Federal Court  Cour fédérale

Date: 20130815

Docket: IMM-4707-13

Citation: 2013 FC 869

Montréal, Quebec, August 15, 2013

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

LARISSA LEGNIN
AND
NIKOL LEGNIN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicants, citizens of Russia, are asking that the Court order a stay of execution of their removal from Canada planned on Wednesday August 28, 2013, at 7:00 a.m.

[2] After spending more than six years in Israel, the applicants arrived in Canada in 2006 and claimed refugee protection.

[3] On July 29, 2011, a Senior Immigration Officer dismissed the PRRA application.

[4] On July 4, 2011, the applicants filed an Application for permanent residence on Humanitarian and Compassionate Considerations (H&C).

[5] On September 20, 2011, the applicants met with the Removal Officer and received their negative PRRA decision. They were informed that their removal orders were now enforceable and that they had the right to contest the negative PRRA decision. The applicants stated that they would conform with the departure order. They did not challenge the negative PRRA decision before the Federal Court.

[6] However, they asked that their removal be deferred so that the applicant, Larissa, could act as a witness in a criminal hearing. The deferral request also contained allegations concerning the best interest of the child, Nikol, and concerning a pending H&C application.

[7] The Law enforcement Officer first rejected the deferral request on the basis of the H&C application. Nevertheless, on December 8, 2011, the Removal Officer granted their request to allow the applicant, Larissa, to testify in a criminal matter.

[8] On January 4, 2013, the applicants met with the Removal Officer. Through their counsel, who was present at the meeting, the applicants requested an indefinite deferral of removal, alleging the "best interest of the child" and the determination of a pending H&C application which was filed

in February 2012. The said request was granted for a period of three months by the Officer, however, not on the basis of the outstanding H&C application, but to allow the applicants to adequately prepare for their departure.

[9] The issue of whether the H&C application was a new procedure was the subject of submissions by the parties during the hearing. I accept the notes of the officer as proof of the following:

> M. Genik m'informe qu'il a dépose une nouvelle demande humanitaire car la première serait truffée d'erreur, faite par l'ancien avocate qui n'a plus le mandat de représenter le sujet.

[10] On March 1, 2013, the applicants' removal was deferred for a second time to allow the child, Nikol, to complete her school year.

[11] On May 28, 2013, the applicants, through their counsel, submitted another administrative deferral of removal request until a decision was rendered on their H&C application. That same day, the Law Enforcement Officer rejected the deferral request. That decision for removal is the subject of this stay application.

Analysis

[12] All three criteria of *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA) must be met for the Court to grant the motion for a stay. If the applicants fail to meet even one of them, the Court cannot grant the requested relief.

[13] The issuance of a stay is an extraordinary remedy. The applicant must demonstrate "special and compelling circumstances" that would warrant "exceptional judicial intervention". The applicants have failed to do so in the case at bar.

No Serious Issue

[14] The law concerning a deferral application in the face of an H&C application is described by O'Keefe J. in *Ortiz v Canada (Minister of Public Safety and Emergency Preparedness)*, 2012 FC 18 at paras 43 to 46 as follows:

> 43 Generally, an outstanding H&C application, absent special considerations, is not sufficient on its own to justify delay unless there is a threat to personal safety (see *Ramada v Canada (Solicitor General)*, 2005 FC 1112, [2005] FCJ No 1384 at paragraph 3; and *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682, [2001] FCJ No 295 at paragraph 45). As stated by Mr. Justice Pierre Blais in the concurring opinion in Baron above, at paragraph 87:
>
> > H&C applications are not intended to obstruct a valid removal order. Where a PRRA has revealed that the applicants are not at risk if they are returned, then the applicants are intended to make future requests for permanent residence from their home country.
>
> 44 Further, the scope of a removal officer's considerations in assessing a deferral request is limited. In general, deferral should only be granted "where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment" (see *Wang* above, at paragraph 48).
>
> 45 Removal officers are not positioned to evaluate all the evidence that might be relevant in an H&C application (see *Ramada* above, at paragraph 7). However, they can consider whether there are good reasons to delay removal, such as a person's ability to travel, the need to accommodate other commitments such as school obligations or compelling circumstances such as H&C considerations (see *Ramada* above, at paragraph 3). They can also consider whether the consequences of removal can be remedied by readmission after an

> outstanding application is approved (see *Wang* above, at paragraph 48).
>
> 46 In terms of affected children, their immediate interests should be treated fairly and with sensitivity (see *Joarder v Canada (Minister of Citizenship and Immigration)*, 2006 FC 230, [2006] FCJ No 310 at paragraph 3). However, removal officers have "no obligation to substantially review the children's best interest before executing a removal order" (see *Baron* above, at paragraph 57).

[15] The applicants' principal argument is that the applicant daughter, who does not read or write Russian, and appears to have a learning difficulty is at the mercy of the Russian school system which is notorious for shunting/ignoring "problem" children, and as such would actually encourage her to quit school.

[16] The applicants point out that the daughter has had her entire education in the Quebec school system; that she is receiving extra individualized support in a proactive fashion and that her separation from her Quebec school however temporary would harm the child's education.

[17] Reference is also made to the child's two permanent resident sisters who share caregiving responsibilities.

[18] The applicants contend that the deferral officer did not give the proper consideration to the evidence of the child's situation.

[19] The child has filed an H&C application and the applicants seek a deferral until such time as the decision is rendered in that matter.

[20] I am in agreement with the respondent that the Officer considered the allegations and evidence and that his decision is reasonable in the circumstances. The factual basis for the applicants is speculative and does not meet the high threshold required for a stay of a removal described above.

[21] The evidence is insufficient and is dated in respect of the child's learning problems, which her counsel acknowledges could not in any event be described as a disability. There are no tests or other supporting documentation besides the letter from her school. Moreover, two years have passed since that letter and an update should have been provided in the interval. Similarly, the evidence on the child's situation in Russia is also speculative and lacking in probative weight.

[22] Based on whether the applicants filed a fresh application in February 2012, there was considerable debate over hardship from the child being outside of Canada for up to a year or even two or three years, should the applicants succeed in their H&C application. Again, any conclusions would be speculative. The child speaks Russian fluently and given that it is not clear that she retains a learning difficulty, the hardship from one or two years outside of Canada is not of sufficient significance to warrant consideration in staying the removal.

[23] It is noted that there appears to be a developing jurisprudence in the Federal Court suggesting that the December 15, 2012 amendment to s. 48(2) further narrows the scope of the Court's already limited discretion by requiring the removal to be executed "as soon as possible", as opposed to the former wording "as reasonably practicable".

[24] I would agree that the amendment is intended to convey the need to minimize delays in executing removal orders. Given that the applicants have already benefited from two deferrals of their removal, the need for compliance with s. 48(2) would appear to be heightened.

Irreparable Harm

[25] Even were I to conclude that there was a serious issue, there is insufficient evidence from that already referred to which would form the basis to conclude that the child will suffer irreparable harm from her removal. The evidence in the main is speculative and insufficient to convey irreparable harm sufficient to warrant a stay of her removal.

Conclusion and Order

[26] Accordingly, for all of the reasons above, the motion for stay of removal is denied, and the court so orders.

JUDGMENT

THIS COURT'S JUDGMENT is that the motion for stay of removal is denied.

"Peter Annis"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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