Federal Court  Cour fédérale

Date: 20100611

Docket: IMM-2436-10

Citation: 2010 FC 620

Ottawa, Ontario, June 11, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

HARJINDER KAUR GOSAL

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] The Applicant's behavior is a serious obstacle for her obtaining the *equity* remedy that she is soliciting :

> [4] It is well established law that the issuing of a stay is an equitable remedy that will only be granted where the applicant appears before the court with clean hands. *See Khalil v. Canada(Secretary of State) [1999] 4 F.C. 661 para 20, Basu v. Canada [1992] 2 F.C. 38, Ksiezopolski v. M.C.I. & S.G.C. [2004] F.C.J. No. 1715*.
>
> [5] In this case the applicant has anything but clean hands. She has shown a constant and persistent disregard for Canadian family law, criminal law and

> immigration law. It would be encouraging illegality, serve a detrimental purpose and be contrary to public policy if the court were to grant her the relief sought.
> [6] Accordingly, given the circumstances of this case, the court is not prepared to exercise any equitable jurisdiction in respect of the applicant.

(*Brunton v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 33, 145 A.C.W.S. (3d) 685).

[2] The onus was on the Applicant to file a clear and satisfactory application. The Pre-Removal Risk Assessment (PRRA) officer cannot be faulted his understanding of the situation of the Applicant in the circumstances. As sated in *Yousef v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 864, 296 F.T.R. 182:

> [31] The Applicant's second argument concerns the duty of fairness and seeks to impose an obligation upon the PRRA officer to "clarify issues that were unclear prior to rendering her decision". This argument is based upon the PRRA officer's treatment of the letter from the translator. The Applicant says that this evidence was sufficiently troubling that it ought to have caused the PRRA officer to seek further explanations about what had taken place before the Board with regard to translated evidence.
>
> [32] The PRRA officer did consider this evidence and held that it was "not specific enough to resolve the numerous credibility concerns noted by the RPD panel". This willingness to consider the translator's letter was generous to the Applicant because clearly it did not constitute new evidence. The Applicant was aware of the translation issues which arose prior to and during the Board hearing but chose to do nothing about it at that time. The letter that was subsequently obtained from the translator says absolutely nothing about the significance of the points which were supposedly translated in error. For all that anyone could tell, these were minor points of interpretation which would have had no significance whatsoever to the outcome of the Board hearing. On the other hand, if the translation problems vaguely alluded to in the translator's letter were of great significance, presumably they would have been clearly identified in a supporting affidavit. The failure by the Applicant to provide any specifics on this issue allowed the PRRA officer to draw a perfectly reasonable inference that the referenced translation difficulties were insignificant or immaterial.

> [33] I also reject the argument that the PRRA officer was under a duty to search out additional clarifying evidence on the strength of this vague allusion to translation difficulties. The burden of proof with respect to the PRRA application rested throughout upon the Applicant, and no such duty to make inquires rested upon the officer. This point was conclusively addressed by Justice Blanchard in the *Selliah* decision, above, in the following passages … (Emphasis added).

Also, as stated in *Zhou v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 186, [2010] F.C.J. No. 213 (QL):

> [24] The PRRA Officer made no error in not considering this evidence or cannot be faulted for not discovering it. It was the applicant's onus to adduce that evidence (*Yousef v. Canada (MCI)*, 296 F.T.R. 182). The PRRA Officer has no obligation to gather and seek additional evidence or make further inquiries (*Selliah v. Canada (MCI)*, 2004 FC 872). (Emphasis added).

II. Judicial Procedure

[3] The Applicant seeks an Order from this Court staying her removal order from Canada which is to be executed on June 18, 2010.

[4] The underlying application is one for leave and judicial review of a Pre-Removal Risk Assessment (PRRA) decision, rendered on March 23, 2010, determining that the Applicant would not be subject to a risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if she had to return to her country of origin.

III. Background

[5] The Applicant, Ms. Harjinder Kaur Gosal, is a citizen of India. She landed in Canada on June 23, 2003, sponsored by her first husband, Mr. Alouette III Harjit Singh Gosal.

[6] On July 2, 2003, Ms. Kaur Gosal's first husband sent a letter to the Immigration authorities, saying that she had deceived him in marriage, that she used her permanent visa to come to Canada without any intention of living with him, and that she had arrived in Canada without informing him of her arrival.

[7] On March 30, 2005, Ms. Kaur Gosal and her first husband divorced.

[8] On May 21, 2005, Ms. Kaur Gosal married Mr. Sukh Singh Kang, who currently resides in India. On February 7, 2006, she gave birth to a child in Canada.

