Federal Court  Cour fédérale

Date: 20100423

Docket: IMM-2026-10

Citation: 2010 FC 440

Ottawa, Ontario, April 23, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

COLLIN DEXTER WYNNE

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS FOR ORDER

WHEREAS the applicant filed a motion on April 19, 2010, for an order staying the enforcement of a removal order scheduled for April 25, 2010, until the Court disposes of his application for leave and judicial review of a decision by Officer Y.L. Cheung of the Canada Border Services Agency refusing his application for an administrative stay of his removal from Canada;

HAVING REVIEWED the applicant's motion record and the respondent's reply record;

HAVING HEARD counsel for the parties via a telephone call in Montréal and Ottawa on April 22, 2010;

HAVING APPLIED the tripartite test articulated by the Supreme Court of Canada in *Manitoba (A.G.) v. Metropolitain Stores Ltd.*, [1987] 1 S.C.R. 110 and *R.J.R. MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, which the Federal Court of Appeal adopted to determine motions for a stay of removal in *Toth v. Canada (Minister of Employment and Immigration* (1998), 86 N.R. 302;

THE COURT ORDERS that the motion for a stay is dismissed on the following grounds:

Background

[1] The applicant is a single 35-year-old citizen of Saint Vincent. He arrived in Canada on October 11, 2005, and has been residing in the Montréal area since then without status. The applicant states that, since his arrival, he has been living with his niece, Roseanne Hackett, and her husband, Mr. Osborn Anthony, a Canadian citizen.

[2] In October 2009, the police conducted a search at the applicant's residence. It was during the search that the authorities discovered that the applicant was residing in Canada without status.

[3] A removal order against the applicant was made on October 9, 2009, but its enforcement was delayed by the effect of the statute following his application for a pre-removal risk assessment

submitted the same day. On February 3, 2010, the officer responsible for the assessment found that the applicant would not face any undue risk if he returned to Saint Vincent. This finding was not the subject of an application for judicial review.

[4] On December 3, 2009, Mr. Osborn Anthony, the husband of the applicant's niece, was the victim of an armed attack and was shot a number of times; he sustained serious injuries and was rendered paraplegic. The applicant now acts as an assistant for his niece's husband to, *inter alia*, put him in his wheelchair and support him when he leaves his home, which is not adapted for his lack of mobility.

[5] The circumstances regarding the husband of the applicant's niece were discussed at the interview on February 8, 2010, which had been arranged to give the applicant the pre-removal risk assessment findings. Officer Y.L. Cheung informed the applicant at that time that the circumstances surrounding the health of his niece's husband did not justify an administrative stay of his removal for an indefinite period. Nonetheless, the officer granted the applicant a two-month stay to enable him and his niece's husband to prepare for his departure and to find alternate solutions. The officer summoned the applicant to another interview scheduled for March 16, 2010.

[6] On February 24, 2010, the applicant submitted an application for permanent residence in Canada under section 25 of the *Immigration* and *Refugee Protection Act*, S.C. 2001, c. 27 (the Act), which permits the Minister to grant this status on an exceptional basis "if the Minister is of the

opinion that it is justified by humanitarian and compassionate considerations . . . taking into account the best interests of a child directly affected, or by public policy considerations."

[7] The application for permanent residence in Canada under section 25 of the Act was primarily based on the fact that the husband of the applicant's niece requires assistance. In the application, the applicant maintained that his sudden departure from Canada would have a serious and disproportionate impact on his niece's husband. The Minister's review of this application is evidently still pending.

[8] On March 11, 2010, the applicant also submitted a written application to the removal officer for an administrative stay. The purpose of his application was to obtain a stay for the time needed to review his application for permanent residence under section 25 of the Act. The application for an administrative stay was based on the following as set out in the written representations of counsel for the applicant, which were provided to the removal officer:

> [TRANSLATION]
> Today, the real basis on which the applicant relies is the fact that a Canadian citizen is going through a difficult situation where the only viable alternative is the presence in Canada of a foreign national who almost certainly will be deported. If that happens, the inconvenience, impact and difficulties experienced will be immediate and obvious. Unfortunately, there does not really seem to be any other solution to Mr. Osborn's problem.
> We submit that the applicant's sudden departure from Canada will have a serious and disproportionate impact on the life of Mr. Osborn Anthony, who is a Canadian citizen.

[9] The scheduled meeting with the officer took place on March 16, 2010. At that time, the applicant was verbally informed about the refusal to grant the administrative stay. He was

summoned to another interview scheduled for April 8, thus giving him an additional *de facto* stay of a few weeks.

[10] On the same day, March 16, 2010, following a telephone application by applicant's counsel, the removal officer again refused a new verbal application for a stay on the basis that he would not grant a stay for an indefinite period. However, the officer indicated to applicant's counsel that he would consent to an additional two-week stay if an application were sent to him in writing.

[11] The applicant received written notice that the stay had been refused but instead of submitting a new stay application for an additional period of two weeks, the applicant asked the officer to set out the reasons for the refusal that were given on March 16. The officer sent the following reasons on March 24, 2010:

> [TRANSLATION]
> The decision to refuse your application was based on the finding that the basis of your application (that a Canadian citizen is going through a difficult situation) does not justify an administrative stay. In addition, we would like to state that the Canadian's situation was already taken into consideration at the interview on February 8, 2010.

[12] On April 8, 2010, the officer met with the applicant and gave him a notice indicating that he must leave Canada on April 25, 2010. At the meeting, the applicant and his counsel stated that they had not received the written reasons of March 24, 2010. The officer therefore gave them a copy of his reasons at that meeting.

[13] The applicant now seeks judicial review of the March 16, 2010, decision whose reasons were sent to him on March 24, 2010, and given to him personally on April 8, 2010; an application for leave under section 72 of the Act was filed on April 12, 2010, along with the stay motion that is before me.

Positions of the parties

[14] In his written representations in support of the stay motion, the applicant sets out two grounds: (a) the officer erred in law by finding that the difficulties of a third party in Canada cannot be the basis for an administrative stay and (b) the decision does not provide adequate reasons because there is no correlation between the evidence in the record and the decision.

[15] The applicant does not allege any harm concerning him personally but relies on the harm that his niece's husband would suffer if he returned to Saint Vincent.

[16] The respondent maintains that the application for leave and judicial review is out of time because the decision refusing the stay on March 16, 2010, was sent to counsel for the applicant the same day. In these circumstances, the application for leave and judicial review is statute barred and therefore cannot serve as the basis of the stay motion. The respondent also submits that the stay motion was submitted late.

[17] As for the merits of the stay motion, the respondent maintains that the removal officer did take into account the information submitted to him about the husband of the applicant's niece but decided on March 16, 2010, that the situation did not merit another stay in addition to those already

granted. He did not refuse to consider the impact of the removal on the husband of the applicant's niece and explained at length the reasons for refusing the stay to applicant's counsel in a telephone conversation on March 16, 2010; he then set out the reasons briefly in writing on March 24, 2010.

[18] The respondent notes that a removal officer's discretion is very limited and is concerned mainly with problems regarding travel arrangements or an applicant's state of health that does not permit him or her to travel. It is not the role of removal officers to consider humanitarian and compassionate circumstances before ordering a removal, or to substitute themselves for the officers who will decide the application for permanent residence under section 25 of the Act.

[19] In this case, the respondent submits that the removal officer properly exercised his discretion in accordance with the limits of his jurisdiction. The respondent adds that assisting an ill relative does not necessarily constitute irreparable harm.

[20] Last, the respondent notes that the applicant has been residing in Canada illegally for a number of years and has been living all this time with his niece and her husband, with full knowledge of the illegality. These facts must be taken into consideration in analyzing the balance of convenience.

Analysis

[21] In light of my findings based on the following analysis, it will not be necessary for me to rule on the issues raised by the respondent concerning time limits or delays.

[22] According to *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 (*Baron*) at paragraph 67, when the Court is dealing with a motion to stay a removal in the context of an application for judicial review of a removal officer's decision refusing an administrative stay, the judge should have in mind, first of all, that the discretion to defer the removal of a person subject to an enforceable removal order is limited and, second, that the standard of review of an officer's decision is that of reasonableness. Since the stay motion is, in effect, seeking a final decision on the impugned order, applicants must be able to put forward quite a strong case to justify their motion.

[23] The *Baron* decision refers to *Wang v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 682, [2001] F.C.J. No. 295 (QL) (*Wang*). In *Wang*, Justice Pelletier wrote the following at paragraphs 48 and 52 (not underlined in the original):

> It has been recognized that there is a discretion to defer removal though the boundaries of that discretion have not been defined. The grant of discretion is found in the same section which imposes the obligation to execute removal orders, a juxtaposition which is not insignificant. At its widest, the discretion to defer should logically be exercised only in circumstances where the process to which deferral is accorded could result in the removal order becoming unenforceable or ineffective. Deferral for the mere sake of delay is not in accordance with the imperatives of the *Act*. <u>One instance of a policy which respects the discretion to defer while limiting its application to cases which are consistent with the policy of the *Act*, is that deferral should be reserved for those applications or processes where the failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment in circumstances and where deferral might result in the order becoming inoperative</u>. The consequences of removal in those circumstances cannot be made good by re-admitting the person to the country following the successful conclusion of their pending application. Family hardship cases such as this one are unfortunate but they can be remedied by readmission.

> . . .
>
> Turning to the issue in the underlying judicial review, the Removal Officer's refusal to defer the removal pending the disposition of the H & C application, I find no serious issue with regard to the Removal Officer's conduct. As set out above, a pending H & C application on grounds of family separation is not itself grounds for delaying a removal. To treat it as such would be to create a statutory stay which Parliament declined to enact. . . .

The Federal Court of Appeal approved this approach in *Baron* at paragraph 51.

[24] Thus, the discretion to stay a removal should normally be reserved for exceptional circumstances such as where the applicant's personal safety would be at risk. Where a stay of removal is sought for the period required to permit the Minister to determine an H & C application under section 25 of the Act, the stay should only be granted where the application under section 25 of the Act is itself based on a risk to the applicant's personal safety or where the same type of exceptional considerations exist.

[25] In this case, there is no consideration related to the applicant's person that justifies granting the stay of removal. In fact, the applicant will not face any foreseeable risk to his personal safety should he return to Saint Vincent.

[26] On the other hand, the spouse of the applicant's niece will lose the assistance the applicant gives him to facilitate his mobility. Is that one of the exceptional circumstances contemplated in the *Wang* and *Baron* decisions that would permit a stay of the applicant's removal notwithstanding that

his personal safety is not at issue? Like the removal officer, I am of the view that the particular facts of this case do not constitute such exceptional circumstances.

[27] We note that the personal situation of the husband of the applicant's niece is certainly tragic, but the applicant's presence by his side is not the only solution available to him. I note that the applicant did not submit a report from the social services or health care services in question stating that they will be unable to provide services to facilitate the mobility of the niece's husband once the applicant is removed to his country, or a report regarding the assistance that may be available under *An Act respecting assistance for victims of crime*, R.S.Q., c. A-13.2 or the *Crime Victims Compensation Act*, R.S.Q., c. I-6. The applicant has the burden of establishing the basis for his stay motion, and we would have expected detailed reports (or, at the very least, detailed affidavits) from social services and health care services as to the lack of alternatives in this particular case.

[28] The applicant cites the decisions in *Samuels v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1349, [2003] F.C.J. No. 1715 (QL); *Kahn v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2005 FC 1107, [2005] F.C.J. No. 1365 (QL); and *Richards v. Minister of Citizenship and Immigration*, (1999) IMM-2720-99 to establish the principle that this Court may stay a removal order where the person subject to the order is assisting an ill or disabled family member. However, the respondent properly notes that Justice Mandamin in *Gallardo v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 938 refused to grant a stay in similar circumstances. All these decisions, however, precede the Federal Court of Appeal decision in *Baron* and must now be analyzed in light of that decision. Moreover, those decisions

involved members of the immediate family of the applicants in question, not third parties or members of the extended family.

[29] We also note that the applicant will not suffer irreparable harm if he returns to Saint Vincent.

[30] Last, I agree with respondent's counsel that, in analyzing the balance of convenience, one cannot ignore the fact that the applicant resided without status for a number of years in Canada with the complicity of his niece and her husband. We are not dealing here with a refugee claimant who properly followed all the steps set out in the Act in order for the Canadian authorities to move his file forward. The applicant stayed in Canada illegally and was never subject to immigration reviews until he was arrested in a police search. On a stay motion, the Court must take into consideration the circumstances of illegality and contempt for the Canadian legislative and regulatory framework governing immigration. In these circumstances, the applicant had a particularly heavy burden in the balance of convenience analysis, a burden that he has not successfully overcome.

[31] In conclusion, the applicant does not meet any of the criteria to obtain a stay. The motion for a stay of execution of the removal is therefore dismissed.

"Robert M. Mainville"

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2026-10
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