Federal Court  Cour fédérale

Date: 20090825

Docket: IMM-4183-09

Citation: 2009 FC 843

Toronto, Ontario, August 25, 2009

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

EMILY ANNE MARIE SHARPE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicant filed a motion on an urgent basis on August 21, 2009, seeking an Order staying the execution of the removal order made against her, now scheduled to be executed on Wednesday, August 26, 2009 at 1:05 p.m.

[2] The Respondent submitted that the Court should not entertain this motion, as it would not be in the interests of justice to do so because: (a) the Applicant is not coming to the Court with clean hands, (b) the Applicant has not provided good grounds for bringing this motion late and on an urgent basis, and (c) it is not open to the Applicant to use the family courts to stay a removal order under the guise of determining the best interests of a child;

[3] The Court briefly heard oral submissions of counsel at the Court in Toronto, Ontario, on short notice, on Tuesday, August 25, 2009 at 2:00 p.m., following which the parties were advised that the motion was being dismissed as the Applicant has not come to the Court with clean hands. I have concluded that this Applicant has engaged in an egregious course of conduct that has permitted her to stay in Canada, with the exception of a few weeks, since she first arrived in October 1995.

[4] The Respondent, in a letter sent to the Court on August 22, 2009 submitted that "the Court should not entertain this motion due to the Applicant's lack of clean hands, her failure to disclose relevant information and her demonstrated unwillingness to comply with Canada's immigration laws and the process of this Court."

[5] The Respondent pointed out that the Applicant failed to report for removal on March 10, 2000 following a negative refugee determination and a denial of a permanent residency application on H&C grounds. The Applicant filed an application for leave and judicial review challenging the Direction to Report (IMM-1226-00). A warrant for her arrest was issued; she applied for a stay which was dismissed. She was removed from Canada on or about July 15, 2000.

[6] She returned to Canada some two weeks later on August 2, 2000, without authorization. Since that time she has had a second H&C application refused on May 14, 2001, a third H&C application dismissed on October 16, 2006, and a negative Pre-removal Risk Assessment made on April 29, 2009. A fourth H&C application was filed July 16, 2009 and remains in process. On October 19, 2006 and September 10, 2008 section 44 inadmissibility reports were written against the Applicant.

[7] In response to the Respondent's allegations of her failure to come to this Court with clean hands, the Applicant filed an affidavit sworn August 24, 2009. In it she blames others for the failures mentioned by the Respondent and accepts no personal responsibility for her own actions. The Court finds that she is untruthful in the affidavit.

[8] She swears that she failed to report for removal on March 10, 2000 because she was not provided with the information that she was to report on that date by her immigration consultant (and pastor) Raymond Cyrus. She fails to mention that on March 10, 2000 she filed an application (IMM-1226-00) for leave and judicial review of the decision directing her to report for removal. I simply do not accept her evidence that she was unaware of the requirement to report when she filed an application for judicial review of that very direction on the very day she was to report. Moreover, she filed an affidavit in IMM-1226-00 in which she swears "I was issued a Departure Order effective within 30 days of February 9, 2000." Accordingly, she has been proved by her own words to have known that she was to depart by March 10, 2000.

[9] Further, she swears in her current affidavit that Mr. Cyrus only retained a lawyer to act on her behalf after she was informed that she was to be removed on July 15, 2000. Court file IMM-1226-00 shows otherwise. That file indicates that Mr. Wayne DeLandro, a barrister and solicitor, filed a motion on March 13, 2000 for a stay of execution of the deportation order issued against the Applicant.

[10] In her current affidavit she swears that:

> The lawyer [retained by Mr. Cyrus after being informed in July that she was to be deported] told me that he would attend Court on the Tuesday prior to my scheduled removal on Saturday, July 15th, 2000 to attempt to prevent my removal from Canada.
>
> However, on the Friday, prior to my removal, I finally managed to contact the lawyer, despite several failed attempts during the week prior. It was on that date that the lawyer told me that he had a tooth ache and did not attend Court on the Tuesday.
>
> As a result, I complied with all instructions provided by the removals officer and left Canada on July 15th, 2000.

[11] Again, Court file IMM-0226-00 proves this to be untruthful. The stay application filed March 13, 2000 with, I would add, an affidavit in support sworn by this Applicant on February 16, 2000, was heard by Justice Hansen on Friday, July 14, 2000 and the record shows that her counsel, Mr. DeLandro appeared and argued the motion. Justice Hansen dismissed the motion for a stay of execution of the deportation order.

[12] The Applicant, after her removal, returned to Canada without authorization some two weeks later. In her affidavit she swears that the "removals officer then told me that I could return to

Canada after about two and a half to three weeks … [and he] did not tell me that I had to seek authorization to return to Canada." I have grave doubt that the Applicant was told any such thing. Further, as was pointed out by the Respondent, the Departure Order form contains an express statement that "the person shall not, after the person is removed from or otherwise leaves Canada, come into Canada without the written consent of the Minister unless an appeal from the Order has been allowed." It is therefore clear that she ignored or was wilfully blind to the prohibition against returning to Canada. She cannot blame others for her actions.

[13] The Applicant now claims that she is responsible for and is seeking custody of her granddaughter. The Court notes that this child was removed from Canada with her Mother in 2007. She was sent to live with her Grandmother, the Applicant in January 2009. She apparently managed to survive with her Mother in the intervening period. The Applicant only filed an application for custody on August 20, 2009. The Respondent suggests that this is an attempt to use the Family Court system and this child as a pawn in the Applicant's obvious desire to avoid removal from Canada. Given my finding as to the Applicant's lack of honesty, her claim that she was unable to commence the custody proceeding earlier due to financial restraints but did so only after a Direction to Report for Removal was issued, makes her explanation questionable.

[14] Counsel urges me not to visit the sins of the Grandmother on her Granddaughter. I am doing no such thing. There are options open to the child to stay in Canada, where her father resides, or return to Grenada where her Mother resides. If the sins of the Grandmother are visited on the

Granddaughter it is not the Court's doing; rather, it is the Grandmother's doing in failing to be honest.

[15] I have come to the conclusion that the Applicant has not been honest, upright, or sincere in her dealings with the Immigration authorities or this Court. Her evidence filed in support of her request for a stay has not been full, honest or candid. She has failed to abide by Canadian law and lawful orders respecting her removal. She has been in Canada without authorization for the better part of 13 years, imposing a substantial drain on the resources of the persons who work diligently in the immigration system when their time and attention could be better spent responding to the demands of honest and candid applicants.

[16] Had I heard this matter on the merits, I would have found for these reasons, and others, that the balance of convenience rested with the Respondent and would have dismissed the motion on its merits for failing to meet all three parts of the tripartite test in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.).

[17] I wish to make it clear that I find no fault with the Applicant's counsel. She relied on the information provided to her by her client. It was not accurate. Counsel did her best, without success, in difficult circumstances to convince the Court to hear the motion on its merits.

ORDER

THIS COURT ORDERS that the motion for a stay is dismissed.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4183-09
STYLE OF CAUSE:	EMILY ANNE MARIE SHARPE v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Toronto, Ontario
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REASONS FOR ORDER AND ORDER:	ZINN J.
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