Federal Court  Cour fédérale

Date: 20101025

Docket: IMM-1396-10

Citation: 2010 FC 1046

BETWEEN:

ZEF SHPATI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Dockets: IMM-6518-09
IMM-6522-09

AND BETWEEN:

ZEF SHPATI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

HARRINGTON J.

[1] Zef Shpati almost had it all. He spent the first 25 years of his life interned in a labour camp in Albania. In 1991 he escaped to what was then Yugoslavia. The United Nations High Commissioner for Refugees named him as a person of concern. He was issued travel documents to the United States. He settled in Michigan with his wife and children and became a permanent resident of that country. His parents and brother came to live in the same neighbourhood.

[2] Years later he did a very stupid thing. He used his wife's Permanent Resident Card (Green Card) to bring his brother's wife into the United States. He was caught out and deported back to Albania in 2005. He promptly turned around and came to Canada where he unsuccessfully applied for refugee status.

[3] He then sought a pre-removal risk assessment (PRRA) and asked for permission to apply for permanent resident status from within Canada on humanitarian and compassionate grounds (H&C). His requests were denied. At that point he was ready to be removed from Canada. Section 48 of the *Immigration and Refugee Protection Act* (IRPA) requires that such a foreign national leave Canada immediately. If not, the removal order "must be enforced as soon as is reasonably practicable."

[4] He promptly filed applications in this Court for leave and for judicial review of both decisions. While those applications for leave were pending, an enforcement officer with the Canada Border Services Agency sought to remove him to Albania. Mr. Shpati requested that his removal be

deferred pending the outcome of the two applications. The officer refused. This gave rise to a third application to this Court, one for leave and for judicial review of that decision. He also moved this Court for a stay of his removal pending the outcome of the three judicial reviews.

[5] In March of this year I granted a stay pending the outcome of the application for leave and for judicial review of the decision of the enforcement officer not to defer. I dismissed the motions in the PRRA and H&C applications as they were then moot. My reasons are reported in *Shpati v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 367.

[6] Thereafter, I granted leave in all three applications. The judicial reviews were heard together.

THE STAY OF REMOVAL

[7] The reasons I granted a stay of removal in the application for leave and for judicial review of the enforcement officer's decision not to defer are fully set out in my earlier decision. Suffice it to say that the officer's opinion that if Mr. Shpati succeeded in his PRRA he would be able to return to Canada raised a serious issue in that it did not take into account the decision of the Federal Court of Appeal in *Perez v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 171, 82 Imm. L.R. (3d) 167. That case stands for the proposition that only those physically in Canada are entitled to a PRRA. Even if one is removed from Canada involuntarily, the PRRA still becomes moot. The irreparable harm was that the officer assessed the risk Mr. Shpati might face on return to Albania, an assessment which he was not qualified to carry out. It followed that the balance of convenience

favoured Mr. Shpati. The inconvenience to the Minister is that if Mr. Shpati is not ultimately successful in either his PRRA or H&C application he will remain for a short time beyond his normal removal date. This hardly compares to risk to Mr. Shpati's life and limb.

LEAVE TO JUDICIALLY REVIEW

[8] One does not have an automatic right to have a decision under IRPA judicially reviewed. Section 72 of the Act provides that leave must first be obtained and, unless the judge otherwise directs, the application shall be disposed of "without delay and in a summary way." The practice is such that the decision is made without a hearing and without providing reasons, whether the decision be to grant or to deny leave.

[9] Leave is to be given if there is a fairly arguable case, which certainly is a standard less than that of the balance of probabilities. The leading case is that of the Federal Court of Appeal in *Bains v. Minister of Employment and Immigration* (1990), 109 N.R. 239, 47 Admin. L.R. 317. I endeavoured to set out my understanding of the process in *Hinton v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1007, 333 F.T.R. 288.

[10] In order to give an applicant a fair opportunity to make his or her case and the respondent, usually the Minister, a fair opportunity to reply, the *Immigration and Refugee Protection Rules* of the Federal Courts set out a schedule for the filing of affidavits and the filing of written memoranda of fact and law. It is noteworthy that unless otherwise directed, affiants are not to be cross-examined before leave is granted.

[11] Once leave is given, the hearing must take place within 90 days. The typical order granting leave, as do the orders in these cases, requires the underlying tribunal to provide copies of its record to the parties and to the Court, contemplates that further affidavits may be filed by both the applicant and the respondent, that affiants may be cross-examined and that the applicant and respondent may file further memoranda of argument.

JUDICIAL REVIEW OF THE PRRA

[12] Mr. Shpati's refugee claim had been dismissed as country conditions had certainly changed in Albania in the 15 years since he had left. His credibility was suspect in that it was thought that he attempted to embellish a land dispute involving his family. It was found that state protection and an internal flight alternative were available.

[13] The tri-partite test used to determine whether an interlocutory injunction or a stay of proceedings should be granted has no application in the judicial review of the PRRA decision, and for that matter of the H&C decision and the refusal to grant an administrative deferral. The question is whether the decision maker erred in law or made an unreasonable finding of fact, either or both of which led to an unreasonable decision. In light of the Supreme Court's holding in *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, issues of law are usually assessed on the standard of correctness, while issues of fact and mixed questions of fact and law are assessed on a reasonableness standard. Although some decision makers have been accorded deference in the

interpretation of their home or closely related statutes, that has never been the case with respect to those administering IRPA.

[14] The PRRA is limited to new evidence, meaning, in accordance with section 113 of IRPA, 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." This new evidence must be evidence which gives rise to a well-founded fear of persecution within the meaning of section 96 of IRPA or to a danger of torture or to a risk to life or to a risk of cruel and unusual treatment or punishment in accordance with section 97.

[15] Mr. Shpati, at first glance, arguably presented new evidence in the form of letters that the ousted communists were still powerful and still looking to do him harm. Reference was also made to an assassination.

[16] However, having now had benefit of full argument and the opportunity to reflect, I am satisfied on the balance of probabilities that the officer's decision was reasonable and should stand. The information provided was extremely vague. The officer was justified in giving little weight to the documents and in considering that Mr. Shpati's allegations were speculative. He had not successfully rebutted the presumption of state protection with new evidence.

JUDICIAL REVIEW OF THE H&C APPLICATION

[17] The normal rule is that a person must apply for a permanent resident visa from outside Canada. However section 25 of IRPA, as it was at the time, provides that the Minister may examine the circumstances of a foreign national who is inadmissible or who does not meet the other requirements of the Act and grant him or her permanent resident status, or an exemption from any other applicable criteria, if of the opinion that such is justified by H&C considerations "taking into account the best interests of a child directly affected, or by public policy considerations."

[18] The decision maker is called upon to balance the applicant's establishment in Canada against his life in his homeland, coupled with a prediction as to whether an application for permanent resident status from outside Canada, which is the rule, would constitute unusual and undeserved or disproportionate hardship. Even if concerns of persecution and risk do not satisfy sections 96 and 97 of IRPA, they may still be relevant in an H&C application with risk allegations (*Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2010 FCA 177, 321 D.L.R. (4th) 111).

[19] I find the officer's decision (not the same one who decided the PRRA) to be, in the language of section 18.1 of the *Federal Courts Act*, "perverse or capricious."

[20] During the five years Mr. Shpati has been in Canada, and even before that when he attempted to enter Canada as a visitor in 2001, his story has been consistent and accepted by every decision maker other than the H&C officer.

[21] Mr. Shpati's wife is also Albanian. However she and their three children are now American citizens. His parents, and interestingly enough his brother and smuggled sister-in-law, live near her. Mr. Shpati is the sole support of his wife and children. A river, the Detroit River, runs through their lives. They live 30 kilometres apart. The family comes over from Canton Township, Michigan, on weekends and holidays and stays with him in Windsor. He is constantly in communication with them. Indeed, the telephone bill produced suggests two telephone calls a day.

[22] The officer found that he had not submitted documentation to support the proposition that he had been a permanent resident of the United States. However, a copy of his Permanent Resident Card was already on file. She also concluded that there was no evidence that his wife and children were even permanent residents of the United States, much less citizens, and that there was no evidence that his family had visited him in Canada on a regular basis. She was not satisfied that relocating and resettling back in Albania would have a significant negative impact on the children or the family as a whole that would amount to unusual and undeserved or disproportionate hardship.

[23] A number of statements as to Mr. Shpati's situation are to be found in lawyers' letters going back to 2006. It has been held in *Ferguson v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067, 74 Imm. L.R. (3d) 306, that there are instances in which statements from counsel may be considered as evidence. In this case in addition to statements from counsel there were others of more recent vintage from an immigration consultant. Given that Mr. Shpati's family situation had always been accepted without question, he should have been informed that the officer wanted more particulars. There is no pleasing some people, and what satisfies some may not satisfy others.

Previous acceptance of his story led Mr. Shpati's advisors to naturally assume it would be accepted again. This is not a case of insufficient evidence. This is a case of credibility. Indeed, if the officer was concerned with Mr. Shpati's credibility, she should have conducted a hearing as prescribed under section 167 of the *Immigration and Refugee Protection Regulations*.

[24] Given how important this decision was to Mr. Shpati, and to his wife and children, and considering the public policy of family reunification, it was completely inappropriate for the officer to choose not to believe. If she had concerns, natural justice dictates that she should have expressed them and given him an opportunity to address them. Mr. Shpati currently has a good job in Windsor. No analysis was done of the employment situation in Albania, the gross domestic product of that country as compared to Canada and the extent to which, while living in Albania, he would be able to support his family.

[25] If the officer doubted that Mr. Shpati's wife was also a Convention refugee reluctant to return to Albania, that doubt should have been raised, so it could have been answered.

[26] The officer does not even suggest that an application by Mr. Shpati from outside Canada for permanent residence would be successful. At present, we have a situation comparable to many who commute between their work and their home on a weekly basis. This banishment to Albania certainly did not have the best interests of the children in mind.

[27] Childhood does not last forever. In *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, Madam Justice L'Heureux-Dubé noted at paragraph 15 that H&C decisions affect the future of individuals' lives in a fundamental manner even if only separated from one parent. She added at paragraph 66 that Parliament placed high value on keeping families together. The river that runs through the Shpatis' lives means that their situation is far from perfect, but it is far better than the alternative. I find the decision unreasonable.

[28] Although I have primarily focused on Mr. Shpati's situation in Canada, with his dependent wife and children near by, but able to visit him regularly, the officer also listed Mr. Shpati's concerns that he would suffer great emotional and psychological hardship if required to return to Albania. She simply concluded that given his employment record he would be able to re-establish himself in Albania. The fact is that he was never established in Albania. There was absolutely no analysis done as to whether a return to a country from which he escaped because he had lived his entire life there in a labour camp constituted unusual and underserved or disproportionate hardship. No consideration was given of the impact of returning to a place where he changed his name to hide his Catholic identity. A statement of fact coupled with a conclusion, but without an analysis, does not constitute reasons and is in breach of procedural fairness (*R. v. Sheppard*, 2002 SCC 26, [2002] 1 S.C.R. 869, and *North v. West Region Child and Family Services Inc.*, 2007 FCA 96, 362 N.R. 83).

THE JUDICIAL REVIEW OF THE REFUSAL TO DEFER

[29] The concern I had that Mr. Shpati was about to be sent by an officer, who had no training in these matters, to a place where he might suffer irreparable harm has now been dissipated. Had the officer deferred to the judicial process, Mr. Shpati would be in exactly the same position in which he presently finds himself. The judicial review of his PRRA was dismissed. The judicial review of the H&C decision has been granted. The interlocutory stay I granted has now been spent. He is entitled to a redetermination of his application for permanent residence from within Canada.

[30] An H&C application does not automatically give rise to an administrative stay pending the outcome of what, in this case, will be a *de novo* review. The Canada Border Service Agency could, notwithstanding that judicial review has been granted, again take the position it is "reasonably practicable" within the meaning of section 48 of IRPA to remove Mr. Shpati now. Should Mr. Shpati be ultimately successful in the reconsideration of his H&C application, even if removed now, he would, as the jurisprudence presently stands, be permitted to return (*Shchelkanov v. Canada (Minister of Employment and Immigration)* (1994), 76 F.T.R. 151, and S*elliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261).

[31] The question which naturally rises is whether this particular judicial review has now become moot in light of the fact that the judicial review of the PRRA has been dismissed. Certainly there is no point to the usual remedy of sending the matter back to another enforcement officer for a fresh determination. However it does not follow that the judicial review itself has become moot. One of the remedies open to the Court under section 18.1 of the *Federal Courts Act* is to declare a decision, order, act or proceeding to be invalid, and to set it aside, without ordering more. There is still a live

controversy between the parties. Mr. Shpati is still removal ready but wishes to remain in Canada pending his H&C redetermination (*Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, 309 D.L.R. (4th) 411).

[32] My concern with respect to the PRRA was that, as I understand it, the effect of the decision of the Federal Court of Appeal in *Perez*, above, is such that if removed Mr. Shpati loses any right he would have had to return, unless the Court decides to hear a matter which has become moot. Although it is open to the Minister to grant a temporary stay while an H&C application is being considered, there is no indication as yet that that will be done while Mr. Shpati's case is being reconsidered (*Immigration and Refugee Protection Regulations*, section 233).

[33] Faced with a motion for a stay presented on an urgent basis, a motions judge rarely has an opportunity to consider the merits of the case in a meaningful way, particularly when it comes to disputed issues of fact. The Supreme Court does not expect a motions judge to be in position to make such crucial findings (*Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311). Furthermore, the file at the time the motion is heard is incomplete. I am guided by the decision of Mr. Justice Pelletier in *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 F.C. 682, where he said at paragraph 45:

> The order whose deferral is in issue is a mandatory order which the Minister is bound by law to execute. The exercise of deferral requires justification for failing to obey a positive obligation imposed by statute. That justification must be found in the statute or in some other legal obligation imposed on the Minister which is of sufficient importance to relieve the Minister from compliance with section 48

> of the *Act*. In considering the duty imposed and duty to comply with section 48, the availability of an alternate remedy, such as a right of return, should weigh heavily in the balance against deferral since it points to a means by which the applicant can be made whole without the necessity of non-compliance with a statutory obligation. For that reason, I would be inclined to the view that, absent special considerations, an H & C application which is not based upon a threat to personal safety would not justify deferral because there is a remedy other than failing to comply with a positive statutory obligation.
>
> [My Emphasis.]

[34] In this case, unlike *Wang*, Mr. Shpati's H&C application also raised a threat to personal safety. Although it was determined in his refugee claim and in his PRRA that he did not have a well-founded fear of persecution and was not a person in need of Canada's protection because of a danger of torture, a risk to life or a risk of cruel and unusual treatment or punishment within the meaning of sections 96 and 97 of IRPA, the same elements may well constitute unusual and underserved or disproportionate hardship.

[35] This case also differs from *Wang* in that in *Wang* the request to the enforcement officer was to defer until the H&C decision was rendered. This naturally brought forth the requirement that the judge considering the motion for the stay take a close look at the merits since the interlocutory motion, if granted, would in effect decide the merits of the matter. In this case the PRRA and H&C have already been decided. Thus the request was for a much shorter deferral – just until such time as the application for leave was decided, and if given, just until the judicial review was decided.

[36] In the circumstances I do not consider the matter moot. The implications of *Perez*, above, have given rise to considerable concern and to uneven treatment of stay motions. Stays have been granted based on the implications of *Perez.* Stays have been refused as *Shpati* has been distinguished on its facts. Stays have been refused with no reference whatsoever to *Perez* or to *Shpati.*

[37] Stays based on concerns similar to those I expressed in *Shpati* were granted by Mr. Justice Phelan in *Dhurmu v. Minister of Citizenship and Immigration*, IMM-1610-10, and in *Dhurmu v. Minister of Public Safety and Emergency Preparedness*, IMM-1759-10. Mr. Justice Hughes did likewise in *Gjokaj v. Minister of Citizenship and Immigration* and *Gjokaj v. Minister of Public Safety and Emergency Preparedness*, IMM-1726-10 and IMM-2002-10.

