

**Date: 20081105**

**Docket: IMM-4770-08**

**Citation: 2008 FC 1239**

**Vancouver, British Columbia, November 5, 2008**

**PRESENT: The Honourable Mr. Justice Phelan**

**BETWEEN:**

**LUIS FERRERA DIAZ**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP  
AND IMMIGRATION**

**Respondent**

**REASONS FOR ORDER AND ORDER**

**I. INTRODUCTION**

[1] This is an application for a stay of deportation to be executed Friday, November 7, 2008.

The deportation follows from a failed PRRA and H&C application decided by one and the same officer.

## II. BACKGROUND

[2] The facts are relatively straightforward. The Applicant is a citizen of Honduras with a somewhat checkered past of a series of criminal convictions in Canada and the United States. The last serious conviction was over 10 years ago.

[3] The Applicant and his Canadian-born wife are effectively the parents or guardians of the Applicant's niece. The niece's father (the Applicant's brother) is awaiting trial on a child molestation charge. The mother was killed in a car accident.

[4] The sole issue before the Court is whether a stay should be granted because of the circumstances of the niece. Arguments regarding the Applicant and the validity of the H&C decision are for another day and another judge.

## III. TRIPARTITE TEST

[5] The law on stays is well established in *Toth v. Canada (Minister of Employment and Immigration)*, [1988] 86 N.R. 302 (F.C.A.). For the reasons to follow, I concluded that the Applicant has met the requirements for a stay.

## IV. SERIOUS ISSUE

[6] In considering the best interests of the child, the Officer concluded that there were three adults involved in parenting the child – the Applicant, the child's father and the Applicant's wife.

Mention is made but no analysis performed on the role of the Applicant's two sisters who live in Canada.

[7] While the Officer would not speculate on what could happen to the child's father and his criminal charges, the Officer concluded that there were a sufficient number of persons engaged in her care and adequate options to safeguard the child.

[8] In the absence of the Applicant due to deportation, the only other persons to care for the child (no evidence of the involvement of children's services or similar organizations) is a person charged with child molestation and the Applicant's wife. The Applicant's wife is faced with the choice of remaining in Canada or accompanying her husband. The Officer apparently assumed that the wife would remain in Canada and continue to care for her husband's niece.

[9] I am of the view that the Applicant has established a serious issue concerning the reasonableness of the conclusions regarding best interests of the child. There is little consideration of what happens to the child if any of the assumptions are not accurate. The wife has since filed evidence indicating her intention to follow her husband – a matter which was not before the Officer but one that cannot be ignored if best interests of the child are to be more than formalistic.

V. IRREPARABLE HARM

[10] The harm posed, the abandonment of the child, is a realistic concern. Unlike other deportation cases involving children where one parent stays in Canada or both leave taking the child, this usual consequence of deportation is not assured.

[11] Neither the Applicant nor his wife can take the child with them since neither has legal status over the child.

[12] In *Sowkey v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 67, I found irreparable harm in a similar circumstance where the harm occasioned by deportation was not the natural consequences.

VI. BALANCE OF CONVENIENCE

[13] When weighing the interests of a child over the administrative convenience of deportation, the result must generally favour the child. This is particularly so where the issue is a stay for a limited period of time.

[14] Courts have a special role to play in protecting children. A short delay until the leave application is considered also allows time for a further consideration of the options available for the care of this 3-year old child.

VII. CONCLUSION

[15] Therefore, the stay of deportation is granted until the final disposition of the leave and application for judicial review.

**ORDER**

**THIS COURT ORDERS that** the stay of deportation is granted until the final disposition of the leave and application for judicial review.

“Michael L. Phelan”

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Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-4770-08

**STYLE OF CAUSE:** LUIS FERRERA DIAZ

and

THE MINISTER OF CITIZENSHIP AND  
IMMIGRATION

**PLACE OF HEARING:** Vancouver, British Columbia

**DATE OF HEARING:** November 3, 2008

**REASONS FOR ORDER  
AND ORDER:** Phelan J.

**DATED:** November 5, 2008

**APPEARANCES:**

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Mr. Edward Burnet	FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

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