Federal Court  Cour fédérale

Date: 20180417

Docket: IMM-4684-17

Citation: 2018 FC 417

Montréal, Quebec, April 17, 2018

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ANDREY KURKIN

Applicant

and

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

Respondents

ORDER AND REASONS

[1] Because this case involves a deportation order pursuant to paragraph 229 (1)(b) of the *Immigration and Refugee Protection Regulations* (SOR/2002-227), counsel for the respondents sought that the name of the Minister for Public Safety and Emergency Preparedness, responsible for matters of that nature, be added in the style of cause. It was so ordered.

[2] Mr. Andrey Kurkin is a Russian national who has been a permanent resident of Canada since May 28, 2003. According to the Russian authorities, he is involved in the murder of his cousin and business partner, one Victor Anatlovich Bondarenko.

[3] According to the information available, through the report of a Senior Investigator in Moscow entitled "Resolution on international search for accused", Mr. Kurkin would have contracted the killing of Mr. Bondarenko to one AI Navrodskiy, who, in turn, sought and paid one AJ Epritskiy. A sum of $10,000 US was the agreed upon price. Apparently, Mr. Kurkin, who acknowledged that he was in Russia at the time and knew Navrodskiy, provided Mr. Navrodskiy with information on a trip of the victim, Mr. Bondarenko that was to take him to Moscow on December 3, 2004. Mr. Kurkin arrived in Moscow in December 1, 2004, and met with Navrodskiy. Mr. Kurkin was also in the Moscow area in the days following as he participated in the search of the victim who had disappeared.

[4] Since Mr. Navrodskiy and Mr. Bondarenko also knew each other, Mr. Navrodskiy invited Mr. Bondarenko to his summer house outside of Moscow. On December 2, 2004, Mr. Epritiskiy arrived at the said summer house and, together with three other individuals, prepared a burial site in the forest near the summer house. On December 3, 2004, early in the evening, Mr. Navrodskiy, accompanied by two other persons, arrived at the summer house. There was apparently a barrier and when Mr. Bondarenko got out of the car to open the said barrier, Mr. Epritskiy fired at the three victims who were all killed. The bodies were carried to the burial site and by 11:00PM, the assailants were back in Moscow in the car used by Mr. Bondarenko, which they then abandoned.

[5] Once the bodies were buried, Mr. Epritiskiy contacted by phone Mr. Navrodskiy and then Mr. Navrodskiy contacted Mr. Kurkin to inform him of the situation.

[6] Both Mr. Epritskiy and Mr. Navrodskiy were found guilty by a Russian Court and were sentenced to extensive prison terms. They were both convicted on December 28, 2011. Mr. Kurkin is sought since December 14, 2010 to be tried for his participation in the murder of three individuals

[7] The record shows that Mr. Kurkin travelled frequently between Canada and Russia between May 28, 2003, and January 21, 2010. That happens to be the day on which Mr. Navrodskiy was arrested. It is submitted that there is no evidence that the departure was planned by showing for instance that the airplane tickets had been purchased long before. The applicant has never returned to Russia. Counsel for the applicant suggested that Mr. Kurkin has known since 2011 that he was the subject of an arrest warrant.

[8] The applicant was found to be inadmissible pursuant to paragraph 36(1)(c) of the *Immigration and Refugee Protection Act* (S.C. 2001, c. 27) [IRPA]. It reads:

Serious criminality	**Grande criminalité**
36 (1) A permanent resident or a foreign national is in admissible on grounds of serious criminality for	**36 (1)** Emportent interdiction de territoire pour grande criminalité les faits suivants :
[…]	[…]
(c) committing an act outside Canada that is an offence in the place where it was committed and that, if committed in Canada, would	**c)** commettre, à l'extérieur du Canada, une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable

constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.	d'un emprisonnement maximal d'au moins dix ans.

It is not disputed that the offence committed in Russia would qualify under paragraph 36(1)(c). Furthermore, section 33 of IRPA applies:

Rules of interpretation	**Interprétation**
33 The facts that constitute inadmissibility under sections 34 to 37 include facts arising from omissions and, unless otherwise provided, include facts for which there are reasonable grounds to believe that they have occurred, are occurring or may occur.	**33** Les faits — actes ou omissions — mentionnés aux articles 34 à 37 sont, sauf disposition contraire, appréciés sur la base de motifs raisonnables de croire qu'ils sont survenus, surviennent ou peuvent survenir.

[9] Two decisions are under review in the application for authorization and judicial review of the Immigration Appeal Division [IAD]. One such decision, dated September 29, 2017, is concerned with the inadmissibility of the applicant. The other, dated October 16, 2017, addresses the issue of possible humanitarian and compassionate considerations with a view to staying the enforcement of the deportation order issued against Mr. Kurkin.

