Federal Court  Cour fédérale

Date: 20070723

Docket: IMM-2717-07

Citation: 2007 FC 750

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 23, 2007

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MARIA BONNIE ARIAS-GARCIA and
ROBERTO SALGADO-ARIAS and
RODOLFO VALDES-ARIAS (ALIAS RODOLFO ARIAS-GARCIA)

Applicants

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] In any application to stay a removal, like in every immigration case, the Court must maintain an appropriate balance between the protection of individuals and the integrity of the immigration system. In this case, the vulnerability of the applicants, in particular of the child, Rodolfo, who was abducted on two occasions, requires that a stay be granted. Moreover, the

integrity of the judicial system and *stare decisis*, given that the content of the two judgments rendered by Mr. Justice Sean Harrington, show that there would be irreparable harm caused by the removal and that the balance of convenience favours the applicants.

[2] Moreover, the officer did not consider the distinction between the application based on humanitarian and compassionate (HC) considerations and the Pre-Removal Risk Assessment (PRRA) application:

> [7] While PRRA and H&C applications take risk into account, the manner in which they are assessed is quite different. In the context of a PRRA, "risk" as per section 97 of IRPA involves assessing whether the applicant would be personally subjected to a danger of torture or to a risk to life or to cruel and unusual treatment or punishment.
>
> [8] In an H&C application, however, risk should be addressed as but one of the factors relevant to determining whether the applicant would face unusual, and underserved or disproportionate hardship. Thus the focus is on hardship, which has a risk component, not on risk as such.
>
> [9] In general terms, it is more difficult for a PRRA applicant to establish risk than it is for an H&C applicant to establish hardship (see: *Melchor v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1600, 2004 FC 1327; *Dharamraj v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 853, 2006 FC 674; and *Pinter v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 366, 2005 FC 296).
>
> [10] In recent years, the PRRA normally precedes the H&C or is decided at the same time. Thus the present case is a little unusual.
>
> [11] In *Pinter*, above, Chief Justice Lutfy wrote:
>
> > [5] In my view, it was an error in law for the immigration officer to have concluded that she was not required to deal with risk factors in her assessment of the humanitarian and compassionate application. She should not have closed her mind to risk factors even though a valid negative pre-removal risk assessment may have been made. There may well be risk considerations which are relevant to an application for permanent residence from within

> Canada which fall well below the higher threshold of risk to life or cruel and unusual punishment.
>
> [Emphasis added]
>
> [12] In the current case, the officer considered the risk factors set out in the negative refugee claim decision, and updated them. Although he considered Mr. Singh Sahota's connections with Canada, as far as India is concerned, although he used the humanitarian and compassionate form, in reality all he did was assess risk, not hardship. For instance he said, "in assessing the risk invoked by the applicant I note that they have, in substance, been previously considered by the IRB." It may well be that a risk may not be so sufficient as to support a refugee claim under sections 96 or 97 of IRPA, but still be of sufficient severity to constitute a hardship.
>
> [13] The officer applied the wrong test, and therefore Mr. Singh Sahota was not given a fair hearing. Although there are rare occasions when it can be said that the result would have been the same (see: *Mobil Oil Canada Ltd. v. Canada Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202), the general rule, and the rule which applies here, is that it is not up to the Court to speculate as to what the result might have been had the proper test been followed (see: *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643.

(*Sahota v. Canada (Citizenship and Immigration)*, 2007 FC 651, [2007] F.C.J. No. 882 (QL).)

INTRODUCTION

[3] The respondents submit that the applicants should have challenged the removal set for June 27, 2007, as they have been aware of it since the beginning of May.

[4] According to her counsel, David Chalk, the principal applicant did not apply to stay the removal because the applicants were informed that their application for a visa exemption based on humanitarian and compassionate considerations would probably be processed before the removal date.

