Federal Court

Cour fédérale

Date: 20111129

Docket: IMM-8265-11

Citation: 2011 FC 1381

Montréal, Quebec, November 29, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JOZELLE MICHELLE JACKSON

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant's motion for a stay of the execution is in regard to a removal scheduled to be carried out on Thursday, December 1, 2011.

[2] The underlying judicial review application challenges the humanitarian and compassionate application [H&C] refusal, dated September 29, 2011, which found that there was no unusual,

underserved or disproportionate hardship to the Applicant if her application was not processed from within Canada.

[3] From the Applicant's motion record it would appear that she is also attempting to establish that there is a "serious issue" to be tried (in file IMM-8264-11, with regard to the refusal of her Pre-Removal Risk Assessment [PRRA], on which no motion for a stay of removal has been filed but which is "piggy-backed" onto the motion of this file [IMM-8265-11]).

II. Background

[4] The Applicant, Ms. Jozelle Michelle Jackson, is neither a permanent resident of Canada, nor a Convention refugee. As such, she is the subject of an enforceable removal order, does not have any legal status to remain in Canada, and pursuant to subsection 48(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*], must leave immediately.

[5] On March 5, 2002, Ms. Jackson entered Canada on a temporary visitor's visa and remained illegally in the country past the authorized date.

[6] In September 2005, about three and a half years after Ms. Jackson's arrival in Canada, she made a claim for refugee protection on the basis of her fear of her brother Allison, with whom she lived in St-Vincent, and who allegedly assaulted and threatened her because she told a neighbor that he was the masked man who had assaulted him.

[7] Her children, 5 year old Krystal Jhanah and 3 year old Kamarrie Jovon, were both born in Canada, in 2006 and 2008 respectively.

[8] On August 3, 2006, the Refugee Protection Division [RPD] rejected Ms. Jackson's claim because she failed to rebut the presumption that effective and adequate State protection was available to her in St-Vincent; although she never denounced her brother to any authority in her country, her brother had been charged, arrested on several occasions and prosecuted by St-Vincent's police for other infractions. The RPD also noted that Ms. Jackson's delay in seeking refugee protection reflected negatively on her alleged fear.

[9] On August 16, 2006, leave to seek judicial review of the negative RPD decision was denied by the Federal Court.

[10] On January 29, 2007, Ms. Jackson submitted an H&C application based on (1) her establishment and ties in Canada; (2) the best interest of her children; and (3) the same allegations of risk as those before the RPD and in her PRRA application.

[11] On January 29, 2011, Ms. Jackson submitted a PRRA application based on new allegations of risk and fear of her ex-boyfriend, Mr. Kamal Baptiste, who abused her in Canada, and also on the same allegations of risk and fear as those submitted, assessed and rejected by the RPD with respect to her brother Allison.

[12] The H&C and PRRA applications were decided by the same officer.

[13] On September 22, 2011, Ms. Jackson's PRRA application was rejected because the PRRA officer found that, although domestic violence remains a serious problem in St Vincent, the government is actively seeking to address the issue and a number of reasonable avenues exist by which Vincentian women may seek the protection of their State. The PRRA officer found that Ms. Jackson's evidence was insufficient to rebut the presumption that the Vincentian State was unwilling or incapable of protecting her, especially, in light of the facts (1) that criminal charges were brought against Mr. Baptiste in Canada, which would assist her in convincing Vincentian authorities of the threat against her; and (2) that the Applicant has a friend who is a police constable in St-Vincent, who could assist her in obtaining protection.

[14] Regarding Ms. Jackson's fear of her brother Allison, the PRRA officer noted that no new facts or "new evidence" pursuant to paragraph 113(*a*) of the *IRPA* had been presented by Ms. Jackson since the RPD's decision. As such, the PRRA officer could not conclude differently from the RPD.

[15] On September 29, 2011, Ms. Jackson's H&C application was rejected because the PRRA officer determined, based on the limited evidence produced, that (1) the Applicant has not established herself in Canada to such a degree that returning to St-Vincent would constitute an unusual and undeserved or disproportionate hardship; (2) she did not establish that resettling in St-Vincent would negatively impact the best interests of her children, in light of their very young age, the presence of their mother and extended family in St-Vincent and the fact that they will retain their Canadian citizenship which will permit them to return to Canada whenever they choose; and

(3) given the availability of State protection and the other services available to the Applicant, she would not experience hardship on the basis of the risk factors presented.

[16] On November 14, 2011, Ms. Jackson filed applications for leave and for judicial review against both the PRRA (IMM-8264-11) and H&C (IMM-8265-11) decisions.

[17] On November 18, 2011, Ms. Jackson's removal from Canada was scheduled to be executed on December 1, 2011.

III. Issue

[18] Has the Applicant met the three-prong test set out in *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA)?

[19] The Court is in full agreement with the position of the Respondent.

[20] The Applicant is not entitled to a stay of the removal order. She has failed to demonstrate that she satisfies any of the three-pronged conjunctive test criteria:

(1) no serious issue to be argued in their underlying application;

(2) absence of an irreparable harm; and,

(3) the balance of convenience favours the Minister.

[21] The granting of a stay is an exceptional measure as stated by Justice J. François Lemieux in *Jordan v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 1076 (QL/Lexis) (TD), and is not to be based on equity considerations:

> [22] This Court does not have original equitable jurisdiction to decide, generally speaking, whether it is fair or unfair to remove someone from Canada. This Court can only intervene in defined circumstances by applying proper legal principles which, in this case, place upon the applicants the burden of meeting the tripartite test for granting stays. [Emphasis added].

IV. Analysis

A. *Serious Issue*

[22] Ms. Jackson is in disagreement with the PRRA officer's appreciation of the facts and the evidence. Nevertheless, the manner in which the PRRA officer weighed the facts, the risk, the relevant H&C factors and the evidence is not sufficient for this Court to intervene (*Singh v Canada (Minister of Citizenship and Immigration)*, 2008 FC 471 at para 4).

(1) Risks of Return

[23] The fact that Ms. Jackson disagrees with the PRRA officer's factual assessment and repeats her explanations that "there is a real fear for her life and well-being … by her brother and from the boyfriend", that were dismissed, does not warrant this Court's intervention. It is within the PRRA officer's jurisdiction to assess the probative value, the weight, the relevancy or the sufficiency to be given to the documentary evidence before him.

[24] It is trite law that the burden of proving a PRRA or H&C claim for protection rested with Ms. Jackson.

[25] Ms. Jackson was required to show she would personally be at risk in St-Vincent in order to sustain a finding of refugee protection (PPRA) or a finding of unusual, undeserved or disproportionate hardship (H&C) (*Maichibi v Canada (Minister of Citizenship and Immigration)*, 2008 FC 138 at para 21).

[26] The risks alleged by Ms. Jackson were the same as those that were rejected by the RPD. Still, the PRRA officer relied on up-to-date documentation. No new facts as to risks of return emerged for the purpose of the PRRA analysis, and the evidence presented by Ms. Jackson in support of her allegations of risk did not allow the PPRA officer to conclude differently from the RPD.

[27] The evidence submitted in support of her allegations of risk to the PRRA officer was unquestionably deficient.

(2) <u>Best interest of the children</u>

[28] Ms. Jackson essentially argues that the PRRA officer would have erred by not being “alert, alive, and sensitive” to the interests of her Canadian-born children, who “are entitled to all the rights, services, and benefits of a Canadian, particularly in the field of education and health”.

[29] Ms. Jackson also adds that “in this case, where the child is not able to finish his school year or even the school semester, the Immigration Officer should have taken this into consideration and delayed the deportation”.

[30] Ms. Jackson cannot in a stay motion, attached to an underlying application for leave and for judicial review of her H&C decision, which is already "piggy-backed" by arguments against her PRRA decision, also attack in a collateral way the refusal by a Removals officer to defer the execution of her removal.

[31] Aside from the fact that Ms. Jackson's 5 year old child is currently attending kindergarten in a "half day program" and the 3 year old child is not yet of school age, the jurisprudence of this Court holds that disruption or loss of schooling does not constitute irreparable harm and that removal from school is "a routine, if painful, incident of removal" (*Selliah v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261).

[32] Contrary to Ms. Jackson's assertions, in determining whether the hardship flowing from having to leave Canada would be unusual or disproportionate, it is clear that the H&C officer was "alert and sensitive", and "well identified and defined" the children's best interests, pursuant to the standards set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 and *Canada (Minister of Citizenship and Immigration) v Legault*, 2002 FCA 125, [2002] 4 FC 358.

[33] The Federal Court of Appeal has confirmed in *Owusu v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 FCR 635, that it was up to an applicant to submit convincing evidence relating to the best interests of the children.

[34] In this context, the H&C officer reasonably concluded that there was insufficient evidence before him to demonstrate that the children would not be able to adjust or would be in any risk if they followed their mother to her country of citizenship.

[35] As stated in *Legault*, above, foreign nationals cannot rely on the existence of Canadian born children to delay or defeat the execution of their lawful removal from Canada:

> [12] … It is not because the interests of the children favour the fact that a parent residing illegally in Canada should remain in Canada (which, as justly stated by Justice Nadon, will generally be the case), that the Minister must exercise his discretion in favour of said parent. Parliament has not decided, as of yet, that the presence of children in Canada constitutes in itself an impediment to any "refoulement" of a parent illegally residing in Canada (see *Langner v. Minister of Employment and Immigration* (1995), 184 N.R. 230 (F.C.A.), leave to appeal refused, SCC 24740, August 17, 1995). [Emphasis added].

[36] In these circumstances, the H&C officer did not ignore the interests of the children and consequently committed no reviewable error in considering their interests.

[37] It is settled law that the PRRA officer did not have the jurisdiction to consider H&C factors in the adjudication of Ms. Jackson's PRRA application. These factors were considered in the H&C assessment.

[38] It is also noted that in the context of an H&C application, "risk should be addressed as but one of the factors relevant to determining whether the applicant would face unusual, and underserved or disproportionate hardship" (*Sahota v Canada (Minister of Citizenship and Immigration)*, 2007 FC 651. It is not determinative of an H&C application. The same is to be said of the establishment/integration of an applicant in Canada as well as the best interests of the children.

[39] Considering that the PRRA officer's determination and findings pertaining to establishment/integration were not challenged by Ms. Jackson, they are deemed to be admitted and correct.

[40] In effect, Ms. Jackson is asking the Court to re-weigh the evidence before the PRRA officer; however, the officer rendered his assessment with both thorough consideration and reasons.

[41] Accordingly, Ms. Jackson's arguments do not serve to impugn neither the H&C decision nor the PRRA decision.

B. *Irreparable Harm*

[42] Ms. Jackson presents no specific arguments or evidence on the issue of irreparable harm.

[43] Ms. Jackson's argument for the irreparable harm part of the tripartite test set-out in *Toth*, above, would pertain to her allegations of risk based on her fear of her brother and her ex-boyfriend, as well as the harm to her children stemming from their resettlement in St-Vincent.

[44] It is not enough for Ms. Jackson to allege in her written submissions that she or her children will suffer irreparable harm without further demonstration or evidence.

[45] "Irreparable harm" must not be speculative nor can it be based on a series of possibilities, and, therefore, the production of non-speculative, objective, evidence as to irreparable harm is

required (*Atakora v Canada (Minister of Employment and Immigration)* 1993, 68 FTR 122). Such evidence has not been adduced in the present case.

[46] For the purposes of a stay of removal, "irreparable harm" is a very strict test. It implies the serious likelihood of jeopardy to an applicant's life or safety. It must be more than unfortunate hardship, including breakup or dislocation of family:

> [21] … 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…

(*Melo v Canada (Minister of Citizenship and Immigration)* (2000), 188 FTR 39).

[47] The risks invoked by Ms. Jackson in her motion are based on the same alleged incidents and narrative that were deemed not to be founded by the RPD, the PRRA assessment and the H&C assessment. It is trite law that allegations of risk that were found insufficient to ground a claim for protection cannot serve as the basis for the establishment of "irreparable harm" in a stay application. In *Singh v Canada (Minister of Citizenship and Immigration)*, 2005 FC 145, Justice Yves de Montigny stated:

> [14] Turning now to the irreparable harm requirement, the applicant has failed to demonstrate that he is really at risk if he should be removed to India. As held by this Court in a number of cases, when the applicant's account has been found not to be credible both by the Refugee Division and a PRRA officer, this same account cannot serve as a basis for an argument supporting irreparable harm in a stay application: *Akyol v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1182; *Saibu v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 151; *Hussain v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 751; *Ahmed v. Canada (Minister of Citizenship and Immigration)*, [2001] 1 F.C. 483 (T.D.). [Emphasis added].

[48] The irreparable harm alleged by Ms. Jackson concerns the "usual consequences of deportation" which the Court of Appeal specifically rejected as insufficient to meet the test for irreparable harm (*Atwal v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427).

[49] In light of Ms. Jackson's personal circumstances and the lack of personalized evidence, any allegation of irreparable harm is pure speculation.

C. *Balance of Convenience*

[50] Ms. Jackson does not have the right to remain in Canada as she has not demonstrated that the balance of convenience favours the non-application of the law.

[51] The Respondent has a statutory duty to execute removals as soon as is practicable (section 48 of the *IRPA*). In a case such as this, where an applicant has not demonstrated that a serious issue and irreparable harm exists, the balance of convenience undoubtedly favours the Respondent.

[52] There is a public interest in enforcing removal orders in an efficient, expeditious and fair manner and in supporting the efforts of those responsible for doing so. Only in exceptional cases will a person's interest outweigh the public interest (*Aquila v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 36 (QL/Lexis) (TD); *Kerrutt v Canada (Minister of Employment and Immigration)* (1992), 53 FTR 93 (TD); *Dugonitsch v Canada (Minister of Employment and Immigration)* (1993), 53 FTR 314 (TD)).

[53] The fact that the person seeking a stay order has had the benefit of a series of procedures within the immigration system can also be taken into account in deciding that the balance of convenience favours the execution of the law by the Minister (*Selliah*, above).

[54] Ms. Jackson has had her allegations of risk analyzed three times (RPD, PRRA, H&C); and, it has been found that no protection is warranted, nor is there an undue hardship based on risk or any other ground in evidence.

[55] The fact that the person seeking a stay order has no criminal record, is not a security concern and is financially established and socially integrated in Canada does not mean that the balance of convenience favours granting a stay order. In dismissing the motion for a stay in *Selliah*, above, the Federal Court of Appeal stated:

> [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 … 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].

[56] It cannot be said that Ms. Jackson established herself in Canada more than any other refugee who is given similar opportunities in Canada while undergoing the refugee determination process, she spent considerable time in Canada (since 2002), living here illegally and in defiance of Canadian immigrations laws.

[57] As noted by Justice Pierre Blais, in *Lee v Canada (Minister of Citizenship and Immigration)*, 2005 FC 413:

> [9] In my view, the officer did not err in determining that the time spent in Canada and the establishment in the community of the applicants were important factors, but not determinative ones. If the length of stay in Canada was to become the main criterion in evaluating a claim based on H & C grounds, it 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. (*Irimie v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1906).

[58] Ms. Jackson's establishment was not due to circumstances beyond her control. It would defeat the purpose of the *IRPA*, if the longer an applicant was to live illegally in Canada, the better his/her chances to stay, even though he/she would not otherwise qualify as a refugee or permanent resident. A failed refugee claimant is entitled to use all the legal remedies at their disposal, but must do so knowing full well that removal will be more painful if it eventually occurs and even though she considers Canada, a better place to live than St-Vincent and the Grenadines, this is not determinative on an H&C application and does not reflect Parliament's intent in enacting section 25 of the *IRPA* (*Serda v Canada (Minister of Citizenship and Immigration)*, 2006 FC 356 at para 21, 23 & 31).

[59] Lastly, the deportation of individuals while they have outstanding leave applications and/or other litigation before the Court does not constitute a serious issue or irreparable harm. Ms. Jackson may conduct her litigation from outside Canada. There is no evidence of an adverse impact of the deportation on the application for leave and, if granted, the judicial review. Removal does not

adversely affect rights on a leave application or automatically render the leave application moot (*Akyol v Canada (Minister of Citizenship and Immigration)*, 2003 FC 931 at para 11).

[60] Ms. Jackson has come to the end of her immigration process. The balance of convenience clearly favours the Minister.

V. Conclusion

[61] For all of the above-mentioned reasons, the Applicant's stay application is denied.

JUDGMENT

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

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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