Federal Court  Cour fédérale

Date: 20110719

Docket: IMM-4461-11

Citation: 2011 FC 906

BETWEEN:

CLAUDINE NEWMAN KELLY

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER

RENNIE J.

[1] It is well established that the threshold for the serious issue test is elevated when the grant of the applicant's motion would effectively give the relief sought in the underlying application for leave and for judicial review. That is the test that applies in the case before the Court today. This reasoning has been applied in the context of removal orders by the Federal Court of Appeal in *Baron v. Canada (M.P.S.E.P.)*, 2009 FCA 81, where the Court stated that the application judge must identify at least one issue that carries with it the likelihood of success in the underlying application. Bearing in mind that the standard of review of an enforcement officer's decision is that of reasonableness, an applicant must be able to put forward "quite a strong case" to succeed on a judicial review challenge of such a decision.

[2] No serious issue can be said to arise from the officer's decision. It is neither the purpose of the *IRPA*, nor the role of this Court, to tailor the outcomes to provide the most advantageous situation to allow parties to confront medical issues which, inevitably, all Canadians face. The officer considered the evidence before him with respect to the impact of removal and took into account the recent in-land sponsorship application. The officer acknowledged that removal would be difficult, both for the applicant and her Canadian partner, but noted that the applicant's partner had available all the medical services and support system available to any other citizen of Canada who might be similarly situated. While the reasons are admittedly thin and barely compelling, they nevertheless meet the requisite standards of transparency and justification, nor does any legal question arise that meets the standard expressed in *Baron*.

[3] Secondly, an enforcement officer acting under section 48 of the *Immigration and Refugee Protection Act* has a very limited discretion when asked to defer removal. The applicant here has not shown that she faces any risk upon return to Jamaica, nor has she established that there are "special considerations" as described by the jurisprudence that require an officer to defer her removal to allow her in-Canada application to be processed. The applicant's spousal application was filed after she was "removal ready", regrettably some few weeks late, and she was therefore ineligible for the administrative stay of removal that is implemented for in-land spousal applicants according to Immigration Manual IP8. Moreover, the Federal Court of Appeal in *Baron* has affirmed that the existence of an alternate way to return to Canada weighs heavily against the granting of a judicial stay of removal. In this context, no issue arises from the exercise of discretion that gives rise to an arguable case with a likelihood of success.

[4] Turning to the issue of irreparable harm, an enforcement officer is not an H&C Officer, and he is accordingly under a very limited duty to consider the best interests of the applicant's common law Canadian spouse. Here, it is compellingly argued that the collateral or consequential impact of the removal of the applicant on her Canadian common-law spouse's ability to live independently and continue to care for himself while he confronts significant medical challenges constitutes irreparable harm.

[5] While irreparable harm must be personal to the applicants, the courts look beyond the applicant to the interests of the Canadian born children and spouses who would remain: *Tesoro v. Canada (M.C.I.)* 2005 FCA 148 at 34. The jurisprudence does not confine the analysis of irreparable harm to the applicant alone. However, the ensuing consequences rarely reach beyond the usual hardships, loss and sorrow associated with deportation. Viewing the matter through the lens of the common law spouse, the fact that he may, and I emphasize the speculative and prospective nature of the possibility, have to rely on nurses, home care, or some form of assisted living by reason of the removal of his partner does not constitute irreparable harm. It is a challenge faced daily by thousands of other Canadians. While difficult, it does not constitute special circumstances as discussed by the Court in *Baron* and *Simones*.

[6] Irreparable harm not having been established, I need not address the balance of convenience. If necessary, I would, however, decide that it falls in the Minister's favour. The applicant chose the in-land sponsorship application, as opposed to an H & C application and must now live with the consequences. Moreover, the application was not timely, as the officer noted. In those circumstances, the balance of convenience clearly lies with the Minister. 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*. The applicant has had the benefit of a Convention Refugee claim and of a PRRA, and has been in Canada without status. The enforceable removal order must now be enforced.

"Donald J. Rennie"
Judge

Toronto, Ontario
July 19, 2011

FEDERAL COURT

SOLICITORS OF RECORD

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