Date: 20060324

Docket: IMM-1503-06

Citation: 2006 FC 378

Ottawa, Ontario, March 24, 2006

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

TYRONE AUBRIE PERRY

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

INTRODUCTION

[1] This is an emergency motion for a stay brought forward with respect to a removal order scheduled for March 24, 2006.

BACKGROUND

[2] On March 13, 2006, an exclusion order was issued for the Applicant's removal.

[3] Prior to his arrest in March 2006, the applicant did not have a valid work permit nor a visitor document since January 2, 1991.

[4] On March 15, 2006, he was to report for removal on March 24, 2006.

[5] On March 17, 2006, the applicant requested that a deferral of execution of his removal order pending his application for landing from within Canada on humanitarian and compassionate (H&C) grounds. The H&C application had not been made and was to be based on the best interests of the Applicant's children.

[6] On March 20, 2006, the request for deferral was refused on the basis of various factors including that the applicant could find employment in the United States with which to support his children in Canada; the Applicant's children could visit him in the United States and he had not taken any steps to perfect his status in Canada during his decades-long history with immigration authorities.

[7] There is no record of the applicant having made any application for permanent residence, on humanitarian and compassionate ground or otherwise, in the more than twenty years he has been living in Canada. The applicant has never applied for refugee protection while in Canada.

ISSUE

[8] The main issue is whether the applicant has satisfied the preconditions for a stay of removal.

A. The Test

[9] In order to demonstrate that he should be entitled to a stay of his removal order, the applicant is required to show all three elements of the conjunctive test:

(a) There is a serious issue to be determined;
(b) There will be irreparable harm if the stay is not granted; and
(c) The balance of convenience favors the granting of a stay.

Toth v. *Canada (M.E.I.)* (1988), 86 N.R. 302 (F.C.A.)

B. Serious Issue to be Tried

[10] The Applicant in his motion has not raised a serious issue to be tried. The respondent acknowledges that case law has held this aspect of the test to be a fairly low threshold, not requiring the same thorough examination of the applicant's case which would be present on a judicial review. However, the applicant must still meet the threshold test by presenting some evidence of his case on judicial review, so that the Court can determine whether any serious legal issue exists.

[11] Case law on stay motions indicates that the existence of a judicial review application or other litigation, by itself, is not a serious issue for the purposes of granting a stay. (*Akyol* v. *Canada (M.C.I.)* [2003] F.C.J. No. 1182 (QL) at para. 11)

[12] The existence of a court application by itself does not constitute a serious issue to be tried. As interlocutory relief, every motion for a stay must take place within the context of an existing judicial application of some kind. If all that was required to raise a serious issue was to file a court application, this aspect of the test would be meaningless.

[13] The scope of the authority of a removal officer to defer removal is not, in itself, a serious issue. A removal officer has a very limited discretion to defer removal given the statutory requirement that removal orders be enforced as soon as reasonably practicable. The law is clear that removal is the rule while deferral is the exception. (*Immigration and Refugee Protection Act*, S.C. 2002, c. 27, s. 48) (*Padda v. Canada (M.C.I.)*, [2003] F.C.J. No.1353 at paras. 7-9)

[14] The discretion of a removal officer to defer removal under s.48 of the IRPA is extremely narrow. It is restricted to determining when the removal order will be executed. In deciding when it is "reasonably practicable" to execute a removal order, a removal officer may consider compelling or special personal circumstances. (*Simoes v. Canada (M.C.I.)*, *supra* at para. 12;*Wang v. Canada (M.C.I.)*, *supra* at para. 45; *Kaur v. Canada (M.C.I.)*, *supra* at paras 15 and 18; *Mollaw v. Solicitor General of Canada*, (September 28, 2004) IMM-8072-04)

[15] The applicant has resided in Canada since 1992. An exclusion order was issued on March 13, 2006 and the applicant received his removal instructions on March 15, 2006. On Friday, March 17, 2006 at 4:57p.m., the applicant's counsel requested a deferral of the applicant's removal pending the determination of the applicant's intended humanitarian and compassionate ("H&C") application for permanent residency. To date, there is no evidence that the applicant has filed an

H&C application despite the extensive passage of time available for him to do so. Rather, the evidence is that the applicant intends to file an H&C application.

[16] The Court has recognized that the mere existence of a pending H&C application is not, in and of itself, a bar to removal. The respondent submits that similar logic should apply to the intention to file an H&C application and that intention should not operate as a bar to removal, especially when the applicant has not provided a reasonable explanation for not having pursued an H&C application prior to the eve of his removal from Canada. (*Simoes v. Canada (M.C.I.)*, [2000] F.C.J. No. 936 at 12; *Wang v. Canada (M.C.I.)*, [2001] 3 F.C. 682 at para. 45; *Kaur v. Canada (M.C.I.)*, [2001] F.C.J. No. 1082 at paras. 18.)

[17] In *Wang v. Canada*, [2001] 3 F.C. 682 (T.D.) at para.31, the Court recognized that a deferral should not be issued simply for the sake of delay.

> A useful starting point in an attempt to discern such an organizing principle is to consider the logical boundaries of the notion of deferral. To defer means "to put over to another time". But one does not defer merely for the sake of delay. If the act of deferring is to be legally justifiable, it must be because, as a result of that deferral, some lawful reason for not executing the removal order may arise.

[18] The applicant has not filed an H&C application, nor has he provided compelling evidence as to why he has not done so. The applicant never sought refugee protection in Canada prior to the issuance of the exclusion order on March 13, 2006. To grant the stay at this time would amount to a delay without justification because there is no outstanding process that could lead to the applicant's landing in Canada. (*Wang v. Canada, supra* at para.42)

[19] The applicant argues that s.3(3)(*f*) of the IRPA has incorporated the *United Nation's Convention on the Rights of the Child,* (the Convention) into Canadian law and that the IRPA must be construed and applied in a manner that is consistent with the Convention.

[20] The Federal Court of Appeal stated that s.3(3)(*f*) does not incorporate international human rights instruments to which Canada is signatory into Canadian law, but rather directs that IRPA must be construed and applied in a manner that complies with those instruments. (*De Guzman v. Canada (M.C.I.),* 2005 FCA 436)

[21] The applicant further argues that the removal officer had an obligation to assess the best interests of the applicant's children prior to making the decision to refuse to defer removal. In *Munar v. Canada (Minister of Citizenship and Immigration),* the Federal Court stated that the removal officer does not have the jurisdiction, the necessary training or the duty to conduct an H&C assessment. The obligation to conduct an H&C assessment properly rests with an H&C Officer and the removal officer is only obligated to consider the short term best interests of children, such as the termination of a school year if the children are traveling with the parent who is being removed.

> For all these reasons, I am of the view that the filing of an H & C application cannot automatically bar the execution of a removal order, even if it results in the separation of a child from his or her parent(s). Similarly, removals officers cannot be required to undertake a full substantive review of the humanitarian circumstances that are to be considered as part of an H & C assessment. Not only would that result in a "pre H & C" application", to use the words of Justice Nadon in *Simoes*, but it would also duplicate to some extent the real H & C assessment. More importantly, removals officers have no jurisdiction or delegated authority to determine applications for permanent residence submitted under section 25 of the IRPA**.** They are employed by the Canadian Border Services Agency, an agency under the auspices of the Minister of Public Safety and Emergency Preparedness, and not by the Department of Citizenship and Immigration. They are not trained to perform an H & C assessment. *Munar v. Canada (M.C.I.),* 2005 FC 1180 [emphasis added]

[22] Precisely the same reasoning applies here. The removal officer had neither the delegated authority nor the jurisdiction to determine the best interests of the applicant's children under section 25 of the IRPA. In *Morello* and in *Lawes*, this Court has recently affirmed that an H&C application by itself is not a bar to removal, and that removals officers have neither jurisdiction nor delegated authority to access H&C applications under s.25 of IRPA. (*Morello v. Canada (M.C.I.),* (unreported, November 1, 2005, IMM-6552-05); *Lawes v. Canada (M.C.I),* (unreported, February 3, 2006, IMM-555-06)

[23] The removal officer was satisfied that the short-term best interests of the applicant's children were not going to be adversely affected by his removal from Canada. The children were living with their mother in Airdrie. The assessment of the children's long-term best interests is to be properly assessed within the context of an H&C application. Again, the applicant has not provided any evidence that he has made an H&C application.

[24] The removal order against the applicant is valid and the respondent is under a statutory duty to execute it.

> The order whose deferral is in issue is a mandatory order which the Minister is bound by law to execute. The exercise of deferral requires justification for failing to obey a positive obligation imposed by statute. That justification must be found in the statute or in some other legal obligation imposed on the Minister which is of sufficient importance to relieve the Minister from compliance with section 48 of the Act. In considering the duty imposed and duty to comply with section 48, the availability of an alternate remedy, such as a right of return, should weigh heavily in the balance against deferral since it points to a means by which the applicant can be made whole without the necessity of non-compliance with a statutory obligation. For that reason, I would be inclined to the view that, absent special considerations, an H & C application which is not based upon a threat to personal safety would not justify deferral because there is a remedy other than failing to comply with a positive statutory obligation. *Wang v. Canada, supra* at para.45

[25] The removal officer did not commit an error of law in refusing to defer the applicant's request for a deferral of removal on the grounds that he intended to bring an H&C application.

[26] The applicant also argues that his s.10(b) rights under the *Charter of Rights and Freedoms* ("the Charter") were violated because he was denied an opportunity to exercise his right to counsel. The Court has held that "subsection 10(b) of the Charter does not extend beyond arrest and detention to include a right to counsel at routine immigration examinations that are not hearings." (*Korniakov v. Canada (M.C.I.)*, [2002] F.C.J. No. 611 at para. 27)

C. Irreparable Harm

[27] The applicant has not demonstrated that he will suffer irreparable harm if he returns to the United States. None of the applicants' submissions amount to irreparable harm, only at most personal disruption which is the normal result of deportation. This stay application should also be dismissed for that reason. (*Aktora v. Canada (M.E.I.)*, [1993] FCT No. 826 (F.C.T.D.))

[28] In *Akyol, supra*, this Court reaffirmed that irreparable harm must be personal and not speculative, and must move beyond the normal consequences of deportation. The applicant's arguments regarding the potential consequences of removal are speculative. He has not provided any evidence to demonstrate that he faces any risk of persecution in the United States or that anyone in the United States is seeking to arrest, detain, interrogate or torture him if he returns. The applicant has failed to provide evidence from objective sources that he faces a personalized danger to his life should he return to the United States. Further, the existence of outstanding litigation does

not constitute irreparable harm. Accordingly, there is no breach of the principles of natural justice if the removal order is executed before the judicial review is heard. (*Akyol* v. *Canada (M.C.I.)***,** ***supra*** at paras. 6, 7, 9, 11)

[29] Irreparable harm must also be much more substantial and more serious than personal inconvenience or hardship. Rather, it must be based on a threat to the life or security of the person, or an obvious threat of ill treatment in the country of origin. Irreparable harm is harm which is irrevocable or permanent. Again, there is simply no such evidence here. (*Louis* v. *Canada (M.C.I.)*, [1999] F.C.J. No. 1101; *Soriano* v. *Canada (M.C.I.)*, [2000] F.C.J. No. 414)

[30] Even where separation caused by removal may produce substantial economic or psychological hardship to a family unit, the test remains whether the applicant himself will suffer irreparable harm. (*Mariona v. Canada (M.C.I.)*, [2000] F.C.J. No. 1521 (T.D.); *Carter v. Canada (M.C.I.)*, 1999] F.C.J. No. 1011 (T.D.); *Balvinder v. Canada (M.C.I.)* (unreported, December 15, 2005, IMM-7360-05))

[31] This Court has held that the break-up or relocation of an applicant's family is not a sufficient basis upon which to find that the applicant will suffer irreparable harm if removed. (*Mallia v. Canada (M.C.I)*, [2000] F.C.J. No. 369 (F.C.T.D.); *Mikhailov v. Canada (M.C.I.)*, [2000] F.C.J. No. 642 (F.C.T.D.); *Aquila v. Canada (M.C.I.)*, [2000] F.C.J. No. 36 (F.C.T.D.))

[32] In *Tesoro*, the Federal Court of Appeal recently considered irreparable harm in some detail and held that family separation is not necessarily a basis for finding irreparable harm. To the

contrary, family separation is merely one of the consequences of deportation. (*Tesoro v. Canada (M.C.I),* 2005 FCA 148 at paras. 34-42)

[33] The respondent respectfully submits that there are no unusual circumstances in this case. Although deportation may be inconvenient and distasteful to the applicant, he has not shown irreparable harm in the circumstances of this case.

D. Balance of Convenience

[34] In assessing the balance of convenience, the Court must consider the public interest in the enforcement of laws that have been enacted by democratically-elected legislatures and passed for the common good. If a statute charges a public authority with undertaking a particular action, the Court should in most cases assume that irreparable harm to the public interest would result from the restraint of that action. (*RJR – MacDonald Inc. v. Canada (Attorney General)* [1994] 1 S.C.R. 311; *Manitoba (Attorney General) v. Metropolitan Stores Ltd.* [1987] 1 S.C.R. 110)

[35] The *Immigration and Refugee Protection Act* requires the Solicitor General of Canada to enforce a removal order as soon as is reasonably practicable. The balance of convenience in this case favours the Minister. The applicant is removal ready, and the Minister is under a statutory obligation to ensure that the removal is carried out as soon as possible. (*Immigration and Refugee Protection Act*, S.C. 2001, c.27, s.48)

[36] If the person seeking a stay order does not establish that he or she will suffer irreparable harm if his or her removal is not stayed, the balance of convenience will favour not staying the

removal because staying the removal must be assumed to cause irreparable harm to the public interest. (*Hill v. Minister of Fisheries and Oceans* (March 17, 2000) T-284-00 (F.C.T.D.); D*ugonitsch v. Canada (M.E.I.)* [1992] F.C.J. No. 320 (F.C.T.D.))

[37] In *Dugonitsch* v. *Canada (M.E.I.)*, Justice MacKay stated:

> Absent evidence of irreparable harm, it is strictly speaking unnecessary to consider the question of the balance of convenience. Nevertheless, it is useful to recall that in discussing the test for a stay or an interlocutory injunction in the Metropolitan Stores case Mr. Justice Beetz stressed the importance of giving appropriate weight to the public interest in a case where a stay is sought against a body acting under public statutes and regulations which have not yet been determined to be invalid or inapplicable to the case at hand. That public interest supports the maintenance of statutory programs and the efforts of those responsible for carrying them out. Only in exceptional cases will the individual's interest, which on the evidence is likely to suffer irreparable harm, outweigh the public interest. This is not such an exceptional case. (*Dugonitsch* v. *Canada (M.E.I.), supra)*

[38] The simple fact that the person seeking a stay order has no criminal record, is not a security concern and is financially established and socially integrated in Canada does not mean that the balance of convenience favours granting a stay order. In dismissing a motion for a stay, the Federal Court of Appeal stated:

> [21] Counsel says that since the appellants have no criminal record, are not security concerns, and are financially established and socially integrated in Canada, the balance of convenience favours maintaining the status quo until their appeal is decided.
>
> [22] I do not agree. They have had three negative administrative decisions, which have all been upheld by the Federal Court. It is nearly four years since they first arrived here. In my view, the balance of convenience does not favour delaying further the discharge of either their duty, as persons subject to an enforceable removal order, to leave Canada immediately, or the Minister's duty to remove as soon as a reasonably practicable…This is not simply a question of administrative convenience, but implicates the integrity and fairness of, and public confidence in, Canada's system of immigration control.
>
> *Selliah v. Minister of Citizenship and Immigration* 2004 FCA 261.

[39] Absent special circumstances, the public interest in this case should outweigh the applicants' personal interest. As noted in the case of *Membreno-Garcia* v. *Canada (M.E.I*):

> There is a public interest in having a system which operates in an efficient, expeditious and fair manner and which, to the greatest extent possible, does not lend itself to abusive practices.
>
> *Membreno-Garcia* v. *Canada (M.E.I*) [1992] F.C.J. No 535 (F.C.T.D.)

[40] The respondent submits that the public interest is an important statutorily mandated concern, and there are no special circumstances present which should override that concern. As such, the balance of convenience in this case lies with the Minister. The applicant is removal ready, and the Minister is under a statutory obligation to ensure that the removal is carried out as soon as possible. (*Immigration and Refugee Protection Act*, S.C. 2001, c.27, s.48)

CONCLUSION

[41] The stay application is dismissed.

ORDER

THIS COURT ORDERS that the application for a stay of the removal order be dismissed.

"Michel M.J. Shore"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-1503-06
STYLE OF CAUSE:	TYRONE AUBRIE PERRY v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	March 23, 2006 by Teleconference
REASONS FOR ORDER:	SHORE J.
DATED:	March 24, 2006

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