Federal Court  Cour fédérale

Date: 20180315

Docket: IMM-971-18

Citation: 2018 FC 300

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, March 15, 2018

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

GARDY NOEL

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

ORDER AND REASONS

[1] In this case, Gardy Noel is seeking a stay of his removal that was ordered for March 21, 2018. On the face of the record, it is not clear what authority this Court has to order the stay given the procedural path the applicant has taken.

[2] In fact, the application for judicial review underlying the stay application relates to the negative result of Mr. Noel's pre-removal risk assessment [PRRA]. That decision was rendered on November 29, 2017, and is the subject of an application for judicial review that is still pending. Mr. Noel requested a so-called "administrative" stay of the removal order on March 9, 2018. That application for an administrative stay was refused on March 12, 2018. No application for judicial review was filed against that refusal. Rather, the applicant appears to be requesting a judicial stay of the removal order on the sole basis that there is a pending application for judicial review of the negative PRRA decision made in November 2017.

[3] The *Immigration and Refugee Protection Regulations* (SOR/2002-227) [Regulations] specifically set out cases where a stay can be granted in the context of a PRRA application. Section 232 of the Regulations could have applied in this case. That section reads as follows:

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,	**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

and the stay is effective until the earliest of the following events occurs:	paragraphe 112(1) de la Loi. Le sursis s'applique jusqu'au premier en date des événements suivants :
(a) the Department receives confirmation in writing from the person that they do not intend to make an application;	**a)** le ministère reçoit de l'intéressé confirmation écrite qu'il n'a pas l'intention de se prévaloir de son droit;
(b) the person does not make an application within the period provided under section 162;	**b)** le délai prévu à l'article 162 expire sans que l'intéressé fasse la demande qui y est prévue;
(c) the application for protection is rejected;	**c)** la demande de protection est rejetée;
(d) [Repealed, SOR/2012-154, s. 12]	**d)** [Abrogé, DORS/2012-154, art. 12]
(e) if a decision to allow the application for protection is made under paragraph 114(1)(a) of the Act, the decision with respect to the person's application to remain in Canada as a permanent resident is made; and	**e)** s'agissant d'une personne à qui l'asile a été conféré aux termes du paragraphe 114(1) de la Loi, la décision quant à sa demande de séjour au Canada à titre de résident permanent;
(f) in the case of a person to whom subsection 112(3) of the Act applies, the stay is cancelled under subsection 114(2) of the Act.	**f)** s'agissant d'une personne visée au paragraphe 112(3) de la Loi, la révocation du sursis prévue au paragraphe 114(2) de la Loi.

Clearly, the stay set out in section 232 is no longer effective since the application for protection was rejected. Now, there is only an application for leave and for judicial review of the refusal of the PRRA application, which does not benefit from the statutory stay that applies to other applications for judicial review (for example, section 231 of the Regulations).

[4] The difficulty that arises is that the legislation appears to set out the parameters for a stay of the removal order during the pre-removal risk assessment. Moreover, the applicant tried to

obtain an administrative stay of that removal order. The *Immigration and Refugee Protection Act*, S.C. 2001, c 27 [the Act] also provides for a stay of a removal order. Section 50 of the Act applies here and reads as follows:

Stay	**Sursis**
50 A removal order is stayed	**50** Il y a sursis de la mesure de renvoi dans les cas suivants :
(a) if a decision that was made in a judicial proceeding — at which the Minister shall be given the opportunity to make submissions — would be directly contravened by the enforcement of the removal order;	**a)** une décision judiciaire a pour effet direct d'en empêcher l'exécution, le ministre ayant toutefois le droit de présenter ses observations à l'instance;
(b) in the case of a foreign national sentenced to a term of imprisonment in Canada, until the sentence is completed;	**b)** tant que n'est pas purgée la peine d'emprisonnement infligée au Canada à l'étranger;
(c) for the duration of a stay imposed by the Immigration Appeal Division or any other court of competent jurisdiction;	**c)** pour la durée prévue par la Section d'appel de l'immigration ou toute autre juridiction compétente;
(d) for the duration of a stay under paragraph 114(1)(b); and	**d)** pour la durée du sursis découlant du paragraphe 114(1);
(e) for the duration of a stay imposed by the Minister.	**e)** pour la durée prévue par le ministre.

One may wonder whether the appropriate process that would give this Court jurisdiction to hear a stay application should not be an administrative stay under paragraph 50(e) of the Act that, when refused, could be the subject of an application for judicial review under section 72 of the Act. That application for judicial review itself allows this Court to intervene to order the stay if it meets the three (3) well-known conditions. Following such a process seems appealing based on

the fact that the stay, as submitted by the applicant, cannot be the stay of an order by the PRRA officer; in fact, PRRA officers do not order anything: they only decide that the Minister's protection is not required given the risks cited. It follows from that decision that the removal order becomes enforceable since the stay expires. Strictly speaking, the removal is not before the Federal Court, since the only issue is rather the appropriateness of the PRRA decision, which does not concern removal. Moreover, the applicant apparently chose to apply for an administrative stay under section 50 of the Act. If that decision is not challenged by judicial review, how can this Court validly consider the issue of the stay?

[5] The applicant was unable to enlighten the Court on the path chosen. In fact, the parties did not do the necessary preparation to argue the issue. Nevertheless, I chose to consider the stay application as though it could typically be submitted before the Court. If it is possible to dispose of the stay application on a basis other than the jurisdictional issue, that would be the preferable path to follow. Therefore, I considered the three (3) criteria of the test that must be satisfied in this case. The applicant must therefore satisfy the Court with respect to each element of the test, as these elements are independent of one other and each must be demonstrated:

1. Is there a serious issue to be tried in the underlying application for judicial review?

2. Will there be irreparable harm if the stay application is not granted?

3. Does the balance of convenience favour the applicant?

(See *RJR-Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311 and *Toth v. Canada (Minister of Employment and Immigration)*, (1988), 86 NR 302 (FCA))

If the applicant fails to demonstrate any one of these elements, the stay is denied.

[6] In this case, the facts as presented are simple. The applicant left his country of nationality, Haiti, in November 2012. He allegedly crossed the border between Haiti and the Dominican Republic before proceeding to Brazil. From there, he alleges to have travelled through a series of South American countries, in Central America and in Mexico, to find himself in the United States. The applicant provided very little information about this journey. In any event, the applicant made a first attempt to enter Canada in March 2017, in Fort-Erie. The record does not reveal how the applicant chose to make this attempt in southeastern Ontario, at the border between Buffalo and Canada. He was sent back to the United States pursuant to paragraph 101(1)(e) of the Act. He was subsequently subject to an exclusion order in Canada for one year.

[7] The respondent submitted to the Court the result of a questionnaire that the applicant completed when he attempted to enter Canada in March 2017. To say the least, answers to simple questions were not as truthful as would be desired. Thus, when asked whether he was ever ordered to leave any country, he answered no. However, he was subject to a deportation order to the United States. He states that he was never in custody even though he had been detained in the United States and in Mexico in the summer of 2016. He denies using aliases even though his fingerprints are associated with two other names.

[8] According to the questionnaire, there is no question of threats to his life if he were to return to his country of nationality. He alleges rather to be persecuted for his political views. When asked why he was seeking refugee status in Canada, he answered [TRANSLATION]

"because I was persecuted in Haiti. I know that Canada is a social country. I need a doctor." He later adds that [TRANSLATION] "I am here to be supported by the Government of Canada." I did not find any trace of the version that he gave in the PRRA application. A little more than three (3) months later, on June 3, 2017, the applicant was intercepted, this time in Quebec after an unlawful entry.

[9] The PRRA application followed and was filed on June 29, 2017, and received a decision in November 2017.

[10] Essentially, the applicant states that he would be in danger if he were removed to Haiti because he would suffer [TRANSLATION] "complex persecution." That complex persecution is not easy to decipher. The applicant alleges that he is a member of a section of the KOPAD, an organisation that [TRANSLATION] "endeavoured to teach peasants in the area to read and write and to explain to them their rights and duties in society" (the applicant's affidavit dated March 12, 2018, also included in the narrative provided in the PRRA application, dated July 18, 2017). The fear of complex persecution appears to be based on, according to the applicant's statements, his involvement in KOPAD (Komite, Organizasyon Peysan Afiliye Delbois). All that is disclosed is that the applicant had allegedly been informed by the members of the organization that he was wanted. No details are provided on the nature of the information, the source, or the circumstances in which the information was allegedly received.

[11] The PRRA decision dated November 29, 2017, found that the PRRA application, when read in the context of the facts disclosed, must be rejected because the applicant did not discharge his burden. Essentially, I infer from this that the PRRA officer considered the facts

disclosed to be very weak, and that the documentary evidence submitted, concerning the situation of Haitians in the Dominican Republic and in Brazil, did not help his case. As noted, there are no details in the record; nothing but a vague allegation is made, and the questionnaire, from three months earlier, was silent on this point. Only persecution for political views and the desire to benefit from the Canadian social net are mentioned. That is the evidence submitted.

[12] The applicant submits, with respect to the serious issue to be tried on judicial review, that the PRRA officer did not sufficiently consider the allegations of persecution in Haiti and that, ultimately, the PRRA officer's reasons did not explain why he did not give any weight to the applicant's only statement. I am not persuaded that this is a serious issue within the meaning of *Wang v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 FCR 682. In fact, when the relief sought with a stay application is the same as that targeted by the application for judicial review, that is, to remain in Canada, the judge is encouraged to examine the merits of the underlying application carefully. It would be incongruous to consider similar issues on such different bases.

[13] In this case, a review of this serious issue results in a finding that the applicant would be confronted with the decision of the Supreme Court of Canada in *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62; [2011] 3 SCR 708, where the Supreme Court states at paragraph 16 that "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." This is not possible on the basis of one vague allegation that there is a personal risk. This burden was on the applicant. The decision-maker clearly indicated that there was no personal

risk in this case, therefore leading to the conclusion that the documentary evidence provided on the Dominican Republic and Brazil was of no assistance. While the allegation is very weak, the PRRA officer's reasons certainly could have been more explicit and better articulated. However, considering the record as a whole, I am ultimately not satisfied that there is a "serious issue" for the Court to address on judicial review. Regardless, it is not necessary to make a finding on that basis since the test for irreparable harm is in no way satisfied.

[14] Therefore, it seems to me that what is completely lacking in this case is a demonstration of the irreparable harm that the applicant alleges he would suffer if he were to be removed to his country of origin. Essentially, this applicant alleges to be in danger without submitting any evidence that goes beyond a general allegation.

[15] As the Federal Court of Appeal has stated on many occasions, the threshold is much higher to satisfy the test for irreparable harm. I refer to paragraphs 14 to 16 of *Gateway City Church v. Canada (National Revenue)*, 2013 FCA 126, which, it seems to me, we must use to assess irreparable harm:

> [14] Such a general assertion is insufficient to establish irreparable harm: *Holy Alpha and Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 265, at paragraph 22. That sort of general assertion can be made in every case. Accepting it as sufficient evidence of irreparable harm would unduly undercut the power Parliament has given to the Minister to protect the public interest in appropriate circumstances by publishing her notice and revoking a registration even before the determination of the objection and later appeal.
>
> [15] General assertions cannot establish irreparable harm. They essentially prove nothing:

> 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.

(*Stoney First Nation v. Shotclose*, 2011 FCA 232 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 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 at paragraph 14; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 at paragraph 12; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraph 17.

[Emphasis added]

(see also *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 176)

[16] It follows that the stay application cannot be granted because irreparable harm was not established. I would add that the balance of convenience favours the government in this case since this applicant has no status in Canada, having made two attempts in barely three months to enter the country, first at the border and later, several hundred kilometres away, illegally. He was not in any way able to provide probative information about his situation, such that the public interest in the enforcement of the Act must take precedence. I note that section 48 of the Act expressly provides that the removal order is enforceable and that the foreign national must leave Canada immediately and the order must be enforced as soon as possible. The government is

bound to comply with the legislation adopted by Parliament, and this is a significant public interest.

ORDER

THIS COURT ORDERS that:

1. The application to stay the execution of the removal order is dismissed;

2. The respondent requested that the style of cause be amended so that the name of the respondent is that provided in the Act rather than the one that is most commonly used. Therefore, the respondent is indicated as the "Minister of Citizenship and Immigration."

"Yvan Roy"
Judge

Certified true translation
This 10th day of October 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-971-18
STYLE OF CAUSE:	GARDY NOEL v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	OTTAWA, ONTARIO (BY CONFERENCE CALL)
DATE OF HEARING:	MARCH 14, 2018
ORDER AND REASONS:	ROY J.
DATED:	MARCH 15, 2018

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