

**Date: 20081107**

**Docket: IMM-4729-08**

**Citation: 2008 FC 1248**

**BETWEEN:**

**TAMAR BEDROS MAZAKIAN  
PATILE MEGUERDI BERBERIAN  
AND PARDY BERBERIAN**

**Applicants**

**and**

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

**Respondents**

**REASONS FOR ORDER**

**LEMIEUX, J.**

**Introduction**

[1] On Friday, October 31, 2008, after hearing the parties in French, I granted a stay, with reasons to follow, from the execution of the applicants' removal to Lebanon scheduled for later that afternoon. These reasons are delivered in English for the benefit of the principal applicant, Tamar Mazakian, a citizen of Lebanon, as are the two other applicants: her daughter Patile, age 19 and her daughter Pardy, age 14 also both citizens of Lebanon.

[2] The applicants challenge, in their underlying judicial review application, the October 23, 2008 decision of an Enforcement Officer (the Officer) who refused to defer their removal from Canada.

[3] It is settled law that a removals officer has a limited discretion to defer the execution of a lawful deportation order because of the wording of subsection 48(2) of the *Immigration and Refugee Protection Act* (the *Act*) which provides “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”.

[4] It is also settled law that a person’s inability to travel in the execution of that person’s removal is a recognized exception to the requirement that a removal order be executed (*Ramada v. Canada (Solicitor General)*, [2005] F.C.J. No. 1384). In the context of a decision to remove children in the execution of a removals order, the jurisprudence of this Court is to the effect that a Removals Officer is not obliged to conduct an in-depth analysis on the best interests of the children but must examine the interests of the children to determine if there are personal circumstances which are compelling enough to warrant deferral such as completing a school year (see *Natoo v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 402 at paragraph 16).

[5] The principal question in this stay application is whether the Officer erred in refusing to defer the applicants’ removal in the light of the facts in the record concerning the principal applicant’s mental health and compelling factors related to her daughters.

[6] More specifically, the fragility of the principal applicant's psychological health was known to the Officer who had received advice from Medical Officer Walter Waddell of Citizenship and Immigration Canada (CIC) on September 16, 2008 that she was not fit to travel at that time on account of her psychological instability evidencing high suicidal risk.

#### Facts

[7] The applicants entered Canada as a family unit after the principal applicant's husband, Mr. Meguerdij Berberian, the father of Patile and Pardy, had obtained a work permit. The applicants accompanied him entering Canada on visitor's visas.

[8] In August 2003, Mr. Berberian returned to Lebanon in order to apply for another work permit which was refused by the Canadian authorities. He has not returned to Canada and is said by the principal applicant they are separated. The applicants overstayed their visitor's visa and (1) in December 2004 made refugee claims on account of their Armenian ethnicity and Christian religion. Those claims were refused on July 13, 2005; leave for judicial review of that decision was not sought. (2) On November 7, 2007, the applicants made an application for a Pre-Removal Risk Assessment (PRRA) which was refused on February 26, 2008 with no leave for judicial review sought from a judge of this Court.

[9] The record also indicates that on June 13, 2008, CIC in Montreal received from the principal applicant an application for permanent residence to Canada based on humanitarian and compassionate (H&C) considerations which was considered by CIC in Vegreville, Alberta and referred back to Montreal on July 24, 2008 for decision which is still pending. Their H&C

application was filed on June 10, 2008 by Raed Mahko, an immigration consultant, who explained to CIC that a disbarred lawyer had previously been instructed by the principal applicant to file the H&C application on February 26, 2008 but had failed to carry out his mandate.

[10] The first of a series of interviews between the Officer and the principal applicant for the purpose of scheduling the applicants from Canada was held on April 29, 2008. At that meeting, she was informed of the negative PRRA decision. She requested that her daughters be allowed to complete their school terms; a request which was granted by the Officer. Their departure from Canada was scheduled for July 15, 2008 with a follow up interview to ensure appropriate travel documentation was complete scheduled for May 15, 2008.

[11] On May 12, 2008, the Officer was advised by the principal applicant's sister that Mrs. Mazakian had been hospitalized and a social worker would be present at the interview on May 15<sup>th</sup>, rescheduled for later in the day. That interview was held with the Officer's notes reflecting the fact the principal applicant was incapable of answering questions or understand what was going on. The Officer requested the social worker to provide her with medical certificates in order to enable her to seek advice from Ottawa.

[12] On July 2, 2008 in the morning, the Officer sent Dr. Waddell medical documents for his consideration in order to advise her in regards to the removal. Dr. Waddell responded promptly the same day to advise her in the following terms:

I reviewed the reports, various documents and notes appended to your fax of 2 July '08 (17 + 1 pages). In summary, Ms. Mazakian suffered an acute stress disorder with suicidal ideation as a result of a deportation order. She was hospitalized briefly

and treatment of acute depression was started in hospital. She was advised to take two months off work and out-patient follow-up was arranged.

Acute stress disorders and acute depression can be managed with medications. I would be willing to write the psychiatrist in charge to request help in determining how long the treatment of the acute illness is likely to be required. However, I would need a signed consent.

IATA suggests certain precautions in the removal of suicidal patients. I can make those available or summarize them for you if you decide to proceed with deportation.

Please contact me if further information is required.

[Emphasis mine.]

[13] That same day, the Officer convened the principal applicant to an interview on July 18, 2008 which was deferred to August 12, 2008 at the request of Mr. Mahko who informed her Mrs. Mazakian was to see her doctor, who had been on holidays, during the week of July 14, 2008 and that he would provide her with that medical evaluation which he did on July 31, 2008.

[14] The medical report provided by Mr. Mahko was written by Psychiatrist Randolph and is dated July 21, 2008. It states that Mrs. Mazakian had her initial evaluation on June 3, 2008 with follow up appointments on June 13, July 7 and July 18, 2008.

[15] This report indicates Mrs. Mazakian is suffering from Acute Stress Disorder and she is compliant with her treatment and medications. Dr. Randolph indicates: “Up until April 2008, the patient was a very well functioning working mother” but “since receiving the notice that she and her two daughters are being legally deported to Lebanon, she has been unable to function.” She is “anxious, suffering from insomnia, feelings of hopelessness, having nightmares as well as suicidal ideations.” She mentions that “suicide has been discussed and its effects on her daughters”.

[16] On August 8, 2008, the Officer forwarded to Dr. Waddell the principal applicant's consent enabling Dr. Waddell to discuss her case with her psychiatrist. On the fax cover sheet, the Officer said to Dr. Waddell "she is ready to be removed but before I do so, I would like your opinion if she is okay to travel or not. Anything you are able to tell me will help me."

[17] On August 12, 2008, the scheduled interview took place between the principal applicant and the Officer. Mrs. Mazakian brought a new medical report and a copy of a letter which indicated she had made an H&C application. She told the Officer her medical condition did not permit her to travel. The Officer told her she would be seeking an opinion from Dr. Waddell and would be contacted; she told her "Si notre médecin juge qu'elle est apte à voyager nous réserverons les billets au prochain rendez-vous."

[18] The record shows that there were communications between Dr. Waddell and the Director of Outpatient Psychiatry at St. Mary's Hospital, Dr. Rita Kuyumjian who on September 9, 2008 wrote to Dr. Waddell:

I do not believe Ms. Mazakian is at all fit to fly to Lebanon at this time. She remains a HIGH suicidal risk if she would be required to return to Lebanon. Access to medical services in Lebanon is very expensive and she would not have the means to afford it. We believe she needs her medications and psychiatric care in Canada.

...

However, she is not well enough to leave our care and too high a suicide risk to be deported from Canada for the time being. I do not have any contacts in psychiatric clinics in Lebanon and the main issue is she cannot afford any medical help there.

...

In summary, I do not think Ms. Mazakian should leave Canada based on her mental and psychological state. She remains an extremely high suicide risk. I believe she should be given the opportunity to remain in Canada where she and her family function well in society.

[Emphasis mine.]

[19] Dr. Kuyumjian also told Dr. Waddell that Mrs. Mazakian had “responded partially with the use of medications”.

[20] On September 9, 2008, Dr. Waddell faxed Dr. Kuyumjian the following message:

Thank you for your prompt reply to my fax, sent one week ago. Professional courtesy is greatly appreciated. I accept your opinion that she is not well enough to fly at the present time. However, I was pleased to learn that she has shown improvement with intensive treatment and hope this continues. In my opinion, she should comply with Canadian law and accept removal when she is well enough. Then, she could apply for permanent resident status with a medical examination. Her mental health problems would not preclude admission, if appropriately resolved. Prolonged delay of a valid removal order, (by threat of suicide), seems unhealthy. Thank you again for your patience in considering my opinion. Regards,

[Emphasis mine.]

[21] On September 16, 2008, Dr. Waddell sent the Officer the following message:

Nancy: I received a reply from Dr. Kuyumjian the same day I wrote. Briefly, she does not consider Ms. Mazakian well enough to fly at present. However, she has shown some improvement with treatment, I have written her again. Lisa is back to-morrow. I will ask her to send you copies of our correspondence. In my opinion, Lebanon provides excellent medical / psychiatric care. Regards, Walter

[22] After receiving this fax from Dr. Waddell, the Officer’s note to file indicates she made the following observation:

16 septembre 2008 : courriel de Dr. Waddell m'avisant que bien que le médecin de Mme Mazakian considère qu'elle n'est pas assez bien pour voyager, il indique que le Liban possède un excellent traitement médical/psychiatrique. Il indique également qu'il m'enverra la documentation. [My emphasis.]

[23] On September 30, 2008, the Officer convened the principal applicant to an interview for October 14, 2008, which she attended with Mr. Mahko.

[24] The Officer's note to file indicates that Mr. Mahko verbally asked the removal be deferred to enable Mrs. Mazakian to continue to have medical follow-ups in Canada and to enable Patile and Pardy to complete school. This request was rejected by the Officer. Her note to file with respect to the October 14, 2008 meeting reads:

14 octobre 2008 : Rencontre avec Madame Mazakian. Je l'avise qu'elle doit maintenant quitter le Canada. Elle me demande de laisser ses filles finir l'année scolaire. Je l'avise qu'elle devait quitter à la fin de l'année scolaire 2007-2008 et que je lui avais déjà accordé un sursis administratif à cet effet. Je refuse donc de prolonger le renvoi. Madame déclare qu'elle doit avoir un suivi médical. J'informe madame que selon l'opinion d'Ottawa, le Liban a un excellent système de santé. Elle répond que cela coûte cher. Je lui indique qu'elle doit quitter avec ses enfants maintenant. Je demande à madame si elle veut acheter ses billets d'avions. Elle déclare qu'elle n'en a pas les moyens. J'effectue donc une réservation pour le 31 octobre 2008. Convocation aéroport remise. Madame n'a pas de questions.

[Emphasis mine.]

[25] On October 16, 2008, the Officer received from Dr. Waddell's assistant Lisa Racine a fax which enclosed Dr. Kuyumjian's September 9<sup>th</sup> letter as well as Dr. Waddell's fax back to the psychiatrist the same day. The Officer's note to file on this point reads:

16 octobre: Fax reçu de Dr. Waddell indiquant qu'il estime qu'un prolongement au renvoi (par menace de suicide) ne serait guère bénéfique à madame Mazakian.



[26] On October 19, 2008, the principal applicant was seen at the emergency facilities Sacré Coeur Hospital and appears to have been admitted.

[27] On October 22, 2008, Mr. Mahko wrote to the Officer asking for an administrative stay on the following grounds:

... premièrement, le syndrome de stress-traumatique qui s'est manifesté à plusieurs reprises chez la demandeur principale, depuis l'annonce de son renvoi du Canada; deuxièmement, on ne saurait faire abstraction de l'intérêt supérieur des enfants dans cette affaire; troisièmement, et pour tout dire, il n'y aurait, qu'à travers la demande C.H. soumise par les demandeurs, que l'intérêt supérieur des enfants pourrait être connu et pleinement apprécié.

[28] He also argued the H&C application was not a late one given the failure of the principal applicant's representative not to carry out her instructions to file this application. The applicant's record indicates that amongst the enclosures sent to the Officer was a photocopy of the principal applicant's visit to Sacré Coeur Hospital on October 19, 2008 but Mr. Mahko's covering letter does not specifically draw this item to the Officer's attention.

[29] On October 23, 2008, the Officer refused the administrative stay in the following terms:

J'ai pris connaissance de la demande de reporter le renvoi en vertu de l'article 25(1) et après avoir évalué la situation, j'en suis arrivé à la conclusion qu'il s'agit d'un cas où les circonstances ne justifient pas que l'on reporte le renvoi. Le renvoi aura lieu le 31 octobre 2008 tel qu'entendu le 14 octobre 2008.

### Analysis

[30] The Supreme Court of Canada in *RJR-MacDonald Inc. v. the Attorney General of Canada*, [1994] 1 S.C.R. 311 specified and explained the three part conjunctive test for the grant of

interlocutory relief: (1) serious question to be tried; (2) irreparable harm suffered by the applicant; and (3) balance of inconvenience.

(1) Serious question to be tried

[31] In *RJR-MacDonald*, above, Justices Sopinka and Cory, on behalf of the Supreme Court, expressed the view that a motions judge should determine this question on an “extremely limited review of the case on the merits” ... and ... “Unless the case on the merits is frivolous or vexatious” the judge should go on to deal with irreparable harm and balance of convenience.

[32] In my view, the applicants satisfy the first state test of a serious question to be tried. I am satisfied the record disclosed in these reasons points to the serious possibility the Officer either fettered her discretion or misconstrued the evidence before her as to the psychological state of the principal applicant in terms of her ability to travel and whether she properly construed Dr. Waddell’s advice. In addition, the Officer did not deal with the applicant’s allegation that available medical care in Lebanon was costly and may not be available to the principal applicant on this account. It is also a fair issue whether the Officer gave sufficient consideration, in the limited context taught by the jurisprudence, as to the best interest of the daughters.

(2) Irreparable harm

[33] Irreparable harm is harm which cannot be compensated in damages. The demonstration of irreparable harm cannot be speculative. On the balance of probabilities, the principal applicant has made out a case of irreparable harm. Because of the weakness of her mental condition, her very life is at stake and, in that circumstance, so are the best interests of the children.

(3) Balance of convenience

[34] Having made out serious questions to be tried and irreparable harm, the balance of convenience favours the applicants (see *Natoo*, above, at paragraph 38).

[35] I touch on two points raised by counsel for the Ministers. She argued the effect of my decision was to grant the applicants a permanent injunction from their removal from Canada. I cannot accept this submission. The stay is principally grounded on the existing mental health of the principal applicant in terms of her incapacity to travel on the current state of the evidence before me and on the availability of medical facilities for her in Lebanon. The stay is granted pending the grant of leave and if leave is granted pending decision on judicial review.

[36] Counsel for the respondents' second point was that the applicants had not discharged their burden because the record shows here inability to travel was stale. I also reject that submission. The advice she received, through Lisa Racine's fax that day, from Dr. Waddell as late as October 16, 2008 was that Mrs. Mazakian was unable to travel. The Officer also had subsequent information of her admission to the emergency department at a hospital on October 19, 2008.

“François Lemieux”

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Judge

Ottawa, Ontario  
November 7, 2008

**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-4729-08

**STYLE OF CAUSE:** TAMAR BEDROS MAZAKIAN et al v.  
THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION et al

**PLACE OF  
TELECONFERENCE  
HEARING:** Ottawa and Montreal

**DATE OF  
TELECONFERENCE  
HEARING:** October 31, 2008

**REASONS FOR ORDER:** Lemieux J.

**DATED:** November 7, 2008

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