Date: 20080923

Docket: IMM-3643-08

Citation: 2008 FC 1068

Ottawa, Ontario, September 23, 2008

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

IRIS LILIANA DOMENZAIN MALAGON

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] This Court has often held that allegations of risk which have been determined to be unfounded by the Board and the pre-removal risk assessment officer (PRRA), cannot be used to establish irreparable harm for the purposes of an application to stay (*Singh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 145, 137 A.C.W.S. (3d) 156). This principle in regard to credibility is adaptable in the context of the failure to reverse the presumption of state protection.

[2] In regard to upsetting the family and the separation that must be endured by Ms. Malagon's spouse, this is not irreparable harm, but rather a phenomena inherent to removal (*Malyy v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 388, 156 A.C.W.S. (3d) 1150 at paragraphs 17-18; *Sofela v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 245, 146 A.C.W.S. (3d) 306 at paragraphs 4 and 5; *Radji v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 100, 308 F.T.R. 175 at paragraph 39). To find otherwise would render impracticable the removal of individuals who do not have the right to reside in Canada. Further, as pointed out in *Golubyev v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 394, 156 A.C.W.S. (3d) 1147 at paragraph 12: irreparable harm is a strict test in which serious likelihood of jeopardy to the applicant's life or safety must be demonstrated.

[3] For these reasons, Ms. Malagon has not established irreparable harm. This ground alone justifies the dismissal of the application.

II. Judicial proceeding

[4] The applicant filed an application to stay her removal to Mexico, scheduled for September 25, 2008, at 6:00 a.m.

[5] The underlying proceeding is an application for leave and for judicial review (ALJR) challenging the PRRA dated June 5, 2008.

III. Facts

[6] The applicant, Iris Liliana Domenzain Malagon, 33 years old, is a citizen of Mexico.

[7] On October 8, 2005, Ms. Malagon arrived in Canada and applied for refugee protection on February 24, 2006.

[8] On May 14, 2007, the Immigration and Refugee Board (Board) dismissed her refugee claim on the ground that she had not reversed the presumption of state protection and that she had not established the absence of an internal flight alternative.

[9] On August 20, 2007, this Court dismissed the application for leave and for judicial review of this decision.

[10] Around October 10, 2007, the Canada Border Services Agency (Agency) sent Ms. Malagon a summons in view of her possible removal. The letter also informed her of her possible right to a PRRA application. Ms. Malagon reported to the Agency March 6, 2008, the delay presumably due to change of address.

[11] On March 15, 2008, Ms. Malagon married a Canadian citizen. On March 20, 2008, she filed a PRRA application. On April 3, 2008, she filed a permanent residence application in the Spouse or Common-law Partner in Canada class.

[12] On June 5, 2008, the PRRA application was dismissed. An ALJR of this decision was filed on August 15, 2008.

[13] On August 5, 2008, Ms. Malagon filed an application for an administrative stay, dismissed on August 6, 2008. On August 20 2008, Ms. Malagon filed an ALJR against this dismissal, without perfecting her application.

IV. Issues

[14] (1) Is the applicant's application to stay founded in regard to the requirements confirmed by the Federal Court of Appeal in *Toth v. Canada (Minister of Employment and Immigration)*, [1988] F.C.J. No. 587 (QL), 86 N.R. 302 (F.C.A.) ?

(2) Is the finding sought by the applicant valid?

V. Analysis

A. The *Toth* test

[15] The Court must determine whether the applicant satisfies the three requirements confirmed in *Toth*, *supra*:

(i) There is a serious issue to be tried in regard to the underlying issue;
(ii) There will be irreparable harm is the stay is not granted; and
(iii) The balance of convenience is in her favour.

[16] As the *Toth* test is conjunctive, the applicant's failure to establish just one of the above-mentioned three requirements must result in the dismissal of her application to stay (*Jaziri v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1086, [2007] F.C.J. No. 1417 (QL) at

paragraph 3; *Cruz v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 166, 146 A.C.W.S. (3d) 128 at paragraph 3).

(i) Serious issue

[17] Ms. Malagon had to establish the existence of a serious issue in regard to the underlying procedure, i.e. the PRRA. A review of this decision and Ms. Malagon's arguments does not establish the existence of any serious issue.

The officer should have arranged an interview

[18] At paragraphs 3 to 7 of her Memorandum, Ms. Malagon argues that the officer should have granted her an interview in order to fairly settle the credibility issue.

[19] This argument is unfounded, since the officer did not make any credibility finding.

[20] Some of the officer's findings relate to a lack of evidence and the weight of the evidence submitted, which is clearly different than credibility issues (*Abdellah v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 786, [2007] F.C.J. No. 1037(QL) at paragraphs 26, 27, 29, 31 and 32).

[21] Further, the central and decisive element was Ms. Malagon's failure to seek protection from her State and her failure to reverse the presumption of state protection.

[22] Under section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations), a hearing need only be held where there is evidence raising a serious issue of the applicant's credibility. This is but one of the three conjunctive requirements of this provision.

[23] As stated by this Court, a hearing in the context of a PRRA is exceptional (*Bhallu v. Canada (Solicitor General)*, 2004 FC 1324, 134 A.C.W.S. (3d) 471). A hearing is required only in the case where credibility is at the heart of the decision and where it would have a determinative effect on the decision (*Abdellah*, *supra* at paragraphs 29 and 30).

[24] Therefore, even if the officer had peripherally referred to credibility, which is not the case here, she still would not have had the obligation to summon Ms. Malagon to a meeting in person (*Kaba v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1113, [2006] F.C.J. No. 1420 (QL) at paragraphs 29 and 30.)

[25] At paragraphs 10 to 15 of her affidavit, Ms. Malagon claims that the officer had to grant her an interview in order to debate the evidence before making her determinations.

[26] This allegation is also unfounded, for the additional reasons that follow.

[27] The assessment of a PRRA application does not involve an exchange of points of view between the applicant and the officer (*Aoutlev v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 111, [2007] F.C.J. No. 183 (QL) at paragraph 39).

[28] The burden of establishing that a removal risk rests on the applicant at the time the application is filed:

> [22] . . . In the case before me the onus was on the applicants to make their case and adduce the necessary evidence to meet this onus. The evidence adduced was ambiguous and in some instances contradictory. There is no evidence to suggest that the Officer was wilfully blind in the circumstances and I find that she was acting in good faith. There was no obligation on the Officer to gather or seek additional evidence or make further inquiries. The Officer was required to consider and decide on the evidence adduced before her. In my view, there was no duty to further clarify the evidence . . .

(*Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 872, 256 F.T.R. 53.)

[29] The applicant had the burden to file appropriate evidence:

> [13] The PRRA officer does not play a role in the submission of evidence. If the evidence is insufficient, the applicant must bear the consequences, and the officer has no obligation to inform the applicant of this . . .
>
> [14] It is not incumbent on the PRRA officer to alert the applicant to insufficiencies in the evidence . . .

(*Lupsa v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 311, 159 A.C.W.S. (3d) 419; also *Tuhin v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 22, [2007] F.C.J. No. 36 (QL) at paragraph 4.)

[30] Ms. Malagon did not submit exhibits supporting her allegations to the effect that her mother was the victim of threats in November 2007 and of a car theft in December 2007 (application record

at pages 19A, 19B; read jointly with page 9 at paragraphs 6, 9 and 13). The officer was entitled not to be satisfied with mere allegations amounting to hearsay, since she had to determine the removal risks under section 97 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), on a balance of probabilities (*Jaouadi v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1549, 305 F.T.R. 122 at paragraph 32).

[31] This debate does not change anything about the central finding of the PRRA officer to the effect that the presumption of state protection had not been reversed.

The officer had to make her own determinations

[32] At paragraph 9 of her memorandum, Ms. Malagon alleges that the officer had to make her own determinations on state protection and not simply refer to the Board's previous findings on this point.

[33] This argument is incorrect for two reasons.

[34] First, the officer carried out her own analysis regarding the issue of state protection, as it appears in her reasons (application record at page 70 at paragraphs 5 to 8.)

[35] Second, the role of the PRRA officer is to assess an applicant's removal risks which could not be assessed by the panel, either because these risks did not exist at the time of the decision or because the applicant could not reasonably file the evidence of these risks at the time of that

decision (paragraph 113(*a*) of the IRPA; *Aslani v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 324, [2008] F.C.J. No. 390 (QL) at paragraph 14).

[36] Undated evidence cannot be used to satisfy this requirement.

[37] Even if the officer was not bound by the Board, she could take into account its reasons (*Aslani*, *supra*; also *Rai v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 12, at paragraphs 36 and 37.)

[38] On this point, the Board's decision is very instructive in regard to Ms. Malagon's failure to reverse the presumption of state protection and the unreasonableness of her refusal to call on her state before seeking protection at the international level:

> . . . According to her testimony during the hearing, [the applicant] never filed a complaint before any institution or authority.
>
> When she was asked why she did not seek protection from the authorities in her country, **the claimant answered that she had no evidence and that, in any event, the police would not do anything, and that she was scared.**
>
> The panel then asked the claimant how she could know that the police would not help her when she did not try to use what the authorities in her country could have made available to her to help her.
>
> She then stated that, ten or so years ago, she had been the victim of domestic violence and that she had approached the police. They initially referred her to some aid agencies for female victims of violence and, according to her own testimony, told her that she could contact them at any time, if that did not work out.

> She then stated that she was not satisfied with the services offered by those agencies, but that she did not contact the police, because she decided to go back to her spouse.
>
> The claimant's answers do not explain why she did not contact the police, and furthermore, the example chosen demonstrates that the police did not refuse to intervene.
>
> [Emphasis added.]

(Panel's reasons, pages 1 and 2.)

[39] The international protection regime is a last resort option: *substitute protection*, as the Supreme Court of Canada confirmed (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689 at paragraph 18.)

[40] In this case, there was a complete failure to seek national protection. Further, Ms. Malagon reticently and unconfidently explained her failure. Subjective reticence cannot excuse applicants for failing to first avail themselves of national protection (*Sanchez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 134, 165 A.C.W.S. (3d) 336 at paragraph 9; *Kim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1126, 141 A.C.W.S. (3d) 822 at paragraph 10).

The officer improperly assessed the evidence

[41] At paragraphs 10 to 13 of her memorandum, Ms. Malagon argues that the officer improperly assessed the evidence. Ms. Malagon's argument is difficult to grasp. In any event, her allegations are inconsistent with reality.

[42] The officer's analysis is nuanced. She describes the shortcomings of the system in Mexico, while finding that protection exists there. She points out that Mexico is a democracy and that the State is structured there. Further, she sets out the recourse that is available to victims who are not satisfied with the assistance they receive and states that there is protection against corrupt officers.

[43] As confirmed in the case law, state protection need not be perfect. Where the state has control of its territory and where it is making serious efforts to protect its citizens, the fact that there are weakness in that protection is not sufficient to refute the presumption of state protection (*Canada (Minister of Employment and Immigration) v. Villafranca*, 150 N.R. 232, 37 A.C.W.S. (3d) 1259; *Burgos v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1537, 160 A.C.W.S. (3d) 696 at paragraph 36).

[44] Ms. Malagon in this case is proposing a reassessment of the evidence. As the Court recently pointed out in *Singh v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 408, [2008] F.C.J. No. 547 (QL):

> [17] When the applicant argues that the panel's decision passed over evidence which he considered important or that the decision looked only at part of the evidence rather than some other part which he considered more important, he is

> quite simply asking this Court to reassess the evidence submitted in support of the refugee status claim and substitute its opinion for that of the panel. Such an approach is prohibited in a judicial review proceeding . . .

(Also paragraphs 18 and 19 in *Singh*, *supra*.)

[45] In her memorandum, Ms. Malagon confirms the officer's analysis, setting out documentary evidence which testifies to the efforts and successes of the Mexican authorities in the battle against corrupt agents (application record, at pages 105 and 137: reference to "Mexico's Corruption Crackdown").

[46] The case law confirms that PRRA officers have specific powers in assessing the evidence before them (*Kaur v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1612, 264 F.T.R. 282 at paragraph 25). The weight to assign to the evidence depends exclusively on the officer's assessment (*Tuhin v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 22, 167 A.C.W.S. (3d) 574 at paragraph 4).

[47] Finally, several recent judgments confirm that the officer's analysis is not unreasonable in a Mexican context.

[48] In *Navarro v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 358, [2008] F.C.J. No. 463 (QL), a case where the persecuting agent was a corrupt police officer and his associates, this Court determined:

> [17] The Board was correct in finding these explanations insufficient to rebut the presumption of state protection. The documentary evidence shows that Mexican authorities are making serious efforts to protect victims that find themselves in situations such as that of the applicants. Even though the situation is still far from being perfect, we are not dealing here with a situation where the state apparatus is no longer carrying out its responsibilities. In these circumstances, the state must at least be offered a real opportunity to intervene before one can conclude that it is unable to provide the protection required by one of its citizens . . .

[49] In *Sanchez, supra*, a case where the persecuting officer was a federal officer (*Sanchez, supra* at paragraph 2), this Court wrote:

> [12] Whatever deficiencies may exist within the Mexican criminal justice system, the country is a functioning democracy with an official apparatus sufficient to provide a measure of protection to its citizens. According to *Hinzman*, above, the burden of attempting to show that one should not be required to exhaust all avenues of available domestic recourse is a heavy one and, on the facts as found here by the Board, it was obviously not met.

[50] In *de la Rosa v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 83, 164 A.C.W.S. (3d) 497, this Court determined:

> [11] On the finding of state protection, it was open to the Board to conclude that the Applicant had provided insufficient evidence to rebut the presumption of state protection. Mexico was found to be a democratic state with a functioning government. On a general level, there was nothing to suggest that Mexico could not provide protection.
>
> [12] On a personal level, it was open to the Board to conclude that the Applicant had not sufficiently attempted to engage state protection to be able to sustain the argument that it was not available to him personally.

[51] Finally, Ms. Malagon's contestation in regard to the handling of general articles filed before the officer (application record at page 9, at paragraphs 13 to 17), cannot help her case since, *inter alia*, she refused all available endeavours to claim the assistance available.

[52] Considering the foregoing, it was not unreasonable for the officer to determine that Ms. Malagon had failed to fulfill her burden in regard to the issue of state protection.

[53] Ms. Malagon did not establish a serious issue and this is sufficient to dismiss the application to stay.

(ii) Irreparable harm

[54] In this case, as irreparable harm, Ms. Malagon alleged the risks connected with her return as well as the separation that her spouse would have to endure (application record at page 10 at paragraph 25).

[55] The risks of return were already assessed in two administrative proceedings, by the panel and by the officer, and both made the same findings. Further, this Court confirmed the reasonableness of the Board's decision refusing the ALJR against the Board's decision. Since the order of this Court, the situation has not changed, as the PRRA confirmed.

[56] This Court has often held that allegations of risk determined to be unfounded by both the Board and the PRRA cannot serve as a basis for establishing irreparable harm in the context of an application to stay (*Singh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 145, 137 A.C.W.S. (3d) 156). This principle relative to credibility is adaptable in the context of the failure to reverse the presumption of state protection.

[57] In regard to the family upsets and the separation that Ms. Malagon's spouse will have to endure, this is not irreparable harm, but rather a phenomenon inherent to removal (*Malyy, supra*; *Sofela, supra*; *Radji, supra*). To find otherwise would render impracticable the removal of individual who do not have the right to reside in Canada. Further, as pointed out in *Golubyev v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 394, 156 A.C.W.S. (3d) 1147 at paragraph 12: irreparable harm is a strict test in which serious likelihood or jeopardy to the applicant's life or safety must be demonstrated.

[58] For these reasons, Ms. Malagon has not established irreparable harm. This ground alone justifies the dismissal of the application.

(ii) Balance of convenience

[59] Subsection 48(2) of the IRPA provides that a removal order enforced as soon as is reasonably practicable. This is the prevailing situation in this case.

[60] Ms. Malagon's removal is not simply a question of administrative convenience, but implicates the integrity and fairness of, and public confidence in, Canada's system of immigration control (*Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, 132 A.C.W.S. (3d) 547 at paragraph 22.)

[61] For these reasons, the balance of convenience favours the public interest in ensuring that the immigration process provided by the Act follows its course.

B. Invalidity of the finding sought

[62] Ms. Malagon is asking this Court to stay her removal until the ALJR has been decided **or until there has been a final decision on her permanent residence application**.

[63] This finding is invalid because it requires that the Court exceed its jurisdiction.

[64] The case law confirms that granting a stay while awaiting an event that is not an underlying procedure of the stay amounts to an excess of jurisdiction, in breach of section 18.2 of the *Federal Courts Act*, R.S. 1985, c. F-7 (*D'Souza v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 1304, [2007] F.C.J. No. 1702 (QL) at paragraphs 36 to 41; *Razzaq v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 442, 290 F.T.R. 79 at paragraph 9; *Muhammad v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 156, 146 A.C.W.S. (3d) 127 at paragraph 13).

VI. Conclusion

[65] Considering all of the preceding, Ms. Malagon does not meet the requirements established by the case law for obtaining a judicial stay.

JUDGMENT

THE COURT ORDERS that the application to stay filed by the applicant be dismissed.

"Michel M.J. Shore"
Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3643-08
STYLE OF CAUSE:	IRIS LILIANA DOMENZAIN MALAGON **v.** MINISTER OF CITIZENSHIP AND IMMIGRATION and MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	September 22, 2008
REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATE OF REASONS:	September 23, 2008

APPEARANCES:

Luc R. Desmarais	FOR THE APPLICANT
Bassam Khouri	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

LUC R. DESMARAIS Montréal, Quebec	FOR THE APPLICANT
JOHN H. SIMS, QC Deputy Attorney General of Canada	FOR THE RESPONDENTS