Date: 20080515

Citation: 2008 FC 612

Docket: IMM-2010-08

BETWEEN:

GURCHARN SINGH MANN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Docket: IMM-2033-08

BETWEEN:

GURCHARN SINGH MANN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

PHELAN J.

I. INTRODUCTION

[1] These are the reasons for the Order of May 5, 2008 staying the deportation of the Applicant.

[2] There are two leave applications for judicial review in issue. The matter in IMM-2010-08 is a challenge to a decision of a Removal Officer not to defer deportation pending a determination of a long-standing H&C application. The other matter, IMM-2033-08, is an application for leave to seek mandamus of the H&C application decision on the grounds that the delay of over three years to process the application is, effectively, a refusal to decide the H&C in a reasonable time.

[3] In granting this stay and providing reasons, I do not wish to be taken as in any way usurping the leave judge who will have before him/her a more complete record (the Respondent has not filed its Record in either file) and possibly more time to consider the merits of the leave applications.

[4] This case is supported by the two experienced counsel's affidavits with respect to the delays in the immigration system regarding processing H&Cs, as well as the likelihood of a meaningful chance of success on an H&C once an applicant is removed.

II. BACKGROUND

[5] The Applicant is a citizen of India. He has been in Canada for 22 years – since December 6, 1985. His refugee claim was denied in June 1990 and he was ordered deported in August 1990.

[6] The Applicant disappeared in November 1990 just prior to his removal. He was arrested in 1997 on an immigration warrant and released on terms shortly thereafter.

[7] Since then, he has remained available for deportation for the last 11 years – his presence known to immigration authorities.

[8] The Applicant's first H&C was refused in February 2001. His PRRA was denied in January 2005.

[9] He submitted a second H&C in November 2004. The file was transferred to Mississauga in April 2005 where apparently it has remained.

[10] On April 23, 2008, the Applicant made a request to defer removal due to his pending H&C application. That deferral was refused on April 28, 2008, and removal scheduled for May 7, 2008.

III. ANALYSIS

[11] The legal test for a stay is so well-known that it need not be repeated here.

[12] For purposes of analysis, I have conflated the two cases because they rely on essentially the same facts and law.

A. *Serious Issue*

[13] When one cuts through all the arguments, the Applicant's legal issue is the unreasonable delay in processing his H&C application.

[14] On the face of it, the Applicant's situation is replete with puzzling governmental delay especially since he was released in 1997.

[15] The affidavit of Robin Seligman, Chair of the Immigration Section of the Canadian Bar Association, is to the effect that Immigration Canada can deal with delays, and does in fact do so, by transferring files from a busy office such as Mississauga to less busy centres. The result is that H&Cs can be dealt with, in some cases, as early as within six months.

[16] The Respondent has not addressed this evidence.

[17] The Court is left with the conclusion, at this stage, that the delay – which on its face is long – is compounded by issues of administrative convenience rather than administrative burden.

[18] The Applicant says that the Removals Officer failed to address the issue of delay. With respect, the jurisdiction of the Removals Officer to defer is very limited. Reliance on interference with the Applicant's ability to play in his musical band or teach in his temple is so weak an argument as to undermine the seriousness of the challenge to the immigration processing system.

[19] However, given the low threshold on serious legal issue as well as an unexplained three-year delay – which approaches the timeframe which this Court, in cases such as *Bakhsh v Canada (Minister of Citizenship and Immigration)* (2004), 256 F.T.R. 195, has found raises issues of reasonableness, the Applicant has met the first threshold for a stay.

B. *Irreparable Harm*

[20] Again, focussing on the substance of the Applicant's two cases, the harm alleged is that, in reality, the rights to an H&C are rendered nugatory upon removal.

[21] In this regard, the Applicant has submitted the affidavits of two lawyers – Robin Seligman and Barbara Jackman. Their evidence is to the effect that, despite government policy statements, their experience has been that once an H&C applicant is removed, while processing of an H&C continues, it is a processing "to a refusal".

[22] The Court recognizes the frailties of this evidence in that it is anecdotal and unscientific or unresearched. However, the affiants have shown through an Access to Information request that the

government keeps no statistics to show that an H&C applicant has a fair chance of success despite removal.

[23] As frail as this evidence is, there is no substantive rebuttal evidence from the Respondent.

[24] As the case law discloses, it has been this Court's presumption that removal would be a neutral event in the context of a consideration of an H&C application. Indeed the Court apparently receives assurances from the Respondent to this effect on a regular basis.

[25] The Applicant has raised doubt as to these assurances. The effect of the Applicant's evidence is that an applicant, for all practical purposes, loses his right to a fair consideration of his H&C when he is removed from Canada.

[26] The issue of the effect of removal touches on all three elements for a stay - serious issue, irreparable harm and balance of convenience.

[27] There may be all sorts of reasons that the perception held by the affiant counsel is not sustainable. The difficulty, at this stage, is that there is no other evidence before the Court to show that the perception is unfounded.

[28] Therefore, the Applicant has met the irreparable harm threshold – at least on this record.

C. *Balance of Convenience*

[29] The Court is mindful that this Applicant has sullied his "clean hands" by disappearing for seven years. Nor is the Court particularly persuaded in the Applicant's favour by his multiple use of immigration procedures.

[30] However, there is a public interest raised in the issues of the timeframes for processing of H&Cs as well as the issue of the effect of removal on an undecided H&C application. The balance favours the Applicant in this case.

IV. CONCLUSION

[31] For all these reasons, I have exercised my discretion to grant a stay until the leave applications can be dealt with on a more complete record.

"Michael L. Phelan"
Judge

Ottawa, Ontario
May 15, 2008

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2010-08 and IMM-2033-08
STYLE OF CAUSE:	GURCHARN SINGH MANN and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS GURCHARN SINGH MANN and THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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APPEARANCES:

Ms. Krassina Kostadinov	FOR THE APPLICANT
Mr. Ricky Tang	FOR THE RESPONDENT

SOLICITORS OF RECORD:

WALDMAN & ASSOCIATES Barristers & Solicitors Toronto, Ontario	FOR THE APPLICANT
MR. JOHN H. SIMS, Q.C. Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT