Date: 20070727

Docket: IMM-2607-07

Citation: 2007 FC 786

[ENGLISH TRANSLATION]

Ottawa, Ontario, July 27, 2007

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ABDELKRIM ABDELLAH

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] This is a motion requesting that the removal order against the applicant be stayed. This motion is joined to an application for leave against the decision refusing the Pre-removal Risk Assessment (PRRA). This decision was issued by a PRRA officer (Officer) on May 7, 2007.

PRELIMINARY REMARK

[2] Given the government reorganization, the Minister of Public Safety and Emergency Preparedness should be added as respondent, in accordance with the *Public Service Rearrangement and Transfer of Duties Act*, R.S.C. (1985), c. P-34 and the *Department of Public Safety and Emergency Preparedness Act*, Statute of Canada 2005, chapter 10, as well as Orders in Council P.C. 2003-2059, P.C. 2003-2061, P.C. 2003-2063, P.C. 2004-1155 and P.C. 2005-0482.

FACTS

[3] The applicant is an Algerian citizen, and he left his country for Canada on September 8, 2005.

[4] On September 12, 2005, the applicant claimed refugee status. In support of his refugee claim, the applicant stated that he worked as an actor in his country and that he feared returning to Algeria because of threats he allegedly received for acting in a romance film. This allegedly displeased two men who reportedly threatened him.

[5] On May 10, 2006, the Refugee Protection Division (RPD) dismissed the applicant's refugee claim, as it found that he was not credible.

[6] On August 25, 2006, the application for leave against that decision by the RPD was dismissed.

[7] On January 16, 2007, during an interview with an immigration officer, the applicant was informed of his right to submit a PRRA application.

[8] During that interview, the applicant stated that he was married to a Canadian citizen and was in divorce proceedings. (Exhibit “B” from the affidavit of Huguette Godin (Interview note dated January 16, 2007).)

[9] On or around January 31, 2007, the applicant filed a PRRA application. Afterward, the applicant sent his submissions in support of his PRRA application, and attached documents on Islam and homosexuality in Algeria, as well as a letter from a psychotherapist.

[10] In support of his PRRA application, the applicant stated that he feared being persecuted in Algeria because of his sexual orientation. He explained that he had discovered that he was homosexual at a very young age and, as an adult and working as an actor, he had had a relationship with a man for three years. He alleged that he was threatened and blackmailed by that man because he had refused to acquiesce to his demand to prostitute himself.

[11] On May 7, 2007, the PRRA officer dismissed the applicant’s application on the grounds that **failed to discharge his burden to show the merits of his fear that he is homosexual and that he might face personal risks for that reason**. In fact, the applicant did not provide any evidence in support of his homosexuality, such as letters from friends or participation in any sort of activities.

On the contrary, the applicant's actions in getting married to a Canadian citizen could lead to an opposite conclusion.

[12] Furthermore, the PRRA officer reviewed the objective documentation on the situation of homosexuals in Algeria (including the documents submitted by the applicant and other, more recent documents that deal with the situation in Algeria) and found that it did not establish that homosexuals are victims of persecution in Algeria. Homosexuals in Algeria may at most be subject to discrimination, which does not constitute a risk under sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act).

ISSUE

[13] Did the applicant show that he fulfilled the three necessary elements to obtain a judicial stay of the removal order?

ANALYSIS

[14] To obtain a judicial stay of a removal order, the applicant must prove the following three elements:

(a) That he raised a serious issue to be tried;

(b) That he would suffer irreparable harm if no order was granted; and

(c) Thirdly, that the balance of convenience considering the total situation of both parties, favours the order.

(*Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (C.A.).)

[15] The respondent argues that the applicant does not satisfy the test set out in *Toth*.

SERIOUS ISSUE

[16] As a serious issue, the applicant alleges that the PRRA officer did not consider the evidence submitted, that is, the letter by Dr. Michel Peterson and the documents on Islam and homosexuality and on the situation in Algeria.

[17] However, a simple reading of the PRRA officer's decision suffices to show that this claim by the applicant is groundless.

[18] Through his claims, the applicant is simply asking this Court to substitute its opinion for that of the PRRA officer. The applicant in no way shows how the PRRA officer's findings would be unreasonable.

[19] Furthermore, the applicant accuses the Officer of not holding a hearing.

[20] Paragraph 113(b) of the Act sets out the manner in which the PRRA application must be reviewed.

113. Consideration of an application for protection shall be as follows:	**113.** Il est disposé de la demande comme il suit :
[...]	…

(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;	b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

[21] Section 161 of *Immigration and Refugee Protection Regulations*, SOR/2002/227 (Regulations) states the Pre-removal Risk Assessment is done on the basis of written submissions. A hearing will only be held if, in accordance with the factors set out in section 167 of the Regulations, the Minister deems that such a hearing is required.

161. (1) A person applying for protection may make written submissions in support of their application and for that purpose may be assisted, at their own expense, by a barrister or solicitor or other counsel.	**161.** (1) Le demandeur peut présenter des observations écrites pour étayer sa demande de protection et peut, à cette fin, être assisté, à ses frais, par un avocat ou un autre conseil.
[...]	…
167. For the purpose of determining whether a hearing is required under paragraph 113(b) of the Act, the factors are the following:	**167.** Pour l'application de l'alinéa 113b) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :
(a) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(b) whether the evidence is central to the decision with respect to the application	b) l'importance de ces éléments de preuve pour la prise de la décision relative

for protection; and	à la demande de protection;
(c) whether the evidence, if accepted, would justify allowing the application for protection.	c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

(Emphasis added.)

(La Cour souligne.)

[22] It must be pointed out that the factors set out in section 167 of the Regulations are cumulative, and that an individual must therefore meet them all to be entitled to a hearing. (*Bhallu v. Canada (Solicitor General)*, 2004 FC 1324, [2004] F.C.J. No. 1623 (QL); *Malhi v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 802, [2004] F.C.J. No. 993 (QL).)

[23] As decided by the case law of this Court, in accordance with section 167 of the Regulations, there is no obligation to hold a hearing for reviewing a PRRA application, except in cases where the applicant's credibility is the decisive element in the decision. (*Abdou v. Canada (Solicitor General)*, 2004 FC 752, [2004] F.C.J. No. 916 (QL) (QL); *Kim v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 321, [2003] F.C.J. No. 452, para 6 (QL); *Allel v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 533, [2003] F.C.J. No. 688, para 25 (QL); *Keller v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1063, [2003] F.C.J. No. 1346, para 4 (QL); *Younis v. Canada (Solicitor General)*, 2004 FC 266, [2004] F.C.J. No. 339, para 6 (QL); *Sylla v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 475, [2004] F.C.J. No. 589, para 6 (QL); *Bhallu*, above, para 6.)

[24] In *Sylla*, above, Justice Simon Noël said the following:

> [6] The right to a hearing in the context of PRRA proceedings exist when **credibility is the key element** on which the officer bases his or her decision and **without which the decision would have no basis**. It has been held that PRRA proceedings without a hearing (under IRPA), an in which the applicant's position is explained in writing, are in accordance with the principles of fundamental justice. (See *Suresh v. Canada (M.C.I.*, [2002] 1 S.C.R. 3 [sic] and *Youmis v. Solicitor General of Canada*, [2004] F.C.J. No. 339, 2004 FC 266, paragraph 6). Therefore, there was no violation of the fundamental rights provided in section 7 of the Charter. (Emphasis added.)

[25] In the case at hand, the respondent argues that the applicant was not entitled to a hearing because the applicant's credibility is not the decisive element on which the Officer based his decision.

[26] In fact, the PRRA officer's decision is based on two distinct and independent findings that do not raise important questions regarding credibility:

- **Inadequacy of the submitted evidence** to support his allegation that he is homosexual. Indeed, no evidence, such as letters from friends, participation in any sort of activities, etc., was submitted to prove this allegation;
- **Absence of objective basis** for the alleged risks of persecution. In fact, after reviewing the recent objective documentary evidence on the situation of homosexuals in Algeria, the Officer found that that evidence did not demonstrate that homosexuals are targets of persecution. At most, they are victims of discrimination, which does not constitute one of the risks identified in sections 96 and 97 of the IRPA. That is how the PRRA Officer found that even if the applicant was homosexual, he had not

> demonstrated a reasonable possibility of being persecuted or that he would risk being subject to torture, death threats, or cruel and unusual treatment or punishment.

[27] In *Sen v. Canada (Minister of Citizenship and Immigration)*, 2006 F.C. 1435, [2006] F.C.J. No. 1804 (QL), Justice Frederick Gibson recently found that the applicant was not entitled to a hearing for the PRRA proceedings because credibility was not the determining issue on the decision; the inadequacy of the evidence submitted in respect of the risks alleged by the applicant:

> [24] I am satisfied that, on a careful reading of the decision here under review, much the same might here be said. **The Applicant's credibility was, I am satisfied, not the determining issue on this decision, either explicitly or implicitly. To paraphrase the foregoing quotation, ...rather the Officer found that the risk to the Applicant had not been established on the totality of the evidence presented by him or on the basis of that evidence read together with the objective documentary evidence. Further, the Officer determined that the Applicant's evidence, taken as a whole, was simply insufficient to warrant a decision in his favour. I adopt the closing sentence of the above quotation as my own, and I repeat: "As the sufficiency of evidence was the central issue and no serious issue of credibility was raised, there was no obligation on the part of the Officer to hold an oral hearing".** (Emphasis added.)

[28] Furthermore, it was decided by Justice Luc Martineau in *Abdou*, above, that the applicant was not entitled to a hearing for the PRRA proceedings because the PRRA officer did not find that the applicant lacked credibility, but rather that the alleged risks had no objective basis, in light of the documentary evidence:

> [3] […] Therefore, there is a right to a hearing in PRRA procedure provided that credibility is the key element on which the officer based his or her decision and that, without a critical finding on credibility, the decision would have been unfounded. This was not the case here. In fact, a careful review of the officer's decision shows that the decision on credibility was not determinative in itself when all of the elements considered are taken into account. The PRRA officer did not find that the applicant lacked credibility but rather that there was no objective basis for the risks

> alleged in light of the documentary evidence and that the only risks that he could incur did not meet the requirements of section 97 of the Act.

[29] In section 167 of the Regulations, Parliament specified the circumstances in which a hearing must be held. **It is only when credibility is at the heart of the decision and would have a decisive impact on it that a hearing is required**. In that case, the applicants had the opportunity to argue their points of view through written submissions, and the PRRA was right to find that a hearing was not required.

[30] Likewise, in *Allel*, above, Justice Paul Rouleau decided that holding a hearing was not required because the PRRA officer had found that the objective evidence did not establish substantial grounds for believing that the applicant would be exposed to a risk of danger or torture should he return:

> [23] The applicant's counsel also submits that the Minister was obliged to hear her client viva voce under section 113(b) of the Act. This provision reads as follows: Consideration of an application for protection shall be as follows: [...]
>
> [24] The factors that the Minister must take into account in the exercise of his discretion are spelled out in section 167 of the Regulations: [...]
>
> [25] As I read these provisions, **it is obvious that the Minister or his delegate is not required to grant a hearing or interview to a claimant, even when serious issues of credibility related to the risks and dangers referred to in sections 96 and 97 of the Act are raised. In the case at bar, the PRRA officer concluded that the objective evidence did not establish a substantial reason to believe that the applicant would be exposed to a risk of danger or torture should he return. No serious issue of credibility is therefore raised in the assessment by the PRRA officer.** Moreover, since the applicant did not establish the existence of a real possibility of torture, the Minister's delegate was not obliged to summon him to an interview or a hearing: Suresh, supra, at paragraphs 121 and 127. (Emphasis added.)

[31] In the case at hand, the PRRA officer found that the evidence was inadequate and that there was a lack of an objective basis for the alleged fear.

[32] Thus, in accordance with the abovementioned decisions of this Court, the applicant was not entitled to a hearing.

IRREPARABLE HARM

[33] With respect to irreparable harm, the applicant alleges that:

- His life and safety would be threatened in Algeria because he is homosexual;
- Enforcing the removal order would render null and void his pending application for permanent residence in Canada in the humanitarian class.

[34] The risk alleged as a homosexual was carefully reviewed by a PRRA officer, who found that, after having reviewed the objective documentary evidence, that homosexuals were not victims of persecution in Algeria. The applicant in no way demonstrated that the Officer's decision was unreasonable.

[35] As for the allegation that enforcing the removal order would render his application for humanitarian considerations (H&C) null and void, and that it would cause him irreparable harm, it was decided on several occasions by this Court that the Minister of Citizenship and Immigration has no obligation to decide an H&C application before enforcing a removal order.

> **Considering that it has been consistently held by judges of this Court that there is no obligation upon the respondent to consider a Humanitarian and Compassionate Application prior to removing a person unlawfully in Canada, and that such an application, in and of itself, does not operate to bar his or her removal from Canada** (see for example *Cuff v. Minister of Citizenship and Immigration* (December 1, 1999), IMM-5680-99);
>
> The requested stay is denied and the motion is dismissed. (Emphasis added.)

(*Mortimore v. M.C.I.*, IMM-3143-00, June 12, 2000 (Justice Yvon Pinard); See also: *Chouhan v. M.C.I.*, IMM-6623-02, January 7, 2003 (Martineau J.); *Csanyi v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 758 (QL) (Justice Pierre Blais); *St-Fleur v. M.C.I.*, IMM-795-00 (Justice François Lemieux); *Jordan v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1076 (QL) (Lemieux J.); *Bandzar v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 772 (QL) (Justice Andrew MacKay).)

[36] Thus, the fact that the H&C application is pending certainly cannot constitute irreparable harm. This H&C application will continue to follow its normal course, and the applicant will be authorized to return to Canada if this application is approved, as set out in the CIC IP5 guide (section 14.5). (Exhibit "C" from Huguette Godin's affidavit (excerpt from IP5 guide).

BALANCE OF CONVENIENCE

[37] Given that the applicant did not establish a serious issue or irreparable harm, the balance of convenience leans in favour of enforcing the removal order by the respondent. (*Morris v. M.C.I.*, IMM-301-97, January 24, 1997, (F.C., Trial Division).)

[38] The balance of convenience favours the Minister, who has a vested interest in seeing this removal order enforced on the date that he set. (*Mobley v. M.C.I.*, IMM-106-95, January 18, 1995 (J. Noël).)

[39] In fact, subsection 48(2) of the Act provides that a removal order must be enforced as soon as the circumstances allow.

[40] The Court of Appeal developed the balance of convenience question for stays and in the public interest, which must be taken into consideration:

> [21] Counsel says that since the appellants have no criminal record, are not security concerns, and are financially established and socially integrated in Canada, the balance of convenience favours maintaining the status quo until their appeal is decided.
>
> [22] **I do not agree. They have had three negative administrative decisions, which have all been upheld by the Federal Court. It is nearly four years since they first arrived here. n my view, the balance of convenience does not favour delaying further the discharge of either their duty, as persons subject to an enforceable removal order, to leave Canada immediately, or the Minister's duty to remove them as soon as reasonably practicable: IRPA, subsection 48(2). This is not simply a question of administrative convenience, but implicates the integrity and fairness of, and public confidence in, Canada's system of immigration control.** (Emphasis added.)

(*Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, [2004] F.C.J. No. 1200 (QL); See also: *Atwal v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427, [2004] F.C.J. No. 2118 (QL); *Dasilao v. Canada (Solicitor General)*, 2004 FC 1168, [2004] F.C.J. No. 1410 (QL).)

[41] In this case, the applicant was able to claim refugee status and submit both a PRRA and an H&C application.

[42] The applicant has exhausted the remedies permitted to him by law.

[43] The respondent's interest in enforcing the removal order without delay takes precedence over the harm that the applicant would suffer.

[44] The balance of convenience is therefore in favour of the respondent.

CONCLUSION

[45] The applicant did not demonstrate that he met the criteria to obtain a stay, and accordingly, this application is dismissed.

JUDGMENT

THE COURT ORDERS that the application to stay the removal order be dismissed.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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