Federal Court  Cour fédérale

Date: 20101122

Docket: IMM-6584-10

Citation: 2010 FC 1169

BETWEEN:

PATHMALOGENI JAYASUNDARARAJAH, ABISHNA JAYASUNDARARAJAH (BY HER GUARDIAN PATHMALOGENI JAYASUNDARARAJAH) AND SUVIGSHAN JAYASUNDARARAJAH (BY HIS GUARDIAN PATHMALOGENI JAYASUNDARARAJAH)

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER

LEMIEUX J.

[1] On Friday November 12, 2010, I stayed the removal to Sri Lanka that country of the Applicants, a Tamil mother and her two minor children, citizens of that country, scheduled for Monday, the 15th of November 2010.

[2] The underlying proceeding to which the stay application was grafted is an application for leave and judicial review dated November 9th 2010 from a deemed refusal to defer their removal

pending the determination of their recently filed applications for permanent residence in Canada based on Humanitarian and Compassionate grounds (new H&C application), filed on July 9, 2010, and as well as a new Pre-Removal Risk Assessment application (the PRRA application), filed on October 22nd 2010. A removal officer decided on November 10th 2010 not to defer their removal which deferral had been requested by the Applicants on November 1, 2010.

[3] These are my reasons for granting that stay.

I. Background

[4] The Applicants were part of a family unit which had included Jayasundararajah Murugan (Mr. Murugan), her husband and the children's father. The couple separated in late 2008 because of his abuse towards his wife over several years. Mr. Murugan was removed to Sri Lanka on November 7th 2010.

[5] As a family unit they came to Canada on September 9, 2004, making a refugee claim which was denied on August 16, 2005 on grounds of credibility, leave to appeal denied on December 1, 2005. An application for permanent residence to Canada with risks, was filed on February 1, 2006, refused on December 22nd 2009, leave to appeal denied on June 8th 2010. A PRRA application was filed on December 28th 2006, refused on December 29th 2009 and leave denied on June 8th 2010.

[6] The family unit was advised on March 1, 2010 that negative decisions had been rendered on their two applications. On October 12th 2010, the Applicants were served with a Direction to Report for Removal on the 15th day of November 2010. Mr. Murugan had previously been interviewed on

October 8th 2010 at which time Canada Border Services Agency (CBSA) was informed by him the couple had separated. Mr. Murugan had been charged in June 2008 with assault on his wife contrary to section 266 of the *Criminal Code*.

[7] On Friday October 22nd 2010, Counsel for the Applicants wrote to the PRRA Office in Toronto filing, on their behalf, a recently completed PRRA application (dated October 18th 2010) and to give that Office a "heads-up" that on the following Monday, October 25th 2010, the PRRA Office would be receiving the Applicants' submissions along with supporting documentation including an affidavit from a friend of the principal applicant regarding the abuse she suffered, a report from psychiatrists and country condition documents on Sri Lanka.

[8] Specifically, that letter of October 22nd 2010 submitted she faced grave personal risks if returned to Sri Lanka, risks which had never been assessed before and ought to be assessed by the PRRA Office prior to her removal. She asked for an urgent consideration of the newly filed PRRA.

[9] On October 25, 2010, the Applicant's Counsel filed the promised material, extensive submissions and documents requesting that documentation ought to be assessed by "an officer with expertise in such matters (…) before their scheduled removal date". It was pointed out that the principal applicant (hereinafter Logeni) and her children had never before had an independent PRRA assessed because the previously filed PRRA had been based on her now separated husband's circumstances and not on her own situation. She submitted their new PRRA application contained new grounds of personalized risk and new information relating to her husband's family in Sri Lanka and also risks from the State since she had been identified as a LTTE sympathizer.

[10] On November 1, 2010, Counsel for the Applicants made a formal request to the Greater Toronto Enforcement Centre to defer their removal. She enclosed the complete set of documents which had been filed with the PRRA Office. She requested deferral "until such time as qualified PRRA and H&C officers have had a chance to consider the [matter]". She requested a decision by November 3rd 2010 at noon and, if that deadline was not met, "I would assume that your decision is in the negative".

[11] As noted on November 10th 2010, the Removal officer refused to defer. The hearing of the stay application proceeded on the basis of the Removal officer's notes to file. I also note that as of Friday the 12th of November 2010, the new PRRA application and the new H&C application still remain outstanding, i.e. have not be decided on the merits.

II. The Minister's Preliminary Observations

[12] Counsel for the Minister made a number of preliminary observations on the stay motion. She argued the stay motion was on abuse of process for the following reasons:

i. the Applicants' have not explained their delay in initiating the deferral request proceedings.
ii. the Applicants' inappropriately imposed an unilateral deadline of less than two days for the completion of a decision on the deferral request on the Respondent Minister.
iii. the Applicants' prematurely filed the present stay motion and underlying application for leave and judicial review prior to the existence of a decision on their deferral request.
iv. the Respondent Minister was forced to prepare a speculative defense for a heretofore non-existent decision within an artificially short time frame.
v. despite the artificial urgency of the present proceedings generated by the Applicants' actions, the Respondent Minister

> and this Court have endeavoured to ensure that the Applicants' receive due process and a fair hearing.

[13] I agree with Counsel for the Minister that the Applicants inappropriately imposed a unilateral deadline of less than two days for the deferral request and prematurely filed an application for leave and judicial review. However, in my view, these factors are not sufficient to lead me to decide not to hear the stay motion particularly when a decision was made on November 10th 2010 upon a request dated November 1st 2010.

[14] It may also be true that the Minister was forced to prepare a speculative defense for a heretobefore non-existent decision. If so, the appropriate remedy is an award of costs for special reasons under section 22 of the *Federal Courts Immigration and Refugee Protection Rules*.

[15] I do not accept Counsel's submission the Applicants had unduly delayed initiating the deferral request. The Applicants did not ask the Removal officer to analyze and decide on the merits the new PRRA application recently filed by the Applicants. She was asked to defer until an official with expertise in these matters had an opportunity to determine the PRRA application. Such a request is not novel and is analogous to the case of a stay application before this Court, where a judge is not expected, in most cases, to decide the underlying issue on the merits but simply to determine whether it has some merit. However, in this case, the Removal officer engaged in a substantive consideration of the merits of the PRRA application which was not appropriate given her limited discretion and, in my view, led her to commit the errors she did.

[16] It also cannot realistically be argued the Applicants unduly delayed the filing of their PRRA application. Leave was denied on the family's February 2006 PRRA on June 8, 2010. The Court has to be sensitive to the fact it took Logeni a considerable amount of time and required some assistance from her friends and a doctor for her to be able to talk of her ordeal as is common with women in her circumstances. In particular, I note Dr. Thirlwell in her October 19, 2010 report saw her for consultations on September 6, 2010 and October 18, 2010. She diagnosed the patient as a woman suffering from the battered woman syndrome who needed to be assessed on multiple occasions because such women are generally very reluctant to talk about their issues for a number of reasons. Removal, she added, "before she receives treatment will place her in even greater risk of harm as she is currently not well enough mentally to defend herself against psychological or physical harm" i.e. psychological collapse and potential suicide.

III. The test for stay is met

[17] It is trite law that to obtain a stay of removal the Applicants must meet the conjunctive three-part test namely they must establish (1) the existence of one or more serious issues, (2) the applicants will suffer irreparable harm if the stay is not granted and (3) the balance of convenience favours the applicants.

A. *Serious Issue*

[18] Because the grant of a stay will give the Applicants the relief they seek on their application for leave and judicial review, that is, their non-removal to Sri Lanka, the gauge of serious issue is not simply whether the serious issue raised is not frivolous or vexatious but rather the Applicants'

must “put forward quite a strong case” (see *Baron v. Canada (MPSEP)*, 2009 FCA 81 at para. 66 and 67).

[19] Counsel for the Applicants raised the following serious issues which may be characterized as either ignoring or misreading the evidence: except in the first instance below.

[20] First, she argues the Removal officer failed to provide adequate reasons on an important finding. She points to the following sentence:

> I note that while the information that is being provided in the deferral request with regards to the abuse that Ms. JAYASUNDARARAJAH and her children has suffered at the hands of Mr. MURUGAN, not been reviewed in the context of the PRRA application, I am not convinced that Ms. Ms. JAYASUNDARARAJAH

She submits the sentence is incomplete and makes no sense.

[21] Second, she next refers to the following finding:

> Inherent in the request, is that the government of Sri Lanka would be unable to offer the family members protection from Mr. MURUGAN and his family at the possibility of them pursuing retribution against her and her children. I note I am not convinced that Ms. JAYASUNDARARAJAH would not be able to seek protection from the Sri Lankan authorities and social agencies, as she has done in Canada, or that they will be unwilling to take measures to counter ay threat presented to her and her children.

She submits this finding in contrary to the documentary evidence citing UNHCR’s 2010 Report on State Protection in Sri Lanka. That report found evidence at pages 112 and 171 of sexual and gender based violence against single Tamil women and girls at the hands of the military and security forces. It also noted existing legal provisions in Sri Lanka concerning rape and domestic violence were not enforced.

[22] Third, she submits the finding the Applicants would be able to avail themselves of the assistance and support of her family in Sri Lanka is perverse because Logeni has no family in Sri Lanka and her ex-husband's family had threatened her with retribution for bringing the assault charge.

[23] Fourth, the Removal officer was not convinced that sufficient new risk evidence had been presented or that deferral of removal was warranted. In support of those propositions, the Officer said that the RPD had already assessed "the subject's circumstances and found them not to be Convention Refugees". Moreover, the Officer said that the PRRA officer "found the subject not to be at risk".

[24] On this point, the Applicant's Counsel submits the Officer failed to appreciate that this case was about a new risk which had not been previously assessed either by the RPD or by the previous PRRA officer.

[25] Counsel for the Respondent did not seriously challenge the Applicants' points nor did she dispute Logeni had been abused by her husband. Rather, on serious issue, she submitted that the issue was whether or not there was in the record any sufficiently compelling evidence to show the Applicants would be at risk if returned to Sri Lanka. She argued there was no evidence that her husband had threatened her since he returned to Sri Lanka nor was there any evidence his family would seek reprisal. There was no evidence, according to Respondent's Counsel, that the Applicants would remain in Colombo and that they could not be safe in other areas of that country.

[26] My appreciation of all of the evidence in the record and the submissions of the parties leads me to conclude that Counsel for the Applicants has made quite a strong case and, in particular, Logeni would be at serious risk of harm if returned to Sri Lanka.

B. *Irreparable Harm*

[27] Having raised a serious issue that if returned to Sri Lanka the Applicants face a serious risk of harm, the jurisprudence teaches us that irreparable harm has been made out. Counsel for the Respondent conceded of this Court this point.

C. *Balance of convenience*

[28] Having made out serious issues and irreparable harm, the balance of convenience favours the Applicants.

[29] For these reasons, a stay is granted until leave has been determined in respect of the Removals officer's decision not to defer and if, leave is granted, until the judicial review of that decision has been determined.

"François Lemieux"
Judge

Ottawa, Ontario
November 19, 2010

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6584-10
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MOTION HELD VIA TELECONFERENCE ON NOVEMBER 12, 2010 FROM OTTAWA, ONTARIO

REASONS FOR ORDER:	Justice Lemieux
DATED:	November 22, 2010

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