F ederal Court  Cour fédérale

Date: 20090624

Docket: IMM-4861-08

Citation: 2009 FC 662

Toronto, Ontario, June 24, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

TIGIST DAMTE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] For the reasons that follow I am of the view that this application is moot and it is dismissed.

[2] On November 2, 2008 an Enforcement Officer of Canada Border Services Agency refused to grant an administrative stay of the Applicant's removal from Canada, scheduled for November 18, 2008 pending a decision on her second Pre-Removal Risk Assessment (PRRA) application. A judicial stay of the scheduled removal pending the decision on this application was granted by Justice Lemieux: *Damte v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 1277.

[3] Ms. Tigist Damte is an Ethiopian national and failed refugee claimant. Her history with Canadian immigration authorities is set out in full in Justice Lemieux's decision. For present purposes, a brief summary will suffice.

[4] In 2006, Ms. Damte's claim that she was arrested and detained in 1998 by Ethiopian authorities on account of her membership in the Ethiopian Peoples Revolutionary Party was dismissed for lack of credibility by the Refugee Protection Division of the Immigration and Refugee Board (RPD). It also rejected her claim to be a refugee *sur place*, on account of her participation in Canadian and American protests against the current regime in Ethiopia, on the basis that Ethiopian authorities would not be aware of her attendance at North American demonstrations. Leave to seek judicial review of the RPD decision was denied.

[5] Within a year of the RPD hearing, it was reported in the press that the Ethiopian regime was spying on opposition supporters abroad, in particular by video-taping anti-government demonstrations and listing participants. However, this evidence was not included in Ms. Damte's

submissions in support of her first PRRA in March of 2007, notwithstanding its availability. The first PRRA officer found that Ms. Damte's removal would not subject her to risks of persecution on Convention grounds, or of cruel and unusual treatment or punishment or death. On October 8, 2008, that determination was upheld as reasonable on judicial review, in light of the evidence that was before the officer which, as noted, did not include the reports of Ethiopian authorities tracking government opponents abroad.

[6] Ms. Damte was subsequently ordered deported in February 2008, but her removal was judicially stayed by Justice Gibson in an Order dated February 11, 2008 (Court file IMM-549-08) pending the disposition of her application for leave and for judicial review. As a result, the enforcement order lapsed.

[7] Ms. Damte filed a second PRRA application in March of 2008, which was supported by the evidence regarding Ethiopian surveillance of anti-government demonstrators in foreign countries.

[8] In October of 2008, while the second PRRA application was outstanding, Ms. Damte was again ordered deported. She requested an administrative stay of her removal pending the outcome of the second PRRA, noting the "new" evidence relating to surveillance and emphasizing that it had not yet been considered by anyone other than Justice Gibson, who had considered it sufficient to establish the irreparable harm component of the test for granting a stay.

On November 3, 2008, the Enforcement Officer declined to authorize the requested administrative stay, noting the following considerations:

> The new evidence in question was not included in her first PRRA claim made in March 2007. According to counsel, the evidence was available for submission in June 2006. This evidence was never submitted in error of counsel on the initial PRRA. The evidence was available to submit in March 2007. Failure to do so cannot result in a deferral of removal.
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> The evidence, which was submitted as proof of irreparable harm for previously filed litigation was dismissed on 08 October 2008.

[9] In the result, the administrative stay was refused by the Enforcement Officer who noted that a second PRRA does not require that a valid removal be stayed, and concluded that he had an obligation under the *Immigration and Refugee Protection Act* to oversee the removal of Ms. Damte as soon as reasonably practicable.

[10] When the deferral was refused, Ms. Damte sought and obtained a stay from Justice Lemieux pending the determination of the within application for judicial review. In his Order, Justice Lemieux raised the possibility that the Enforcement Officer had erred in refusing to consider the new evidence tendered by Ms. Damte, and found that the Officer erred in concluding that the new evidence had been considered in the Court's Order of October 8, 2008.

[11] On June 9, 2009 the Applicant's second PRRA was refused. Additionally, the same officer denied her H&C application on June 10, 2009. Regrettably neither was transmitted to the Applicant or her counsel until the day before this hearing was scheduled. Given the importance

of such decisions, especially when made a few days prior to a hearing before this Court, the Respondent should urgently take steps to ensure that such decisions are immediately transmitted to the applicants and their counsel. Failure to do so puts counsel at a disadvantage and may result in a postponement of a scheduled hearing.

[12] At the hearing scheduled in this application, counsel for the Respondent submitted that the judicial review application was moot as the second PRRA decision had been made, and that the Court ought not to hear the matter.

[13] The Respondent relies on the decision of the Federal Court of Appeal in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81. In that case, the Court of Appeal indicated that a determination as to whether a live issue exists between parties is dependant upon the proper characterization of the controversy between them. *Baron* involved a review of a refusal to defer removal pending an H&C application where the H&C determination had not been made at the time the matter came before the Court, but the removal date had passed as a stay had been granted. The Court stated that the proper characterization of the controversy was whether the Applicant should be removed prior to the happening of a particular event, in that instance prior to the determination of the H&C application. As the H&C application had not yet been determined, the Court held that the controversy remained a live one.

[14] In this instance, the correct characterization of the controversy between these parties is whether the Applicant should be removed prior to the decision on her second PRRA. That

decision has now been made and the parties agree that on the basis of *Baron*, the controversy between them is moot.

[15] The Applicant submits that while there is no longer a live controversy between the parties, there remains an adversarial relationship between them and that the Court should exercise its discretion to hear the merits of the application, notwithstanding the mootness of the issue in the application. In *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 the Supreme Court held that when deciding whether to exercise discretion to hear a matter, notwithstanding that it is moot, the judge should consider three factors: (1) the existence of an adversarial relationship between the parties; (2) the concern for judicial economy; and (3) the need for the Court not to intrude into the legislative sphere.

[16] In the present matter, the Applicant submits that there remains an adversarial relationship between the parties. I am not convinced. The Applicant may well disagree with the decisions on the second PRRA and the H&C application and has the option to seek leave to review those decisions. That has not yet occurred. Until she does, it cannot be said that there is any *lis* between the parties except for this application, which is moot. The Applicant submits that the issue giving rise to the adversarial relationship is not whether the removal should have been deferred but whether the officer, in making the decision not to defer removal, ought to have considered the new evidence of video surveillance. I do not accept that as framed, that question remains “live” in any meaningful sense of the word, as the officer in deciding the second PRRA did consider the new evidence.

[17] I am satisfied that there is no judicial economy to be served by considering the application on the merits. The Applicant submits that the Court's decision on the merits will provide guidance to other enforcement officers faced with a request for an administrative stay where there is evidence submitted that was previously available but not considered and thus the decision in this matter may reduce the number of other proceedings filed with this Court. First, such situations arise rarely. Second, I agree with the Respondent that an officer's decision as to whether to consider "new" evidence is very fact specific and is dependent on the reasons why the evidence was not previously submitted. Accordingly, the Court's guidance, if any, from deciding this matter will be of little value to other parties.

[18] A decision on the merits will clearly not intrude into the legislative scheme. The Respondent submitted that any decision in this application may impact on a potential judicial review of the second PRRA decision. I fail to see that connection as the decisions underlying them are distinct and discrete.

[19] Weighing the relevant factors, I come to the view that I ought not to exercise my discretion to hear the application on its merits. A decision on the merits can have no impact on these or other potential parties.

[20] The Applicant proposed that the Court certify a question which I phrase as follows: Is there any impediment to an Enforcement Officer, when considering a deferral request, to

consider evidence that was not before the PRRA officer but which could have been had it been submitted at the earliest opportunity?

[21] In order to be certifiable, the question must be a serious question of general importance which would be dispositive of an appeal. As the only issued determined herein is whether I ought to exercise my discretion to hear the application, notwithstanding that the *lis* is moot, the question as proposed could not be dispositive of an appeal. No question will be certified.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that the application for judicial review is dismissed on the ground that it is moot and no question is certified.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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