Date: 20051128

Docket: IMM-6770-05

Citation: 2005 FC 1609

Ottawa, Ontario, November 28, 2005

PRESENT: THE HONOURABLE MR. JUSTICE HARRINGTON

BETWEEN:

ALBERT BALL, MARINA BALL AND GERMAN BALL

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-6614-05

AND BETWEEN:

ALBERT BALL

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER

HARRINGTON J.

[1] Things are not going well for the Ball family—the father Albert, the mother Marina, the sons German and Adam and the daughter Sonia. Albert, Marina and German filed a refugee claim, which was rejected, and now Albert is under a removal order. He must report for removal to Israel on December 5, 2005. To date, no order has been issued for Marina and German to report for removal.

[2] The family does not want to leave Canada. However, if they must, Albert wishes to return to Israel, while Marina wishes to return to Russia. Albert and Marina each want custody of their three children.

[3] Albert and Marina are currently in a separation from bed and board proceeding in the Quebec Superior Court. The hearing will be held on December 8, 2005 and could cover a number of issues, including child custody. It is therefore essential that consideration be given to Albert's chances of obtaining custody of the children if he is in Israel while Marina and the children are here in Canada.

Facts

[4] Albert was born in Russia to a Jewish father and a Christian mother. He considers himself a Christian. Marina was also born in Russia, but to two Christian parents. Their eldest son, German, now 15 years old, was also born in Russia. Their younger children, Sonia and Adam, were both born in Canada.

[5] In 1996, Albert invoked his right of return to Israel on the basis of his Jewish ancestry and moved with Marina and German to Israel. However, the Ball family was not happy in Israel because of the discrimination they suffered from being not only Russian but also Christian.

[6] In November 1999, Albert moved with his family from Israel to Canada, where he immediately claimed refugee protection. In May 2002, the Immigration and Refugee Board (IRB) rendered a negative decision on the applicant's claim. The Federal Court dismissed the application for leave and judicial review submitted by the applicant for the purpose of challenging the IRB decision. The applicants subsequently submitted an application under the post-determination refugee claimant in Canada (PDRCC) class, which became an application for pre-removal risk assessment (PRRA).

[7] In the meantime, Marina gave birth to Sonia in 2002 and to Adam in 2004. On September 21, 2005, the PRRA officer rendered a negative decision on the applicant's PRRA application for Albert, Marina and German. It should be noted that, since Sonia and Adam both have Canadian citizenship, they are not subject to the removal order. However, they are much too young to be able to appreciate what is at stake. The negative decision by the PRRA officer is the subject of an application for a stay of proceedings before this court, IMM-6770-05.

[8] As a result of the negative decision on the PRRA, the family was summoned to an interview on October 13, 2005 with the Canada Border Services Agency to discuss their removal. All five members of the family attended. At the meeting, Marina informed Immigration Officer Meloche that she and Albert had been separated since February 2005 and that she wished to return to Russia, not Israel. Albert informed Officer Meloche that he was about to take legal action to obtain custody

of the children. Officer Meloche scheduled another meeting with Albert for October 31, 2005. At that meeting, Albert filed documents concerning the separation proceedings initiated in the Quebec Superior Court. Officer Meloche called the documents invalid, because they were approved by a "special clerk," and ordered that Albert be removed on December 5, 2005, as planned.

[9] The second issue for determination is the motion by Albert Ball to obtain a stay of execution of a removal order issued against him, IMM-6614-05. Technically, the application concerning Marina and German is premature, since no date has been set for their departure. However, since the respondents did not bring up this point, the Court will not raise it either.

[10] *A priori*, it should be understood that these reasons relate not only to IMM-6614-0, but also to IMM-6770-05. There was no evidence introduced before this Court to indicate that a date had been set for the removal of Marina and German.

Issues

[11] There are two issues for consideration, each separately. The first relates to IMM-6770-05. Did the applicants meet the tripartite test set out in *Toth v. Canada (Minister of Citizenship and Immigration)* (1988), 86 N.R. 302, that is, did they raise a serious issue, would they suffer irreparable harm, and does the balance of convenience favour them? The second issue relates to file IMM-6614-05. Should the Court grant a stay of execution of Albert Ball's removal order? It should also be mentioned that the applicant refers to paragraph 50(*a*) of the *Immigration and Refugee Protection Act* (the Act).

50. A removal order is stayed (*a*) if a decision that was made in a judicial proceeding -- at which	**50.** Il y a sursis de la mesure de renvoi dans les cas suivants : *a*) une décision judiciaire a pour

the Minister shall be given the opportunity to make submissions -- would be directly contravened by the enforcement of the removal order;	effet direct d'en empêcher l'exécution, le ministre ayant toutefois le droit de présenter ses observations à l'instance;

[12] The problem with the applicant's reliance on subsection 50(*a*) of the Act is that the Minister was not served as an added party and therefore cannot offer his submissions in the proceedings.

[13] It is necessary to assess the repercussions of the fact that, if Mr. Ball is removed on December 5, 2005, he will not be able to attend the hearing of December 8, 2005 on the issue of custody of his children. We should not lose sight of the fact that this proceeding is the only way of ensuring that Mr. Ball obtains the benefit of a fair and equitable hearing.

Negative Decision by the PRRA Officer

[14] The applicant argues that the decision by Officer Meloche is patently unreasonable because the officer considered the situation only in Russia and not in Israel. The applicant must discharge the burden of proof by introducing evidence concerning his PRRA application. Since the applicant submitted no evidence concerning the situation in Israel, he cannot subsequently criticize the officer's failure to analyse the situation there. Section 113 of the Act is clear on what must be included in a PRRA application. Furthermore, subsection 161(2) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, stipulates that it is up to the applicant to submit any new evidence:

161. (1) A person applying for protection may make written submissions in support of their application and for that purpose may be assisted, at their own expense, by a barrister or solicitor or other counsel.	**161.** (1) Le demandeur peut présenter des observations écrites pour étayer sa demande de protection et peut, à cette fin, être assisté, à ses frais, par un avocat ou un autre conseil.

New evidence	Nouveaux éléments de prevue
(2) A person who makes written submissions must identify the evidence presented that meets the requirements of paragraph 113(*a*) of the Act and indicate how that evidence relates to them.	(2) Il désigne, dans ses observations écrites, les éléments de preuve qui satisfont aux exigences prévues à l'alinéa 113*a*) de la Loi et indique dans quelle mesure ils s'appliquent dans son cas.

[15] The applicants cannot simply submit an application for a PRRA and then assume that the officer will consider all the factors, even if they are not presented to him. The burden of proof rests on the applicants, as stated by Von Finckenstein J. in *Hailu v. Canada (Solicitor General)*, [2005] F.C.J. No. 268 (QL).

[16] Despite the applicant's claims, none of the documents presented before this Court has demonstrated that a serious issue is raised. The burden of proof lies on the applicants and they have not met that burden. Therefore, the Court cannot grant a stay of execution of the PRRA officer's negative decision.

Enforcement of a Removal Order

[17] The Court takes strong exception to the basis of the decision by Officer Meloche concerning the removal order against the applicant. Where a removal order is concerned, it is clear from the wording of section 48 of the Act that the removal must be enforced as soon as is reasonably practicable.

48. (1) A removal order is enforceable if it has come into force and is not stayed.	**48.** (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
(2) If a removal order is	(2) L'étranger visé par la

enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable.	mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.

[18] Officer Meloche's affidavit is the key document influencing this Court's decision and is included in the respondents' written submissions in IMM-6614-05. It is clear from the interview with the Ball family that Albert and Marina initiated separation proceedings for a number of reasons, *inter alia*, because Albert wished to return to Israel and Marina to Russia with the children. Also, Albert argued before this Court that, because he had invoked his right of return to Israel, he could not return to Russia. However, there is no evidence to support this in the documentation.

[19] The real problem with Officer Meloche's reasoning is that he described the order by the Quebec Superior Court as being invalid. In my opinion, he completely misunderstood the significance of the order. Officer Meloche appeared to be alluding to the fact that it was not an official order, since the document was signed by a "special clerk". Unfortunately, this interpretation is completely wrong. This type of order is as valid as a Superior Court order signed by a judge, just as an order by a prothonotary is as valid as an order by a Federal Court judge.

[20] The application concerning the separation of Albert and Marina is to be filed on December 8, 2005. One way or another, the current order by the Quebec Superior Court stipulates that Albert and Marina Ball have joint custody of German and Sonia, with each parent having the children alternate weeks. Albert may see the youngest, Adam, only on weekends.

[21] As was stated in the preceding, it is equally significant that paragraph 50(*a*) of the Act states that a decision made in a judicial proceeding has the direct effect of staying enforcement of the removal order if the Minister has had an opportunity to make submissions. In the instant case, the Minister was unaware of the proceedings before the Quebec Superior Court, because the parties failed to serve him as an added party with respect to the application to be heard on December 8, 2005, at their own peril. They cannot rely on paragraph 50(*a*) unless the Minister has, in fact, been served.

[22] It is also important to note that Mr. and Mrs. Ball also have two young children who are Canadian citizens and that the Superior Court order makes it clear that neither parent may leave Canada with the children without the consent of the other parent. Of course, the two Canadian children have the right to remain here, while German does not. In *Alexander v. Canada (Solicitor General),* [2005] F.C.J. No. 1416 (QL), Dawson J. dismissed an application for judicial review of a decision by a deportation officer that the removal order concerning the applicant was still enforceable, despite a court order granting custody of her children but prohibiting them from leaving Ontario. Again, that case does not apply to the facts here, especially since the Minister never had an opportunity to make submissions. In another vein, however, Dawson J. discusses the special case of a young child with Canadian citizenship, stating at paragraph 31:

> First, after awarding custody to Ms. Alexander, the orders went on to provide that Ms. Alexander's children "shall not be removed from the Province of Ontario". Applying the grammatical and ordinary sense of the phrase "directly contravened", as found in subsection 50(a) of the Act, I find that the orders would only be directly contravened if either of Ms. Alexander's children were removed from Ontario. The removal order applies only to Ms. Alexander, because her two children are Canadian citizens who enjoy an absolute right to remain in Canada. Thus, the removal order does not interfere with the physical location of Ms. Alexander's children. Faced with removal, Ms. Alexander could (as she had earlier contemplated if her request for a stay was unsuccessful) apply to the Ontario Court of Justice for a variation of its order, or Ms.

> Alexander could make arrangements to leave her children in Canada. Neither of those options would contravene the interim or final order.

[23] While the application for a stay of execution in *Alexander*, *supra*, was dismissed because the children were Canadian citizens, we must not forget that, in this case, German cannot remain in Canada for the time being. Thus, a custody order prohibiting the children from leaving Canada is a problem with respect to German. While it is true that the removal order does not currently affect the tenor of paragraph 50(*a*) of the Act, this is only because the Minister has not yet had an opportunity to make his submissions, which will have to be done.

[24] The notion that Albert may be removed without having an opportunity or the right to make his arguments for custody of his children is unjust. Under subsection 48(2) of the Act, it is unjust to determine that it is reasonably practicable for Albert to be removed from Canada, since he must be given an opportunity to be a party to proceedings regarding his children's custody.

[25] The respondents argue that the applicant does not meet the tripartite test set out in *Toth, supra*. According to the test in *Toth*, *supra*, this is clearly a serious issue, as Mr. Ball is under a removal order while a party to a dispute over custody of his children. It is also obvious that he will suffer irreparable harm because he will have no opportunity to present his case in the custody hearing and, finally, on the balance of convenience, it is ridiculous to believe that, after having spent five years in Canada, he cannot remain here another three days in order to participate in the custody hearing.

Conclusion

[26] For the foregoing reasons, first, the Court dismisses the motion to stay the negative decision by the PRRA officer. Second, the Court stays Albert Ball's removal order pending the application for leave and judicial review of the decision by Officer Meloche and, if granted, judicial review of that decision. The Court also reminds the parties that paragraph 50(*a*) of the Act is only applicable if the Minister is served as an added party in order to make submissions during the hearing on December 8, 2005.

"Sean Harrington"

Judge

Ottawa, Ontario
November 28, 2005

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6770-05
STYLE OF CAUSE:	ALBERT BALL, MARINA BALL AND GERMAN BALL v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-6614-05
STYLE OF CAUSE:	ALBERT BALL v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	November 21, 2005
REASONS FOR ORDER BY:	The Honourable Mr. Justice Harrington
DATED:	November 28, 2005

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