Date: 20000609

Docket: IMM-2653-00

Between:

ZOFIA CIBOROWSKA

Plaintiff

- and -

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Defendant

REASONS FOR ORDER

TREMBLAY-LAMER J.:

[1] The plaintiff applied for a stay of execution of a deportation order issued against her on May 18, 2000. The immigration officer informed the plaintiff that her application for permanent residence would not be assessed before she left Canada in view of the Minister' s policy not to give priority to applications under s. 114(2) of the *Immigration Act* ("the Act")[1] received less than six months before the removal date.

---

[1] R.S.C. 1985, c. I-2.

[2] The plaintiff came to Canada over 11 years ago, on May 28, 1989, with a visitor's visa. She is a citizen of Poland. She is a single parent and her son is of Canadian nationality by birth.

[3] On December 5, 1990 the plaintiff filed an application as a refugee, an application which has never been traced.

[4] In January 1994 the plaintiff filed another application as her initial application had been lost by Immigration Canada. This application was heard on February 14, 1996 and a negative decision made regarding her.

[5] On February 29, 2000 the plaintiff received a risk evaluation decision, nearly ten years after her initial application. In early May 2000 the plaintiff submitted a landing application made in Canada as the spouse of a permanent resident and for humanitarian reasons. This application was received by Immigration Canada at Vegreville on May 8, 2000.

[6] The plaintiff married her *de facto* spouse on or about May 28, 2000 after he had received his final divorce decree.

[7] The plaintiff's application for a stay will be valid if she persuades this Court that she meets the tests laid down in *Toth v. Canada (M.E.I.)*.[2]

[8] To begin with, is there a serious issue? This Court's decisions have several times recognized[3] that the Minister has no duty to examine an application made on humanitarian grounds before implementing a removal order. Accordingly, this allegation cannot itself constitute a serious issue.

---

[2] (1988) 86 N.R. 302 (F.C.A.).

[3] *Lewis v. Canada (M.C.I.)* (1996), 37 Imm L.R. (2d) 85 (F.C.T.D.); *Francis v. Canada (M.C.I.)* (January 14, 1997), IMM-156-97 (F.C.T.D.); *Okoawoh v. Canada (M.C.I.)* (January 9, 1996), IMM-3481-95 (F.C.T.D.); *Moktari v. Canada (M.C.I.)* (December 1, 1997), IMM-4923-97 (F.C.T.D.); *Levy v. Canada (M.C.I.)* (December 3, 1997),

[9] The plaintiff further argued that the defendant had failed to assess the plaintiff's risk of removal in her country of origin. I do not accept such a statement. On February 29, 2000 a post-claim determination officer ("PCDO") informed the plaintiff that her case had been reviewed and it had been concluded that she did not run any of the risks listed in the definition of a member of the PDRCC class. The plaintiff did not file an application for judicial review of that decision. I do not see how she can now object that the defendant did not evaluate the risk before implementing the removal order.

[10] She also raised an error by the immigration officer, who ruled that the landing application under s. 114(2) of the Act should have been submitted six months before the removal date.

[11] In this regard counsel for the defendant, Mr. Pépin, confirmed that a departmental directive exists[4] indicating that as of October 1999, except for classes of persons at risk and applications filed beyond the six-month limit, "last-minute" applications pursuant to s. 114(2) would no longer be processed before removal.

[12] Although the defendant must consider any application under s. 114(2), I recognize that she has no duty under the Act to do so within a given time. Further, there is no allegation in the case at bar that the defendant acted in bad faith. It also cannot be argued that the delay in processing the humanitarian application was unjustifiable, since it was filed in early May.

[13] However, the decision challenged by the plaintiff in the case at bar is that of the removal officer.

IMM-4848-97 (F.C.T.D.); *Banwait v. Canada (M.C.I.)* (April 7, 1998), IMM-1259-98 (F.C.T.D.).

[4] Appendix A.

[14] Section 48 of the Act provides that a removal order must be implemented as soon as circumstances permit. This Court's decisions have held that removal officers enjoy a measure of discretion, in particular as to the pace at which they proceed with the removal.[5]

[15] My colleague Simpson J. considers that this discretion may include "consideration of whether it is reasonable to await a pending decision on a H&C application before removal".[6] In any case, though limited, this discretion does exist and the officer should exercise it.

[16] In view of the Department's recent directive to cease giving priority to "last-minute" humanitarian applications under s. 114(2) of the Act, the exercise of such discretion becomes especially important.

[17] In the case at bar the defendant submitted no affidavit by the removal officer to confirm whether he exercised his discretion, and if so whether he did this fairly.

[18] I therefore conclude that the absence of evidence that the officer exercised his discretion fairly before carrying out the removal order constitutes a serious issue.

[19] On the second point, irreparable harm, I am satisfied that it has been met. Although several judgments of this Court have found that the separation of a family temporarily is not irreparable harm as such, each judgment rests essentially on the specific facts of the case. In several instances the Court has

---

5 *Poyanipur v. Canada (M.C.I.)* (1995), 116 F.T.R. 4 (F.C.T.D.); *Pavalaki v. Canada (M.C.I.)* (March 10, 1998), IMM-914-98 (F.C.T.D.); *Saini v. Canada (M.C.I.)*, [1998] 4 F.C. 325 (F.C.T.D.); *Wiltshire v. Canada (M.C.I.)* (April 27, 2000), IMM-1512-00 (F.C.T.D.).

6 *Poyanipur, ibid.*, at page 6.

recognized that when there is good evidence that the deportation may produce serious hardship for the family there may be irreparable harm.[7]

[20] In the case at bar counsel for the defendant admitted that a year might elapse before the humanitarian application is reviewed. In my opinion, the longer the delay in processing humanitarian applications involving the separation of spouses or disruption of a family, the greater the trauma will be. What might have been only an unfortunate hardship in the case of a separation of a few months will, in my view, constitute irreparable harm if it extends over a lengthy period.

[21] I am therefore persuaded that the evidence in the case at bar supports the existence of irreparable harm.

[22] On the balance of convenience, I recognize that the defendant has a duty to ensure that the public interest is protected. However, Immigration Canada took 11 years to process the plaintiff's case. During that time she gave birth to a son in Canada and began a new life with a permanent resident whom she married as soon as he obtained his final divorce decree. Her husband filed a sponsorship application and if the marriage proves to be authentic the plaintiff has a good chance of her humanitarian application being successful. In view of the foregoing, I consider that the balance of convenience is in the plaintiff's favour.

[23] The motion for a stay is granted until the application for judicial review is decided.

Danièle Tremblay-Lamer
JUDGE

OTTAWA, ONTARIO
June 9, 2000

---

[7] *Garcia v. Canada (M.E.I.)* (1993), 65 F.T.R. 177 (F.C.T.D.); *Smith v. Canada (M.E.I.)* (1992), 58 F.T.R. 292 (F.C.T.D.); *Ribeiro v. Canada (M.E.I.)* , 55 F.T.R. 318 (F.C.T.D.); *J.E.P. v. Canada (MCI)* (October 6, 1998), IMM-3460-98 (F.C.T.D.).

Certified true translation

Martine Brunet, LL. B.

APPENDIX A

FEDERAL COURT OF CANADA
TRIAL DIVISION

NAME OF COUNSEL AND SOLICITORS OF RECORD

COURT No.	IMM-2653-00
STYLE OF CAUSE:	ZOFIA CIBOROWSKA
	v.
	MCI
PLACE OF HEARING:	MONTRÉAL, QUEBEC
DATE OF HEARING:	May 29, 2000
REASONS FOR ORDER BY:	TREMBLAY-LAMER J.
DATED:	JUNE 9, 2000

APPEARANCES:

ME ANTHONY KRAKAR	FOR THE PLAINTIFF
ME MICHEL PÉPIN	FOR THE DEFENDANT

SOLICITORS OF RECORD:

ME ANTHONY KRAKAR	FOR THE PLAINTIFF
M. Morris Rosenberg Deputy Attorney General of Canada	FOR THE DEFENDANT