[38] *Shpati* was distinguished by Mr. Justice Mosley in *Sansores v. Minister of Citizenship and Immigration*, IMM-2532-10, on the grounds that the enforcement officer did not attempt to assess risk (which, as I held at paragraph 43 of *Sphati*, was clearly outside the discretion provided by section 48 of IRPA). Mr. Justice de Montigny also refused to grant a stay in *Cui v. Minister of Citizenship and Immigration*, IMM-4159-10, and in *Cui v. Minister of Public Safety and Emergency Preparedness*, IMM-4206-10. He pointed out that *Shpati* was circumscribed by the particular facts underlying it.

[39] In *Therqaj v. Minister of Citizenship and Immigration*, IMM-3598-10, Mr. Justice Zinn referred to *Shpati* but did not accept that the moot judicial review application of a negative PRRA decision automatically results in irreparable harm.

[40] Finally in *Karthikeyan v. Minister of Citizenship and Immigration*, IMM-1602-10, and in *Idyamat v. Minister of Citizenship and Immigration*, IMM-2740-10, Justices Crampton and Boivin dismissed motions for stays. The speaking orders do not indicate one way or another whether they were referred to *Perez* and to *Shpati*.

[41] It seems to me that this Court, counsel and those who administer IRPA would benefit from the wisdom of the Federal Court of Appeal in these matters.

[42] Building on what I said earlier in the first *Shpati*, both parties took issue with paragraph 45 thereof which reads:

> Although an application for leave and for judicial review of a negative PRRA does not automatically result in a stay, I find it difficult to accept that Parliament intended that it was "reasonably practicable," for an enforcement officer, who is not trained in these matters, to deprive an applicant of the very recourse Parliament had given him.

I remain strongly of that view, but emphasize that *Perez* did not deal with a refusal by an enforcement officer to defer. *Perez* dealt with a decision of this Court not to grant a stay.

[43] Mr. Shpati suggests, based on *Wang*, above, and *Baron*, above, that the enforcement officer has to consider if the underlying applications for judicial review of negative PRRA and H&C

decisions, with risk allegations, were made in good faith, and in a timely fashion. If so, an administrative deferral should be granted as the decision whether or not to grant leave would come down in the next few months. The Minister notes, however, and rightly in my view, that a timely application for leave and for judicial review when a person is already removal ready does not automatically result in a stay.

[44] Both parties point out, however, that circumstances could change after a negative PRRA, or a negative H&C decision, which might give rise to fresh administrative applications. In such instances the H&C and PRRA officers seized of these new applications would not be in position to make a quick decision before the scheduled removal and so there would be no underlying decision upon which a stay of removal could be granted or refused by this Court; unless the enforcement officer was asked to defer the removal and refused. I agree with that proposition and believe I covered it in paragraph 47 of my earlier reasons. Certainly it is well established that the officer has discretion under section 48 of IRPA to time removals by taking into consideration fitness to travel, the end of a school year, refund of a rental deposit, medical issues and whether an H&C decision should have already been rendered save for bureaucratic delays.

[45] What I do say however is that an enforcement officer has not been empowered to opine on decisions already rendered on PRRA or H&C applications with risk elements. Nor is he or she in a position to opine whether an applicant will be successful in an application for leave and for judicial review already filed. I accept that the officer has jurisdiction to defer removal on the basis that a

decision will soon be rendered by the Court. However it is also open to the officer to refuse, leaving it to the applicant to seek a stay from a judge of this Court.

[46] As mentioned in my earlier decision in *Shpati* it may be that in *Perez* the Federal Court of Appeal was limiting itself to the case before it which was a dismissal of a stay motion by a judge of this Court, not a refusal by an enforcement officer to defer in favour of the judicial process.

[47] Notwithstanding that *Perez* might be distinguishable, it does not appear that way on its face. Consequently, judicial review should be granted as the enforcement officer erred in law in stating that if successful in his PRRA, Mr. Shpati would be entitled to return to Canada. The remedy, however, since he is entitled to a new H&C, is simply a declaration to that effect – no more.

CERTIFIED QUESTIONS

[48] At the close of the hearing, I stated that I was inclined to dismiss the PRRA, and to grant the H&C. The only indication I gave with respect to the decision not to defer was my concern that there may be an element of mootness involved. The parties were invited to frame questions for certification accordingly.

[49] Neither party proposed a question in IMM-6522-09, the H&C decision. None shall be certified.

[50] In IMM-6518-09, the PRRA decision, Mr. Shpati proposed two questions. The first one is:

> Where the newly acquired documents corroborate, validate or clarify an alleged risk that was advanced previously at their refugee hearing, must the PRRA officer consider this evidence "new" for the purposes of a PRRA analysis?

[51] The second more properly relates to the role of the enforcement officer and will be considered in that context.

[52] In my opinion, the "new" evidence proffered by Mr. Shpati was not, for the reasons stated, "new" evidence at all and would not support a successful appeal. I decline to certify.

[53] With respect to IMM-1396-10, the refusal to defer removal by the enforcement officer, there are three proposed questions, one by Mr. Shpati and two by the Minister.

[54] Mr. Shpati's second question is this:

> Where an applicant has pending PRRA litigation before the Court, does this pending litigation require that he be allowed to remain in Canada until its conclusion in view of section 72 of the *IRPA*, section 31(2) of the *Interpretation Act*, *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817 and the Respondent's Manual PP3, without the necessity to seek an application for a stay of removal?

[55] The Minister proposed two questions in the alternative:

> When a foreign national has a negatively determined PRRA, has filed an application for leave and judicial review of that PRRA decision, but continues to maintain the same allegation of risk in a request to defer removal, does an enforcement officer have the discretion to defer removal on that basis alone or must a judicial stay based on the PRRA application for leave and for judicial review be sought in Federal Court?

and:

> Does the potential mootness of an applicant's PRRA litigation upon removal warrant a deferral of removal pending resolution of this same litigation?

[56] My decision is final, without an appeal to the Federal Court of Appeal unless in accordance with section 74 of IRPA, I certify that a serious question of general importance is involved.

[57] In *Canada (Minister of Citizenship and Immigration) v. Liyanagamage* (1994), 176 N.R. 4, the Federal Court of Appeal was of the view that:

a. The question must be one that transcends the interests of the parties to the litigation and contemplates broad significance or general application;

b. The question must be dispositive of the appeal;

c. The certification process is not to be equated with declaratory judgments of questions that need not be decided in order to dispose of the case, or be equated with the reference process.

[58] In *Zazai v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 89, 318 N.R. 365, the Federal Court of Appeal added that if the judge in first instance decided that an issue need not be dealt with, such issue would not be an appropriate question for certification.

[59] More recently in *Varela v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 145, [2010] 1 F.C.R. 129, Mr. Justice Pelletier speaking for the Federal Court of Appeal added that a serious question of general importance must arise from the issues in the case and not from the judge's reasons.

[60] In *Varela*, above, I certified a number of questions. I certified them notwithstanding I was comfortable with my own reasons. Would it have made a difference if I had expressed doubt? Lord Denning in his *The Discipline of Law*, Oxford University Press, 1979, quoted Sir George Jessel as saying "I may be wrong and sometimes am, but I am never in doubt." The issue is not how strongly the views of the judge in first instance are held, but rather whether he or she is open enough to realize that there may be another point of view.

[61] Nevertheless, guided by *Zazai* I did not even deal with the *Interpretation Act* and so will not certify a question related thereto.

[62] The thrust of Mr. Shpati's other question is that *Perez* was wrongly decided. As the Minister is the only possible appellant, that issue would not be depositive of the appeal as per *Liyanagamage*, above. However, as per *Varela,* above, and previous cases, if another question is certified, it is open to the Federal Court of Appeal to consider all relevant issues.

[63] It is not for me to say that *Perez* was wrongly decided. It is for the Federal Court of Appeal to decide the extent to which it is prepared to revisit its own decisions. The Court of Appeal has taken the position that it, as an intermediate court of appeal, ought not to depart from a decision of an earlier panel merely because it considers that the first case was wrongly decided. The Supreme Court would normally be the appropriate forum. The leading case is *Miller v. Canada (Attorney General),* 2002 FCA 370, 220 D.L.R. (4th) 149, based to a considerable extent upon its earlier

decision in *Canada (Minister of Employment and Immigration) v. Widmont,* [1984] 2 F.C. 274. The Court will not overrule a decision of another panel unless the previous decision was manifestly wrong.

[64] Thus in *Kremikovtzi Trade v. Phoenix Bulk Carriers Ltd.*, 2006 FCA 1, 3 F.C.R. 475, the presiding panel had a point of view different from the Court's earlier decision in *Paramount Enterprises International, Inc. v. An Xin Jiang (The)*, [2001] 2 F.C. 551, but would not depart from it. However, the Federal Court of Appeal allowed the appeal and the Supreme Court allowed the subsequent appeal. In its decision *Phoenix Bulk Carriers Ltd. v. Kremikovtzi Trade*, 2007 SCC 13, [2007] 1 S.C.R. 588, at paragraph 3 of its reasons, the unanimous Supreme Court said:

> […] Whatever the merits of the practice that led the Federal Court of Appeal to allow the appeal, its conclusion that s. 43(2) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, was not satisfied in this case cannot stand.

[65] Neither *Miller* or *Widmont*, above, made reference to the earlier decisions of the Federal Court of Appeal in *Domestic Converters Corporation v. Arctic Steamship Line*, [1980] F.C.J. No. 321 (QL), only officially reported years later at [1984] 1 F.C. 211, and *Miida Electronics, Inc. v. Mitsui O.S.K. Lines Ltd. and ITO -- International Terminal Operators Ltd.*, [1982] 1 F.C. 406.

[66] In *Domestic Converters*, Justices Pratte and Le Dain concluded that Canadian maritime law did not encompass a claim against a terminal operator for loss of cargo after discharge from a ship but before delivery. The third member of the panel, Deputy Judge Lalonde, dismissed the claim

against the terminal operator on the merits and so deliberately refrained from opining on jurisdiction.

[67] Not so many months later, the same issue came up again in *Miida*. Mr. Justice Pratte reiterated that the Federal Court did not have jurisdiction over the terminal operator. Mr. Justice Le Dain said: "On the question of jurisdiction, I am now of the view that I was wrong in the conclusion which I reached in the *Domestics Converters* case." This time, Deputy Judge Lalonde considered jurisdiction and came to the same conclusion as Mr. Justice Le Dain. That is the view which ultimately prevailed in the Supreme Court (*ITO – International Terminal Operators Ltd. v. Miida Electronics Inc.*, [1986] 1 S.C.R. 752 (*The Buenos Aires Maru)*).

[68] The decision as staked out by the Federal Court of Appeal in *Domestic Converters* could hardly be considered one that was "manifestly wrong", yet it was reversed 2-1 by the same panel which had decided it.

[69] I agree with the Respondent's submissions that both questions he submitted are serious, of general importance, address the scope of enforcement officers' jurisdiction, and would support an appeal. I see no reason why both should not be certified.

[70] Based on my reading of *Baron*, above, I consider that a live controversy still exists, so that the matter is not moot. I would have come to the opposite opinion had the judicial review of the H&C decision been dismissed.

SUMMARY

[71] The judicial review in the PRRA, IMM-6518-09, is dismissed. The judicial review in the H&C, IMM-6522-09, is granted. There is no question to certify under either docket number.

[72] The judicial review in IMM-1396-10, the refusal to defer, is granted. Both questions proposed by the Minister are certified.

[73] A copy of these reasons shall be placed in all three docket numbers.

"Sean Harrington"
Judge

Ottawa, Ontario
October 25, 2010

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1396-10
STYLE OF CAUSE:	ZEF SHPATI v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
AND DOCKETS:	IMM-6518-09 IMM-6522-09
STYLE OF CAUSE:	ZEP SHPATI v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 14, 2010
REASONS FOR ORDER:	HARRINGTON J.
DATED:	October 25, 2010

APPEARANCES:

Joel Etienne Dov Maieriovitz	FOR THE APPLICANT
John Provart Nicole Rahaman	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Gertler Etienne, LLP Barristers & Solicitors North York, Ontario	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS