Date: 20090109

Docket: IMM-5629-08

Citation: 2009 FC 28

BETWEEN:

ARNALDO ACHI DELISLE
AND JOANNA DIZAZZO

Applicants

and

MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER

LEMIEUX J.

Introduction and Background

[1] On Monday, January 5, 2009, I granted the Applicant, Arnaldo Archi Delisle, a citizen of Cuba, a stay of the execution of his removal to the United States, scheduled for Wednesday, January 7, 2009, at 8:00 a.m., until leave of the underlying application for judicial review was decided and, if granted, until the judicial review application was decided.

[2] The stay application is grafted to a challenge by way of an application for leave and judicial review of the December 19, 2008 decision of an Enforcement Officer who refused to defer his removal which had been requested on December 15, 2008 on two grounds:

1. The recently discovered fact his wife Joanna Dizazzo was three and one half months pregnant who provided a letter from her family physician, dated December 12, 2008, her pregnancy was considered a high risk due to her weight and rhumatological condition and that it was not advisable she undergo "the major stress and distress associated with losing her husband and parent at a most vulnerable time in her life".

2. A letter dated December 14, 2008, from the Legal Services Coordinator of Vermont Refugee Assistance Inc., who expressed the view that if removed, Mr. Delisle "will face mandatory detention if returned to the United States and his eligibility for relief from removal is severely limited".

[3] This is Mr. Delisle's second stay application. I dismissed his first stay application by decision, dated November 26, 2008, reported at 2008 FC 1325. That first stay application was grafted to an application for leave and judicial review of a decision of a Minister's Delegate, dated September 15, 2008, but only communicated to him on October 15, 2008 determining: (1) he would not be at risk if he was returned to his country of nationality (Cuba) or his country of habitual residence (the United States); (2) he was not a danger to the public in Canada; and, (3) there were insufficient humanitarian and compassionate grounds to keep him in Canada.

[4] In rejecting the first stay application, I wrote the following at paragraphs 14 and 15 in terms of serious issue:

> (a) Serious question to be tried
>
> [14] The Supreme Court of Canada in *RJR -- MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (*RJR -- MacDonald*) discussed the indicators of a serious question to be tried stating the threshold was a low one and that the judge on the application for a stay must make a preliminary assessment of the merits of the case and once satisfied that the application is neither vexatious or frivolous should go on to consider the other two criteria.
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> [15] Counsel for the applicant raised in my view at least the following serious questions:
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> 1) Did the Delegate apply the correct legal test to determine that conditions in Cuba had changed to such an extent so as to eliminate any section 97 risk to the applicant if returned to Cuba?
>
> 2) Did the Delegate err in fact by ignoring relevant documentary evidence on current conditions in Cuba and specifically in failing to comment on the US DOS report on Cuba published in March 2008 which was in front of him?

[5] As to irreparable harm, I said this in rejecting his stay application, I wrote in part:

> [20] First, while I accept that irreparable harm may in some circumstances encompass that type of harm to a family unit (see *Kahn v. the Minister of Public Safety and Emergency Preparedness*, 2005 FC 1107, at paragraph 27), I am not satisfied that, after reading the applicant's affidavits and those of his partner Jo-Anne Dizazzo, he has identified any harm which rises above the harm normally associated with the execution of a lawful deportation order. In my view, the harm the applicant and his partner have identified is inherent in the nature of a deportation involving the removal of a family member. The applicant had to show his particular circumstances and those of his family unit disclosed a type of harm upon removal which was unique and special. This he has failed to do.

[6] On a balance of convenience, I found:

(c) Balance of convenience

[35] Not having established irreparable harm, the balance of convenience favours the Minister in discharging his obligations under section 48 of the *Act* to remove the applicant as soon as practicable.

Facts

[7] The facts are set out in 2008 FC 1325 and may be summarized:

(a) Mr. Delisle fled Cuba on a raft in September 1994, was picked up by the U.S. Navy and sent to Guantanamo Bay, but was permitted to enter the United States in 1995 on a special program related to Cuban nationals. He apparently became a permanent resident, a status which he may have lost because of two criminal convictions in 1996 and 1997 whose sentences he served in U.S. prisons.

(b) He came to Canada on February 17, 2000, claimed refugee status, was found to have a well founded fear of persecution from Cuba, but was deemed excluded under section 1Fb) of the Geneva Convention because of the serious crimes he had committed in the United States.

(c) He established a common law relationship with Joanna Dizazzo in early 2001, their son Alejandro is born of that union; the family unit also includes Tyson, a 15 year old teenager, the product of a union between Joanna Dizazzo and a previous relationship.

(d) From the record in Mr. Delisle's first stay application, it is clear her most recent pregnancy was unknown to the Applicants, who recently married, until after I had

> dismissed Mr. Delisle's first stay application. Ms. Dizazzo is the breadwinner of the family unit with Mr. Delisle being the caregiver. I am also satisfied the pregnancy occurred before the Minister's Delegate informed Mr. Delisle of his decision communicated in late October 2008.

[8] Some extracts from Dr. Colavincenzo's December 12, 2008 letter concerning Joanna Dizazzo, which was before the Enforcement Officer, are quoted below. It is important to appreciate this letter is not controverted there being no other evidence on the record concerning the impact on his wife and unborn child of Mr. Delisle's removal. Dr. Colavincenzo is Joanna Dizazzo's family physician who has known her for approximately eight years and has treated her on several medical issues. The doctor stated:

1. When she informed him on December 9, 2008 of her unplanned and unexpected pregnancy, she visited his office and "she was completely unrecognizable. I've known her for many years and I have never seen her so sad and full of fear and despair".

2. "Psychologically, she displays deep emotions of sadness and anxiety including lack of appetite, nausea, fatigue and pessimism that will be detrimental to her health and also to the well being of her two children who have always had a happy and strong mother. More importantly, this condition could also have an effect on the well being of her unborn child with the risk of premature weight and birth and more tragically the risk of a miscarriage. Moreover, considering her unhealthy mental state she may have a major psychological problem when the baby is born that is known as post partum depression. This condition is prevalent and dangerous in that it may lead to unpredictable and tragic events."

3. "As far as treatments are concerned, they do exist. But during pregnancy it is always advisable not to take any medication because of the risk of teratogenicity or toxicity. In this case the best treatment is to remedy the underlying circumstance or situation and that is to avoid destabilizing or causing stress and distress to an individual who is both physically and psychologically fragile. A loss of her husband would be strongly detrimental to her health."

4. "In light of what I've reported above, with the opinion that the deportation of her husband (that is considered a loss in her life and to the life of her children), this would have a negative impact on her life, on her pregnancy and as a mother of two children, it is strongly recommended that a favorable decision be granted so as to avoid potentially danger to Mrs. Dizazzo's health. As a physician in family practice I believe in compassion and humanitarianism and most of all I strive to promote and maintain health in all my patients and this lady is no exception. That is why I freely wrote this letter."

Analysis

[9] I make three preliminary observations. First, counsel for the Respondent Minister challenged Joanna Dizazzo's standing to be an Applicant in this proceeding, submitting she was not directly affected by the Enforcement Officer's decision not to defer Mr. Delisle's removal to the United States because as a Canadian citizen she could not be removed. Counsel for the Applicants submitted her Charter rights were affected and therefore she has standing. It is unnecessary for me to determine the issue because on ordinary principles relating to stay of removal orders, as a member of the family unit, harm to her would provide sufficient connection and is a relevant consideration in determining Mr. Delisle's removal (see *Toth v. Canada (Minister of Employment and Immigration)*, (1988) 86 N.R. 302 (C.A.) and *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, at paragraph 44, where Justice Pelletier, as he then was, wrote interpreting the statutory provision that the execution of removal orders must be carried out as soon as reasonably practicable:

> **44** Obviously, there is a range of factors arising from the mechanics of making travel arrangements which will require the exercise of some judgment and discretion. The vagaries of airline schedules, the uncertainties related to the issuance of travel documents, medical conditions affecting the ability to travel, these are all factors which could result in removal being rescheduled. Beyond that are factors outside the narrow compass of travel arrangements but which are affected by those arrangements such as children's school years, pending births or deaths. These too could influence the timing of removal. These arise even on the narrowest reading of section 48 of the Act. [My emphasis.]

[10] Second, I need not deal with the Charter Issues raised by counsel for the Applicants, as in my view, this application for a stay can be determined on the settled jurisprudence of this Court as to when it is appropriate to grant a stay or not, in the light of the statutory mandate, which Parliament has set out in several versions of federal laws relating to immigration that removals shall be carried out as soon as reasonably practicable. My overall finding is that, in the unique circumstances of this case, it was not reasonably practicable to enforce his removal order at this time.

[11] Third, since I found that the issue, surrounding Joanna Dizazzo's health and that of her unborn child determinative, I need not comment on the second ground, advanced by counsel for the Applicants, relating to the opinion expressed by Vermont Refugee Assistance Inc. as to Mr. Delisle's mandatory detention if removed to the United States and the availability of options for relief.

[12] The parties acknowledge it is settled law to obtain a stay, an Applicant must establish conjunctively: (1) the existence of a serious issue to be tried; (2) irreparable harm and balance of convenience.

[13] As I indicated orally when granting the stay, I was satisfied, on the unique and uncontroverted evidence before me, the three part test has been met in this case.

(a) Serious issue

[14] Counsel for the Respondent argued and the Court and counsel for the Applicants agreed the normally low threshold of a serious issue, not being frivolous or vexatious, was not applicable in this case and that the Applicants had to establish the serious question(s) would point to a likelihood of success.

[15] I find counsel for the Applicants has made out at least three serious questions to be tried which flow from the written reasons of the Enforcement Officer, dated December 19, 2008. Referring to a statement made by Dr. Colavincenzo in his letter, of December 12, 2008, that "her pregnancy could be considered as high risk due to her weight and rhumatological condition […] not advisable that she undergo the major stress" the Enforcement Officer wrote:

> According to that letter, Ms. Dizazzo's medical condition is not a direct consequence of her husband's removal. The stress associated with the removal would merely be an additional factor to other health problems. Moreover, the family has first learned of the removal procedure in October 2008, giving them time to prepare for it. On December 15th, 2008, we have also accorded them a 3 weeks extra delay in order for them to spend the holidays together.
>
> We therefore believe that you have not identified any harm that rises above the consequences normally associated with the execution of a lawful deportation order. In reaching this decision, we have also considered that Ms. Dizazzo has a family in Canada to support her, and access to medical care.

[16] I set out these serious questions which meet the likelihood of success criteria:

1. Did the Enforcement Officer apply the proper test to gauge whether removal was warranted or not. Recent jurisprudence suggests the proper test is to determine whether there are compelling personal circumstances to warrant deferral? (See *Ramada v. Canada*

(Solicitor General), [2005] F.C.J. No. 1384 and *Tamar Mazakian et al v. the Minister of Citizenship and Immigration et al*, 2008 FC 1248.) Moreover, in *Wang* above, Justice Pelletier specifically referred to pending births as a relevant factor to be considered.

2. Did the Enforcement Officer misinterpret the medical evidence? She found as a fact that Joanna Dizazzo's medical condition is not a direct consequence of her husband's removal; the stress associated with the removal is merely an additional factor to other health problems. There is a serious question the Enforcement Officer misinterpreted what the doctor was saying. What he was really saying was, but for Mr. Delisle's removal, she and her unborn child would not be exposed to the risks he identified. In her second medical finding, the Enforcement Officer found she had family in Canada who could support her and have access to medical care. I agree with counsel for the Applicants this finding, unsupported by any evidence, is based on pure conjecture.

3. Was there a positive duty on the Enforcement Officer to seek a medical opinion as to the strength of Dr. Colavincenzo's advice particularly when she was specifically asked to do so by the Applicants' counsel?

(b) Irreparable harm

[17] Based on the unchallenged evidence before me, Joanna Dizazzo has demonstrated irreparable harm if her husband Mr. Delisle is removed from Canada at this time. Her physical security is affected as is that of the unborn child. Counsel for the Respondent conceded as much when questioned by the Court. I add, however, this case cannot be taken for the proposition that a

normal pregnancy would justify a stay on grounds of irreparable harm. This case, as the evidence showed, rises much higher, reaching to serious harm which cannot be said to be a normal consequence of removal.

(c) Balance of convenience

[18] Having raised a serious issue and irreparable harm, the balance of convenience favours the Applicants. Two additional factors enter into the equation. Mr. Delisle is not a danger to the Canadian public (as found by the Minister's delegate). Moreover, he is the essential caregiver.

[19] For these reasons, the stay of removal is granted.

"François Lemieux"

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Judge

Ottawa, Ontario
January 9, 2009

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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