Date: 20071029

Docket: IMM-2718-07

Citation: 2007 FC 1115

Ottawa, Ontario, October 29, 2007

PRESENT: The Honourable Madam Justice Mactavish

BETWEEN:

AMPARO TORRES VICTORIA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Amparo Torres Victoria is the subject of an inadmissibility proceeding currently pending before the Immigration Division of the Immigration and Refugee Board. That hearing has proceeded, in part, on the basis of evidence which has not been provided to either Ms. Torres or to her counsel.

[2] Ms. Torres now seeks an order staying the Immigration Division proceedings. She asks that these proceedings be stayed pending the determination of her application for judicial review of an interlocutory decision of the Immigration Division refusing to dismiss the proceedings against her.

The Immigration Division had rejected Ms. Torres' argument that the process followed in her case, which involved the use of "secret evidence" was unfair, in light of the decision of the Supreme Court of Canada in *Charkaoui v. Canada (Minister of Citizenship and Immigration)*, [2007] 1 S.C.R. 350, 2007 SCC 9.

[3] For the reasons that follow, the motion for a stay is dismissed.

Background

[4] Ms. Torres is a citizen of Colombia. She came to this country in 1996, and obtained permanent residence in Canada as a Convention refugee accepted abroad.

[5] Ms. Torres is the subject of a report under subsection 44(1) of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27. This report alleges that she is a member of a terrorist organization, namely the *Fuerzas Armadas Revolucionarias de Colombia* (or "FARC").

[6] This report was referred to the Immigration Division of the Immigration and Refugee Board for an admissibility hearing, in accordance with subsection 44(2) of the Act. Following a two day *in camera* hearing in May of 2005, the Minister obtained an order pursuant to sections 86 and 78 of *IRPA* for the non-disclosure of confidential information relied upon in support of the section 44 report.

[7] Ms. Torres was provided with a summary of the confidential information, a document that consists of 16 paragraphs. Much of the document consists of generic information relating to FARC. The disclosed information discusses Ms. Torres' political activities in Colombia, but does not identify information directly pointing to her membership in FARC. The summary does, however, make reference to the fact that members of Ms. Torres' immediate family are FARC members.

[8] Ms. Torres was also provided with documentary evidence regarding conditions within Colombia.

[9] The public portion of Ms. Torres' admissibility hearing then commenced, continuing over six sittings.

[10] In August of 2005, Ms. Torres brought a motion before the Immigration Division. Amongst other things, she asked for greater disclosure of the confidential information. She also asked to have the confidential portion of the proceedings re-heard, with the benefit of an *amicus curiae* appointed to test the evidence. That request was denied.

[11] Over the course of the proceedings, Ms. Torres also brought motions seeking, amongst other things, a more detailed summary of the confidential evidence, specific disclosure of exculpatory documents that Ms. Torres believed were in the possession of the respondent, and the production of witnesses for cross-examination. Each of these requests was refused by the Immigration Division.

[12] It appears that after Ms. Torres had completed her testimony, and prior to the completion of the hearing, the Immigration Division also received submissions from the Crown, *in camera*.

[13] The admissibility hearing was completed in September of 2006, and the presiding member reserved his decision. Before a final decision was handed down in this case, however, the Supreme Court of Canada rendered its decision in *Charkaoui*.

[14] Relying upon *Charkaoui*, Ms. Torres then brought a motion before the Immigration Division, seeking the summary dismissal of the inadmissibility proceedings on the basis that the procedure that had been followed in her case had been unfair. In the alternative, Ms. Torres asked that the proceeding before the Immigration Division be suspended, pending her application to the Federal Court for an order staying the proceedings. On June 28, 2007, the Immigration Division dismissed Ms. Torres' motion.

[15] Ms. Torres then brought an application for leave and for judicial review of the Board's interlocutory decision. This application is still pending before this Court.

[16] On July 10, 2007, Ms. Torres brought a motion in this Court, on an urgent basis, seeking to stay the Immigration Division proceedings pending the determination of her application for judicial review. Justice Campbell heard this motion on July 16, 2007. That same day, he issued an interlocutory order prohibiting the Immigration Division from rendering a decision in Ms. Torres' case until such time as the motion for a stay could be heard and finally determined.

[17] Justice Campbell's reasons simply note that this was done to preserve the *status quo* pending the hearing of this motion. His interlocutory order remains in force, pending my decision in this matter.

The Prematurity Issue

[18] Counsel for the respondent points out that Ms. Torres' underlying application for leave and for judicial review relates to an interlocutory decision of the Immigration Division. Interlocutory decisions are generally not subject to judicial review, unless they relate to either the jurisdiction of the tribunal in question, or to the impartiality of the presiding member, neither of which is in issue in this case. As a consequence, the respondent says, this Court should not even entertain the motion for a stay.