[5] Mr. Chalk specified the following on this point:

> [TRANSLATION]
>
> 6. Without making a commitment, Ms. Petticlerc said that the HC application would normally be reviewed by a Citizenship and Immigration Canada officer, either Isabelle-Anne Moreault, or Huguette Samson.
>
> . . .
>
> 8. I was confident that there would be a positive decision in Ms. Arias-Garcias' case because of the family's exceptional integration at every level and the fact that it was clearly in the best interests of Ms. Arias-Garcia's youngest son and the family that the permanent residence file be processed in Canada. Moreover, I knew that the immigration office in Québec had a much lighter caseload then the office in Montréal.
>
> 9. From Tuesday, June 19, 2007, until Thursday, June 21, I made many attempts to contact Ms. Moreault or Ms. Samson by telephone to find out whether a decision would be made before the date scheduled for the family's departure. I left messages on their voicemail, without receiving a response. When I had still not received a response on Thursday, June 21, I tried other numbers for immigration officers in Québec and I left other urgent messages, which have still not been answered.
>
> 10. I spoke with Ms. Arias-Garcia at the end of the day. She told me that a priest who was interested in her case had told her that a decision would be made the next day on her HC application.

[6] The principal applicant was represented by Diane Bélanger, a lawyer specialized in immigration law for 20 or so years, for all administrative proceedings with Minister of Citizenship and Immigration representatives.

[7] Ms. Bélanger had been ill since February 2006. Following examinations, she underwent surgery performed by Dr. Liane Feldman at the Montreal General Hospital on April 18, 2006, for cancer of an adrenal gland.

[8] Ms. Bélanger was unable to work for almost the entire year because of this cancer. She died on December 2, 2006, as a result of the cancer.

[9] In February 2007, Jean El Masri referred the principal applicant to another immigration law specialist, Mr. Chalk, who finalized the permanent residence application based on humanitarian and compassionate considerations. (Mr. El Masri never represented the principal applicant except to plead before the courts. Since he does not specialize in immigration law, he could not represent the applicants before the immigration authorities.)

[10] Since the permanent residence application should have been processed at the respondents' office in Québec before Friday, June 22, 2007, namely before the removal order came into force, the removal was not contested.

[11] In fact, there is one issue: an application to stay can only suspend the removal until a decision is made on the application for a visa exemption based on humanitarian and compassionate considerations. This decision was rendered before the date set for removal. In other words, if a stay had been requested and granted, it could not have gone beyond June 26, 2007, namely the date that the applicants and their counsel would have been aware of the decision.

[12] The application for a visa exemption based on humanitarian considerations is not in itself grounds to delay the removal. The situation is different here: the principal applicant has not only filed such an application, but thought that a decision would be rendered before the departure date.

[13] The respondents argue that the principal applicant should have contested the removal between June 26, 2007 (when, according to Mr. Chalk, he received the decision) and June 27, 2007, even when the HC decision was made on June 20, 2007, and was not communicated for six days.

[14] The four authorities cited by the respondents (*Inderjit Singh v. Canada (Minister of Employment and Immigration)*, [1983] F.C.J. No. 1087 (F.C.A.) (QL), *Manohararaj v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 376, [2006] F.C.J. No. 495 (QL), *Mohar v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 952, [2005] F.C.J. No. 1179 (QL) et *Chavez v. Canada (Minister of Public Safety and Emergency Preparedness*), 2006 FC 830, [2006] F.C.J. No. 1059 (QL), are problematic because all of them involve stays for removal that were submitted in different ways:

- Several years after the removal date (between 2 and 5 years), and
- Only after the claimant's arrest.

[15] That is not the case before this Court.

[16] The Court notes *Lima v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 383, [2007] F.C.J. No. 530 (QL):

> [16] It is trite law that in order for the Applicant to succeed on a motion for an order staying his or her removal pending final determination of an Application for leave and for judicial review such as that here before the Court, the burden rests on the Applicant to establish three things: first, that there is a serious issue to be tried on his or her application for leave and for judicial review; second, that unless the stay is granted the Applicant or, as in this case, a child directly affected by the Applicant's removal, will suffer irreparable harm; and third, that the balance of convenience favours the Applicant rather than the Respondent[2]. Similarly, it is trite law that a stay of removal is an equitable remedy and, as such, it is open to the Court to deny the remedy in circumstances where an applicant does not come to the Court with "clean hands".
>
> [17] Certainly, on the facts of this matter, the Applicant does not come to the Court with "clean hands". The Applicant has been evading a deportation order and a warrant for her arrest since the end of July, 1997. That being said, I am loathe to inflict the sins of the mother on the daughter in the circumstances here before the Court and I will therefore turn to a consideration of the tripartite test for a stay of removal based on a somewhat analogous circumstance in which a stay of removal was granted notwithstanding a lack of "clean hands" on the part of an applicant (See : *Calabrese v. Canada (Minister of Citizenship and Immigration)*, [1966] F.C.J. No. 723 (QL), May 23, 1996).
> . . .
>
> [19] **Against the very low threshold for a serious issue to be tried**, I am satisfied that the issue of whether the Respondent, on the relatively unique facts of this case, breached the duty of fairness owed to the Applicant by failing to provide reasonable notice of a relatively imminent decision where the decision, as here, was to be taken in less than 4 months from the date of application, a period of approximately l/5th of the Respondent's own best estimates of the time from application to decision, is a serious one. (Emphasis added.)

