Federal Court		Cour fédérale

Date: 20100610

Docket: IMM-2484-10

Citation: 2010 FC 625

Toronto, Ontario, June 10, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

JOTHIRAVI SITTAMPALAM

Applicant

and

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

Respondents

REASONS FOR ORDER AND ORDER

[1] This concerns a motion pursuant to section 18.2 of the *Federal Courts Act* and to Rule 372(2) of the *Federal Courts Rules* submitted late in the afternoon of June 8, 2010 on behalf of Jothiravi Sittampalam (the "Applicant'') for the stay of the enforcement of his removal scheduled

for the afternoon of June 10, 2010. A special urgent oral hearing on this motion was held before me in Toronto on June 9, 2010.

The context and background

[2] This motion is the continuation of difficult and protracted litigation between the parties concerning the removal of the Applicant which has been on-going for many years.

[3] I need not review the entire history of this litigation. I do however note the following salient aspects which are particularly pertinent for the purposes of disposing of this motion.

[4] The Applicant has been found to be inadmissible to Canada for both serious criminality and organized criminality pursuant to paragraphs 36(1)(a) and 37(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act"), based on various criminal convictions and on a reasonable ground to believe that he was a member and leader of the A.K. Kannan Tamil street gang operating out of the Toronto area. This gang is said to have been involved in numerous serious crimes affecting members of the local Tamil community. This inadmissibility finding has been upheld by this Court and the Federal Court of Appeal.

[5] As a Convention refugee, the Applicant cannot be removed from Canada unless the Minister is of the opinion, pursuant to paragraph 115(2)(a) of the Act, that he is a danger to the public in Canada, or pursuant to paragraph 115(2)(b)of the Act, that he should not be allowed to remain in Canada on the basis of the nature and severity of the acts committed.

[6] On July 6, 2006, the Minister's delegate issued an opinion under paragraphs 115(2)(a) and 115(2)(b) of the Act concluding that the Applicant does pose a danger to the public in Canada and that the nature and severity of the acts he committed are such that he should not be allowed to remain in Canada (the "danger opinion"). The Minister's delegate further determined that the Applicant does not face a substantial risk of torture, a risk to life, or a risk of cruel and unusual treatment or punishment in Sri Lanka, and that the Applicant's humanitarian considerations are not such as to prevent his removal from Canada (the "risk assessment").

[7] The Applicant challenged this decision in judicial review and was granted a stay of removal pending the disposition of his application.

[8] Justice Snider allowed in part the judicial review of these findings of the delegate: *Sittampalam v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 687, 316 F.T.R. 142, [2007] F.C.J. No. 932 (QL). Justice Snider clearly upheld the danger opinion. However, she returned the matter to the Minister's delegate in order to proceed with a new risk assessment. Indeed, Justice Snider found that the Minister's delegate had failed to consider all the evidence then available, and had not proceeded with the balancing exercise contemplated by *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3; 2002 SCC 1.

[9] On January 11, 2008, the Minister's delegate issued a new risk assessment, again finding that although there was some possibility of risk, the Applicant's removal would not reasonably expose him to a risk of persecution, torture, cruel or unusual treatment or punishment in Ski Lanka.

The Minister's delegate further concluded that the danger opinion outweighed any risk to the Applicant should he be removed.

[10] The Applicant again challenged this decision in judicial review and was again granted a stay of removal pending the disposition of his application.

[11] Justice Mandamin found the treatment of the evidence by the Minister's delegate in this new risk assessment to be flawed and unreasonable. He also found that the balancing exercise required under *Suresh* had not been properly carried out: *Sittampalam v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 65, 340 F.T.R. 53, [2009] F.C.J. No 59 (QL).

[12] Following this decision of Justice Mandamin, the same delegate issued a new risk assessment dated April 14, 2010 concluding again that the Applicant would not be subject to a substantial risk of torture or risk to life or to cruel and unusual treatment or punishment if he returned to Sri Lanka, and also concluding that there was no indication that the Applicant would be more at risk than other residents of Sri Lanka.

[13] This third risk assessment was again challenged by the Applicant who has submitted a still pending application for leave and for judicial review before this Court.

[14] Concurrently with this leave application, the Applicant sought to obtain again a stay of his removal pending the outcome of these new judicial proceedings.

[15] The motion for stay of removal was argued before Justice Shore. He refused to grant the stay for the reasons set out in a very recent decision dated May 21, 2010: *Sittampalam v. Canada (Minister of Citizenship and Immigration and Minister of Public Safety and Emergency Preparedness)*, 2010 FC 562.

[16] Justice Shore found that the Minister's delegate did not ignore any evidence or fail to properly assess the evidence submitted. Consequently he found that the Minister's delegate had properly carried out a new adequate risk assessment as ordered by Justice Mandamin.

[17] Justice Shore also found that the Applicant had not established irreparable harm since he failed to demonstrate on a balance of probabilities that he would experience harm if returned to Sri Lanka. Finally, Justice Shore found that in light of his criminal convictions and the danger opinion, the balance of convenience weighted heavily in favour of the removal of the Applicant on public interest considerations.

[18] The Applicant sought to appeal the order of Justice Shore to the Federal Court of Appeal on the basis of bias and challenging the merits of the decision. Justice Pelletier refused to accept the filing of the proceedings for the following reasons dated May 21, 2010:

> Please advise Ms. Jackman that her material is not accepted for filing. The judge who decided the matter which she seeks to appeal did not certify a question. Under section 79, there is no right of appeal in the absence of a certified question. As for the question of an apprehension of bias, the basis of the allegation, as disclosed by the affidavit evidence is unsound. It is essentially a statistical approach with no means of controlling factors which might otherwise explain the result. This Court can only grant interlocutory

> injunction if there is some matter before it over which it has jurisdiction. That is not the case here.

