Date: 20070712

Docket: IMM-2603-07

Citation: 2007 FC 737

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 12, 2007

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MENDOZA DURAN Beatriz Eugenia

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

PRELIMINARY REMARKS

[1] As part of a motion to stay the removal order, the applicant cannot allege the same risks that were dismissed at the Refugee Protection Division (RPD) and in the pre-removal risk assessment (PRRA).

> [2] ...Moreover, his allegations on that point are substantially the same as the ones raised when his claim was before the Immigration and Refugee Board. His allegations, then assessed and dismissed because they were not credible, cannot be the basis of an allegation of irreparable harm (see, for example, *Akyol v. The Minister of Citizenship and Immigration*, [2003] FCJ No. 1182, 2003 FC 931).

(*Dimouamoua v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 940, [2005] FCJ No. 1172 (QL).)

INTRODUCTION

[2] The applicant, a Mexican citizen, is filing a motion to stay a removal order made against her. This motion was attached to an application for leave and for judicial review (ALJR) regarding the negative decision that was made in the applicant's PRRA on May 17, 2007.

[3] A motion to stay a removal order was also filed in docket IMM-2604-07, attached to an ALJR regarding a removal officer's refusal to postpone her removal.

FACTS

[4] The applicant is a Mexican citizen and claimed refugee status in Canada on June 22, 2004. (Page 2, "Risks identified by the Applicant", Notes to file – Pre-removal Risk Assessment, (PRRA Reasons), exhibit "D" of the Affidavit of Francine Lauzé.)

[5] The applicant alleged that she is afraid in her country due to her homosexuality. (See the "Reasons" for the decision made on January 6, 2005, by the RPD exhibit **"**E**"** of the Affidavit of Francine Lauzé.)

[6] The refugee claim was heard by the RPD of the Immigration and Refugee Board (IRB), which rejected her claim on January 6, 2005, due to the applicant's lack of credibility. The applicant did not file an ALJR for that decision.

[7] The applicant filed an application for a pre-removal risk assessment on February 25, 2007. (Application for a Pre-Removal Risk Assessment, exhibit **"F"** of the Affidavit of Francine Lauzé.) A negative decision was made on May 17, 2007. (PRRA Reasons, exhibit **"D"** of the Affidavit of Francine Lauzé.)

[8] The applicant is at present allegedly in a common-law union with a man, as it appears in affidavits from the applicant and her spouse, and allegedly filed an application for permanent residency in Canada as a spouse on February 9, 2007.

[9] The negative decision in her PRRA application was communicated to the applicant on June 9, 2007, and was the subject of the ALJR, which was filed on June 28, 2007 and is the dispute underlying this motion. (See "Summons for June 9, 2007", exhibit "A" of the Affidavit of Francine Lauzé and after "Officer's notes from June 9, 2007", exhibit "B" of the Affidavit of Francine Lauzé.)

[10] During the meeting on June 9, 2007, the applicant received a letter informing her that she **had to appear no later than July 4, 2007** at the offices of the Canada Border Services Agency (CBSA) in possession of an airplane ticket with a departure date no later than July 13, 2007.

[11] The applicant **did not appear on July 4, 2007**, and the CBSA was in a position to issue an arrest warrant against the applicant for her failure to appear. Due to the applicant's failure, no

departure date could be set. (See note on record signed by Éric Gagnon, dated 05-07-2007, exhibit "L" of the *Affidavit* of Francine Lauzé.)

[12] On July 4, 2007, the applicant signed and filed motions to stay the removal order in this docket and docket IMM-2604-07.

[13] On July 6, 2007, the applicant finally appeared at CBSA offices and, because the applicant had in her possession an airplane ticket for a flight leaving on July 13, 2007, the departure date was set for July 13, 2007. (See the "Officer's notes", dated July 6, 2007, exhibit "G" of the Affidavit of the Francine Lauzé and the confirmation of the departure date of July 13, 2007, dated July 6, 2007, exhibit "H" of the Affidavit of Francine Lauzé.)

