Date: 20090131

Docket: IMM-400-09

Citation: 2009 FC 110

Montréal, Quebec, January 31, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

PETRO PETROVYCH

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

Introduction

[1] In its consideration of a stay of removal application, the Court is under obligation to determine whether the applicant's position, in regard to serious issue, irreparable harm and balance of convenience is clear, doubtful or non-existent.

[2] Recognizing that granting a stay is an exceptional measure, the weight given to the evidence of both sides must be carefully scrutinized. It is this scrutiny that allows the Court to formulate a

narrative, inasmuch as possible, by which to answer the tri-partite *Toth* test (*Toth v. Canada (Minister of Employment and Immigration.)* (1988), 86 N.R. 302 (F.C.A.)

Judicial Procedure

[3] This is a motion for a stay of removal of the applicant, scheduled for Sunday, February 1, 2009.

Background

[4] On December 4, 1998, the applicant was granted a visitor visa by the Canadian visa post in Kiev, Ukraine, which was valid until June 9, 1999.

[5] The applicant entered Canada on December 10, 1998. On October 13, 1999, the applicant made a refugee claim. The applicant's refugee claim was denied, and the decision was sent to him by mail on January 26, 2001.

[6] On February 21, 2001, the applicant filed an Application for Leave and for Judicial Review of the negative Refugee Protection Division decision. Leave was dismissed on June 6, 2001.

[7] The applicant failed to report for a removal interview on August 19, 2002, and a Warrant for Arrest was issued on August 20, 2002.

[8] The applicant was arrested on August 27, 2004, and detained. Subsequently, the applicant was released on a $3,000.00 cash bond, and other terms and conditions.

[9] On November 1, 2004, the applicant made a Humanitarian and Compassionate (H&C) application, without a sponsor.

[10] The applicant was found eligible to make a Pre-Removal Risk Assessment (PRRA) application on November 15, 2004. The PRRA application was received on November 30, 2004. The PRRA application was denied on May 11, 2005, and the negative PRRA decision was served on the applicant in person on July 11, 2005.

[11] On July 21, 2005, the applicant filed an Application for Leave and for Judicial Review of the negative PRRA decision, along with a motion for a stay of his removal. The motion for a stay of removal was heard and dismissed by Madam Justice Snider on August 3, 2005. A search of the Federal Court website indicates that on August 4, 2005, the applicant filed a Notice of Discontinuance of his application, challenging the negative PRRA decision.

[12] The applicant subsequently failed to report for his second removal on August 4, 2005. On August 10, 2005, a Warrant for Arrest was issued.

[13] On July 12, 2007, the applicant's H&C application was reviewed and was transferred to the PRRA unit for a risk assessment, as the applicant had raised the same risk allegations he alleged in his PRRA application. The H&C application remains pending at the PRRA unit.

[14] The applicant was arrested on January 24, 2009, and detained. Detention was recommended until his removal from Canada is confirmed. Removal arrangements were made and he was served personally with a Direction to Report for removal on January 24, 2009, for a flight scheduled on February 1, 2009.

[15] On January 29, 2009, a translator employed by the applicant's new counsel attended at GTEC and spoke to the Enforcement Officer with carriage of the applicant's case. She asked the Enforcement Officer to defer the applicant's removal until a decision on the outstanding H&C had been rendered. There is no evidence that this translator was authorized to act on behalf of the applicant, and no such authorization seems to have been presented to the Enforcement Officer. There is also no evidence that the translator provided the Officer with any evidence to support the applicant's request. The Officer indicated that the applicant could make a request in writing which would be considered in a timely manner before his removal.

[16] On January 30, 2009, the applicant filed an Application for Leave and for Judicial Review of a refusal to defer removal, together with a motion for a stay of his removal.

Issue

[17] Has the applicant satisfied all three prongs of the conjunctive test for a stay?

Analysis

[18] The test for the granting of an order staying execution of a removal order is:

a. whether there is a serious question to be determined by the Court;

b. whether the party seeking the stay would suffer irreparable harm if the stay were not issued; and

c. whether on the balance of convenience the party seeking the stay will suffer the greater harm from the refusal to grant the stay.

(See: *Toth, supra*; *R.J.R.-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311)

[19] The test for a stay is conjunctive and the applicant must therefore satisfy each branch of this tri-partite test.

Serious Issue

[20] This is not the applicant's first motion for a stay of removal. According to the Federal Court's electronic docket system, on July 21, 2005, the applicant made two motions to this Court requesting a stay of his removal pending applications for judicial review of his negative PRRA decision and a refusal to defer removal. These motions were heard and dismissed by the Honourable Madam Justice Snider on August 3, 2005. The Court file numbers for those applications were IMM-4414-05 and IMM-4413-05.

[21] In her Order, Justice Snider stated that no serious issue was raised by the Enforcement Officer's decision not to defer removal, due to the fact that the applicant's H&C was not filed in a timely manner. Justice Snider also found that the applicant's allegations of harm were not supported by any evidence and that the applicant's conduct was such that the balance of convenience favoured the respondent.

[22] The Court's endorsement of the Order states:

> The balance of convenience does not favour the Applicant. He failed to report for his removal interview in August, 2002. He failed to notify CIC of his whereabouts. A warrant was issued for his arrest and was outstanding for 2 years when he was finally detained on another matter. In these circumstances, the public interest in promoting respect for Canada's immigration laws, and in executing removal orders as soon as practicable outweighs the interest of the Applicant. (*Petrovych v. The Minister of Citizenship and Immigration*, (3 August, 2005) Ottawa IMM-4413-05, IMM-4414-05).

The applicant failed to report for removal

[23] A warrant was issued for his arrest on August 10, 2005; it was only executed on January 24, 2009 after an investigation. The applicant has been detained as a flight risk since this time, pending his removal.

[24] The applicant's misconduct in this case is serious, and it is compounded by the fact that he has made no mention of it in his stay motion record.

[25] The Court has held as much in a series of cases, including *Kathirvelu v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1404; *Antonucci v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1320 (T.D.) and *Araujo v. M.C.I.* (Aug. 27, 1997), Court File No. IMM-3660-97 (F.C.T.D.) where Madam Justice McGillis refused to exercise her equitable jurisdiction to stay a removal order that the applicant had chosen to disobey by failing to report for removal. As McGillis J. stated:

> The Court routinely hears, on an urgent basis, applications to stay the execution of deportation orders. However, in the present case, the applicant failed to institute his proceedings in a timely manner, and he chose to disobey a valid deportation order. As a result, he is in Canada unlawfully and a warrant is outstanding for his arrest. In the circumstances, the applicant cannot request the Court to exercise its equitable jurisdiction to stay the order that he has chosen to disobey. The request for an urgent hearing is therefore denied.

[26] In *Duboulay v. M.P.S.E.P.* (Jan. 7, 2007), Court File No. IMM-216-07 (F.C.), the Court also emphasized the importance of applicants including all relevant facts in their materials when seeking a stay on an urgent basis. The Court noted that facts relating to an applicant having disobeyed the law and eluded removal were "highly relevant" in this regard. The Court decided not to entertain the applicant's motion, "which would have the effect of rewarding the applicant for her decision not to respect Canada's laws."

[27] It should also be noted that the applicant's current removal arrangements resulted from his arrest and detention on January 24, 2009. These enforcement measures were directly attributable to the applicant's failure to report for removal in August 2005 after his stay motion was dismissed by the Court.

Insufficient evidence presented to Enforcement Officer to support request for deferral

[28] This Court has held that the onus to prove that a deferral of removal is warranted in any particular circumstances rests squarely with the applicant. In *John v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 420 at paras. 22-24, the Honourable Madam Justice Snider held:

> Further, it appears to me that the burden rests squarely with the person seeking a deferral to present compelling evidence to support the deferral, including, if applicable, evidence related to the best interests of the child. Vague references to financial concerns or unsubstantiated submissions of the lack of alternative caregivers ought not to be sufficient and certainly, in my view, does not shift the burden to the officer to make inquiries and otherwise ferret out better information.

[29] In this case, the applicant has not presented sufficient evidence to the Officer to prove that a deferral is warranted in the circumstances. According to the affidavit of the translator, she asked the Officer to defer removal pending the applicant's H&C application and due to his allegations that he faced risk upon return to Ukraine. The Officer invited the applicant to put his deferral request in writing and informed him that it would be considered in a timely manner. The applicant has not done so and now argues that the Officer's conduct was unreasonable. There is no evidence that the translator even gave the Officer a copy of the H&C submissions, or any other evidence whatsoever for her to consider whether deferral was appropriate. A simple request for a deferral, not followed by any evidence to support it, does not shift the onus to the Officer to produce and consider evidence which may support the applicant's request.

[30] It is trite law that an outstanding H&C application, in and of itself, is not sufficient to warrant the deferral of a person's removal from Canada. The jurisprudence had held that there must be compelling personal circumstances to support a request for a deferral. This Court has also held that sometimes an H&C application that was filed in a timely manner and has yet to be resolved due to backlogs in the system may be an appropriate reason to defer removal; however, in this case the applicant's H&C was not timely as it was not filed until two years after he failed to report for removal. Furthermore, any establishment that the applicant alleges will be lost due to his deportation were gained in direct contravention of Canada's immigration laws and while the applicant was actively evading arrest and deportation and ignoring orders issued by this Court.

[31] As the applicant has failed to establish a serious issue, this motion can be dismissed on this basis alone.

Irreparable Harm

[32] The onus is on the applicant to demonstrate, through clear and convincing evidence of irreparable harm, that the extraordinary remedy of a stay of removal is warranted. Irreparable harm must constitute more than a series of possibilities and cannot be simply based on assertions and speculation (*Atwal v.Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427).

[33] Federal Court jurisprudence also establishes that irreparable harm must be something more than the inherent consequences of deportation. As Mr. Justice Pelletier stated in *Melo v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 403:

> (…) if the phrase irreparable harm is to retain any meaning at all, it must refer to some prejudice beyond that which is inherent in the notion of deportation itself. To be deported is to lose your job, to be separated from familiar faces and places. It is accompanied by enforced separation and heartbreak.

Risk allegations already rejected by a PRRA Officer essentially repeated in this motion record without any supporting evidence does not constitute irreparable harm

[34] The risk allegations made by the applicant, which he alleges constitute irreparable harm have already been considered and rejected by the PRRA Unit. The risk allegations made in the H&C application are almost identical to those described in the PRRA. The applicant cannot rely on the same risk allegations that were not found to be established in the PRRA and were rejected previously by this Court in a stay motion, without any new evidence, or any evidence at all, to support them.

Inherent consequences of deportation do not constitute irreparable harm

[35] The applicant claims that if deported he will be unable to return to Canada due to the general application of Canada's immigration laws which will require him to obtain authorization to return to Canada (ARC). The applicant characterizes this consequence as irreparable harm.

[36] The requirement to apply for an ARC is the direct result of the applicant's choice to remain in this country illegally after his authorized period of stay in Canada to make a refugee claim has ended. This requirement is faced by all who are removed from Canada every year and does not

constitute anything other than the inherent effects of deportation. As such, it does not meet the test for irreparable harm (*Melo, supra*).

H&C consideration remains in effect even if applicant is removed from Canada

[37] The existence of an outstanding H&C application does not amount to irreparable harm. No reason exists to believe that the H&C will not continue to be processed, or that the decision will inevitably be negative, once the applicant has been removed from Canada.

[38] This Court has held that "[t]here is nothing on the face of this provision or IRPA as a whole that would preclude the granting of permanent resident status or an exemption from the Act's requirements where the applicant is outside Canada. It is clear to me that the policy manual contemplates, as was the case in this instance, that H and C requests will continue to be processed following removal." (*Uberoi v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1232)

[39] Justice Evans, writing for the Federal Court of Appeal, stated in *Palka v. Canada (Minister of Public Safety and Emergency Preparedness), 2008 FCA 165:*

> ***14*** The existence of a pending H&C application has often been held not to constitute irreparable harm, especially when, as here, the application was not made in timely fashion after unsuccessful applications for refugee status and a PRRA. Counsel says that it was justifiable for them to wait five years before making their H&C application so that they could demonstrate establishment in Canada. This was a tactical decision and the appellants must live with the consequences.
>
> ***15*** Further, the appellants have provided no evidence that removal will render their H&C application nugatory. Denying a

> stay will not destroy the H&C application insofar as it is based on their ties to Canada through the length of time that they have been here, family, employment, friends and school, especially if, as counsel claims, their application is "exceptionally strong on its merits".

[40] This Court has recently held that even if an applicant's H&C application is refused due to deportation before a decision was rendered, a remedy, nevertheless, remains. In *Stewart v. MPSEP,* (August 29, 2008) Toronto, IMM-3570-08, Mr. Justice Zinn held that the proper remedy for an H&C application rejected solely on the basis that an applicant is no longer in Canada is to commence a proceeding in this Court:

> In my view if it is established that the Respondent failed to properly and adequately process the Applicant's application on humanitarian and compassionate grounds solely or principally because the Applicant was no longer in Canada, the Applicant will have been denied procedural fairness. He can then seek a review of such a refusal in a proceeding against the Respondent before this Court. There is no evidence offered that such a process, although involving some delay, would not provide the Applicant with a remedy.

[41] The applicant's argument on this point is speculative and consists of a series of possibilities, and as such is not clear and convincing evidence of irreparable harm.

[42] As the applicant has failed to satisfy the test for irreparable harm, this motion can be dismissed on this basis alone.

Balance of Convenience

[43] Section 48 of the *IRPA* provides that an enforceable removal order must be enforced as soon as is reasonably practicable.

[44] 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. (See *Dugonitsch v. Canada (Minister of Employment and Immigration.),* [1992] F.C.J. No. 320; *RJR-MacDonald Inc. v. Canada, supra; Blum v. Canada (Minister of Citizenship and Immigration)* (1994) 90 F.T.R. 54)

[45] The balance of any inconvenience which the applicant may suffer as a result of removal from Canada does not outweigh the public interest which the respondent seeks to maintain in the application of the *Immigration and Refugee Protection Act* – specifically an interest in executing a deportation order as soon as reasonably practicable (*Atwal v. Canada (Minister of Citizenship and Immigration.)* 2004 FCA 427).

JUDGMENT

For all of the above reasons, **THIS COURT ORDERS AND ADJUDGES** that the motion for a stay of removal from Canada is denied.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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