Federal Court  Cour fédérale

Date: 20191211

Docket: IMM-7287-19

Citation: 2019 FC 1595

Vancouver, British Columbia, December 11, 2019

PRESENT: The Honourable Mr. Justice Lafrenière

BETWEEN:

GUICHAO CHEN

Applicant

And

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

UPON MOTION dated December 4, 2019, on behalf of the Applicant, Guichao Chen, for an Order granting a stay of Mr. Chen's removal to China that is scheduled to take place on December 12, 2019;

AND UPON reviewing of the motion material filed by the parties and hearing submissions of counsel for the parties at the General Sittings in Vancouver on December 10, 2019;

I. Relief Requested

[1] In his notice of motion, Mr. Chen seeks an interim order pursuant to section 18.2 of the *Federal Courts Act,* or alternatively, the Court's inherent jurisdiction, staying the execution of the removal order against the Applicant "until such time that the Application for Leave and for Judicial Review has been dealt with by this Honourable Court". However, in his written and oral submissions, counsel for the Applicant submits that the removal should be stayed until the Applicant's application based on humanitarian and compassionate grounds [H&C] is decided.

[2] I gave oral reasons for dismissing the motion after hearing from the Applicant's counsel. With minor changes that do not affect the substance of what I said in my oral ruling, and after adding some background facts to provide context, here are my written reasons.

II. Background

[3] Mr. Chen is a citizen of China.

[4] Mr. Chen arrived in Canada in December 1984, and he claimed refugee protection. His refugee claim was refused in April 1987.

[5] Mr. Chen remained in Canada without status for almost 20 years. Mr. Chen became a permanent resident in Canada in 2004, after he was sponsored by his first wife.

[6] Mr. Chen has two children, one with his first wife, aged 29, and a minor child with his second wife. He also has a minor step-child with his second wife.

[7] On May 3, 2016, Mr. Chen was charged with one count of production of a controlled substance (methamphetamine), one count of possession of a controlled substance for the purpose of trafficking and two counts of unlawful possession of chemicals and equipment for use in production or trafficking in a substance.

[8] In October 2017, Mr. Chen's minor child and step-child were seized by the Ministry of Children and Family Development (British Columbia).

[9] On March 5, 2018, Mr. Chen was convicted of production of a controlled substance (methamphetamine), contrary to subsection 7(1) of the *Controlled Drugs and Substances Act*, SC 1996, c 19 [CDSA]; and two counts of unlawful possession of chemicals and equipment, contrary to subsection 7.1(1) of the CDSA. Mr. Chen was sentenced to three years imprisonment.

[10] Based on those convictions, on September 6, 2018, Mr. Chen was reported under subsection 44(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] for serious criminality, pursuant to paragraph 36(1)(a).

[11] On September 14, 2018, Mr. Chen was advised he had been reported under subsection 44(1) of the IRPA, and he was allowed an opportunity to provide submissions as to why a removal order should not be sought. Mr. Chen responded that his lack of ties to China, his ties to Canada, and hardship for his family should be considered by the officer.

[12] In November 2018, Mr. Chen's minor child and step-child were returned to Mr. Chen's wife while Mr. Chen was serving his sentence.

[13] On November 16, 2018, Mr. Chen was referred to the Immigration Division of the Immigration and Refugee Board for an admissibility hearing.

[14] On June 27, 2019, the Immigration Division issued a Deportation Order against Mr. Chen. The Immigration Division determined Mr. Chen was inadmissible to Canada based on serious criminality for having been convicted of an offence punishable by a maximum term of imprisonment of at least 10 years, or for an offence for which a term of imprisonment of more than six months has been imposed, pursuant to paragraph 36(1)(a) of the IRPA. Mr. Chen did not challenge that decision.

[15] On October 7, 2019, Mr. Chen submitted an application for a pre-removal risk assessment [PRRA].

[16] On October 22, 2019, Mr. Chen was released on day parole and currently resides in a halfway house.

[17] On October 23, 2019, Mr. Chen was interviewed by an officer of the Canada Border Services Agency [CBSA] regarding his PRRA application, and the officer told Mr. Chen that he would need to prepare to return to China. His PRRA application was refused on November 8, 2019.

[18] On November 22, 2019, an officer of the CBSA met the Applicant for an interview and delivered the PRRA application refusal. The officer told Mr. Chen that he was to depart Canada on or before December 13, 2019. Mr. Chen confirmed with the Officer that he did not face risk in China and that he would leave Canada.

[19] On November 22, 2019, the same day he received his PRRA application refusal, Mr. Chen submitted a H&C application to remain in Canada.

[20] On November 25, 2019, Mr. Chen requested a deferral of his removal to wait for his H&C application to be decided. His deferral request was refused by a CBSA officer [Enforcement Officer] on November 28, 2019.

[21] On December 3, 2019, Mr. Chen was advised he was to be removed to China on December 12, 2019. That same day, he filed the underlying leave application seeking to judicially review the decision of the Enforcement Officer. The following day, he brought the present motion.

III. Whether to Grant the Relief Requested

[22] The test for the granting of an interlocutory injunction is the tri-partite test set out in *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110, and adopted in the context of stay of removal applications by the Federal Court of Appeal in Toth v Canada (Minister of Employment and Immigration) (1988), 6 Imm LR (2d) 123 (FCA) [Toth]. That test

requires that three elements be satisfied, “serious issue to be tried”, “irreparable harm” and “balance of convenience”.

A. *Serious Issue*

[23] When the underlying proceeding is an application for leave and judicial review of a CBSA officer’s refusal to defer an applicant’s removal, the applicant faces an elevated standard for demonstrating a serious issue on a stay motion. The reason for this is that if the stay motion were granted, the Court would effectively be granting the very relief requested in the application.

[24] As a result, the Court is required to consider whether the underlying proceeding is likely to succeed: *Wang v Canada (Citizenship and Immigration)*, 2001 FCT 148 at para 11.

[25] Counsel for the Applicant acknowledged at the hearing of the motion that the discretion of an enforcement officer to defer an applicant’s removal is “very limited”. Generally, the discretion is limited to addressing the impediments to immediate removal: *Forde v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1029 at para 36; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paras 51-60 [*Lewis*]. These impediments include an applicant’s ability to travel, the need to accommodate other commitments or compelling personal circumstances: *Ramada v Canada (Solicitor General)*, 2005 FC 1112 at para 3.

[26] Mr. Chen submits that the Enforcement Officer’s decision is unreasonable because the Officer failed to consider Mr. Chen’s request that the deferral be granted until his H&C

application was determined and until the Supreme Court of Canada disposes of the pending application for leave to appeal (SCC Docket 38891) from the decision of the Federal Court of Appeal in *Revell v Canada (Citizenship and Immigration)*, 2019 FCA 262 [*Revell*], a case concerning an inadmissibility decision which Mr. Chen considers relevant to his case.

[27] Mr. Chen submits that the Enforcement Officer erred in law by not granting his deferral request, as this breached his rights under sections 7 or 12 of the *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [*Charter*].

[28] Being substantially in agreement with the Respondent's submissions, which I adopt and make mine, I am not satisfied that the underlying proceeding raises a serious question.

[29] The Enforcement Officer correctly noted that a pending H&C application does not entitle a person to remain in Canada. The timeliness of the application was certainly a relevant factor that could be taken into account.

[30] Mr. Chen submitted his H&C application six months after he was issued a Deportation Order and one month after he was advised that he was to prepare himself for his return to China. Given that the H&C application was submitted late, the Enforcement Officer was clearly not dealing with a short-term deferral request. In fact, it appears that the current processing time for an H&C application is approximately 31 months. In the circumstances, the Enforcement Officer's decision to refuse deferral on the basis the outstanding H&C application was not

unreasonable (see *So v Canada (Public Safety and Emergency Preparedness)*, 2019 CanLII 92224 (FC); *Forde* at para 35).

[31] Moreover, I agree with the Minister that the Enforcement Officer did not err by refusing to grant Mr. Chen's deferral request to await a decision by the Supreme Court of Canada involving another individual. The facts of this case and *Revell* are distinguishable, as Mr. Chen never sought to challenge his inadmissibility to Canada. As the case law now stands, removals do not deprive applicants of their *Charter* rights: see *Medovarski v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 [*Medovarski*]; see *Revell*; see *Moretto v Canada (Citizenship and Immigration)*, 2019 FCA 261.

B. *Irreparable Harm to the Applicant*

[32] The tripartite test set out in *Toth* is conjunctive and I therefore need not consider the other two branches test. However, for the sake of completeness, I wish to add the following.

[33] Mr. Chen submits that family separation can cause irreparable harm if it results in the separation of a child and his or her parents or the separation of spouses. He also argues that family separation can constitution irreparable harm where an applicant relies on them to remain drug-free and crime-free.

[34] Mr. Chen claims that he will face tremendous hardship and risks to his personal safety if he is removed to China. This includes stigmatization and mistreatment because of his status as a deported person with a criminal record; a jarring transition from life in a free society to life

in a country where “state agents commonly commit gross human rights abuses, severely restrict civil rights, and violently punish dissent”; a lack of mental health resources and support services in China to mitigate the extreme emotional hardships arising from family separation; and a disparity in quality of life standards. While I accept that being required to return to China may pose a hardship for Mr. Chen, I am not satisfied that he will suffer any harm, let alone irreparable harm, if required to do so.

[35] Mr. Chen freely stated during an interview that he does not face risk in China. He also travelled to Hong Kong on his Chinese passport in April 2015 and remained there for three months without any indication he experienced risk or harm.

[36] Moreover, Mr. Chen’s risks were assessed through the PRRA application. The officer assessing the PRRA application determined Mr. Chen’s removal to China did not present a personalized risk. Mr. Chen did not challenge the negative PRRA decision by way of judicial review.

[37] Mr. Chen argues that his removal would have a significant impact on his children and family. However, the Enforcement Officer considered the best interests of his Canadian-born children and Mr. Chen cannot point to any reviewable error in the Officer’s finding that there was insufficient evidence presented that his removal would result in permanent or irreparable hardship upon his family.

C. *Balance of Convenience*

[38] Mr. Chen submits where other factors appear evenly balanced, it is prudent to take such measures as will preserve the status quo. Mr. Chen asserts that the status quo will allow him to return to his family. He argues that there is no danger to the public and no irreparable harm to the public interest in delaying his removal. I disagree.

[39] In this case, the balance of convenience clearly favours the Minister, who is responsible for the expeditious enforcement of the relevant statutory scheme.

[40] Mr. Chen's case implicates the integrity of that statutory scheme, which has as an objective Canada's security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada and by emphasizing the obligation of permanent residents to behave lawfully while in Canada: *Medovarski* at para 10; *Jean v Canada (Citizenship and Immigration)*, 2009 FC 593 at para 2.

[41] I also wish to add that Mr. Chen's failure to make full and frank disclosure of all relevant facts militates against granting the relief requested: *Lopez De Donaire v Canada (Citizenship and Immigration)*, 2007 FC 1189 at paras 7, 10. Mr. Chen submits that his conviction in March 2018 arose out of a singular event and there are no other convictions in his 35-year history in Canada. He further states that he has not been charged or convicted of any criminal offences since 2016 and goes on to argue that the only reasonable inference that can be taken is that he does not pose a danger to society. Mr. Chen fails to mention, however, that he was also charged with Keeping a Common Bawdy-House and Living on the Avails of Prostitution

in April 2008, again charged with Living on the Avails of Prostitution in October 2009, and later charged with Assault in August 2012. While Mr. Chen may not have been convicted of the offenses with which he is charged, the fact that he was previously charged with serious crimes undermines his argument that he poses no danger to society.

[42] For the above reasons, the motion for an order staying Mr. Chen's removal to China is dismissed.

ORDER in IMM-7287-19

THIS COURT ORDERS that the motion is dismissed.

"Roger R. Lafrenière"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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