

**Date: 20070925**

**Docket: IMM-3809-07**

**Citation: 2007 FC 956**

**Toronto, Ontario, September 25, 2007**

**PRESENT: The Honourable Mr. Justice Mandamin**

**BETWEEN:**

**KALIFA KIMBERLY TREA**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

**AMENDED REASONS FOR ORDER AND ORDER**

**Preliminary Issue**

[1] Ms. Kalifa Kimberly Trea was the subject of previous removal. She applied for a stay of removal. Madam Justice Gauthier dismissed her application for a stay of removal on August 25<sup>th</sup>, 2005. The removal was scheduled for August 26<sup>th</sup>, 2005. Ms. Trea failed to attend as required.

[2] Counsel for the Respondent submitted that Ms. Trea's current application for a stay of removal order ought not to be heard because Ms. Trea does not come to the Court with "clean

hands” having failed previously to comply with the removal order. Counsel for the Respondent referred to a directive from Madam Justice Tremblay-Lamer in which she held that it was not in the interest of justice to hear a second stay application where an Applicant failed to attend a previously ordered removal.

[3] Counsel for the Applicant submitted that Ms. Trea had an explanation for failing to attend her removal. At the time of the first stay application, Trea was pregnant. At the time the removal order was to take effect on August 26, 2005, Ms. Trea was experiencing difficulty with her pregnancy and in fact spent time at a health clinic under observation. Subsequently, Ms. Trea gave birth to a child approximately one month later. The child was born prematurely at eight months.

[4] The Applicant’s failure to cooperate with the removal is not excusable in law since her application for a stay had not been granted by the Court. The difficulties with the pregnancy, which has been substantiated by the evidence submitted and, the fact that a birth of a child is a major life event do offer a reasonable explanation for her failure to comply such that it is appropriate for the Court to exercise its discretion and hear this application.

### **The Application for a Stay of a Removal**

[5] Ms. Trea is subject to a removal as of this evening, Monday, September 24th, 2007. She applies for a stay of a removal order. For her application to be successful she must satisfy the tripartite test in *Toth v. Canada (Minister of Citizenship and Immigration)* [2006] FC 682. There must

be serious issue to be tried, irreparable harm must result if the stay is not granted, and the balance of convenience must favour the applicant.

### **Serious Issue to be Tried**

[6] Where an Applicant is seeking a remedy in an interlocutory motion that is much the same as the underlying action, the standard to be met is higher than that set out in *RJR – MacDonald Inc. v. Canada*. In *Wang v. Canada (Minister of Citizenship and Immigration)* (2001) 3 F.C. 282; it is held that in such circumstances the likelihood of success to the underlying application is also a consideration. The Applicant has submitted that serious issues have been raised in that she has an agency application and a spousal application in process. The agency application has been in the process for 22 months. She does not control the processing of the application. The agency application should be considered because of the delay of 22 months. Further, she also has a spousal application as a result of her marriage some five months previously. I am satisfied that, in combination, these two matters can be considered as a serious issue.

[7] Further, the counsel for the applicant submits that the removal officer failed to consider the emotional impact on the Applicant's child if removed from the family. On review of the removal officer's notes, it would appear that the removal officer did consider the care and financial support for the child and the impact on the applicant of being separated from her child. However, the officer did not consider the emotional impact of family separation on the child. I am satisfied this also constitutes a serious issue to be considered.

### **Irreparable Harm**

[8] Irreparable harm should the removal order take effect, the child will be removed from the family unit. The child may stay on with the mother or the step-father or with other caregivers. There is evidence that the child has become attached to the step-father. The child would be affected by being separated from either the applicant, or her step-father. I am satisfied the test for irreparable harm to the child has been met.

### **Balance of Convenience**

[9] The Applicant has not been a burden to Canadian society. She has not been on welfare nor has she been subject of criminal charges. She is in a family relationship with her new husband who has applied to sponsor her. The couple are caring for the two year old child. The Applicant has two applications in process, a H & C application, which has been in process for 22 months, and a more recent spousal application.

[10] In all these circumstances, the Court finds the balance of convenience favours the applicant.

### **Conclusion**

[11] For the foregoing reasons; an order for a stay of removal of the Applicant from Canada will issue until the H & C and spousal applications have been finally disposed of.

**ORDER**

**UPON** Kalifa Kimberly Trea's motions for an order staying a removal to Trinidad currently scheduled for midnight September 24<sup>th</sup>, 2007;

**AND UPON** having considered the materials filed by the party, and having considered oral representations made on September 24<sup>th</sup>, 2007;

**THIS COURT ORDERS** that the stay be granted until the completion of the H & C application and the spousal application.

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"Leonard S. Mandamin"

Judge

**FEDERAL COURT**

**NAMES OF COUNSEL AND SOLICITORS OF RECORD**

**DOCKET:** IMM-3809-07

**STYLE OF CAUSE:** KALIFAQ KIMBERLY TREA v. THE MINISTER OF  
PUBLIC SAFETY AND EMERGENCY  
PREPAREDNESS

**PLACE OF HEARING:** Toronto, Ontario

**DATE OF HEARING:** September 24, 2007

**AMENDED REASONS FOR  
ORDER AND ORDER:** MANDAMIN J.

**DATED:** September 25, 2007

**APPEARANCES:**

Hilary Cameron  
Barrister and Solicitor  
Kareena Wilding  
Barrister and Solicitor

FOR THE APPLICANT  
FOR THE RESPONDENT

**SOLICITORS OF RECORD:**

Hilary Cameron  
Toronto, Ontario  
John H. Sims, QC  
Deputy Attorney General of Canada  
Toronto, Ontario

FOR THE APPLICANT  
FOR THE RESPONDENT