Date: 20090522

Docket: IMM-2257-09

Citation: 2009 FC 543

Ottawa, Ontario, May 22, 2009

PRESENT: The Honourable Orville Frenette

BETWEEN:

CHRISTOPHER MUWULYA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application on a motion to stay the execution of a deportation order scheduled to be executed on Saturday, May 23, 2009 at 2pm.

BACKGROUND FACTS

[2] The Applicant, a citizen of Uganda, entered Canada as a visitor to attend a conference, on July 14, 2002.

[3] On July 25, 2002, he presented a refugee claim which was denied on March 8, 2004.

[4] His application for leave and judicial review against the above decision was denied on May 25, 2004.

[5] A Pre-Removal Risk Assessment of January 2, 2009 was rejected on May 5, 2009.

[6] An Application for leave and judicial review of the PRRA decision was made on May 5, 2009.

[7] When the Applicant received a decision in respect for removal on May 23, 2009, he agreed to leave voluntarily.

[8] On May 21, 2009, he served this application for a stay of the deportation order.

[9] He alleges the PRRA Officer committed a reviewable error in considering new evidence, i.e. two e-mails about the Applicant's activities in Uganda. In addition, he claims his common-law spouse is pregnant and he needs to take care of her and the child to be born.

PRELIMINARY ISSUES

1) Lateness of the stay motion

[10] The Applicant does not provide any valid reason why the stay motion was presented only two days before the date of removal. A stay is an extraordinary measure which must not be but a

last minute strategy to delay removal unless based upon very serious reasons. *Shi v. Canada (PSEPC)*, 2007 FC 534, para. 6:

> ***6*** *I dismissed this motion because of its lateness and because of the obvious prejudice to the Respondent if the matter was heard on the merits. An applicant should not enjoy a strategic advantage by bringing last-minute stay motions before the Court. This is a discretionary and extraordinary remedy the granting of which requires a meaningful record and careful consideration. This is the very type of situation considered by the Federal Court of Appeal in El Ouardi v. Canada (Solicitor General), [2005] F.C.J. No. 189, 2005 FCA 42, where Justice Marshall Rothstein observed:*
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> > *6 I am inclined to the view that, in the circumstances of this case, Blais J. was entitled to determine, as an initial issue, whether to entertain the stay motion and did not decline jurisdiction by dismissing the application on that ground. In the case of a late application for a stay, a motions judge must be given considerable leeway in dealing with the matter. In cases of late stay applications, a requirement to consider the merits could result in an automatic stay because of the need to give the Minister time to respond or the time necessary for the Court to decide the matter. Therefore, in cases of late stay applications, I doubt there is an obligation on the Court to consider the merits in all cases, especially where the application is very late as in this case. Certainly, the motions judge should consider the reason for the lateness of the application. If the Minister is involved in the circumstances giving rise to the delay, then the decision might be different than if the applicant is responsible.*
> >
> > *7 In the present case, the facts are that the stay application could have been made on or shortly after January 7, 2005, when the appellant was advised of her scheduled removal date. In these circumstances, I tend to think that Blais J. properly exercised his discretion not to entertain the very late stay motion, that it was within his jurisdiction to do so, even though he may not have considered*

> *the merits of the application and that the matter is not appealable to this Court. However, the threshold for a serious issue is low and I do not think it would be appropriate for me, sitting on a motion for a stay pending appeal, to make a final decision on this issue.*

2) <u>The lateness of the application for leave</u>

[11] The PRRA decision is dated January 22 009, but the application for leave and judicial review was only served on May 5, 2009 i.e. more than four months later.

[12] A motion in stay must be supported by an underlying application for leave. Section 72(2) of the *IRPA* requires that an application for leave be made within 15 days the applicant is informed of the decision.

[13] Unless an applicant obtains permission from a Judge of the Federal Court limit pursuant to section 72(2)(c) of the *IRPA*, a prospective applicant cannot present his application. To obtain an extension of time, the four conditions set out by the Federal Court of Appeal in *Canada (Attorney General) v. Hennelly* (1998) 244 N.R. 399, must be met.

[14] Therefore, for the Applicant has not satisfied these conditions in both the above reasons, the stay application should be dismissed but I will also dismiss the application because of its lack of merit.

3) <u>The test for a stay removal</u>

[15] The test on a stay of removal was set out by the Federal Court of Appeal in *Toth v. MCI* (1988) 86 N.R. 302.

[16] The test is based upon three conjunctive conditions:

1. That there is a serious issue to be tried;
2. That irreparable harm will be caused if the stay is not granted;
3. That the balance of convenience favours the granting of the stay.

<u>THE SERIOUS ISSUE TO BE TREATED</u>

[17] The test for this condition is whether there is a serious issue to be tried which is neither frivolous nor vexatious (*Sowkey v. MCI*, 2004 FC 67; *Domingo v. MSPC*, 2009 FC 425 paras. 38-41).

[18] The Applicant alleges that he filed an application for judicial review of the PRRA decision because the officer considered "new evidence" i.e. two emails set to him about the human rights situation in Uganda and the relation of the Applicant with an opposition political party.

[19] The Respondent argues there is no serious issue raised. The interpretation of this condition signifies that the Court must decide, whether on the merits, the underlying application is likely to succeed. *Simy Yu. v. Canada (MCI)* 2009 FC 41 paras. 21-22.

[20] The Applicant contests the P RRA decision because the officer had considered emails. The former could not consult them. A reading of the PRRA decision shows that the Officer considered all of the evidence produced and he was not obliged to refer to every detail in the evidence.

[21] In my view, not only was the decision the right one, but the IRB determined the Applicant was not credible. The Applicant also argues his presence is necessary in Canada because his common-law wife is pregnant and the child will need him. This is not a serious issue in this case.

IRREPARABLE HARM

[22] The Applicant alleges that he will suffer irreparable harm if returned to Uganda a country where his life will be at risk. He also alleges his present situation has not allowed him to file for a Humanitarian and Compassionate application. The Applicant alleges his removal will negatively affect his ability to communicate with his counsel from Uganda. The allegations are speculative and cannot fulfil the requirements of this condition.

DISRUPTION OF FAMILY LIFE

[23] The jurisprudence of our Court has maintained that disruption of family life, loss of employment, emotional stress, loss of financial support of a spouse, are all incumbent consequences of a removal and therefore cannot be considered irreparable damage (*Malyy v. Canada (MSPP),* 2007 FC 388, 156 A.C.W.S. (3d) 1150; *Sofela v. Canada (MCI)* – 2006 FC 245, 146 A.C.W.S. (3d) 306; *Chetary v. MPEP* , 2009 FC 436).

[24] It has been held that separation from a pregnant wife and two children may constitute personal inconvenience, maybe even hardship, but it does not institute irreparable harm (*Castro v. MCI* IMM-2729-97, July 4, 1997; *Kwan v. Canada (MCI)* (1998), 159 F.T.R. 262 para. 25).

[25] In this case the first condition has not been met.

BALANCE OF CONVENIENCE

[26] Under section 48(2) if the *Act* the Respondent has the obligation to execute an order of removal as soon as it is reasonably possible. According to case law the matter of public interest must be considered to satisfy this condition (*Membrano-Garcia v. Canada (MCI)* (1998) 3 F.C. 306, 55 F.T.R. 104; *Blum v. Canada (MCI)*, 90 F.T.R. 54; 52 A.C.W.S. (3d) 1099).

[27] In the present case, an application for leave and judicial review of the PRRA decision has not yet been granted leave. There is question of an HC application is speculative not yet having been filed.

[28] Therefore this balance of convenience favours the Respondent.

[29] In conclusion, the application for a stay has failed. This Court orders that the application for a stay against the removal order is rejected.

ORDER

THIS COURT ORDERS that

1. This application seeking a stay of deportation is dismissed.

"Orville Frenette"
Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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