[19] Unsatisfied, the Applicant decided to choose another forum in which to adjudicate his case and stay his removal. Consequently, a motion was submitted in the Ontario Superior Court of Justice to obtain a stay of removal. An interim stay was granted for a few days, but the matter was quickly dismissed by Justice Brown on May 28, 2010 in *Sittampalam v. Canada (Attorney General)*, 2010 ONSC 3205 on the basis that that the Ontario Superior Court did not have jurisdiction over the matter. In so doing, Justice Brown concluded that the Applicant was pursuing a course of forum-shopping (at para. 31 of the decision):

> Second, on his motion to continue in this court Mr. Sittampalam wishes to re-litigate issues already fully argued and decided before the Federal Court. The relief he seeks before the Superior Court of Justice is virtually identical to that which he sought before the Federal Court. Shore J. gave extensive reasons for denying the applicant an injunction preventing his removal. As I read the applicant's materials in this court, he simply wishes to re-litigate the same issues. That indicates to me that Mr. Sittampalam is engaged in forum shopping. Although the respondents stated that they were not relying on the principles of *res judicata* or issue estopel, the Supreme Court of Canada has spoken clearly about the need for courts to scrutinize attempts by parties to re-litigate matters already decided.

[20] Following his unsuccessful attempt in securing a stay in the Ontario Superior Court, the Applicant is now pursuing another attempt to obtain a stay of his removal before the Federal Court.

[21] On June 7, 2010, the Applicant's counsel wrote to an enforcement officer seeking a deferral of his removal alleging that new information contained in news and related reports concerning Sri Lanka supported his claims, and also relying on an affidavit from a Mr. Nagalingam which is

discussed further below. The deferral was sought for the time required by the Minister's delegate to consider this allegedly new information.

[22] The day following this deferral request, on June 8, 2010, the Applicant submitted this motion seeking anew a stay of the Applicant's removal.

The issues

[23] Though numerous issues have been raised by both parties within the framework of this motion, they can be summarized in two opposing propositions.

[24] The Applicant basically argues that the allegedly new evidence must be assessed by the minister's delegate prior to his removal in light of the novelty and importance of this information, which directly addresses the serious risk he will face should he be removed to Sri Lanka. This Court should thus grant the stay since a new serious issue has now only recently come to light: must the minister's delegate consider new information prior to removing the Applicant? The Applicant adds that irreparable harm and the balance of convenience can also be reassessed anew by this Court in light of this new serious issue and in light of the importance of the new information addressing risk which renders moot the decision of Justice Shore on these matters.

[25] The Applicant's arguments are characterized by the Respondents as a naked attempt at judge shopping and as an abuse of the judicial process. The Respondents add that the allegedly new information is simply a rehash of existing information that was both before the minister's delegate

and Justice Shore, and this Court should not entertain such a blatant abuse of process. Issue estoppel is raised.

Analysis

[26] The entire argument of the Applicant is premised on the assumption that the information provided is novel, compelling and important. After carefully reviewing this information, and as further discussed below, I find that the issues raised by this motion and the allegedly new evidence submitted are not substantially different from what was before Justice Shore as dealt with in his recent decision dated May 21, 2010 pursuant to which the Applicant's prior motion for a stay of his removal was denied.

[27] This motion brought on behalf of the Applicant is a thinly disguised attempt to overturn the above-mentioned decision of Justice Shore through a new decision by another judge of this Court. The Applicant has been forum shopping and is now judge shopping.

[28] The additional news reports add little to previous reports concerning the difficult situation in Sri Lanka. Many of these documents predate the decision of Justice Shore and were actually submitted to him by the Applicant.

[29] None of these documents are so compelling that they could result in a different risk assessment by the minister's delegate. This is recognized in the affidavit of Patricia Watts submitted in support of the Applicant's motion, and which candidly states at paragraph 11 that

notwithstanding this allegedly new information, the minister's delegate decision is nevertheless expected "to be negative".

[30] As for the affidavit of Mr. Nagalingam, this document is dated August 6, 2009 and was thus available to the Applicant and his counsel prior to both the minister's delegate decision and the order of Justice Shore. The Applicant's counsel states that she was not aware of the existence of this affidavit until very recently. I have no evidence before me nor any reason to dispute the sincerity of counsel's statement on this matter, however it remains a fact that Mr. Nagalingam and the Applicant were and are represented by the same law firm. The issue is not if the affidavit was known, but rather if it was reasonably available. In light of the circumstances at hand, I can only conclude that this affidavit was reasonably available to the Applicant or his counsel since at least August 2009.

[31] Moreover, the plight of Mr. Nagalingam was extensively discussed by both the minister's delegate in the risk assessment and by Justice Shore in his order, and the affidavit adds very little to what was already known.

[32] Consequently the arguments based on allegedly new information are nothing more than a last minute desperate attempt by the Applicant to seek to overturn the decision of Justice Shore by another judge of this Court, after having failed with the Federal Court of Appeal and through forum shopping in the Ontario Superior Court.

[33] The words of Justice Rothstein in *Zolfiqar v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1790 (QL) at para. 20 are apposite in the circumstances of this case:

> The Court must maintain opened and ready access, especially in serious cases such as applications to stay deportation orders. However, that important purpose must not be debased by repetitious applications involving forum shopping and judge shopping. This application is an abuse of the process. It should not have been brought. The application is dismissed.

ORDER

THE COURT ORDERS that this motion is denied.

"Robert M. Mainville"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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