[9] On May 1, 2007, and on August 9, 2007, Ms. Kaur Gosal was interviewed by an immigration officer. During those interviews, she alleged that her first husband came to pick her up when she arrived in Toronto, and that they lived together for a period of three and a half months, after which he left her and returned to Vancouver.

[10] On November 7, 2007, an admissibility hearing was held before the Immigration Division. At the hearing, Ms. Kaur Gosal agreed to proceed by way of admission and admitted that she had made misrepresentations when she entered Canada.

[11] Therefore, pursuant to subsection 40(1)(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), an exclusion order was issued against Ms. Kaur Gosal by the Immigration Division.

[12] Ms. Kaur Gosal then filed an appeal before the Immigration Appeal Division (IAD), challenging the validity of the exclusion order and asking for special relief based on humanitarian and compassionate (H&C) grounds.

[13] On July 21, 2008, the IAD concluded that Ms. Kaur Gosal had misrepresented her relationship with her first husband and faked her marriage with the sole intention to acquire permanent resident status in Canada.

[14] On December 15, 2008, the Federal Court dismissed an application for leave and for judicial review of the IAD decision.

[15] On January 19, 2009, Ms. Kaur Gosal was informed that she might have to leave Canada but that she could file a PRRA prior to her departure if she wished to do so.

[16] On February 3, 2009, Ms. Kaur Gosal filed her PRRA, now alleging that she would be at risk in India because her first husband would seek revenge and have her killed after her arrival.

[17] On March 23, 2010, the PRRA officer dismissed the application, as he found that Ms. Kaur Gosal did not file sufficient and probative evidence that would demonstrate the risk she alleges facing in India.

[18] On April 19, 2010, Ms. Kaur Gosal was given the negative decision.

[19] Ms. Kaur Gosal filed an application for leave of the PRRA decision on May 3, 2010. That procedure underlies the present motion for a stay of the execution of the removal.

IV. Issue

[20] Has the tri-partite conjunctive test in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302, 11 A.C.W.S. (3d) 440 (F.C.A.) been met?

V. Analysis

[21] The Court agrees with the position of the Respondent.

[22] This Court could dismiss the present motion on the sole basis that Ms. Kaur Gosal does not come before it with clean hands.

[23] At the hearing before the Immigration Division, Ms. Kaur Gosal had admitted having contracted a marriage of convenience in order to obtain permanent resident status in Canada.

[24] In an interview with an immigration officer, she stated that her first husband welcomed her at her arrival at Pearson airport in Toronto and that they lived together a few months before he unexplainably left her. She also stated to the same officer that she did not know who Ms. Surjit Kaur Nijjar was.

[25] Both these allegations are false, as she never lived with her first husband and as it appears that Ms. Surjit Kaur Nijjar was in fact her own aunt, with whom she had been living.

[26] Due to misrepresentations, Ms. Kaur Gosal was issued an exclusion order from the Immigration Division.

[27] Moreover, when Ms. Kaur Gosal contested the Immigration Division decision before the IAD, she brought forward a narrative that was found to be fabricated. The IAD rendered a clear and unequivocal conclusion:

> Having heard the appellant's testimony about the allegations of misrepresentation, the tribunal did not find the appellant to be credible.
>
> The tribunal concludes that these omissions and the implausibility of her explanations, undermine the veracity of her second story and the tribunal concludes that the second story was fabricated in order to justify her misrepresentations.

[28] In support of her appeal to the IAD, Ms. Kaur Gosal said that she flew to Toronto because she did not want to live with her first husband. She stated that she found out just before the wedding that he was handicapped. Since the marriage was arranged by her parents, she would have felt that she had to go to Canada to live with him but decided, in Toronto, that she did not want to live with him.

[29] The Federal Court refused leave for Ms. Kaur Gosal to file an application for judicial review of the IAD decision.

[30] Ms. Kaur Gosal is again alleging parts of her story that were found to have been fabricated by the IAD.

[31] Indeed, in her Affidavit, she specified that she took a flight to Toronto because she did not find tickets to fly to Vancouver, where her first husband resides.

[32] The IAD did not find that allegation to be credible.

[33] She also repeats that when she left India, her intentions were to be with her first husband, and that she changed her mind only after a few days spent with her aunt in Toronto.

[34] Again, the IAD did not find these allegations to be credible. Moreover, she admitted that she had entered into a marriage of convenience in India with the intent of acquiring permanent resident status in Canada.

[35] Following these findings, Ms. Kaur Gosal is still attempting to adjust her testimony and declarations to obtain legal status in Canada.

[36] Even if Ms. Kaur Gosal had not been charged with any criminal accusations, she would not be able to benefit from her own misrepresentations and illegal scheme by which to seek status in Canada.

[37] Consequently, her motion could have been dismissed for that reason only.

The *Toth* test

[38] To be granted a stay of removal, an applicant must demonstrate that he/she meet all criteria of the tri-partite test established by the Federal Court of Appeal in *Toth*, above:

A. irreparable harm;

B. serious issue; and

C. balance of convenience.

[39] The requirements of the tri-partite test are conjunctive. Consequently, an applicant must satisfy **all three criteria** before this Court can grant a stay of removal.

[40] Ms. Kaur Gosal did not demonstrate a serious issue to be tried in the application for leave and for judicial review, which she filed, that she will suffer irreparable harm if she returned to India, and that the balance of convenience favours her instead of the Minister.

A. Irreparable Harm

[41] Irreparable harm is a serious test that is met only when an applicant has shown that his/her safety would be put at risk upon return to her country of origin:

> [26] This Court has held that irreparable harm is a strict test in which **serious likelihood or jeopardy to the applicant's life or safety** must be demonstrated. The unsubstantiated risk identified by the Applicants does not meet this threshold (*Frankowski v. Canada (Minister of Citizenship and Immigration)* (2000), 98 A.C.W.S. (3d) 641, [2000] F.C.J. No. 935 (QL) at para. 7).

(*Diallo v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 84, [2009] F.C.J. No. 126 (QL); *Kerrutt v. Canada (Minister of Employment and Immigration)* (1992), 53 F.T.R. 93; 32 A.C.W.S. (3d) 621; *Calderon v. Canada (Minister of Citizenship and Immigration)* (1995), 92 F.T.R. 107, 54 A.C.W.S. (3d) 316).

[42] Irreparable harm has to be demonstrated on the balance of probabilities. Also, the evidence supporting allegations of potential irreparable harm must be convincing:

> [43] Irreparable harm involves a high threshold. The Court must be satisfied that irreparable harm will occur if the stay is not granted (*Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, 132 A.C.W.S. (3d) 261 at paras. 12-20; *Stampp v. Canada (Minister of Citizenship and Immigration)* (1997), 127 F.T.R. 107, 69 A.C.W.S. (3d) 901 at paras. 15-16; *Atakora v. Canada (Minister of Employment and Immigration)* (1993), 68 F.T.R. 122, 42 A.C.W.S. (3d) 486 at paras. 11-12 (T.D.); *Legrand v. Canada (Minister of Citizenship and Immigration)* (1994), 27 Imm. L.R. (2d) 259, 52 A.C.W.S. (3d) 1301 at para. 5 (F.C.T.D.); *Akyol v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 931, 124 A.C.W.S. (3d) 1119 at para. 7). (Emphasis added).

(*Sittampalam v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 562; *Mazakian v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1248, 76 Imm.L.R. (3d) 151 at par. 33; *Ghavidel v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 397, 156 A.C.W.S. (3d) 1146 at par. 21).

[43] Ms. Kaur Gosal pleads in her submissions that she would face two separate or distinct risks if she returns to India.

[44] First, she states that her first husband would want to seek revenge and have her killed from his home in Burnaby.

[45] Second, she pleads the existence of a family dispute involving her second husband's uncle, who allegedly killed his father and would have threatened to kill her, her husband and her child.

[46] To support these serious allegations, Ms. Kaur Gosal has filed:

a. an undated affidavit from her second husband;

b. an undated affidavit from the chief village councillor (sarpanch) in her hometown;

c. an affidavit from her own mother;

d. a judgment rendered in 2004 concerning the killing of her second husband's father;

e. a few newspaper clips relating to honor killings in India.

[47] This evidence is far from being sufficient to show on a balance of probability that Ms. Kaur Gosal will be killed if she returns to India.

[48] First, two of the three affidavits originate with family members.

[49] Ms. Kaur Gosal's second husband is directly concerned by the removal of his wife, as she has admitted trying to sponsor him to Canada. If she returns to India, his sponsorship would inevitably fail.

[50] The probative value of the second husband's affidavit, which is unsigned, is very low.

[51] The third affidavit is written by a sarpanch who clearly has no personal knowledge of the facts to which he is attesting. He attests only that the husband's uncle (Amrajit Singh) "has been heard saying" that he would kill him and his family; therefore, low probative value is given to the affidavit.

[52] Even if the said sarpanch writes that Ms. Kaur Gosal's second husband risks to be harmed "any time", and while she herself writes in her affidavit that her husband lives in hiding, he apparently finds the possibility to play Kabbadi to which his uncle follows him relentlessly.

[53] It does not appear from the documents filed in support of Ms. Kaur Gosal's motion that her husband was, in fact, ever attacked by his uncle.

[54] As for the judgment that is filed supporting the motion, it was rendered in 2004 (her husband's father was allegedly killed in 2002), even before Ms. Kaur Gosal married her second husband. Ms. Kaur Gosal made no mention of the supposed threats in her appeal to the IAD, wherein she nonetheless discussed the many H&C factors she thought could support a relief from the exclusion order issued against her.

[55] Nowhere in the documents that she filed in support of her motion, did Ms. Kaur Gosal give indications as to when the said uncle was released nor as to when and in what circumstances he would have made the alleged threats.

[56] Ms. Kaur Gosal, also, never submitted to the IAD her reflection or statement in regard to a fear of an honor killing that could be ordered by her first husband if she was to return to India.

[57] Her risk of being killed in India is an H&C factor that could have been submitted to the IAD. Her silence, at the hearing, on the issues before the IAD, is troubling.

[58] Finally, the documentary evidence adduced by Ms. Kaur Gosal showing that honor killings are common in India is not, in and of itself, sufficient to prove that she would personally be subject to a risk of such as the subjection evidence does not point in that direction.

[59] Despite the fact that these are crimes, Ms. Kaur Gosal still had to demonstrate that her first husband is willing to seek revenge by killing her in India.

[60] Also, after divorcing her first husband, Ms. Kaur Gosal returned to India to remarry her second husband. It is highly suspicious that one who alleges a fear of honor killings in her country would return to remarry.

B. Serious Issue

[61] Ms. Kaur Gosal does not raise any serious issue with regard to the PRRA decision for which she is seeking a judicial review.

[62] From the underlying decision, it is evident that Ms. Kaur Gosal filed confusing submissions in support of her PRRA.

[63] Indeed, a careful reading of Ms. Kaur Gosal's submissions demonstrate that she fears her first husband who would do all he could to have her killed in India. It is not clear whether the death of her second husband's father had anything to do with her first marriage.

[64] Ms. Kaur Gosal has now filed a much clearer affidavit in which she explains in greater detail the two situations which placed her at risk in India. Nevertheless, the affidavit would have assisted the PRRA officer's comprehension of her file; however, it was not in his possession.

[65] The conclusion of the PRRA officer on the basis of the evidence that was filed before him and on the basis of his comprehension of it was entirely reasonable.

[66] On the other hand, even if the PRRA officer did not understand that the 2002 murder was not related to Ms. Kaur Gosal's first husband, most of his conclusions would stand even with knowledge of that information. The affidavits would still be self-serving and of low probative value. She still would have not told the IAD about the risks she now alleges facing.

[67] Also, the documentary evidence was not filed before the PRRA officer.

[68] It is clear from the documents that the evidence was insufficient to demonstrate that Ms. Kaur Gosal would face a risk in India. As specified above, three self-serving affidavits cannot in themselves demonstrate on a balance of probabilities that one faces death, especially where the affiants have direct interest in the outcome of the case or do not even have personal knowledge of the facts to which they are attesting.

[69] No need to hold an interview with Ms. Kaur Gosal, as the main problem with her Application was the fact that the evidence was **insufficient** to demonstrate the risk she alleges. Consequently, her credibility was not directly at stake.

[70] Even if the PRRA officer came to the conclusion that she genuinely feared to be killed by her first husband or by her second husband's uncle, the evidence that was filed to support these fears was lacking and did not prove the fears were well-founded (*Canada (Attorney General.) v. Ward*, [1993] 2 S.C.R. 689, 41 A.C.W.S. (3d) 393).

[71] For all these reasons, the underlying application does not raise a serious issue.

C. Balance of Convenience

[72] Finally, the balance of convenience favours the Minister.

[73] According to section 48 of the IRPA, the Minister does have a duty to execute an enforceable removal order "as soon as is reasonably practicable":

Enforceable removal order	Mesure de renvoi

48. (1) A removal order is enforceable if it has come into force and is not stayed.	**48.** (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
Effect	Conséquence
(2) 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) 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.

[74] Equally, it is trite law that the public interest must be taken into account; the Court decides whether the balance of convenience favours an applicant or the Minister.

[75] In this case, in light of all of the foregoing arguments, it is in the public interest that Ms. Kaur Gosal be removed as soon as possible (*RJR- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *Blum v. Canada (Minister of Citizenship and Immigration)*, (1994), 90 F.T.R. 54, 52 A.C.W.S. (3d) 1099). She admitted to a cosmetic marriage to enter Canada. She misrepresented the situation and her behaviour is not to be rewarded.

[76] Furthermore, the criteria as to a serious issue and that of the irreparable have not been met, the balance of convenience favours the Minister (*Rwiyamirira v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1171, 157 A.C.W.S. (3d) 597 at para. 27).

VI. Conclusion

[77] For all of the above reasons, the Applicant’s application for a stay of the execution of the removal is denied.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for a stay of execution of the removal be denied

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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