Federal Court  Cour fédérale

Date: 20101110

Docket: IMM-6447-10

Citation: 2010 FC 1129

Toronto, Ontario, November 10, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MARINAH BERGMAN AND
SARA MALKA GERSHZON

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The underlying application for leave and for judicial review challenges a Direction to Report. As held by this Court, a Direction to Report is not a reviewable decision and, hence, not subject to judicial review: There is no valid application upon which to grant the injunction requested. The evidence indicates that the Enforcement Officer acted fairly and reasonably. He

accommodated the Applicants in the year it took to schedule Ms. Marinah Bergman's removal to Australia and, at Ms. Sara Malka Gershzon's request, her removal to the United States.

[2] The Applicants have not put forward any clear evidence of harm should they be removed; let alone evidence of irreparable harm.

[3] Ms. Bergman remained in Canada for two-and-half years without status once her visitor's visa expired. Once discovered, she subsequently filed various applications - some of which the factual foundations were less than accurate; related applications for leave and for judicial review were denied. She was also determined to be inadmissible due to criminal convictions in the United States for fraud. As the background record below demonstrates (pages 3 to 6 inclusive), the Applicants have exercised every means to extend their stay but they do not have an unqualified right to remain in Canada. The Minister now has a legislated obligation to enforce the removal order. The balance of convenience favours the Minister.

[4] As stated by Justice John Sopinka in *Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711:

> The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.

[5] Subsequent to consideration of the pleadings, the Court is fully in accord with the position of the Respondent.

II. Judicial Review

[6] This is a motion for a stay of removal of the Applicants, scheduled for Sunday, November 14, 2010. The Applicant, Ms. Marinah Bergman is scheduled to be removed to Australia. The Applicant, Ms. Sara Malka Gershzon is scheduled to be removed to the United States.

[7] The underlying application for the requested injunction staying removal challenges a Direction to Report. The Applicants also made a request for a deferral of removal which was submitted the date they received their Direction to Report – October 21, 2010. That deferral request does not make up the basis for this application.

III. Background

[8] Mrs. Bergman arrived in Canada at Lester B. Pearson International Airport on January 7, 2002. She was admitted as a visitor for a six month period, she received an extension to her visitor status to expire on October 15, 2002.

[9] On May 24, 2005, Mrs. Bergman was arrested while attempting to meet her daughter, Ms. Gershzon, at Lester B. Person International Airport.

[10] On May 24, 2005, Ms. Bergman made a claim for refugee protection. This claim was rejected on the basis of credibility and that she was not a protected person. Leave was denied for a judicial review of the Refugee Protection Division's (RPD) original decision. An additional application for leave was also denied on the RPD's decision not to reconsider the matter.

[11] On May 27, 2005, Ms. Bergman was found to be inadmissible as she was in Canada without an immigrant visa and that she was convicted in the United States for conspiracy to commit offense or defraud the United States.

[12] In October 2006, Ms. Bergman filed a spousal sponsorship application which was eventually withdrawn in January 2009 as it was discovered that the sponsor was not co-habituating with Ms. Bergman.

[13] Ms. Bergman received a negative Pre-Removal Risk Assessment (PRRA) decision in March 2009.

[14] In regard to the scheduling of this removal, a brief case history is as follows:

- In November 2009, Ms. Bergman met with the Enforcement Officer to discuss removal arrangements. The Enforcement Officer informed Ms. Bergman that if she wished to make a deferral request she could do so upon removal being scheduled;
- In December 2009, Ms. Bergman was informed not to purchase a plane ticket where she would have to transit through Hong Kong. Ms. Bergman bought a plane ticket with a transit through Hong Kong. Ms. Bergman was provided with an instruction sheet indicating through which countries she could not transit. Ms. Bergman brought a deferral request with her; the Enforcement Officer informed Ms. Bergman that if she wished to make a deferral request she could do so upon removal being scheduled and a Direction to Report being produced;
- In January 2010, Ms. Bergman brought in a plane ticket and a deferral request with her. The Enforcement Officer informed Ms. Bergman that if she wished to make a deferral request she could do so upon removal being scheduled and a Direction to Report being produced. The Enforcement Officer informed Ms. Bergman that an updated note on her daughter's condition would assist in determining a deferral;

- The Enforcement Officer was advised by Ms. Bergman that her daughter has Australian citizenship;
- On January 22, 2010, Ms. Bergman brought a doctor's note. A medical deferral was granted.
- From February until July 2010 the medical deferral was extended;
- In July 2010, Ms. Bergman provided an invoice for a flight to Perth via Dubai departing September 29, 2010. She informed the Enforcement Officer that her daughter's medical claim would be resolved in September as her lawyer assured her of this. The Enforcement Officer informed her that he required a new itinerary as she could not transit through Dubai as noted in the instruction sheet provided to her previously;
- On July 22, 2010, a new itinerary provided by Ms. Bergman was approved and she was served with a Direction to Report;
- On September 2, 2010, Ms. Bergman met with the Enforcement Officer along with her daughter and provided additional information to her deferral request;
- On September 7, 2010, the Enforcement Officer received a call from Air Canada informing him that there were no bookings relating to the itinerary presented by Ms. Bergman. The Enforcement Officer called Ms. Bergman's travel agent who confirmed that no ticket was ever purchased and the booking had since expired. The Enforcement Officer called Ms. Bergman who confirmed that she never purchased a ticket and then she proceeded to inquire about her deferral request. The Enforcement Officer informed Ms. Bergman that once a booking can be confirmed the deferral request would be processed;
- On September 13, 2010, Ms. Bergman attended the Greater Toronto Enforcement Centre (GTEC) to retrieve Ms. Gershzon's passport as, according to her, a one way ticket to

Australia cannot be issued without a valid Australian passport. Ms. Bergman took Ms. Gershzon's U.S. passport in order to obtain Australian passport;

- On October 14, 2010, Ms. Bergman informed the Enforcement Officer that Ms. Gershzon did not apply for an Australian passport and that Ms. Gershzon wanted to be removed to New York instead. The Enforcement Officer informed Ms. Bergman that the Canada Border Services Agency (CBSA) would be issuing the tickets given the difficulties associated with the removal in the past;
- On October 21, 2010, both Ms. Bergman and Ms. Gershzon were served with their Directions to Report for November 14, 2010.

IV. Issue

[15] Has the three part conjunctive *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302, 11 A.C.W.S. (3d) 440 (F.C.A.), test for a stay been satisfied?

V. Analysis

No proper leave application as no decision is being challenged

[16] The Applicants are challenging a Direction to Report for removal in their underlying application for leave and for judicial review.

[17] A motion for a stay of removal is an injunction dependent upon a proper underlying application before the Court. In *Oberlander v. Canada (Minister of Citizenship and Immigration)*, 2003 FCA 134, 121 A.C.W.S. (3d) 610, the Federal Court of Appeal made it clear that, when a person seeks injunctive relief in respect of a matter arising under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), that request for injunctive relief must be brought on the

basis of a proper application for leave and for judicial review. The absence of a proper application for leave is a sufficient basis on its own for the Court to dismiss the motion.

[18] This Court has confirmed that a Direction to Report is nothing more than informational communication, the sole purpose of which is to explain when and where the removal order against an applicant is to be executed. The issuance of a Direction to Report, in and of itself, does not constitute a "decision" or order falling within the ambit of subsection 18.1(2) of the *Federal Courts Act*, 1985, c. F-7, and cannot be the subject of a judicial review application. This Court has held that where the underlying application for judicial review challenges a Direction to Report, the stay can be dismissed on this preliminary basis. Since the Direction to Report is not a reviewable decision, there is no valid underlying application to support the stay motion (*Daniel v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 392, 156 A.C.W.S. (3d) 1144 at para. 12; *Tran v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 394, 138 A.C.W.S. (3d) 343 at para. 2; *Jarada v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 14, 150 A.C.W.S. (3d) 887).

The tripartite conjunctive test

[19] The test for the granting of an order staying execution of a removal order is:

a. whether there is a serious question to be determined by the Court;

b. whether the party seeking the stay would suffer irreparable harm if the stay were not issued; **and**

c. whether, on the balance of convenience, the party seeking the stay will suffer the greater harm from the refusal to grant the stay.

(*Toth*, above; *RJR- MacDonald Inc. v. Canada (Attorney General*), [1994] 1 S.C.R. 311).

[20] The test for a stay is conjunctive: The Applicants must satisfy each branch of the three part test.

[21] The issuance of a stay is an extraordinary remedy: the Applicants must demonstrate "special and compelling circumstances" that would warrant "exceptional judicial intervention." They have not done so (*Ikeji v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 573, 106 A.C.W.S. (3d) 123 at para. 8).

A. Serious Issue

[22] As the Applicants have not put forward an application to challenge a decision, no serious issue exists.

[23] The Federal Court of Appeal has confirmed that the Minister is bound by law to execute removal orders as soon as reasonably practicable and deferral should be reserved for those applications where failure to defer will expose the applicant to "risk of death, extreme sanction or inhumane treatment. With respect to humanitarian and compassionate (H&C) applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety" (*Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, 176 A.C.W.S. (3d) 490 at para. 51).

[24] Ms. Bergman has had her personal risk assessed in a RPD claim and in a PRRA in regard to her return to Australia. Both claims were rejected as was her applications for leave and for judicial

review of the RPD decisions. Ms. Gershzon chose to return to New York instead of accompanying her mother to Australia.

[25] As per section 48 of the IRPA, an Enforcement Officer has the legislated obligation to enforce, as soon as is reasonably practicable, a removal order as the foreign national subject to a removal order must leave Canada immediately. The Enforcement Officer acted in good faith and reasonably accommodated the Applicants in scheduling their removal; a process which began a year ago.

B. Irreparable Harm

[26] The onus is on the Applicants to demonstrate, through clear and convincing evidence of irreparable harm, that the extraordinary remedy of a stay of removal is warranted. Irreparable harm must constitute more than a series of possibilities and cannot be simply based on assertions and speculation (*Atwal v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427, 136 A.C.W.S. (3d) 109).

[27] Ms. Bergman has not put forward any evidence or made any claim that she would suffer irreparable harm if removed to Australia. Also, while Ms. Bergman and Ms. Gershzon were given the opportunity to travel to Australia together and claim that Ms. Gershzon is the dependent daughter of Ms. Bergman, Ms. Gershzon, herself, indicated that she chose to be removed to New York instead of accompanying her mother to Australia (Notice of Motion, Applicant's Record (AR) at p. 2, para. 2).

[28] Ms. Gershzon has put forward evidence indicating injuries sustained while a passenger in a motor vehicle accident in August 2009. Ms. Gershzon's injuries consisted of soft tissue damage and she was released from the hospital within one day with a prescription to take Ibuprofen and Tylenol (Hospital Documentation, AR at pp. 9-11).

[29] Ms. Gershzon's recent assessment indicates that she has demonstrated significant progress in her condition and in order to achieve her complete recovery it is still recommended for her to continue with rehabilitation. Ms. Gershzon has not put forward any evidence that such rehabilitation would not be available in the U.S. (Downsview Healthcare Inc., AR at p. 16); nor does it appear that it would not be available in Australia.

[30] The Applicants' evidence also indicates a lack of consensus between reports regarding Ms. Gershzon's abilities to perform daily tasks. The evidence adduced is not "clear and convincing evidence" (Rebuttal Assessment, AR at p. 32). In fact, rebuttal evidence is significantly contradictory in that regard.

[31] Ms. Gershzon's has not put forward any evidence that a flight from Toronto to Newark would cause irreparable harm. Ms. Gershzon's evidence is that if she is to sit for a prolonged period, while having a decreased tolerance, she is to use a back support, to alternate sitting and standing, and to perform seated stretches. This is no evidence of irreparable harm which would result from a plane trip from Toronto to Newark or even to Australia with use of a back support, alternate sitting and standing, and seated stretches performed. (Rebuttal Assessment, AR at pp. 27 and 33).

[32] No evidence exists of irreparable harm for either Ms. Bergman or Ms. Gershzon and the evidence of any harm resulting from a removal is speculative at best.

[33] The risk of irreparable harm cannot be speculative. The Applicants have failed to provide any clear and convincing evidence of irreparable harm. The Applicants have failed to satisfy the second conjunctive part of the test for a stay of removal (*Simon v. Canada (M.C.I. & M.P.S.E.P)*, (24 April 2008) Docket No. IMM-1764-08, by Justice Leonard J. Mandamin).

C. Balance of Convenience

[34] Section 48 of the IRPA provides that an enforceable removal order must be enforced as soon as is reasonably practicable.

[35] As stated by Justice Sopinka in *Chiarelli*, above:

> The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.

[36] The Applicants are seeking extraordinary equitable relief. It is trite law that the public interest must be taken into consideration when evaluating this last criterion. In order to demonstrate that the balance of convenience favours the Applicants, the latter would have had to demonstrate a public interest not to remove them as scheduled. The Applicants have not done so (*RJR-MacDonald Inc.*, above; *Blum v. Canada (Minister of Citizenship and Immigration)* (1994), 90 F.T.R. 54, 52 A.C.W.S. (3d) 1099).

[37] The Applicant, Ms. Bergman came to Canada, remained in Canada without status for two-and-a-half years and, once caught, gambled on a refugee claim that was unfounded. Although

Ms. Bergman was determined to be inadmissible because of her criminal convictions in the United States and that she remained in Canada for two-and-half-years without status, the Applicants have been granted full access to our administrative and legal systems and have used it in a variety of ways to extend their time in Canada. Ms. Bergman has filed applications for refugee protection, reconsiderations of a negative RPD decision, spousal sponsorship, PRRA, deferral and leaves for judicial reviews; however, as noted by Justice Yves de Montigny: "A failed refugee claimant is certainly entitled to use all the legal remedies at his or her disposal, but he or she must do so knowing full well that the removal will be more painful if it eventually comes to it" (*Serda v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 356, 146 A.C.W.S. (3d) at para. 23).

[38] The balance of any inconvenience which the Applicants may suffer as a result of removal from Canada does not outweigh the public interest which the Respondent seeks to maintain in the application of the IRPA and its regulations – specifically an interest in executing a deportation order as soon as reasonably practicable (*Atwal*, above).

VI. Conclusion

[39] For all of the above reasons, the motion for a stay of removal from Canada is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the motion for a stay of removal be dismissed.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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