ANALYSIS

[14] In order to assess the merits of the motion to stay, this Court must determine whether the applicant meets the criteria in case law issued by the Federal Court of Appeal in *Toth v. Canada (Minister of Employment and Immigration)*, 86 N.R. 302 (FCA).

[15] In that case, the Federal Court of Appeal selected three criteria that it took from injunction case law, more specifically from the decision by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 SCR 110. Those three criteria are:

(1) the existence of a serious question;

(2) the existence of irreparable harm; and

(3) the assessment of the balance of convenience.

[16] The three criteria must be met for this Court to grant the requested stay. If only one of them is not met, this Court cannot grant the requested stay.

[17] In this case, the applicant has not demonstrated the existence of a serious question to be decided as part of her ALJR regarding the officer's decision on her claim on humanitarian and compassionate grounds or the existence of irreparable harm and lastly, the applicant's inconveniences are not greater than those of the public interest, which means that the removal must be enforced as soon as is reasonably practicable under subsection 48(2) of the IRPA.

SERIOUS QUESTION

[18] The applicant did not demonstrate the existence of a serious question to be decided by this Court.

[19] The applicant must show that she had reasonable opportunities to be given judgment in her main remedy, that being her application for judicial review against the officer's decision.

THE PRRA OFFICER'S DECISION IS REASONABLE

[20] The PRRA officer analyzed the applicant's allegations and the documentary evidence, and found that the applicant had not demonstrated that she met the criteria of sections 96 and 97 of the

IRPA. That finding was reasonably inferred from the evidence and the applicant did not show that intervention from this Court is warranted.

[21] In support of her PRRA application, the applicant reiterated the same facts and fears as those that were previously reviewed by the RPD. The RPD found that the applicant was not credible and did not accept her allegations. (Page 5 of the RPD Reasons, exhibit “E” of the Affidavit of Francine Lauzé.)

[22] The risks mentioned by the applicant in her PRRA application were based on the allegations surrounding her homosexuality when she was in Mexico. She did not want to return to Mexico and re-live what she endured. (Page 8 of the PRRA Application, exhibit “F” of the Affidavit of Francine Lauzé.)

[23] The applicant had submitted **no new evidence and no new facts** since her refugee claim was rejected by the RPD, which would have supported the alleged personal risks.

[24] Despite that and considering that no new facts were presented in support of the PRRA application, the officer proceeded with a review of the contemporary documentary evidence on the situation in Mexico.

[25] The PRRA officer did not make any errors in his analysis of the objective situation in the finding that was made, in which the applicant did not show that she would be personally at risk if she were to return to Mexico (Pages 6 and 7 of the Reasons of the PRRA decision).

[26] In light of the foregoing, the respondent maintains that the applicant failed to raise a serious question in support of her motion. The motion for a stay of removal can be dismissed for that one single reason.

IRREPARABLE HARM

[27] The concept of irreparable harm was defined by the Court in *Kerrutt v. Canada (Minister of Employment and Immigration)*, (1992) 53 F.T.R. 93, [1992] FCJ No. 37, para 15 (QL) (TD), as being **the removal of a person to a country where there exists a danger to his or her life and safety**.

[28] Sandra J. Simpson, J., in *Calderon v. Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No. 393, para 22 (QL) also stated the following regarding the definition of irreparable harm as established in *Kerrutt*, above:

> [22] In *Kerrutt v. MEI* (1992), 53 F.T.R. 93 (F.C.T.D.), Mr. Justice MacKay concluded that, for the purposes of a stay application, **irreparable harm implies the serious likelihood of jeopardy to an applicant's life or safety. This is a very strict test** and I accept its premise that **irreparable harm must be very grave** and **more than the unfortunate hardship** associated with the breakup or relocation of the family. (Emphasis added)

[29] The applicant partially repeated the facts that had already been alleged in the refugee claim and the PRRA application regarding her alleged homosexuality when she was living in Mexico.

[30] The RPD rejected the applicant's refugee claim on January 6, 2005, finding that it did not believe the applicant's allegations. The applicant did not file an ALJR for that decision. (RPD Reasons, exhibit "E" of the Affidavit of Francine Lauzé.)

[31] Additionally, the risks that were raised by the applicant in her PRRA application are based on the allegations surrounding her homosexuality when she was in Mexico. She did not want to return to Mexico and re-live what she endured.

[32] The PRRA officer found that the applicant was not at risk if she were to return to Mexico. (PRRA Reasons, exhibit "D" of the Affidavit of Francine Lauzé.)

[33] The applicant explains that she now realizes that she was allegedly not really homosexual, but that she acted in such a way to show eccentricity. Moreover, she is now openly, and with her family's knowledge, in a relationship with a man.

[34] As part of a motion to stay a removal order, the applicant cannot allege the same risks that were rejected by the RPD and in the PRRA.

> [2] ...Moreover, his allegations on that point are substantially the same as the ones raised when his claim was before the Immigration and Refugee Board. His allegations, then assessed and dismissed because they were not credible, cannot be

> the basis of an allegation of irreparable harm (see, for example, *Akyol v. The Minister of Citizenship and Immigration*, [2003] FCJ no 1182, 2003 FC 931).

(*Dimouamoua*, above.)

[35] Moreover, in support of her motion to stay, the applicant alleged that since her spouse is Muslim, her parents disowned her, and she feared for her "future, reputation, and safety" if she had to return to Mexico. (Paragraphs 28 and 30, Applicant's Affidavit, page 13 of the **Motion Record**.)

[36] Those allegations by the applicant are vague and do not provide any details on the irreparable harm that she would suffer if she had to return to Mexico. It is not clear whether those risks were due to the fact that her spouse is a Muslim or associated with her allegations of homosexuality.

[37] For those reasons, the alleged prejudice is purely speculative:

> [7] Second, irreparable harm must not be speculative nor can it be based on a series of possibilities. The Court must be satisfied that the irreparable harm will occur if the relief sought is not granted: Atakora, supra, at para. 12; *Syntex Inc. v. Novopharm Inc. (1991)*, 36 C.P.R. (3d) 129, at page 135 (F.C.A.); *and Molnar v. Canada (Minister of Citizenship and Immigration)*, [2001] F.C.J. no 559, 2001 FCT 325, at para. 15.

(*Akyol v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 931 [2003] FCJ No. 1182 (QL).)

APPLICANT'S SPOUSE

[38] In his affidavit, the applicant's spouse stated that he cannot live with the applicant in Mexico, since her family has disowned them.

[39] In addition, he cites the financial commitments that he and the applicant have taken on together and that it would be impossible for him to pay those debts on his own.

[40] The problems raised by the spouse and the applicant are normal consequences for a removal. In addition, neither details nor evidence were provided as to those commitments.

[41] Moreover, no details on the relationship were submitted.

[42] It is settled law that the separation of a family is not in itself an irreparable harm because this is a normal consequence of a removal.

> [3] Second, family separation per se is not irreparable harm because it is within the normal consequences of deportation (see, i.e.: *Asomadu-Acheampong v. M.E.I.* (March 22, 1993), IMM-1008-93; *Boda v. M.E.I.* (1992), 56 F.T.R. 106; *Mobley c. M.C.I.* (June 12, 1995), IMM-107-95; *Jones v. M.C.I. (*June 12, 1995), IMM-454-95; *Ram c. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. no. 883 (QL); *Mario Ernesto Huezo et al. c. M.C.I.* (April 21,1997), IMM-1491-97; *William Geovany Castro v. M.C.I.* (October 14, 1997), IMM-2729-97; *Melo v. Canada (M.C.I.)* (2000), 188 F.T.R. 39 et *Kaur v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. no. 766 (QL)). There is nothing about the applicant's case which takes it beyond the usual result of deportation.

(*Celis v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 1231 [2002] FCJ No. 1679, para 3 (QL); See also: *Parsons v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 913, [2003] FCJ No. 1161, para 10 (QL); *Damiye v. Canada (Minister of Citizenship and Immigration)*, [2001] FCJ No. 70, para 24 (QL).)

[43] Separation from a spouse is not the type of prejudice to which the three-part test refers for obtaining a stay. Thus, Pelletier J. mentions in *Melo v. Canada (Minister of Citizenship and Immigration)*, [2000] FCJ no. 403 (TD) (QL):

> [21] These are all unpleasant and distasteful consequences of deportation. But if the phrase irreparable harm is to retain any meaning at all, it must refer to some prejudice beyond that which is inherent in the notion of deportation itself. To be deported is to lose your job, to be separated from familiar faces and places. It is accompanied by enforced separation and heartbreak. There is nothing in Mr. Melo's circumstances which takes it out of the usual consequences of deportation.

[44] Ultimately, the applicant and her spouse knew of the applicant's precarious status when they took on financial commitments, which moreover have not been proven before the Court, and made their decisions in full knowledge of the case. In the words of Paul Rouleau J., they took their own risks:

> [16] I see no transgressions in the conduct of the Minister; no expectations granted the applicant; if he chose to marry while still not having his situation favourably determined by Canadian authorities, it is at his peril, not that of the Minister who has a duty to uphold the laws of Canada.

(*Banwait v. Canada (Minister of Citizenship and Immigration)*, [1998] FCJ no. 522 (TD) (QL).)

[45] As a result, and in the absence of a serious question to be decided by this Court, the applicant has not demonstrated the existence of irreparable harm.

BALANCE OF CONVENIENCE

[46] In addition to showing that the underlying ALJR raises a serious question and that an irreparable harm will be suffered if there is no stay of removal, the person applying for the stay must

establish that, in light of all circumstances, the balance of convenience favours the granting of the stay. (*Manitoba (Attorney General) v. Metropolitan Ltd.*, above; *R.J.R. – Macdonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311; *Toth*, above).

[47] To determine the balance of convenience, the Court must decide which of the two parties will suffer the greatest prejudice based on whether the stay is granted or denied. (*Manitoba (Attorney General) v. Metropolitan Ltd.*, above.)

[48] With no serious questions or irreparable harm, the balance of convenience favours the Minister, whose interest is that the removal order is enforced on the set date. (*Mobley v. Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No. 65, para 2 (QL).)

[49] In fact, subsection 48(2) of the Act sets forth that a removal order must be enforced as soon as is reasonably practicable.

48. (1) **Enforceable Removal Order** - A removal order is enforceable if it has come into force and is not stayed.	**48.** (1) **Mesure de renvoi** - La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
(2) **Effect** - If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable.	(2) **Conséquence** - L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.

[50] Barbara Reed J., in *Membreno-Garcia v. Canada (Minister of Citizenship and Immigration)*, [1992] 3 FC 306 (TD), [1992] FCJ No. 535, para 18 (QL), also elaborated on the question of the balance of convenience in matters of stays and of the public interest, which must be considered:

> [18] What is in issue, however, when considering balance of convenience, is the extent to which the granting of stays might become a practice which thwarts the efficient operation of the immigration legislation. It is well-known that the present procedures were put in place because a practice had grown up in which many many cases, totally devoid of merit, were initiated in the court, indeed were clogging the court, for the sole purpose of buying the appellants further time in Canada. There is a public interest in having a system which operates in an efficient, expeditious and fair manner and which, to the greatest extent possible, does not lend itself to abusive practices. This is the public interest which in my view must be weighed against the potential harm to the applicant if a stay is not granted.

[51] The balance of convenience weighs in favour of the Minister.

CONCLUSION

[52] For all of these reasons, the motion for stay of the removal order is dismissed.

JUDGMENT

THE COURT ORDERS that the motion for stay of the removal be dismissed.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2603-07
STYLE OF CAUSE:	MENDOZA DURAN Beatriz Eugenia v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Ottawa, Ontario (by teleconference)
DATE OF HEARING:	July 11, 2007
REASONS FOR JUDGMENT:	SHORE J.
DATED:	July 12, 2007

APPEARANCES:

Anthony Karkar	FOR THE APPLICANT
Patricia Nobl	FOR THE RESPONDENT

SOLICITORS OF RECORD:

ANTHONY KARKAR Montréal, Quebec	FOR THE APPLICANT
JOHN H. SIMS, QC Deputy Attorney General of Canada	FOR THE RESPONDENT