidence is within the discretion of the H&C officer, who is a person with expertise, and it is not the Court's function to reassess facts which were put before the officer:

> [27] In fact, Mr. Diallo is essentially asking this Court to reassess all the evidence and to make a different decision.
>
> [28] However, it is not the Court's function to reassess facts which were put before the officer (*Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] F.C.J. No. 457 (QL), para. 11; *Lim v. Canada (Minister of Citizenship and Immigration)*, 2002 FCTD 956, [2002] F.C.J. No. 1250 (QL), para. 20).

> [29] It appeared from the H&C decision that the PRRA officer reviewed all the evidence submitted by Mr. Diallo in support of his H&C application.
>
> [30] It was entirely a matter for the officer, not the applicant, to decide on the weight to be given to each of the various points submitted by the applicant, based on the evidence before him. Mere disagreement as to the weight given to the various points submitted is not sufficient to warrant this Court's intervention.
>
> [31] The officer's conclusions were reasonable and were based on the evidence. Assessment of the evidence is within the discretion of the officer, who is a person with expertise. [Emphasis added.]

(*Diallo*, above.)

[56] In light of the foregoing, the applicants did not discharge their burden of establishing the existence of a serious issue to be tried in the context of their ALJR of the H&C decision.

[57] Therefore, this stay motion should be dismissed.

B. *Irreparable harm*

[58] It is important to emphasize that a negative PRRA decision was rendered with respect to the applicants a few months ago, that is, in July 2011. The PRRA officer found that there was no risk of persecution or threat to the lives of the applicants if they were to return to Israel. This decision does not seem to have been challenged by the applicants.

[59] Regarding irreparable harm, the applicants simply reiterated the same allegations that they raised in their H&C application, namely the following: a risk of return as well as the loss of their jobs and social network.

[60] The risks indicated by the applicants consist of the same facts and risks that were submitted to the RPD. These same facts were also reviewed by the Federal Court, which dismissed the ALJR of the RPD's decision.

[61] According to the stay motion record, each decision from each decision-maker submitted into evidence rejected the applicants' allegations of a risk to their lives or safety if they were to return to Israel.

[62] It is well settled that the risks alleged before the RPD, the PRRA officer and the H&C officer were all found to be unsatisfactory and cannot constitute irreparable harm. This Court recently pointed this out in *Eid*, above:

> [85] It is well settled that risk allegations that have already been assessed and determined to be unfounded cannot constitute irreparable harm for the purposes of a stay motion. The same narrative proposed to this Court, with no supporting evidence whatsoever, cannot show irreparable harm
>
> [42] The remarks of this Court in this regard are relevant:
>
> [55] The risks of return were already assessed in two administrative proceedings, by the panel and by the officer, and both made the same findings. Further, this Court confirmed the reasonableness of the Board's decision refusing the ALJR against the Board's decision. Since the order of this Court, the situation has not changed, as the PRRA confirmed.
>
> [56] This Court has often held that allegations of risk determined to be unfounded by both the Board and the PRRA cannot serve as a basis for establishing irreparable harm in the context of an application to stay (*Singh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 145, 137 A.C.W.S. (3d) 156). This principle relative to credibility is adaptable in the context of the failure to reverse the presumption of state protection. [Emphasis in original.]

(Also, *Jozsefne*, above; *Malagon*, above; *Tchoumbou*, above.)

[63] Considering that the applicants are not submitting any new elements with respect to their fear of return, there is an obvious absence of irreparable harm.

[64] Moreover, jurisprudence has repeatedly recognized that alleged harm must be more than the usual consequences of deportation:

> [21] These are all unpleasant and distasteful consequences of deportation. But if the phrase irreparable harm is to retain any meaning at all, it must refer to some prejudice beyond that which is inherent in the notion of deportation itself. To be deported is to lose your job, to be separated from familiar faces and places. It is accompanied by enforced separation and heartbreak. . . . [Emphasis added.]

(*Thanabalasingham v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 486; also, *Thirunavukkarasu v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1075; *Atwal v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427.)

[65] In this case, the applicants submitted no evidence of harm other than the inherent consequences of removal of a person who does not have legal status in Canada. Loss of employment and/or separation from friends are unfortunate, but they are simply inherent consequences of their removal.

[66] Contrary to the applicants' submissions, the simple fact that an ALJR is pending is not an obstacle to the enforcement of a valid removal order. The processing of their ALJR will continue regardless of where the applicants are (*El Ouardi v Canada (Solicitor General)*, 2005 FCA 42;

Akyol v Canada (Minister of Citizenship and Immigration), 2003 FC 931; *Silverio v Canada (Minister of Citizenship and Immigration)*, 2011 FC 295 at paragraph 15).

[67] In this case, it is clear that the applicants' allegations do not constitute irreparable harm.

C. *Balance of convenience*

[68] Under the circumstances, it is obvious that the balance of convenience favours the respondents in that the applicants had not established the existence of a serious issue or irreparable harm.

[69] Subsection 48(2) of the IRPA imposes the obligation to enforce a removal order as soon as is reasonably practicable.

[70] The Federal Court of Appeal has confirmed that, when assessing the balance of convenience, the notion of public interest must be taken into account. Moreover, it has confirmed that the fact that an applicant has availed himself or herself of several recourses since his or her arrival in Canada, all of which were unfavourable, may be considered in the assessment of the balance of convenience:

> (iii) Balance of convenience
>
> [21] Counsel says that since the appellants have no criminal record, are not security concerns, and are financially established and socially integrated in Canada, the balance of convenience favours maintaining the *status quo* until their appeal is decided.
>
> [22] I do not agree. They have had three negative administrative decisions, which have all been upheld by the Federal Court. It is nearly four years since they first arrived here. In my view, the balance of convenience does not favour delaying

> further the discharge of either their duty, as persons subject to an enforceable removal order, to leave Canada immediately, or the Minister's duty to remove them as soon as reasonably practicable: IRPA, subsection 48(2). This is not simply a question of administrative convenience, but implicates the integrity and fairness of, and public confidence in, Canada's system of immigration control. [Emphasis added.]

[71] In this case, the applicants were able to exhaust all of the recourses available to them under the IRPA.

[72] The balance of convenience therefore favours the respondents.

VII. Conclusion

[73] In light of the foregoing, the applicants do not meet the jurisprudential requirements for obtaining a judicial stay.

JUDGMENT

THE COURT ORDERS the dismissal of the motion for a stay of removal.

"Michel M.J. Shore"
Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

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DATED:	November 29, 2011

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