Federal Court

Cour fédérale

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TO / DESTINATAIRE(S) :

1. **Name / Nom : Ms. Arghavan Gerami**

   Facsimile / Télécopieur : 613-695-7776 **Telephone / Téléphone : 6013-701-3855**

   ☐ **As requested / tel que demandé**

   X **Left voice message / suite au message vocal**

2. **Name / Nom : Mr. Kirk Shannon**

   Facsimile / Télécopieur : 613-954-1920 **Telephone / Téléphone : 613-670-6270**

   ☐ **As requested / tel que demandé**

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3. **Name / Nom :**

   Facsimile / Télécopieur : **Telephone / Téléphone :**

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SUBJECT / OBJET :

Court File No. / N° du dossier de la Cour: IMM-5649-13

Between / entre: Jeany Etienne et al. v. MCI

Enclosed is a true copy of the Reasons for Order and Order of Mr. Justice Zinn : // Vous trouverez ci-joint une copie conforme de:

dated / daté du MAR-17-14

c.c. : CAS-SATJ -

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Federal Court Cour fédérale

Date: 20140314

Docket: IMM-5649-13

Citation: 2014 FC 256

Ottawa, Ontario, March 14, 2013

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

JEANY ETIENNE
ROSE ETIENNE
HANNAH ETIENNE
JUDITH ETIENNE
SIMEON ETIENNE

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

[1] The Minister brings a motion for an Order granting the application for judicial review. It is opposed by the Applicants.

[2] On August 30, 2013, I issued an Order staying the removal of the Applicants to the Turks and Caicos founded on their application for leave and judicial review of a decision of an enforcement officer not to defer their removal. I did so because, in my view, their circumstances paralleled those in *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1: No assessment of risk had been made and there was evidence establishing a prima facie case of risk.

[3] The letter requesting a deferral of removal stated:

> We are requesting that you defer removal until such time as [the Applicants] request for protection has been duly considered by a competent, qualified tribunal. They are barred from applying for a Pre-Removal Risk Assessment until September 11, 2013.

[4] Mere days after my Order, the Applicants became eligible for a Pre-Removal Risk Assessment, which was offered to them, and which is apparently outstanding.

[5] On December 24, 2013, I granted leave to judicially review the officer's decision.

[6] In the Minister's Written Submissions in support of the motion to grant the application for judicial review, the Minister admits:

> [T]he record does not show that the Enforcement Officer considered the best interest of the child when making his decision. As a result the decision is unreasonable and should be quashed.

As a consequence, the Minister submits that "there is no live controversy between the parties because the Respondent seeks the same remedy that the Applicants requested in their Notice of Application."

[7] In resisting the Minister's motion, the Applicants say that there remains a live issue "properly before this Court for consideration and adjudication," namely the constitutionality of subsection 112(2)(b.1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[8] In my view, the Minister's admission that the decision under review is unreasonable coupled with the offer of a Pre-Removal Risk Assessment to the Applicants renders this application moot. In fact, months ago in response to the Applicants' application at the leave stage, the Minister described the issue and its position as follows:

> 15. The within application for leave ought to be dismissed on the basis of mootness.
>
> 16. This application for leave and judicial review is moot and the Court should not exercise its discretion to hear it.

[9] The argument advanced then by the Minister parallels that which he advances now in support of this motion. The only distinguishing fact is the new admission that the Officer's decision was unreasonable. Then as now, the Minister points to the cases heard on December 13, 2013, wherein the constitutionality of paragraph 112(2)(b.1) is directly at issue and submits that this issue does not need to be decided in this application. I agree with the Applicants that the facts of those cases are quite different as none involve a risk of harm to a minor and, more importantly, none involve a situation where an applicant was being removed without any risk assessment whatsoever.

[10] Although that situation will never again arise for these Applicants, it may well arise for others. The Minister does not assert that the Court's determination of the constitutionality of

paragraph 112(2)(b.1) in the cases now under consideration by this Court will also apply to that situation. Given the differing factual background, it cannot.

[11] The Supreme Court in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 outlined three criteria for the Court when considering whether to hear a matter that is moot: (i) the presence of an adversarial context, (ii) concern for judicial economy, and (iii) the need for the Court to be sensitive to its role as the adjudicative branch in the political network.

[12] Present before me is a motion from the Canadian Association of Refugee Lawyers (CARL) to be added as a party to the application or, in the alternative, to be granted leave to intervene. If it is granted, and I note a similar motion was granted in the cases heard in December, the adversarial context will be present regardless of the interests of the personal Applicants.

[13] Although judicial economy is served by refusing to permit this moot matter to be heard, it may well be a false economy because it is very likely that the present situation will come back before the Court only with different litigants.

[14] In this case, determining the issue of the constitutionality of paragraph 112(2)(b.1) is exactly the role of the Court. Its determination does not intrude into the role of Parliament any more than the current applications before this Court. Moreover, the separate determination is needed given these circumstances raise a different constitutional question than those at issue in the current applications, namely, the removal of the applicants to a place where their risk has never been assessed.

[15] Accordingly, and for these reasons, the Respondent's motion is denied. The Court declares that notwithstanding mootness, this application shall be heard on the issue of the constitutionality of paragraph 112(2)(b.1) of the *Immigration and Refugee Protection Act*, SC 2001, on the facts of the present application.

[16] The Minister is directed to advise the Court as to its position on the motion of CARL within seven (7) days.

THEREFORE, IT IS ORDERED that:

1. The motion for judgment is dismissed; and

2. The Application shall be heard, notwithstanding mootness, on the issue of the constitutionality of paragraph 112(2)(b.1) of the *Immigration and Refugee Protection Act*, SC 2001, on the facts of the present Application.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5649-13
STYLE OF CAUSE:	JEANNY ETIENNE ET AL v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

MOTION DEALT WITH IN WRITING WITHOUT THE APPEARANCE OF PARTIES

REASONS FOR ORDER AND ORDER:	ZINN J.
DATED:	March 14, 2014

WRITTEN REPRESENTATIONS BY:

Arghavan Gerami	FOR THE APPLICANTS
Kirk Shannon	FOR THE RESPONDENT

SOLICITORS OF RECORD:

GERAMI LAW PC Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANTS
WILLIAM F. PENTNEY Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT