Date: 20080331

Docket: IMM-892-08

Citation: 2008 FC 406

Ottawa, Ontario, March 31, 2008

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

RONALD REGINALD PATTERSON

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

I. Overview

[1] Where an individual has ignored Canada's immigration laws, returned to Canada repeatedly after being deported and worked without authorization, it is not incumbent upon a removal officer to wait to schedule his removal until after his spousal application has been determined. As is abundantly clear from his immigration history, the Applicant had no status, at any time. The Applicant decided to marry and have a child at a time when he was without any status in Canada. The fact that such choices were made does not place a duty on a removal officer to permit an Applicant to stay in Canada in order to file a spousal application.

[2] In-Canada, spousal applications, like humanitarian and compassionate (H&C) applications, operate independently of the deportation process. They do not have the effect of halting deportations until such applications are determined. Had this been Parliament's intention, the legislation would provide for a statutory stay of removal once such an application has been filed. (*Shchelkanov v. Canada (Minister of Employment and Immigration)* (1994), 76 F.T.R. 151; *Matadeen v. MCI* (22 June 2000) Doc. No. IMM-3164-00 (F.C.T.D.).)

II. Introduction

[3] The Applicant, Mr. Ronald Reginald Patterson, has filed a motion for a stay of the execution of the removal order. The underlying application for leave challenges the decision of the Enforcement Officer in the exercise of her discretion not to defer removal.

III. Background

[4] The Applicant, Mr. Ronald Reginald Patterson, is a citizen of St. Vincent who arrived in Canada with a valid six month visa, on September 26, 1998, at the Lester B. Pearson Airport. The Applicant remained in Canada continuously without legalizing his status and commenced employment without obtaining proper authorization.

[5] On September 15, 2003, the Applicant was served in person with a Pre-Removal Risk Assessment (PRRA) application. The Applicant did not apply for a PRRA at this time.

[6] On July 18, 2003, the Applicant was issued an Exclusion Order.

[7] On January 13, 2005, a Warrant for the Applicant's arrest was signed because of his failure to appear for his removal interview, on January 11, 2005.

[8] On January 25, 2005, the Applicant departed from Lester B. Pearson Airport, at 11:50 p.m., returning to St. Vincent.

[9] On April 21, 2005, the Applicant returned to Canada, without seeking authorization. The Applicant had a Deportation Order signed against him.

[10] On April 27, 2005, the Applicant departed Canada a second time, at 8:30 a.m., returning to the Port of Spain.

[11] In October 2005, the Applicant returned to Canada without seeking authorization.

[12] On March 14, 2006, a Notice of Arrest was issued against the Applicant, who was detained until removal. The Applicant was subsequently released with conditions.

[13] On March 15, 2006, the Applicant had a Deportation order issued against him. The Applicant also made a claim for Convention Refugee status which was denied, on March 26, 2007.

The Applicant applied for leave and for judicial review of this decision, on April 5, 2007, and leave was denied, on July 3, 2007.

[14] On September 10, 2007, the Applicant applied for a PRRA. The Applicant received a negative decision on his PRRA, on January 8, 2008.

[15] On December 24, 2007, the Applicant applied for landing under a spousal application. The Applicant's file was transferred to the local Citizenship and Immigration Centre (CIC), on February 15, 2008.

IV. Issue

[16] The Applicant has failed to meet the tri-partite test for a stay of his removal given the lack of a serious issue, the absence of proof of irreparable harm, and the balance of convenience favouring the Minister.

V. Analysis

Test for Granting a Stay

[17] The Supreme Court of Canada has established a tri-partite test for determining whether interlocutory injunctions should be granted pending a determination of a case on its merits, namely: (i) whether there is a serious question to be tried; (ii) whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm; and (iii) the balance of convenience, in terms of which of the two parties will suffer the greater harm from the

granting or refusal of an interlocutory injunction pending a decision on the merits. (*Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.).)

A. Serious Issue

1) Higher threshold for serious issue

[18] Granting this motion would effectively grant the relief which the Applicant seeks in the underlying application for leave and for judicial review (i.e. deferring removal). This Court must, therefore, engage in a more extensive review of the merits of the application. In *Sklarzyk v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 336, [2001] F.C.J. No. 579 (QL), Justice Edmond Blanchard held:

> [10] The granting of this motion would in effect grant the relief sought in the applicants' underlying application for leave and for judicial review (i.e. deferring removal). In such cases, I accept that the Court must engage in a more extensive review of the merits of the case. Then, when the second and third stages of the test are considered and applied, the anticipated results on the merits should be born in mind.

(Reference is also made to *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311; *Wang v. Canada (Minister of Citizenship and Immigration)* (2001), 204 F.T.R. 5.)

2) Officer's limited discretion exercised reasonably

[19] The validity of the removal order is not in doubt. Removal officers have a statutory duty to remove persons subject to valid removal orders from Canada as soon as reasonably practicable. (*Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), ss. 48(2).)

[20] The discretion which a removal officer may exercise is very limited, and in any case, is restricted as to when a removal order will be executed. In deciding when it is "reasonably practicable" for a removal order to be executed, an officer may consider various factors such as illness, other impediments to travelling, and pending H&C applications. (*Simoes v. Canada (Minister of Citizenship and Immigration)* (2000), 187 F.T.R. 219; *Wang*, above.)

3) Officer's limited discretion exercised reasonably

[21] No administrative deferral of removal applied in this case which would require the Officer not to proceed with the removal. The spousal application is not an impediment to his removal. (*Satchell v. MCI*, (IMM-6197-06) November 30, 2006 (F.C.); *Pattar v. MPSEP* (IMM-4041-06) August 3, 2006 (F.C.); *Chaves v. MCI* (IMM-7134-05) December 2, 2005 (F.C.)

[22] An outstanding application for landing does not raise a serious issue. It is open to the Applicant to file an application, in the normal course, from outside of Canada, as a member of the family class and as noted by the Enforcement Officer, such family class applications are given priority processing.

[23] In a case such as this, where an individual has ignored Canada's immigration laws, returned to Canada repeatedly after being deported and worked without authorization, it is not incumbent upon a removal officer to wait to schedule his removal until after his spousal application has been determined. As is abundantly clear from his immigration history, the Applicant had no status, at any time. The Applicant decided to marry and have a child at a time when he was without any status in

Canada. The fact that such choices were made does not place a duty on a removal officer to permit an Applicant to stay in Canada in order to file a spousal application.

[24] In-Canada, spousal applications, like H&C applications, operate independently of the deportation process. They do not have the effect of halting deportations until such applications are determined. Had this been Parliament's intention, the legislation would provide for a statutory stay of removal once such an application has been filed. (*Shchelkanov*, above; *Matadeen*, above.)

[25] Moreover, a removal officer does not have an obligation to conduct an inquiry akin to a "pre-H&C":

> [36] …removals officers cannot be required to undertake a full substantive review of the humanitarian circumstances that are to be considered as part of an H & C assessment. Not only would that result in a "pre H & C" application", to use the words of Justice Nadon in *Simoes*, but it would also duplicate to some extent the real H & C assessment. More importantly, removals 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, an agency under the auspices of the Minister of Public Safety and Emergency Preparedness, and not by the Department of Citizenship and Immigration. They are not trained to perform an H & C assessment.

(*Munar v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1180, [2005] F.C.J. No. 1448 (QL); Reference is also made to *Tran v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1240, [2006] F.C.J. No. 1565 (QL); *Perry v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 378, [2006] F.C.J. No. 473 (QL); *Simoes*, above; *Rettegi v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 153, [2002] F.C.J. No. 194

(QL); *Williams v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 853, [2002] F.C.J. No. 1133 (QL).)

B. Irreparable Harm

1) No evidence of Irreparable Harm

[26] Irreparable harm must not be speculative nor can it be based on a series of possibilities. The Court must be satisfied that the irreparable harm will occur if the relief sought is not granted. (*Akyol Canada (Minister of Citizenship and Immigration)*, 2003 FC 931, [2003] F.C.J. No. 1182 (QL); *Osaghae v. MCI* (IMM-872-03) February 12, 2003 (F.C.T.D.).)

[27] With respect to the alleged risk faced by the Applicant in St. Vincent, it originates with his brother, a Rastafarian who smokes Marihuana and when impeded shows signs of aggression. That risk has been assessed by specialized decision-makers on two occasions: first, by the Refugee Protection Division (RPD) and then by the PRRA Officer. The same allegations of risk cannot now serve as a basis for an allegation of irreparable harm. (*Akyol*, above.)

[28] With respect to the Applicant's spouse's health, the medical documentation provided does not indicate that she will suffer harm if the Applicant is deported and is to await to learn of his status from outside of Canada. Canada has a social safety net available to those who are in need. The Applicant's spouse also has family in the Toronto area who assist her in providing for her children.

[29] The Federal Court of Appeal has held that irreparable harm is more than the unfortunate hardship associated with the relocation of the family. (*Selliah v. Canada (Minister of Citizenship*

and Immigration), 2004 FCA 261, [2004] F.C.J. No. 1200 (QL); Reference is also made to *Benjamin v. SGC* (IMM-8313-04) October 4, 2004 (F.C.); *Wright v. Canada (Minister of Citizenship and Immigration)* 2002 FCT 113, [2002] F.C.J. No. 138 (T.D.).)

[30] In the recent case of *Atwal v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427, [2004] F.C.J. No. 2118 (QL), the Federal Court of Appeal reiterated the high level of harm that must be demonstrated for a finding of irreparable harm:

> [14] Irreparable harm must constitute more than a series of possibilities. The onus is on the appellant to demonstrate in the evidence that the extraordinary remedy of a stay of removal is warranted.
>
> …
>
> [16] The irreparable harm claimed by the appellant with regard to loss of job and separation from his family consists of the usual consequences of deportation. It is not of the type contemplated by the three-stage test for granting a stay. As stated by Pelletier J.: *Melo v. Canada (Minister of Citizenship and Immigration)*, (2000), 188 F.T.R. 39 at para. 21:
>
> > If the phrase "irreparable harm" is to retain any meaning at all, it must refer to some prejudice beyond that which is inherent in the notion of deportation itself. To be deported is to lose your job, to be separated from familiar faces and places. It is accompanied by enforced separation and heartbreak.
>
> [17] As stated by Evans J.A. in *Selliah v. Canada (Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1200, 2004 FCA 261, at para. 13:
> The removal of persons who have remained in Canada without status will always disrupt the lives that they have succeeded in building here. This is likely to be particularly true of young children who have no memory of the country that they left. Nonetheless, the kinds of hardship typically occasioned by removal cannot, in my view, constitute irreparable harm for the purpose of the *Toth* rule, otherwise stays would have to be granted in most cases, provided only that there is a serious issue to be tried.

[31] Family separations can be unfortunate but they can be remedied by readmission upon a successful application from abroad, as is the normal course under the IRPA. An application for landing, even a spousal application, does not refer to an obligation, which would justify the Minister in not performing her statutory duty to execute a removal order as soon as it is practically possible. (*Wang*, above, pars. 47-49, 52-53.)

C. Balance of Convenience

[32] Subsection 48(2) of the IRPA provides that an enforceable removal order must be enforced as soon as is reasonably practicable:

48. (1) A removal order is enforceable if it has come into force and is not stayed.	**48.** (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
Effect	
(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable.	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.

[33] The Federal Court of Appeal has confirmed that the Minister's obligation is "not simply a question of administrative convenience, but implicates the integrity and fairness of, and public confidence in, Canada's system of immigration control." (*Selliah*, above, para. 22.)

[34] In the present case, the Applicant seeks 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 should demonstrate

that there is a public interest not to remove him as scheduled. (*RJR-MacDonald*, above; *Blum v. Canada (Minister of Citizenship and Immigration)* (1994), 90 F.T.R. 54, [1994] F.C.J. No. 1990 (QL), per Justice Paul Rouleau.)

[35] As stated by the Justice John Sopinka, in *Canada (Minister of Employment and Immigration v. Chiarelli*, [1992] 1 S.C.R. 711::

> The most fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter or remain in the country.

[36] The balance of any inconvenience which the Applicant may suffer as a result of removal from Canada does not outweigh the public interest which the Respondent seeks to maintain in the application of the IRPA, specifically an interest in executing a deportation order as soon as reasonably practicable. (*Atwal*, above.)

[37] In the within motion, the Applicant has not demonstrated that the balance of convenience favours the non-application of the law nor does it outweigh the public interest.

VI. Conclusion

[38] The Applicant's motion for a stay of the execution of the removal order is dismissed.

ORDER

THIS COURT ORDERS that the Applicant's motion for a stay of the execution of the removal order be dismissed.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-892-08
STYLE OF CAUSE:	RONALD REGINALD PATTERSON v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	March 31, 2008 (by Teleconference)
REASONS FOR ORDER AND ORDER:	SHORE J.
DATED:	March 31, 2008

APPEARANCES:

Mr. Raj Napal	FOR THE APPLICANT
Ms. Catherine Vasilaros	FOR THE RESPONDENT

SOLICITORS OF RECORD:

NAPAL LAW OFFICE Brampton, Ontario	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT