Federal Court  Cour fédérale

Date: 20090528

Docket: IMM-4161-08

Citation: 2009 FC 550

Ottawa, Ontario, this 28th day of May 2009

PRESENT: The Honourable Orville Frenette

BETWEEN:

Erius ALLIU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application to obtain leave to commence a judicial review application pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") of a decision by a Pre-Removal Risk Assessment ("PRRA") officer, rendered on September 4, 2008,

whereby she determined that the applicant did not meet the criteria to be granted permanent residence on humanitarian and compassionate ("H&C") grounds.

[2] The undersigned granted a stay of execution of a deportation order of the applicant on November 12, 2008. In the circumstances, I believe it is necessary to write the reasons why I am refusing leave.

The Background Facts

[3] The applicant came to Canada in 2002, at age 18, seeking refugee protection alleging that as a member of the Democratic Party ("DP") in Albania, he was targeted.

[4] The Immigration and Refugee Board rejected his claim in 2003, based upon concerns about his credibility and because he had not established he had been an active member of the DP. An application for leave and judicial review of this decision was denied in December 2003.

[5] On April 19, 2004, the applicant submitted an application for permanent residence in Canada based upon H&C grounds. That application was dismissed on September 4, 2008. He was ordered deported to Albania on May 16, 2008 but an administrative deferral was granted for a period of three months.

[6] The applicant had filed for a PRRA in 2007; this application was dismissed on April 9, 2008. There was no application for judicial review of this decision.

The Stay Decision

[7] The undersigned granted a stay of the deportation order because the officer had not discussed or disposed of one of the two new issues raised *i.e.* the personalized risk faced by the applicant if returned to Albania concerning compulsory military service.

The Test for Leave Authorizing Judicial Review

[8] As enunciated in subsection 72(1) of the Act, judicial review commences when leave is granted. The only test to consider is whether the applicant raised a "fairly arguable case" on a serious question to be determined (*Bains v. Minister of Employment and Immigration* (1990), 47 Admin. L.R. 317, 109 N.R. 239, paragraph 1 (F.C.A.)).

[9] The applicant relies upon my findings at the stay application level to argue he has met the test for leave (*Alliu v. Minister of Citizenship and Immigration*, 2008 FC 1256).

[10] The respondent pleads that the tests on an application for a stay and for leave, are not identical. The test for a stay is whether the "serious issue" raised is "not frivolous or vexatious"; a test lower than the one at leave level *i.e.* "a fairly arguable case" (*Bains*, *supra*; *Brown v. Minister of Citizenship and Immigration*, 2006 FC 1250, paragraph 5; *Streanga v. Minister of Citizenship and Immigration*, 2007 FC 792, paragraphs 7 and 9).

[11] The applicant submits he has met the test for the leave application. The respondent argues that the applicant had not adduced any "supporting evidence of any type", to support the military

evidence issue. The respondent also pleads that this issue was dealt with in the PRRA decision from which there was no judicial review sought.

Analysis

[12] The facts and a perusal of the PRRA decision show that the main issue raised by the applicant *i.e.* the military evidence one had been dealt with. Furthermore, the applicant did not provide any evidence to support his claim on this issue. The record reveals that the applicant has exhausted all recourse avenues since 2002 in order to remain in Canada.

[13] His first H&C application was dismissed in 2008. A second H&C application can be pursued outside Canada. I must therefore conclude that the applicant has not satisfied the test of a serious question raised by a fairly arguable case.

Mootness

[14] Very recently in the case of *Baron v. Minister of Citizenship and Immigration*, 2009 FCA 81, the Federal Court of Appeal dismissed an appeal against a decision of Justice Eleanor Dawson who had refused leave after a stay order because the removal date having been past, the issue having become moot because there was no "live controversy" to be determined. In appeal, Justice Pierre Blais wrote:

> [87] H&C applications are not intended to obstruct a valid removal order. . . .
>
> [88] In the appellants' case, the H&C application is still pending. It is my view that this still does not prevent their removal. . . .

[15] The facts in that case bear resemblance to the ones in the present case. The *Baron* Court of Appeal decision was rendered on March 13, 2009 *i.e.* after my stay decision of November 12, 2008. The conclusion reached in *Baron* must be followed in the present case. See also *Chetaru v. Minister of Public Safety and Emergency Preparedness*, 2009 FC 436.

[16] The applicant had also asked this Court to "order that the respondent process the application for landing within Canada". I could avoid answering this question but I choose to do so. The respondent contests this demand submitting that the Court does not possess the power or jurisdiction to grant a H&C application without "due process". In my view, the Court possesses the power under subsection 18.1(3) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, to issue orders/directives it considers appropriate in the circumstances of the case. Furthermore, according to the jurisprudence, the Federal Court possesses an inherent power in order to assure the objectives and the goals of the legislation involved are attained (*Canada (Human Rights Commission) v. Canadian Liberty Net*, [1998] 1 S.C.R. 626; *Ali v. Canada (Minister of Employment and Immigration)*, [1994] 3 F.C. 73 (T.D.); *Lazareva v. Minister of Citizenship and Immigration*, 2004 FC 1372).

[17] However the factual basis in the present case does not justify the issuance of such an order in this matter.

[18] For all of these reasons the application for leave is denied.

ORDER

THIS COURT ORDERS THAT:

The application for leave and for judicial review of the decision of a Pre-Removal Risk Assessment officer, rendered on September 4, 2008, whereby she determined that the applicant did not meet the criteria to be granted permanent residence on humanitarian and compassionate grounds, is dismissed.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-4161-08
STYLE OF CAUSE:	Erius ALLIU v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

APPLICATION DEALT WITH IN WRITING

REASONS FOR ORDER AND ORDER:	The Honourable Orville Frenette, Deputy Judge
DATED:	May 28, 2009

Mr. Peter Shams	FOR THE APPLICANT
Mr. Evan Liosis	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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