Date: 20081027

Docket: IMM-4587-08

Citation: 2008 FC 1204

Ottawa, Ontario, October 27, 2008

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

SONAM PALDEN LAKHA

Applicant

and

THE MINISTER OF CITIZENHIP AND IMMIGRATION
and

THE MINISTER OF PUBLIC SAFETYAND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR ORDER AND ORDER

[1] This is a motion for a stay of the removal of the applicant, Sonam Palden Lakha, to the United States of America (US) pending the final disposition of his Application for Leave and for Judicial Review of a negative Pre-Removal Risk Assessment (PRRA) decision dated August 13, 2008.

[2] Mr. Lakha was born in India and spent some years working in Nepal. He entered the US in June 2004 and from there entered Canada on January 17th, 2005, at which time he filed a claim for

protection alleging citizenship in the People's Republic of China (PRC) and a risk of persecution based on his race and Tibetan nationality. He has never lived in Tibet. While in the US, Mr. Lakha did not make a claim for asylum or otherwise seek to regularize his status. His claim was denied by the Refugee Protection Division (RPD) on November 8th, 2006, and leave for Judicial Review of that decision was denied by this Court on April 18th, 2007.

[3] The RPD held that Mr. Lakha failed to establish his identity as a national of any country and that there was no country of reference upon which his claim could be assessed. The PRRA officer found that Mr. Lakha had failed to put forth any new or cogent evidence to establish his identity as a national of the PRC. Nonetheless the officer proceeded to conduct an assessment of the possible risk that the applicant would face if deported to the PRC. The officer concluded that the applicant had not provided evidence that his profile was similar to those persons who would currently be at risk of persecution or harm in Tibet having regard to the current country conditions.

[4] The issue on this motion is whether the applicant has satisfied the tri-partite test established by the Federal Court of Appeal in *Toth v. Canada (Minister of Employment and Immigration)*, (1988), 86 N.R. 302 (F.C.A.), [1988] F.C.J. No. 587 (QL). To succeed, the applicant must demonstrate that his motion is based on a serious issue, that he will suffer irreparable harm if the removal order is executed and that the balance of convenience favours the grant of a stay.

[5] It is well established that the threshold for accepting that a serious issue exists is low: *Asali v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 860, at paragraph 8.

[6] The following questions were submitted by the applicant as issues to be determined on the judicial review of his negative PRRA decision:

1. Did the Officer err in that she rejected the admissibility of evidence before her on the basis that it was not "new" pursuant to Section 113(a) of *IRPA*?
2. Did the PRRA Officer err in that she did not consider whether evidence before her was sufficient to rectify the RPD findings in respect of the Applicant's identity and citizenship?
3. Did the Officer err in that she ignored or misconstrued the Applicant's argument and evidence in respect of a *sur place* claim?
4. Did the Officer misconstrue the Applicant's counsel's submission with respect to the admissibility of certain country condition documentation in respect of Tibet?
5. Did the Officer err in that her analysis of country conditions in Tibet is made in perverse and or capricious disregard to the evidence before her?

[7] For the purposes of this motion, I am prepared to accept that one or more of these questions raises a serious issue to be tried. However, that is not the end of the matter. Mr. Lakha must satisfy the two other branches of the *Toth* test before I can grant the requested stay.

[8] This motion was brought forward on an urgent basis due to an inadvertent delay in the service and filing of the applicant's motion record. The respondent did not have an opportunity to submit written materials prior to the initial hearing on October 22, 2008. At the conclusion of that hearing, I advised counsel that I wished to receive written submissions on the question of irreparable harm. An interim stay was granted. Counsel for both parties filed written representations on October 23, 2008 and a further hearing was conducted. The interim stay was continued and the matter reserved until to-day to consider the arguments and authorities cited.

[9] It is submitted by the applicant that his removal will effectively be to the PRC as he has no right to remain in the US and it would be speculative to assume that the American authorities would

grant him asylum or protection from removal. The respondent's position, in effect, is that he bears no onus to prove that the applicant will not be deported to the PRC and that it would be speculative to assume the contrary. The onus remains with the applicant to establish irreparable harm which he has failed to do.

[10] The applicant argues that the jurisprudence of this Court supports the proposition that if a Judge hearing an application for a stay of removal finds that there exists a serious issue in respect of a negative PRRA decision, resulting in exposing the applicant to persecution or subjecting him personally to a danger of torture or a risk to life or cruel or unusual punishment, then irreparable harm will necessarily follow and the balance of convenience will normally favour the applicant.

[11] The authority cited for this proposition is the decision of Mr. Justice Luc Martineau in *Figurado v. Canada (Solicitor General)*, 2005 FC 347. The principle developed by Justice Martineau in that case has been cited and applied in a number of stay decisions: see for example *Streanga v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 792.

[12] The assumption that removal to the US would result in removal to the country of potential persecution when the applicant has no right to remain in the US has been accepted in several decisions. Those cited by the applicant include *Asali, above*; *Ponnampalam v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1174; *Cortez v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 946; *Hatami v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1755; *Omar v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 801; and *Augusto v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 801.

[13] From my reading of these decisions, there was evidence of risk to the applicant in the country of origin and the Court was persuaded on the evidence that removal from the US to that country was probable or at least likely. I note that in *Augusto*, for example, there was affidavit evidence that the applicant would be barred from law from applying for asylum in the US. There is no evidence of a similar nature in these proceedings.

[14] There are also several decisions where the Court has found that removal to the US would not constitute irreparable harm notwithstanding the possibility of removal to the applicant's country of origin: *Radji v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 100; *Qureshi v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 97; *Hussein v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1266; *Mughal v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 970; *Choudary v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 962; *Joao v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 880; *Akyol v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 931; *Aquila v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 36; and *Karthigesu v. Canada (Minister of Citizenship and Immigration)*, 153 F.T.R. 204, [1998] F.C.J. No. 1038.

[15] This Court has also held that the issue of irreparable harm must be evaluated in relation to the country to which the Minister proposes to return an individual: *Kerrutt v. Canada (Minister of Employment and Immigration)*, (1992) 53 F.T.R. 93, [1992] F.C.J. No. 237; *Radji*, above; and *Qureshi*, above.

[16] There is no evidence before me that the applicant would suffer irreparable harm if deported to the US. None arises from the prospect that the applicant may have to engage the US immigration system to claim asylum or protection from removal: *Mughal*, above.

[17] The US enjoys a democratic system of checks and balances, an independent judiciary and constitutional guarantees of due process: *Hinzman v. Canada (Minister of Citizenship and Immigration)* 2007 FCA 171. One must assume, in the absence of evidence to the contrary, that the US treats detainees and refugee claimants fairly: *Hisseine v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 388. It will be up to the American authorities to decide whether the applicant should eventually be removed to another country or not: *Mikhailov v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 642; *Akyol* above; and *Qureshi*, above.

[18] On the evidence that was before the RPD and the PRRA officer and resubmitted on this motion, it is not at all clear that the applicant has citizenship in the PRC by virtue of his Tibetan nationality. The onus was on the applicant to establish that he would be removed to the PRC and would suffer irreparable harm as a consequence. He has failed to do so. I am not prepared to speculate that the American authorities will remove him to the PRC.

[19] The applicant also submits that his challenge to the PRRA officer's negative PRRA decision may be rendered nugatory, as the application may be found to be moot if he has left Canada. Counsel for the respondent conceded that this may be raised by the Minister as a ground for dismissing the underlying application should leave be granted: *Figurado*, above; *Sogi v. Canada*

(Minister of Citizenship and Immigration), 2007 FC 108; and *Perez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 526.

[20] In *Kim v. Canada (Minister of Citizenship and Immigration)*, (2003) 33 Imm. L.R. (3d) 95 at paragraph 9, Mr. Justice James O'Reilly noted that nothing in the Act or the Rules would interfere with the entitlement of a PRRA applicant who has been removed from Canada and who is successful on judicial review to have that application reconsidered. See also *Nalliah v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 FC 759; *Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261; *El Ouardi v. Canada (Solicitor General)*, 2005 FCA 42; and *Golubyev v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 394.

[21] I do not draw from these decisions the conclusion that an application for judicial review is rendered moot in every case where the applicant has been removed from Canada. On the particular facts of the matter there may no longer be a "live controversy" between the parties with respect to the PRRA decision if the applicant is no longer in Canada: *Perez*, above, at paragraph 26. However, whether an application for judicial review is moot, and if found to be moot, whether the Court will exercise its discretion to hear the matter, will turn on the facts of each case.

[22] In the present case and on the basis of the evidence before me, I am not prepared to conclude that the applicant's challenge to the PRRA officer's decision would be rendered moot by his removal to the US. But even if I were to accept that proposition, I would not agree with the applicant's contention that irreparable harm would result from such a finding. It remains open to the applicant to seek the protection of the US.

[23] In light of my conclusion with respect to irreparable harm, I do not need to address the balance of convenience.

ORDER

THIS COURT ORDERS that the motion for a stay of removal is dismissed.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4587-08
STYLE OF CAUSE:	SONAM PALDEN LAKHA and THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Ottawa, Ontario (via teleconference)
DATE OF HEARING:	October 22-23, 2008
REASONS FOR ORDER AND ORDER:	MOSLEY J.
DATED:	October 27, 2007

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