Date: 20081112

Docket: IMM-4161-08

Citation: 2008 FC 1256

Ottawa, Ontario, November 12, 2008

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 a motion for an order staying the execution of a deportation order of the applicant scheduled to be executed on Thursday, November 13, 2008 at 12:45 p.m.

[2] The applicant is a citizen of Albania who came to Canada in September 2002, when he was 18 years old. He sought protection on two grounds, namely:

1. Fears a return on political grounds;
2. Fears the risk of being prosecuted as a military draft evader.

[3] The Immigration and Refugee Board rejected the applicant's claim of risk in Albania because of his lack of credibility and lack of evidence that he would be persecuted if returned because of his involvement with the Democratic Party.

[4] On April 19, 2004, the applicant submitted an application for residence in Canada based upon humanitarian and compassionate grounds ("H&C").

[5] This application was dismissed on September 4, 2008; he had been ordered deported to Albania on May 16, 2008 but an administrative deferral had been granted for three months.

[6] In 2007, the applicant filed a Pre-Removal Risk Assessment ("PRRA"), which application was rejected by decision dated April 9, 2008.

[7] The applicant did not ask for a review of the PRRA decision but presented an application of review against the H&C decision.

The H&C decision of September 4, 2008

[8] The officer discussed the applicant's concerns and fears of return to Albania resulting from his political activities, his involvement, his integration and his establishment in Canada. The applicant relied upon his employer's, Grizzly Concrete Cutting Inc., letter for the loss of his services.

[9] There was no discussion about the issue of military service evasion or its consequences. The officer mentioned the applicant's involvement with community services, his uncle's sponsorship and the fact he learned both official languages of Canada.

[10] The officer lists the information he consulted including, the Refugee Protection Division's decision and the applicant's PRRA application and negative decision rendered without a subsequent application for judicial review. He concluded that the applicant's circumstances, based on all information, did not justify an exemption based on sufficient H&C grounds.

[11] The officer did not address the applicant's personalized risk if returned to Albania. The applicant seeks a stay of removal until the disposition of the judicial review of the H&C decision, if leave is granted.

[12] The Federal Court of Appeal in *Toth v. Minister of Employment and Immigration* (1988), 86 N.R. 302, establishes the conditions justifying a stay, i.e.:

1. There is a serious issue to be tried;
2. Irreparable harm will be caused if the stay is not granted; and
3. The balance of convenience favours the applicant's request.

This test is conjunctive, i.e. all conditions must be met.

[13] The *Webster's New Dictionary and Thesaurus* (1990), at page 884, defines "serious" as "acute, alarming, central, crucial, dangerous, deep, … important, … severe, … significant, …

urgent, weighty …". It would seem that a stay of removal, being a last minute process to avoid removal, that the condition of "serious issue" would have been applied literally. However, the jurisprudence of the Federal Court has opted for a very low threshold for a finding of a "serious issue to be tried".

[14] The case law has decided that a court must simply assess whether the issues are, on their face, neither frivolous nor vexatious (see, for example, *Williams v. Minister of Citizenship and Immigration*, 2001 FCT 851, and *Oberlander v. Attorney General*, 2003 FCA 134, at paragraph 20).

[15] In *Sowkey v. Minister of Citizenship and Immigration*, 2004 FC 67, Justice Phelan stated at paragraph 17:

> None of these issues, in my view, are frivolous or vexatious. Whether they meet the test for leave need not be determined at this stage.

[16] The applicant now raises three issues:

1. The military service issue.
2. The general conditions in Albania of corruption and crime.
3. His degree of integration and establishment in Canada.

The military service issue

[17] The applicant submits the officer failed to consider the undue hardship caused by the risk of persecution and imprisonment, under harsh conditions, if found guilty of evading military service.

[18] The respondent points out that this argument is purely speculative because the documentation in evidence shows that military service in Albania can be easily avoided either by paying a sum of C$3,400.00 or by volunteering for various community services.

[19] It was also argued that the facts in this case differ greatly from the ones found in *Perez v. Minister of Citizenship and Immigration*, 2008 FC 663, and *Glass v. Minister of Citizenship and Immigration*, 2008 FC 881.

The general conditions in Albania of corruption and crime

[20] The applicant relies upon recent documentation to base his arguments on this ground.

[21] The respondent answers that no specific evidence was adduced to support the applicant's allegations on this issue. He adds that, in any case, the applicant would not be subject to greater hardship than the rest of the Albanian citizens.

The applicant's degree of integration and establishment in Canada

[22] The applicant pleads that the officer failed to consider his personal circumstances showing his integration and establishment in Canada.

[23] The evidence revealed his good employment record in Canada and in particular his services with Grizzly Concrete Cutting Inc. who consider his services as essential.

[24] It was also established that he has learned both official languages in Canada and has performed community services in Canada.

Analysis

[25] The applicant argues the officer did not discuss the personalized risks and hardship he would face in Albania based upon the issues discussed before; a failure which was considered an error in law by Chief Justice Lutfy in *Pinter v. Minister of Citizenship and Immigration*, 2005 FC 296, at paragraphs 2 and 5:

> . . . there is a difference between the assessment of risk factors in an application for humanitarian and compassionate consideration and one for protection from removal.
>
> [. . .]
>
> In my view, it was an error in law for the immigration officer to have concluded that she was not required to deal with risk factors in her assessment of the humanitarian and compassionate application. She should not have closed her mind to risk factors even though a valid negative pre-removal risk assessment may have been made. There may well be risk considerations which are relevant to an application for permanent residence from within Canada which fall well below the higher threshold of risk to life or cruel and unusual punishment.

[26] I consider that this reasoning applies on all fours in the present case, because the officer did not assess the risk factors in the H&C application. Therefore, at least issues 2 and 3 fall under this category and merit a hearing to assess their validity. The applicant has therefore satisfied this condition.

Irreparable harm

[27] The applicant submits be would suffer irreparable harm if returned to Albania: (a) arrest and imprisonment as an evader of military service; (b) the hardship of returning to a criminal and corrupt environment; and (c) he would suffer serious economic and personal losses even if his H&C application was granted while he was outside Canada.

[28] The respondent argues that these hardships are speculative and are no more severe than the ones suffered by every removal from Canada (*Melo v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 403 (T.D.), at paragraphs 20 and 21). Economic losses do not qualify as irreparable harm (*Sidi v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 663 (T.D.)).

[29] An analysis of all the evidence in this case shows that if removed, the applicant would suffer irreparable harm.

Balance of convenience

[30] Public considerations and security are considered in the interpretation of section 48 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, and require the prompt enforcement of removal orders (*Dugonitsch v. Canada (Minister of Citizenship and Immigration)*, [1992] F.C.J. No. 320 (T.D.)).

[31] However, the applicant has been in Canada for six years. He was regularly employed; he volunteered his services and seems to have integrated well into the Canadian society. For these reasons, the balance of convenience favours him. Therefore, the stay must be granted.

ORDER

The stay of removal of the applicant is hereby granted. The stay will remain in effect until the judicial disposition of the application for leave and, if granted, until such time as the application for judicial review is disposed of by the Court.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	Erius ALLIU v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA
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