FACTS

[17] The Court reiterates the facts involving the principal applicant that were set out in the decision *M.B.G.A. v. R.V.M.*, [2004] J.Q. No. 6779 (QL), of the Court of Appeal of Quebec, on June 8, 2004:

[TRANSLATION]

[8] The child's father is a citizen of Mexico; he is a notary public and 65 years old. The mother is also a citizen of Mexico but made an immigration application in Canada. She is a dentist and is 37 years old. They were married on xxxx 1997 and the child born of the union, R . . . V . . . A . . . , was born on . . . 1998. The appellant, the child's mother, also had an 8-year-old older child, Ro . . . , born of a previous union.

[9] The couple was separated on July 20, 1999. According to the appellant's testimony, it was following an incident of physical violence by her husband, while he was holding the child in his arms, that she decided to leave the matrimonial home with her children and to live first with her mother and then take a house to settle there with her children. In the months that followed this separation, the father had access to the child R . . . , who would sleep on occasion at his father's home during the visits. There were discussions between the lawyers about the possibility of filing divorce proceedings. According to the appellant's testimony, the father allegedly asked for the child as follows:

> . . .
>
> Yes, that's it.
>
> A- He wanted the child to be given to him, that he be given the child, he asked that I give him the child because I already have another son and that I, I could keep just one child. I told him no, that the two (2) of them are my children _ the two (2) children are mine. We had to agree to be able to share the time with the two (2) children.
>
> . . .
>
> A- He never . . . he never loved Ro . . .

[10] At one point, in April 2000, when the child was at his mother's home with the child's nanny, the father showed up and with or without the nanny's consent (the evidence is contradictory on this point and there is no reason to decide the issue), the father brought the child to his home. The mother was informed by the nanny over the phone and for several days, she did not know where the child was; the father was not at his office and did not communicate with the mother despite many telephone calls from her. It was a vacation and when he returned to the city, the father contacted the mother and then filed court proceedings requesting custody of the child. As such, the child stayed with the father for two and a half

months, without the mother's consent. On May 10, 2000, the judge decided to award interim custody to the mother and, again according to the mother's testimony, the father did not comply with this interim order and did not return the child. This is how the appellant describes the circumstances:

THE COURT:

Q- And what happened?

A- He never gave him back. After two (2) months, almost two (2) months, I was still waiting for the child.

Q- Two (2) months.

A- Waiting for two (2) months. And through some parents of Mr. V . . . , I was told that the child was sick. It was then that I decided to go, to go to Mr. V's house . . . I waited for him there outside the house. When he came out of the house through the garage, the child came out behind him, the child was crying behind him.

I took the child, I hugged him, and I asked him to let me (inaudible) with the child, that I knew that the child was sick. He told me no, that he would take the child to his mother's house to give him medicine. He always left the child at his mother's house, at his sister's house, because he was always at the office.

I took the child and tried to get in my car, but then, violently, he took the child and the car keys, he told me not to leave and not to take the child with me and that he had a meeting right then with the notaries and had to leave then. I asked him to let me stay in his house with the child, then he took my keys and left. I stayed there at his house; I made breakfast for the child. The child then started vomiting, he had a little diarrhea, he had . . . he was bleeding, he had a fever, I, I was afraid, I was very afraid. That was when I took the child . . .

. . .

Q- You stated that you were afraid and that's what you did?

A- I was very afraid, I saw the child so sick, I could not be with him.

Q- What did you do, madam?

A- I took the child, we left Mr. V's house . . . , I was running everywhere (inaudible), there was a friend's house near there . . .

THE COURT:

Q- What is the friend's name?

A- O . . . I asked my friend to help me get out of the area, because there was security . . .

Q- What do you mean, security?

. . .

THE COURT:

It is a gated community; there was a fence around the property.

THE INTERPRETER:

Yes, that's it.

A- And since I did not have a car, because he had taken my keys, then, there was the child's nanny (inaudible) also and from there we left for my parents' house.

[11] After the child was better, the father again asked the mother for access rights, which were granted to him for one day at a time. Shortly afterward, on father's day, the father refused to bring the child back at the end of the day visit. The parties talked all night and the mother states that the next morning around 10:00 a.m., the father gave her legal papers to sign regarding the divorce, custody of the child, authorization for the father to leave the country with the child, etc., all in exchange for returning the child to his mother. Not being a jurist, she did not understand everything and refused to sign the document. The father then allegedly refused to return the child to his mother.

[12] The mother then turned to the court and while she was waiting for the judge's decision, she ran into the child by chance on the street in the company of the father's sister. An incident followed with the child's aunt and the police were called. Presented with the judgment dated May 10, 2000, the police returned the

child to his mother. The mother testified that she was afraid afterwards that the child would be abducted a third time; she therefore changed residences often, living in turn with her brother, her parents, an aunt, etc. Since she worked in Mexico City, she went there regularly and often lived at her brother's former apartment in Mexico. She testified that the father threatened that he would take the child and that she would never see him again and that her telephone conversations were intercepted.

[13] On December 6, 2001, a judgment was rendered in Mexico granting interim custody of the child R . . . to the mother with access rights for the father, the respondent.

[14] It was in this fearful state of mind that the mother had a birth certificate issued for R . . . that indicated "that she was a single parent" and that the father was unknown. On December 20, 2001, a passport was issued to the child R . . . in the name of "R . . . A . . . G . . . ", namely the name of the mother alone.

[15] On June 24, 2002, the appellant arrived in Quebec with her two children, with a tourist visa in hand. She settled in city A and sent the children to daycare and to school. She began administrative proceedings to obtain a selection certificate to live in Quebec. To do so, she had to return to Mexico for an interview with Canadian immigration authorities. She then returned to Mexico in February 2003 for that purpose. On April 28, 2003, the Immigration Service in Mexico issued Quebec selection certificates to the appellant, to Ro . . . and to R . ... On May 28, 2003, the appellant came back to Quebec with her children.

[16] On April 28, 2003, a judgment was rendered awarding interim custody of the child to the father. But on October 22, 2003, a new judgment was rendered in Mexico, setting aside the judgment dated April 28, 2003, and returning the parties to the status quo as of December 6, 2001, i.e., awarding custody of the child back to the mother.

[17] On November 9, 2003, the mother went on a trip to the United States for a few hours with the children. When she returned to Canada, she was stopped at the border by the Immigration Division and put into detention with the two children on the grounds that she had abducted the children in violation of a custody order and based on two arrest warrants issued against her in Mexico [See Note 2, *infra*] dated June 25, 2002, and September 25, 2002, i.e. before the judgment dated October 22, 2003, that awarded the interim custody back to the mother.

[18] In support of her HC application, Ms. Arias-Garcia raises the father's violence, the abductions of Rodolfo, and the complaints that were issued before the courts.

[19] In the case of the principal applicant, the Court of Appeal of Quebec also dismissed the motion for the return of the principal applicant's son, Rodolfo Valdes-Arias, born on July 19, 1998, filed by the father under the *Act respecting the civil aspects of international and interprovincial child abduction*, R.S.Q. c. A-23.01, because of his integration in his new environment:

> [TRANSLATION]
>
> [36] These interests of the child are sometimes reviewed in light of Article 3 of the United Nations Convention on the Rights of the Child:
>
> > In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.
>
> . . .
>
> [39] Based on a review of these principles and a review of the evidence, I infer first that the child is integrated in his new environment. The two children have gone together to daycare or to school since October 7, 2002. They are well integrated. R . . . quickly learned French ("Québécois" French, say the witnesses) in contact with his classmates, made friends outside of school and in school and his relationship with his sibling seems strong. R . . . has also begun to read and write in French. Both children go together every day to the same school. The environment offers them continuity and stability. The mother is also in a stable romantic relationship (six months at the time of the hearing at trial) with a 56-year-old engineer and administrator who is in a stable situation and who communicates well with the children. Although the new companion speaks Spanish, the children insist on speaking to him in French.
>
> [40] Contrary to what the judge stated at trial, the appellant did not come to Quebec just as a tourist, but to eventually establish herself there if she could obtain the necessary authorisation.
>
> [41] I find that the evidence indicates that the child has integrated into his new environment and I propose, for that reason, that the appeal be allowed, that the trial judgment be quashed and that the motion for the immediate return of the child R . . . to Mexico be dismissed, each party to pay its own costs.

(*M.B.G.A. v. R.V.M., supra*.)

[20] Since the Court of Appeal of Quebec's decision, there has been a final judgment of divorce by a Mexican court, awarding final custody of Rodolfo to the principal applicant.

[21] The applicants have been in Canada since June 2002. They are even more integrated than they were at the time of the Court of Appeal's judgment in June 2004, and the effects of their departure would be a significant detriment to the family's well-being, according to the test in *Toth v. Canada (Minister of Employment and Immigration)*, 86 N.R. 302 (C.A.).

[22] Ms. Arias-Garcia, in her HC application, specified the following facts:

> [TRANSLATION]
>
> I have reason to believe that Mr. Valdes will come after Rodolfo if we have to return to our country. He has already abducted our son on two occasions and he has threatened more than once to do it again. Considering everything that has happened since, I fear that this will have aggravated his threats and that now more than ever he could act on them.
>
> …
>
> In accordance with the concept of parental authority, I would have to obtain Mr. Valdes's consent to leave Mexico with Rodolfo. Under the circumstances, it is very likely that he will refuse any request to travel. It will be impossible for me to get him to cooperate since he has refused to cooperate with me since the beginning of the proceedings. In fact, since 2000, my ex-husband has breached his obligation to pay alimentary support for me and for his own son. I ask you to read the opinion of my Mexican lawyer, José Arturo Vera Aboytes, attached. He has represented me since the beginning of the proceedings and is very familiar with the legal aspects of the case. In his opinion, it will be "impossible to obtain [Mr. Valdes'] authorization for [Rodolfo] to leave Mexico" based on his very obvious failure to cooperate since the proceedings began. He adds that even though Mr. Valdes wants to get custody

> of our son, since our separation he has always refused to ensure his well-being in failing to pay his alimentary support.
>
> …
>
> In the last few years, I have had the opportunity to offer my children a nice stable life in their best interests. I have seen them grow in an environment that is, first, very removed from the reality that they were living in before, but also one that they adapted to and integrated into very quickly. The children were very young when we permanently settled in Canada in June 2002. Roberto was six years old and Rodolfo was only 4. Rodolfo has spent almost half of his life in Canada and is only familiar with the Canadian school system. All of their friends, all of their attachments, and sociocultural references are Quebecois. They built their childhood in Canada. **It would be unfortunate to uproot them from this life that is theirs today. Returning to Mexico would greatly upset them, especially with regard to Rodolfo considering all of the circumstances involving his father. He has already suffered a great deal and I worry about what will happen to him if we have to leave Canada. He is very strong and mature for his age, but there are limits to what a young child can overcome. Moreover, since our meeting with the removal officer Lise Petitclerc, on May 8, 2007, I notice that both of my sons are afraid. They wake up in the middle of the night afraid that I may already be gone. This deportation order troubles them enormously.** (Emphasis added.)

SERIOUS ISSUE

[23] The Court of Appeal of Quebec's attention to the children's best interests in this case is significant.

[24] Ms. Arias-Garcia has a profession and her employer wants to keep her because of her specialization and devotion. The Court notes the fact that her job is not in a big city but rather in a rural area.

Undue hardship in regard to the children's best interests and integration

[25] This involves a very specific physical risk and psychological harm to a young vulnerable child and also, the integration of the entire family that has taken place.

[26] The officer accepts the reality of both of Rodolfo's abductions by his father and the serious risk of other abductions, but, nevertheless, finds that there is not any significant harm considering that the principal applicant could recover him afterward (the physical and psychological state of the child, Rodolfo, was not adequately addressed by the officer).

[27] In other words, the harm to a child who may be abducted by his father is inexistent or negligible if [TRANSLATION] "[the mother] recovers him afterward", and this irrespective of the duration of the abduction, the conditions in which her son is found, and the sequelae (reference is made to the Court of Appeal of Quebec's judgment and the affidavit before the Supreme Court of Canada).

[28] It is impossible to disregard that it is in the child's interest that he not be abducted a third time (see Mr. Zuloaga's letter on how long it would take to put an end to the abduction).

[29] The officer disregarded the emotional and psychological harm that the children will suffer if they leave, dismissing every consideration particular to their case.

[30] The letter from Diane Arsenault of the Centre régional de santé et de services sociaux de Rimouski (dated March 16, 2007), specifies:

> [TRANSLATION]
> My work in mental health for over 30 years has often put me in contact with young people in difficulty; rarely does this clientele come from a family unit that is as close as the one in this case. The children must live in a stable emotional environment, whether it is the family, social, or environmental milieu. At this time, the lives of these two children could not be better adapted. They live in harmony in their living environment thanks to the affection and the courage of their mother who is unrelenting in providing them with what they need so they can become stable adults, despite the difficult and uncertain situation.
>
> It would be harmful to their health to make them relive other trauma such as leaving for a country that is foreign to them and where their father could not provide them with stability . . .

[31] With respect, it is clear that the respondents' officer disregarded Guide IP 5, paragraph 5.8, on the child's best interests, according to which the following must be taken into account:

- The age of the child;
- the degree of the child's establishment in Canada;
- the child's links to the country concerned;
- the impact to the child's education;
- Whether the child would be placed in a situation of risk.

[32] Indeed, the analysis of harm to the children from the point of view of their integration over four years is significant:

- The applicants arrived in Canada on June 24, 2002, i.e. five years ago, apart from a brief stay in Mexico in 2003;

- The children's integration, in particular Rodolfo's, must be analysed from a particular point of view that goes beyond the loss of a school year;
- The letter from Ms. Arsenault of the Centre régional de santé et de services sociaux de Rimouski, that refers to the harmful effect it will have on the children if they leave their current environment and the trauma they will suffer.

[33] The immigration officer does not refer to the harm that will be suffered by the child Rodolfo and the other applicants if they leave, even if this major harm is abundantly documented. This factor was not addressed by the officer:

> [17] . . . the more important the evidence that is not mentioned specifically and analyzed in the agency's reasons, the more willing a court may be to infer from the silence that the agency made an erroneous finding of fact "without regard to the evidence": *Bains v. Canada (Minister of Employment and Immigration)* (1993), 63 F.T.R. 312 (F.C.T.D.). In other words, the agency's burden of explanation increases with the relevance of the evidence in question to the disputed facts. …

(*Cepeda-Gutierrez v. Canada (Minister of Citizenship and Immigration)* (1998), 157 F.T.R. 35, [1998] F.C.J. No. 1425 (QL).)

> [15] With regard to the university documents submitted, the Board's statement that "it is surprised by their production" at the second hearing when the applicant had clearly stated he would do so at the first hearing, casts a doubt on the Board's objectivity since it clearly fails to consider the applicant's testimony on this point.

(*Afkham v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 180, [2004] F.C.J. No. 208 (QL).)

> [6] The officer did take into account the submissions related to economic and emotional hardship. However, his finding that this was not undue, undeserved or disproportionate hardship was based, at least in part, on the fact that the separation would be minimal in length. This error may well have had a substantial impact on the other factors considered by the officer, in the circumstances of this particular

> case. I am unable to speculate as to whether the result would have been the same but for the error, and I therefore allowed the application for judicial review . . .

(*Rhman v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 644, [2004] F.C.J. No. 772 (QL).)

[34] Paragraphs 45 to 49 of the principal applicant's affidavit are noted for the purpose of understanding the motion:

> [TRANSLATION]
>
> **45.** The respondents' officer overlooked that I could obtain permanent residence in a few months if I were not afraid that I would never get out of Mexico with Rodolfo if I were to return. This proves the seriousness of the harm in the event of departure or removal from Canada.
>
> **46.** The respondents' officer assumes that I can "exercise [my] profession in Mexico, as I did before arriving in Canada, which would provide the children with a stable situation".
>
> **47.** However, the respondents' officer did not have any information to support her assumption that I could practice my profession again after a five-year absence.
>
> **48.** The officer also disregarded the fact that I do not have any revenue or assets (moveable or immoveable) in Mexico.
>
> **49.** Finally, the respondents' officer failed entirely to consider the public interest, namely my employer's need – in the health care field – to keep me because of the lack of qualified professionals in Rimouski, which was one of the grounds for the permanent residence application . . .

[35] Based on the lack of communication with the principal applicant, the officer made findings that were not based on the information that she had before her, contrary to the decisions of this Court:

> [8] I agree that no obligation exists but, instead of going further and asking questions which might have provided greater contextual detail, I find that the

> Immigration Officer speculated on the information provided. There is no evidence upon which the Immigration Officer could draw the conclusion that, if the Applicant is required to go outside of Canada to be landed, she and her husband would have "fruitful years together in the future, due to their age". It is agreed that an application for landing made from Guyana would take at least one year. Given the notorious fact that the Applicant's husband is already passed his expected longevity, and given the fact that the Applicant herself is approaching her longevity, I find that it is unreasonable for the Immigration Officer to speculate on their future life together.

(*Ramprashad-Joseph v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1715, [2004] F.C.J. No. 2091 (QL).)

Distinction between a PRRA application and an HC application

[36] The officer did not consider the distinction between the HC application and the PRRA application:

> [7] While PRRA and H&C applications take risk into account, the manner in which they are assessed is quite different. In the context of a PRRA, "risk" as per section 97 of IRPA involves assessing whether the applicant would be personally subjected to a danger of torture or to a risk to life or to cruel and unusual treatment or punishment.
>
> [8] In an H&C application, however, risk should be addressed as but one of the factors relevant to determining whether the applicant would face unusual, and underserved or disproportionate hardship. Thus the focus is on hardship, which has a risk component, not on risk as such.
>
> [9] In general terms, it is more difficult for a PRRA applicant to establish risk than it is for an H&C applicant to establish hardship (see: *Melchor v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1600, 2004 FC 1327; *Dharamraj v. Canada (Minister of Citizenship and Immigration)*, [2006] F.C.J. No. 853, 2006 FC 674; and *Pinter v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 366, 2005 FC 296).
>
> [10] In recent years, the PRRA normally precedes the H&C or is decided at the same time. Thus the present case is a little unusual.
>
> [11] In *Pinter*, above, Chief Justice Lutfy wrote:
>
> > [5] In my view, it was an error in law for the immigration officer to have concluded that she was not required to deal with risk factors

> in her assessment of the humanitarian and compassionate application. She should not have closed her mind to risk factors even though a valid negative pre-removal risk assessment may have been made. There may well be risk considerations which are relevant to an application for permanent residence from within Canada which fall well below the higher threshold of risk to life or cruel and unusual punishment.
>
> [Emphasis added]

[12] In the current case, the officer considered the risk factors set out in the negative refugee claim decision, and updated them. Although he considered Mr. Singh Sahota's connections with Canada, as far as India is concerned, although he used the humanitarian and compassionate form, in reality all he did was assess risk, not hardship. For instance he said, "in assessing the risk invoked by the applicant I note that they have, in substance, been previously considered by the IRB." It may well be that a risk may not be so sufficient as to support a refugee claim under sections 96 or 97 of IRPA, but still be of sufficient severity to constitute a hardship.

[13] The officer applied the wrong test, and therefore Mr. Singh Sahota was not given a fair hearing. Although there are rare occasions when it can be said that the result would have been the same (see: *Mobil Oil Canada Ltd. v. Canada Newfoundland Offshore Petroleum Board*, [1994] 1 S.C.R. 202), the general rule, and the rule which applies here, is that it is not up to the Court to speculate as to what the result might have been had the proper test been followed (see: *Cardinal v. Kent Institution*, [1985] 2 S.C.R. 643.

(*Sahota*, *supra*.)

IRREPARABLE HARM

[37] The Court refers to the principal applicant's affidavit, and points out the following:

- The abductions and threats by Mr. Valdes, Rodolfo's father, which are not disputed by the respondents;
- The father's tactics to date, including the repeated lies (not to mention the total lack of financial support, contrary to the law);
- The sequelae that the children will suffer again, having witnessed violence and

abductions and the immediate threat to their safety and their stability if they are returned to Mexico;

- The children's terror at the mere mention of returning to Mexico.

[38] The children are at risk of irreparable harm if they return to Mexico, which a judgment granting the application for review on the merits will not necessarily change.

[39] The principal applicant did not leave Mexico for a better financial life – she is a professional and had her own clinic – she left to protect her youngest son from a constant threat.

[40] The principal applicant and her children do not have a place to live in Mexico, or any financial resources in that country, but she has a profession and a job in Canada where she is appreciated by those around her.

[41] In the two judgments of July 2005, Harrington J. decided that there was irreparable harm, [TRANSLATION] "in particular the abduction".

[42] The respondents do not deny this harm but say that it is not irreparable because the police can retrieve the child.

[43] The applicants specified that:

(1) This argument is the same one that was made before Harrington J. and that he

rejected it in both of his judgment (namely the admission of the reality of the abductions, but the distinction between the abduction itself and the fact that the child would be found if he were abducted);

(2) The facts have not changed since these judgments, and the integrity of the judicial system and *stare decisis* is a value that must be preserved;

(3) The requirements for an application for stay are different from those for a PRRA application, just as the requirements for an HC application are different from those for a PRRA application; each application has its subject and its purpose.

[44] The Court notes the following passage from the judgment of Mr. Justice Edmond Blanchard in *Almrei v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1394, [2003] F.C.J. No. 1790 (QL):

> [24] I am in agreement with the view expressed by Mr. Justice Robertson in *Suresh v. M.C.I.*, [1999] 4 F.C. 206 (F.C.A.) at paragraph 13, where the learned Justice stated that the issue of irreparable harm can be answered in one of two ways. The first involves an assessment of the risk of personal harm if a person is deported to a particular country, which is one of the key questions at issue in the underlying application to this stay application. The second involves assessing the effect of a denial of a stay application on a person's right to have the merits of his or her case determined and to reap the benefits associated with a positive ruling.
>
> [25] At paragraph 14 of his reasons for decision, the learned Justice stated that, should the applicant be deported prior to the hearing of this appeal, the pending appeal will be rendered "moot" or "nugatory". He explained:
>
> > Assuming that Mr. Suresh is deported and detained in Sri Lanka prior to that proceeding, and assuming that he is successful on appeal, Mr. Suresh's successful constitutional challenge would be unlikely to release him and, therefore, he would be unable to avail himself of the fruits of his victory, most likely, the right to remain in Canada until such time as his case is disposed of in accordance with the

> Charter. Were he to remain in Canada and be successful on his appeal, I take it for granted that the Minister would be unable to act on the deportation order.
>
> [26] I am of the view that the above reasoning of Mr. Justice Robertson in *Suresh*, *supra*, is applicable to the case at bar. On the evidence, it is unlikely that Syrian authorities will release the applicant should he be successful on his underlying application, and he would therefore be unable to avail himself of the "fruits of his victory". Consequently, I find it unnecessary to fully consider and decide the risk to the applicant if he is returned to Syria and whether that risk constitutes irreparable harm. For the purposes of this stay application, I find that the applicant will suffer irreparable harm if his stay is not granted, on the basis that removal will render his pending application "moot" or "nugatory".

BALANCE OF CONVENIENCE

[45] The Court repeats its analysis for this test, noting again the two judgments by Harrington J. in the months of July 2005.

[46] The Court notes the harm that will be suffered by the applicants if the stay is not granted, which is greater than the inconvenience for the respondent.

[47] The applicants are not a threat to Canada, and have acted in accordance with the Canada's laws since their arrival.

[48] The principal applicant has a position in Rimouski; she is a professional and appreciated in her environment.

[49] A reference is made to the documents provided by Dr. Pierre Couture, her boss.

[50] The public interest will not be served by an immediate deportation as opposed to a stay until there is a judgment by this Court on the applications for leave and for judicial review filed in this case.

CONCLUSION

[51] For all of these reasons, the motion to stay the enforcement of the removal orders is allowed.

JUDGMENT

THE COURT ORDERS that the motion to stay the enforcement of the removal orders be allowed until there is a final judgment regarding the applicants.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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