Federal Court

Cour fédérale

Date: 20170314

Docket: IMM-1098-17

Citation: 2017 FC 276

[ENGLISH TRANSLATION]

Montréal, Quebec, March 14, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ANNE FLAVIA CRASTA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

ORDER AND REASONS

[1] In a decision rendered on February 28, 2017, an enforcement officer denied the applicant a stay of execution of a removal order scheduled for March 15, 2017. An application for leave to seek judicial review of this decision was filed on March 8, 2017. This is the application for judicial review underlying the application for stay.

[2] In these matters, an applicant must provide the Court with clear, compelling evidence that the three parts of the three-stage test described in *RJR -- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 and *Toth v. Canada (Minister of Employment and Immigration)*, [1988], 86 NR 302 (FCA) have been satisfied. If the applicant fails to satisfy one of the three parts, the application is denied. The parts are well known. They are:

1. Is a serious constitutional issue to be determined?
2. Will the applicant suffer irreparable harm if the stay is not granted?
3. Does the balance of convenience favour the applicant?

[3] The applicant arrived from the Republic of India on September 23, 2004. She had travelled on a false Canadian passport and had no baggage or ticket, therefore, the route she took to Canada could not be determined. She has since launched many appeals in the hope of not having to return to her home country. Her applications to be recognized as a refugee or person in need of protection, a pre-removal risk assessment (PRRA), and four other applications citing humanitarian and compassionate grounds were all dismissed. Applications for judicial review were filed before this Court regarding the application for refugee status, the PRRA application, and two of the four applications on compassionate and humanitarian grounds, but they were unsuccessful.

[4] The applicant is now challenging the decision of the enforcement officer who refused to grant a stay. The primary purpose of the application filed with the enforcement officer was not to seek an administrative stay, as I understand the position taken by the applicant, but to obtain the opportunity to remain in the country through an enforcement officer. As the enforcement officer

noted, it would be impossible to determine the purpose for which such a stay would be granted. It is common knowledge that the enforcement officer has very narrow jurisdiction under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, which stipulates:

Enforceable removal order **48(1)** A removal order is enforceable if it has come into force and is not stayed.	**Mesure de renvoi** **48(1)** La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
Effect **(2)** If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.	**Conséquence** **(2)** L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être exécutée dès que possible.

Counsel for the applicant recognizes the limits of discretion that can be exercised. He cited complete passages from *Baron v. Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311 [*Baron*]. The power to defer a removal is only related to the timing of the removal. It does not involve the enforcement officer cancelling the removal order. I cite one of the paragraphs in *Baron*:

> [51] "In order to respect the policy of the Act which imposes a positive obligation on the Minister, while allowing for some discretion with respect to the timing of a removal, deferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. With respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety."

[5] Here, few elements are cited. The applicant argued that the serious issue involved the officer's refusal to consider all of the evidence submitted and that she was apparently not receptive, sensitive or attentive to the applicant's situation. The applicant also claims to fear

persecution for her membership in a social group (she is Catholic and a woman). This persecution involves sexual assault and violence against women in India.

[6] These general allegations are in no way personalized and, in any case, have already been appealed before the panels. The enforcement officer could not grant such an application.

[7] The applicant cannot raise a question that she would say is serious because it is neither trivial nor vexatious. This is not the test. In *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FCR 682 [*Wang*], the Court held that a party seeking the same relief through an interlocutory application as the relief to be obtained on the merits of the judicial review must make this demonstration not on the basis of a non-trivial or vexatious question, but on the likelihood of success. Pelletier J. wrote the following in paragraph 10 of *Wang*:

> [10] … It is this congruence of the relief sought in the interlocutory and the final application which leads me to conclude that if the same relief is sought, it ought to be obtained on the same basis in both applications. I am therefore of the view that where a motion for a stay is made from a Removal Officer's refusal to defer removal, the judge hearing the motion ought not simply apply the "serious issue" test, but should go further and closely examine the merits of the underlying application.

[8] In this case, this underlying application has no chance of success. The enforcement officer cannot stay the removal indefinitely, as the Act requires that it take place as soon as possible. As a result, no serious question has been raised and the application for stay must be dismissed on that basis alone.

[9] At the hearing, counsel for the applicant contended that the enforcement officer should have granted her a stay because the government allegedly took too long to carry out the removal. In support of his argument, counsel filed without notice a document that appeared to be from Citizenship and Immigration Canada asking Ms. Crasta to obtain travel documents for her departure.

[10] Counsel was seeking to establish that his client had exercised a certain diligence following the denial of her refugee claim. The document mentions an "Assistant Consulate Officer" of the "High Commission of India" in Canada. The Canadian document, dated July 27, 2006, was seen by the Indian official at the High Commission only on August 22, 2006. What is striking is that the Indian official's handwritten notes indicate that he saw the applicant on August 22, 2006. He said that "(S)he is not eligible to issue a passport as she is a refugee." This cannot be correct because the applicant had already failed in her attempt to be declared a refugee. If a passport was denied for this reason, the denial was based on false information. The evidence does not reveal the content of the discussion between the Indian official and the applicant, but the words in the document do not cast the applicant in a very favourable light.

[11] These words are also inconsistent with paragraph 13 of the affidavit signed by the applicant on March 6, where the reason given by the official for his denial was apparently that "I was not eligible to obtain a travel document, i.e. the passport, on the grounds that I had claimed refugee status in Canada." This is not consistent with the statement made at the hearing, and the refugee status claim had already been dismissed in August 2006.

[12] In fact, the only real argument as to whether there is a serious issue is that the government should have removed the applicant earlier, despite her repeated applications to the panel and this Court for leave to cite humanitarian and compassionate grounds. In filing the August 2006 document, the applicant sought to suggest that she was willing to leave in 2006. However, she had no status in Canada (she was certainly not a refugee) and did not even have a pending claim. Yet the result of the approach was that the Indian official seems to have believed that an Indian passport could not be issued for a refugee in Canada. We do not know where this erroneous information comes from. At any rate, the applicant's case was not bolstered by this document.

[13] The applicant's argument regarding the delay is not supported by any authority. In fact, the argument has surrealistic overtones. How can an applicant who initiated multiple appeals to avoid having to leave Canada and who was allowed to pursue her appeals without being removed now complain that the generosity towards her was abusive?

[14] Had she been truly diligent, the applicant would no longer have objected to her departure and would have taken steps to obtain the required documents. However, this applicant concealed her origin upon her arrival in Canada, and made an attempt in 2006, which she claimed was unsuccessful, but which failed because of the Indian official's understanding that the applicant was a refugee. The evidence suggests that the purpose of her repeated appeals, which she was entitled to institute, was not to demonstrate her willingness to leave. The indulgence of allowing her to institute all these appeals without actively seeking her expulsion cannot be used against

the government. It can perhaps be assumed that an argument could be made if government abuse of any kind had been alleged and proved. This is not the case here.

[15] Absent any authority or compelling argument, it is impossible to see where there might be a serious issue with a likelihood of success involving an enforcement officer with very limited discretion.

[16] But there is more. It has not been established in this case that the applicant would suffer irreparable harm. The evidence in this regard is generic: it is claimed that women are abused in India and that religious minorities are not welcome. Instead, clear, compelling evidence of the harm suffered must be submitted. What is required is a level of particularity that demonstrates a real probability that harm will result (*Gateway City Church v. Canada (National Revenue))*, 2013 FCA 126. As the Court of Appeal stated in *Stoney First Nation v. Shotclose* , 2011 FCA 232:

> [48] … It is all too easy for those seeking a stay in a case like this to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court's satisfaction – that the harm is irreparable.

[17] Finally, the balance of convenience largely favours the government. It is worth noting that the *Immigration and Refugee Protection Act* is in the public interest, and section 48, *supra*, places an obligation on the Minister to ensure that foreign nationals leave Canada when they no longer have any status. In *Canada (Minister of Employment and Immigration) v. Chiarelli)*, [1992] 1 SCR 711, the Supreme Court of Canada referred to one of the pillars of immigration law as follows:

> « The most fundamental principle of immigration law is that noncitizens do not have an unqualified right to enter or remain in the country. » [TRADUCTION] « Le principe le plus fondamental du droit de l'immigration veut que les non-citoyens n'aient pas un droit absolu d'entrer au pays ou d'y demeurer. »

[18] The applicant never had status in Canada. From her first contact with the immigration system, the Refugee Protection Division found that it was not satisfied with the applicant's identity, because the applicant arrived without a passport, baggage or ticket indicating the route she took to get to Canada. The public interest requires that the applicant return to her country of origin. While the government has been seeking the necessary travel documents since 2012, it has only succeeded in obtaining them very recently. The applicant has exhausted her appeals in Canada.

[19] The application for stay is therefore dismissed.

ORDER

THE COURT ORDERS that the application for stay of the removal order to be enforced on March 15, 2017, be dismissed.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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