Date: 20090528

Docket: IMM-5258-08

Citation: 2009 FC 552

Ottawa, Ontario, this 28th day of May 2009

Present: The Honourable Orville Frenette

BETWEEN:

Milena URBANCZYK

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for leave to commence an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the "Act") against a decision dated November 25, 2008 of a Deferral Officer or Inland Enforcement Officer's refusal of a deferral from an order of removal to Poland scheduled for December 5, 2008. The undersigned granted a stay of execution against the above order on December 5, 2008, pending the determination for leave and for judicial review of the refusal of deferral of the removal order.

[2] The applicant alleges the following issues:

1. She is an innocent victim because her first humanitarian and compassionate ("H&C") application was refused because of her partner's criminal charge in the United States, which is alleged to have occurred before she met him.
2. If she is sent back to Poland, this will separate her from her partner for several years before the agency processes her H&C application.
3. She suffers from a major depression, controlled by medication but these last events accentuated her anxiety and stress.

[3] The respondent answers:

1. The separation of a couple is a usual result of a removal.
2. Anxiety and depression are usual consequences of deportation. There is no evidence that medical services and medication are not available in Poland to treat that illness (*Palka v. Minister of Public Safety and Emergency Preparedness*, 2008 FCA 165).
3. The existence of an outstanding H&C application alone is not in itself, sufficient support to a stay of deportation order (*Simoes v. Minister of Citizenship and Immigration* (2000), 187 F.T.R. 219, at paragraph 12; *Barrera v. Minister of Citizenship and Immigration*, 2003 FCT 779).

[4] I based my decision to stay on the "serious issues" test because: "If one examines individually these issues, he or she could conclude they do not meet the test of "seriousness" but cumulatively I believe they do meet the criteria."

The Test for Leave for Judicial Review

[5] Subsection 72(1) of the Act provides that judicial review to the Federal Court commences by making an application to the Federal Court and if leave is granted, the decision is reviewed in accordance with subsection 18.1(4) of the *Federal Courts Act*, R.S.C. 1985, c. F-7.

[6] For leave to be granted, the test or only consideration is whether there is "a fairly arguable case and a serious question to be determined" (*Bains v. Minister of Employment and Immigration* (1990), 47 Admin. L.R. 317, 109 N.R. 239, paragraph 1 (F.C.A.)).

[7] In *Wu et al. v. Minister of Employment and Immigration* (1989), 7 Imm. L.R. (2d) 81 (F.C.T.D.), Madam Justice Barbara Reed wrote:

> On leave to commence proceedings application the task is not to determine, as between the parties, which arguments will win on the merits after a hearing. The task is to determine whether the applicants have a fairly arguable case, a serious question to be determined. If so leave should be granted and the applicants allowed to have their argument heard.

In *Virk v. Minister of Employment and Immigration* (1991), 13 Imm. L.R. (2d) 119 (F.C.T.D.), "arguable case" has been defined as one that has a chance of success on judicial review.

Mootness

[8] The issue of mootness might have arisen in this case following the Federal Court of Appeal decision in *Baron v. Minister of Citizenship and Immigration*, 2009 FCA 81, released on March 13, 2009 *i.e.* after my stay decision of December 5, 2008.

[9] In *Baron*, Justice Eleanor Dawson had dismissed the applicant's judicial review application challenging a refusal to defer removal pending an outstanding H&C application because the removal date had passed and therefore the matter became moot.

[10] Although the Court of Appeal concluded that the matter was not moot because there still was live controversy between the parties, *i.e.* the H&C application, this did not prevent the removal of the appellant.

[11] The applicant submits that in the instant case, the matter is not moot for the same reason. The respondent opines that what is the issue here was an either or proposition and since the 60-day extension sought has expired, the matter is moot, even if there is an outstanding H&C application. The removal should have proceeded.

[12] I do not believe necessary to address the issue of mootness because *Baron* settles the matter of the removal deciding that in similar circumstances as the present one, removal on the prescribed date, the order was enforceable.

[13] The applicant can pursue her H&C application outside Canada.

[14] In conclusion, leave for judicial review will be refused for the same reasons as enunciated in *Baron*, *supra*. See also *Chetaru v. Minister of Public Safety and Emergency Preparedness*, 2009 FC 436.

ORDER

THIS COURT ORDERS THAT:

The application for leave and for judicial review of the Deferral Officer or Inland Enforcement Officer's decision of November 25, 2008 is refused.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-5258-08
STYLE OF CAUSE:	Milena URBANCZYK v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

APPLICATION DEALT WITH IN WRITING

REASONS FOR ORDER AND ORDER:	The Honourable Orville Frenette, Deputy Judge
DATED:	May 28, 2008

Mr. Andrew Brouwer	FOR THE APPLICANT
Mr. David Joseph	FOR THE RESPONDENT

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