[19] I agree with counsel for the respondent that, as a general proposition, in the absence of special circumstances, interlocutory rulings made by administrative tribunals should not be challenged until the tribunal has rendered its final decision: see *Zündel v. Canada (Human Rights Commission)* [2000] 4 F.C. 255, 256 N.R. 125 (F.C.A.), at ¶10 and *Szczecka v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 934, 116 D.L.R. (4th) 333 at 335.

[20] There are a number of reasons why this is so, including the fact that the application may be rendered moot by the ultimate outcome of the case, and the risk of the fragmentation of the process, with the accompanying costs and delays.

[21] As to what may be considered to be "special circumstances", Justice Sharlow gave the following examples in *Canada (Canadian Human Rights Commission) v. Canada 3000 Airlines Ltd. (re Nijjar)*, [1999] F.C.J. No. 725, where she stated at ¶15 that:

> Special circumstances may exist if judicial review of the impugned decision is dispositive of a substantive right of a party (*Canada v. Schnurer Estate*, [1997] 2 F.C. 545 (F.C.A.)), or if judicial review is sought on a question that goes to the legality of the tribunal itself (*Cannon v. Canada*, [1998] 2 F.C 104 (F.C.T.D) ...

[22] I do not, however, read the jurisprudence relating to the issue of prematurity to say that an application for judicial review of an interlocutory decision of an administrative tribunal is void from the outset. Rather, the Court may exercise its discretion to decline to entertain the application.

[23] I am prepared to exercise my discretion to entertain Ms. Torres' request for a stay. That said, it seems to me that the question of prematurity may have a bearing on each of the elements of the tripartite injunctive test, and will thus be addressed in that context.

Has Ms. Torres identified a Serious Issue in This Case?

[24] Ms. Torres submits that the Supreme Court of Canada has recognized that the process followed in her case is unfair, and violates her section 7 *Charter* rights. While acknowledging that she is not subject to a security certificate, Ms. Torres submits that the Supreme Court's reasoning in *Charkaoui* is equally applicable in this case.

[25] Moreover, Ms. Torres submits that the public safety considerations that led the Supreme Court of Canada to suspend its declaration of invalidity for a year in *Charkaoui* do not arise in this case. As a result, Ms. Torres argues that the Supreme Court's decision in *Charkaoui* should have immediate effect in this case.

[26] It is generally neither desirable nor appropriate to engage in a prolonged discussion of the merits of a case on a motion for a stay: *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at ¶50. Rather, the Court must be satisfied that the underlying application is neither frivolous nor vexatious.

[27] With this in mind, I am satisfied that Ms. Torres has established the existence of at least one potential serious issue as to the fairness of the process followed in this case in relation to the confidential evidence.

[28] In coming to this conclusion, I would note that the fact that the Supreme Court chose to suspend its remedy in *Charkaoui* does not take away from the legitimacy of the concerns as to fairness of the process in either that case or in this.

[29] Moreover, I do not agree with the respondent that this Court's decision in *Segasayo v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 372 is necessarily determinative of this case. In this regard, I would simply note that there are arguably material differences between Ms. Torres' case and the circumstances in issue in *Segasayo*.

[30] These differences include the fact that the amount of redacted material in issue in *Segasayo* was evidently very limited, relative to the entirety of the record. The respondent has not suggested that this is so in this case. Moreover, the section 78 process was applied only by analogy in *Segasayo*, which did not involve an inadmissibility hearing but rather an application for ministerial relief. Section 78 of *IRPA* is directly applicable in this case.

[31] As a consequence, I am satisfied that Ms. Torres has potentially satisfied the serious issue component of the test for a stay. I also recognize, however, that the issue may not end up having any practical implications for Ms. Torres, given that we do not know how the Immigration Division will ultimately rule, or what the basis for the Board's decision will be. I will return to this concern in my consideration of where the balance of convenience lies in this case.

Irreparable Harm

[32] Ms. Torres asserts that she will suffer profound emotional harm if she is found to be a "terrorist", based upon a process in which she could not meaningfully contest the evidence against her. Not only will her reputation be irreparably damaged, she says that a finding that she is a terrorist will put her family in Colombia at significant risk.

[33] She also asserts that allowing a decision to be made in her case based upon a process that has been found by the Supreme Court of Canada to be unfair would result in irreparable harm to the Canadian justice system, and "would be a stain on Canada's history".

[34] Ms. Torres further contends that allowing the Immigration Division to determine that she is a member of a terrorist organization will set the removals process in motion, further causing her irreparable harm.

[35] Finally, she says that she has limited financial resources to spend on the continuing defence of a hearing that would inevitably be declared unlawful.

[36] Proof of irreparable harm must be clear and not speculative: see, for example, *Nature Co. v. Sci-Tech Educational Inc.* (1992), 41 C.P.R. (3d) 359 at 367. Given that we do not know what the outcome of the Immigration Division proceedings will be, all of Ms. Torres' claims of irreparable harm are entirely speculative at this point.

[37] Moreover, even if Ms. Torres is found to be inadmissible to Canada by the Immigration Division, given the number of steps still to be taken in the removals process, there is no realistic prospect that Ms. Torres will be removed to Colombia between now and the time that her application for judicial review is finally disposed of.

[38] As a consequence, Ms. Torres has not satisfied the second branch of the tripartite test for granting a stay.

Balance of Convenience

[39] I am also not persuaded that the balance of convenience favours granting the stay. As was noted earlier, the underlying decision of the Immigration Division was an interlocutory one, and thus the application for judicial review is arguably premature.

[40] We have no way of knowing at this juncture how the proceedings before the Immigration Division will play themselves out. It remains possible that the Immigration Division will rule in Ms. Torres' favour, in which case her application for judicial review would potentially be rendered moot.

[41] It is also possible that even if the Immigration Division finds Ms. Torres to be inadmissible, in doing so it may choose to rely only on the public record, and to disregard the confidential evidence, again arguably rendering Ms. Torres' concerns moot.

[42] Moreover, if the process employed by the Immigration Division does not satisfy the requirements of the *Charter* and procedural fairness, this can be addressed and corrected on the judicial review of the merits of the Immigration Division's decision.

[43] In these circumstances, I find that the balance of convenience favours allowing the Immigration Division to complete its task, and to render a decision in Ms. Torres' case.

Conclusion

[44] Having failed to demonstrate that she would suffer irreparable harm unless a stay is granted, or that the balance of convenience favours the granting of the stay, it follows that the motion must be dismissed.

Certification

[45] Counsel for Ms. Torres suggests that there is some doubt as to whether it is open to this Court to certify questions for the Federal Court of Appeal in relation to an interlocutory order such as this.

[46] That said, Ms. Torres refers to this Court's recent decision in *Harkat v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 508, where the Court stayed a security certificate proceeding pending Parliament's legislative response to the *Charkaoui* decision. In *Harkat*, the Court certified a series of questions for the Federal Court of Appeal, and Ms. Torres submits that I should do likewise in this case.

[47] In my view, the Court's decision in *Harkat* is distinguishable from the present case in that the stay that was granted in *Harkat* had the effect of permanently staying the security certificate proceedings brought under the current legislative regime. As such, it was arguably a final decision.

[48] In contrast, what is sought in this case is a conventional interim stay, putting the Immigration Division proceedings on hold pending the determination of Ms. Torres's application for leave and for judicial review.

[49] My order dismissing the motion for a stay is unquestionably an interlocutory order made in the context of the underlying application for judicial review. With this in mind, the law is clear: that is, no appeal lies to the Federal Court of Appeal in relation to an interlocutory judgment of this Court made in a proceeding under the *Immigration and Refugee Protection Act*. In this regard see paragraph 72(2)(e) of *Immigration and Refugee Protection Act, Canada (Minister of Citizenship and Immigration) v. Edwards*, 2005 FCA 176 and *Kocak v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 54.

[50] As a consequence, I do not think that it is open to me to certify the questions proposed by Ms. Torres.

[51] That said, even if it were open to me to do so, I would not, in any event, have certified the questions proposed by Ms. Torres. While the final decision in this case may or may not ultimately raise issues of general importance, I have not finally decided any legal issues on this motion. I have simply found that Ms. Torres has met the low threshold for establishing that a serious issue arises in her case.

[52] Moreover, my analysis of the issue of irreparable harm is fact-specific, and my assessment of the question of the balance of convenience requires the weighing of a number of factors, including the circumstances of Ms. Torres' personal situation.

[53] As such, I am not persuaded that it is appropriate to certify the questions proposed by Ms. Torres, and I decline to do so.

Costs

[54] Ms. Torres asks for her costs in any event of the cause, submitting that she is neither poor enough to qualify for legal aid, nor wealthy enough to fund *Charter* litigation.

[55] I decline to make any order of costs at this stage in this proceeding, and will leave the matter of costs to be dealt with by the judge dealing with the merits of the application for judicial review, should leave be granted.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that this motion is dismissed.

"Anne Mactavish"
Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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