

Date: 20081205

Docket: IMM-5221-08

Citation: 2008 FC 1355

Ottawa, Ontario, December 5, 2008

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

ROBERT CHARLTON

Applicant

and

**THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondent

REASONS FOR ORDER AND ORDER

[1] On November 30, 2008, I granted a stay from the execution of Robert Charlton's removal scheduled for Jamaica the next day. These are my reasons for doing so. The applicant's stay request is grafted to an application for leave and judicial review of a decision dated November 27, 2008 by an Enforcement Officer (the Officer) not to defer his removal.

Facts

[2] The applicant came to this country in July 2005 on a temporary work visa to perform farm labour during the 2005 harvesting season. He was reported AWOL from Pond Craig Farm in November 2005. A warrant was issued for his arrest on February 6, 2006.

[3] He had gone underground and only came to the attention of the immigration authorities when he was hospitalized for injuries suffered in an industrial accident at a workplace where he had obtained employment using a false name. He was arrested on March 27, 2007, was released on conditions and attended a pre-removal interview on April 23, 2007 at which time he was offered a Pre-Removal Risk Assessment (PRRA) which he availed himself of leading to a negative decision dated February 17, 2008 communicated to him at a pre-removal interview on March 17, 2008. The applicant did not seek to challenge the negative PRRA decision by seeking leave of this Court.

[4] The industrial accident he suffered is at the center of his stay application. His right hand was severely crushed on March 23, 2007. He was treated at the Workplace Safety and Insurance Board (WSIB) Hand Specialty Program in the Toronto Western Hospital. He is under the care of Dr. von Schroeder (Dr. Schroeder), an orthopaedic surgeon. Several of Dr. Schroeder's medical reports were sent to the Officer when written deferral was requested.

[5] The record indicates the Applicant was reassessed by Dr. Schroeder on October 16, 2007 who noted some progress in his fingers but problems with his right wrist. On October 29, 2007, he underwent right wrist arthroscopy. He was seen by Dr. Schroeder on February 12, 2008 in follow-up. His medical report to the WSIB indicates progress with the fingers but again problems with the

right wrist where significant damage was discovered. He remarked “probability of future surgery was high”. Another surgical operation took place on April 21, 2008.

[6] The officers at the Canada Border Services Agency (CBSA) were aware of the applicant’s medical condition. At his pre-removal interview on March 17, 2008, he was accommodated with respect to his then upcoming surgery on April 21, 2008.

[7] On June 18, 2008, Mr. Charlton attended another pre-removal interview when, according to the Officer’s notes to file, he informed CBSA officers he was to have another operation on his hand in April or May 2009, the Officer noting “no proof was submitted”. These notes to file also reveal, however, the applicant showed the interviewing officer a note from his doctor stating that he was to return to the clinic in one month’s time for a follow-up assessment. Removal was deferred for a couple of months subsequent to his appointment with Dr. Schroeder.

[8] On November 6, 2008, he attended another pre-removal interview. The Officer’s notes to file indicate “subject could not provide proof of his appointment in April 2009. Subject served call-in notice for November 12, 2008 to receive direction to report for removal.” He attended that interview on November 12th and was directed to report for removal scheduled for November 30, 2008.

[9] On November 26, 2008, CBSA received a deferral request on behalf of the applicant from the consulting firm of Immigration Experts Inc. It was 27 pages in length and included his entire

medical file. As noted, on November 27, 2008, the Officer refused to defer. A new direction to report was issued for removal on December 1, 2008.

[10] As part of the material submitted to the Officer was a letter dated November 13, 2008 “to whom it may concern” from Dr. Schroeder, the material part of which reads:

He states he is unable to work due to the pain involving the right wrist.

His next appointment is scheduled here on April 7, 2009. It is possible that he will require future surgery to be determined at that time.

He will require infrequent medical monitoring and follow-up for his chronic right wrist pain. He is approaching maximum medical recovery and he will continue to have chronic pain.

Please do not hesitate to contact me should further information be required.

[11] Also part of that package was an application to sponsor Mr. Charlton’s permanent residence in Canada signed by his common law spouse who indicated their relationship began in March 2006. That sponsorship application is dated October 10, 2008.

Analysis

[12] It is settled law in order to obtain a stay of his removal, the applicant had to establish a serious question to be tried with respect to the Officer’s decision not to defer; irreparable harm flowing from his removal and the balance of convenience in his favour.

(a) Serious issue

[13] I accept the submission of counsel for the respondent, the applicant had to meet the higher test of likelihood of success rather than the lower threshold of a question that was not frivolous and vexatious since the granting of the stay would give him the relief he seeks on judicial review.

[14] After examining the notes to file, in respect of the Officer's decision and considering the arguments of counsel, I was satisfied the underlying application for leave and judicial review raises the following serious questions:

- 1) Did the Officer apply the right test in reaching his decision not to defer? It is clear that the Officer focussed on Mr. Charlton's ability to travel on the day of his scheduled removal. The recent jurisprudence of this Court is broader than this test and is to the effect a removals Officer must examine whether there are compelling personal circumstances warranting deferral, namely humanitarian, and compassionate considerations (see *Ramada v. Canada (Solicitor General)*, 2005 FC 1112 and the cases which have followed it).
- 2) Did the Officer err in embarking upon a study of the medical reports without consulting the medical officers at Citizenship and Immigration Canada who are there for that purpose?
- 3) Did the Officer misinterpret the medical evidence, particularly, Dr. Schroeder's letter of November 13, 2008?

(b) Irreparable harm

[15] Irreparable harm includes harm to an individual's personal integrity. It is clear Dr. Schroeder scheduled a follow up consultation with Mr. Charlton for April 7, 2009. He thought that follow up was necessary because of the applicant's medical condition. He wanted to find out how the patient was doing after the surgical intervention in April 2008. He could not say whether Mr. Charlton would need future surgery until he had examined him. Counsel for the Respondent argued there was no evidence on the record he could not obtain adequate medical services in Jamaica. With respect, the issue raised by counsel for the respondent is premature in that until Dr. Schroeder could do the follow up, he, nor anybody else was in the position of determining whether additional surgery or other appropriate treatment was necessary. Irreparable harm flowed, in my view, from the fact the applicant would not be able to consult with the surgeon who had treated him throughout his serious industrial accident and who had many follow-ups with him and knew his needs.

(c) Balance of convenience

[16] Counsel for the Respondent argued the applicant did not have clean hands with respect to his immigration file; he went underground and tried to evade the law. If it were not for the present uncertainties surrounding the applicant's medical condition, I would have accepted counsel for the respondent's submission. On balance, convenience favours the stay of his removal pending the determination of his application for leave and judicial review.

ORDER

THIS COURT ORDERS that the applicant's removal from Canada is stayed pending the determination of his leave application and, if leave is granted, pending the determination of his application for judicial review.

“François Lemieux”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5221-08

STYLE OF CAUSE: ROBERT CHARLTON v. THE MINISTER OF
PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS

PLACE OF HEARING: Ottawa, Ontario

DATE OF HEARING: November 30, 2008

**REASONS FOR ORDER
AND ORDER:** Lemieux, J.

DATED: December 5, 2008

APPEARANCES:

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