Date: 20080430

Docket: A-169-08

Citation: 2008 FCA 165

Present: **EVANS J.A.**

BETWEEN:

JADWIGA PALKA
PAULA PALKA

Appellants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

Heard by conference call at Ottawa and Toronto, Ontario, on April 30, 2008.

Order and Reasons for Order delivered at Ottawa, Ontario on April 30, 2008.

REASONS FOR ORDER BY: EVANS J.A.

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REASONS FOR ORDER

EVANS J.A.

[1] This is a motion by Jadwiga Palka and her daughter, Paula Palka, for a stay of removal to their country of nationality, Poland, pending the disposition of an appeal to this Court. Their removal has been scheduled for May 3, 2008. I heard the motion via teleconference with the parties' counsel.

[2] The Palkas are appealing from a decision of the Federal Court, dated March 13, 2008 (2008 FC 342), in which Justice Mactavish dismissed the Palkas' application for judicial review of a refusal by an enforcement officer to defer their removal from Canada, then scheduled for June 13,

2007, until their application for permanent residence on humanitarian and compassionate grounds ("H&C") had been decided.

[3] Justice Mactavish held that the application for judicial review was moot, and did not consider its merits. She based her finding of mootness on the fact that another Judge of the Federal Court had stayed the Palkas' removal scheduled for June 13, 2007, pending the disposition of their application for judicial review of the officer's refusal to defer their removal. Justice Mactavish rejected the position taken by both the Palkas and the respondent, the Minister of Public Safety and Emergency Preparednesss, that the passing of the scheduled removal date did not render the application for judicial review moot because an application for permanent residence on H&C grounds was outstanding. She certified a question for appeal on the mootness issue.

[4] To provide some context to this motion for a stay of removal pending the disposition of the Palkas' appeal from Justice Mactavish's decision, I shall summarize the principal legal landmarks in their protracted and tangled immigration history. They first came to Canada in April 1997. In 1999, they applied for recognition as refugees on the ground of abuse by Jadwiga's husband. The Refugee Protection Division of the Immigration and Refugee Board rejected the application because it did not find her evidence credible. An application for leave and judicial review of the Board's decision was dismissed by the Federal Court in October 2001.

[5] In August 2006, the Palkas applied for a Pre-Removal Risk Assessment ("PRRA") based on their fear of physical harm from Jadwiga's husband and supported by new evidence that was not

before the Board. The PRRA officer concluded that the new evidence did not "overcome" the Board's negative credibility finding, and rejected the application in January 2007. Their removal was scheduled for March 21, 2007, but was subsequently deferred until June 2007 to enable Paula to complete her school year. Their application for judicial review of the PRRA decision was dismissed by the Federal Court in January 2008.

[6] Meanwhile, in September 2006, the Palkas had applied for permanent residence on H&C grounds. Their application is principally based on: their establishment in Canada; the presence in Canada of other family members and the support needs of Jadwiga's father; the best interests of Paula, who is 15 years old; and their fear of violence in Poland. As I have already noted, no decision on the H&C application has yet been received.

[7] Shortly after Justice Mactavish dismissed the application for judicial review of the enforcement officer's refusal to defer the removal that had been scheduled for June 13, 2007, a direction was issued requiring the Palkas to report for removal on May 3, 2008. The Palkas did not apply for judicial review of this direction.

[8] The grant of a stay of removal of a non-citizen from Canada is within the discretion of the Motions Judge who must exercise that discretion by applying the tripartite test governing the award of an interlocutory injunction: *Toth v. Canada (Minister of Employment and Immigration)* (1998), 86 N.R. 302 (FCA). Thus, in order to obtain a stay, the Palkas must establish that: (i) their appeal from Justice Mactavish's decision raises a serious question; (ii) they will suffer irreparable harm if a

stay is not granted; and (iii) the balance of convenience favours a stay and the maintenance of the *status quo* pending the disposition of their appeal. I shall consider each part of the test in turn.

(i) Is there a serious issue?

[9] As a rule, the "serious question" factor is readily satisfied. It should be easy to persuade a Judge of this Court that a question certified for appeal by a Judge of the Federal Court is not frivolous or vexatious. However, the Minister argues that it is necessary to look beyond the mootness question certified by Justice Mactavish to the underlying subject of the application for judicial review, namely, the legality of the enforcement officer's exercise of discretion to refuse to defer the Palkas' removal pending the disposition of their H&C application. The Minister submits that, since a stay would give the appellants most of the relief that that they are seeking in the application for judicial review, the "serious question" test is more demanding than normal and requires proof of a likelihood of success in the application.

[10] Because I have concluded that the Palkas cannot satisfy the other two parts of the test, I am prepared to assume for the purpose of this motion that the certified question is the relevant issue. As the Minister concedes, it is not vexatious or frivolous.

(ii) Irreparable harm

[11] The Palkas say that, if removed to Poland, they will suffer various kinds of irreparable harm: the loss of their H&C application; Jadwiga will suffer psychological harm if forced to return to Poland; and their appeal to this Court from Justice Mactavish's decision will be rendered nugatory.

[12] Before considering these submissions in detail, I should emphasize that the normal hardships attendant on deportation from Canada cannot constitute irreparable harm for the purpose of the *Toth* test, otherwise a stay would be the norm and removal the exception: *Tesoro v. Canada (Minster of Citizenship and Immigration),* [2005] 4 F.C.R. 210 at para. 34. This would subvert Parliament's intention that those subject to a valid removal order must leave immediately and the order enforced as soon as is reasonably practicable: *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, subsection 48(2).

(a) H&C application

[13] The Palkas argue that their immediate removal will undermine their application for permanent residence on H&C grounds. I do not agree. Counsel conceded that the Palkas' H&C application will be processed, even after their removal from Canada. If the Palkas' H&C application was granted after their removal, they may be permitted to return to Canada.

[14] The existence of a pending H&C application has often been held not to constitute irreparable harm, especially when, as here, the application was not made in timely fashion after unsuccessful applications for refugee status and a PRRA. Counsel says that it was justifiable for them to wait five years before making their H&C application so that they could demonstrate establishment in Canada. This was a tactical decision and the appellants must live with the consequences.

[15] Further, the appellants have provided no evidence that removal will render their H&C application nugatory. Denying a stay will not destroy the H&C application insofar as it is based on their ties to Canada through the length of time that they have been here, family, employment, friends and school, especially if, as counsel claims, their application is “exceptionally strong on its merits”.

[16] The Palkas rely on *Owusu v. Canada (Minister of Citizenship and Immigration),* 2003 FCA 470, to support their position on this point. However, the facts of *Owusu* were unusual and very different from those in the present case: Mr Owusu’s H&C application was based on his ability to continue to send money to support his child in Ghana from his employment in Canada.

(b) psychological harm

[17] Jadwiga relies on a report from a psychologist stating that a return to Poland would cause her psychological harm. In my view, this is an insufficient evidential basis to establish irreparable harm. First, the report was based largely on what Jadwiga told the psychologist about her experiences; however, the Board has found her evidence of spousal abuse to be non-credible, a decision which the PRRA officer held was not overcome by new evidence. Second, Jadwiga and the psychologist had only one meeting and there was no evidence of any follow-up treatment. Third, the report was prepared in 2006 to assist Jadwiga in her efforts to remain in Canada on H&C grounds and is thus, to an extent, self-serving. Fourth, stress and depression caused by the prospect of removal from Canada are of little relevance in this context since they are inherent in the enforcement of the Act.

(c) appeal will be nugatory

[18] The Palkas argue that, if they are denied a stay, their appeal from Justice Mactavish’s decision will be nugatory, since it will be dismissed for mootness. This, they say, constitutes irreparable harm. I do not agree.

[19] First, even if their appeal is moot, the Court may decide to hear it in its discretion, on the ground that the question certified by Justice Mactavish may arise repeatedly and be evasive of review. To this end, I note that the question certified has been the subject of other decisions in the Federal Court and is clearly one of some difficulty.

[20] Second, even if a refusal of a stay does render the appeal nugatory, this does not necessarily constitute irreparable harm. It all depends on the facts of the individual case: *El Ouadi v. Canada (Solicitor General)*, 2005 FCA 42. In the present case, the Board and the PRRA officer rendered negative decisions on applications made on the basis of a fear of physical harm in Poland. In view of these findings, I am not persuaded that the hearsay statements in the affidavit sworn for the purpose of this proceeding establish that Jadwiga would be at risk of violence if returned to Poland.

(iii) Balance of convenience

[21] In my view, the balance of convenience does not favour a stay. True, the Palkas have been in Canada for more than nine years, and appear to have been successful in establishing themselves and to have led blameless lives. Given the length of time that they have been here, the presence of

family members in Canada, the health of Jadwiga's father, and the enhanced life opportunities available to them, it is very understandable that they wish to remain.

[22] However, that is not the test on a motion for a stay of removal. Despite numerous attempts, through administrative and legal channels, they have been denied status in Canada. There has to be some finality. To grant yet another deferral of their removal is contrary to the public interest as expressed in the Act. The appellants have not persuaded me that their interest in remaining outweighs the public interest in the due enforcement of the law. I decline to defer their removal yet again.

[23] For these reasons, the motion will be dismissed.

J.A.

FEDERAL COURT OF APPEAL

NAMES OF COUNSEL AND SOLICITORS OF RECORD

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DATED:	April 30, 2008

APPEARANCES:

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