Date: 20081211

Docket: IMM-4523-08

Citation: 2008 FC 1364

Ottawa, Ontario, December 11, 2008

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MICHAEL ELLERO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

AMENDED REASONS FOR JUDGMENT AND JUDGMENT
(This amended version only amends the file number and nothing else)

I. Overview

[1] There is a public interest in enforcing removal orders in an efficient, expeditious and fair manner and in supporting the efforts of those responsible for doing so. Only in exceptional cases will an individual's interest outweigh the public interest (*Aquila v. Canada (Minister of Citizenship and Immigration)* (2000), 94 A.C.W.S. (3d) 960, [2000] F.C.J. No. 36 (QL) (F.C.T.D.); *Kerrutt v. Canada (Minister of Employment and Immigration)* (1992), 53 F.T.R. 93, 32 A.C.W.S. (3d) 621; *Dugonitsch v. Canada (Minister of Employment and Immigration)* (1992), 53 F.T.R. 314, 32 A.C.W.S. (3d) 1135 (F.C.T.D.)).

II. Introduction

[2] The Applicant is a citizen of the United States of America who requests to stay his deportation to the United States (U.S.), scheduled for December 11, 2008.

[3] The Applicant claimed that members of the Mexican or Italian mafia and others wanted to "eliminate him" and that the Central Intelligence Agency (CIA) has created a "psychic profile" on him. The Applicant's refugee claim was rejected by the Immigration and Refugee Board, Refugee Protection Division (IRB) because he was found not to be credible.

[4] The Applicant's Pre-Removal Risk Assessment (PRRA) was also rejected. The risks identified by the Applicant in his PRRA application were substantively the same as those which were heard and assessed by the IRB. Much of the documentation provided to the PRRA officer pre-dates the IRB decision. The remainder of the documentation provided by the Applicant does not demonstrate a risk upon return to the U.S.

[5] The Applicant has failed to disclose a serious issue and, therefore, he should not be granted a stay of deportation.

II. Background

[6] The Applicant is a citizen of the U.S. He came to Canada on October 19, 2005. He made a claim for refugee protection on November 14, 2005, claiming that members of the Mexican or Italian mafia and others want to "eliminate him". Allegedly, his opponents are fearful that the book

he has written will be published in due course, thereby, exposing the corruption “in the federal government and elsewhere in the United States”. He states that the U.S. government used a psychic against him and that this all stems from the CIA which has a “psychological profile” on him (PRRA Decision, dated September 5, 2008, p. 1, Attached as Exhibit “E” to the Affidavit of Cheryl Giles).

[7] The Applicant claims he did not seek state protection from the U.S. authorities because he believes that the police cannot provide physical protection for him against “the evil and perils of the world” (PRRA Decision, dated September 5, 2008).

[8] The Applicant’s claim for refugee status was rejected by the IRB in a decision, dated December 19, 2006.

[9] The Applicant filed an Application for leave and for judicial review seeking to quash the IRB decision denying that the Applicant is a Convention refugee or person in need of protection.

[10] Prior to the disposition by the Court of the Application for leave and for judicial review of the IRB decision, but after the close of pleadings, the Applicant moved for interlocutory relief, seeking (i) an Order to obtain an official transcript of his hearing before the Board; and (ii) an Order to extend the time of the case to allow the Applicant to retain an attorney (interlocutory motion) (Affidavit of Cheryl Giles).

[11] On April 23, 2007, Justice Frederick Gibson dismissed the Applicant's interlocutory motion. On April 27, 2007, Justice Gibson dismissed the Application for leave and for judicial review (Affidavit of Cheryl Giles).

[12] The Applicant then filed a motion for reconsideration of both Orders of Justice Gibson (Affidavit of Cheryl Giles).

[13] The Applicant's motion for re-consideration was dismissed by way of an Order of Justice Gibson, dated June 5, 2007 (Affidavit of Cheryl Giles).

[14] The Applicant subsequently submitted an application for a PRRA (Affidavit of Cheryl Giles).

[15] The PRRA officer rejected the Applicant's application. The PRRA officer found:

(i) the risks identified by the Applicant in his PRRA application are substantively the same as those which were heard and assessed by the IRB;

(ii) that there was less than a mere possibility that the Applicant would suffer persecution should he be returned to the U.S.; and

(iii) that there were no substantial grounds to believe the Applicant would face torture, nor are there reasonable grounds to believe that the Applicant faces a risk to life or cruel and unusual treatment or punishment if returned to the U.S.

(PRRA Decision, dated September 5, 2008).

[16] On October 15, 2008, the Applicant commenced an Application for leave and for judicial review of the negative PRRA decision (Affidavit of Cheryl Giles).

IV. Issue

[17] Has the Applicant met the tri-partite test for the granting of a stay of removal?

V. Analysis

The test for a stay

[18] The criteria upon which a stay of execution may be granted are as follows:

(i) whether there is a serious question to be determined by the Court;

(ii) whether the party seeking the stay would suffer irreparable harm if the stay were not issued; and

(iii) whether, on the balance of convenience, the party seeking the stay will suffer the greater harm from the refusal to grant the stay.

The requirements of the tripartite test are conjunctive; that is, the Applicant must satisfy all three branches of the test before this Court can grant a stay. (*Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302, 11 A.C.W.S. (3d) 440 (F.C.A.), *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, *Oberlander v. Canada (Attorney General)*, 2003 FCA 134, 121 A.C.W.S. (3d) 610).

[19] The issuance of a stay is an extraordinary remedy wherein the Applicant needs to demonstrate “special and compelling circumstances” that would warrant “exceptional judicial

intervention" (*Tavaga v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm. L.R. (2d) 82, 28 A.C.W.S. (3d) 371 (F.C.T.D.); *Apotex Inc. v. Wellcome Foundation Ltd.* (1998), 232 N.R. 40, 82 C.P.R. (3d) 429 (F.C.A.)).

[20] The Applicant has failed to demonstrate that he meets all three requirements of the test.

Serious Issue

[21] To establish the existence of a serious issue, the Applicant must satisfy the Court that the underlying application is not frivolous or vexatious (*Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110; *Toth*, above; *RJR-MacDonald Inc.*, above at para. 44).

[22] In establishing a serious issue, the Applicant must show that issues in the underlying Application for judicial review raise at least an arguable case (*Rahman v. Canada (Minister of Citizenship and Immigration)* (2001), 103 A.C.W.S. (3d) 153, [2001] F.C.J. No. 106 (QL) at para. 15; *Molnar v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 325, 104 A.C.W.S. (3d) 1104 at para. 12).

The underlying PRRA Decision is reasonable

[23] There is no serious issue in the underlying application. The Applicant is simply raising the same points he raised in his motions brought during the Application for leave to commence judicial review of the IRB decision process and in the Application for leave of the IRB decision itself. What the Applicant did in using the PRRA process (and now the emergency motion process) is to re-

argue the motions and applications that were dismissed by this Court during the IRB stage (Affidavit of Cheryl Giles).

[24] The Applicant's submissions that the PRRA officer erred in not having taken into account the evidence he submitted in regard to perceived procedural fairness issues which he allegedly encountered during the IRB process had been heard and decided upon in previous proceedings before this Court.

[25] Moreover, the letters he attaches as Exhibits A1 and A2, and the excerpts of his Memorandum of Argument attached to Exhibit A3 were previously filed by the Applicant during the leave to commence judicial review of the IRB decision process and have already been disposed of by this Court as explained above (Applicant's Affidavit, pp. 8-16).