[10] The appeal before the IAD came following a decision of the Immigration Division which had found in favour of the applicant. Obviously, the IAD found against the applicant on both, finding him inadmissible and denying humanitarian and compassionate considerations. Since this is an appeal *de novo* before the IAD, we are not concerned here with the ID decision.

[11] A stay is in support of judicial review applications and it must be in relation to an underlying judicial review application (section 18.2 of the *Federal Courts Act*, R.S.C., 1985, c. F-7). In stay applications, the applicant must satisfy the tripartite test found 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). It requires that the applicant satisfy each branch of the test:

1. the applicant must satisfy the Court that there is a serious issue to be litigated in the underlying judicial review application;

2. the applicant must satisfy the Court that there will be irreparable harm if the stay is not granted;

3. the applicant must satisfy the Court that the balance of inconvenience favours the applicant.

[12] I have listened carefully to the oral representations made by counsel for the applicant and read with considerable attention the written submissions. I must confess that it is difficult to discern what the serious issue might be. Although not articulated in the factum, it appears that the main argument is the alleged lack of evidence concerning Mr. Kurkin. In matters of this nature, the administrative tribunal benefits from a great deal of deference from the reviewing court. That is because these matters are to be reviewed on a reasonableness standard. Thus, if the outcome arrived at by the administrative tribunal falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law, and that there is the existence of justification, transparency and intelligibility within the decision-making process, the test for

reasonableness will have been met. It follows that an applicant must satisfy the Court that there is a serious issue around the decision, the reasonableness of finding the applicant to be inadmissible and the conclusion that H & C considerations did not prevail. These decisions will be set aside only if they are not reasonable. Thus, the burden on an applicant must be to convince the Court there is a serious issue that the decisions are not reasonable, not merely that another decision would be preferable. Unfortunately, the case was largely argued as if the standard of review was correctness, without even alluding to the deference owed the decision-maker.

[13] Instead of addressing the IAD decision, which he never discussed, the applicant targets what he calls "the Russian legal procedures arguing that a decision on inadmissibility cannot be based on police reports". Fundamentally, the applicant argues that there is no evidence before the IAD. That fails to recognize that the standard applicable is that of reasonable grounds to believe, which is said to be more than suspicions but less than the balance of probabilities.

[14] The memorandum of facts and law targets more specifically the Russian judicial system about which the applicant claims there cannot be any confidence. It would appear that the contention is that whatever comes out of the judicial system, it is to be disregarded because of general corruption. That is a generalized assertion that is difficult to defend. If true, that would mean that no one should be returned to their country of nationality, in this case Russia, to face justice where there are allegations about the justice system. That is squarely addressed by respondents' counsel who argues, successfully in my view, that assuming that the Russian judicial system has issues, each case must be considered on its own. The IAD did not suggest that circumspection was not in order. But it found that this applicant did not have the profile of

someone who could attract a politically motivated prosecution, which appears in view of the evidence, to be the main challenge. Unless the applicant can point to something specific, and not featuring mere speculations, the indictment of a judicial system and the integrity of those acting in it requires more than mere general assertions. To put it another way, there is no reason to suggest that the system in Russia in geared against this particular applicant. We are simply faced with a general assertion without support.

[15] Before the IAD, the applicant, who testified, was not believed. Furthermore, it appears clear that he left Russia, never to return since the day the alleged co-conspirator was arrested.

[16] In my view, the applicant has not discharged the burden of demonstrating the seriousness of the issue that the IAD decision is unreasonable. I agree with the applicant that another acceptable outcome was possible on the facts of this case. But that is not sufficient to succeed. What needs to be demonstrated is that the outcome reached by the IAD was not another possible, acceptable outcome. The issue is rather whether it was unreasonable to accept the evidence offered about the involvement of the applicant in the triple murder committed in 2004. The applicant claims that there is no evidence and that therefore it was unreasonable.

[17] The reasonable grounds to believe may come from a variety of sources. Here they come from a report coming from Russian authorities, the fact that the applicant is charged with the crime and circumstantial evidence suggesting that he left Russia the same day his co-conspirator was arrested, thus seeking to escape. Furthermore, it is not disputed that the applicant was in Russia the day his cousin and business partner was murdered. The IAD also considered that the

applicant, who testified before the IAD, was not a credible witness, basically avoiding to answer questions and having a selective memory. For instance, he does not remember the annual revenue of the firm, employing 40 people, in which he partnered with his cousin and another person, yet he claims that his cousin was assassinated because his cousin was in possession of 450,000 Euros. Similarly, the applicant testified that he did not have any interest left in the firm, having sold his share (1/3) to his mother for the fantastically discounted amount of around $ 200 Cdn. The IAD did not believe that a real transaction occurred, leaving the applicant with a significant interest in the jointly-owned firm.

