Federal Court		Cour fédérale

Date: 20100811

Docket: IMM-4560-10

Citation: 2010 FC 816

Toronto, Ontario, August 11, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

LEON MICKEY PRIMUS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR ORDER AND ORDER

Overview

[1] Section 48 of the *Immigration and Refugee Protection Act* (the "*IRPA*") requires that a removal order "be enforced soon as is reasonably practicable."

[2] In *Montreal Port Authority v. City of Montreal and Attorney General of Canada*, the Federal Court of Appeal, citing the Supreme Court of Canada, stated: "discretionary power is not absolute and untrammelled. It is constrained by the scheme and object of the act that grants it."

> ***Montreal Port Authority v. City of Montreal and Attorney General of Canada,* 2008 FCA 278, ¶ 35, citing *C.U.P.E. v. Ontario (Minister of Labour),* [2003] 1 S.C.R. 539, ¶ 107**

[3] Section 48 of the *IRPA* gives enforcement officers very limited authority to defer the execution of a removal order. The Respondent notes that the *IRPA* provides for a PRRA and, therefore, the factors that can be considered by enforcement officers in making deferral decisions are related to the physical ability of the Applicant to comply with the removal order, e.g. fitness to travel or the making of effective travel arrangements.

> ***Baron v. Canada (M.P.S.E.P.),* 2009 FCA 81 (CanLII), 2009 FCA 81, ¶ 67**
> ***Simoes v. Canada (M.C.I.), 2000 CanLII 15668 (F.C.), 2000, 187 F.T.R. 219 (F.C.T.D.)***
> ***Wang v. Canada (M.C.I.),* 2001 FCT 148**

[4] In *Wang*, the Court explained how very limited a removal officer's discretion is:

> At its widest, the discretion to defer should logically be exercised only in circumstances where the process to which deferral is accorded could result in the removal order becoming unenforceable or ineffective. Deferral for the mere sake of delay is not in accordance with the imperatives of the Act. One instance of a policy which respects the discretion to defer while limiting its application to cases which are consistent with the policy of the Act, is that deferral should be reserved for those applications or processes where the failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment in circumstances and where deferral might result in the order becoming inoperative.
>
> ***Wang, supra,* ¶ 48**

Judicial Procedure

[5] This is a motion for a stay of removal of the Applicant, a thirty-six year old citizen of St. Vincent and Guyana, who has been in Canada since 2001. The Applicant is scheduled for removal to St. Vincent on August 12, 2010. Since entering Canada as a visitor, the Applicant has benefited from a number of immigration processes. The Applicant received negative decisions on his refugee claim, humanitarian and compassionate ("H & C") application, as well as, his Pre-Removal Risk Assessment ("PRRA"). His deferral request is based on H & C factors including: hardship, best interests of his Canadian daughter and medical concerns.

Background

[6] The Applicant's deferral request was based on essentially the same submissions as his H & C application. He received a negative determination in his H & C application on June 10, 2010 and has not challenged that decision.

[7] The Applicant's deferral request included information regarding his family in Canada and the hardship he would face if removed. These are H & C factors and beyond the scope of the enforcement officer's discretion. This Court has made it clear on numerous occasions that enforcement officers are not qualified to assess H & C issues. As Justice Yves de Montigny stated in *Munar*:

> [R]emovals officers have no jurisdiction or delegated authority to determine applications for permanent residence submitted under section 25 of the IRPA. They are employed by the Canadian Border Services Agency […] and not by the Department of Citizenship and Immigration. They are not trained to perform an H & C assessment.

***Munar v. Canada (M.C.I.)*, 2005 FC 1180, ¶ 36**

Issue

[8] Has the Applicant met the conjunctive tri-partite *Toth* test?

Analysis

(i) Serious Issue

[9] An enforcement officer's obligation to consider the best interests of the child is limited to circumstances in which there is no practical alternative to deferring removal in order to ensure the care and protection of the child. Such is not the case here. The child will remain in the care of her mother here in Canada. The Officer stated in her notes to the file that the Applicant provided insufficient evidence as to his concerns that his removal would have on the child's living arrangements, care giving, etc. The Officer took into account the interests of the child to the extent required. As such, no serious issue arises regarding the consideration by the Enforcement Officer of the child's interests.

(ii) Irreparable Harm

[10] As noted in *Petrovych*, "risk allegations that have already been rejected by [an] Officer and essentially repeated in [a] motion record without any supporting evidence does not constitute irreparable harm."

***Petrovych v. M.P.S.E.P.*, 2009 FC 110, ¶ 34**

[11] Federal Court jurisprudence penned by Justice Denis Pelletier also establishes that irreparable harm must amount to more than the inherent consequences of deportation.

***Melo v. Canada (M.C.I.)* (2000), 18 F.T.R. 39, ¶ 21**

Similarly in: ***Tesoro v. M.C.I.*, 2005 FCA 148 (CanLII), 2005 FCA 148, ¶ 34-42**
And in: ***Baron v. M.P.S.E.P.*, 2009 FCA 81 (CanLII), 2009 FCA 81, ¶ 69**

(iii) Balance of Convenience

[12] The Applicant is seeking extraordinary equitable relief. It is trite law that the public interest must be taken into consideration when evaluating this last criterion. In order to demonstrate that the balance of convenience favours the Applicant, the latter would have had to demonstrate that there is a public interest not to remove him as scheduled.

***R.J.R. MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311**

[13] The balance of any inconvenience which the Applicant may suffer as a result of removal from Canada does not outweigh the public interest as per the legislation in ensuring that the application of the *Immigration and Refugee Protection Act* does ensue – specifically an interest in executing a deportation order as soon as reasonably practicable.

***Atwal v. M.C.I.*, 2004 FCA 427**

Conclusion

[14] In conclusion, the conjunctive tri-partite *Toth* test has not been met by the Applicant; therefore, the motion for a stay is dismissed.

ORDER

THIS COURT ORDERS that the motion for a stay of removal be dismissed.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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