The PRRA officer considered all the evidence submitted

[26] The PRRA officer's risk assessment is thorough, well-reasoned and indicative of his extensive consideration of relevant factors. His assessment included consideration of the PRRA application, the Applicant's extensive submissions in support of his PRRA application, the IRB decision and the documentary evidence in its entirety as submitted by the Applicant. The PRRA officer also considered external sources including Freedom House, Freedom in the World (2008), the FBI Academy – Behavioural Science Unit, the Federal Bureau of Investigation, The American Civil Liberties Union – Police Practices, and the U.S. Government Official Web Portal, 'Law Enforcement and Corrections – Related Agencies' (PRRA Decision, dated September 5, 2008).

[27] The PRRA officer properly decided not to give consideration to documents submitted by the Applicant that pre-dated the IRB decision as these documents would have been available for presentation to the IRB. No explanation was provided by the Applicant as to why they were not presented at the appropriate time (PRRA Decision, dated September 5, 2008).

[28] The onus is on the Applicant (i) to provide the PRRA officer with new evidence in support of the PRRA Application, not the same evidence that was before the IRB, and (ii) to show how the new evidence meets the requirements of section 113 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) (*Kaybaki v. Canada (Solicitor General of Canada)*, 2004 FC 32, 128 A.C.W.S. (3d) 784).

[29] The "new" evidence submitted by the Applicant consisted of copies of his Rogers bills, fax verification documents, receipts and copies of baggage claim tickets. Subsection 161(2) of the *Immigration and Refugee Protection Regulation*, SOR/2002 22 (Regulations) requires that a person who makes written submissions must indicate the relevance of the evidence. The PRRA officer properly found that these items did not substantiate the risks, cited by the Applicant (PRRA Decision, dated September 5, 2008).

[30] The PRRA officer found that the risks identified by the Applicant in his PRRA are substantively the same as those which were heard and assessed by the IRB. The officer did not find that the Applicant's past treatment, in and of itself, warranted a granting of protection nor was it indicative of a forward-looking risk in light of the documentary evidence regarding country

conditions in the U.S. and the Applicant's personal circumstances (PRRA Decision, dated September 5, 2008).

[31] The PRRA officer found it objectively unreasonable that the Applicant did not seek protection prior to leaving the U.S. and has not shown clear and convincing evidence that he is unwilling to avail himself of protection in his home country. Documentary evidence shows that state protection is available (PRRA Decision, dated September 5, 2008).

[32] The decision of the PRRA officer is reasonable. There is no evidence that the PRRA officer acted arbitrarily or in bad faith, or considered extraneous or irrelevant factors; furthermore, there is no evidence that the assessment of the Applicant's PRRA application was completed in a manner contrary to law or the duty of procedural fairness.

[33] The PRRA officer properly considered the application of the Applicant and determined, based on the evidence before him, that the Applicant did not satisfy the statutory criteria under section 96 or 97 of the IRPA.

[34] It is not the role of the Court to reweigh the evidence that was before the PRRA officer. The PRRA officer is not to act as a Court of appeal from a prior refugee board decision. The PRRA procedure is not an appeal or an application for review of the IRB decision. Parliament clearly intended to limit the evidence to be presented in the context of such a procedure itself (*Raza et al. v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, 370 N.R. 344 at paras. 12, 13

and 16; *Quiroga v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1306, 153 A.C.W.S. (3d) 192 at para. 12).

[35] The officer's decision was reasonably open to him on the record and he did not ignore evidence. Accordingly, the underlying PRRA officer's decision does not raise a serious issue *Figuardo v. Canada (Solicitor General)*, 2004 FC 241, 129 A.C.W.S. (3d) 374 at paras. 6-7; PRRA Decision, dated September 5, 2008).

Irreparable Harm

[36] The Applicant must demonstrate that removal will result in a reasonable likelihood of harm before a finding can be made that removal will result in irreparable harm (*Soriano v. Canada (Minister of Citizenship and Immigration)* (2000), 188 F.T.R. 18, 7 Imm. L.R. (3d) 181).

[37] Irreparable harm is more substantial and more serious than personal inconvenience. It implies the serious likelihood of jeopardy to an applicant's life, liberty or security of the person, or an obvious threat of ill treatment in the country to which removal will be effected (*Mikhailov v. Canada (Minister of Citizenship and Immigration)* (2000), 191 F.T.R. 1, 97 A.C.W.S. (3d) 727; *Frankowski v. Canada (Minister of Citizenship and Immigration)* (2000), 98 A.C.W.S. (3d) 641; [2000] F.C.J. No. 935 (QL)).

[38] An applicant's subjective fear of returning to his/her country does not constitute irreparable harm. Objective evidence of harm related to danger must be demonstrated (*Ram v. Canada*

(Minister of Citizenship and Immigration) (1996), 64 A.C.W.S. (3d) 657, [1996] F.C.J. No. 883 (QL); *Gogna v. Canada (Minister of Employment and Immigration)* (1993), 68 F.T.R. 140, 42 A.C.W.S. (3d) 480 (F.C.T.D.)).

[39] The Applicant has not demonstrated that his removal to the U.S. would cause irreparable harm. The Applicant has not shown that he would be subject to a serious likelihood of jeopardy to his life, liberty or security as a result of the removal.

State Protection

[40] As the Supreme Court of Canada confirmed, the state is presumed capable of protecting its citizens and refugee claimants must, therefore, provide "clear and convincing confirmation" of its inability or unwillingness to protect them. The Applicant has not done so in this case. Moreover, if there is evidence upon which the tribunal could conclude that state protection is available to an applicant, the Court should not intervene (*Paul v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 398, 310 F.T.R. 307 at para 18; *Canada (Attorney General) v. Ward* [1993] 2 S.C.R. 689).

[41] In this case, the Applicant is a citizen of the U.S. The documentary evidence indicates that the U.S. makes serious efforts to protect its citizens. The PRRA officer reasonably concluded that state protection exists in the U.S. and is available for the Applicant (PRRA Decision, dated September 5, 2008).

[42] The Applicant must demonstrate that he sought state protection. In this case, the Applicant stated he did not seek protection from the U.S. authorities because he believes the police cannot provide physical protection for him against “the evil and perils of the world.” He stated to the PRRA officer that his life would be at risk if he sought protection and spoke out against his persecutors. There was insufficient evidence to support this assertion and the PRRA officer found that the Applicant did not provide clear and convincing evidence that he is unable or unwilling to avail himself of protection in his home country. Moreover, the PRRA officer found it objectively unreasonable that the Applicant did not seek state protection prior to leaving the U.S. (PRRA Decision, dated September 5, 2008).

[43] Furthermore, the PRRA officer found that country conditions have not deteriorated in the U.S. since the Applicant was before the IRB (PRRA Decision, dated September 5, 2008).

[44] The PRRA officer reasonably concluded that there is less than a mere possibility that the Applicant faces persecution should he return to the U.S. and that the Applicant is not a person described in section 96 or 97 of the IRPA. The PRRA officer, therefore, properly rejected the Applicant’s application (PRRA Decision, dated September 5, 2008); IRPA, ss. 161(2)).

Lack of credibility found by IRB

[45] The IRB determined that the Applicant’s evidence of persecution was not credible and, therefore, its finding was reasonable:

(a) The Applicant did not produce any documentation at the hearing to substantiate his allegations;

(b) The Applicant did not produce evidence of having reported any incidents to the police or any other authority;

(c) The IRB found that the Applicant waited three weeks after landing in Canada to claim refugee status.

(IRB Decision, December 15, 2006 at p. 6).

[46] This Court has held that where an Applicant's account was found not to be credible by the IRB, the account cannot serve as a basis for an argument supporting irreparable harm in a stay application (*Akyol v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 931, 124 A.C.W.S. (3d) 1119 at para. 8; *Iwekaogwo v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 782, 157 A.C.W.S. (3d) 392 at para. 17).

[47] The Applicant’s risk has already been assessed a number of times and each time he was found not to be at risk in his country of origin. This alleged risk, already reasonably assessed, does not meet the test for irreparable harm (*Golubyev v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 394, 156 A.C.W.S. (3d) 1147 at para. 13; *Manohararaj v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 376, 147 A.C.W.S. (3d) 600).

[48] As for the material submitted in Exhibit A4 to the Applicant's stay motion record, it is uncertain whether this material was before the PRRA officer. In any event, these documents do not provide any new information to establish a danger or a risk to the Applicant.

[49] The Applicant has failed to demonstrate irreparable harm. A claimant, rejected by the IRB, bears the onus of demonstrating that country conditions or personal circumstances have since changed. The Applicant had not met the test for the PRRA application and now has not met the test for irreparable harm (*Cupid v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 176, 155 A.C.W.S. (3d) 396 at para. 4).

[50] Irreparable harm must be evaluated in relation to the country to which the Minister proposes to return an individual. No irreparable harm exists in the case at bar; the Applicant is being removed to the U.S. (*Radji v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 100, 308 F.T.R. 175 at paras. 41-420).

[51] No statutory provision exists for a stay pending the review of a PRRA decision. This indicates that Parliament intended that failed PRRA applicants could be removed prior to their judicial review application being determined. This is consistent with the Minister's duty to execute removal orders as soon as reasonably practicable (IRPA at s. 231-232; *Golubyev*, above).

Balance of Convenience

[52] In determining the balance of convenience, the Court must determine which of the two parties will suffer the greater harm by the stay being granted or denied (*Manitoba (Attorney General) v. Metropolitan (MTS) Ltd.*, above).

[53] There is a public interest in enforcing removal orders in an efficient, expeditious and fair manner and in supporting the efforts of those responsible for doing so. Only in exceptional cases will an individual's interest outweigh the public interest (*Aquila*, above; *Kerrutt*, above; *Dugonitsch*, above).

[54] The IRPA requires the Minister of Public Safety and Emergency Preparedness to enforce a removal order as soon as is reasonably practicable (IRPA at ss. 48(2)).

[55] A finding that the balance of convenience favours the Minister is a sufficient basis upon which to dismiss a stay motion as specified in the Overview (*Singh v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1033, 151 A.C.W.S. (3d) 898).

[56] In the present case, the balance of convenience favours the Minister. The Applicant is now ready for removal and the Minister is under a statutory obligation to ensure that the Applicant's removal is carried out as soon as reasonably possible (IRPA at ss. 48(2)).

VI. Conclusion

[57] The Applicant has failed each of the three prongs of the tripartite stay test. As a result, the Applicant's motion for a stay of removal is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicant's motion for a stay of removal be dismissed.

Obiter

It is suggested that cooperation be in effect between the two governments, that of Canada and the United States, to medically assist Mr. Ellero in ensuring that he be treated in the most appropriate manner, recognizing a need exists for medical assessment and/or treatment throughout the removal process and immediately upon his return to the United States. The Applicant has said during the course of the hearing that medical issues can be dealt with in the United States as effectively as in Canada. (However, the Applicant fears that an initial period of forty-five days may ensue prior to eligibility for medical care in the United States, should he be removed.) According to the jurisprudence, medical issues must be taken into account in respect of removals to ensure that the physical well-being of an applicant be taken into account, thus, also in the transfer process, should the need arise. Mention is made of treatment which the Applicant is allegedly receiving for high-blood pressure in addition to all else that may be evaluated for which medication and treatment may be necessary; thus, it is incumbent that any medical condition which may be of a serious nature be attended to in such a case.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Mr. Michael Ellero	FOR THE APPLICANT
Ms. Sharon Johnston	FOR THE RESPONDENT

SOLICITORS OF RECORD:

MICHAEL ELLERO Ottawa, Ontario	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT