Federal Court Cour fédérale

Date: 20190316

Docket: IMM-1794-19

Citation: 2019 FC 325

Ottawa, Ontario, March 16, 2019

PRESENT: Mr. Justice Grammond

BETWEEN:

ILE BEROS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] Mr. Beros applies for the stay of his removal from Canada, scheduled for March 18, 2019. The respondent Minister asks the Court to decline to hear that motion, because it has been brought too late. For the following reasons, I agree with the Minister and I decline to hear this motion.

I. Motions for Stay of Removal and Delay: Principles

[2] Judicial review has a discretionary nature (*Strickland v Canada (Attorney General)*, 2015 SCC 37 at para 37, [2015] 2 SCR 713). That means that an applicant does not have a strict entitlement to a ruling on the merits. The Court has the discretionary power to refuse to hear an application, taking into account a range of factors that have been recognized by case law—for example, that the application was not brought in a timely manner.

[3] These principles apply equally in the context of motions for stay of an administrative decision. A motion for a stay is part of the judicial review process and shares its discretionary nature. This is true, in particular, of motions for stay of removal in immigration and refugee matters.

[4] This Court has frequently urged applicants to act as quickly as possible when they wish to challenge a direction to report for removal from Canada. In particular, applicants may request an administrative deferral of their removal and are encouraged to do so before bringing proceedings in this Court. They may also challenge an administrative decision that paved the way for their removal and ask this Court to stay that decision until this Court's judgment on the matter.

[5] Where an applicant does not act diligently in preparing a challenge to his or her removal, this Court has the discretion to decline to hear a motion for stay of removal that was not filed in a timely manner: *El Ouardi v Canada (Solicitor General)*, 2005 FCA 42.

[6] In my view, this discretion should be exercised with caution, for several reasons.

[7] First, in many cases motions for stay of removal involve a risk to the applicant's life or physical integrity. Those interests are protected by section 7 of the *Canadian Charter of Rights and Freedoms*. This Court's role has been described as a "safety valve" that guarantees that persons are not removed from Canada without due consideration for their Charter-protected interests: *Atawnah v Canada (Citizenship and Immigration)*, 2016 FCA 144 at para 23, [2017] 1 FCR 153. We are reluctant to expose someone to risks of that nature simply because the person did not act as quickly as we would have expected in challenging the removal.

[8] Second, we are mindful of the difficulties that persons subject to a removal order may encounter in obtaining legal representation. Applicants may have limited resources. Obtaining legal aid may require time. We should not dismiss a motion for stay of removal for reasons that are beyond the applicant's control.

[9] Third, the right to ask this Court to stay an administrative process is enshrined in legislation: see section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7. In certain circumstances, a stay is necessary to ensure the effective exercise of this Court's supervisory jurisdiction over federal tribunals.

[10] Thus, when a motion for stay of removal is not brought at the earliest opportunity, the motion should include an explanation for the delay and, if possible, evidence supporting that explanation.

[11] There will be cases in which those explanations will not be satisfactory. In those cases, there are important reasons to exercise our discretion to decline to hear the motion for stay of removal.

[12] The first reason is that although a risk to the life or security of the applicant may be at issue, the process remains a contradictory one and must be fair to the respondent Minister. Motions for stay of removal raise important and complex issues and deserve careful consideration. Where there is no valid reason to bring such a motion on the eve of the scheduled removal, it is not fair to ask the respondent to prepare a meaningful response in a very short period of time, in particular during weekends. The respondent may have difficulty assembling the relevant materials and preparing submissions that are tailored to the facts of the case. Moreover, it is not in the interests of justice to ask our Court to decide such motions in a hurried fashion.

[13] The second reason is that we should not apply the law in a manner that rewards the strategic delaying of filing a motion for stay of removal. If we allowed the filing of such motions at the last minute, applicants could file a record that omits certain facts, hoping that the respondent will be unable to find them quickly. They could try to create an atmosphere of urgency and an impression that the risk they face has not been thoroughly assessed. The interests of justice are better served by the timely filing of motions for stay of removal, allowing both parties to provide the Court will all relevant information.

[14] With this in mind, I turn to Mr. Beros’s motion.

II. Application to Mr. Beros's Case

[15] Mr. Beros was born a citizen of Yugoslavia. He became a permanent resident of Canada in 1989. He is married to a Canadian citizen and has three adult children. He never became a Canadian citizen.

[16] Since his arrival, Mr. Beros was convicted for a number of crimes. As a result, he became inadmissible to Canada, pursuant to section 36 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA]. Mr. Beros's motion record does not contain any information regarding the proceedings that led to his inadmissibility. The usual process is that a report is prepared pursuant to section 44 of IRPA and a hearing is held before the Immigration and Refugee Board.

[17] Mr. Beros sought a pre-removal risk assessment [PRRA]. On July 21, 2017, his PRRA application was refused. His application is not in the record before me. The reasons of the PRRA officer, however, suggest that Mr. Beros submitted more or less the same facts that he now alleges in support of his assertion of irreparable harm in this motion. The PRRA officer noted that Mr. Beros did not file any documentation in support of his assertions. The officer thus found that Mr. Beros's story was not corroborated and gave it no weight.

[18] While Mr. Beros did not mention this in his motion materials, it appears from the records of this Court that he brought an application for leave and judicial review of the negative PRRA decision, which was dismissed on January 4, 2018. Mr. Beros then applied for reconsideration of that decision. That further application was denied on May 14, 2018.

[19] On February 18, 2019, Mr. Beros was given a direction to report to Pearson Airport for his removal to Croatia on Monday, March 18, 2019.

[20] Almost a month later, and three days before the scheduled removal, on Friday, March 15, 2019, at around 3:00 pm, Mr. Beros's lawyer informed the registry office of this Court that he intended to file a motion for stay of removal. The motion and its supporting materials were filed on Saturday, March 16, at around 3:30 pm. The motion materials include a request to CBSA for an administrative deferral of the removal, made earlier on Saturday, March 16. They also include a request for a new PRRA, made on March 15.

[21] Upon receiving that motion, counsel for the respondent asked this Court to decline to hear it, because it had been brought too late. Counsel states that if the motion is heard, presumably tomorrow, Sunday, March 17, they will be unable to file a motion record. I agree with the respondent, for three reasons.

[22] First, Mr. Beros's motion materials do not provide a satisfactory explanation as to why it was not brought earlier.

[23] Mr. Beros's materials and submissions refer to his "medical issues" or "medical conditions." There is, however, little explanation of what those issues are and why they prevented Mr. Beros from bringing this motion in a timely fashion. There is a letter dated March 4, 2019 from Dr. Fareeha Khan, who has been treating Mr. Beros since 2015 and states that Mr. Beros has a number of conditions including back, shoulder, leg and neck pain, hypertension and

dyslipidemia. While Mr. Beros asserts, in his affidavit, that he has "not always been of sound mind and strength to attend to [his] immigration matters," there is nothing in Dr. Khan's letter that justifies Mr. Beros's late filing of this motion for stay of removal. Dr. Khan also states that Mr. Beros is working full-time, which hardly supports Mr. Beros's assertion that his medical condition prevented him from asserting his rights.

[24] Neither does Mr. Beros provide any explanation of his inability to retain a lawyer as soon as he was given a direction to report for removal on February 18, 2019. If there was any such difficulty, for example a delay in obtaining legal aid, it should have been mentioned in Mr. Beros's affidavit.

[25] Second, there are indications that Mr. Beros attempted to act strategically in bringing this motion at the very last minute. Mr. Beros's new PRRA application dated March 15, 2019, includes letters of support written by his neighbours on March 7 or March 12, 2019, as well as a letter from a religious institution, written on March 4, 2019, confirming his marriage. As I noted above, Dr. Khan's letter was written on March 4. This shows that Mr. Beros has been actively preparing his challenge for over ten days. As I mentioned in *Kanumbi v Canada (Immigration, Citizenship and Refugees)*, 2018 FC 336 at para 8, applicants should give notice to the opposing party and to this Court's registry as soon as they contemplate bringing a motion for stay of removal. Mr. Beros did not do this.

[26] Third, Mr. Beros also mentioned, in his affidavit, that, possibly due to his medical condition, he does not remember making a PRRA application in 2017. He suggests that his new

application is supported by the documents that were missing in 2017. However, a closer review of the new PRRA application shows that, with respect to Mr. Beros's allegations of risk upon returning to Croatia, it remains based solely on Mr. Beros's statement and, as far as we can tell from the 2017 PRRA decision, it is based on substantially the same story. In this respect, as I mentioned above, a review of this Court's records shows that Mr. Beros applied for judicial review of his negative 2017 PRRA decision and represented himself in this process. This is hard to reconcile with Mr. Beros's statement that he does not remember anything about this. Moreover, while I cannot know Mr. Beros's intentions, I can say that had someone wanted to mislead this Court, one would not have proceeded differently.

[27] Whether or not this is intentional, this shows the dangers of hearing motions for stay of removal filed at the very last minute. The problems I have identified might well have gone unnoticed. Had this been the case, this would have created an impression that Mr. Beros did not have a genuine opportunity to have his risk assessed. During a weekend, counsel for the respondent may not have been able to locate the evidence to rebut Mr. Beros's allegations.

[28] Simply put, hearing this motion in the present circumstances would be an unfair process.

[29] Accordingly, I decline to hear Mr. Beros's motion.

ORDER in IMM-1794-19

THIS COURT declines to hear the applicant's motion for stay of removal.

"Sébastien Grammond"
Judge