Date: 20081205

Docket: IMM-5258-08

Citation: 2008 FC 1353

Ottawa, Ontario, this 5th day of December 2008

Present: The Honourable Orville Frenette

BETWEEN:

Milena URBANCZYK

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

AMENDED REASONS FOR JUDGMENT AND JUDGMENT

[1] This is a motion seeking a stay of removal of the applicant to Poland, scheduled for December 5, 2008 at 10:45 p.m.

[2] The applicant, a Polish national, came to Canada on July 5, 2001 with a visitor's visa valid until January 5, 2002. The visa was not renewed and on May 23, 2002, a departure order was issued against her.

[3] The applicant made an application for refugee status in 2002 but later, the Refugee Protection Division decided it was deemed to be abandoned.

[4] In 2002, the applicant met Joaquin Diazgranados, a Columbian, who became her common-law partner. On January 5, 2005, she was arrested for giving a false address and an unresponsive cell phone number.

[5] On May 31, 2005, the applicant's Pre-Removal Risk Assessment ("PRRA") application received a negative decision. She and her partner presented applications for permanent residence on Humanitarian and Compassionate ("H&C") grounds, in which she was sponsored by her partner. These applications were dismissed because Mr. Diazgranados was deemed inadmissible because of a standing warrant in the United States in a pending criminal charge, i.e. sexual assault.

[6] Mr. Diazgranados communicated with his U.S. lawyer to attempt to resolve this problem on September 18, 2008.

[7] The applicant made a new H&C application. On November 19, 2008; she requested the Canadian Border Services Agency to defer her removal until such time as the H&C application had been processed. In the alternative, she requested a 60-day delay to allow time to resolve the matter in the U.S.

[8] The removal officer, in his decision of December 3, 2008, analyzed the reasons or issues advanced by the applicant to support a deferral of the removal order:

1. The applicant requested the deferral until the decision on her recent H&C application. She alleged she was not involved with the event which caused her partner and herself to lose the first H&C application. She alleged any long separation from Mr. Diazgranados could lead to an eventual break-up.
2. The applicant raised the fact that she is suffering from a major depressive disorder; she is under medical care and medication. The threat of removal causes her additional stress and anxiety.

[9] The officer considered these factors but concluded they did not justify a deferral request.

[10] A tripartite conjunctive test for a stay of removal was elaborated in *Toth v. Minister of Employment and Immigration* (1988), 86 N.R. 302 (F.C.A.). The case law considers a stay as an extraordinary remedy for which the applicant must demonstrate "special and compelling circumstances, to warrant exceptional judicial intervention" (*Shchelkanov v. Minister of Employment and Immigration*, 76 F.T.R. 151; *Minister of Citizenship and Immigration et al. v. Harkat*, 2006 FCA 215, at paragraph 10). According to *Toth, supra*, the conditions for a stay are as follows:

1. There is a serious issue to be tried;
2. Irreparable harm will be caused if the stay is not granted; and
3. The balance of convenience favours the granting of the stay.

[11] These conditions must be considered in the context of the very limited discretion a removal officer possesses under section 48 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27

(the "Act") (*Simoes v. Minister of Citizenship and Immigration*, 187 F.T.R. 219, at paragraph 12; *Wang v. Canada (M.C.I.)*, [2001] 3 F.C. 682, at paragraph 45; *Baron v. Minister of Public Safety and Emergency Preparedness*, 2008 FC 341; *Pacia v. Minister of Citizenship and Immigration*, 2008 FC 804).

[12] The threshold to determine a serious issue is usually described in case law as "not frivolous and vexatious". However, a literal meaning of the word "serious" requires a more elevated threshold. Justice Pelletier in *Wang v. Minister of Citizenship and Immigration*, [2001] 3 F.C. 682, at paragraph 11, noted that the serious issue is not frivolous and vexatious, but rather the "likelihood of success".

[13] The applicant alleges serious issues:

1. The applicant is the innocent victim in that her first H&C application was refused because of her partner's criminal charge in the U.S., which is alleged to have occurred before she met him.
2. If she is sent back to Poland, this will separate her from her partner for several years before the agency processes her H&C application.
3. She suffers from major depression, controlled by medication but these last events accentuated her anxiety and stress.

[14] The respondent answers:

1. The separation of a couple is a usual result of a removal.

2. Anxiety and depression are usual consequences of deportation. There is no evidence that medical services and medication are not available in Poland to treat this illness (*Palka v. Minister of Public Safety and Emergency Preparedness*, 2008 FCA 165).
3. The existence of an outstanding H&C application alone is not, in itself, sufficient support to stay a deportation order (*Simoes*, *supra*, at paragraph 13; *Barrera v. Minister of Citizenship and Immigration*, 2003 FCT 779).

[15] If one examines individually these issues, he or she could conclude they do not meet the test of "seriousness" but cumulatively I believe they do meet the criteria.

[16] The applicant repeats that after a six-year relationship with her partner, many years of separation may cause irreparable harm. The applicant quoted case law which supports her view (*Hwang v. Minister of Citizenship and Immigration*, 226 F.T.R. 318). A few exceptional cases authorized stays pending the processing of applications for leave and judicial review (*Kahn v. Minister of Public Safety and Emergency Preparedness*, 2005 FC 1107; *Kowlessar v. Minister of Public Safety and Emergency Preparedness* (October 30, 2008), IMM-4631-08).

[17] The applicant invokes also her severe depression which is aggravated by the threat of removal and the removal.

[18] There is credible evidence in the record that the removal will cause irreparable harm to the applicant.

[19] Although the balance of convenience does not automatically flow from a finding of serious issue and irreparable harm, these factors cannot be ignored. There must be a balance between the respondent's obligation to execute removal orders as soon as practicable in accordance with subsection 48(2) of the Act, and the applicant's interest.

[20] In this case, the applicant poses no danger to the public or to the security of Canada. She has been in Canada for seven years; she is employed and suffers from a serious illness. I believe the balance of convenience is in her favour (*Singh v. Minister of Citizenship and Immigration,* 104 F.T.R. 35).

[21] The conditions of the test having been met, this motion will be granted.

JUDGMENT

The Court orders a stay of the execution of the deportation order against the applicant pending the determination for leave and judicial review of the refusal of deferral of the removal order.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-5258-08
STYLE OF CAUSE:	Milena URBANCZYK v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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REASONS FOR JUDGMENT AND JUDGMENT:	The Honourable Orville Frenette, Deputy Judge
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APPEARANCES:

Mr. Andrew Brouwer	FOR THE APPLICANT
Mr. David Joseph	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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