Date: 20080526

Docket: IMM-4023-07

Citation: 2008 FC 663

BETWEEN:

ELDER BENJAMIN SOLIS PEREZ

Applicant

and

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

Respondents

REASONS FOR ORDER

MARTINEAU J.

[1] This is an application for judicial review of a decision rendered by E. Thérriault, Pre-Removal Risk Assessment (PRRA) Officer, on July 19, 2007, which rejected the applicant's PRRA application on the grounds that he would not be subject to risk of persecution, torture, risk to life or risk of cruel and unusual treatment or punishment if returned to his country of nationality or habitual residence.

[2] The applicant, Elder Benjamin Solis Perez, is a citizen of Mexico.

[3] On January 11, 2006, the applicant arrived in Montreal. A few weeks later he applied for refugee protection stating that as a homosexual man, he feared persecution in Mexico on the basis of his sexual orientation. He also stated that he feared his ex-boyfriend.

[4] In October 2006, the Immigration and Refugee Board (the IRB) rejected the applicant's asylum claim concluding that he was neither a Convention refugee nor a person in need of protection in accordance with sections 96 and 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as amended (the Act). The IRB was of the opinion that the applicant failed to rebut the presumption that state protection is available in Mexico.

[5] The applicant sought leave to judicially review the IRB's decision (Court file: IMM-6010-06). The application for leave was dismissed in March 2007.

[6] The applicant, self-represented at that time, subsequently made a PRRA application. He submitted personalized and documentary evidence concerning his risk of return.

[7] The PRRA officer rejected the applicant's PRRA application on July 19, 2007 (the impugned decision).

[8] The applicant applied to the Court for an order staying his removal which was to take effect on October 29, 2007. On October 25, 2007, Justice Blanchard dismissed the stay application:

> Assuming without deciding that there is a serious issue to be tried in this matter, I am of the view that the Applicant has failed to establish that he will suffer irreparable harm should he be removed to Mexico.
>
> The undisputed evidence establishes that HIV treatment and medication are available in Mexico. Notwithstanding the able submissions by counsel for the Applicant, the evidence fails to establish that the Applicant will be unable to access treatment or medication in Mexico. While the documentary evidence supports the submission that homosexuals and HIV positive homosexuals may be discriminated against in Mexico, this in itself is insufficient to establish that the Applicant will suffer irreparable harm.
>
> In the circumstances, the balance of convenience favours the Respondent.

[9] The applicant returned to Mexico and remains there today.

[10] In the meantime, leave was granted by the Court to judicially review the impugned decision. In the Order granting leave, the applicant was given until the middle of February to serve and file further affidavits. On February 12, 2008, the applicant filed the affidavit of Mr. David Thompson, a lawyer working as a coordinator of research and a volunteer at the Immunodeficiency Service of the Montreal Chest Institute (MCI). Approximately one month later, the applicant filed an additional memorandum of fact and law. The respondents did not file supplemental written representations.

[11] In seeking to judicially review the impugned decision, the applicant first submits that the PRRA officer erred by not admitting new evidence, in particular a letter from Mr. Henning Scharoff, member of the United Nations World Food Programme which states that people who are HIV positive (HIV+) or suffering from AIDS are subjected to serious discrimination. Second, the applicant alleges that the PRRA officer failed to consider the risks related to HIV and whether there

could be grounds for finding persecution based on an accumulation of the risks associated with having HIV and being gay. Finally, the applicant states the PRRA officer erred by concluding the situation in Mexico has improved to such an extent that homosexuals may live in safety in that country.

[12] The applicant seeks the following remedies of the Court: quash the decision of the PRRA officer dated July 19, 2007; order that a new decision be taken by another PRRA officer and that the applicant be returned to Canada during that redetermination; order that the costs of returning the applicant be borne by the respondents; order that the order quashing the decision apply *nunc pro tunc* (or retroactively) to one day prior to the applicant's removal; and take all other appropriate measures to safeguard the rights of the parties.

[13] This Court has addressed the question of mootness in the context of immigration and refugee matters on numerous occasions. As a preliminary matter, on its face, the judicial review of the impugned decision appears moot since the applicant is no longer in Canada. Indeed, the issue of mootness was raised by the respondent in the spring of this year. On April 3, 2008, the respondent Minister of Citizenship and Immigration filed a notice of motion to dismiss the applicant's application for judicial review. The respondent was of the view that the applicant chose to return voluntarily to his country of origin which rendered the matters raised in this judicial review "wholly academic." According to the respondent, it would therefore be appropriate for the Court to exercise its discretion to decline to hear the matter by summarily dismissing the application for judicial review.

[14] In the alternative, the respondent also argued that should this Court decide to hear the judicial review, it would be appropriate the strike the affidavit sworn by Mr. Thompson as it constitutes evidence that was not presented to the PRRA officer and is thus, not under review in the present matter. For clarity, according to his testimony, Mr. Thompson had provided the applicant with information concerning his request for permanent residence from within Canada. Once the applicant had left Canada for Mexico in October 2007, Mr. Thompson continued to communicate with the applicant *via* email and telephone. In essence, Mr. Thompson attests to the fact that the applicant "continues to experience strong rejection from immediate family members because of his homosexuality; […] has personally witnessed police harassment of businesses that cater to the gay community in Mexico City, as well as of patrons of those businesses; […] has related to [Mr. Thompson] his observations of a lack of efficient police enforcement of security within the neighbourhood where gay businesses are located as well as widespread fear of police among the gay population in the city". Further, according to Mr. Thompson, the applicant described to him that HIV infection remains extremely taboo even in communities where it is prevalent and that "some members of the gay community have informed [the applicant] that they do not wish to have HIV+ friends."

[15] The applicant conceded to the respondent's motion to strike the affidavit of Mr. Thompson "for the judicial review of the PRRA decision." However, the applicant stated that the original purpose in filing the affidavit was to "pre-emptively have on record evidence to persuade the Court to use its discretion to hear the matter, should it find the matter moot. This was based on the assumption that the Respondents would have raised the issue in their further memorandum of fact

and law." Indeed, had the respondents submitted further written representations where the issue of mootness was raised, the applicant stated he would have sought leave of the Court to have the affidavit considered in response to that issue. In terms of the merits of the motion to dismiss, the applicant was of the view that it was very late for the respondent to submit such a motion. In the applicant's written representations, applicant's counsel argued the applicant would be prejudiced in the following ways: "[t]he Applicant wishes to return to Canada or at the very least, to have his PRRA studied as soon as possible; […] the Respondents submit the motion for the very same time when the application for judicial review is to be heard; and, […] because the Applicant is in Mexico and communication with him can be erratic, […] the Applicant has not been able to submit further evidence to contradict the qualification of the Respondent that the Applicant has left [Canada] **voluntarily.**" [Emphasis in original]

[16] Having considered the representations of the parties and "considering that it is in the interest of this Court and of the parties that this matter be heard at a later date", Justice Pinard dismissed the respondent's motion to dismiss on April 10, 2008. Justice Pinard allowed the respondent to raise the issue of mootness in an additional memorandum of argument with supporting affidavits. Similarly, the applicant was to be afforded the opportunity to respond to the respondent's materials. The hearing of the judicial review was adjourned.

[17] By letter dated April 17, 2008, the respondent informed the Court : « nous n'entendons plus soulever la question du caractère théorique dans la cause citée en rubrique. Ainsi, nous ne soumettrons pas de mémoire supplémentaire […] ».

[18] Nevertheless, the issue of mootness is not one left to the good will of parties or their respective counsel. Instead, it is an issue of judicial policy and discretion that involves the inherent power of the Court to control its own process. In this regard, it can always be raised *proprio motu* (of the Court's own accord) by the applications judge charged with hearing an application.

[19] Accordingly, as presiding judge, I issued the following direction on May 20, 2008:

DIRECTION

> Counsel are directed to be ready to argue at the start of the hearing: 1) whether the present application has been rendered moot by the departure from Canada of the applicant; 2) whether this is a proper case for the Court's discretion to hear a moot application; and 3) whether this case is distinguishable from *Figurado v. Canada (Solicitor General)*, 2005 FC 347, [2005] F.C.J. No. 458 (QL); *Nalliah v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 759, [2005] F.C.J. No. 956 (QL); *Thamotharampillai v. Canada (Solicitor General)*, 2005 FC 756, [2005] F.C.J. No. 953 (QL); and *Sogi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 108, [2007] F.C.J. No. 158 (QL).

[20] I heard complete submissions from counsel on the issues raised in the direction. For the reasons that follow, I conclude that the matter is moot; that it is not a proper case for the Court's discretion to hear this application; and, that there are no convincing reasons in this case not to adopt the reasoning expressed by the Court in the cases mentioned above. As a result, I will not hear the merits of the application. This judicial review shall be dismissed on grounds of mootness.

[21] The leading case for analyzing whether or not an application for judicial review is moot is *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 (*Borowski*). The following excerpt

from the reasons of Justice Sopinka at page 353 is particularly helpful to clarify the doctrine of mootness:

> The doctrine of mootness is an aspect of a general policy or practice that a court may decline to decide a case which raises merely a hypothetical or abstract question. The general principle applies when the decision of the court will not have the effect of resolving some controversy which affects or may affect the rights of the parties. If the decision of the court will have no practical effect on such rights, the court will decline to decide the case. This essential ingredient must be present not only when the action or proceeding is commenced but at the time when the court is called upon to reach a decision. Accordingly if, subsequent to the initiation of the action or proceeding, events occur which affect the relationship of the parties so that no present live controversy exists which affects the rights of the parties, the case is said to be moot. The general policy or practice is enforced in moot cases unless the court exercises its discretion to depart from its policy or practice. The relevant factors relating to the exercise of the court's discretion are discussed hereinafter.
>
> The approach in recent cases involves a two-step analysis. First it is necessary to determine whether the required tangible and concrete dispute has disappeared and the issues have become academic. Second, if the response to the first question is affirmative, it is necessary to decide if the court should exercise its discretion to hear the case [...].

[22] In *Figurado v. Canada (Solicitor General)*, 2005 FC 347, [2005] F.C.J. No. 458 (QL) (*Figurado*), I considered whether or not a judicial review of a decision of a PRRA officer was moot. In *Figurado*, the applicant was a citizen who, like the applicant in this instance, had been denied a stay of removal pending determination of the application for judicial review and who, again like the applicant here, had been granted leave in respect of his application for judicial review.

[23] Paragraphs 8, 40 and 41 of *Figurado* are particularly relevant:

> The applicant seeks to have the PRRA decision set aside and asks that the matter be remitted for redetermination before a different

officer. However, in the meantime, on February 16, 2004, this Court dismissed the applicant's motion requesting a stay of the enforcement of the removal order until the present judicial review application could be heard and decided. The Motions Judge considered there was no serious issue raised. The applicant has since been removed from Canada. That said, on September 17, 2004, the Applications Judge granted leave for judicial review.
[…]

The PRRA process was implemented to allow individuals to apply for a review of the conditions surrounding the risk of return prior to their removal from Canada and not after their removal. Indeed, the PRRA emerged as a result of the jurisprudence of the Federal Court of Appeal and the Supreme Court of Canada, which required a timely risk assessment to comply with section 7 of the Charter (*Farhadi v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 646 (F.C.A.) (QL); *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3). It is clear that Parliament's primary intention in enacting the PRRA process was to comply with Canada's domestic and international commitments to the principle of non-refoulement, Regulatory Impact Analysis Statement to the IRPA Regulations, Canada Gazette, Part I, December 15, 2001, pp. 4550, 4552). Subsection 115(1) of the IRPA, found in Division 3 - Pre-removal risk assessment which comprises sections 112 to 116 of the IRPA, assures that a person shall not be removed from Canada to a country where they would be at risk of persecution for reasons of race, religion, nationality, membership in a particular social group or at risk of torture or cruel and unusual treatment or punishment. Naturally, this statutory right is subject to the exceptions mentioned at subsection 115(2) of the IRPA (however, for the purposes of the present case, it is not necessary to determine whether such exceptions contravene section 7 of the Charter). Accordingly, the PRRA is closely linked in time to removals and is carried out immediately prior to removal.

The fact that PRRA applicants receive a statutory stay of removal under section 232 of the IRPA Regulations is indicative of the legislative intent to have PRRAs completed before applicants are to be returned to face the risks they allege. The PRRA's fundamental purpose is to determine whether or not a person can safely be removed from Canada without being subject to persecution, torture or inhumane treatment. This purpose ceases to exist upon removal. Further, if the applicant returned and suffered

> persecution, torture or inhumane treatment, the redetermination of the PRRA may not have any practical effect. […]

[24] Moreover, while the circumstances that were before me in *Figurado* were similar to those on this application for judicial review, they differ in that a stay of removal in that matter was denied on the basis of no serious issue to be tried, whereas in the case at bar, irreparable harm was determined not to have been established. I note that in *Nalliah v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 759, [2005] F.C.J. No. 956 (QL) (*Nalliah*) and *Thamotharampillai v. Canada (Solicitor General)*, 2005 FC 756, [2005] F.C.J. No. 953 (QL) (*Thamotharampillai)*, the Court held that the removal of an applicant makes the judicial review of a decision rejecting an application for protection moot when the evidence does not disclose any irreparable harm (which is the case here, since Justice Blanchard dismissed the stay motion on this ground).

[25] Further, in *Sogi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 108, [2007] F.C.J. No. 158 (QL) (*Sogi*), a recent decision from this Court, my colleague Justice Noël states at para. 31 that: “the purpose of an application for protection, such as made by the applicant, is to assess the risks before removal, not after it”. According to Justice Noël, this is why section 232 of the Act provides that an applicant has the benefit of an automatic stay of the removal order while the decision on the PRRA application is pending. In doing so, Parliament intended that the PRRA should be determined before the PRRA applicant is removed from Canada, to avoid putting her or him at risk in her or his country of origin. To this extent, if a PRRA applicant is removed from Canada before a determination is made on the risks to which that person would be subject to in her or his country of origin, the intended objective of the PRRA system can no longer be met. Indeed,

this explains why section 112 of the Act specifies that a person applying for protection is a “person in Canada”.

[26] I am of the view that these precedents conclusively establish that in the case before me, the application for judicial review of the impugned decision is moot, as it fails notably to meet the “live controversy” test. Indeed, a positive decision at this stage will have no tangible, concrete or practical effect.

[27] I turn now to the second step in the mootness analysis, namely a determination of whether, irrespective of a finding of mootness, the Court should nevertheless exercise its discretion to hear the case.

[28] In *Borowski*, above at p.358-363, the Supreme Court of Canada outlined the following factors for a court to consider when deciding whether or not to exercise its discretion to hear a matter: first, whether an adversarial context still exists; secondly, the concern for judicial economy; and, thirdly, the need for the Court to demonstrate a measure of awareness of its proper law-making function. Moreover, in addition to these criteria, the Court may also consider any other relevant factor (*Sogi*, at para. 40).

[29] First, I am satisfied that an adversarial context still exists. The applicant is now ably represented by counsel. I have also taken into account the additional evidence the applicant wishes the Court to consider with respect to the issue of mootness (*i.e.*, the affidavit of Mr. Thomson dated

February 12, 2008). According to this evidence, the affiant suggests that the applicant continues to experience discrimination because he is both gay and HIV positive and that he "has consistently expressed a very strong desire to return to Montreal in order to be able to live freely, without threat and in safety and in peace as an HIV+ gay man."

[30] However, as mentioned by Justice Noël in *Sogi*, at paragraphs 42 and 43, "a moot issue must not unduly use up the resources of our judicial system […] It must be asked whether a judicial solution to the issue could have concrete consequences on the rights of the parties […]". In the case at bar, the Court is not entitled to determine whether the applicant is suffering persecution in Mexico because he is both gay and HIV positive. Neither can this Court make a determination on the availability of state protection in Mexico. The only practical advantage, if there is one, would be that the Court could order that the matter be re-determined by another PRRA officer. I doubt very much that the Court would have the power to order that the applicant be returned to Canada, at the costs of the Government of Canada, during that redetermination. Accordingly, it is only where there is a positive reassessment of the alleged persecution and risk that the applicant could then ask that authorization be granted to return to Canada (and apply for permanent residence). "But this hypothetical advantage results in adding a supplementary burden to the judicial system and scarce resources already greatly in demand in immigration matters" (*Figurado*, at para. 47).

[31] With respect to the third criteria, what I said in *Figurado* at paragraph 48, is informative:

> Finally, by ordering a PRRA officer to reconsider an application for protection after an applicant has been removed from Canada, I am not certain that in so doing, the Court would not be departing from its traditional role as the adjudicative branch in our political

> framework. In such a case, it could be said that a redetermination ordered by the Court amounts or comes very close to the establishment of a new category of persons in need of protection, persons removed from Canada who continue to claim outside Canada that they are at risk. I note that section 95 of the IRPA already defines and establishes the categories of "protected persons" to which refugee protection is conferred. In this regard, I note that under the IRPA Regulations, a foreign national who is outside Canada already has the right to apply for a permanent resident visa as a member of the Convention refugees abroad class, the country of asylum class and the source country class (paragraph 70(2)(c) of the IRPA Regulations). In these circumstances, it is not unreasonable to infer that refugee protection should be limited to persons outside Canada who fall under one of these categories.

[32] In *Nalliah*, at paragraph 22, Justice Gibson also writes:

> Section 232 of the Immigration and Refugee Protection Regulations provides for a stay of removal where a PRRA application is made, which continues, generally speaking, until the PRRA application is rejected if such be the case. Such was the case on the facts of this matter. It is noteworthy that the same Regulations do not provide for a continuation of the stay where an application for judicial review of a PRRA decision is made, whether or not leave is granted on that application. Thus, the Governor-in-Council, acting under authority granted by Parliament, saw fit not to extend the section 232 stay to circumstances such as those underlying this application for judicial review. In the result, it remained open to my colleague Justice Snider to deny a discretionary judicial stay and, when she did so, to the Respondent to remove the Applicant notwithstanding the Applicant's allegation of serious risk of irreparable harm.

[33] Thus, I find it very hard to accept, in law, that what was once a legal action of the government (the enforcement of the removal order) may become illegal afterwards simply by judicial dicta, especially since the Motions Judge (Justice Blanchard in this case) refused to grant a stay of execution. To be “illegal”, the Applications Judge must later declare that any order quashing the impugned decision made by the PRRA officer applies *nunc pro tunc* (or retroactively) to one

day prior to the applicant's removal. Again, I doubt very much that the Court has the power, from a legal point of view, to make such an order.

[34] I am also of the opinion that my hearing the judicial review in this instance, would, in essence, amount to an indirect review of the merits of Justice Blanchard's decision on the legality of the enforcement of the removal order. It bears reiterating that Justice Blanchard determined, based on the evidence before him, that the applicant had not established that he would suffer irreparable harm if returned to Mexico. Accordingly, even assuming a serious issue was raised, the balance of convenience favored the immediate execution of the removal order. It was open to my colleague Justice Blanchard to deny a discretionary judicial stay and, when he did so, it was equally open to the respondents to seek to remove the applicant.

[35] The situation before me thus, raises a concern for judicial economy and, as stated Justice Gibson in *Nalliah* and *Thamotharampillai,* above, may be "inappropriate as an encroachment on the proper law-making function of the Governor-in-Council."

[36] For these reasons, having determined the application for judicial review is moot, the Court also declines to exercise its discretion to hear this application for judicial review, notwithstanding its mootness. Accordingly, the present application must fail and shall be dismissed by the Court.

[37] At the close of the hearing of this application for judicial review, I advised counsel that I may choose to issue reasons and thereafter provide counsel with an opportunity to make

submissions on certification of a serious question of general importance. These reasons will be issued and circulated. Counsel will have thirty (30) days from the date that these reasons are issued and circulated to exchange and file submissions on certification of a question. Counsel should ensure that any such submissions are exchanged in a timely manner to allow for responsive submissions, if considered appropriate, within the time here provided.

"Luc Martineau"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4023-07
STYLE OF CAUSE:	ELDER BENJAMIN SOLIS PEREZ v. The Minister of Citizenship and Immigration and The Minister of Public Safety and Emergency Preparedness
PLACE OF HEARING:	**MONTREAL**
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APPEARANCES:

Me Peter Shams	FOR THE APPLICANT
	FOR THE RESPONDENTS
Me Zoe Richard	

SOLICITORS OF RECORD:

Saint-Pierre Grenier Avocats Inc. Montreal, Quebec	FOR THE APPLICANT
John H. Sims Deputy Attorney General of Canada Montreal, Quebec	FOR THE RESPONDENTS