Federal Court  Cour fédérale

Date: 20111006

Docket: IMM-6714-11

Citation: 2011 FC 1138

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 6, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

DIEFF MONDELUS

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary

[1] Since his arrival in 2008 until October 4, 2011, the applicant has taken advantage of the many opportunities afforded to individuals under Canadian immigration law to avoid a return to France. It is now time to proceed with the removal.

[2] Parliament's intent calls for an interpretation that is consistent with that intent with regard to persons who have exhausted all possible avenues for staying in Canada. As specified in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 F.C.R. 311, by the Federal Court of Appeal:

> [51] ...After a careful and thorough review of the relevant statutory provisions and jurisprudence pertaining thereto, Mr. Justice Pelletier circumscribed the boundaries of an enforcement officer's discretion to defer. In reasons which I find myself unable to improve, he made the following points:
>
> – There are a range of factors that can validly influence the timing of removal on even the narrowest reading of section 48, such as those factors related to making effective travel arrangements and other factors affected by those arrangements, such as children's school years and pending births or deaths.
>
> – The Minister is bound by law to execute a valid removal order and, consequently, any deferral policy should reflect this imperative of the Act. In considering the duty to comply with section 48, the availability of an alternate remedy, such as a right to return, should be given great consideration because it is a remedy other than failing to comply with a positive statutory obligation. In instances where applicants are successful in their H&C applications, they can be made whole by readmission.
>
> – In order to respect the policy of the Act which imposes a positive obligation on the Minister, while allowing for some discretion with respect to the timing of a removal, deferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. With respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety.
>
> – Cases where the only harm suffered by the applicant will be family hardship can be remedied by readmitting the person to the country following the successful conclusion of the pending application.

II. Introduction

[3] The applicant, who was born in Haiti and is a citizen of France, is submitting to this Court a motion to stay an order issued against him for removal to Saint-Martin (Guadeloupe), which is to be enforced on October 8, 2011, at 6:30 a.m.

[4] This motion is incidental to an application for leave and judicial review (ALJR) challenging the decision dated September 28, 2011, by the law enforcement officer of the Canada Border Services Agency (CBSA), denying the request to defer removal made by the applicant on September 15, 2011.

[5] The Court agrees with the respondent's position that the applicant does not meet the three-part test set out in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302, 11 A.C.W.S. (3d) 440 (FCA). Consequently, his motion for a stay is denied.

III. Facts

[6] The applicant, Mr. Dieff Mondelus, was born in Haiti and holds French citizenship. He arrived in Canada for the first time on July 5, 2008, as a visitor.

[7] On December 15, 2008, the applicant married Ms. Mélanie Forand.

[8] On March 30, 2009, the period of the applicant's stay was extended to June 30, 2009.

[9] On April 28, 2009, Citizenship and Immigration Canada (CIC) received an application for permanent residence in the spouse or common-law partner class together with an application to sponsor and undertaking from Ms. Forand in the applicant's favour (APR #1).

[10] That same day, the applicant also filed a work permit application.

[11] In the weeks that followed, around the month of May 2009, the applicant apparently separated from his spouse and stopped living with her, and then subsequently began dating Ms. Teryka Trudel in the summer of 2009.

[12] Although the applicant alleges in his affidavit that it was obvious to him that his APR #1 was moot once he separated from his spouse, and that he simply forgot to communicate that fact to CIC, the evidence in the record shows that CIC sent him a request for additional information on July 20, 2009, and the information requested from the applicant was received on August 10, 2009.

[13] On December 10, 2009, CIC received from Ms. Forand a request to withdraw sponsorship, in which she stated that the marriage had not been *bona fide* and that the applicant was trying to make her maintain the application.

[14] On January 19, 2010, CIC advised the applicant that his APR #1 had been rejected, given the withdrawal of the sponsorship application and his spouse's allegations. CIC also rejected his application for a work permit and informed the applicant that he was now without status and had to leave Canada immediately.

[15] The applicant did not contest that decision.

[16] The applicant waited until April 4, 2010, before leaving Canada. He returned to the country on May 5, 2010, and was admitted with a visitor record expiring on June 25, 2010.

[17] On June 25, 2010, an officer issued a report under section 44 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27(IRPA) against the applicant, because he had reasonable grounds to believe that the applicant was inadmissible under paragraph 36(1)(*c*) of the IRPA, given that he was the subject of a warrant in France for armed robbery.

