Federal Court  Cour fédérale

Date: 20191119

Docket: IMM-6972-19

Citation: 2019 FC 1466

Vancouver, British Columbia, November 19, 2019

PRESENT: THE CHIEF JUSTICE

BETWEEN:

JENNELYN OCAMPO PAYUKET

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER

UPON MOTION by the Applicant, Jennelyn Ocampo Payuket, for an Order staying the execution of the removal order scheduled to be executed this evening until such time as her Application for Leave and for Judicial Review has been finally determined;

AND UPON considering that the above-mentioned Application concerns a decision [the **Decision**] by an Inland Enforcement Officer [the **Officer**] of the Canada Border Services Agency [the **CBSA**], to refuse Ms. Payuket's request for a deferral of her removal;

AND UPON considering the tripartite test for a stay articulated in *Toth v Canada* (*Minister of Employment and Immigration*), (1988), 86 NR 302 (FCA) [***Toth***], *RJR-MacDonald Inc v Canada* (*Attorney General*), [1994] 1 SCR 311 (SCC) and *R v Canadian Broadcasting Corp*, 2018 SCC 5);

AND UPON considering that the tripartite test is conjunctive, such that Ms. Payuket must meet every prong of the test: *Janssen Inc. v Abbvie Corporation*, 2014 FCA 112;

AND UPON considering the elevated standard ("a likelihood of success") that applies to the first prong of the test when an applicant is seeking to review a negative decision on a request to defer removal: *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682, at para 11; *Baron v Canada (The Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, at paras 66-67 and 74 [***Baron***]);

AND UPON considering that in the context of the present Motion, this means a likelihood of demonstrating that the Decision was unreasonable: *Lewis v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FCA 130, at para 42 [***Lewis***];

AND UPON considering that the discretion of CBSA officers to defer removal is very limited and is restricted to deferring removal for a temporary, short period of time: *Lewis*, above, at paras 54-55, and *Forde v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1029, at para 36 [***Forde***];

AND UPON reviewing and considering the written materials submitted on behalf of the parties as well as the verbal submissions made by counsel yesterday afternoon;

AND UPON concluding that Ms. Payuket has failed to demonstrate a likelihood of success in respect of the first prong of the tripartite test for a stay, and that therefore there is no need to reach a determination with respect to the other two prongs of that test;

THIS COURT ORDERS that this motion is dismissed for the reasons set forth in the Endorsement below.

ENDORSEMENT

[1] In her request for a deferral of her removal, Ms. Payuket, who is a citizen of the Philippines, requested that she be permitted to remain in Canada on humanitarian and compassionate [**H & C**] grounds, having regard to (i) the adverse consequences that she would face if she were removed to the Philippines, and (ii) the best interests of her Canadian born son, Jairus, who is 20 months old and is still being breast-fed. Ms. Payuket maintained that Jairus's best interests are for him to remain in Canada with both of his parents, and that she requires more time to submit overseas documents for the purposes of a spousal sponsorship application that her common law spouse, Mr. Jordan Saddleman, is prepared to submit forthwith, even without those documents.

[2] Ms. Payuket added that Mr. Saddleman is a status member of the Okanagan Indian Band [the **Band**] and has refused to provide consent for Jairus, who is also a member of the Band, to travel. She further noted that she and Mr. Saddleman "have given Jairus a strong cultural affiliation with the [Band] through various learning events, and teachings of his culture and heritage."

[3] In separate correspondence, the Chief of the Band, Mr. Byron Louis, expressed strong opposition to Ms. Payuket being separated from Jairus and maintained that the Band has a recognizable legal interest in Jairus's welfare.

[4] In the Decision, the Officer determined that Ms. Payuket "is seeking to defer the removal indefinitely." In my view, that determination was not unreasonable.

[5] Nowhere in her request for a deferral did Ms. Payuket identify the types of temporary, short term considerations that have been identified in the settled jurisprudence: *Lewis*, above, at paras 54-55; *Forde*, above, at paras 36-40;

[6] Given that the timing of a decision on the couple's yet-to-be filed spousal sponsorship application was indeterminate, Ms. Payuket is unlikely to be able to establish that the Officer's refusal to defer Ms. Payuket's removal until at least that point in time was unreasonable. Indeed, Ms. Payuket's request to defer her removal until that indeterminate date was beyond the discretion of the officer: *Forde*, above, at para 42. It is only where an H&C or spousal sponsorship application was made on a timely basis and remains outstanding due to a backlog in processing that a deferral may be warranted: *Lewis*, above, at para 81; *Forde*, at paras 38-41.

[7] In the course of reaching the Decision, the Officer noted that he had attempted to meet all of Ms. Payuket's requests for additional time, particularly given the circumstances of her young child, by (i) initially providing her, on July 24, 2019, with one month to depart from Canada, (ii) providing her with a deferral of a further one month; and (iii) providing her with another deferral on September 29, 2019. The Officer noted that, notwithstanding all of that additional time, Ms. Payuket still had not made an application on H & C grounds, pursuant to s. 25 of the

Immigration and Refugee Protection Act, SC 2001, c 27 [**IRPA**], and has no other outstanding applications under the IRPA.

[8] By way of background, the Officer also observed that Ms. Payuket's legal status in Canada had expired in October 2017, her application for permanent residence had been refused in November 2018, she was arrested on a Canada-wide warrant after failing to appear for two proceedings convened by the CBSA, and that she had been issued an Exclusion Order to depart Canada.

[9] Considering the additional time that the Officer has provided to Ms. Payuket since providing her with an initial removal date on July 24, 2019, and considering the above-mentioned background, as well as the fact that Ms. Payuket still has not made an application under s. 25 of the IRPA and still has not made her spousal sponsorship application, it is unlikely that Ms. Payuket will be able to succeed in demonstrating that the Officer's decision was not "within a range of possible, acceptable outcomes which are defensible in respect of the facts and the law": *Dunsmuir v New Brunswick*, 2008 SCC 9, at para 47.

[10] The Officer explicitly recognized that it would be best for Jairus to have access to both of his parents. However, he also properly recognized that Ms. Payuket is subject to a removal order that must be enforced as soon as reasonably practical. Faced with Mr. Saddleman's refusal to provide consent for Jairus to travel with his mother, the Officer was left in the position where the practical consequence of that refusal was that Jairus would be separated from his mother. This will be a very unfortunate consequence of Ms. Payuket's removal. However, "one of the unfortunate consequences of a removal order is hardship and disruption of family life": *Baron*,

above, at para 69, see also *Nguyen v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 225, at para 25.

[11] In summary, for the reasons set forth above, Ms. Payuket has not met the first prong of the tri-partite test for a stay of removal. In brief, she is not likely to be able to demonstrate that the Officer's refusal to provide her with a further deferral of her removal from Canada was unreasonable.

[12] I pause to observe that during the hearing of this motion, Ms. Payuket's counsel referred to potential constitutional arguments that might be made in the near future in respect of her removal from Canada, given her status as a member of the Band. In the absence of having been provided with any sense whatsoever of the nature of those potential arguments, which Ms. Payuket and the Band have had ample opportunity to make since the Exclusion Order was initially made against her in March of this year, I cannot conclude that Ms. Payuket is likely to succeed with respect to those arguments. I will simply add in passing that if Jairus leaves Canada with his mother, that will be pursuant to a voluntary decision made by his parents.

[13] Accordingly, this Motion will be dismissed. It is not necessary to consider the other two prongs of the tri-partite test.

[14] Before concluding, I feel compelled to address one additional point. Ms. Payuket also submits that she was not given sufficient notice of her removal from Canada. Considering that she was initially provided with thirty (30) days to leave Canada, was subsequently provided with two subsequent deferrals, and had sufficient time to make written and oral submissions in support of this Motion, I do not accept her position in this regard.

[15] Nonetheless, I am very sympathetic to her position that the she ought to have been provided with more than seven days' notice of her most recent date of removal from Canada. Such short notice for removal typically will make it very difficult for an applicant to consult with legal counsel, prepare a request for a deferral of removal and prepare an application to this Court in the event of an adverse decision on the removal request. In addition, it may make it practically difficult for a CBSA officer to make a decision on the removal request in time for written submissions to be made to this Court, and for the Court to consider and reflect upon those submissions, and then issue a decision, prior to the removal date.

[16] Indeed, in this case, circumstances were such that this decision could only be issued a matter of hours before the scheduled removal, later this evening. This is far from ideal.

[17] Although Ms. Payuket was able to have her Motion heard and decided prior to her removal date, the same may not always be true for others who are provided with similarly short removal dates. This may leave the Court in the unacceptable position of having to issue an interim stay of removal, to provide the parties with the opportunity to make written submissions to the Court, and to provide the Court with an opportunity to review and reflect upon those submissions.

"Paul S. Crampton"

Chief Justice