Date: 20070201

Docket: IMM-244-07

Citation: 2007 FC 110

Montréal, Quebec, February 1, 2007

Present: The Honourable Mr. Justice Shore

BETWEEN:

MUHAMMAD ZAKIR SHAIKH

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] In light of the following, the applicant has failed to raise a serious question in support of his motion. The motion for a stay of removal order could be dismissed on that ground alone.

[2] [17] It is trite law that this new evidence, not before the decision-maker, is inadmissible before the Court on a stay application and on the judicial review from the PRAA officer's determination.

(*Pandher v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 80, [2006] F.C.J. No. 101, (QL))

LEGAL PROCEEDING

[3] This is a motion for a stay of the removal order issued against the applicant. This motion is combined with an application for leave and for judicial review (ALJR) of the decision refusing to exempt the applicant from the requirement to obtain his permanent resident visa from outside Canada based on humanitarian and compassionate grounds. This decision was made on May 30, 2006, by the pre-removal risk assessment officer (PRRA) (Exhibit A to the affidavit of Mahsa Moshir).

PRELIMINARY REMARKS

Amendment to the style of cause

[4] Because the *Department of Public Safety and Emergency Preparedness Act*, (S.C. 2005, c. 10) has come into force, the Minister of Public Safety and Emergency Preparedness should have been named as a respondent in addition to the Minister of Citizenship and Immigration, in accordance with the Order-in-Council issued April 4, 2005 (P.C. 2005-0482).

[5] The style of cause is amended to add the Minister of Public Safety and Emergency Preparedness as a respondent in addition to the Minister of Citizenship and Immigration.

FACTS

[6] The applicant, a citizen of India, arrived in Canada and claimed refugee status on January 27, 2003 (“Case Summary”, H&C Application – Notes to file, exhibit B to the affidavit of Mahsa Moshir (officer’s notes)).

[7] The refugee claim was refused by the Refugee Protection Division of the Immigration and Refugee Board (RPD) on May 10, 2004 (Exhibit P-1 to the affidavit of the applicant, applicant’s record).

[8] The RPD did not believe the applicant’s allegations and found no credible basis to his claim:

> . . . pursuant to s. 107 (2) of the *Act*, the tribunal determines that **there is no credible basis to the claim in that there is no credible or trustworthy evidence on which the tribunal could have determined that the claimant is a Convention refugee or a person in need of protection**. (My emphasis.)

(Page 8 of the RPD’s reasons for decision, exhibit P-1 to the applicant’s affidavit, applicant’s record)

[9] On August 5, 2004, the Federal Court dismissed the application for leave and for judicial review of the RPD decision (“Case Summary”, officer’s notes, exhibit B to the affidavit of Mahsa Moshir).

[10] On March 28, 2005, the applicant applied for an exemption from the requirement to apply for permanent residence from abroad based on humanitarian and compassionate grounds.

[11] On May 30, 2006, the officer refused the applicant's application based on humanitarian and compassionate grounds (Letter from officer and H&C Application – Notes to file, exhibit P-1 to the applicant's affidavit, applicant's record).

[12] The applicant received the officer's reasons on June 6, 2006 (ALJR, exhibit A to the affidavit of Mahsa Moshir).

[13] On January 17, 2007, the applicant filed an application for leave and judicial review of the decision regarding the application based on humanitarian and compassionate grounds, and a motion for an extension of time.

ANALYSIS

[14] In order to assess the merits of the stay motion, this Court must determine whether the applicant meets the criteria set out by the Federal Court of Appeal in *Toth v. Canada (Minister of Citizenship and Immigration)*, 86 N.R. 302 (F.C.A.), [1988] F.C.J. No. 587 (QL).

[15] In that case, the Federal Court of Appeal adopted three criteria imported from the case law on injunctions, more specifically the decision by the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110. These three criteria are:

A - a serious question to be tried;

B - irreparable harm; and

C - the balance of convenience.

[16] All three criteria must be met for this Court to grant a stay. If one of them is not met, this Court cannot grant a stay.

[17] In this case, the applicant has not demonstrated that there is a serious question to be tried on his application for leave to review the officer's decision concerning the application based on humanitarian and compassionate grounds, or that he will suffer irreparable harm. Finally, the applicant's interests are not superior to the public interest in wanting the removal order to be enforced as soon as is reasonably practicable under subsection 48(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act).

A – SERIOUS QUESTION

[18] The applicant has not established that there is a serious question to be tried by this Court.

[19] The applicant must show that he has a reasonable chance of succeeding in his main action, i.e. his application for judicial review of the officer's decision.

[20] The applicant received a copy of the officer's decision on June 6, 2006. It was not until seven months later, on January 17, 2007, that the applicant served and filed his ALJR.

[21] Paragraph 72(2)(*b*) of the Act provides that an application for leave and judicial review must be filed within 15 days of the decision where the matter arises in Canada.

[22] The applicant explains in his motion for an extension of time that he [TRANSLATION] "did not think it was useful to ask for judicial review since he was supposed to obtain permanent residence as an American." In addition, he explains that he is [TRANSLATION] "unable to do so because he has not obtained his passport from India, and his American permanent residency cannot proceed for that reason." (ALJR, exhibit A to the affidavit of Mahsa Moshir)

[23] The applicant's request for an extension of time does not meet the criteria established by the Court for granting such special relief.

[24] The case law has established that the party requesting an extension of time must provide a reasonable explanation for the entire period in which he or she is in default and must prove that he or she has an arguable case (*Grewal v. Canada (Minister of Employment and Immigration)*, [1985] 2 F.C. 263, [1985] F.C.J. No. 144 (QL); *Beilin v. Canada (Minister of Employment and Immigration)*, (1994) 88 F.T.R. 132, [1994] F.C.J. No. 1863, paragraph 6 (T.D.) (QL); *Lewis v. Canada (Minister of Employment and Immigration)*, 2001 FCT 676, [2001] F.C.J. No. 1004 (T.D.)(QL), paragraph 6 (Prothonotary John Hargrave); *Nwammadu v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 107, [2005] F.C.J. No. 134 (QL), paragraph 9).

[25] Furthermore, the applicant must also demonstrate that he or she had a continuing intention to challenge, in the legal sense, the decision in issue (*Canada (Attorney General) v. Hennelly*, [1999] F.C.J. No. 846, (C.A.) (QL), paragraph 3; *Semenduev v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 70 (T.D.) (QL), paragraph 2; *Butt v. Canada (Solicitor General)*,

2004 FC 1032, [2004] F.C.J. No. 1255 (QL), paragraph 4; *Tihomirovs v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 197, [2006] F.C.J. No. 235 (QL), paragraph 111; *Nwammadu*, above, note 11, paragraphs 9-10).

[26] The time limits for applications for leave must be complied with and are more than mere technicalities (*R. v. Roberge*, 2005 SCC 48, [2005] S.C.J. No. 49 (QL), paragraph 6; *Beilin*, above, note 11; *Lewis*, note 11; *Nwammadu*, above, note 11).

[27] Mr. Justice Louis Marceau's remarks in *Grewal* are relevant here:

> The imposition of time limits to dispute the validity of a legal decision is of course meant to give effect to a **basic idea of our legal thinking that, in the interest of society as a whole, litigation must come to an end (interest reipublicae ut sit finis litium)**, and the general principles adopted by the courts in dealing with applications to extend those limits were developed with that in mind.
> (My emphasis.)

(*Grewal*, above, note 11 (concurring reasons of Marceau J.))

[28] To satisfy this Court that there is a serious question to be tried on this motion for a stay of execution of a removal order, the applicant has to demonstrate that his motion for an extension of time has a chance to succeed (*Semenduev*, above, note 12 ; *Butt*, above, note 12).

> [2] As an extension of time is a condition precedent to the consideration of his leave application, the Applicant must, in order to satisfy me that it raises a serious issue, also establish that his application for an extension of time raises a serious issue. To do so, the Applicant must put before me evidence from which I could conclude that there are grounds upon which this Court could extend the time. In this respect, the case law requires amongst other things that the Applicant establish that he had, throughout the period with respect to which the extension is being sought the intention to challenge, in the legal sense, the decision in issue, but that he was prevented from doing so by reason of factors which were beyond his control.

(*Semenduev*, above, note 12)

[29] The applicant's explanation clearly shows that, until recently, he had no intention of challenging the officer's decision by way of judicial review:

> . . . The applicant did not think it was useful to ask for judicial review since he was supposed to obtain permanent residence as an American. However, the applicant is unable do so because he has not obtained his passport from India, and his permanent American residency cannot proceed for that reason. . . .

