Date: 20070726

Docket: IMM-3003-07

Citation: 2007 FC 783

Ottawa, Ontario, July 26, 2007

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

BARRINGTON RICHARDS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION; THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] The Applicant is a foreign national who was stripped of his permanent resident status due to his extensive criminal record of 33 convictions spanning a 9 year period. He had already been before the Immigration Appeal Division (IAD) in 2002, but he continued his criminal activities and returned to the IAD, less than five years later, in 2007. The Applicant was informed of his scheduled removal for July 23, 2007 and, at that time, voiced an agreement in regard to a return to Jamaica. He again voiced his desire to be removed to Jamaica on July 25, 2007. The Applicant, nevertheless, then filed a stay motion on short notice at 2:30 p.m., July 25, 2007, recognizing that his removal is scheduled for July 27, 2007. He is scheduled to be escorted by two Canada Boarder

Services Agency (CBSA) officers due to his past criminal activities. The Applicant is considered by the Respondent to be unrehabilitated, violent, a long time criminal and an alcoholic who has spent much of his time in Canada, in detention. His stay is dismissed as the public's interest and safety requires that he be removed.

TEST FOR A STAY

[2] The test for granting a stay is well established. The Applicant must establish:

1. that there is a serious question to be tried;
2. that the moving party would, unless the injunction is granted, suffer irreparable harm; and
3. that the balance of convenience favours the moving party.

(*Toth v. Canada (M.E.I.)* (1988), 86 N.R. 302 (F.C.A.); *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311.)

[3] The requirements of the tripartite test are conjunctive. That is, the Applicant must satisfy all three branches of the test before this Court can grant a stay of proceedings. (*Toth*, above; *Marenco v. Canada (M.C.I.)*, (1994), 86 F.T.R. 299.)

[4] The Applicant is challenging the removal officer's refusal to defer. Since the granting of the Applicant's motion would effectively give him the relief he seeks in his underlying application for leave and for judicial review, this Court must engage in a more extensive review of the merits of the application. This has been confirmed in *Wang v. Canada (M.C.I.)*, (2001) 3 F.C. 682, at paragraph

1, where Justice Denis Pelletier held that the threshold for the serious issue branch of the tripartite test in motions such as this, is not frivolous and vexatious, but rather, the "likelihood of success." No merit exists to his application for leave regarding the removal officer's refusal to defer removal and he has no likelihood of success on judicial review. (Reference is also made to: *RJR-MacDonald*, above.)

[5] The issuance of a stay is an extraordinary remedy wherein the Applicant must demonstrate "special and compelling circumstances" that would warrant "exceptional judicial intervention". The Applicant is a foreign national who had his permanent residence revoked because of his 33 criminal convictions. He has not shown circumstances why he should be able to remain in Canada, and, in fact, the IAD which considered his appeal on the circumstances of his case, including H&C grounds, found that he ought to be deported from Canada. (*Tavaga v. Canada (M.E.I.)*, (1991), 15 Imm. L.R. (2d) 82; *Machado v. Canada (M.E.I.)*, (1989), 9 Imm. L.R. (2d) 90; *Ikeji v. Canada (M.C.I.)*, [2001] F.C.J. No. 885, para. 8.)

SEROUS ISSUE

No reviewable error in Officer's decision

[6] Section 48 of the *Immigration and Refugee Protection Act*, S.C. 2001 c. 27 (IRPA) requires that a removal order "be enforced as soon as reasonably practicable." (IRPA, s. 48.)

[7] Removals officers have the authority to defer execution of a removal order only in very limited circumstances such as those arising just prior to the removal date. In this case, it was well

within the Officer's discretion to find that the Applicant's circumstances did not warrant deferral of removal. (*Pavalaki v. Canada (M.C.I.)*, [1998] F.C.J. No. 338; *Wiltshire v. Canada (M.C.I.)*, [2000] F.C.J. No. 571, para. 6; *Simoes v. Canada (M.C.I.)*, [2000] F.C.J. No. 936; *Wang*, above, paras. 31, 32, 45; *Prasad v. Canada (M.C.I.)*, 2003 FCT 614, para. 32; *Padda v. Canada (M.C.I.)*, 2003 FC 1081, paras. 8-9.)

