Date: 20081126

Docket: IMM-4539-08

Citation: 2008 FC 1325

Ottawa, Ontario, November 26, 2008

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

ARNALDO ACHI DELISLE

Applicant

and

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

Respondents

REASONS FOR ORDER AND ORDER

Introduction

[1] The applicant, a citizen of Cuba, seeks a stay of his removal to the United States. On October 20, 2008, the Chief Justice of this Court issued an interim stay of his removal scheduled for the United States the next day pending the filing of additional material and a full hearing of his stay application. His stay application is grafted to an application for leave and judicial review challenging the decision of a Minister's Delegate (the Delegate) dated September 15, 2008 but only communicated to him on October 15, 2008 determining (1) he would not be subject to the risks

identified in section 97 of the *Immigration and Refugee Protection Act* (the *Act*) if returned to his country of nationality (Cuba) or his country of habitual residence (the United States), (2) that he was not a danger to the public in Canada and (3) that there were insufficient humanitarian and compassionate grounds to keep him in Canada. The Delegate's decision was made pursuant to sections 112(3) and 113(d) of the *Act* which provide that a pre-removal risk assessment is limited to section 97 factors and in the case of an applicant who is inadmissible on grounds of serious criminality, whether that person is a danger to the public in Canada. The procedure governing the Delegate's consideration of the issues is spelled out in section 172 of the *Immigration and Refugee Protection Regulations* (the *Regulations*). I set out, in both official languages, in a schedule to these reasons sections 112 and 113 of the *Act* and section 172 of the *Regulations*.

[2] The procedure contemplates a three step process leading the Delegate's decision:

- A risk assessment by a PRRA Officer (the Officer);

- An opportunity for an applicant to comment on the risk assessment by making submissions to the Delegate;

- A decision by the Delegate.

Background

[3] The applicant was born in Cuba on August 23, 1966. In September 1994, he fled Cuba aboard a raft, was intercepted by the U.S. Navy and confined for a year at Guantanamo Bay. He was allowed to enter the United States as a refugee in 1995. He apparently became a permanent resident of that country but asserts he lost his status because of the crimes he committed there.

[4] While in the United States, he was convicted of two offences: a first offence on October 15, 1996 for possession of a controlled substance (cocaine) for which he was sentenced to imprisonment between 12 to 24 months and a second offence on December 11, 1997 for possession of cocaine with intent to sell for which he was sentenced to imprisonment between 12 to 34 months, a sentence which if the crime had been committed in Canada could be for a term of imprisonment for life.

[5] On February 17, 2000, he entered Canada and immediately claimed refugee status on the basis of fear of return to Cuba because of his political opinion and the United States because of likely incarceration on account of breaches of the U.S. *Immigration Act*. His claim was refused by the Refugee Division on June 11, 2001. The Refugee Division found him to be credible. The tribunal found considering he left Cuba illegally and had lived in the United States for more than four years, it had reason to believe Mr. Delisle had a well founded fear of returning to Cuba. The tribunal, however, held he could not be granted refugee status because he was excluded under section 1Fb) of the Geneva Convention of 1951, i.e. having committed a serious crime in the United States, namely, drug trafficking.

[6] On July 4, 2002, Justice Pinard of this Court dismissed the applicant's judicial review application being of the view the Refugee Division had made no error. The conditional deportation order which had been issued against the applicant became enforceable against him when his refugee claim failed.

[7] On May 2003, making an assessment of Mr. Delisle's PRRA application, the Officer expressed the following opinion: "Considering the previous evaluation, the immigration file of the claimant, his profile, the situation in Cuba and the United States, I am of the opinion that the claimant will be at risk for his life and at risk of cruel and unusual treatment or punishment by the Cuban authorities if he was returned to Cuba." [Emphasis mine.]

[8] The Officer, under the heading "the best interests of the child", said the applicant had a two year old child, Alejandro who is 7 years of age, born from his common law partner Jo-Anne Dizazzo. He also observed the applicant had mentioned in his PRRA observations "that his girlfriend, her son [Tyson who is 14 years of age] from a previous relationship and their mutual son" are all supported and cared for by his spouse's family. He also noted he had a child in Cuba. He considered the best interests of Alejandro and Tyson and determined "It is my opinion that the final decision as to whether the child should follow the claimant or remain in Canada with the mother is up to the couple." Under the heading "Results of Assessment – Opinion", the Officer made no formal determination on the best interests of the child.

[9] By letter of May 2003, the applicant was provided a copy of the Officer's opinion report and with documents. The applicant was also advised that such documents would be sent to the Delegate

who "will determine if you are at risk of torture, risk to life or risk to cruel and unusual treatment or punishment" and that he had an opportunity to make representations.

[10] The applicant and his spouse responded the next day by stating that he basically agreed with the opinion adding "I would also like to add that the best interests of my child would not be to live with his mother or myself since he has been with both of us and his older brother …." The couple went on to make other comments invoking humanitarian considerations.

[11] As noted on September 15, 2008, the Delegate issued his decision. In summary, his conclusions were:

- The applicant would not be exposed to section 97 risks because conditions had changed in Cuba with the transfer of power (the Presidency) from Fidel Castro to his brother Raoul;

- Upholding the Officer's findings on this point, he concluded the applicant would not be exposed to section 97 if returned to the United States being of the view he was "paroled into the United States on a special program"; "he was released after his State prison term/USINS detention (although he possesses a criminal record)"; he might have difficulty to find a job but not being able to find a job is not a section 97 risk; discrimination does not constitute a section 97 risk and his fear of being detained and the possibility of being detained in the U.S. is not "a situation justifying in itself Canada's protection";

- The applicant is not a danger to the public because his criminal convictions for serious crimes are over 10 years old; he has expressed regret and he is unlikely to re-offend.

[12] On October 17, 2008, the applicant sought leave and judicial review of the Delegate's decision.

Analysis

[13] It is settled law that in order to obtain a stay of his removal pending consideration of his application for leave and judicial review, the applicant must satisfy the Court on each of the three elements that are necessary to obtain a stay: (1) serious question to be tried; (2) irreparable harm and (3) balance of convenience.

(a) Serious question to be tried

[14] The Supreme Court of Canada in *RJR -- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (*RJR -- MacDonald*) discussed the indicators of a serious question to be tried stating the threshold was a low one and that the judge on the application for a stay must make a preliminary assessment of the merits of the case and once satisfied that the application is neither vexatious or frivolous should go on to consider the other two criteria.

[15] Counsel for the applicant raised in my view at least the following serious questions:

1) Did the Delegate apply the correct legal test to determine that conditions in Cuba had changed to such an extent so as to eliminate any section 97 risk to the applicant if returned to Cuba?

2) Did the Delegate err in fact by ignoring relevant documentary evidence on current conditions in Cuba and specifically in failing to comment on the US DOS report on Cuba published in March 2008 which was in front of him?

[16] I do not think the issue raised by the applicant on whether the Delegate adequately considered the best interests of the children raises a serious issue as the Federal Court of Appeal, in *Varga v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 394, determined a PRRA analysis does not encompass a consideration of the best interests of a child.

[17] I note that counsel for the applicant, in his first memorandum filed on October 17, 2008, had claimed the Delegate had acted without jurisdiction in re-assessing the risk previously assessed by the Officer. He abandoned that point in his further submissions.

(b) Irreparable harm

[18] Counsel for the applicant made three submissions the applicant satisfied the irreparable harm test:

- Irreparable harm on account of the break-up of the family unit;

- Irreparable harm on account of the fact his judicial review application seeking to set aside the Delegate's decision will become moot;

- Irreparable harm on account of his likely detention in the United States.

[19] For the reasons that follow, I am of the view the applicant has not demonstrated the likelihood he will suffer irreparable harm on the three grounds he advanced.

[20] First, while I accept that irreparable harm may in some circumstances encompass that type of harm to a family unit (see *Kahn v. the Minister of Public Safety and Emergency Preparedness*, 2005 FC 1107, at paragraph 27), I am not satisfied that, after reading the applicant's affidavits and those of his partner Jo-Anne Dizazzo, he has identified any harm which rises above the harm normally associated with the execution of a lawful deportation order. In my view, the harm the applicant and his partner have identified is inherent in the nature of a deportation involving the removal of a family member. The applicant had to show his particular circumstances and those of his family unit disclosed a type of harm upon removal which was unique and special. This he has failed to do.

[21] Second, counsel for the applicant relies on the decision in *Solis Perez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 663 as well as other cases for the proposition his removal from Canada will result in his leave and judicial review application becoming moot or with practical effect since he will no longer be in Canada.

[22] In a very recent decision dated October 27, 2008 involving a deportation to the United States, my colleague Justice Mosley in *Lakha v. the Minister of Citizenship and Immigration et al*, 2008 FC 1204 (*Lakha*) had an opportunity to comment on this issue.

[23] He wrote the following at paragraphs 21 and 22 which I subscribe to:

> [21] I do not draw from these decisions the conclusion that an application for judicial review is rendered moot in every case where the applicant has been removed from Canada. On the particular facts of the matter there may no longer be a "live controversy" between the parties with respect to the PRRA decision if the applicant is no longer in Canada: *Perez*, above, at paragraph 26. However, whether an application for judicial review is moot, and if found to be moot, whether the Court will exercise its discretion to hear the matter, will turn on the facts of each case.
>
> [22] In the present case and on the basis of the evidence before me, I am not prepared to conclude that the applicant's challenge to the PRRA officer's decision would be rendered moot by his removal to the US. But even if I were to accept that proposition, I would not agree with the applicant's contention that irreparable harm would result from such a finding. It remains open to the applicant to seek the protection of the US.

[24] Finally, I cite Evans J.A.'s decision in *Palka v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 165 where he wrote the following at paragraphs 18, 19 and 20:

> **18** The Palkas argue that, if they are denied a stay, their appeal from Justice Mactavish's decision will be nugatory, since it will be dismissed for mootness. This, they say, constitutes irreparable harm. I do not agree.
>
> **19** First, even if their appeal is moot, the Court may decide to hear it in its discretion, on the ground that the question certified by Justice Mactavish may arise repeatedly and be evasive of review. To this end, I note that the question certified has been the subject of other decisions in the Federal Court and is clearly one of some difficulty.
>
> **20** Second, even if a refusal of a stay does render the appeal nugatory, this does not necessarily constitute irreparable harm. It all depends on the facts of the

> individual case: *El Ouadi v. Canada (Solicitor General)*, [2005] F.C.J. No. 189, 2005 FCA 42. In the present case, the Board and the PRRA officer rendered negative decisions on applications made on the basis of a fear of physical harm in Poland. In view of these findings, I am not persuaded that the hearsay statements in the affidavit sworn for the purpose of this proceeding establish that Jadwiga would be at risk of violence if returned to Poland.

[25] As a result, the applicant fails on this point.

[26] Third, counsel for the applicant argues Mr. Delisle's removal to the United States will lead to his detention because of his lack of status there. In support of that proposition, the applicant filed a letter dated October 19, 2008 from the Legal Services Coordinator at the Vermont Refugee Assistance Inc. who expresses the following views:

- "We have learned that he was ordered deported from the United States on account of two criminal convictions" [and that consequently] … "he runs a high risk of being detained on arrival. Further, there will be no bond set for his release and it can be expected that he will face a considerable amount of time in detention".

- She states if arrested by U.S. authorities when entering the United States through Lacolle "he would face detention in the Clinton County Jail in Plattsburg, N.Y. where the majority of the detainees are is custody for criminal activity" with no special recognition who are subject to immigration custody.

[27] With respect, I cannot give any weight to this view because it is premised on his having been deported from the United States which is a fact not established anywhere in the evidence and is contrary to it.

[28] There is a long line of cases from this Court that, without specific evidence in the record, removal to the United States does not constitute irreparable harm even if the person may be detained because the United States is presumed to treat its detainees fairly. This line of cases was expressed by Justice Nadon in *Mikhailov v. the Minister of Citizenship and Immigration*, [2000] F.C.J. No. 642; continued through in *Akyol v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1182; reiterated in *Joao v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 880 and confirmed in cases such as *Perry v. the Minister of Public Safety and Emergency Preparedness*, 2006 FC 378 and *Qureshi v. the Minister of Citizenship and Immigration et al*, 2007 FC 97.

[29] Recently, the Federal Court of Appeal in *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171 held that the governmental institutions in the U.S. had democratic systems of checks and balances, an independent judiciary and constitutional guarantees of due process which I might add have recently been re-affirmed by the Supreme Court of the United States in matters of habeas corpus involving the Guantanamo detainees detained after 9/11.

[30] Counsel for the applicant also argues the United States will deport him to Cuba where he is at risk. He asserts he has no legal status in the United States.

[31] In *Lakha*, Justice Mosley also had an opportunity to consider this point. He stated the onus was on the applicant to establish that he would be removed to the People's Republic of China (PRC) and that he would suffer irreparable harm and he failed to do so. His conclusion was he was not prepared to speculate "that the American authorities would remove him [in that case] to the PRC".

[32] The same situation prevails before me. No evidence was provided to this Court which would show the United States would return the applicant to his country of nationality. Such evidence has been provided in other cases which were considered by the Federal Court. Such evidence, tendered through affidavit evidence of American immigration practitioners covered such points as that person's status on re-entry to the United States when removed from Canada, the eligibility of that person to apply for asylum in the United States, the likelihood of release from detention on bond or otherwise and his ability to apply for withholding from removal from the United States.

[33] The applicant's bald assertion he is without legal status in the United States does not of itself establish an intention of the United States to deport him to Cuba. This is clear from another recent decision of Justice Mosley dated November 5, 2008 in *Wangden v. Canada (Minister of Citizenship and Immigration et al)*, 2008 FC 1230 another case involving removal to the United States. Justice Mosley had extensive affidavit evidence before him. It is clear from that evidence there are different kinds of status for migrants in the United States; that the United States is a signatory to the Convention which contains an obligation not to remove a person to a country where that person would be at risk and that the mechanism of withholding from removal (equivalent to a limited PRRA under section 112(3) of the *Act*) ensures that the United States respects its Convention obligations against non-refoulement.

[34] In my view, in the specific circumstances of this case, particularly when he seemed to have been granted some kind of status after he fled Cuba, he had an obligation to be forthcoming to this Court in explaining his status and the availability of recourse to the U.S. justice system if the United States indicated its intention to remove him to Cuba. This, once again, he has failed to do. The result is that the argument of irreparable harm on account of removal remains speculative and as a result cannot be maintained.

(c) Balance of convenience

[35] Not having established irreparable harm, the balance of convenience favours the Minister in discharging his obligations under section 48 of the *Act* to remove the applicant as soon as practicable.

[36] For these reasons, this stay application is dismissed.

ORDER

THIS COURT ORDERS that this stay application is dismissed.

"François Lemieux"

_____

Judge

SCHEDULE "A"

Immigration and Refugee Protection Act (2001, c. 27)

Application for protection

112. (1) A person in Canada, other than a person referred to in subsection 115(1), may, in accordance with the regulations, apply to the Minister for protection if they are subject to a removal order that is in force or are named in a certificate described in subsection 77(1).

Exception

(2) Despite subsection (1), a person may not apply for protection if

(a) they are the subject of an authority to proceed issued under section 15 of the Extradition Act;

(b) they have made a claim to refugee protection that has been determined under paragraph 101(1)(e) to be ineligible;

(c) in the case of a person who has not left Canada since the application for protection was rejected, the prescribed period has not expired; or

(d) in the case of a person who has left Canada since the removal order came into force, less than six months have passed since they left Canada after their claim to refugee protection was determined to be ineligible, abandoned, withdrawn or rejected, or their application for protection was rejected.

Restriction

Loi sur l'immigration et la protection des réfugiés (2001, ch. 27)

Demande de protection

112. (1) La personne se trouvant au Canada et qui n'est pas visée au paragraphe 115(1) peut, conformément aux règlements, demander la protection au ministre si elle est visée par une mesure de renvoi ayant pris effet ou nommée au certificat visé au paragraphe 77(1).

Exception

(2) Elle n'est pas admise à demander la protection dans les cas suivants :

a) elle est visée par un arrêté introductif d'instance pris au titre de l'article 15 de la Loi sur l'extradition;

b) sa demande d'asile a été jugée irrecevable au titre de l'alinéa 101(1)e);

c) si elle n'a pas quitté le Canada après le rejet de sa demande de protection, le délai prévu par règlement n'a pas expiré;

d) dans le cas contraire, six mois ne se sont pas écoulés depuis son départ consécutif soit au rejet de sa demande d'asile ou de protection, soit à un prononcé d'irrecevabilité, de désistement ou de retrait de sa demande d'asile.

Restriction

(3) Refugee protection may not result from an application for protection if the person

(3) L’asile ne peut être conféré au demandeur dans les cas suivants :

(a) is determined to be inadmissible on grounds of security, violating human or international rights or organized criminality;

a) il est interdit de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux ou criminalité organisée;

(b) is determined to be inadmissible on grounds of serious criminality with respect to a conviction in Canada punished by a term of imprisonment of at least two years or with respect to a conviction outside Canada for an offence that, if committed in Canada, would constitute an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years;

b) il est interdit de territoire pour grande criminalité pour déclaration de culpabilité au Canada punie par un emprisonnement d’au moins deux ans ou pour toute déclaration de culpabilité à l’extérieur du Canada pour une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable d’un emprisonnement maximal d’au moins dix ans;

(c) made a claim to refugee protection that was rejected on the basis of section F of Article 1 of the Refugee Convention; or

c) il a été débouté de sa demande d’asile au titre de la section F de l’article premier de la Convention sur les réfugiés;

(d) is named in a certificate referred to in subsection 77(1).

d) il est nommé au certificat visé au paragraphe 77(1).

Consideration of application

Examen de la demande

113. Consideration of an application for protection shall be as follows:

113. Il est disposé de la demande comme il suit :

(a) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

a) le demandeur d’asile débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n’étaient alors pas normalement accessibles ou, s’ils l’étaient, qu’il n’était pas raisonnable, dans les circonstances, de s’attendre à ce qu’il les ait présentés au moment du rejet;

(b) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

b) une audience peut être tenue si le ministre l’estime requis compte tenu des facteurs réglementaires;

(c) in the case of an applicant not described

c) s’agissant du demandeur non visé au

in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

(d) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

(ii) in the case of any other applicant, whether the application should be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.

Immigration and Refugee Protection Regulations (SOR/2002-227)

Applicant described in s. 112(3) of the Act

172. (1) Before making a decision to allow or reject the application of an applicant described in subsection 112(3) of the Act, the Minister shall consider the assessments referred to in subsection (2) and any written response of the applicant to the assessments that is received within 15 days after the applicant is given the assessments.

Assessments

(2) The following assessments shall be given to the applicant:

(a) a written assessment on the basis of the factors set out in section 97 of the Act; and

(b) a written assessment on the basis of the factors set out in subparagraph 113(d)(i) or (ii) of the Act, as the case may be.

paragraphe 112(3), sur la base des articles 96 à 98;

d) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part :

(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

Règlement sur l'immigration et la protection des réfugiés (DORS/2002-227)

Demandeur visé au paragraphe 112(3) de la Loi

172. (1) Avant de prendre sa décision accueillant ou rejetant la demande de protection du demandeur visé au paragraphe 112(3) de la Loi, le ministre tient compte des évaluations visées au paragraphe (2) et de toute réplique écrite du demandeur à l'égard de ces évaluations, reçue dans les quinze jours suivant la réception de celles-ci.

Évaluations

(2) Les évaluations suivantes sont fournies au demandeur :

a) une évaluation écrite au regard des éléments mentionnés à l'article 97 de la Loi;

b) une évaluation écrite au regard des éléments mentionnés aux sous-alinéas

Certificate

(2.1) Despite subsection (2), no assessments shall be given to an applicant who is named in a certificate until a judge under section 78 of the Act determines whether the certificate is reasonable.

When assessments given

(3) The assessments are given to an applicant when they are given by hand to the applicant or, if sent by mail, are deemed to be given to an applicant seven days after the day on which they are sent to the last address that the applicant provided to the Department.

Applicant not described in s. 97 of the Act

(4) Despite subsections (1) to (3), if the Minister decides on the basis of the factors set out in section 97 of the Act that the applicant is not described in that section,

(a) no written assessment on the basis of the factors set out in subparagraph 113(d)(i) or (ii) of the Act need be made; and

(b) the application is rejected.

113d)(i) ou (ii) de la Loi, selon le cas.

Certificat

(2.1) Malgré le paragraphe (2), aucune évaluation n'est fournie au demandeur qui fait l'objet d'un certificat tant que le juge n'a pas décidé du caractère raisonnable de celui-ci en vertu de l'article 78 de la Loi

Moment de la réception

(3) Les évaluations sont fournies soit par remise en personne, soit par courrier, auquel cas elles sont réputées avoir été fournies à l'expiration d'un délai de sept jours suivant leur envoi à la dernière adresse communiquée au ministère par le demandeur.

Demandeur non visé à l'article 97 de la Loi

(4) Malgré les paragraphes (1) à (3), si le ministre conclut, sur la base des éléments mentionnés à l'article 97 de la Loi, que le demandeur n'est pas visé par cet article :

a) il n'est pas nécessaire de faire d'évaluation au regard des éléments mentionnés aux sous-alinéas 113d)(i) ou (ii) de la Loi;

b) la demande de protection est rejetée.

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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APPEARANCES:

Peter Shams	FOR THE APPLICANT
Claudia Gagnon	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

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