[18] That same day, the report was referred for investigation to the Immigration Division of the Immigration and Refugee Board (ID). The CBSA then arrested the applicant on June 29, 2010.

[19] On July 9, 2010, the ID found that, even though the applicant was wanted in France and his behaviour was similar to that of a fugitive, he was not subject to paragraph 36(1)(*c*) of the IRPA. The ID released the applicant with conditions that same day.

[20] On January 5, 2011, CIC received an application for permanent residence in the spouse or common-law partner class together with an application to sponsor and undertaking from Ms. Trudel in the applicant's favour (APR #2).

[21] On January 11, 2011, CIC advised the applicant that the request to extend his stay filed on June 14, 2010, had been denied. CIC also informed the applicant that he was now without a status and had to leave Canada as soon as possible.

[22] The applicant did not contest that decision.

[23] On February 24, 2011, an officer issued a report under section 44 of the IRPA against the applicant, because he had reasonable grounds to believe that the applicant was inadmissible under section 41 and subsection 29(2) of the IRPA for having failed to leave Canada at the end of the authorized stay period.

[24] On February 28, 2011, the applicant was given the opportunity to file a pre-removal risk assessment (PRRA) application during an interview with a law enforcement officer, but he chose not to pursue it. The law enforcement officer also agreed to schedule the removal for after the date on which the applicant's spouse was to give birth, which at that time was expected on April 21, 2011.

[25] On April 29, 2011, during another interview with a law enforcement officer, the applicant asked that his removal be deferred until he could obtain a passport for his son, who was born on April 19, 2011. He said that he wanted to leave Canada with his spouse and child. The law enforcement officer granted the request.

[26] An interview was scheduled for May 31, 2011, and then postponed to June 27, 2011, and then again to July 7, 2011. In the meantime, on July 6, 2011, the applicant confirmed that he had received the passport for his son.

[27] On July 7, 2011, the applicant met with a law enforcement officer and asked him to grant him an administrative stay under the Public Policy under subsection 25(1) of the IRPA to facilitate processing in accordance with the regulations of the spouse or common-law partner in Canada class

(Policy). The law enforcement officer agreed to grant him 60 days, as provided for in the Policy, and informed CIC of this that same day.

[28] On July 6, 2011, CIC sent a letter to the applicant's spouse, informing her that she had to file an undertaking immediately with the Quebec government.

[29] On September 6, 2011, during an interview with the applicant, the officer denied a verbal request for an administrative stay under the Policy, given that he had already received one.

[30] On September 15, 2011, the applicant applied for an administrative stay in writing.

[31] On September 20, 2011, the officer met with the applicant again. His departure was scheduled for October 8, 2011, to Saint-Martin, since he did not want to go to Paris.

[32] On September 28, 2011, the officer rejected the application for an administrative stay of the applicant's removal that was received on September 15, 2011.

[33] On September 30, 2011, the applicant filed an ALJR of that decision. This motion for a stay is based on that application.

[34] In addition, as of October 3, 2011, the Quebec government's Ministère de l'Immigration et des Communautés culturelles (MICC) still had not received the undertaking of the applicant's spouse respecting the applicant.

IV. Issue

[35] Did the applicant demonstrate that he met the three parts of the test in *Toth*, above, to obtain a judicial stay of the removal order issued against him?

V. Analysis

[36] The Court agrees with the respondent's position. The applicant did not meet the three parts of the test in *Toth*, above.

[37] For the Court to be able to issue an order to stay a removal, it must determine whether the applicant has met each of the three parts of the test set out by the Federal Court of Appeal in *Toth*, above.

[38] In that case, the Federal Court of Appeal decided on three tests that it imported from the case law on injunctions, specifically the Supreme Court of Canada decision in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110. These three tests are:

a. Is there a serious issue to be decided concerning the main action?
b. Did the applicant establish that he would suffer irreparable harm if the stay is not granted?
c. Does the balance of convenience weigh in favour of the applicant?

[39] The three tests must be met conjunctively for this Court to grant the stay requested. Even if there is only one that is not met, the Court cannot grant the stay requested.

[40] In this case, the applicant did not demonstrate that there is a serious issue to be decided as part of his ALJR of the officer's decision, or that he will suffer irreparable harm, and, finally, the applicant's interests are not superior to the public interest in wanting the removal order to be enforced as soon as is reasonably practicable under subsection 48(2) of the IRPA.

A. Serious issue

[41] The serious issue threshold is high in cases where a motion for a stay is made with respect to a refusal to defer the applicant's removal because, if granted, the stay will in effect give the applicant the remedy sought in the underlying application for judicial review.

[42] Consequently, instead of simply applying the serious issue test, the Court must carefully determine if, on the merits, the underlying application is likely to be allowed (*Wang v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682, at para. 11; *Thirunavukkarasu v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1075 at para. 3; *Williams v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 683 at para. 8).

[43] The applicant must show that there is a fairly arguable case and that he has a reasonable chance of succeeding in his main action, namely, the application for judicial review of the officer's decision:

> [32] Moreover, the Court now has the benefit of the Federal Court of Appeal's recent decision in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 (*Baron*), which involved a judicial review of the exercise of an enforcement officer's discretion not to defer a family's removal to Argentina pending the determination of an outstanding H&C application.

> [33] In *Baron*, Justice Nadon confirmed: (1) the standard of review of an enforcement officer's decision to refuse to defer is assessed on the standard of reasonableness; (2) the scope of an enforcement officer's discretion to defer is limited; and (3) the gauge for the assessment of serious issue on a stay application is not the lower standard of the issue not being frivolous or vexatious but rather the higher threshold of whether the issue raised is fairly arguable – has a chance of success, i.e. the judge must go further and closely examine the merits of the underlying application (see *Baron*, at paragraph 67). [Emphasis added.]

(*Ali v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 993; also, *Baron*, above, at paras. 66 and 67.)

(1) Limited discretion of the law enforcement officer

[44] The officer's decision to refuse to defer the removal is owed deference by this Court. This Court will intervene only if the decision is unreasonable (*Baron*, above, at paras. 25 and 67; *Ferraro v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 815, at para. 40; *Pacia v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 629, at para. 6; *Vieira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 626, at paras. 17 to 19).

[45] The discretion of removal officers in deferring removal is very limited (*Baron*, above; *Adviento v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1430, 242 F.T.R. 295 (FC); *Prasad v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 614 (FC)).

[46] This discretion is limited only to cases where there is a serious, practical impediment to the removal:

> [7] As my colleague Mr. Justice Barnes noted in *Griffiths v. Canada (Solicitor General)*, [2006] F.C.J. No. 182 at paragraph 19, a deferral is "a temporary measure necessary to obviate a serious, practical impediment to immediate removal". [Emphasis added.]

(*Uthayakumar v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 998.)

[47] In *Baron*, above, the Federal Court of Appeal cited with approval this Court's decision in *Simoes v. Canada (Minister of Citizenship and Immigration)* (2000), 187 F.T.R. 219, [2000] F.C.J. No. 936 (QL/Lexis), and indicated that a removal provided for under section 48 of the IRPA was to take place except in cases of illness, inability to travel and, possibly, H&C applications that have been pending for a long time:

> [49] It is trite law that an enforcement officer's discretion to defer removal is limited. I expressed that opinion in *Simoes v. Canada (Minister of Citizenship and Immigration)* (2000), 7 Imm. L.R. (3d) 141 (F.C.T.D.), at paragraph 12:
>
> > [12] In my opinion, the discretion that a removal officer may exercise is very limited, and in any case, is restricted to when a removal order will be executed. In deciding when it is "reasonably practicable" for a removal order to be executed, a removal officer may consider various factors such as illness, other impediments to travelling, and pending H & C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system. For instance, in this case, the removal of the Applicant scheduled for May 10, 2000 was deferred due to medical reasons, and was rescheduled for May 31, 2000. Furthermore, in my view, it was within the removal officer's discretion to defer removal until the Applicant's eight-year old child terminated her school year. [Emphasis added.]

(2) The officer's decision is reasonable

[48] The officer's decision was reasonable. His notes show that he took into account all relevant elements and that, given his limited discretion, he was justified in rejecting the application for an administrative stay.

[49] At the outset, it must be remembered that a pending sponsorship application is not an impediment to removal (*Salazar v. Canada (Ministre de la Sécurité publique et de la Protection civile)*, 2009 CF 56, at para. 24; *Duran v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 738, at para. 24).

a) *The best interests of the child and the consequences on the family*

[50] First, contrary to what the applicant alleged at paragraphs 21 to 31 of his memorandum, the officer did take into account the best interests of the child and the alleged consequences of the removal on the family.

[51] The officer noted that the applicant had benefited from a number of administrative stays, including one because he wished to prepare for his eventual departure in the company of his spouse and son. The fact that his spouse decided that she would stay in Canada with the child is certainly not grounds for granting a temporary stay of removal.

[52] In addition, given the evidence submitted by the applicant, it was not unreasonable for the officer to find that his spouse could count on the support of her friends and family, if necessary.

[53] A law enforcement officer may defer removal for short-term considerations, such as to allow a child to finish a school year, because of illness, or to ensure that measures have been taken to provide for the care of children who are Canadian citizens and who will not be accompanying the

parent being deported (*Munar v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180, [2006] 2 F.C.R. 164, at paras. 39-40).

[54] In this case, the request to defer the removal so that the applicant could stay with his son and his spouse does not involve a short-term situation, especially since the applicant did not submit any evidence showing the consequences for the child in the short term that could constitute a serious, practical impediment to the removal.

b) APR #2 and the Public Policy

[55] Second, as the officer emphasized in his notes dated September 6 and 28, 2011, the applicant has benefited from several stays of removal since he became subject to a removal order. The first stay was granted so he could be present when his spouse gave birth. The second stay was granted so that he could obtain a passport for his son, on the grounds that he planned to leave Canada with his entire family. Finally, a third and final 60-day administrative stay was granted under the Policy so that sponsorship application could be examined.

[56] In this regard, the officer rightly found that he did not have to grant a second administrative stay under the Policy, given that the applicant had already received one.

[57] In his written submissions, the applicant seems to allege that an administrative stay under the Policy should be extended indefinitely in all cases, until the examination of a sponsorship application is completed. However, that is not the purpose of the Policy.

[58] This Court has consistently held that the administrative stay provided for in the Policy is limited to the period of examining a PRRA or 60 days:

> [20] I accept the Respondent's submission that the administrative deferral under the Policy sought by the Applicant would already have expired even if the Officer had found that the Applicant was eligible .... [Emphasis added.]

(*Enabulele v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 641.)

> [30] The applicant was, therefore, not eligible for the policy since her application was submitted after she had been invited to the pre-removal interview. Moreover, the administrative deferral lasts for 60 days and, if it had been applicable, would have expired by now. [Emphasis added.]

(*Duran*, above; also: *Hosein v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 551, at paras. 7-8.)

[59] In fact, the wording of the Policy is clear. The CBSA has agreed to grant a temporary administrative stay of removal to applicants who qualify under the Policy.

> **F. ADMINISTRATIVE DEFERRAL OF REMOVAL**
> The Canada Border Services Agency has agreed to grant a temporary administrative deferral of removal to applicants who qualify under this public policy. The deferral will not be granted to applicants who:
>
> • Are inadmissible for security (A34), human or international rights violations (A35), serious criminality and criminality (A36), or organized criminality (A37);
> • Are excluded by the Refugee Protection Division under Article F of the Geneva Convention;
> • Have charges pending or in those cases where charges have been laid but dropped by the Crown, if these charges were dropped to effect a removal order;
> • Have a warrant outstanding for removal;
> • Have previously hindered or delayed removal; and
> • Have been previously deported from Canada and have not obtained permission to return.

> For those applicants who are receiving a pre-removal risk assessment (PRRA), the administrative deferral for processing applicants under this H&C public policy will be in effect for the time required to complete the PRRA (R232). Applicants who have waived a PRRA or who are not entitled to a PRRA will receive an administrative deferral of removal of 60 days.
>
> Applicants who apply under this public policy after they are deemed removal ready by CBSA will not benefit from the administrative deferral of removal except in the limited circumstances outlined below (transitional cases).
>
> …
>
> Where the deferral period applies, CIC will make best efforts to process spousal sponsorship cases to a step-one decision within 60-day period. (A step-one decision occurs after CIC has received an application which contains evidence that the applicant is married or in a common-law relationship with an eligible sponsor, is living with that sponsor and that the sponsorship submitted is a valid one.) After a positive step-one decision, the R233 stay will be invoked until such time as CIC makes a final decision on whether to grant permanent residence. More details on the regulatory stay are found below. [Emphasis added.]

(Applicant's Record (AR), Exhibit B, at pp. 36, 37, 39 and 40.)

[60] Thus, during this 60-day stay, CIC makes best efforts to come to a decision, provided that the sponsorship application is valid and complies with legislative requirements.

[61] The applicant had received the 60-day administrative stay. It is therefore incorrect to claim that the officer was required to grant a second stay under the Policy. Contrary to what the applicant is alleging in his written submissions, the officer was well aware of APR #2—he took it into account, but reasonably found that it did not justify another stay of removal, in view of his obligation to proceed with the removal as soon as was practicable.

[62] Despite the fact that a step-one decision on the applicant's APR #2 had not yet been made, this was in no way attributable to the officer, the CBSA or CIC. As soon as the administrative stay was granted on July 7, 2011, the law enforcement officer advised CIC, which had just sent a letter to

the applicant, requesting that his spouse file an undertaking. To date, this undertaking has not been filed because APR # 2 did not meet all requirements.

(3) APR #2 was not valid

[63] In addition, APR #2 cannot be considered to have been filed in a timely manner because it appears that it was defective when filed. At the very least, contrary to *Shase v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 418, cited by the applicant, it is speculation to argue that a decision could be made shortly, given the failure of the applicant and his spouse to file a valid sponsorship application.

[64] In fact, as the applicant admitted in his affidavit, his spouse was not an eligible sponsor, since she was receiving social assistance.

[65] At paragraph 22 of his affidavit, the applicant alleges that he and his spouse had not noticed this requirement when filing APR #2.

[66] However, aside from the fact that this is a requirement explicitly provided for in paragraph 133(1)(*k*) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (IRPR), the applicant's spouse had clearly answered Yes to question 5 ("Are you in receipt of social assistance for a reason other than disability?") in the sponsorship application.

[67] The sponsorship application clearly states: “If you answer “YES” to any questions 5 to 13, you are not eligible to be a sponsor (or co-signer, if applicable). You should not submit your application. See **Who can sponsor** in the Guide for information.”

[68] Thus, without wishing to speculate or causing prejudice to the decision that may eventually be made concerning the applicant’s APR #2, section 133 of the IRPR seems clear as to the requirements of a sponsorship application at the time of its filing for a favourable decision to be made:

Requirements for sponsor	**Exigences : répondant**
133. (1) A sponsorship application shall only be approved by an officer if, on the day on which the application was filed and from that day until the day a decision is made with respect to the application, there is evidence that the sponsor	**133.** (1) L’agent n’accorde la demande de parrainage que sur preuve que, de la date du dépôt de la demande jusqu’à celle de la décision, le répondant, à la fois :
...	[...]
(*k*) is not in receipt of social assistance for a reason other than disability.	*k*) n’a pas été bénéficiaire d’assistance sociale, sauf pour cause d’invalidité.

[Emphasis added.]

(Also, *Guzman v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 1134, [2007] F.C.R. 411 at paras. 35 *et seq.*)

[69] At a minimum, it is impossible to state that a decision on the applicant's APR #2 is imminent. While the applicant in *Shase,* above, had obtained his Quebec certificate of selection, in this case, an undertaking has not even been filed yet.

B. Irreparable harm

[70] The concept of irreparable harm was defined by the Court in *Kerrutt v. Canada (Minister of Employment and Immigration)* (1992), 53 F.T.R. 93, at paragraph 15, as being the removal of a person to a country where his or her life or safety is in jeopardy.

[71] Justice Sandra Simpson in *Calderon v. Canada (Minister of Citizenship and Immigration)* (1995), 92 F.T.R. 107, [1995] F.C.J. No. 393 (QL/Lexis), mentioned the following concerning the definition of irreparable harm established in *Kerrutt*:

> [22] In *Kerrutt v. M.E.I.* (1992), 53 F.T.R. 93 (F.C.T.D.) Mr. Justice MacKay concluded that, for the purposes of a stay application, irreparable harm implies the serious likelihood of jeopardy to an applicant's life or safety. This is a very strict test and I accept its premise that irreparable harm must be very grave and more than the unfortunate hardship associated with the breakup or relocation of a family. [Emphasis added.]

[72] The burden was on the applicant to provide such evidence to the Court in support of his allegation of irreparable harm.

[73] In this case, in his memorandum, the applicant did not in any way demonstrate that there would be a serious likelihood of jeopardy to his life or safety if he were to return to Saint-Martin. In fact, the applicant is basically submitting the same arguments with respect to irreparable harm as he did with respect to the serious issue.

(1) Best interests of the child and family separation

[74] The applicant did not submit any evidence of harm that he would suffer if he had to leave Canada.

[75] The case law teaches us that the best interests of the child do not prevent the removal of a parent without a legal status in Canada (*Baron*, above, at para. 57).

[76] It has also been established that it is up to the person relying on the best interests of the child to adduce proof supporting his or her allegations. Vague conjectures are not sufficient (*Owusu v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 38, [2004] 2 F.C.R. 635, at paras. 5 and 8; *Simoes*, above, *Keppel v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1208; *John v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 420, 231 F.T.R. 248).

[77] Finally, it is settled law that the separation of a parent from a child does not constitute irreparable harm:

> [TRANSLATION]
>
> [34] As regards the applicant's separation from his two children in Canada, it is settled law that the separation of the family does not constitute irreparable harm, but is instead a normal consequence of a removal.

(*Salazar v. Canada (Ministre de la Sécurité publique et de la Protection civile)*, 2009 CF 56.)

[78] What is more, the fact that the applicant will be separated from his spouse is not a sufficient reason to find that he would suffer irreparable harm if removed from Canada, since this is a direct and inherent consequence of a removal.

[79] In this regard, the following remarks were recently made by the Court in *Malagon v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1068:

> [2] In regard to upsetting the family and the separation that must be endured by Ms. Malagon's spouse, this is not irreparable harm, but rather a phenomena inherent to removal (*Malyy v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 388, 156 A.C.W.S. (3d) 1150 at paragraphs 17-18; *Sofela v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 245, 146 A.C.W.S. (3d) 306 at paragraphs 4 and 5; *Radji v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 100, 308 F.T.R. 175 at paragraph 39). To find otherwise would render impracticable the removal of individuals who do not have the right to reside in Canada. Further, as pointed out in *Golubyev v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 394, 156 A.C.W.S. (3d) 1147 at paragraph 12: irreparable harm is a strict test in which serious likelihood of jeopardy to the applicant's life or safety must be demonstrated.
> [Emphasis added.]

(Also, *Arturo v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 766, at paras. 45-46.)

[80] *Perry v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 378 states that irreparable harm is evaluated from the applicant's point of view and not from the point of view of the family members remaining in Canada:

> [30] Even where separation caused by removal may produce substantial economic or psychological hardship to a family unit, the test remains whether the applicant himself will suffer irreparable harm. (*Mariona v. Canada (M.C.I.)*, [2000] F.C.J. No. 1521 (T.D.); *Carter v. Canada (M.C.I.)*, 1999] F.C.J. No. 1011 (T.D.); *Balvinder v. Canada (M.C.I.)* (un, December 15, 2005, IMM-7360-05))
> [Emphasis added.]

[81] Moreover, the applicant and his spouse were aware of the applicant's tenuous status; the respondent is not responsible for the risks the applicant voluntarily took in full knowledge of the consequences:

> [16] I see no transgressions in the conduct of the Minister; no expectations granted the applicant; if he chose to marry while still not having his situation favourably determined by Canadian authorities, it is at his peril, not that of the Minister who has a duty to uphold the laws of Canada.

(*Banwait v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 522 F.C.T.D. (QL/Lexis).)

(2) Pending sponsorship application

[82] The applicant's claim that he would be denied the benefit of the application of the Policy simply because he is removed from Canada is contradicted by the very wording of the Policy, which states: "As is the case now, clients with a pending H&C application who are removed from Canada while their application is being considered will be able to return to Canada if a positive decision is rendered" (AR, Exhibit B at p. 37).

[83] The sponsorship application will continue to be processed after his removal, and the applicant will be able to return to Canada if the decision is in his favour (*Ibrahima v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2011 FC 607, at para. 44; *Berki v. Canada (Solicitor General)*, 2005 FC 1084, at para. 5).

[84] Moreover, the fact that the applicant cannot be present in Canada while his APR #2 is being processed does not meet the definition of harm established in *Calderon*, above, namely, jeopardy to his life.

[85] In addition, there is nothing to prevent the applicant from being sponsored by his spouse from outside Canada.

[86] In fact, this is the usual practice. Moreover, the existence of an application based on humanitarian and compassionate grounds in this case is not a reason to defer removal and does not constitute irreparable harm, since “the H&C process is an exception to the general legislative intent that persons apply to be in Canada from outside Canada” (*Gyan v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 771, at para. 10).

[87] Moreover, it is speculation to say that the applicant’s spouse will be dependent on social assistance if the applicant is removed, thereby making her unable to sponsor the applicant from outside Canada.

[88] There is no evidence in the record that the applicant’s spouse cannot use the services of government-subsidized daycare centres, family members or friends or, as a last resort, private daycares, as do many other mothers who are in the work force. In any case, this does not constitute irreparable harm.

(3) No alleged jeopardy to life or safety

[89] Finally, the applicant’s affidavit and his written submissions do not allege any jeopardy to his life if he were to be removed to Saint-Martin.

[90] The Court agrees that a removal is never easy, but nevertheless notes that the applicant is in the same situation as every other person who is removed.

[91] In light of the foregoing, the applicant has not met the second test in *Toth*, above.

C. Balance of convenience

[92] Subsection 48(2) of the IRPA imposes the obligation of enforcing the removal order as soon as is reasonably practicable:

48. (1) A removal order is enforceable if it has come into force and is not stayed.	**48.** (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent

[93] To determine the balance of convenience, the Court must decide which of the two parties will suffer the greater harm depending on whether the stay is granted or refused (*Metropolitan Stores Ltd.*, above).

[94] In this case, given the absence of a serious question and irreparable harm, the balance of convenience favours the Minister, who has an interest in the removal order issued against the applicant being enforced on the date set for it.

[TRANSLATION]

> Having found no serious question or irreparable harm, I have no difficulty in concluding that the balance of convenience favours the enforcement of the removal order by the Minister in accordance with his obligation under section 48 of the Act.
> [Emphasis added.]

(*Morris v. MCI*, IMM-301-97, January 24, 1997 (J. Lutfy).)

> [5] Assuming without deciding that there is a serious issue to be tried in this matter, the requested temporary stay of removal of the applicants from Canada is denied on the ground that no irreparable harm has been established.
>
> ...
>
> [12] In conclusion, I find that there is nothing about the applicants' case which takes it beyond the usual results of deportation (*Melo v. Canada (Minister of Citizenship and Immigration)* (2000), 188 F.T.R. 39 at para. 21). Under such circumstances, the balance of convenience is in favour of the respondent as public interest requires that the removal order be executed as soon as is reasonably practicable (*Celis v. Canada (Minister of Citizenship and Immigration)*, [2002] F.C.J. No. 1679, 2002 FCT 1231 at para. 4). [Emphasis added.]

(*Akyol v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 931; also, *Mobley v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 65 (QL/Lexis).)

[95] Moreover, it is important to note that several factors in the applicant's immigration history in Canada tip the balance of convenience in the Minister's favour:

a. the applicant had the opportunity to submit an initial application for permanent residence in the spouse or common-law partner class which was rejected, since his marriage had been determined not to be *bona fide*, which the evidence in the record seems to corroborate;

b. the applicant is the subject of a warrant in France, and has been avoiding a return there since his arrival in Canada in 2008. Although the ID has never considered him

to be subject to paragraph 36(1)(*c*) of the IRPA, it did mention that the applicant's behaviour met the definition of a fugitive;

c. the applicant knowingly exceeded his authorized stay period on two occasions, in addition to submitting a second invalid sponsorship application, and the delay in processing it is therefore attributable to him.

[96] The balance of convenience weighs entirely in the Minister's favour.

VI. Conclusion

[97] In view of the foregoing, the applicant does not meet the tests established in the case law for granting a judicial stay. The motion for a stay of removal is denied.

JUDGMENT

THE COURT ORDERS the motion for a stay of removal be denied.

"Michel M.J. Shore"
Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6714-11
STYLE OF CAUSE:	DIEFF MONDELUS v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

MOTION CONSIDERED BY TELECONFERENCE ON OCTOBER 5, 2011, BETWEEN OTTAWA, ONTARIO AND MONTRÉAL, QUEBEC

REASONS FOR JUDGMENT AND JUDGMENT:	SHORE J.
DATED:	October 6, 2011

APPEARANCES:

Mylène Barrière	FOR THE APPLICANT
Charles Junior Jean	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Mylène Barrière, Counsel Montréal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT