

Date: 20080303

Docket: IMM-1046-07

Citation: 2008 FC 274

Ottawa, Ontario, March 3, 2008

PRESENT: The Honourable Mr. Justice O'Reilly

BETWEEN:

ALMIR KOLENOVIC

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Almir Kolenovic was scheduled to be removed from Canada to his country of origin, Montenegro, in March 2007. He had asked an immigration enforcement officer to defer his removal, given that he had an outstanding application to re-open his unsuccessful claim for refugee protection, had requested a second pre-removal risk assessment, had recently submitted an application for humanitarian and compassionate relief, was receiving treatment for post traumatic stress disorder, and was afraid to return to Montenegro. The officer refused. Mr. Kolenovic submits that the officer erred and asks me to order the officer to reconsider.

[2] Subsequent to the request for deferral, Justice Roger Hughes granted Mr. Kolenovic a stay of execution of the removal order pending a decision on his application to re-open his refugee claim. On August 8, 2007, the Immigration and Refugee Board (IRB) refused that application.

[3] Mr. Kolenovic did not attend the hearing of this application for judicial review on January 16, 2008. Nor did he communicate with the Court to request an adjournment or explain his absence. Counsel for the respondent described unsuccessful attempts to serve Mr. Kolenovic with a Book of Authorities on the day prior to the hearing. In the circumstances and with the agreement of the respondent, I undertook to decide this application on the basis of the materials filed. Attached is a transcript of the proceedings on January 16, 2008.

[4] The respondent's position is that these proceedings are moot, given that Mr. Kolenovic, in effect, has already obtained the relief he was seeking from the enforcement officer – he was permitted to remain in Canada to pursue his application before the IRB. I agree with the respondent that this application for judicial review is moot and will exercise my discretion not to decide it.

I. Issue

[5] Is this application for judicial review moot, given that Mr. Kolenovic was permitted to remain in Canada pending his application to re-open his refugee claim?

II. Analysis

[6] Mr. Kolenovic's principal argument relates to the failure of the officer to grant him a deferral pending a decision of the IRB. Even if I were to conclude that Mr. Kolenovic's position should prevail, the remedy to which he would be entitled would be a reconsideration of his request for a deferral until the IRB rendered its decision. But the IRB has *already* rendered its decision. There is no point asking another officer to grant Mr. Kolenovic's request. These circumstances render this application moot.

[7] Mr. Kolenovic also argued that the officer erred by failing to consider new evidence of the risk that faces him in Montenegro. This argument appears entirely baseless given that Mr. Kolenovic had already had the benefit of a refugee hearing and a pre-removal risk assessment, and had recently initiated a request for a second assessment. In addition, the enforcement officer did consider the materials Mr. Kolenovic had submitted and concluded that they did not disclose any further risk.

[8] The remaining question is whether I should exercise my discretion to decide this application notwithstanding that it is moot. I decline to do so. Considering the relevant criteria (see *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342), there remains, in a general sense, an adversarial relationship between the parties, but I do not think the interests of judicial economy would be served by deciding this case. The law governing the discretion available to enforcement officers is well-settled: *Kovacs v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 1247.

I am doubtful that the facts before me present an occasion to advance the law or provide guidance to other officers even though, to do so, would not take the Court outside of its proper role.

[9] Therefore, this application for judicial review is dismissed. No question arises for certification.

JUDGMENT**THIS COURT'S JUDGMENT IS that**

1. The application for judicial review is dismissed;
2. No question of general importance is stated.

“James W. O’Reilly”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1046-07

STYLE OF CAUSE: ALMIR KOLENOVIC v. MCI

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: January 16, 2008

**REASONS FOR JUDGMENT
AND JUDGMENT:** O'REILLY J.

DATED: March 3, 2008

APPEARANCES:

Unrepresented

FOR THE APPLICANT

Janet Chisholm

FOR THE RESPONDENT

SOLICITORS OF RECORD:

Unrepresented

FOR THE APPLICANT

JOHN H. SIMS, Q.C.
Deputy Attorney General of Canada
Toronto, ON

FOR THE RESPONDENT

Court File No. IMM-1046-07

THE FEDERAL COURT

BETWEEN:

ALMIR KOLENOVIK

Applicant

- and -

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

**APPLICATION FOR JUDICIAL REVIEW HEARD BEFORE
MR. JUSTICE O'REILLY**

**in Courts Administration Service, Courtroom No. 7B,
330 University Avenue, Toronto, Ontario
on Wednesday, January 16, 2008 at 9:58 a.m.**

APPEARANCES:

Ms. Janet Chisholm

for the Respondent

Also Present:

Mr. S. Shepherd

Court Registrar

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**200 Elgin Street, Suite 1105
Ottawa, Ontario K2P 1L5
(613) 564-2727**

**130 King Street West, Suite 1800
Toronto, Ontario M5X 1E3
(416) 861-8720**

1 Toronto, Ontario
2 --- Upon commencing Wednesday, January 16th, 2008,
3 at 9:58 a.m.

4 REGISTRAR: This hearing of the
5 Federal Court of Canada is now resumed. The
6 Honorable Mr. Justice O'Reilly is presiding. The
7 court calls file IMM-1046-07, Almir Kolenovic and
8 the Minister of Citizenship and Immigration. The
9 applicant is not present; Ms. Janet Chisholm
10 appears for the respondent.

11 JUSTICE O'REILLY: Good morning.

12 MS. CHISHOLM: Good morning.

13 JUSTICE O'REILLY: I see no one is
14 here for the applicant.

15 MS. CHISHOLM: Not as far as I
16 know. I am not certain -- someone has entered the
17 courtroom, and I am not certain who it is.

18 JUSTICE O'REILLY: That is my law
19 clerk.

20 MS. CHISHOLM: Thank you, my
21 lord. I have corresponded with the applicant on
22 several occasions in the last two months. I wrote
23 him in November 2007 asking his position on whether
24 or not he was going to carry on with this judicial
25 review, in light of the fact that the remedy he had

1 asked for — that he not be deported until his
2 motion to reopen was decided — had been effectively
3 granted. I have indicated that we might consider
4 pursuing a motion.

5 I have included this information
6 in my memorandum of law. There have been three
7 rounds of correspondence I have had with the
8 applicant. I have proof of service in each of
9 those occasions to the fax number that was provided
10 by the applicant.

11 This morning, after it became
12 obvious the applicant wasn't going to appear, I
13 called my assistant because it came to my attention
14 that we had attempted to effect service of the book
15 of authorities yesterday. I wanted to see what
16 happened.

17 I was told that the process server
18 attempted service. He knocked on the door — I can
19 recount the whole story, if you like.

20 JUSTICE O'REILLY: Yes, please.

21 MS. CHISHOLM: He knocked on the
22 door and he could tell someone was inside but no
23 one was answering. At that point he called the
24 number that had been provided by the applicant and
25 he reached an individual who said he was an agent

1 for the applicant. The agent indicated that he
2 would try calling the applicant, but stated in any
3 event he was in the right place, that he did have
4 the proper address.

5 I am not certain what happened
6 after that between the process server and the
7 agent, but I am told that at that point in time,
8 someone did come to the door. They didn't open the
9 door, but they began to shout profanities. At that
10 point in time, the process server left the book of
11 authorities on the doorstep.

12 I would like to provide that
13 information to the court, and note that that
14 information is coming to me third-hand, but I
15 believe it to be accurate.

16 JUSTICE O'REILLY: Thank you, Ms.
17 Chisholm.

18 MS. CHISHOLM: Thank you, my lord.

19 JUSTICE O'REILLY: Do you have any
20 suggestions on how to proceed this morning?

21 MS. CHISHOLM: My lord, I am in
22 your hands. I note that the large part of what the
23 applicant was asking for, and what Justice Hughes
24 had ordered in the stay, was that the deferral be
25 granted until such time as the motion to reopen at

1 the IRB was decided. As you can see by the further
2 affidavit we have provided, that has, in fact, come
3 to fruition. I would suggest that the bulk of the
4 applicant's arguments are now moot and that is
5 something the court may want to take into
6 consideration as to whether or not you want to
7 dismiss this matter today outright or if you want
8 to reschedule.

9 JUSTICE O'REILLY: What I have
10 done in other circumstances like this is I have
11 sought consent of counsel for the respondent to
12 decide the applicant's application on the basis of
13 the written materials filed. The position you have
14 just stated as to mootness is set out in your
15 further memorandum and would I take that into
16 account, as I would take into account the
17 submissions that the applicant has made in his
18 materials.

19 I would propose that way of
20 proceeding to you, and in addition, ask that the
21 transcript of what has been said in open court this
22 morning be served on the applicant so that he is
23 aware of how the court is proceeding and that it is
24 taking his arguments seriously as they are set out
25 in his written materials.

1 MS. CHISHOLM: Yes, my lord. I
2 would have no objection to you -- with me, simply
3 relying on my written submissions today, and
4 stating to the court that you go ahead and decide
5 that based on both parties' written submissions.
6 If I may, though, I want to take a look at my notes
7 to make sure there is nothing else that I wanted to
8 add today, other than what is in my written
9 submissions.

10 JUSTICE O'REILLY: Very well.

11 MS. CHISHOLM: I would rely on my
12 written submissions and note that, I apologize, but
13 I did not serve the book authorities in advance.
14 That did not happen yesterday, but I have left a
15 copy today with you so if you need to refer to any
16 of the cases they are before you.

17 JUSTICE O'REILLY: Thank you, Ms.
18 Chisholm. I think I will proceed that way.

19 MS. CHISHOLM: Thank you, my lord.

20 JUSTICE O'REILLY: Thank you very
21 much. We will adjourn.

22 --- Whereupon the hearing adjourned at 10:07 a.m.

I HEREBY CERTIFY THAT I have, to the best
of my skill and ability, accurately transcribed
the foregoing proceedings.

Catherine Keenan

Catherine Keenan, Computer Aided Transcriptionist