88-A-324

CORAM: HEALD J.
REED J.
MCQUAID D.J.

BETWEEN:

JOSEPH TOTH

Applicant

and

MINISTER OF EMPLOYMENT AND IMMIGRATION,

Respondent.

Heard at Toronto on Thursday, June 2, 1988
Order rendered at Ottawa on Tuesday, June 21, 1988.

REASONS FOR JUDGMENT BY: HEALD J.

CONCURRED IN BY: REED J.

CONCURRED IN BY: McQUAID D.J.

CORAM: HEALD J.
REED J.
MCQUAID D.J.

BETWEEN:

JOSEPH TOTH

Applicant

and

MINISTER OF EMPLOYMENT AND IMMIGRATION

Respondent

REASONS FOR ORDER

HEALD J.

This is an application for an order staying the execution of the deportation order issued against the applicant on July 27, 1971, and also, for an order for directions as to the expediting of the within applications for extension of time within which to apply for leave to appeal and for leave to appeal. Those applications were filed in the Court on May 30, 1988.

The question of the Court's jurisdiction to grant a stay in the circumstances of this case, was argued extensively at the hearing before us. Counsel for the applicant submitted, initially, that the provisions of paragraph 51(1)(c) of the Immigration Act, 1976,1 applied so as to effect a stay of the deportation order. I am not persuaded that this provision assists the applicant in the circumstances of this case. The decision of the Immigration Appeal Board which dismissed the applicant's appeal and ordered that he be deported as soon as practicable is dated March 29, 1988. Section 84 of the Act provides that applications for leave to appeal the Board's decision must be made within 15 days or within such extended time as a Judge of this Court may, for special reasons allow. As noted supra, the application for extension of time within which to apply for leave was not filed until May 30, 1988. It is therefore apparent that no timely appeal has been filed. It is equally apparent that no timely signification in writing to an immigration officer of an intention to appeal has been established on this record. In my view, an intention to apply for an extension of time within which to apply for leave to appeal, which is not timely, is

not encompassed by the words employed in paragraph 51(1)(c) supra. Accordingly, I reject the invitation of counsel for the applicant to construe that paragraph as effecting a stay of the deportation order upon the filing of the May 30th application. Such a construction would distort to an unacceptable degree, the plain meaning of the words used by Parliament in that paragraph. In my view, the stay imposed pursuant to paragraph 51(1)(c) applies only where the appeal is timely or, at the very least, the application for leave to appeal is timely. Accordingly, I reject the submissions of counsel for the applicant with respect to jurisdiction under paragraph 51(1)(c).

Applicant's counsel argued, alternatively, that this Court possesses implied jurisdiction to grant a stay in these circumstances. I have concluded that we do have such jurisdiction. The jurisdiction of this Court to hear and determine an appeal from the decision of the Immigration Appeal Board if leave to appeal is granted, is founded in subsection 30(1) of the Federal Court Act. That subsection reads:

> 30.(1) The Court of Appeal has exclusive original jurisdiction to hear and determine all appeals, that, under any Act of the Parliament of Canada except the Income Tax Act, the Estate Tax Act and the Canadian Citizenship Act, may be taken to the Federal Court.

This Court decided in the case of New Brunswick Electric Power Commission v. Maritime Electric Company Limited and National Energy Board [1985] 2 F.C. 13, that in cases where there exist statutory provisions conferring a right to appeal against the order of a tribunal, that circumstance together with the provisions of subsection 30(1) supra, confer an implied jurisdiction on the Federal Court of Appeal to stay the operation of that order where the appeal would otherwise be rendered nugatory.

In this regard, Mr. Justice Stone, in the New Brunswick Electric Power case, discussed at page 27 of the reasons:

> ... the absurdity that could result if, pending an appeal, operation of the order appealed from rendered it nugatory.

He went on to observe:

> Our appellate mandate would then become futile and be reduced to mere words lacking in practical substance. The right of a party to an "appeal" would exist only on paper for, in reality, there would be no "appeal" to be heard, or to be won or lost. The appeal process would be stifled. It would not, as it should, hold out the possibility of redress to a party invoking it. This Court could not, as was intended, render an effective result. I hardly think Parliament intended that we be powerless to prevent such a state of affairs.

I endorse these comments by my colleague and apply them in support of my conclusion that this Court has implied jurisdiction to grant a stay in the circumstances of the instant case.

Counsel for the respondent sought to distinguish the New Brunswick Electric Power case on the basis that the case at bar arises under the Immigration Act where Parliament has

specifically addressed the question of stay in section 51 of the Act as noted supra. It was his submission that in so providing for a stay in particular circumstances, Parliament has, by implication, removed any implied jurisdiction to grant stays in circumstances not envisaged by section 51. I am unable to accept this view of the matter. In the absence of express words by Parliament excluding our implied jurisdiction and in view of the powerful rationale for such implied jurisdiction as articulated by Mr. Justice Stone supra, I am unable to conclude that the Court's implied jurisdiction to grant a stay under the Immigration Act in all other circumstances not encompassed by the provisions of section 51 of the Act is ousted. It is not without significance, in my view, that in a recent decision2, this Court assumed jurisdiction to grant a stay of the proceedings at an inquiry being held under the Immigration Act, 1976, pending an appeal to this Court from a judgment of the Trial Division dismissing an application for certiorari and prohibition.

For all of the above reasons, I have concluded that this Court has jurisdiction to grant the relief asked for in this motion.

Having concluded that this Court does have jurisdiction to grant the stay asked for herein, it becomes necessary to determine the appropriate tests to be applied in the exercise of that jurisdiction. In the decision of the Supreme Court of Canada in the case of Attorney General of Manitoba v. Metropolitan Stores (M.T.S.) Ltd., et al [1982] 1 S.C.R. 110, Beetz J. speaking for the Court stated at p.127:

> A stay of proceedings and an interlocutory injunction are remedies of the same nature. In the absence of a different test prescribed by statute, they have sufficient characteristics in common to be governed by the same rules and the Courts have rightly tended to apply to the granting of interlocutory stay the principles which they follow with respect to interlocutory injunctions.

This Court, as well as other appellate courts have adopted the test for an interim injunction enunciated by the House of Lords in American Cyanamid Co. v. Ethicon Ltd., [1975] A.C. 3963. As stated by Kerans J.A. in the Black case supra:

> The tri-partite test of Cyanamid requires, for the granting of such an order, that the applicant demonstrate, firstly, that he has raised a serious issue to be tried; secondly that he would suffer irreparable harm if no order was granted; and thirdly that the balance of convenience considering the total situation of both parties, favours the order.

THE SERIOUS ISSUE TEST

I will expressly refrain from examining in detail the issues raised by the applicant herein since they will, necessarily, be examined by the panel of the Court that will hear the application for extension of time and the application for leave to appeal. For the purposes of this application for a stay, I think it sufficient to observe that the applicant has raised at least two serious issues. The first serious issue to which he has referred is the question of the validity of the deportation order. The deportation order was based on a finding that the applicant was a person described in subparagraph 18(1)(e)(ii) of the Immigration Act, 1952, in that he had been convicted of an offence under the Criminal Code4. The offence in question was a conviction on January 11, 1971 of unlawfully taking a motor vehicle without the consent of the owner, contrary to the Criminal Code. This offence was a summary conviction offence for which he received a suspended sentence and was placed on probation for one year. The Immigration Act, 1952, was repealed and replaced by the Immigration Act, 1976, on April 10, 1978. It seems clear that while the applicant was subject to deportation under subparagraph 18(1)(e) of the 1952 Act, he would not be subject to deportation under the 1976 Act. I say this because the relevant paragraph of the 1976 Act is paragraph 27(1)(d) which applies only in cases where a sentence of more than six months has been imposed or five years or more may be imposed.

In such circumstances, this Court's decision in Lyle v. M.E.I. [1982] 2 F.C. 821 might well assist the applicant in attacking the validity of the deportation order herein. At the very least, it is my view that a serious issue has been raised.

The second serious issue which the applicant has raised, in my view, relates to the continuing equitable jurisdiction of the Immigration Appeal Board. In the recent case of M.E.I. v. Ian Clancy, (File A-317-87, May 20, 1988) this Court, following the decision of the Supreme Court of Canada in Grillas v. M.M.I. [1971] 23 D.L.R. (3d) 1 concluded that the Board's equitable jurisdiction under paragraph 72(1)(b) of the Immigration Act, 1976, is a continuing jurisdiction and not one which must be exercised once and for all. In Clancy, the further view was expressed that the Board is able to exercise that equitable jurisdiction "until such time as the removal order has actually been executed."

The applicant's affidavit sworn June 1, 1988, deposes that his solicitor has requested written reasons for the Board's March 29, 1988 decision that he be deported as soon as practicable. Attached as Exhibit C to that affidavit is a transcript of the proceedings before the Board which led to the Board's order of March 29. That transcript contains some 145 pages of evidence given by the applicant, by his mother, by his wife, by his brother-in-law, by his sister and by the operating manager of the family concrete pumping business. In the submission of counsel for the applicant, that evidence shows:

a) that the applicant is a permanent resident of Canada;

b) that the applicant was born in Hungary in 1952, moved to England at the age of three and from there to Canada at the age of fifteen and has lived in Canada continuously since 1967;

c) that his parents and family are law abiding people and over the years have built up a viable concrete pumping business, his father has recently taken a heart attack and the

applicant is now the mainstay of that business;

d) that between 1971 and 1983, the applicant engaged in a number of criminal offences, which resulted from drug addiction;

e) that since February of 1985, the applicant has been law abiding, assisting in the family business and supporting his wife and two children;

f) that he has obtained treatment and counselling for his drug problem and has overcome that problem;

g) that the concrete pumping business is extremely busy at this time of the year and if the applicant is deported at this time, there is reasonable likelihood that the family business will fail, having regard to the father's poor health and inability to manage the business; and

h) that the applicant's wife and children would suffer great hardship in the event of his deportation5.

As noted supra, the reasons for the Board's decision have not been received as yet. In dismissing the applicant's appeal, it is quite possible that the Board made findings of credibility adverse to the applicant as well as in respect of the evidence of some or all of his supporting witnesses. However, at this juncture, that evidence stands uncontradicted, and, on this basis, raises a serious issue relating to the exercise of the Board's equitable jurisdiction. Accordingly, in my view, the serious issue test articulated in the American Cyanamid case has been met for the purposes of this interlocutory stay application.

THE IRREPARABLE HARM TEST

On the basis of the evidence adduced before the Board as well as the material placed before us in support of the May 30th application, which, at this time, stands uncontradicted, I am of the view that the applicant has met the irreparable harm test. As noted supra, the evidence is to the effect that if the applicant is deported now, there is a reasonable likelihood that the family business will fail and that his immediate family as well as others who are dependent on the family business for their livelihood will suffer. I think that at least a portion of this potential harm is irreparable and not compensable in damages. Accordingly, I conclude that the second component of the tripartite American Cyanamid test has been met.

THE BALANCE OF CONVENIENCE TEST

Keeping in mind that, in deciding the question of balance of convenience, the Court must give equal consideration to the interests of both parties and, in cases like this where the injunction is sought against a public authority exercising a statutory power, this circumstance must also be taken into consideration, I have concluded, nevertheless, that the applicant has made out a case for an interlocutory stay. In the applicant's favour are the very serious

consequences, both from a family and a financial point of view, which would ensue upon the execution of the deportation order. As against that is the circumstance mentioned supra, that a stay will interfere with the execution of a deportation order issued by a Special Inquiry Officer pursuant to the duties and powers vested in him under the Immigration Act, 1952, There is also the additional factor referred to by respondent's counsel which can be characterized as somewhat of a "floodgate" argument. Counsel was concerned about the precedential effect the granting of a stay in this case might have on the multitude of deportation orders being issued by the various adjudicators across Canada. My response to this submission is that the precedential value of a stay being granted in one case is minimal since such a stay is granted only after careful consideration of all the circumstances of that case. It is not to be considered as a precedent for the granting of a stay in other cases and in different circumstances. In my opinion, in the total circumstances of this case, an interlocutory stay should be granted provided that an expedited schedule can be designed which will impose reasonable time constraints involving a provision, as well, for the continued supervision and control of the Court6.

REMEDY

For the foregoing reasons, I would stay the execution of the Deportation Order made against the applicant herein on July 27, 1971 on the following terms and conditions:

a) the within applications for extension of time within which to apply for leave to appeal and for leave to appeal are set down for hearing at Toronto, Ontario on Tuesday, August 2, 1988 at 10 a.m.;

b) the applicant's further written representations, if any, will be filed and served on or before the 18th day of July, 1988;

c) the respondent's written representations in reply will be filed and served on or before the 25th day of July, 1988; and

d) the stay granted herein will be in full force and effect until Tuesday, August 2, 1988 at 10 a.m. or such later time as may be determined by the panel of the Court dealing with the matter at that time.

"Darrel V. Heald"
J.F.C.C.

1 The applicable portions read:
51. (1) ...the execution of a removal order is stayed
(c) in any case where the person ... files an appeal or signifies in writing to an immigration officer that he intends to appeal a decision of the Board to the Federal Court of Appeal, until the appeal has been heard and disposed of or the time for filing an appeal has elapsed, as the case may be;

2 Mahmoud Mohammad v. M.E.I. et al, File A-362-88, March 14, 1988.

3 Compare: Apple Computer Inc v. Minitronics of Canada et al, 8 C.P.R. (3d) 431. See also: Law Society of Alberta v. Black 8 D.L.R. (4th) 346 at 349, Alberta Court of Appeal.

4 The copy of the Deportation Order affixed to the applicant's affidavit herein as Exhibit A describes the applicable section of the 1952 Act as being subparagraph 19(1)(e)(ii). My review of the applicable provision discloses that, in reality, the applicable subparagraph is subparagraph 18(1)(e)(ii).

5 The applicant's evidence (Transcript pp. 32 and 33) establishes that he has two children.One of the children has kidney problems which necessitated an operation last year.

6 Compare: Rio Hotel Ltd. v. Liquor Licensing Board [1986] 2 S.C.R. ix.
See also: Yri-York Limited et al v. Attorney General of Canada et al, Federal Court of Appeal, File 1118-87, January 19, 1988.

88-A-324

CORAM: HEALD J.
REED J.
MCQUAID D.J.

BETWEEN:

JOSEPH TOTH,

Applicant

and

MINISTER OF EMPLOYMENT AND IMMIGRATION

Respondent

REASONS FOR ORDER

I have read the Reasons for Judgment of Mr. Justice Heald herein with which I agree.

B. Reed"
J.F.C.C."

CORAM: HEALD J.
REED J.
MCQUAID D.J.

BETWEEN:

JOSEPH TOTH

Applicant

and

MINISTER OF EMPLOYMENT AND IMMIGRATION

Respondent

REASONS FOR ORDER

MCQUAID D.J.

I have read the Reasons for Judgment of Mr. Justice Heald herein with which I agree.

"C.R. McQuaid"
J.F.C.C.

FEDERAL COURT OF CANADA

NAMES OF COUNSEL AND SOLICITORS OF RECORD

COURT FILE NO.: 88-A-324
STYLE OF CAUSE: Joseph Toth v. M.E.I.
PLACE OF HEARING: Toronto, Ontario
DATE OF HEARING: June 2, 1988
REASONS FOR JUDGMENT BY: Heald, J.
CONCURRED IN BY: Reed, J. McQuaid, D.J.
DATED: June 21, 1988

APPEARANCES:
Ms. B. Jackman
for the Applicant,
M. Duffy, Esq.
for the Respondent.

SOLICITORS OF RECORD:
O'Connor, Ecclestone & Kaiser Kingston, Ontario
for the Applicant,

F. Iacobucci, Q.C.
Deputy Attorney General of Canada
Ottawa, Ontario
for the Respondent.