Federal Court  Cour fédérale

Date: 20160812

Docket: IMM-3098-16

Citation: 2016 FC 931

Ottawa, Ontario, August 12, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

NING ZHOU

Applicant

and

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

Defendant

ORDER AND REASONS

[1] The Applicant seeks a stay of the execution of a removal order. The removal is scheduled to take place on August 15, 2016. The Applicant is currently detained.

[2] The Applicant was born in 1982 and is a Chinese national. She seems to have spent significant time outside of China, attending school in Singapore from August 2003 to December

2004, and in the United Kingdom between January 2005 and December 2011. Back in China, she got married on May 9, 2012 and gave birth to a son in November 2012.

[3] Just a few months later, in March 2013, the Applicant would have fallen in the shower and suffered a mild concussion. In order to recover more quickly, she would have started to practice Falun Gong. In June 2014, while practicing Falun Gong, it seems that the group she was with received a tip that the Chinese police was to raid the location. The Applicant had enough time to escape through the back door and she would have gone into hiding.

[4] When the Applicant escaped from the police on June 7, 2014, she got into a taxi cab that took her to the railway station. She took the train from her hometown to Beijing, a ten-hour train ride. She claims that Chinese officials were looking for her at her home as early as June 9, 2014; indeed, they would have visited her home on five occasions. Disguised with sunglasses and a hat, she would have attended the American Embassy in Beijing in order to obtain a visa for the United States. Armed with that visa, she would have left Beijing on September 9, 2014, travelled through Hawaii in order to reach Seattle, in the State of Washington. She would have crossed the Canadian border by walking and she reached Vancouver. From there, she caught a flight to Toronto where, two months later, she made an application for refugee status (November 15, 2014).

[5] Her refugee claim was dismissed by the Refugee Protection Division in a decision dated January 12, 2015. The Applicant appealed that decision before the Refugee Appeal Division. Her appeal was dismissed, the panel finding:

> [33] Although the RPD erred in expecting the appellant to do more to obtain an FDA letter, the error is not fatal to the RPD's decision. Having reviewed the evidence, the RAD concludes that the appellant's credibility is damaged by the US visa interview, her ability to exit the country on her true passport, and the lack of consequences faced by her family for failing to reveal her location. Her credibility is further undermined by her failure to make a refugee claim in the United States and her delay in claiming in Canada, issues which are not challenged by the appellant on appeal. The appellant is generally lacking in credibility. She has not established with credible evidence that she was sought by the PSB or that she fled from them or that she was or is perceived to be a practitioner of Falun Gong. For this reason, her refugee claim must fail.

The authorization to launch a judicial review of the RAD decision was not granted by this Court.

[6] The next step was to have a Pre-Removal Risk Assessment (PRRA), which was delivered on July 18, 2016. There was new evidence that was submitted by the Applicant before the PRRA officer. Three Notices of Arrest on the part of the Chinese authorities were submitted, together with a letter sent by the Applicant's husband on June 9, 2016. It would appear that the three arrest warrants were left with the Applicant's husband on March 9, 2015, July 20, 2015 and March 14, 2016. These notices bear the following numbers:

- March 9, 2015: Notice No.: [2015] 00186
- July 20, 2015: Notice No.:[2015] 00203
- March 14, 2016: Notice No.: [2016] 00610

[7] There is little known about these arrest warrants other than they have become part of the record before the PRRA officer. Thus, it is not explained why there is only a difference of seventeen notices between March 9, 2015 and July 20, 2015, when it would appear that about

ninety notices per month were issued in the first 78 days of 2015. Similarly, while the March 9, 2015 notice was number 186, the March 14, 2016 notice bears number 610.

[8] Be that as it may, the PRRA officer concluded that there was little probative weight that should be given to the letter from the Applicant's spouse or to the Notices of Arrest. The PRRA officer was of the view that the letter is attesting two events that have already been found not to be established by the RPD and the RAD. As for the Notices of Arrest, the PRRA officer found a number of deficiencies:

- The documents are in the name of one Ling Zhou and not Ning Zhou;
- The address on the document is not the address where the Applicant resided before she left for Beijing in June 2014;
- No other witnesses seem to have witnessed the delivery of the Notices of Arrest and there were no witness statements offered in support of such delivery;
- These documents come from the Applicant's husband who would have a direct stake in the outcome of the case; there is on this record only statements from the spouses and no one else has offered any evidence.

[9] The PRRA officer also notes that the Applicant's family does not appear to have been specifically affected or targeted by the Chinese authorities for the purpose, for instance, to force them to identify where the Applicant might be.

[10] Finally, the PRRA officer noted that the Canadian Embassy in China indicated that the province in which the Applicant resided before going to Beijing is considered particularly high-risk for fraudulent documents.

[11] It is somewhat odd that warrants for the arrest of this particular Applicant seem to have surfaced only late in the process. It is not explained why the interest of the authorities would have been picked many months after the Applicant escaped the police raid in January 2014 to the point of having notices of arrest issued. Indeed, it is not clear why the authorities would show any interest in someone who has escaped and whose identity was established in a manner not made available in this case. We are told that the address appearing on the notices is that of the parents of the applicant's husband, where he would be residing. No information was offered to explain why the husband is living with his parents and how he was located at the new address by the police evidently eager to find his wife as late as March 2016, close to two years after she disappeared before a police raid on an assembly of Falun Gong practitioners. To put it another way, the story told is less than cogent.

[12] The applicant has challenged the PRRA officer's decision of July 20, 2016, by filing an application for leave and judicial review before this Court.

[13] As is always the case in applications for stay of execution of removal orders, the Applicant must satisfy the tripartite test established in *RJR MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311. The test requires that: (1) the Applicant establish that there is a serious issue to be tried in the underlying application; (2) that there would be irreparable harm suffered if the stay is not granted; and (3) the balance of convenience favours the Applicant.

[14] Contrary to suggestions that a finding that there is a serious issue brings with it that the other two prongs of the test are satisfied, the Federal Court of Appeal has unequivocally found that such is not the case. The three branches of the test must be satisfied.

[15] In *Janssen Inc. v Addvie Corporation*, 2014 FCA 112, one can read:

> [19] Each branch of the test adds something important. For that reason, none of the branches can be seen as an optional extra. If it were otherwise, the purpose underlying the test would be subverted.
>
> [20] The test is aimed at recognizing that the suspension of a legally binding and effective matter – be it a court judgment, legislation, or a subordinate body's statutory right to exercise its jurisdiction – is a most significant thing: *Mylan Pharmaceuticals ULC v. AstraZeneca Inc.*, 2011 FCA 312 at paragraph 5. The binding, mandatory nature of law – which I shall call "legality" – matters. Indeed, it is an aspect of the rule of law, a constitutional principle: *British Columbia v. Imperial Tobacco Canada Ltd.*, 2005 SCC 49, [2005] 2 S.C.R. 473 at paragraph 58.
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> [21] Therefore, a suspension or stay should be granted only after all three branches of the test, with their associated policies, favour a temporary suspension of legality.

[16] The Applicant, on this stay application, focussed her attention on the seriousness of the issue to be tried on the merits. Relying on *Figurado v Canada (Solicitor General)*, [2005] FCJ No. 458, the Applicant argues that if the Court finds that there is a serious issue to be tried, given that the matter is the negative PRRA decision, it would follow that there would be irreparable harm as the remedy sought would be negated, making the judicial review moot.

[17] As to the PRRA decision, the Applicant makes two arguments. First, she claims that the decision is unreasonable because the PRRA officer did not give enough weight to the new

evidence, that is the arrest notices and the husband's letter. Second, the reasons given by the PRRA officer would be inadequate. The Applicant relies on *Dunsmuir v New Brunswick*, 2008 SCC 9; [2008] 1 SCR 190.

[18] The equation offered by the Applicant that in cases involving PRRA decisions that (serious issue) + (mootness) = (stay) is not appropriate. The Federal Court of Appeal addressed the issue squarely in *Shpati v Canada (MPSE)*, 2011 FCA 286, [2012] FCR 133. In the context of a PRRA decision, the Court found that there may not be mootness. The Court of Appeal found that even if moot, a court could exercise its discretion and hear the case and set aside the PRRA decision. The Minister could permit the return of the Applicant pending the redetermination (para 30).

[19] More to the point, the Court of Appeal answered the question at the heart of the issue of a stay application following a negative PRRA decision. "Does the potential mootness of the pending PRRA litigation warrant deferral of removal?" (para 34). The answer was a resounding no:

> [35] In my view, the answer to this question is no. If it were otherwise, deferral would be virtually automatic whenever an individual facing removal had instituted judicial review proceedings in respect of a negative PRRA. This would be tantamount to implying a statutory stay in addition to those expressly prescribed by the IRPA, and would thus be contrary to the statutory scheme.

[20] Having found that mootness does not necessarily constitute irreparable harm, the Court goes on to find:

> [39] If mootness does not in itself amount to irreparable harm for the purpose of the tripartite test for the grant of a judicial stay of removal, I see no reason why enforcement officers should always be legally required to consider it when determining a request for deferral pending the disposition of PRRA litigation.

[21] That is not to say the potential mootness would not be considered by the Federal Court Judge hearing an application for a judicial stay. It is simply one element to be weighed in considering the tripartite test. It goes without saying that the quality of the new evidence will be an important feature.

[22] In considering the seriousness of the issue to be tried, it is not sufficient for an Applicant to argue that the issue is not frivolous. Where, as here, "[t]he result is that if the stay is granted, the relief sought will have been obtained on a finding that the question raised is not frivolous" (*Wang v MCI*, [2001] 3 FCR 682), a different test needs to be met. Frivolous will not do. A more probing examination must take place. In the words of Justice Pelletier in *Wang*, "the judge hearing the motion ought not apply the 'serious issue' test, but should go further and closely examine the merits of the underlying application" (para 10). The test that should be applicable is that of likelihood of success.

[23] The two serious issues raised by the Applicant are that the reasons were inadequate and that the new evidence was not given sufficient weight. As for the inadequacy of reasons, the Applicant does not account for the Supreme Court of Canada decision in *Newfoundland & Labrador Nurses' Union v Newfoundland & Labrador*, 2011 SCC 62; [2011] 3 SCR 708.

[24] As the Court writes, *Dunsmuir*, cited by the Applicant in support of her position, does not stand for the proposition "that the 'adequacy' of reasons is a stand-alone basis for quashing a decision, or as advocating that a reviewing court undertake two discrete analyses — one for the reasons and a separate one for the result" (para 14). The Court notes that perfection is not the standard; rather, what is needed is an understanding of why the decision was made such that we can see why the decision falls within the range of acceptable outcomes (*Dunsmuir*, para 47):

> [16] Reasons may not include all the arguments, statutory provisions, jurisprudence or other details the reviewing judge would have preferred, but that does not impugn the validity of either the reasons or the result under a reasonableness analysis. A decision-maker is not required to make an explicit finding on each constituent element, however subordinate, leading to its final conclusion (*Service Employees' International Union, Local No. 333 v. Nipawin District Staff Nurses Assn.*, [1975] 1 S.C.R. 382, at p. 391). In other words, if the reasons allow the reviewing court to understand why the tribunal made its decision and permit it to determine whether the conclusion is within the range of acceptable outcomes, the *Dunsmuir* criteria are met.

[25] The Court in *Newfoundland* cites with approval an article by Professor Dyzenhaus, dealing with the adequacy of reasons, including that "the court must first seek to supplement them before it seeks to subvert them" (para 12).

[26] Here, it is perfectly clear why the PRRA officer found against the Applicant: he did not believe her story. The PRRA officer did give little probative weight to the so-called new evidence. Reasons for that conclusion were given. There were certainly not enough new evidence to counterbalance the story that was told to the RPD and the RAD, both of whom found against the Applicant. The PRRA officer considered the case in its entirety.

[27] The burden on the Applicant was to offer new evidence as unassailable as possible given the strong conclusion found by other administrative decision-makers. It is worth repeating the conclusion of the RAD. It was not established:

- that the Applicant was sought by the PSB
- that she fled from them
- that she was a practitioner of Falun Gong
- that she was perceived as a practitioner of Falun Gong

[28] The question is therefore whether that allegations that the PRRA officer's decision being unreasonable has a likelihood of success. In my view, once considered in the context of the story told by the Applicant, it is not likely that the challenge will succeed. The Court in *Newfoundland* found particularly helpful in understanding the nature of the exercise para 44 of the factum of one of the parties reproduced at the end of para 18 of the reasons for judgment:

> When reviewing a decision of an administrative body on the reasonableness standard, the guiding principle is deference. Reasons are not to be reviewed in a vacuum – the result is to be looked at in the context of the evidence, the parties' submissions and the process. Reasons do not have to be perfect. They do not have to be comprehensive.

In effect, the PRRA officer was indicating that the so-called new evidence stretched credulity. Not only are the reasons sufficient and adequate to understand why that conclusion is reached, but one is bound to conclude that it is a possible acceptable outcome.

[29] Given that the tripartite that requires that each branch be satisfied, it follows that the stay application cannot succeed. I would however add some comments on the need to prove irreparable harm.

[30] In *Gateway City Church v Minister of National Revenue*, 2013 FCA 126, the Court of Appeal insists on the quality of evidence that is needed to establish irreparable harm:

> [15] General assertions cannot establish irreparable harm. They essentially prove nothing:
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> > It is all too easy for those seeking a stay in a case like this to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court's satisfaction – that the harm is irreparable.
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> (*Stoney First Nation v. Shotclose*, 2011 FCA 232 (CanLII) at paragraph 48.) Accordingly, "[a]ssumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight": *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255 (CanLII) at paragraph 31.
>
> [16] Instead, "there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted": *Glooscap, supra* at paragraph 31. See also *Dywidag Systems International, Canada, Ltd. v. Garford Pty Ltd*., 2010 FCA 232 (CanLII) at paragraph 14; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25 (CanLII), 268 N.R. 328 at paragraph 12; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 (CanLII) at paragraph 17.

[31] In this case, there were a lot of gaps that remained unexplained, in the evidence tendered by the Applicant throughout the immigration proceedings as far as the record before the Court is concerned. According to the evidence, there would be 40 million practitioners of Falun Gong in China. Not only is the escape of the Applicant quite remarkable in itself, but we are left with

wondering why this Applicant would have been pursued to the extent she claims she was, without her family being harassed beyond repeated visits by the police. And why are arrest warrants issued after numerous visits? Not only is there one warrant left with the husband but two more are issued. Indeed, the first warrant is dated March 9, 2015, some two months before the RAD decision. Why wasn't it available? Doesn't that deserve a full explanation? And where are the warrants coming from? Why are they issued and why are they left in a place that is not the applicant's residence in China? Why did the husband move his residence and how was he located by the authorities as the person related to a Falun Gong practitioner whose disappearance goes back to June 2014? Where are the details that will give the ring of veracity?

[32] In matters of this nature, the burden is on the Applicant to satisfy the Court providing evidence of a convincing level of particularity. That was not present in this case.

As a result, the application is dismissed.

ORDER

THIS COURT ORDERS that the application for a stay of the removal order set for August 15, 2016, is dismissed.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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