[18] Finally, the IAD did not accept the contention that the evidence coming from Russia is not to be believed. Rather, it is persons « qui s'en prennent contre le gouvernement et pourraient représenter un certain danger pour leur idéologie et ambitions (para 9) » who are at greater risk. The IAD found that the case is not politically charged as the applicant does not correspond to the profile of accused in such cases.

[19] The IAD found Mr. Kurkin inadmissible, on the basis of his involvement in the murder, about which it had reasonable grounds to believe in the facts presented to it. Mr. Kurkin had to satisfy the Court that there is serious issue concerning that conclusion, that there was a serious case to make that it is unreasonable. He failed to do so. The burden has not been discharged.

[20] The applicant also claimed that the best interest of the children and the right to family life are sufficient for him to benefit from humanitarian and compassionate considerations. They were denied by the IAD. This is somewhat bizarre. The applicant is to a large extent estranged from

his **adult** children who have been living with their mother in Toronto since around 2004. One is hard-pressed to identify the best interests of adult children who are living hundreds of kilometers from the father who has been a limited presence in their lives for more than 10 years. In my view, this is in the nature of a frivolous argument that is not deserving of further attention. In fairness, counsel for the applicant did not press the issue at the hearing. That was a wise decision.

[21] Having found that there is no serious issue that has been raised by the applicant, it is not necessary to consider the other two branches of the test. I would, however, note that I would have been reluctant to find irreparable harm in the circumstances. Mr. Kurkin is charged with a very serious offence in his country of nationality. Although a permanent resident of Canada since 2003, he has been going back to Russia on a very regular basis, was in the country, near Moscow, when the three murders were committed on December 3, 2004, and he left Russia for good, never returning, the day Mr. Navrodskiy was arrested for murder. The applicant has not articulated what the irreparable harm would be if he were to return to Russia where he will be judged with respect to the charge pending against him. In essence, the applicant pleads his lack of assets in Russia and his successful establishment in Canada, and that the justice system in Russia is corrupt. His counsel writes at paragraph 31 of his memorandum of fact and law that "(t)he deportation of the applicant before the end of the legal procedures here without him being given the chance to give evidence on the situation in Russia would create irreparable harm to him". The irreparable harm must be established now, as part of the stay motion. In my estimation, these assertions do not rise to a level of irreparable harm. Mr. Kurkin has been found to be inadmissible and returning to his country of nationality is a natural consequence of being

deported. As Stratas J.A. articulated in a number of Federal Court of Appeal decisions, it does not suffice to simply call the inconvenience a irreparable harm. The best articulation of that general notion is to be found in *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126, at paragraphs 14 to 16:

> [14] Such a general assertion is insufficient to establish irreparable harm: *Holy Alpha and Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 265 at paragraph 22. That sort of general assertion can be made in every case. Accepting it as sufficient evidence of irreparable harm would unduly undercut the power Parliament has given to the Minister to protect the public interest in appropriate circumstances by publishing her notice and revoking a registration even before the determination of the objection and later appeal.
>
> [15] General assertions cannot establish irreparable harm. They essentially prove nothing:
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> > 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.
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> (*Stoney First Nation v. Shotclose*, 2011 FCA 232 at paragraph 48.) Accordingly, "[a]ssumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight": *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255 at paragraph 31.
>
> [16] Instead, "there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted": *Glooscap, supra* at paragraph 31. See also *Dywidag Systems International, Canada, Ltd. v. Garford Pty Ltd.*, 2010 FCA 232 at paragraph 14; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 at paragraph 12; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraph 17.

[22] The generalization that a foreign justice system is corrupt, to the point of affecting every person who faces it, would require much more than the articles offered as evidence in this case, articles that are at times close to 10 years old. On the other hand, there is no indication that this applicant is in any kind of particular jeopardy. The "evidence" stayed in my view at a level of generalization such that it does not meet the more exacting standard of "real probability that irreparable harm will result unless a stay is granted." As noted by the IAD, the applicant's profile does not suggest the kind of bias required to establish irreparable harm. The evidence therefore does not rise above assumptions, speculations, hypotheticals and arguable assertions. In my estimation, irreparable harm has not been established on this record.

[23] As a result, the stay application, with respect to a departure from Canada scheduled for April 17, 2018, is dismissed.

ORDER

THIS COURT ORDERS that the stay motion of a deportation order to be executed on April 17, 2018 be dismissed.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4684-17
STYLE OF CAUSE:	AUDREY KURKIN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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