Federal Court  Cour fédérale

Date: 20110405

Docket: IMM-1444-11

Citation: 2011 FC 418

BETWEEN:

TERHEMBA THOMAS SHASE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER

LEMIEUX J.

I. Introduction

[1] On Tuesday, March 15, 2011, I stayed Terhemba Thomas Shase's removal to Nigeria scheduled at 6:00 p.m. that day. These are my reasons for doing so. The underlying proceeding to which this stay application is grafted is the refusal, dated March 1, 2011, by a removals officer to defer his removal.

II. Background and Facts

[2] The applicant was born in Nigeria in December 1982 and is a citizen of that country. He came to Canada on July 18, 2006 claiming refugee status the same day. On May 27, 2009 the Refugee Protection Division rejected his claim. He was self represented at the hearing. His application for leave and judicial review was deemed abandoned for failure to file his application record.

[3] On March 1, 2010 he was given an opportunity to file for a Pre-Removal Risk Assessment (PRRA). That application was denied on December 20, 2010. He did not seek judicial review of the PRRA decision.

[4] On February 2, 2007, he began a relationship with Suzy Jeannie Kauki, a Canadian Citizen of Inuit ethnicity. They became common-law spouses. Suzy gave birth to her fist child on or about October 6, 2008; a second daughter to the couple was born recently.

[5] On or about March 22, 2010, counsel for the applicant submitted an application for permanent residence on behalf of Mr. Shase, sponsored by his wife Suzy. That application was made pursuant to a Public Policy known as the Sponsor Common-law Partners in Canada Class, issued under section 25(1) of the *Immigration and Refugee Protection Act*, 2001, c. 27 (*IRPA*) to facilitate processing in accordance with the Regulations. The Policy's declared purpose is:

> The Minister has established a public policy under subsection 25(1) of the *Immigration and Refugee Protection Act* (IRPA), setting the criteria under which spouses and common-law partners of Canadian

> citizens and permanent residents in Canada who do not have legal immigration status will be assessed for permanent residence. The objective of this policy is to facilitate family reunification and facilitate processing in cases where spouses and common-law partners are already living together in Canada. [Emphasis added]

[6] The Policy states as follows:

> 3. Policy
>
> CIC is committed to family reunification and facilitating processing in cases of genuine spouses and common-law partners already living together in Canada. CIC is also committed to preventing the hardship resulting from the separation of spouses and common-law partners together in Canada, where possible.
>
> This means that spouses or common-law partners in Canada, regardless of their immigration status, are now able to apply for permanent residence from within Canada in accordance with the same criteria as members of the *Spouse or Common-Law Partner in Canada class*. This facilitative policy applies **only to relationships in which undertakings of support have been submitted**.
>
> Undertakings are a requirement under this public policy largely because undertakings can be an indication of the applicant's links with relatives in Canada, which is, in turn, a factor that adds to the degree of hardship involved in the separation of spouses and common-law partners. Undertakings are also a requirement in the *Spouse or Common-Law partner in Canada class*.
>
> A25 is being used to facilitate the processing of all genuine out-of-status spouses or common-law partners in the *Spouse or Common-law Partner in Canada* class where an undertaking has been submitted. Pending H&C spousal applications with undertakings will also be processed through this class. **The effect of the policy is to exempt applicants from the requirement under R124(b) to be in status and the requirements under A21(1) and R72(1)(e)(i) to not be inadmissible due to a lack of status; however, all other requirements of the class apply** and applicants will be processed based on guidelines in IP2 and IP8. [Bold emphasis in original; Underline emphasis added]

[7] The Policy makes it clear that CIC is committed to processing all compliant spousal applications, including the ones under the public policy, on a priority basis.

[8] In terms of Quebec applicants which is the case here, the policy says:

> i. Quebec
>
> Eligible applicants who reside in the province of Quebec are treated according to the *Regulations* of the *Spouse or Common-law Partner in Canada* class. They must meet Quebec's sponsorship requirements.
>
> Applicants who are **not** successful in the *Spouse or Common-law Partner in Canada* class but request permanent residence under H&C and reside in the province of Quebec must meet the province's selection criteria pursuant to 25(2) of IRPA.
>
> In these two cases, the officer should forward the file to MICC. The officer should continue processing the file once the province of Quebec has made a decision within their jurisdiction. [Bold emphasis in original, Underline emphasis added]

[9] On the 22nd of February 2011 the applicant received his certificate of selection from the Quebec authorities and the federal authorities were so advised.

III. Discussion and Conclusions

[10] I am well aware of the jurisprudence of this Court and of the Federal Court of Appeal whose most recent pronouncement is *Baron v Canada (Minister of Public Safety and Emergency Preparedness)* 2009 FCA 81, [2010] 2 FCR 311 to the effect that:

a. The test for making out a serious issue is more stringent (an arguable case) where the underlying proceeding is a judicial review application from a removal officer refusing to defer.

b. The discretion of a removal officer is limited – the question is not whether but when a person should be deported.

c. The mere existence of an outstanding Humanitarian and Compassionate (H&C) application does not constitute a bar to the execution of a valid removal order.

d. However, a pending H & C application that was brought on a timely basis but has not yet been resolved is a relevant factor.

[11] The ground invoked by the applicant to the removal officer was that his sponsored application for permanent residence was sent on March 22, 2010 with the appropriate fee paid and was received on April 12, 2010. It was made in a timely manner and should be studied before being removed because of consequences his removal would have. During the hearing I inquired of counsel what effect the applicant's removal would have on his sponsorship application since he would no longer be in Canada. Counsel for the Minister thought the application would continue to be processed; counsel for the applicant thought the application would not continue to be processed. I asked both counsel to make appropriate verifications.

[12] By letter dated March 15, 2011 I was advised by counsel for the Minister that the application would continue to be processed but would likely be refused because he would not meet the requirement under the Policy that he be living with his sponsor which might not have been the case if he had made an H & C application. As an aside, the Policy provides for an automatic administrative stay while a spousal sponsored application for permanent residence is being examined but the applicant here fell within an exception to that benefit because he was removal ready at the time his sponsored application was filed.

[13] The information provided to me by counsel for the applicant was to similar effect to that provided the Court by counsel for the respondent.

[14] In my view the likely refusal of his sponsorship application caused directly by his removal is a major factor in determining whether the removal officer properly exercised his discretion to stay his removal pending a determination on the merits of a timely sponsored spousal application. It would mean a very lengthy separation for the family. There is no explanation why CIC Vegreville only embarked on the study of his application on June 28, 2010 when CIC Vegreville cashed the fees when it was in possession of a bank receipt of $550.00 which was attached to his application.

[15] In my view, the applicant established a serious issue to be tried because the removals officer failed to consider all relevant factors when he refused the request for deferral. In particular, he failed to weigh the purpose of the policy against the facts of this case and failed to appreciate the effect of not granting that request – a lengthy separation of the father of a young family in what appears to be a genuine relationship.

[16] The lengthy separation in the particular circumstances of this young family tips the scale on irreparable harm. I appreciate that separation is normally viewed as an ordinary consequence of a removal and does not constitute irreparable harm. However, the consequences of his removal means that his sponsorship application (which is timely and at the first stage normally handled within 9 to 10 months) will be likely refused. Such effect, in my view is not an ordinary consequence of removal.

[17] Having made out a serious issue and irreparable harm the balance of convenience favours the applicant.

[18] When I mention the particular circumstances of this case I am aware that the mother and the children have been living in the North since the fall of 2010. This does not mean they have separated. The evidence before me is that the applicant will join them. He had to stay in Montréal because of his immigration problems. His wife sent a lengthy letter to the Court explaining how her relationship with the applicant has grown and pleaded he not be removed.

[19] For these reasons, the stay of his removal is ordered until the determination of his leave application and, if leave is granted, until the judicial review application is decided.

"François Lemieux"
Judge

Ottawa, Ontario
April 5, 2011

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1444-11
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APPEARANCES:

M Stewart Istvanffy	FOR THE APPLICANT
	FOR THE RESPONDENT

SOLICITORS OF RECORD:

M Stewart Istvanffy Montréal, Québec	FOR THE APPLICANT
Myles J. Kirvan, Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT