

Federal Court



Cour fédérale

Date: 20130524

Docket: IMM-6506-12

Citation: 2013 FC 550

BETWEEN:

**SULTANA NARNIGER BEGUM
MOHAMMAD RUSLAAN HOSSAIN**

Applicants

and

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

Respondents

REASONS FOR ORDER

[1] Earlier today, I heard a motion by the applicants, mother and son, to defer their removal to Bangladesh scheduled for tomorrow, until the Court rules on their application for judicial review of a refusal on behalf of the Minister of Citizenship and Immigration to allow them to apply for permanent residence from within Canada on humanitarian and compassionate grounds.

[2] I granted the stay. This is why.

[3] Ms. Begum and her son have had a long and convoluted history in Canada. They arrived here in 1999 when young Mohammad was less than 2 years old.

[4] They were denied refugee status and their application for leave to judicially review that decision was dismissed. Thereafter, they had benefit of a pre-removal risk assessment which also was negative. They have been removal ready since 2004, in the sense of there being no legal impediments thereto.

[5] The underlying decision in this case is a refusal to permit them to apply for permanent residence from within Canada. That decision was rendered in 2012. Considered a flight risk, Ms. Begum has been in detention for the past year.

[6] In December 2012, leave was granted by Mr. Justice Manson. On 19 March 2013, the judicial review was heard on the merits by Madam Justice Strickland. She reserved judgment, which has not yet been rendered.

[7] On 15 May 2013, the applicants were served with a “notification for removal arrangements” informing them that their removal was scheduled for 25 May 2013. This is a form notice. There was no mention therein of the proceedings in this Court.

[8] Through counsel they requested a deferral. This is what the Inland Enforcement Officer of the Canada Border Service Agency said yesterday:

The Canada Border Service Agency (CBSA) has an obligation under section 48 of the *Immigration and Refugee Protection Act* to enforce

removal orders as soon as possible. Having considered your request, I do not feel that a deferral of the execution of the removal order is appropriate in the circumstances of this case.

[9] Clearly, the Officer had no feelings at all!

[10] Accompanying his refusal letter were notes to file, also dated yesterday. Among other things, he quoted, in referring to judicial review of negative humanitarian and compassionate decisions, from the enforcement manual ENF 09 Judicial Review, section 5.22.:

[...] have the right to seek judicial review of any decision, order, etc., made pursuant to the IRPA. The mere filing of a Court application, however, does not necessarily affect normal immigration processing and does not preclude the Minister's officials from enforcing the provisions of the IRPA, including the enforcement of a removal order.

Strictly speaking, even if judicial review is granted, the remedy is to refer the matter back to another officer for reconsideration of the application for permanent residence within Canada. A successful judicial review of such cases does not operate as a stay of removal.

[11] Thus, the enforcement manual ENF 09 could well have read: "The mere filing of a court application; the mere granting of leave; the mere granting of judicial review, however does not necessarily affect normal immigration processing and does not preclude the Minister's officials from enforcing the provisions of the IRPA, including the enforcement of a removal order."

[12] During the hearing before me, I said I was not particularly interested in the tripartite test for an interlocutory stay which is that there be a serious issue, irreparable harm if the stay were not

granted and if the balance of convenience favoured the applicant. I was more interested in the administration of justice.

[13] I wanted to know if the Enforcement Officer was aware of the court proceedings when he served the notice of removal. The record is silent. Did he assume there was no merit to the judicial review, notwithstanding Mr. Justice Manson has already decided there was a fairly arguable case? It is only in the notes to file, dated yesterday, that there is an acknowledgment that there are, in fact, ongoing court proceedings.

[14] The applicants have been removal ready for almost nine years. Why incarcerate Ms. Begum for a year, and deprive her of her decent income as a teacher, and then decide to remove her and her son, a son who knows nothing of Bangladesh?

[15] This motion deals with the administration of justice, and disrespect of this Court. It is not quite contempt, but not far off. The *sub judice* rule is almost on point. Not only were proceedings ongoing, but a hearing on the merits of the judicial review has taken place.

[16] If the Canada Border Services Agency is interpreting section 48 of the *Immigration and Refugee Protection Act* which now requires removal “as soon as possible” rather than “as soon as practical”, so that the only way the removal can be stopped is by court order, then so be it! What happened to common sense?

[17] Counsel for the Minister informed the Court that the applicants would be removed on the government's dime. If they are, however, ultimately successful in their application for permanent residence from within Canada, notwithstanding that they would be outside Canada, the government is not undertaking to pay their way back, the same government which has prevented Ms. Begum from earning any money over the last year.

[18] The Minister "graciously" conceded there was a serious issue, but argued that there was no irreparable harm and that the balance of convenience favoured him. I am not prepared to second guess Mr. Justice Manson, and whatever Madam Justice Strickland may decide. The irreparable harm is that the applicants would be removed from Canada without the wherewithal to return should they be ultimately successful. The balance of convenience favours them.

[19] Only because costs were not sought, costs will not be granted.

"Sean Harrington"

Judge

Toronto, Ontario
May 24, 2013

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-6506-12

STYLE OF CAUSE: SULTANA NARNIGER BEGUM MOHAMMAD
RUSLAAN HOSSAIN v. THE MINISTER OF
CITIZENSHIP AND IMMIGRATION AND THE
MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: MAY 24, 2013

REASONS FOR ORDER: HARRINGTON J.

DATED: MAY 24, 2013

APPEARANCES:

Clarisa Waldman FOR THE APPLICANTS

Jane Stewart FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Waldman & Associates FOR THE APPLICANTS
Toronto, Ontario

William F. Pentney FOR THE RESPONDENTS
Deputy Attorney General of Canada
Toronto, Ontario