Federal Court  Cour fédérale

Date: 20110621

Docket: IMM-5409-10

Citation: 2011 FC 731

Ottawa, Ontario, June 21, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MARIA ELENA PARRA ANDUJO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] Subsection 52(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*) states that "if a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances." By requiring an Authorization to Return to Canada (ARC), section 52 of the *IRPA* sends "a strong message to individuals to comply with enforceable departure orders", as described in the Guidelines:

> … A permanent bar on returning to Canada is a serious consequence of non-compliance. Consequently, an Authorization to Return to Canada (ARC) should not be used as a routine way to overcome this bar, but rather in cases where an officer considers the issuance to be justifiable based on the facts of the case.
>
> Individuals applying for an ARC must demonstrate that there are compelling reasons to consider an Authorization to Return to Canada when weighed against the circumstances that necessitated the issuance of a removal order. Applicants must also demonstrate that they pose a minimal risk to Canadians and to Canadian society. Merely meeting eligibility requirements for the issuance of a visa is not sufficient to grant an ARC.

(Citizenship and Immigration Canada (CIC), Operation Manual, OP 1 Procedures, 28 August 2009 at para 6.1, Applicant's record (AR) at p 22).

II. Introduction

[2] A Mexican citizen and failed refugee claimant was subject to a deportation order based on her failure to depart Canada as required by the *IRPA.* As a result, the Applicant may not return to Canada without first obtaining the permission of an immigration officer, which comes in the form of an ARC. The Applicant did not leave Canada for almost three years after the prescribed period following the lifting of the stay; that, in order to allegedly benefit from a Pre-Removal Risk Assessment (PRRA).

III. Judicial Procedure

[3] This is an application for judicial review of a decision by a Counsellor and Operations Manager at the Immigration Section of the Embassy of Canada in Mexico, on July 27, 2010, denying the Applicant, a failed refugee claimant, an ARC pursuant to section 52 of the *IRPA.*

IV. Background

[4] The Applicant, Ms. Maria Elena Parra Andujo, was born on July 21, 1978, and is a citizen of Mexico. She lived in Canada from June 11, 2002 to April 17, 2007.

[5] On May 23, 2003, the Applicant claimed refugee protection. A departure order was issued pursuant to paragraph 20(1)(*a*) of the *IRPA* and section 6 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (*IRPR*). Under subsection 49(2) of the *IRPA*, the departure order was conditional and could not become effective until one of the conditions provided in the subsection had occurred.

[6] Ms. Andujo's refugee claim was denied on November 27, 2003 by the Refugee Protection Division of the Immigration and Refugee Board (Board), finding her not credible. On March 31, 2004, the Federal Court dismissed the application for leave and for judicial review of this decision.

[7] The refusal of the application for leave ended the stay of execution of the departure order (para 231(1)(*a*) of the *IRPR*); thus, the departure order became enforceable on March 31, 2004 (subsection 48(1) of the *IRPA*). The Applicant was given 30 days to leave Canada following the lifting of the stay. On April 30, 2004, the departure order became a deportation order pursuant to subsection 224(2) of the *IRPR*.

[8] The Applicant did not leave Canada and alleges that she had remained in Canada in order to benefit from a Pre-Removal Risk Assessment (PRRA). On January 2, 2007, the Canada Border

Services Agency (CBSA) sent the Applicant a notice for her to meet with an Enforcement Officer in order to update her file. On January 13, 2007, the Applicant met an Enforcement Officer, who notified her of her right to file a PRRA application which resulted in a stay of execution of the deportation order pending the PRRA decision (section 232 of the *IRPR*).

[9] On January 26, 2007, the Applicant submitted a PRRA application which was denied. As provided in paragraph 232(*c*) of the *IRPR*, the stay under section 232 of the *IRPR* ended with the rejection of the PRRA application. The Applicant did not apply for leave and for judicial review against that decision and, on April 17, 2007 the Applicant was deported from Canada.

[10] On December 29, 2008, the Applicant filed an application for permanent residence in Canada in the skilled worker category. She had successfully applied for Quebec residence and obtained a Quebec Selection Certificate (Certificate). Having obtained her Certificate, the Applicant was able to apply for a Permanent Resident Visa on the basis of a Quebec provincial selection.

[11] A letter of March 25, 2009 informed the Applicant that she had to apply for an ARC and provide information in support of its issuance (AR at p 15). When asked to explain the circumstances necessitating the issuance of a removal order, the Applicant, on May 17, 2009, sent a letter referring to her application for a Permanent Resident Visa. In that letter, the Applicant explained why a written authorization from a Canadian Immigration Officer was required in order for her to return to Canada (AR at pp 29-30).

[12] On March 24, 2010, a letter was sent by email to the Applicant requesting, for the second time, that she provide the Reasons for Decision rendered by the Board in regard to her claim for refugee protection (Respondent's Memorandum of Argument and Affidavit at p 11).

[13] On July 27, 2010, the Counsellor denied the request for the issuance of an ARC. On the same day, the Visa Officer denied the Applicant's application for permanent residence, as she was inadmissible due to a negative ARC decision (Decisions, dated July, 27, 2010, and CAIPS notes, AR at pp 8-10 and 11-13).

V. Decision under Review

[14] In a decision dated July 27, 2010, the Counsellor found that the Applicant did not demonstrate that there were compelling reasons to consider an ARC, when weighed against the circumstances that necessitated the issuance of a removal order. Specifically, the Counsellor considered the explanations submitted by the Applicant for leaving Canada almost three years after the prescribed 30-day period following the lifting of the stay of execution of her removal order. The Counsellor found that the Applicant's explanation was insufficient, and denied her request for the issuance of an ARC as a result:

> Votre application et la documentation l'accompagnant ont été revues avec soin. Cependant, le Gestionnaire des opérations, qui détient la permission d'autoriser ou non une Autorisation de retour n'est pas satisfait qu'il existe des circonstances atténuantes justifiant votre retour au Canada. Les circonstances entourant votre renvoi du Canada et les raisons d'y retourner ont été considérées dans l'évaluation de votre cas. Cette décision a pour effet de vous interdire de territoire tel qu'il est prescrit au paragraphe 52(1) de la loi :
>
> > 52(1) L'exécution de la mesure de renvoi emporte interdiction de revenir au Canada, sauf autorisation de l'agent.

> En conséquence[], il a été établi que vous étiez inadmissible au Canada et qu'il n'est pas dans l'intérêt de la population de vous émettre une autorisation de retour annulant cette interdiction. Il ne semble pas qu'il existe des raisons suffisantes et documentées pour justifier votre admission au Canada.

(Decision dated July 27, 2010, AR at p 8).

[15] As a result of this negative decision, the Visa Officer of the Canadian Embassy in Mexico denied the Applicant's application for a Permanent Resident Visa on July 27, 2010.

VI. Position of the Parties

[16] The Applicant submits that the decision reveals the following errors, which are sufficient to have the decision reconsidered:

A) The Officer failed to consider the low-level nature of the gravity concerning the *IRPA* violation and that the legislative scheme itself allows for a conditional departure order to become a deportation order but it does not necessarily have to be such;

B) The Officer further failed to consider several other factors specifically required under the Minister's guidelines, namely:

   a. that the Applicant's only violation was to remain in Canada, after the negative decision by the Board, to benefit from a PRRA;

   b. that the Applicant promptly left Canada after having received a negative PRRA;

   c. that the Applicant paid for her plane ticket to return to Mexico;

   d. that the Applicant has no other violations with the immigration authorities;

   e. that the Applicant had a job offer;

   f. that the Applicant is a Quebec selected immigrant;

g. that the Applicant studied while in Canada, learned both languages and was employed;

h. that the Applicant volunteered while in Canada.

C) The Officer's decision contains glaring factual errors, namely:

a. that the Counsellor refers to section 36 of the *IRPA* in his decision;

b. that the form authorizing the Canadian Embassy to send her the Right of Permanent Resident Fees has been sent to the Applicant to an erroneous addressee: "Leonardo Pantoja Munoz" (Tribunal Record at p 6);

c. that the Applicant never received the alleged email of March 24, 2010.

[17] The Respondent submits that the Counsellor's decision is a discretionary administrative decision and was reasonable according to the legislative context and case law. In the course of the ARC process, the Applicant was asked for information which she did not send. Also, the decision-maker's CAIPS notes demonstrate that all relevant factors were taken into consideration.

VII. Issue

[18] Was the Counsellor's decision, denying the Applicant an ARC, reasonable?

VIII. Relevant Legislative Provisions

[19] The following provision of the *IRPA* is applicable in these proceedings:

No return without prescribed authorization	**Interdiction de retour**
52. (1) If a removal order has been enforced, the foreign national shall not return to	**52.** (1) L'exécution de la mesure de renvoi emporte interdiction de revenir au

Canada, unless authorized by an officer or in other prescribed circumstances.	Canada, sauf autorisation de l'agent ou dans les autres cas prévus par règlement.
Return to Canada	**Retour au Canada**
(2) If a removal order for which there is no right of appeal has been enforced and is subsequently set aside in a judicial review, the foreign national is entitled to return to Canada at the expense of the Minister.	(2) L'étranger peut revenir au Canada aux frais du ministre si la mesure de renvoi non susceptible d'appel est cassée à la suite d'un contrôle judiciaire.

[20] The following provisions of the *IRPR* are applicable in these proceedings:

Types of removal order	**Types**
223. There are three types of removal orders, namely, departure orders, exclusion orders and deportation orders.	**223.** Les mesures de renvoi sont de trois types : interdiction de séjour, exclusion, expulsion.
Departure order	**Mesure d'interdiction de séjour**
224. (1) An enforced departure order is prescribed as a circumstance that relieves a foreign national from having to obtain authorization under subsection 52(1) of the Act in order to return to Canada.	**224.** (1) L'exécution d'une mesure d'interdiction de séjour à l'égard d'un étranger est un cas prévu par règlement qui exonère celui-ci de l'obligation d'obtenir l'autorisation prévue au paragraphe 52(1) de la Loi pour revenir au Canada.
Requirement	**Exigence**
(2) A foreign national who is issued a departure order must meet the requirements set out in paragraphs 240(1)(*a*) to (*c*) within 30 days after the order becomes enforceable, failing which the departure	(2) L'étranger visé par une mesure d'interdiction de séjour doit satisfaire aux exigences prévues aux alinéas 240(1)*a*) à *c*) au plus tard trente jours après que la mesure devient exécutoire, à défaut de

order becomes a deportation order.

Exception — stay of removal and detention

(3) If the foreign national is detained within the 30-day period or the removal order against them is stayed, the 30-day period is suspended until the foreign national's release or the removal order becomes enforceable.

…

Deportation order

226. (1) For the purposes of subsection 52(1) of the Act, and subject to subsection (2), a deportation order obliges the foreign national to obtain a written authorization in order to return to Canada at any time after the deportation order was enforced.

Application of par. 42(*b*) of the Act

(2) For the purposes of subsection 52(1) of the Act, the making of a deportation order against a foreign national on the basis of inadmissibility under paragraph 42(*b*) of the Act is prescribed as a circumstance that relieves the foreign national from having to obtain an authorization in order to return to Canada.

quoi la mesure devient une mesure d'expulsion.

Exception : sursis ou détention

(3) Si l'étranger est détenu au cours de la période de trente jours ou s'il est sursis à la mesure de renvoi prise à son égard, la période de trente jours est suspendue jusqu'à sa mise en liberté ou jusqu'au moment où la mesure redevient exécutoire.

[…]

Mesure d'expulsion

226. (1) Pour l'application du paragraphe 52(1) de la Loi, mais sous réserve du paragraphe (2), la mesure d'expulsion oblige l'étranger à obtenir une autorisation écrite pour revenir au Canada à quelque moment que ce soit après l'exécution de la mesure.

Application de l'alinéa 42*b*) de la Loi

(2) Pour l'application du paragraphe 52(1) de la Loi, le cas de l'étranger visé par une mesure d'expulsion prise du fait de son interdiction de territoire au titre de l'alinéa 42*b*) de la Loi est un cas prévu par règlement qui dispense celui-ci de l'obligation d'obtenir une autorisation pour revenir au Canada.

Removal order — certificate	**Mesure de renvoi — certificat**
(3) For the purposes of subsection 52(1) of the Act, a removal order referred to in paragraph 81(*b*) of the Act obliges the foreign national to obtain a written authorization in order to return to Canada at any time after the removal order was enforced.	(3) Pour l'application du paragraphe 52(1) de la Loi, la mesure de renvoi visée à l'article 81 de la Loi oblige l'étranger à obtenir une autorisation écrite pour revenir au Canada à quelque moment que ce soit après l'exécution de la mesure.

[21] Section 232 of the *IRPR* is also relevant to the present case:

Stay of removal — pre-removal risk assessment	**Sursis : examen des risques avant renvoi**
232. A removal order is stayed when a person is notified by the Department under subsection 160(3) that they may make an application under subsection 112(1) of the Act, and the stay is effective until the earliest of the following events occurs …	**232.** Il est sursis à la mesure de renvoi dès le moment où le ministère avise l'intéressé aux termes du paragraphe 160(3) qu'il peut faire une demande de protection au titre du paragraphe 112(1) de la Loi. Le sursis s'applique jusqu'au premier en date des événements suivants [...]

IX. Standard of Review

[22] This Court, by the pen of Justice John A. O'Keefe, recently addressed the issue of the standard of review in the context of an ARC decision. The Court held that the standard is reasonableness:

> [21] The Supreme Court of Canada in *Dunsmuir* also held that the standard of review analysis need not be conducted in every instance. Instead, where the standard of review applicable to the particular question before the court is well-settled by past jurisprudence, the reviewing court may adopt that standard of review. Only where this search proves fruitless must the reviewing court undertake a consideration of the four factors comprising the standard of review analysis.

> [22] The Court in *Sahakyan v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1542 (*Sahakyan*) held that on judicial review of an application under section 52 of the Act, the standard of review is reasonableness *simpliciter*.
>
> [23] Thus, in light of the Supreme Court of Canada's decision in *Dunsmuir* and the previous jurisprudence of this Court, I find the standard of review applicable to the issue of whether the Officer properly exercised his discretion to be reasonableness. When reviewing a decision on the standard of reasonableness, the analysis will be concerned with "the existence of justification, transparency and intelligibility within the decision-making process [and also with] whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir* at paragraph 47). Put another way, the Court should only intervene if the Decision was unreasonable in the sense that it falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law."
>
> . . .
>
> [60] I agree with the Respondent that, given the highly discretionary and fact-driven nature of ARC decisions, the Court should extend considerable deference in reviewing any such decision against the reasonableness standard. As the case law makes clear, little in the way of reasons or justification is required of a decision maker in this context. See *Akbari* at paragraph 11; *Chazaro* at paragraph 21; and *Singh*.

(*Umlani v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1373, 77 Imm LR (3d) 179; also *Pacheco v Canada (Minister of Citizenship and Immigration)*, 2010 FC 347, at paras 27-28).

X. Analysis

[23] Although the Applicant alleged that the officer committed errors as listed in paragraph 16 of this decision, those alleged "errors" are not errors, but, rather, circumstances which the Applicant, herself, considers should have mitigated the severity of the officer's response received in respect of the ARC, and even further should have created a climate for an opposite decision to be taken, rather, a positive decision on her behalf. Given the discretionary nature of an ARC in the scheme of the *IRPA*, however, the Counsellor's decision was reasonable on the facts of this case. The relevant

legislative scheme with regard to an ARC application had already been set out by Justice Maurice Lagacé in *Khakh v Canada (Minister of Citizenship and Immigration)*, 2008 FC 710:

> IV. Relevant Legislation
>
> [15] Failed refugee claimants such as the applicants are subject to removal from Canada once their claim has been finally determined. Section 223 of the *Immigration and Refugee Protection Regulations*, S.O.R./2002-227 (the Regulations) outlines three types of removal orders, namely, departure orders, exclusion orders and deportation orders.
>
> [16] Under subsection 224(2) of the Regulations, a foreign national who is issued a departure order must leave Canada within 30 days of the order becoming enforceable. Failure to do so results in the departure order becoming a deportation order.
>
> [17] This transformation is significant. Under section 224 (1) of the Regulations, a foreign national subject to an enforced departure does not need to obtain authorization under subsection 52(1) of the Act in order to return to Canada. However, once a departure order becomes an enforceable deportation order, removal from Canada carries significant consequences. Section 226 of the Regulations, which governs deportation orders, states that a foreign national subject to an enforced deportation order cannot return to Canada at any point in the future without first obtaining written authorization to do so.

[24] In the present case, by not leaving Canada within the 30-day period mandated in subsection 224(2) of the *IRPR*, the Applicant became subject to a deportation order that was executed when she ultimately left Canada on April 17, 2007. Accordingly, by operation of subsection 52(1) of the *IRPA* and section 226 of the *IRPR*, the Applicant could not return to Canada without prior written authorization. In *Chazaro v Canada (Minister of Citizenship and Immigration)*, 2006 FC 966, 155 ACWS (3d) 640, Justice Pierre Blais stated that there are no criteria set out in the *IRPA* or in the *IRPR* to assess an application for an ARC. The Court held:

> [19] Neither the Act nor the Regulation specifies any criteria for the officer in charge of assessing the application for authorization to return. However, guidelines are given in *Sahakyan, supra*. In paragraph 23, Harrington J. wrote that the pivotal issue for the type of assessment that was conducted in this case is the analysis of the reasons for which the applicant delayed in leaving Canada:

> In the final resort, it falls upon the courts, not the Minister or his officers, to construe the Act. The officer's focus on matters which would not have been relevant had Mr. Sahakyan left in time, shows that he misconstrued the Act. This is not to say that Mr. Sahakyan's Canadian history is not relevant. What it does mean is that that history must be relevant to his late departure. The centrepiece of the officer's concern had to be the reasons why Mr. Sahakyan left in June, rather than in March. [My emphasis]

[25] In addition, the decision to permit the Applicant's admission to Canada after a deportation order must be at the discretion of the Minister, "without the necessity for giving reasons ... only a duty to fairly consider the reason advanced, to acknowledge that they were read and considered, and then to decide" (*Singh v Canada (Minister of Employment and Immigration)* (1986), 6 FTR 15, 1 ACWS (3d) 28).

The Counsellor's decision is reasonable

[26] Subsection 52(1) of the *IRPA* states that "if a removal order has been enforced, the foreign national shall not return to Canada, unless authorized by an officer or in other prescribed circumstances." By requiring an ARC, section 52 of the *IRPA* sends "a strong message to individuals to comply with enforceable departure orders", as described in the Guidelines:

> … A permanent bar on returning to Canada is a serious consequence of non-compliance. Consequently, an Authorization to Return to Canada (ARC) should not be used as a routine way to overcome this bar, but rather in cases where an officer considers the issuance to be justifiable based on the facts of the case.
>
> Individuals applying for an ARC must demonstrate that there are compelling reasons to consider an Authorization to Return to Canada when weighed against the circumstances that necessitated the issuance of a removal order. Applicants must also demonstrate that they pose a minimal risk to Canadians and to Canadian society. Merely meeting eligibility requirements for the issuance of a visa is not sufficient to grant an ARC.

(CIC, Operation Manual, OP 1 Procedures, 28 August 2009).

[27] The Applicant cannot justify her non-compliance by the fact that she decided to wait in Canada and benefit from a PRRA and that the notice under section 160 of the *IRPR* was issued after the removal order became a deportation order. In *Revich v Canada (Minister of Citizenship and Immigration)*, 2005 FC 852, 180 FTR 201, Justice Danièle Tremblay-Lamer held that it was not unfair for the Respondent to notify the Applicant of her right to apply for a PRRA after the departure order issued against her had already become a deportation order. As stated by the Counsellor, the *IRPA* imposed an obligation on the Applicant to obtain a certificate of departure within the prescribed time limit, and ignorance of this requirement is no excuse for failing to comply with it. The Court relies on the decision of Justice Blais, in *Chazaro*, above, at paragraph 22.

[28] After considering all the evidence provided, including the Applicant's letter dated May 17, 2009, the Counsellor denied the ARC based on the following factors:

- The explanations submitted by the Applicant for leaving Canada almost three years after the prescribed 30-day period following the lifting of the stay were not found satisfactory. The Applicant stated that she did not know that the departure order would be enforced if she applied for refugee status. The Counsellor did not accept ignorance of the law as an explanation because the Applicant benefited from the services of an interpreter when she signed the departure order and she is a well educated person;
- Even though the Applicant was selected for a Certificate by the Province of Quebec, that is not sufficient to outweigh her obligation to satisfy the reviewing officer and justify her overstay.

(AR at pp. 8-10).

[29] As to the consideration of the factors prior to an ARC, Justice O'Keefe, in *Pacheco*, above, stated:

> [51] Generally in ARC decisions, an officer has discretion to determine which factual circumstances he or she will consider. ARC decisions should not be construed as mini humanitarian and compassionate applications. Instead, ARC decisions are not only highly discretionary in nature but are "largely based on open-ended and subjective discretion." (see *Akbari* above, at paragraphs 8 and 11).
>
> [52] Without special circumstances akin to the circumstances in *Akbari* above, visa officers are not required to specifically address all of an applicant's circumstances in their reasons, "Nor is there a requirement that formal reasons be provided." (*Akbari* above, at paragraph 11).
>
> [53] Ms. Akbari's unique situation required special consideration. Similar circumstances do not exist in the case at bar. Moreover, there is no evidence to rebut the presumption that the visa officer did in fact consider the above noted factors. An ARC decision maker is not required to give formal or comprehensive reasons.

[30] The Applicant also asserted that acceptance under the Certificate Program normally constitutes a compelling reason for returning to Canada. The Respondent did not dispute that this factor may constitute a compelling reason; however, having a compelling reason to return to Canada falls under the factor "Reasons for the request to return to Canada." This factor itself is only one of the three important factors identified by the Operation Manual OP1 (AR at p 23). The two other factors are the severity of the violation and the cooperation with the authorities. The Counsellor was of the view that these two factors outweighed the Applicant's reasons for the request to return to Canada. This result was one possible, reasonable outcome according to the facts of the case and the Court must not intervene.

XI. Conclusion

[31] Considering these facts and the highly discretionary nature of the decision, the Counsellor's reasons to refuse the authorization to return to Canada were entirely reasonable.

[32] For all of the above reasons, the Applicant’s application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for judicial review be dismissed with no question for certification.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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