

Date: 20080421

Docket: IMM-1429-08

Citation: 2008 FC 523

Ottawa, Ontario, April 21, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

KULWINDER SINGH KANG

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant seeks an order for a stay of his deportation which is scheduled to occur on Tuesday, April 22, 2008. He seeks a stay pending his application for leave and if leave is granted, of the application for judicial review of the decision of March 14, 2008, made by an Enforcement Officer. That decision denied the Applicant's request to delay his deportation pending the outcome of his application for permanent residence.

[2] The Applicant is a citizen of India. He came to Canada via the United States of America in December of 1996, after abandoning his USA refugee claim. He also claimed refugee status in Canada but abandoned that claim after marrying a Canadian citizen in January of 1997.

[3] In January 19, 2006, the Applicant filed a spouse or common-law partner in Canada application for permanent residence. A negative Pre-Removal Risk Assessment was made on March 7, 2007, and has never been challenged.

[4] On January 30, 2008, the Applicant's wife withdrew her Undertaking of Assistance supporting the applicant's permanent residence application. As a result, on February 20, 2008, the Applicant was informed that the Respondent was precluded from rendering a decision on the application and that his file had been closed.

[5] The wife's withdrawal of her Undertaking that supported the first application occurred January 30, 2008. She wrote to the Respondent on February 29, 2008, explaining that she and her husband had reconciled and she now knew that she had erred in withdrawing her support. She asked that the original application be reinstated.

[6] On February 27, 2008, the Applicant provided his proposed travel itinerary and requested the deferral of removal until April 26, 2008, in order to attend his sons' birthdays. That request was denied as was a request to reconsider that denial. Neither decision was challenged.

[7] On March 12, 2008, after the Applicant and his spouse apparently reconciled, the Applicant filed a new spouse or common-law partner in Canada application for permanent residence supported with his wife's new Undertaking of Assistance and again requested that the removal be deferred pending its consideration. That request was denied on March 14, 2008, and is the decision being challenged in the leave application pending before this Court.

[8] The Applicant argues that the Respondent, in denying the request to defer removal, failed to consider or properly assess the best interests of his two Canadian born children. It was argued by counsel that these interests were essentially two-fold: the emotional support the children received from their father and his financial support.

[9] In *Wang v. Canada (Minister of Citizenship and Immigration) (T.D.)*, 2001 FCP 148, Justice Pelletier (as he then was) reviewed the principles applicable in deferral applications, in that case in the context of a pending H&C application. He noted, correctly in my view, that if there is an alternative remedy, such as a right of return, that should weigh heavily against deferral. This is so because the Minister has a legal obligation pursuant to section 48 of the *Immigration and Refugee Protection Act* to effect removal "as soon as reasonably practicable".

[10] The Applicant has possible alternative remedies which could lead to his return to Canada, namely the pending application filed March 12, 2008.

[11] There is no evidence that the officer failed to consider the impact the removal will have on the children. In fact, she attested to giving such consideration in her affidavit filed in these proceedings and her notes to file made at the time each deferral was sought indicates such consideration was given.

[12] Further, there is evidence to counter the suggestion that there will be an emotional loss for the children with their father's removal. His wife, in February 2008, advised the officer that "he has never spent time with his children".

[13] Even the financial support is in question. While he attests that he is the principal breadwinner, there is no evidence that his family will not be able to survive financially if he is removed to India. There is no evidence as to his worth, his ability to gain employment in India, nor evidence that he will not be able to provide the financial support to his family after removal that he is expected, legally and morally, to provide to them.

[14] The Applicant also raised issues of possible mistreatment if he is returned to India. There was a PRRA which was negative and it has not been challenged. There is thus no objective evidence of any risk of persecution, torture, unusual treatment or punishment to the Applicant if he is returned to India.

[15] The Applicant has not established that there is a serious issue to be tried not that there will be irreparable harm if the removal order is not stayed. He has not met the tripartite test in

Toth v. Canada (Minister of Employment and Immigration) (1988), 86 N.R. 302 (F.C.,A.).

Accordingly, there are no grounds for deferral and no basis for the stay requested.

[16] Therefore it is ordered that this application for a stay is dismissed.

ORDER

THIS COURT ORDERS that:

1. This application for stay of the removal order is dismissed.

“Russel W. Zinn”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1429-08

STYLE OF CAUSE: KULWINDER SINGH KANG v.
THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: April 21, 2008

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AND ORDER:** ZINN, J.

DATED: April 21, 2008

APPEARANCES:

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