

Date: 20070919

Docket: IMM-3685-07

Citation: 2007 FC 938

Ottawa, Ontario, September 19, 2007

PRESENT: The Honourable Mr. Justice Mandamin

BETWEEN:

CELIAFLOR GALLARDO

Applicant

and

**MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

REASONS FOR ORDER AND ORDER

[1] **UPON MOTION** for an Order that the execution of the removal order against the applicant be scheduled to take place on September 23, 2007 be stayed until such time as the Application for Leave and Judicial Review in this matter has been disposed of;

[2] **AND UPON** review of the parties' motion records;

[3] **AND UPON** hearing the submissions of counsel for the applicant and respondent on September 18, 2007 in Ottawa;

[4] The applicant Celiaflor Gallardo seeks an order for a stay of removal order to the Philippines scheduled to take place on September 23, 2007 until her Application for Leave and Judicial Review has been disposed of and, if leave is granted, until such time as the judicial review is finally disposed of by this Court.

[5] The grounds for the applicant's motion are irreparable harm would result if she were removed from Canada. First, her life would be imperiled because she would not be able to afford her diabetes medication in the Philippines. Second, her invalid mother would also suffer irreparable harm if she, the applicant, would not be present to provide for her mother's care.

[6] At the onset of the hearing, the applicant's counsel objected to an affidavit in the respondent's motion record which documented inquiries about the cost of diabetes medication in the Philippines. He submitted that the respondent counsel improperly obtained an adjournment in order to make such inquiries and further that he was caught by surprise by the affidavit.

[7] The respondent counsel explained that the adjournment was obtained solely to allow new counsel to become informed. Subsequent to the adjournment, respondent's previous counsel became aware of the proceeding and joined the new counsel as co-counsel. I accept respondent counsel's explanation.

[8] The affordability of the diabetes medication is central to the issue of irreparable harm to the applicant. It was open to applicant's counsel to buttress the applicant's affidavit evidence of the

cost of the diabetes medication by other inquiry but he chose not to do so. Considering the foregoing, I accept the respondent's contested affidavit as evidence in this hearing.

The Test for Granting a Stay Order

[9] The test for the granting of a stay requires the applicant to demonstrate firstly, that she has a serious issue to be tried; secondly, that she would suffer irreparable harm if no stay was granted; and thirdly, that the balance of convenience favours the applicant (*Toth v. Canada (Minister of Employment and Immigration)* (1998), 6 Imm L.R. (2d) 123 (F.C.A.), [1988] F.C.J. No. 587 (QL)).

Serious Issue

[10] The test of a "serious issue to be tried" is that the issue being raised is not frivolous, (*RJR MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 31, [1994] S.C.J. No. 17. The matters raised by the applicant of health and care of invalid relatives satisfies this low threshold.

Irreparable Harm

[11] The applicant stated by affidavit that she is a Type 2 diabetic and requires a drug, Metformin, to maintain her health. The generic equivalent in the Philippines is Humamet. The applicant deposes that she took Humamet in the Philippines for her diabetes prior to August 18, 2001. This diabetes medication cost 75 pesos a tablet and she required three tablets a day. Her medication in the Philippines would cost approximately 225 pesos per day which equates to \$170.12 Canadian per month. She did not believe she could find employment in the Philippines and thus would not be able to afford the Humamet medication. Her husband lives in the Philippines but

he is supporting their three adult children who are in school and he could not afford to pay for her diabetes medicine. Her father in Canada previously assisted but cannot do so now.

[12] The respondent filed an affidavit by Linda Noel who had made email enquiries to an official of the Department of Health in the Philippines. The response from Agnette P. Peralta, Director IV, Bureau of Health Devices and Technology, Department of Health, Republic of Philippines, advised that the current Humamet cost 8.60 pesos per 500 mg and 14.25 pesos for 850 mg in the largest drug store chain in the Philippines. Further, the generic equivalent of the medication cost 4.60 pesos per 500 mg and 7.15 pesos per 850 mg. The cost for three tablets would be 25.8 pesos per day or 13.8 pesos per day for the generic version of the drug. Thus, the cost of the Humamet/Metformin diabetes medication per day in the Philippines is much less than the 75 pesos per day the applicant reported she had to pay in 2001. The cost of the Humamet/Metformin in the Philippines today is \$18.90 Canadian per month or \$10.20 Canadian for the generic version instead of the \$170.12 Canadian.

[13] I find the assertion by the applicant that she or her family could not afford to buy her diabetes medication unconvincing.

[14] The applicant lives with her parents in Ottawa and she cares for her disabled mother. She cooks for her parents, cleans, does the laundry, and assists her mother with her personal hygiene. Her mother is an amputee and wheelchair bound. Her doctor advises that having a close relative available to help would be beneficial to her health.

[15] The applicant's father, 77 years of age in 2006, deposes that he has four sons in Canada, three in Ottawa and one in Toronto. Each are married and have children. One, in Ottawa, is disabled. He states his sons cannot assist his wife as the applicant has.

[16] The respondent's counsel submits that the applicant must show that she herself would suffer irreparable harm, citing Mosley J. in *Tajram v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 760, [2006] F.C.J. No. 949:

I acknowledge that as family members age and become ill, the hardships which typically accompany separation become much more difficult and may reach the level where they are more than the "usual consequences of deportation", as described by Justice Evans in *Tesoro*. However, the test for a stay, in my view, should focus primarily on the effect of the removal upon the applicants themselves.

[17] The applicant's counsel makes reference to *Samuels v. Minister of Citizenship and Immigration*, 2003 FC 1349 where the heavy reliance of children 18 and 21 on their mother was a necessary consideration; to *Kahn v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2005] F.C.J. No. 1365 where that applicant's wife and children depended on the applicant for emotional and financial support in part as a result of involvement in a serious accident, and *Richards v. The Minister of Citizenship and Immigration*, (1999) IMM-7220-99 where the applicant was the primary caregiver for her blind 72 year old grandmother. In each of these cases, the Court recognized that harm would occur where the relatives were heavily dependant on a applicant sole caregiver.

[18] Here, the applicant's parents have other family members in Canada and, more particularly, in Ottawa. Three sons and their families live in Ottawa, the same city as the parents. While one son is himself disabled, the others and their families are available to help. In fact, one does help transport their mother about, as the applicant states in her affidavit.

[19] The applicant's mother had to have a leg amputated as a result of her diabetes in 2003. The applicant deposed that she had lived 'equally' with her brother in Toronto and her parents in Ottawa between the years 2001 and 2006. It was in September 2006, that the applicant began living exclusively with her parents in Ottawa.

[20] While the family members may not provide the same assistance as the applicant, I find that the applicant's mother is not in a situation where it may be said she is heavily and solely dependant on the applicant.

The Balance of Convenience

[21] The balance of convenience weighs the inconvenience of the applicant should the stay be denied against the public interest in executing the deportation order as soon as reasonably practical. *Atwal v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427, [2004] F.C.J. No. 2118.

[22] The applicant has been in Canada without permanent residency status. She has availed herself of administrative and judicial processes provided by legislation in an effort to remain. The ultimate determination was that she should return to the Philippines.

[23] I find that the balance of convenience favours the respondent.

Conclusion

[24] For the above reasons, the application for a stay of execution of the removal order is dismissed.

ORDER

THIS COURT ORDERS that the motion for a stay of the execution of the removal order is dismissed.

"Leonard S. Mandamin"

Judge

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-3685-07

STYLE OF CAUSE: CELIAFLOR GALLARDO v.
MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: September 18, 2007

**REASONS FOR ORDER
AND ORDER:** Mandamin J.

DATED: September 19, 2007

APPEARANCES:

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