Federal Court  Cour fédérale

Date: 20131220

Docket: IMM-7970-13

Citation: 2013 FC 1281

Toronto, Ontario, December 20, 2013

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

INDRAKUMARY DESITHARATA MARIYANAYAGAM

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a motion for a stay of the removal that is to be executed on December 26, 2013. The motion is incidental to an application for leave and for judicial review of the refusal of an inland enforcement officer [the "Officer"] to grant a deferral of the removal order. That decision was made on December 11, but the matter comes to this Court only now.

[2] The applicant is a 60-year old woman from Sri Lanka. She has already made a refugee claim, which was denied on February 4, 2013. Leave for judicial review was also denied on June 26.

[3] Central to the contention of the applicant is the fact that the law has been amended recently. New section 170.2 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] makes it clear that an applicant cannot reopen her refugee application. The section reads:

170.2 The Refugee Protection Division does not have jurisdiction to reopen on any ground — including a failure to observe a principle of natural justice — a claim for refugee protection, an application for protection or an application for cessation or vacation, in respect of which the Refugee Appeal Division or the Federal Court, as the case may be, has made a final determination.	**170.2 La Section de la protection des réfugiés n'a pas compétence pour rouvrir, pour quelque motif que ce soit, y compris le manquement à un principe de justice naturelle, les demandes d'asile ou de protection ou les demandes d'annulation ou de constat de perte de l'asile à l'égard desquelles la Section d'appel des réfugiés ou la Cour fédérale, selon le cas, a rendu une décision en dernier ressort.**

Parliament's intent is strengthened and made even clearer with new paragraph 112(2)(b.1) of the *IRPA*:

112. (2) Despite subsection (1), a person may not apply for protection if	**112. (2) Elle n'est pas admise à demander la protection dans les cas suivants :**
(*b.1*) subject to subsection (2.1), less than 12 months, or, in the case of a person who is a national of a country that is designated under subsection 109.1(1), less than	***b.1*) sous réserve du paragraphe (2.1), moins de douze mois ou, dans le cas d'un ressortissant d'un pays qui fait l'objet de la désignation visée au**

36 months, have passed since their claim for refugee protection was last rejected — unless it was deemed to be rejected under subsection 109(3) or was rejected on the basis of section E or F of Article 1 of the Refugee Convention — or determined to be withdrawn or abandoned by the Refugee Protection Division or the Refugee Appeal Division;	**paragraphe 109.1(1), moins de trente-six mois se sont écoulés depuis le dernier rejet de sa demande d'asile — sauf s'il s'agit d'un rejet prévu au paragraphe 109(3) ou d'un rejet pour un motif prévu à la section E ou F de l'article premier de la Convention — ou le dernier prononcé du désistement ou du retrait de la demande par la Section de la protection des réfugiés ou la Section d'appel des réfugiés;**

As a result of that amendment, no Pre-Removal Risk Assessment [PRRA] is available for 12 months following the refugee decision.

[4] Evidently, Parliament wishes for the refugee decision to be final and be acted upon. The applicant is lamenting the state of the law to the effect that the possibility to re-open a refugee decision or to seek a PRRA have disappeared. More than once has it been suggested in the memorandum of facts and law and at the hearing that this latest attempt would allow the applicant to make a PRRA application after February 4, 2014.

[5] Circumventing the law can never be a proper motivation. Furthermore, the discretion left in the hands of officers under section 48 of the *IRPA* is very limited:

48. (1) A removal order is enforceable if it has come into force and is not stayed.	**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.**
(2) If a removal order is enforceable, the foreign	**(2) L'étranger visé par la mesure de renvoi exécutoire**

national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.	**doit immédiatement quitter le territoire du Canada, la mesure devant être exécutée dès que possible.**

[6] The applicant is arguing her case as if the Officer has a broad discretion to consider issues that would properly be before other bodies. Indeed, as explicitly stated the applicant wants for the removal order to be lifted in order to make a PRRA application. As readily concluded by the applicant, she raises for the first time that she has been involved in an abusive relationship with her husband in Sri Lanka for some 30 years. She claims that this matter was not raised as part of her refugee claim because of the shame she feels, such sentiment being gender as well as culturally based. However the issue of violence against women was raised by applicant's counsel at the refugee hearing, although it appears that it was not argued forcefully and to the extent the applicant now tries to argue (paragraph 12 of the Refugee Protection Division decision of February 4, 2013). Actually the applicant "revealed that she and her husband are estranged". The Panel even noted "the fact that the claimant would more likely than not be on her own upon her return to Sri Lanka".

[7] It is not disputed that the tripartite test of *RGR MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 and *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA) controls. Hence, the Court must be satisfied that there is a serious issue to be tried on the judicial review, that irreparable harm to the applicants will arise if deported, and the balance of convenience favours them. Failure on the part of the applicants on any prong of the test is fatal. In my view, it will suffice to discuss the balance of convenience and the serious issue branches of the test.

[8] There is a considerable public interest in removing from Canada persons that are without status. A removal order, following due process of the law, was issued. The *IRPA* was amended recently (section 48) to limit even more any residual discretion that was left with officers tasked with removing foreign nationals. What is more is that Parliament has spoken through new section 170.2 and paragraph 112(2)(b.1) of the *IRPA* in order to negate the ability to have a multiplicity of proceedings. Applicants must put their best case forward. In this case, the issue of violence against women was raised before the Panel. Furthermore, the spouses are now estranged. To come at this late stage with a rather generic allegation need to be weighed against the integrity of the immigration system as Parliament wants it. Given paragraph 112(2)(b.1), it would be in my view inappropriate to seek to circumvent the operation of the law.

[9] The discretion left in the Officer by the law is clearly very limited. The applicant would have wanted for the Officer to conduct an examination akin to the two recourses that are now negated by recent amendments. Thus, it will be only in truly exceptional cases that an Officer will defer a removal order. There may be circumstances when a new risk emerges. Satisfying a Court that the Officer has acted unreasonably will itself be a tall order in view of the deference that is owed decision-makers whose decision is reviewable on a standard of reasonableness.

[10] That takes us to a review of the serious issue. The burden on the applicant is heavier in cases like these. Because the remedy sought on the stay application is the same as the one claimed in the underlying judicial review application, I have to "closely examine the merits of the underlying application". (*Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FC 682 at paragraph 10 [*Wang*]). The test is the likelihood of success.

[11] In *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311 [*Baron*], the Court of Appeal instructs reviewing judges on how stay of removal orders are to be dealt with:

> [67] While I agree entirely with my colleague's approach to the "serious issue" prong of the tripartite test in the context of a motion to stay a removal order, I would add the following. In determining whether a serious issue exists so as to warrant the granting of a stay of removal, the Judge hearing the motion should clearly have in mind, first of all, that the discretion to defer the removal of a person subject to an enforceable removal order is limited, as explained in *Simoes*, above, and, particularly, in *Wang*, above. Second, the Judge should also have in mind that the standard of review of an enforcement officer's decision is that of reasonableness. Thus, for an applicant to succeed on a judicial review challenge of such a decision, he or she must be able to put forward quite a strong case. In my view, the appellants herein clearly did not have such a case to put forward.

With respect, the applicant in this case did not have a strong case either.

[12] Accordingly, the standard of reasonableness applies and the deference that accompanies that standard applies in full force. In the case at hand, the applicant claims that she has suffered from domestic violence at the hands of her husband of 30 years. But in proceedings taking place earlier this year, she also claimed that she was estranged from her husband and indeed she is expected to be living alone in Colombo when she goes back.

[13] In *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 [*Shpati*], the Court of Appeal answers the question "does the potential mootness of the pending PRRA litigation warrant deferral of removal?" It answered its question in the following paragraph:

> [35] In my view, the answer to this question is no. If it were otherwise, deferral would be virtually automatic whenever an

> individual facing removal had instituted judicial review proceedings in respect of a negative PRRA. This would be tantamount to implying a statutory stay in addition to those expressly prescribed by the IRPA, and would thus be contrary to the statutory scheme.

[14] As can be appreciated, the situation has been made even clearer since *Shpati* because there cannot be a PRRA anymore. Turning an application for a stay of a removal order is very much akin to seeking indirectly to do what cannot be done directly. This is impermissible.

[15] In paragraph 51 of *Baron*, above, the Court of Appeal agreed wholeheartedly with Pelletier J. , as he then was, in *Wang*, above:

> [51] […]
>
> - There are a range of factors that can validly influence the timing of removal on even the narrowest reading of section 48, such as those factors related to making effective travel arrangements and other factors affected by those arrangements, such as children's school years and pending births or deaths.
>
> - The Minister is bound by law to execute a valid removal order and, consequently, any deferral policy should reflect this imperative of the Act. In considering the duty to comply with section 48, the availability of an alternate remedy, such as a right to return, should be given great consideration because it is a remedy other than failing to comply with a positive statutory obligation. In instances where applicants are successful in their H&C applications, they can be made whole by readmission.
>
> - 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.

[16] I cannot find fault with the decision of the Officer that the facts of this case never rose to the level presented in the preceding paragraph. In *Simoes v Canada (Minister of Citizenship and Immigration)* (2000), 7 Imm LR (3d) 141 (FCTD), we find the following paragraph which was endorsed by the Court of Appeal in *Baron*, above, at paragraph 49:

> In my opinion, the discretion that a removal officer may exercise is very limited, and in any case, is restricted to when a removal order will be executed. In deciding when it is "reasonably practicable" for a removal order to be executed, a removal officer may consider various factors such as illness, other impediments to travelling, and pending H & C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system. For instance, in this case, the removal of the Applicant scheduled for May 10, 2000 was deferred due to medical reasons, and was rescheduled for May 31, 2000. Furthermore, in my view, it was within the removal officer's discretion to defer removal until the Applicant's eight-year old child terminated her school year. [Footnotes omitted.]

[17] The applicant would want for the removal order to be deferred until after she can make a proper PRRA application. In so doing, she wants to circumvent the *IRPA*. In view of the very narrow discretion available to the Officer, it was perfectly reasonable to deny the refusal, especially where it appears that the case has been split and, at any rate, the allegations never attained the level required under the law to grant that kind of very exceptional remedy.

[18] The applicant made a long exposé about abused women in Sri Lanka and why they are not prone to raise the issue in public. The demonstration would have been more convincing if it were not for the fact that the issue was known and even raised in the refugee case. It must be remembered that a removal Officer may order a stay where there are extreme circumstances. In *Baron*, above, the Court of Appeal speaks of being exposed "to the risk of death, extreme sanction or inhumane

treatment". Justice Harrington captures the same notion in *Shpati v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 367 at paragraph 41:

> […] 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.

[19] In spite of the valiant effort by counsel for the applicant, the case never rose to that level.

[20] I have concluded that the motion fails because it does not have a likelihood of success in the underlying application for judicial review and the balance of convenience favours the respondent. The words of Décary J.A. in a different context, in *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 FC 358 still resonate:

> In short, the *Immigration Act* and the Canadian immigration policy are founded on the idea that whoever comes to Canada with the intention of settling must be of good faith and comply to the letter with the requirements both in form and substance of the Act. Whoever enters Canada illegally contributes to falsifying the immigration plan and policy and gives himself priority over those who do respect the requirements of the Act. The Minister, who is responsible for the application of the policy and the Act, is definitely authorized to refuse the exception requested by a person who has established the existence of humanitarian and compassionate grounds, if he believes, for example, that the circumstances surrounding his entry and stay in Canada discredit him or create a precedent susceptible of encouraging illegal entry in Canada. In this sense, the Minister is at liberty to take into consideration the fact that the humanitarian and compassionate grounds that a person claims are the result of his own actions. [Emphasis added.]

[21] As a result, the motion for a stay of the removal order to be executed on December 26, 2013 is dismissed.

ORDER

THIS COURT ORDERS that the motion for a stay of the removal order to be executed on December 26, 2013 is dismissed.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-7970-13

STYLE OF CAUSE: INDRAKUMARY DESITHARATA MARIYANAYAGAM
v
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 19, 2013

REASONS FOR ORDER AND ORDER: ROY J.

DATED: DECEMBER 20, 2013

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