(Motion for extension of time, ALJR, exhibit A to the affidavit of Mahsa Moshir)

[30] The applicant has not established that there are special reasons for a judge of this Court to allow an extended time for filing (paragraph 72(2)(*c*) of the IRPA) and, accordingly, he has not shown that there is a serious question to be tried on his ALJR.

[31] In his written submissions in support of his stay motion under the heading [TRANSLATION] "Serious Question," the applicant states that the officer's evaluation of disproportionate or unusual hardship did not take into account the fact that the applicant could not claim to be a citizen of any country (Paragraph 7 of written submissions, applicant's record).

[32] The officer states in his affidavit that the applicant did not mention or submit evidence that he was experiencing difficulties in obtaining his Indian passport or that he could not claim to be a citizen of any country.

[33] The applicant adduced no evidence that he had relied on this ground before the officer to demonstrate disproportionate or unusual hardship, and his affidavit is silent on this issue.

[34] The applicant also argues that the officer should have considered the application for permanent residence, sponsored by his wife, that was pending in the United States at that time (Paragraph 7 of written submissions, applicant's record).

[35] The officer states in his affidavit that the applicant presented no evidence regarding his contacts with his wife in the United States and did not mention that his application for permanent residence, sponsored by his wife, was pending in the United States at that time.

[36] The exchange of e-mail that the applicant submitted to support his motion is dated October 2006, long after the decision was made on the application based on humanitarian and compassionate grounds (Exhibit P-4 of the affidavit of the applicant, applicant's record).

[37] Moreover, this exchange does not indicate in any way that the Indian authorities refused to issue a passport to the applicant.

[38] Similarly, the evidence adduced on this motion regarding a visa application in the United States mentions only cryptically the types of visa in question, under the heading "Visa Symbol", i.e. IR1 and K3 (Exhibit P-3 to the affidavit of the applicant, applicant's record).

[39] Since this information was not in evidence before the officer, the applicant cannot now rely on it at the level of the judicial review and stay motion.

> [17] It is trite law that this new evidence, not before the decision-maker, is inadmissible before the Court on a stay application and on the judicial review from the PRAA officer's determination.

(*Pandher*, above)

[40] Considering all the foregoing, the applicant has therefore failed to raise a serious question in support of his motion. The motion for a stay of removal order could be dismissed on this ground alone.

B – IRREPARABLE HARM

[41] The concept of irreparable harm was defined by the Court in *Kerrutt v. Canada (Minister of Employment and Immigration)*, (1992) 53 F.T.R. 93, [1992] F.C.J. No. 237, paragraph 15 (QL) (T.D.) as returning a person to a country where his or her safety or life are in jeopardy.

[42] In *Calderon v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 393, paragraph 22 (QL), Madam Justice Simpson wrote the following regarding the definition of irreparable harm set out in *Kerrutt*:

> [22] In *Kerrutt v. M.E.I.* (1992), 53 F.T.R. 93 (F.C.T.D.) Mr. Justice MacKay concluded that, for the purposes of a stay application, **irreparable harm implies the serious likelihood of jeopardy to an applicant's life or safety. This is a very strict test** and I accept its premise that **irreparable harm must be very grave and more than the unfortunate hardship** associated with the breakup or relocation of a family. (My emphasis.)

[43] The applicant's affidavit merely states that he would suffer irreparable harm if he had to return to his country of origin. Moreover, his written submissions mention only that his life would be at risk if he were returned to India.

[44] As stated in the certificate of departure, the applicant will be returned to the United States, pursuant to paragraph 241(1)(*a*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (the Regulations) and the *Canada-U.S. Safe Third Country Agreement*.

[45] Since both the applicant's affidavit and his written submissions are silent as to the irreparable harm he would suffer if he were removed to the United States, there is no evidence before this Court on this point.

[46] It is superfluous that the respondent submits that the applicant has provided no satisfactory evidence of irreparable harm should he return to India.

[47] In support of his application based on humanitarian and compassionate grounds, the applicant repeated the same allegations that were before the RPD (various documents in support of the application based on humanitarian and compassionate grounds, exhibit C to the affidavit of Mahsa Moshir).

[48] With respect to the application based on humanitarian and compassionate grounds, the officer noted in his risk assessment that the RPD had found the applicant's allegations not credible.

[49] The officer also noted that the applicant had adduced no evidence that he would personally be at risk if he were to possibly return to India. The documentary evidence had no connection to the applicant or his situation, and the applicant did not provide the officer with any explanation connecting him to this documentation (Exhibit A to the affidavit of officer Olivier Perreault; page 3 of the officer's notes, exhibit B to the affidavit of Mahsa Moshir).

[50] In his written submissions concerning the serious question, the applicant does not dispute the officer's risk assessment. Therefore, it has not been shown that the officer erred in his analysis or in his finding that the applicant failed to prove he would personally be at risk should he return to India (Paragraph 7 of written submissions, applicant's record; page 3 of officer's notes, exhibit B to the affidavit of Mahsa Moshir).

[51] Accordingly, in the absence of a serious question to be tried by this Court, the applicant has not established irreparable harm.

C - BALANCE OF CONVENIENCE

[52] In addition to demonstrating that the underlying application for judicial review raises a serious question to be tried and that he or she would suffer irreparable harm if the removal order is not stayed, the person requesting a stay must establish that, having regard to all the circumstances, the balance of convenience favours granting the stay (*Manitoba*, above; *R.J.R. – MacDonald Inv. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *Toth*, above).

[53] In order to determine the balance of convenience, the Court must decide which of the two parties will suffer the greater harm from the granting or refusal of a stay (*Manitoba*, above).

[54] In the absence of a serious question and irreparable harm, the balance of convenience favours the Minister, who has an interest in having a removal order enforced on the scheduled date (*Mobley v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 65, paragraph 2 (QL)).

[55] In fact, subsection 48(2) of the Act provides that a removal order must be enforced 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..

[56] In *Membreno-Garcia*, Madam Justice Barbara Reed discussed the balance of convenience issue on stay motions and the public interest that must be considered:

> [18] What is in issue, however, when considering balance of convenience, is the extent to which the granting of stays might become a practice which thwarts the efficient operation of the immigration legislation. It is well known that the present procedures were put in place because a practice had grown up in which many many cases, totally devoid of merit, were initiated in the court, indeed were clogging the court, for the sole purpose of buying the appellants further time in Canada. There is a public interest in having a system which operates in an efficient, expeditious and fair manner and which, to the greatest extent possible, does not lend itself to abusive practices. This is the public interest which in my view must be weighed against the potential harm to the applicant if a stay is not granted.

(*Membreno-Garcia v. Canada (Minister of Employment and Immigration)*, [1992] 3 F.C. 306 [1992] F.C.J. No. 535 (T.D.) (QL)).

[57] It is important to note that since the applicant was the subject of a no credible basis finding, he was unable to benefit from the statutory stay set out in section 231 of the Regulations.

231. (1) Subject to subsections (2) to (4), a removal order is stayed if the subject of the order has filed an application for leave for judicial review in accordance with subsection 72(1) of the Act with respect to a determination of the Refugee Protection Division to reject a claim for refugee protection, and the stay is effective until the earliest of the following:	**231.** (1) Sous réserve des paragraphes (2) à (4), la demande d'autorisation de contrôle judiciaire faite conformément au paragraphe 72(1) de la Loi à l'égard d'une décision rendue par la Section de la protection des réfugiés rejetant la demande d'asile emporte sursis de la mesure de renvoi jusqu'au premier en date des événements suivants:
(*a*) the application for leave is refused,	*a*) la demande d'autorisation est rejetée;
…	[...]

(2) **Subsection (1) does not apply if the Refugee Protection Division states in its decision, in accordance with subsection 107(2) of the Act, that there is no credible basis for the claim**.	(2) **Le paragraphe (1) ne s'applique pas dans le cas où, dans sa décision, la Section de la protection des réfugiés fait état, conformément au paragraphe 107(2) de la Loi, de l'absence d'un minimum de fondement de la demande d'asile.**

(My emphasis.)

[58] The balance of convenience favours the Minister.

CONCLUSION

[59] For all these reasons, the applicant’s motion for a stay is dismissed.

JUDGMENT

THE COURT ORDERS that this motion for a stay be dismissed

"Michel M.J. Shore"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-244-07
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