Date: 20090609

Docket: IMM-2706-09

Citation: 2009 FC 611

BETWEEN:

SHADENE GLASGOW

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER

Lemieux, J.

Introduction and background

[1] On Friday, May 29, 2009, I granted a stay of the removal of the Applicant to St. Vincent scheduled for Monday, June 1, 2009, at 5:40 a.m. I undertook to provide reasons for that grant of stay.

[2] The underlying leave and judicial review application, to which this stay application is grafted, is the May 25, 2009 decision of Enforcement Officer Pearce who refused to defer her removal on account of the best interests of her Canadian born son Roshawn, who is currently under investigation for "severe development delay and microcephaly (small head)".

[3] The Enforcement Officer's refusal to defer came after three previous grants of deferral requests to accommodate her son's medical condition and according to counsel for the Respondent, was refused this time because the request for deferral "was insufficient to establish that her son's now chronic medical condition would be seriously compromised by removal or that he was unfit to fly".

[4] The basic premise in this case is that the Applicant, the sole caregiver of Roshawn and another Canadian child Romano, would take them with her if removed to St. Vincent. Canada Border Services Agency (CBSA) knew this fact which is why it purchased airline tickets for Ms. Glasgow and her two sons.

Facts

[5] The Applicant entered in this country on October 20, 2004 and was authorized to remain as a temporary resident until April 19, 2005. She was pregnant at that time and subsequently gave birth to Romano on February 22, 2005. In her affidavit she states she decided to give birth in Canada. She explained she almost lost the baby through a miscarriage and had, in 2002, lost a child in St. Vincent two days after birth because of lack of a doctor; there was only a nurse at her delivery.

[6] The Applicant overstayed her permit authorisation and did not seek to regularize her status. Her son Roshawn was born on July 20, 2007.

[7] A section 44 report, on account of her overstay, was made under the *Immigration and Refugee Protection Act* (*IRPA*) and an Exclusion Order issued. The Applicant was arrested at the

Toronto Pearson International Airport on July 1, 2008. She was there to welcome her sister who was accompanying Romano who had been sent to St. Vincent in August 2006 in the care of the Applicant's mother and aunt.

[8] On July 4, 2008, a first deferral request was granted until September 2, 2008 to accommodate the Applicant who had advised she needed time to make arrangements in order to leave Canada with her two sons.

[9] On August 13, 2008, a second deferral request was made and was granted until the end of November 2008 on account of Roshawn's medical condition. That request was supported by a letter dated August 6, 2008 from the professional staff at Davenport Perth Neighbourhood Centre (the Medical Clinic) who wrote:

> Roshawn was born with a diagnosis of intrauterine growth retardation requiring close monitoring and will continue to need ongoing medical follow up, and especially, in his formative years being up to age six. He needs long-term follow up to ensure optimal growth and development of bodily organs and function.
>
> Roshawn was assessed today and he has experienced weight loss requiring further follow up. Interventions have been put in place for stabilization. Ideally, it would be optimal for him to be followed up in one month to give adequate time for effective intervention. Thereafter, he will require continued regular medical follow up of up to at least three months to ensure stabilization. Immediate consequences of lack of medical follow up in the next few months may result in continued weight loss resulting in inadequate brain development affecting cognitive, motor, social, and emotional development, inadequate organ development and function. Children his age, and especially his size, have very little reserve and can become acutely ill very quickly.
>
> I am strongly recommending that Mrs. Glasgow's deportation order be deferred to facilitate Roshawn's medical stabilization. [My emphasis.]

[10] On December 1, 2008, a third deferral request was made. The Enforcement Officer's notes do not indicate whether it was granted or denied. His notes simply say: "no enforcement action taken". That deferral was supported by a letter dated November 25, 2008 from the medical clinic who advised that Roshawn had been followed closely at the clinic for issues related to growth deceleration. The clinic's staff doctor and nurse added: "At his most recent 15 months of age visit, Roshawn was noted to have speech delay and minimal growth of his head causing him to be referred to St. Joseph Health Centre for assessment by their speech and language pathology center". They wrote that the Applicant had been advised of the need for immediate speech and language therapy which will be ongoing for several months. The staff at the medical clinic also said they were in the process of referring the child to a pediatric specialist concerning his recent minimal head growth. They concluded:

> In view of Roshawn's speech and language deficits and associated need for therapy, and further investigations of his brain growth, we strongly recommend a continued delay to deport Shadene Glasgow and her Canadian child. We thank you for your ongoing compassion and consideration. [My emphasis.]

[11] The medical clinic letter was backed up by a November 26, 2008 letter from the Toronto Preschool Speech and Language Services who also assessed his language deficiencies stating he required direct intervention to overcome his delay skills.

[12] On January 27, 2009, the Applicant was offered a PRRA application which she completed and filed on February 11, 2009 resulting in a negative decision on March 13, 2009 served on her on April 21, 2009. No leave was sought in connection with this decision.

[13] On April 21, 2009, Ms. Glasgow was also served with a call-in notice for May 7, 2009 with instructions to attend with a one-way ticket to St. Vincent.

[14] On May 4, 2009, Richard Wazana, her legal counsel, wrote to an Enforcement Officer at the Greater Toronto Enforcement Centre (GTEC) to request a further deferral of the Applicant's removal "again to allow a further assessment of her son".

[15] Mr. Wazana's deferral request was supported by the following:

(1) An April 20, 2009 letter from Dr. Anna Bancrji, a pediatrician at St. Michael's Hospital in Toronto who wrote to the Immigration and Refugee Board:

> We are currently investigating Roshawn for severe developmental delay and microcephaly (small head). He has delayed milestones, and poor speech development. We have done a CT of his head, and are awaiting for him to be assessed by Genetics and a developmental specialist. At the current time, without these investigations, Roshawn is at risk of not getting the investigators and any support he may require in St. Vincent. For these reasons, we are requesting that they are allowed to stay on compassionate grounds to allow us to investigate his developmental delay. [My emphasis.]

(2) A letter dated April 20, 2009 from the Hospital for Sick Children in Toronto was sent to Dr. Bancrji to advise that its Clinical Genetics Clinic had received her referral of Roshawn and is currently under review by the clinic staff.

(3) Two letters from Bloorview Kids Rehab in Toronto, dated April 21, 2009 and April 27, 2009 concerning a referral of Roshawn at their Child Development Program.

(4) The CT results.

(5) A letter dated May 12, 2009 from Arlette Garreton, a therapist at the medical clinic writing to Mr. Wazana as follows:

> I have been in contact with the Milton Cato Memorial Hospital, Pediatric Division, in St. Vincent, phone number 1-784-456-1185. I spoke with Miss Comlisse about services available for children with autism. She informed me that they do not have the expertise or facilities to provide medical care to these children. In such cases, the children are referred to specialists overseas for medical care. In the case of Shadene's son, a Canadian citizen, it will be in his best interests to stay in Canada, with his mother, where he could receive the best care for his disability. [My emphasis.]
>
> Please convey this to the immigration centre to ensure that Roshawn is able to access medical care in Canada.

The Enforcement Officer's decision

[16] The Enforcement Officer noted the reason for deferral was on account of Roshawn's best interests; that he is a Canadian citizen who cannot be removed and as a Canadian citizen he has "the right to remain in Canada and benefit from the social programs and health care available to Canadians". He also noted that at Ms. Glasgow's request, CBSA had purchased airline tickets for her and her two children.

[17] The Enforcement Officer also acknowledged Roshawn "is currently under investigation for severe developmental delay and microcephaly (small head)". Furthermore, counsel states:

> I realise that Ms. Glasgow's removal has already been deferred, more than once; however, her son suffers from a brain abnormality and is slowly working his way through the medical labyrinth that involves lengthy wait times. Based on the above and the lack of adequate, specialized infant medical care available in St. Vincent, it is

> strongly advised that Roshawn, a Canadian child, be allowed to remain here with his mother in the short-term until he can be further assessed."" [My emphasis.]

[18] The Enforcement Officer then concluded citing section 48 of *IRPA*:

> I acknowledge counsel's statement as well as the letter submitted with the request to defer from Arlette Garreton, counsellor at the Davenport Perth Neighbourhood Community Health Centre that speaks to the care available for Roshawn in St. Vincent. However it should be noted that as an Enforcement Officer I have limited discretion to defer removal. Furthermore, the information submitted that speaks to care available in St. Vincent is more appropriately considered in the context of an application on humanitarian and compassionate (H&C) grounds under section 25(1) of *IRPA* rather than as a request for me to defer removal under section 48(2) of *IRPA*. CIC's Field Operations Support System (FOSS) reflects that as of today's date, no H&C application has been received by CPC Vegreville.
>
> Additionally, I note that CBSA has previously granted two separate deferrals to Ms. Glasgow and that the deferral granted to Ms. Glasgow on 13 August 2008 was to allow Ms. Glasgow to remain in Canada with Roshawn in consideration of his ongoing health concerns.
>
> I have reviewed all the evidence submitted with the request to defer and I find insufficient evidence has been submitted to demonstrate that Roshawn is unfit for air travel or that air travel would be detrimental to his health at this time.
>
> Having considered all of the above factors, I am not satisfied that a deferral of removal is warranted on these grounds. [My emphasis.]

Analysis

[19] It is well settled to obtain a stay of a valid removal order, the Applicant must establish: (1) a serious question to be tried; (2) irreparable harm if the stay is not granted; and (3) the balance of convenience being in her favour.

[20] The parties agree in terms of a serious issue the test is not whether the Applicant has simply advanced a question which is not frivolous or vexatious but rather, as stated by the Supreme Court of Canada in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, at page 338,

an extensive review of the merits is required because it grants the Applicant the remedy, albeit it temporary, she seeks in her judicial review application. Recently, Justice Nadon, on behalf of the Federal Court of Appeal, in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 (*Baron*), a case involving a judicial review of a decision of an Enforcement Officer not to defer, described the serious issue gauge as one requiring the reviewing judge to take "a hard look at the issue raised in the underlying application" … had to show a strong case. In sum, the test is likelihood of success for the underlying application (see *Baron*, at paragraph 66).

[21] *Baron*, above, also reiterates the following principles:

1) An Enforcement Officer's discretion to defer removal under section 48 of *IRPA* is very limited and, in any case, is restricted to when a removal order will be executed, reference being made to *Simoes v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 936 (T.D.) and *Wang v. Canada (Minister of Citizenship and Immigration)* (T.D.), [2001] 3 F.C. 682;

2) An Enforcement Officer is not required to undertake a substantive review of the best interests of children before executing a removal order;

3) At paragraph 65, Justice Nadon wrote: "If the conduct of the person seeking a deferral of his or her removal either discredits him or creates a precedent which encourages others to act in a similar way, it is entirely open to the enforcement officer to take those facts into

consideration in determining whether deferral ought to be granted." In *Baron*, the appellants had failed to report for their pre-removal interviews;

4) The standard of review of an Enforcement Officer's refusal to defer is reasonableness; and,

5) Hardship and disruption of family life is one of the unfortunate consequences of a removal order and does not constitute irreparable harm.

[22] In now turn to the required analysis for the grant of a stay:

a) Serious issue

[23] The existence of a serious issue must be assessed against the background of the jurisprudence which teaches us an Enforcement Officer's discretion is very limited and is focused on the timing of the removal. That jurisprudence also holds the best interests of children are to be assessed in the short term and not in the long term (see *Munar v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 761).

[24] Having said this, an Enforcement Officer must consider compelling personal circumstances (see *Ramada v. Canada (Solicitor General)*, 2005 FC 1112, which is very much on point as that case involved the interests of a Canadian born child being treated at Sick Kids Hospital in Toronto when it was uncertain the child could obtain treatment in Portugal).

[25] Within the framework described above, I see at least the following serious issues gauged on the likelihood of success test:

1. Whether the Enforcement Officer erred in ruling his limited discretion did not include deferral of the timing of the mother's removal in order to enable a proper diagnosis to be performed on Roshawn. Clearly, the evidence is to the effect Roshawn's medical condition was still under investigation and no proper diagnosis of his medical condition had been determined.

2. Did the Enforcement Officer by misreading the evidence err or fetter his discretion when he seems to have focused his decision on the medical services available in St. Vincent and are best to be considered under an H&C application and no such application had been made?

3. Did the Enforcement Officer err in not considering the short term interests of the Canadian born child?

4. Did the Enforcement Officer err in the exercise of his discretion by holding that two deferral requests were enough?

5. Did the Enforcement Officer unduly limit his discretion when he confined that discretion to unfitness to travel by air?

b) Irreparable harm

[26] The evidence before me is clear to the effect that lack of proper diagnosis and lack of proper treatment following diagnosis is likely to be seriously injurious to Roshawn's health.

c) Balance of convenience

[27] In the circumstances, the balance of convenience favours the Applicant. The behavior of the Applicant is not as it did in *Baron*, an affront to Canada's immigration law which merits sanction by dismissing the stay application.

[28] For these reasons, the stay application is granted pending leave for judicial review and if leave is granted, pending the judicial review's determination.

"François Lemieux"

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Judge

Ottawa, Ontario
June 9, 2009

FEDERAL COURT

SOLICITORS OF RECORD

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