Officer considered the Applicant's criminal litigation

[8] The Applicant states that the officer did not give reasons for her decision. This is incorrect; rather, the officer did give reasons but the Applicant neglected to request said reasons. The Respondent has provided them in the record.

[9] Further, the Applicant states the officer ignored that his August 2006 conviction is under appeal at the Ontario Court Appeal. The officer, however, specifically noted this in her reasons for decision; therefore, this argument is unfounded.

[10] The Applicant further claims that if he is removed, his criminal appeal to the Ontario Court of Appeal will be rendered nugatory. The case law from the Ontario Court of Appeal, itself, does not support this argument.

[11] In *Diakite v. Canada (M.P.S.E.P.)*, April 17, 2007, IMM-1530-07, Justice Johanne Gauthier dismissed the stay motion of the applicant, noting that the Ontario Court of Appeal had found it was

unnecessary for him to remain in Canada in order to pursue his appeal and that he could do this in writing from Guinea.

[12] Further to this case in *Diakite*, above, at the Ontario Court of Appeal, that court refused to order that the applicant remain in Canada pending his appeal and stated: "[i]f the applicant is deported prior to his appeal date, that does not prevent him from pursuing his appeal. He may do so in writing from Guinea." (Endorsement of Justice Michael J. Moldaver, Ontario Court of Appeal, *Diakite v. Her Majesty the Queen*, March 29, 2007.)

[13] In addition, the Ontario Court of Appeal in *R. v. Bish*, [1998] O.J. No. 5215, stated that: "it was common ground, that in the circumstances of this case, the deportation of the applicant will not render his appeal moot." The Ontario Court of Appeal dismissed his motion for a stay of removal.

[14] The case law from the Ontario Court of Appeal, itself, indicates that the Applicant's appeal would not be moot, should the Applicant be deported from Canada prior to it being heard. The Applicant has retained counsel for the purposes of this appeal and this counsel can receive instructions from the Applicant from Jamaica.

[15] The Applicant further alleges, if his August 2006 conviction is overturned, his deportation order against him would not be valid.

[16] The Applicant was convicted beyond a reasonable doubt after a trial. He appealed that decision and his appeal was rejected in a lengthy decision of the Superior Court of Justice of Ontario.

[17] It is speculative that the Ontario Court of Appeal will overturn the Applicant's conviction. A conviction stands until and unless it is overturned. Moreover, even so, the Applicant still has 32 other criminal convictions, including a February 2004 conviction under s.267 for assault with the weapon, which is the exact same offence he again committed in August 2006. Regardless of the outcome of the Applicant's Ontario Court of Appeal, he is still inadmissible for serious criminality.

[18] The Applicant claims he cannot be removed from Canada while he is appealing his conviction for the second time, he has not cited any case law or statutory provisions in support of his contention. Nothing in the law requires him to be allowed to remain in Canada while he exhausts the entire criminal appeals process. The Applicant is a foreign national, who, regardless of the outcome of his appeal, is inadmissible for serious criminality.

[19] The Applicant had his permanent residence removed by the IAD and he failed to seek judicial review of this decision. The Applicant is no longer a permanent resident and has decided not to exercise his judicial review rights. The Applicant also chose not to participate in the Pre-Removal Risk Assessment (PRRA) process. It is the Applicant's own actions which have placed him in the position of being legally removable before his Ontario Court of Appeal is finalized.

[20] The Applicant, if after removed, succeeds at the Ontario Court of Appeal in having his conviction overturned, he will be able to apply for permission to return to Canada. If his August 2006 conviction is overturned, it will not be taken into consideration in deciding whether or not to allow him to return. His other 32 convictions, nevertheless, would render him criminally inadmissible for serious criminality. This, again, is the Applicant's own doing in that he repeatedly participated in criminal activities.

IRREPARABLE HARM

[21] This Court has held that irreparable harm is a strict test in which serious likelihood or jeopardy to the applicant's life or safety must be demonstrated. The Applicant has provided no evidence that there is a risk to his life or safety. (*Duve v. Canada (M.C.I.)*, [1996] F.C.J. 387 (T.D.) at para. 22; Reference is also made to: *Mikhailov v. Canada (M.C.I.)*, [2000] F.C.J. No. 642, paras. 12-13; *Frankowski v. Canada (M.C.I.)*, [2000] F.C.J. No. 935, para. 7; *Csanyi v. Canada (M.C.I.)*, [2000] F.C.J. 758, para. 4.)

[22] The Applicant states that his children will be harmed if he is not able to say goodbye to them as he believes they are on vacation in Florida at present. It is clear from the Applicant's own record that he has not seen or spoken to his children, who are 15 and 12, for at least a year and a half. The IAD decision reveals that the evidence clearly demonstrates that he had rarely visited his children since separated from their mother in 1990's and that he has spent a large portion of his time in Canada, in detention. Neither his ex-wife, nor his children, provided any letter on his behalf for him to remain in Canada for his IAD appeal. This is a strong indication that the Applicant's children

would not be harmed by his being removed without saying goodbye. Moreover, it is speculative, whether and when, he may see his children in the future whether or not he is removed.

[23] The Applicant's allegations that he will be unable to pursue his Federal Court leave application regarding the refusal to defer removal have already been rejected in a much more serious context, that of PRRA applicants where risk to life is alleged.

[24] On this point Justice James O'Reilly found in *Kim v. Canada (M.C.I.)*, 2003 FCT 321: "I see nothing in the Act or the Rules that 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." Further, as Justice Luc Martineau decided in *Akyol v. Canada (M.C.I.)*, 2003 FC 931:

> [11] Sixth, the deportation of individuals while they have outstanding leave applications and/or other litigation before the Court, is not a serious issue nor does it constitute irreparable harm: *Ward v. Canada (Minister of Citizenship and Immigration)*, [1997] F.C.J. No. 86 (T.D.) at para. 12; and *Owusu v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 1166 (T.D.). I also note that the application for leave and judicial review will continue regardless of where the applicants are located, and that they can provide instructions to counsel as to how to proceed with the litigation from the U.S. or, should they end up there, Turkey.

(Reference is also made to: *Ryan v. Canada (M.C.I.)*, [2001] F.C.J. No. 1939 at para. 8.)

[25] Indeed, this Court and the Court of Appeal routinely dismiss stays where there are outstanding applications for leave and for judicial review or appeals. (*Selliah v. Canada (M.C.I.)*, above; *El Ouardi v. Canada (S.G.)*, 2005 FCA 42; *Sivagnanansuntharam v. Canada (M.C.I.)*,

(February 16, 2004, Docket A-384-03) (F.C.A.); *Tesoro v. Canada(M.C.I.)*, 2005 FCA 148 (F.C.A.).)

[26] The proper, persuasive, and authoritative approach is the one articulated by the Federal Court of Appeal that has held that removing an applicant from Canada, while his appeal of his negative PRRA is pending, does not render his/her rights nugatory. In *Selliah v. Canada (M.C.I.)*, [2004] F.C.J. No. 1200 (F.C.A.)**,** Justice John Maxwell Evans stated:

> [20] Since the appeal can be ably conducted by experienced counsel in the absence of the appellants and since, if the appeal is successful, the appellants will probably be permitted to return to Canada at public expense, I cannot accept that removal renders their right of appeal nugatory.

[27] Further, Justice Judith Snider considered but rejected a similar argument to the one advanced by the Applicant and ultimately concluded that the application is **not** rendered nugatory by removal. Justice Snider relied on *Kim*, above, and on the Court of Appeal's decision in *Selliah*, above, and noted as follows in *Nalliah v. Canada (M.C.I.)*, 2004 FC 1649:

> [30] The second branch of Mr. Nalliah's argument is that the loss of the right to continue the litigation constitutes irreparable harm. Contrary to these submissions, if the injunction is refused, their right to an effective remedy will not be rendered nugatory. As Mr. Justice O'Reilly stated in *Kim v. Canada* (*Minister of Citizenship and Immigration*) (2003), 33 Imm. L.R. (3d) 95 (F.C.T.D.), at paragraph 9: "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" .
>
> [31] In *Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 26, at paragraph 20, Justice Evans of the Court of Appeal stated:
>
> > Since the appeal can be ably conducted by experienced counsel in the absence of the appellants and since, if the appeal is successful,

