Federal Court Cour fédérale

Date: 20130305

Dockets: IMM-1421-13
IMM-1422-13

Citation: 2013 FC 233

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, March 5, 2013

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

NAGALOGATHEVY SIVAGURUNATHAN

Applicant

and

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

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicant, Nagalogathevy Sivagurunathan, filed with this Court two applications for a stay of a removal order against her, which must take effect on March 6, 2013. The removal is to be to Sri Lanka. The Court agreed to hear these matters on March 4 because of the imminent removal

of the applicant. The same order must be rendered in the both files and the reasons for this order will be the same in both files. Thus, both will contain the same reasons.

[2] Counsel for the respondents argued that the applications for a stay should be rejected because they were filed late. In fact, the applicant knew since February 7 that she would be removed in the beginning of March and the date of March 6, 2013, had been known to her since February 14. The applicant filed her applications for a stay on March 1. Given the finding that I made on the stay itself, I decline the opportunity given me to dispose of the matter on this narrow basis. It should be remembered, however, that this Court established more than 20 years ago that the stay requested at the last minute could be rejected. In *Membreno-Garcia v Canada (Minister of Employment and Immigration*, [1992] 3 FC 306, Reed J. found:

> "In my view, the bringing of a request for a stay at the very last minute is often in itself reason to refuse the request." (page 315)

[3] In this case, the applicant arrived in Canada on August 14, 2008. It was only on October 22, 2008, that she made a refugee claim. This claim was refused on October 18, 2010. An application for leave for judicial review of this refusal was submitted to this Court and it was rejected on March 14, 2011. A pre-removal risk assessment (PRRA) under section 112 of the *Immigration and Refugee Protection Act* (the Act) was submitted on October 24, 2011; the said application was rejected on November 14, 2012.

[4] The applicant also raised humanitarian considerations in an application for permanent residence to allow her to submit her application for permanent residence from Canada (section 25 of the Act).

This application was also rejected. The Senior Immigration Officer's decision was made on November 16, 2012, but the applicant stated that she only received it on February 7, 2013.

[5] Both the decision on the pre-removal risk assessment (IMM-1421-13) and the decision on the application for permanent residence in Canada for humanitarian and compassionate considerations (IMM-1422-13) are subject to applications for judicial review within the meaning of section 72 of the Act. These two applications are all recent; therefore the applications for leave have not been heard.

[6] The applicant argued that the pre-removal risk assessment and her permanent residence application for humanitarian and compassionate considerations were poorly decided and therefore there must be a stay of the removal order to reverse these decisions.

[7] To obtain the said stay, the applicant must satisfy the Court that a serious question must be argued, that the stay is necessary to prevent irreparable harm from being done to her and that the balance of convenience is in her favour (*R.J.R. - Macdonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311; *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (FCA)).

[8] In a supported oral argument, counsel for the applicant presented his argument with vigour and eloquence that the Senior Immigration Officer (the decision-maker)—the same in both files—[Translation] "breached the duty of natural justice and fairness and not expeditiously". He said that the decision-maker failed to make an item-by-item analysis for each action before him, merely

considering that the questions raised by the applicant in these two actions had already been the subject of a decision for which leave for judicial review was refused.

[9] It should be remembered that applications for leave are decided on the basis of the "fairly arguable" test set out in *Bains v Canada (Minister of Employment and Immigration)*, [1990], 47 Admin. L.R. 317 (FCA). If the Court refused permission because the case did not meet a test such as the "fairly arguable" test, was it not reasonable for the decision-maker to consider that arguments based on different facts were required to make a different decision?

[10] Further, the applicant filed a grievance with the PRRA officer for not having made an item-by-item analysis. According to her, that was the error that constitutes the serious issue that must be satisfied at the first test giving way to a stay. As for the decision-maker's review with respect to the application to obtain permanent resident status for humanitarian and compassionate considerations, the applicant also grieved the failure to consider the best interests of the children (apparently the applicant was referring to her daughter's children with whom she has been living for several years), a consideration that is expressly provided for in section 25 of the Act.

[11] The difficulty that the applicant is facing is that her arguments must be measured against the applicable test in both actions. Therefore, a PRRA decision is not an appeal of the decision of the Refugee Protection Division (RPD). If the same facts were submitted to the PRRA officer, there is nothing new to be considered. Section 113 of the Act is clear in this regard. In the words of paragraph (a), "an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection…". This burden has not been discharged in this case. Even at the hearing before this Court, counsel for the applicant was not able to specifically point to

anything new. She also did not meet the test of proving a personalized risk. It was reasonable for the officer to reject the application since nothing new, strictly speaking, was brought before him and since he could not act in an RPD appeal.

[12] The applicant is faced with the same difficulty in her file under section 25 of the Act. This application cannot be a refugee claim submitted before another decision-maker. In fact, a test also exists in this area that must be met by the applicant. The applicant relied on her status of establishment in Canada and the risks that a return to Sri Lanka could result in. Again, the issue of risk does not help her since it is again an attempt to present the same argument: the risks incurred are no different than those dealt with by the RPD and the decision-maker could reasonably be satisfied with this analysis. It would have been unreasonable, *arguendo*, if he did not do it. On the basis of the file as it was, the decision-maker only had to consider the applicant's establishment in Canada.

[13] In this regard, the applicant's burden was to satisfy the decision-maker that the application for permanent residence that had to be made outside Canada, as required under section 11 of the Act, could be made in Canada because if it was made outside Canada, it would cause unusual and undeserved or disproportionate hardship. This is the test. The mere fact of the removal outside Canada certainly has its disadvantages. But these disadvantages must be to such a degree that they are unusual hardships that would be undeserved or disproportionate. Further, the Act specifically provides for the best interests of the child directly affected as a humanitarian and compassionate consideration. It is a burden that the applicant failed to discharge despite the sympathy that her case could inspire.

[14] The allegation initially made before this Court was that the interests of the child directly affected in this case would have to be considered to receive two commentaries. First, what is before the Court is the case as submitted to the officer under section 25. No such argument was before him and no such argument could succeed before this Court. At best, the applicant stated that she was close to her grandchildren and that they "will definitely suffer hardship as we all are very close". Also, it is far from clear that the argument could have been successful had it been argued more vigorously. The Act contemplates the "interests of a child directly affected". In this case, they are the applicant's grandchildren with whom she shares their parents' home.

[15] Therefore, serious questions were not shown before this Court. Repeatedly making the same argument based on the same evidence would not be sufficient. As for the establishment in Canada, the evidence simply does not satisfy the test for unusual and undeserved or disproportionate hardship. It is worth noting that the decision-maker's decisions in these matters benefit from deference and that they will only be reviewed if they are not reasonable.

[16] It must be remembered that the applicant's status in Canada has been unsettled for a long time. Since 2008, when she made a refugee claim in Canada, her status has never been recognized. The actions have added up and at every stage the same argument was made, without success. The only new argument, in any meaningful sense, was that of establishment in Canada after several years of essentially non-existent status, which was at best very unsettled. As stated, this single argument does not satisfy the test.

[17] Therefore, it is not necessary to consider the two other elements of the three-prong test, i.e. balance of convenience and irreparable harm. Failure to satisfy one of the elements of the test to

obtain a stay is sufficient. If I had to do it, I would have found that the applicant had failed to meet her burden with respect to the other elements as well.

[18] I am not persuaded that irreparable harm always requires a serious risk that endangers life or safety. At the same time, the mere application for judicial review alone would not prevail over the stay of the removal order. More is required. In this case, the applicant did not show a serious risk for her, other than general documentary evidence. She also did not show a strength of argument that would render illusory a judicial review otherwise based on very serious and well supported issues. The applicant did not satisfy either.

[19] It then follows that the balance of convenience is not in the applicant's favour. The Act provides that the removal order must be relatively expeditious (section 48 as amended in December 2012). The public interest in the removal taking place to maintain the integrity of the system (*Membreno-Garcia v Canada* (*Minister of Employment and Immigration*, [1992] 3 FC 306) also prevails when there is no serious question or irreparable harm.

[20] Accordingly, the application to stay the removal order planned for March 6, 2013, is dismissed.

ORDER

THE COURT ORDERS that the application to stay the removal order planned for March 6, 2013, is dismissed.

The style of cause in both records is amended to include the Minister of Public Safety and Emergency Preparedness who is responsible for the execution of removal orders.

"Yvan Roy"

Judge

Certified true translation

Catherine Jones, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1421-13 & IMM-1422-06
STYLE OF CAUSE:	NAGALOGATHEVY SIVAGURUNATHAN v MCI ET AL
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	March 4, 2013
REASONS FOR ORDER BY:	ROY J.

DATED: March 5, 2013

APPEARANCES:

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