Date: 20070202

Docket: IMM-72-07

Citation: 2007 FC 111

Montréal, Quebec, the 19th day of February, 2007

PRESENT: THE HONOURABLE MR. JUSTICE SHORE

BETWEEN:

Édouard AOUTLEV

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] Even though the applicant must leave the country before his Application for Leave and for Judicial Review (ALJR) brought against the decision concerning the Pre-Removal Risk Assessment (PRRA) or H&C (humanitarian and compassionate considerations) application is decided, the Court has ruled that this does not constitute irreparable harm. In fact, it is pure speculation to say that this would render the applicant's remedy nugatory.

[2] The Federal Court of Appeal dismissed such a submission in two recent judgments concerning motions to stay removal orders while an appeal against an application for judicial review of a PRRA decision was pending. Specifically, in *Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, [2004] F.C.J. No. 1200 (QL), the applicants submitted that their removal would render their appeal nugatory. The Court of Appeal stated the following:

> [20] Since the appeal can be ably conducted by experienced counsel in the absence of the appellants and since, if the appeal is successful, the appellants will probably be permitted to return to Canada at public expense, I cannot accept that removal renders their right of appeal nugatory.

(Also: *El Ouardi v. Canada (Solicitor General)*, 2005 FCA 42, [2005] F.C.J. No. 189 (QL), at paragraph 8.)

JUDICIAL PROCEEDING

[3] This is a motion to stay enforcement of an order to remove the applicant to Russia, dated February 5, 2007. This motion is joined with an application for leave brought against a decision refusing the applicant an exemption from the requirement of obtaining a permanent resident visa from outside of Canada because of H&C. This decision was rendered on November 29, 2006.

[4] The Minister of Public Safety and Emergency Preparedness, who is responsible for the enforcement of removal orders, was added to this motion as a respondent, in accordance with the *Department of Public Safety and Emergency Preparedness Act* (S.C. 2005, c. 10) and the order in council dated April 4, 2005 (P.C. 2005-0482).

FACTS

[5] For the factual background, the respondent refers the Court to pages 2 and 3 of the H&C decision, as well as to the exhibits filed with the affidavit of Jean Bellavance. (Applicant's Record, pages 8-14).

[6] The applicant is challenging not only the H&C decision, but also the PRRA decision, as well as the decision of the removal officer. Accordingly, the respondent also addresses the points raised by the applicant in his file in connection with these two decisions. (Applicant's Record, page 107, paragraph 135).

ANALYSIS

[7] Does the application for leave underlying the present motion raise a serious issue? Does the removal of the applicant involve a risk of irreparable harm, and does the balance of convenience favour making a judicial order to stay the removal within the meaning of *Toth v. Canada (Minister of Employment and Immigration)*, 86 N.R. 302 (F.C.A.), [1988] F.C.J. No. 587 (QL) and *R.J.R. - MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311?

[8] The three criteria must be met for the Court to grant the requested stay. If one of them is not met, this court cannot grant the requested stay. The applicant's allegations do not meet the three criteria set out in *Toth* and *R.J.R. -MacDonald*, *supra*, and the motion to stay removal must therefore be dismissed.

A. SERIOUS ISSUE

[9] The applicant submits that the officer's decision was unfounded because the officer rendered an unreasonable decision and breached the principles of procedural fairness by not giving him a chance to submit any additional details, be it at a hearing or in writing. (Applicant's Record, page 102, paragraphs 98 and 99; page 103, paragraph 106; page 105, paragraph 123; page 108, paragraph 137)

[10] First of all, the Court concluded that an interview is not a general requirement in the case of decisions regarding applications based on humanitarian and compassionate considerations, and that offering applicants a chance to make their submissions in writing satisfies the requirements of procedural fairness. (*Étienne v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1314, [2003] F.C.J. No. 1659 (QL), at paragraph 6 (Yvon Pinard J.); *Bouaraoudj v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1530, [2006] F.C.J. No. 1918 (QL), at paragraphs 17 to 21, Conrad von Finckenstein J.)

[11] Moreover, with regard to H&C applications, this Court recently concluded in *Samsonov v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1158, [2006] F.C.J. No. 1457 (QL), that the officer was not required to contact the applicant so that he could complete his evidence.

[12] In *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 94, [2003] F.C.J. No. 139 (QL), this Court stated that it was up to the applicant to bring to the officer's attention any evidence relevant to humanitarian and compassionate considerations. The Federal Court of Appeal upheld the decision in *Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38,

[2004] F.C.J. No. 158 (QL), and reiterated that the burden of submitting all facts in support of an application on humanitarian and compassionate considerations rested with the applicant.

[13] In *Nguyen v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 236, [2005] F.C.J. No. 281 (QL), this Court relied on the Federal Court of Appeal's judgement in *Owusu*, *supra*, to dismiss the argument of the applicant, who submitted, as in the case at bar, that the officer was required to contact him to obtain all information necessary to render an appropriate decision.

[14] Finally, in *Irias v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1321, [2003] F.C.J. No. 1717 (QL), at paragraph 24, this Court concluded that when an applicant submits an insufficient argument, this does not shift the burden of obtaining additional information to the officer.

[15] In light of the case law cited above, there is no doubt that the officer was under no obligation to contact the applicant to allow him to complete his evidence or to ask the applicant to do so at the hearing. The applicant had every opportunity to submit any evidence he deemed necessary in support of his application, right up until a decision on the application on humanitarian and compassionate considerations was rendered. There was no breach of the principles of procedural fairness.

[16] The applicant argues that the officer erred in stating that the applicant did not sufficiently show in his submissions that he would suffer disproportionate hardship if he were to be separated from family members remaining in Canada.

[17] The officer concluded as follows concerning family ties:

> *Family unification:*
>
> The applicant states that he is very close to his immediate family, his sister, in Canada, and that he considered her like his mother and since he had not heard from his father since he was detained by the police in Russia: "We dread to think what could happen to him" (2002). The applicant later, in 2006, mentions that his father is in Canada and indicates that he has applied for permanent residence. But the applicant does not mention that the father made or was accepted as a refugee – he does not mention the quality of his relationship with his father in Canada that would indicate that a separation from him would cause a serious hardship. Although he considers his sister in Canada like a mother, the sister, who has already spoken on the applicant's behalf, has not expressed this same idea in a way that would show that their separation would cause an excessive hardship. The applicant has not sufficiently shown that his relation with her is one that if the applicant had to leave Canada, this would cause an excessive hardship.

(Applicant's Record, page 13, paragraph 5.)

[18] In the absence of any evidence that the applicant's separation from his father and sister would cause unusual and undeserved or disproportionate hardship, it was reasonable for the officer to conclude as he did.

[19] It is important to note that the officer had no evidence that the applicant's father would definitely be allowed to remain permanently in Canada. In fact, Citizenship and Immigration Canada had not rendered a decision to that effect.

[20] Case law has determined that, in the absence of any evidence supporting the conclusion that separation from family members would cause unusual and undeserved or disproportionate hardship, such separation in itself does not constitute humanitarian and compassionate considerations warranting an exemption.

[21] In *Chau v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 107, [2002] F.C.J. No. 119 (QL), at paragraph 19, this Court referred to one of these previous decisions to reiterate that the fact that a person leaves family members and employment behind does not necessarily constitute harm warranting a favourable decision with regard to humanitarian and compassionate considerations.

[22] Likewise, the fact that the applicant made progress in adapting to Canadian society, held employment and became financially independent cannot automatically allow the officer to conclude that there were sufficient humanitarian and compassionate considerations. As this Court ruled in *Tartchinska v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 373 (QL), independence in itself does not ensure that an application based on humanitarian and compassionate considerations will be allowed, in the absence of other factors showing that the refusal of an H&C application would cause unusual or disproportionate hardship.

[23] The applicant’s position is above all an expression of disagreement with the assessment of the evidence the immigration officer relied on in rendering his decision, as well as being an

invitation to the Court to replace this decision with a new assessment of the evidence. This does not meet the standards for judicial review.

[24] First of all, it is trite law that it is up to the officer to examine the documents submitted in evidence and assess their probative value (*Lim v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 956, [2002] F.C.J. No. 1250 (QL), at paragraph 20 (Eleanor Dawson J.). This is what the officer did by giving precise and complete reasons in support of his conclusion. Likewise, the officer listed all the documentary sources consulted. (Also: *Uddin v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 937, [2002] F.C.J. No. 1222 (QL).)

[25] As regards the claim for refugee protection made by the applicant's sister, the officer concluded as follows:

> The applicant submits a notice of a positive refugee decision for the applicant's sister, her husband and son. However, there are no details as to the reason for the positive decision or to the reasons for the initial refugee claim of the sister to the IRB. The applicant states that he and his sister sought refuge in Canada for the same reasons, due to persecution and that she was accepted in Canada as a refugee. The applicant, however, does not give details as to what precisely his and his sister's refugee claims had in common. Therefore, it is not sufficient information to give probative value to the fact that his sister was accepted as a refugee. The applicant has not submitted sufficient evidence to show how one could reasonably conclude that his sister was accepted for the same reasons invoked by the applicant.

(Applicant's Record, page 12, paragraph 2.)

[26] This Court's case law has established in a large number of decisions that a decision-maker is not bound by the result in another claim, even if the claim involves a relative, because refugee status is determined on a case-by-case basis, and because it is possible that the other decision was

incorrect. *Bakary v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1111, [2006] F.C.J. No. 1418 (QL) (Pinard J.); *Rahmatizadeh v. Canada (Minister of Citizenship and Immigration)*, [1994] F.C.J. No. 578 (QL) (Marc Nadon J.).)

[27] The Court concluded as follows in another decision:

> [7] Moreover, the *stare decisis* rule relied on by the applicants is not applicable here, since all the facts of the other claim before the Refugee Division were not adduced in evidence (see *Handal et al. v. M.E.I.* (June 10, 1993), 92-A-6875).

(*Ostafi v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 1683 (QL).)

[28] The officer considered all the evidence submitted to him and assessed all the relevant factors regarding humanitarian and compassionate considerations.

[29] The applicant did not show that there was any evidence which would have allowed this Court to conclude that the decision was unreasonable, and there is nothing warranting intervention by this Court in the officer's decision.

[30] Accordingly, if the officer's decision is not unreasonable, there is no serious issue. For this reason, since the applicant did not show that there was a serious issue, and because the three criteria set out in *Toth, supra*, are cumulative, this motion should be dismissed.

PRRA decision

[31] The applicant also submits that, in respect of the PRRA, the officer breached the principles of procedural fairness by not giving him the chance to provide additional details, be it at a hearing or in writing. (Applicant's Record, page 108, paragraphs 138 to 141.)

[32] First of all, in *Yousef v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 864, [2006] F.C.J. No. 1101 (QL), at paragraph 33, the Court concluded that the burden of proof always rests on the applicant.

[33] Second, in *Kaba v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1113, [2006] F.C.J. No. 1420 (QL), at paragraph 25 (Pinard J.), the Court reiterated that no hearing is held in connection with a PRRA, except in exceptional circumstances when all the conditions mentioned in section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations), are met.

[34] In the case at bar, the applicant did not meet the conditions in section 167 of the Regulations. Consequently, the PRRA officer did not have to require him to appear at an interview.

[35] Contrary to what the applicant submits at paragraph 137, in *Younis v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 266, [2004] F.C.J. No. 339 (QL), at paragraphs 4 to 6 (Pinard J.), and in other subsequent decisions, this Court had concluded that the right to a hearing is not absolute and that an application review process which does not provide for a meeting between

the decision-maker and the applicant is nevertheless consistent with the principles of fundamental justice under the *Canadian Charter of Rights and Freedoms*, Part I, Schedule B to the *Canada Act, 1982*, c. 11 (U. K.) (Charter) if it allows the applicant to submit all his or her arguments. In *Iboude v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1316, [2005] F.C.J. No. 1595 (QL), Yves de Montigny J. wrote the following:

> [11] With respect to the obligation to hold a hearing, the applicants claim that the female applicant should have been heard by the PRRA officer since her credibility was at issue. A hearing would have enabled her to allay the officer's misgivings with regard to the validity of certain documents.
>
> [12] **Section 113 of the *Immigration and Refugee Protection Act* clearly establishes that the Minister or his representative is not bound to grant a hearing or an interview. The Supreme Court recognized in *Suresh v. Canada (M.C.I.)*, [2002] 1 S.C.R. 3, that a hearing was not required in all cases and that the procedure provided under section 113 was consistent with the principles of natural justice stated in the Canadian Charter;** in the vast majority of cases, it will be enough that applicants have the opportunity to submit their arguments in writing. [Emphasis added]

[36] Contrary to what the applicant submits at paragraph 135, it cannot be argued that he did not have the benefit of a pre-removal risk assessment. Canadian immigration authorities assessed the risk involved in his return to his native country on three occasions.

[37] It is clearly established in case law that the removal of a person from Canada is not contrary to the principles of natural justice and that the enforcement of a removal order is not contrary to sections 7 and 12 of the *Charter*. (*Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, at pages 733-735; *Medovarski v. Canada (Minister of Citizenship and*

Immigration), [2005] 2 S.C.R. 539 at paragraph 46; *Isomi Canada (Minister of Citizenship and Immigration)*, 2006 FC 1394, [2006] F.C.J. No. 1753 (QL), at paragraph 32 (Simon Noël J.).)

[38] Contrary to what the applicant submits at paragraph 139 of his memorandum, the fact that the applicant may or may not have a hearing before the Refugee Protection Division on the ground specified in section 97 does not determine his right to have an interview. (*Iboude*, *supra*, at paragraphs 3 and 12; *Demirovi v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1284, [2005] F.C.J. No. 1560 (QL), at paragraphs 1 and 7 (Dawson J.).)

[39] Contrary to what is alleged at paragraph 140 of the Applicant's Record, the Court concluded that the PRRA officer was not required to send him a draft decision. (*Rasiah v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 583, [2005] F.C.J. No. 711 (QL), at paragraph 21; *Vasquez v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 91, [2005] F.C.J. No. 96 (QL), at paragraphs 16 to 28 (Michael Kelen J.).)

[40] Finally, the evidence in the record supports the conclusion that the PRRA officer analyzed and meticulously considered all the evidence invoked by the applicant. Although the applicant does not agree with this decision, he must still show that this decision raises a serious issue. As mentioned by the Court in *Ahmed v. Canada (Solicitor General)*, 2004 FC 686, [2004] F.C.J. No. 845 (QL), Madam Justice Anne Mactavish writes:

> [5] . . . Decisions of PRRA officers are to be given significant deference. Where there is nothing unreasonable in the PRRA decision, there will be no serious issue. In this case, the PRRA officer clearly considered the applicants' submissions as well as the recent documentary evidence with respect to ongoing human rights abuses in

> Pakistan. What the applicants are asking the Court to do is to re-weigh the evidence that was before the PRRA officer. While the applicants may not agree with the PRRA decision, they have not demonstrated that it was arguably perverse or patently unreasonable.

(Also: *Ray v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 731, [2006] F.C.J. No. 927 (QL), at paragraph 29 (Max M. Teitelbaum J.).)

[41] With respect, the applicant did not show that there was a serious issue, and because the three criteria in *Toth* are cumulative, this motion should be dismissed.

Decision of the removal officer

[42] The applicant also invoked the fact that the removal officer's decision to refuse to defer the removal was unreasonable and arbitrary. (Applicant's Record, page 109, paragraph 144)

[43] However, no request to defer removal was submitted to the removal officer. Accordingly, he is completely blameless. (Affidavit of the removal officer, Jean Bellavance.)

B. IRREPARABLE HARM

[44] It should be noted that in *Kerrutt Canada (Minister of Employment and Immigration)*, (1992) 53 F.T.R. 93, [1992] F.C.J. No. 237 (QL), this Court defined irreparable harm as being the removal of a person to a country where there is a risk to his or her life and safety.

[45] Also, in *Calderon v. Canada (Minister of Citizenship and Immigration)*, (1995) 92 F.T.R. 107, [1995] F.C.J. No. 237 (QL) the Court stated that “irreparable harm must be very grave and more than the unfortunate hardship associated with the breakup or relocation of a family”.

[46] Furthermore, to be described as irreparable, the harm must have irrevocable or permanent aspects. (*Soriano v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 414 (QL), at paragraph 28.)

[47] In this case, the applicant submits that he would sustain irreparable harm because (1) enforcement of the removal order would render nugatory the remedy sought by his applications; (2) he alleges a risk of arrest and mistreatment in case of removal to Russia; and (3) he would suffer disproportionate hardship following separation from his immediate family in Canada, since he has no family in Russia. (Applicant’s Record, page 106, paragraph 134).

[48] Even if the applicant must leave the country before his ALJR of the PRRA or H&C decision is decided, this Court has ruled that this is not irreparable harm. In fact, it is pure speculation to say that this would render his remedy nugatory.

[49] The Federal Court of Appeal dismissed such an argument in two recent judgments concerning motions to stay removal orders pending the hearing of an appeal against a judicial review of a PRRA decision. More specifically, in *Selliah*, *supra*, the applicants argued that a removal would render their appeal nugatory. The Court of Appeal stated the following:

> [20] Since the appeal can be ably conducted by experienced counsel in the absence of the appellants and since, if the appeal is successful, the appellants will probably be permitted to return to Canada at public expense, I cannot accept that removal renders their right of appeal nugatory.

(Also: *El Ouardi v. Canada (Solicitor General)*, 2005 FCA 42, [2005] F.C.J. No. 189 (QL), at paragraph 8.)

[50] The Court followed these judgements in several recent cases. There is no reason not to apply similar principles in the circumstances in this case. *Kaur c. Canada (Solicitor General)*, 2005 FC 16, [2005] F.C.J. No. 36 (QL), at paragraph 6; *Singh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 159, [2005] F.C.J. No. 140 (QL), at paragraphs 39 and 40.)

[51] In this case, it is speculative to say that the applicant's application for leave and for judicial review will become moot and nugatory. The Court has discretionary authority and has recently exercised such authority to hear applications for judicial review of PRRA decisions after motions to stay were dismissed.

[52] In fact, this Court has stated on numerous occasions that irreparable harm must not be purely speculative. (*Ward v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 86 (QL); *Atakora v. Canada (Minister of Employment and Immigration)*, (1993) 68 F.T.R. 122 (F.C.T.D. [1993] F.C.J. No. 826 (QL).)

[53] The applicant reiterates the same allegations already made in his claim for refugee protection before the RPD and in his PRRA and H&C applications.

[54] It is useful to note that the RPD rejected his account because it did not find it to be credible. The Federal Court refused to intervene and dismissed the application for leave. (Exhibit "B", Affidavit of Jean Bellavance.)

[55] This Court's case law is to the effect that this "account" cannot be the basis of an allegation of irreparable harm. (*Akyol v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 931, [2003] F.C.J. No. 1182 (QL); *Kane v. Canada (Solicitor General)*, IMM-6321-04, August 5, 2004 (Johanne Gauthier J.); *Harjinder Singh Sohal v. Canada (Minister of Citizenship and Immigration)*, IMM-1005-05, March 7, 2005 (Michel Beaudry J.); *Singh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 145, [2005] F.C.J. No. 199 (QL), at paragraph 16 (de Montigny J.).)

[56] With respect, this allegation is not consistent with the notion of irreparable harm as defined in this Court's case law. In *Pancharatnam v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 867, [2004] F.C.J. No. 1057 (QL), Mr. Justice Sean Harrington clearly explained what is irreparable harm:

> [23] . . . However, as said by Pelletier J., as he then was, in *Melo v. Canada (Minister of Citizenship and Immigration)* (2000), 188 F.T.R. 39, at paragraph 21:
>
> > . . . **if the phrase irreparable harm is to retain any meaning at all, it must refer to some prejudice beyond that which is inherent to 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 . . . .**
> > [Emphasis added]

(Also: *Pao v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 941, [2005] F.C.J. No. 1173 (Pinard J.).)

[57] In light of the applicable case law, the applicant's allegations are clearly insufficient to show that his return to Russia would cause him irreparable harm. Because the three criteria set out in *Toth* are cumulative, this motion should be dismissed.

C. BALANCE OF CONVENIENCE

[58] Under subsection 48(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, the respondent is required to proceed with the removal of the applicant "as soon as is reasonably practicable".

[59] Although the applicant does not have a criminal record, holds gainful employment and has made efforts to achieve social and financial integration in Canada, this does not mean that the balance of convenience is in his favour.

> [11] . . 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: IRPA, subsection 48(2). 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.

(*Dhothar v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 35, [2006] F.C.J. No. 67 (von Finckenstein J.)

[60] In the case at bar, the applicant has not established the existence of irreparable harm or of a serious issue; given the nature of the “inconvenience” alleged and the respondent’s obligations under the Act, the public interest must in this case override the applicant’s individual interest.

CONCLUSION

[61] For all these reasons, the applicant’s motion to stay is dismissed.

JUDGMENT

THE COURT ORDERS that this motion to stay be dismissed.

"Michel M.J. Shore"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-72-07
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