> the appellants will probably be permitted to return to Canada at public expense, I cannot accept that removal renders their right of appeal nugatory.
>
> [32] The cases of *Suresh* and *Resulaj*, referred to by Mr. Nalliah may be distinguished on the basis that, in both of those cases, there was significant evidence supporting a personalized risk. From a review of the jurisprudence, I conclude that irreparable harm cannot be solely founded on difficulty in pursuing legal rights of challenge once removed from Canada.

[28] Furthermore, as stated earlier, the Applicant does have the option, under s. 52, of applying to return to Canada after his deportation order is executed.

[29] Irreparable harm alleged by the Applicant is speculative and it does not satisfy the test.

BALANCE OF CONVENIENCE

Applicant has not met the test

[30] The Applicant has not met the third aspect of the tri-partite test, insofar as the balance of convenience favours the Minister and not the Applicant.

[31] The inconvenience that the Applicant may suffer as a result of his removal from Canada does not outweigh the public interest in executing removal orders as soon as reasonably practicable in accordance with s. 48 of IRPA.

[32] The public interest is to be taken into account and weighed together with the interests of private litigants. (*Manitoba (A.G.) v. Metropolitan Stores (MTS) Ltd,* [1987] 1 S.C.R. 110, at 146.)

[33] The Applicant is seeking extraordinary equitable relief. It is trite law that the public interest must be taken into consideration when evaluating this last criterion. In order to demonstrate that the balance of convenience favours the Applicant, the latter should demonstrate that there is a public interest **not** to remove him as scheduled. (*RJR-MacDonald*, aobve; *Blum v. Canada (M.C.I.)*, (1994) 90 F.T.R. 54, decided by Justice Paul Rouleau.)

[34] In this context, as Justice Evans held in *Selliah*, the balance of convenience does not favour delaying further the discharge of either the Applicant's duty, as a person subject to an enforceable removal order, to leave Canada immediately, or the Minister's duty to remove him as soon as 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. M.C.I.*, 2004 FCA 261 at paras. 21-22; *Dasilao v. Canada (M.C.I.)*, 2004 FC 1168.)

[35] The balance of convenience further tips in favour of the Minister when the Applicant's criminal record is taken into account. The Applicant, in this case, has accumulated 33 convictions while in Canada, including multiple convictions for assault and assault with a weapon. According to the IAD, which recently heard his appeal, he is an unrehabilitated long time criminal with little establishment demonstrated in Canada. As Justice Marshall Rothstein stated in *Mahadeo*, criminal convictions are "public interest considerations that weigh heavily against an applicant in a consideration of the balance of convenience." Justice William P. McKeown agreed with this reasoning in *Gomes v. Canada (M.C.I.)*, (1995), 26 Imm. L.R. (2d) 308 (T.D.), and held that:

> [7] With respect to the balance of convenience test, I am in agreement with the reasoning of Rothstein J. in *Mahadeo v. Canada (Secretary of State)*, October 31,

> 1994, (unreported), Court File IMM-4647-94 (F.C.T.D) [Please see [1994] F.C.J. No. 1624]. In that case, Rothstein J. stated that when the applicant is guilty of welfare fraud or has been convicted of a criminal offence in Canada, the balance of convenience weighs heavily in favour of the respondent. In this case the applicant was convicted of assault causing bodily harm, which I find to outweigh any consideration of the emotional devastation of the applicant's family. I therefore find that the balance of convenience in this case lies with the respondent.

(Reference is also made to: *Mahadeo v. Canada (Secretary of State)*, [1994] F.C.J. No. 1624 at para. 3 (T.D.) (QL); *Moncrieffe v. Canada (M.C.I.)*, [1995] F.C.J. No. 1576 (T.D.) (QL) and *Choubaev v. Canada (M.C.I.)*, 2002 FCT 816.)

CONCLUSION

[36] For all the above reasons, this motion for a stay of removal is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicant's application for an order to stay the removal be dismissed.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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