Federal Court  Cour fédérale

Date: 20110622

Docket: IMM-3880-11

Citation: 2011 FC 747

Ottawa, Ontario, June 22, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MICHAIL TSIAVOS

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

I. Overview

[1] The decision in this case is the Court's or the judicial branch's interpretation of the relevant legislative provisions which the legislative branch formulated in the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] giving priority to the security of Canadians and denying serious criminals access to Canada; the executive branch is under obligation to ensure that such legislative provisions are carried out expeditiously.

[2] In *Lucas v Canada (Minister of Citizenship and Immigration)*, 2006 FC 34, 155 ACWS (3d) 913, this Court rejected a judicial review application of a decision of the Immigration Appeal Division (IAD), involving an applicant from Trinidad and Tobago. The applicant in that case, inadmissible for serious criminality, had been in Canada since the age of ten, and at the time of the IAD hearing, was the father of a daughter born in Canada. The Court recognized that the IAD's decision "…has significant consequences -- in fact, the applicant will end up without resources in a country he left at the age of [10] -- [It] is not my place to substitute my judgment for that of the panel". *Lucas* is illustrative of the difficult situation which both the IAD, and this Court, on occasion face. On the one hand, the Respondent is seeking to remove a Canadian permanent resident who undeniably has ties in Canada including Canadian children. On the other hand, this same individual has a serious criminal record, and poses a threat to the security of Canadians.

[3] The best interests of the Applicant's Canadian children are important; however, the security of Canadian society as a whole is paramount.

[4] In this case, the evidence before the removals officer indicated that the children are residing with their mother, and will continue to do so after their father is removed.

[5] Moreover, the removals officer's notes make it clear that he reviewed the supporting material accompanying the request for an administrative stay.

[6] In this case, the Applicant did not have a right to appeal the removal order to the IAD; therefore, the possibility of arguing that humanitarian and compassionate considerations, including the best interests of the children affected, justified the granting of a stay by the IAD was not even open to the Applicant, by reason of his serious criminal conduct.

II. Introduction

[7] The Applicant served a notice of motion upon the Respondent. He seeks to stay the removal order that is to be executed on Saturday, June 25, 2011.

[8] The Applicant has known since April 12, 2011 that he would be removed from Canada on June 25, 2011.

[9] The Applicant lost his permanent residence status on October 18, 2010 by operation of law, by reason of his serious criminality.

[10] The Applicant argues that this Court should stay his removal until his outstanding application for permanent residence based on humanitarian and compassionate grounds (H&C) has been decided; however, none of the circumstances of this case justify a departure from the general rule that an outstanding H&C application, even if considered, is not an impediment to removal.

[11] The Applicant further argues that he is not fit to travel; however, the Applicant did not refer to this issue in his letter dated May 30, 2011 requesting an administrative stay of his removal;

moreover, the medical evidence provided at the very last minute is not sufficient to establish that the Applicant will suffer irreparable harm if he is removed from Canada to Greece.

Last minute stay motion

[12] Ordinarily, in order to be heard at a general sitting on a Monday in Montreal, the Applicant is to serve and file his motion record on the Wednesday in order to comply with rule 362(1) of the *Federal Courts Rules*, SOR/98-106. This rule provides that an applicant must serve and file a motion record at least two days before the hearing.

[13] Rule 362(2) states that the Court may hear a motion on less than two days notice if the "…moving party satisfies the Court of the urgency of the motion".

[14] In this case, the Applicant and his lawyer met with a removals officer on April 12, 2011; the Applicant was informed that he would be removed from Canada on June 25, 2011 (Respondent's Record (RR), Notes of the Removals Officer at p 72).

[15] On May 30, 2011, the Applicant's lawyer wrote to the removals officer to request an administrative stay of removal (Motion Record (MR), Letter dated March 30, 2011 from the Applicant's lawyer to the removals officer at pp 18-24).

[16] On May 31, 2011, the removals officer refused this request (MR, Letter dated May 31, 2011 from the removals officer to the Applicant at p 12).

[17] The Applicant has not attempted to provide any explanation to this Court as to why he made his request for an administrative stay almost one month and a half after he was advised on April 12, 2011 that he would be removed from Canada on June 25, 2011.

[18] Nor does he explain why, once his lawyer had made a written request for removal on May 30, 2011, which request was refused the following day by the removals officer, he did not move promptly to bring the stay motion now before this Court.

[19] The Applicant's lack of diligence demonstrates a lack of respect for the efficient administration of justice in immigration matters.

[20] The words of Justice Yvon Pinard in *Matadeen v MCI*, IMM-3164-00 are particularly relevant in this case:

> …Indeed, "last minute" motions for stays force the respondent to respond without adequate preparation, do not facilitate the work of this Court, and are not in the interest of justice; a stay is an extraordinary procedure which deserves thorough and thoughtful consideration.

[21] For these reasons alone, it would be open to this Court to outrightly dismiss this stay motion.

[22] Nevertheless, the Court will outline in substance why, even on the merits of the case, the request for a stay of removal is denied.

[23] The Court is completely in accord with the position of Me Gretchen Timmins on behalf of the Respondent.

III. Background

[24] The Applicant, Mr. Michail Tsiavos, did come to Canada as a visitor, and was eventually granted permanent residence on December 17, 2003.

[25] On November 21, 2009, a report was issued against the Applicant under s 44 of the *IRPA*. It stated that the Applicant is inadmissible for serious criminality for having been convicted in Canada of an offence under an Act of Parliament punishable by a maximum term of imprisonment of at least 10 years.

[26] In particular, the section 44 report disclosed that the Applicant had been convicted of the following criminal offences:

1) September 29, 2008 – possession of a weapon for a dangerous purpose; and,

2) October 1, 2008 – obstructing justice.

[27] On May 11, 2010, the Applicant had an admissibility hearing before the Immigration Division of the Immigration and Refugee Board (ID). On the basis of the evidence adduced at the hearing, a deportation order was issued against the Applicant (Respondent's Motion Record (RMR), ID Decision at pp 15-16).

[28] On June 9, 2010, the Applicant appealed the removal order to the IAD (RMR, Minister's Motion to Dismiss Appeal for want of jurisdiction at p 28, first para).

[29] On September 30, 2010, the Minister made a motion to the IAD to dismiss the Applicant's appeal for lack of jurisdiction. The Minister took the position that the total sentence imposed for the offences of which the Applicant was convicted was 64 months (5 years and 4 months). Accordingly,

the Minister argued that subsection 64(2) of the *IRPA* applied: the Applicant had no right of appeal because he was found to be inadmissible for serious criminality with respect to a crime punishable by a maximum term of imprisonment of at least 10 years for which he was punished in Canada by a term of imprisonment of at least two years (RMR, Minister's submissions contained in the Minister's Motion at paras 8-15).

[30] By letter dated October 12, 2010, the Applicant's lawyer wrote to the Minister advising that the Applicant did not contest the motion to dismiss the appeal (RMR at p 26).

[31] On October 18, 2010, the IAD issued a Notice of Decision confirming that the Minister's motion had been allowed, and that the appeal of the Applicant was dismissed for lack of jurisdiction (RMR at p 24).

[32] A transcript of extracts from the proceedings before the criminal court, which took place on December 23, 2008, was filed with the Minister's motion to dismiss the Applicant's appeal. These extracts show that the Applicant was convicted of very serious offences:

1) The Applicant was involved with his ex-wife in criminal activities that resulted in her conviction for conspiracy to commit murder for which she received a sentence of 7 years in prison (RMR, Transcript of criminal proceedings of December 23, 2008 (Transcript) at p 35, last para);
2) The prosecution accepted a plea from the Applicant to the offence of having conspired to cause serious bodily harm, causing serious bodily harm, obstruction of justice and possession of a dangerous weapon (Transcript at pp 36, 39, 41 and 42);

3) The Applicant drove a car to the victim's place of business, accompanied by two young men. The young men left the car, attacked the victim, returned to the car, and were driven away from the scene by the Applicant. The Applicant did not carry out the attack on the victim, but he knew what was happening, and the knife came from his home (Transcript at p 42, last para);
4) Following the attack, wiretapped conversations between the Applicant, his ex-wife and others provided evidence of a conspiracy to obstruct justice (Transcript at p 43).

[33] As of the date of the IAD's decision to dismiss the Applicant's appeal for lack of jurisdiction, the Applicant lost his permanent residence status by operation of law (*IRPA* at paras 46(1)(*c*) and 49(1)*c*)).

[34] The transcript of the criminal proceedings also demonstrates that at that time, the Applicant was well aware that his conviction could ultimately lead to his removal from Canada (Transcript at p 55).

[35] On December 23, 2010, just over two months after the Applicant's appeal to the IAD was dismissed, he married his current spouse (MR, Marriage Certificate at p 111),

[36] On March 10, 2011, the Applicant's Pre-Removal Risk Assessment (PRRA) was rejected.

[37] On April 12, 2011, the Applicant attended at the offices of the Canada Border Services Agency (CBSA) and was given his negative PRRA decision. He was also given a notice to appear for his removal on June 25, 2011.

[38] By letter dated May 30, 2011, the Applicant requested an administrative stay of his removal.

[39] On May 31, 2011, the Applicant's request was refused. The removals officer's letter and his notes reveal that he considered:

- all of the material provided by the Applicant;
- the best interests of the children involved;
- that the reasons presented did not justify a deferral of removal;
- that the children's mother (the Applicant's ex-wife) had legal custody of them;
- that the Applicant's assertions that his current wife cannot go to Greece, and that the economic situation in Greece is in crisis, are not circumstances justifying deferral;
- that the opinion of a Psychologist as to the damage that would be caused to the family members by the Applicant's removal was not sufficient to justify a deferral of removal.

(MR, Refusal Letter dated May 31, 2011 at p 12; RMR, Removals Officer's Notes at p 73).

IV. Issue

[40] Has the Applicant demonstrated that he satisfies the tri-partite test established in *Toth*, above?

V. Analysis

[41] Since the Applicant has no legal status in Canada, his PRRA application has recently been rejected, and the removals officer has refused to stay his removal, the only remedy available to him is a judicial stay under section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7.

SERIOUS ISSUE

a) The Applicant has not established the existence of a serious issue

The removals officer did not breach procedural fairness by refusing to defer removal until the H & C application is decided

[42] The Applicant argues in his written representations that the removals officer breached procedural fairness by refusing to defer removal until his H&C application is decided.

[43] The Federal Court of Appeal in *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311, at paragraph 25, confirmed that, absent special considerations, which do not exist in this case, H&C applications will not justify deferral of removal, unless based upon a threat to personal safety (*Turay v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FC 1090 at para. 15 *Baron*, at para 51).

[44] In this case, the Applicant's application for protection pursuant to a PRRA was recently rejected demonstrating that a return to his country of citizenship will not expose him to a threat to his personal safety (RMR, Affidavit of Josée Pelletier, PRRA Decision at pp 61-68).

[45] This Court has reiterated on numerous occasions that the discretion of a removals officer to defer removal is extremely limited (*Adviento v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1430, 242 FTR 295 at para 37).

[46] This principle was reaffirmed by the Federal Court of Appeal in *Baron*, above, at paragraph 25. The Federal Court of Appeal also confirmed that, although removals officers do have 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 (*Turay*, above, at para 15; *Baron*, above, at para 51).

[47] It is therefore clear that there is no merit in the Applicant's argument that the officer breached procedural fairness by refusing to defer his removal so that his H&C application could be decided.

The removals officer's reasons were adequate, and he considered the best interests of the children affected by the removal

[48] The Applicant argues that the officer's reasons are deficient; in particular, that he failed to give full written reasons as is required when the best interests of children are involved.

[49] In the refusal letter dated May 31, 2011, the removals officer clearly states: "[a]fter a revision of all material submitted and having tak[en] into consideration the best interests of the children involved, I have concluded that the reasons presented do not justify a stay of removal."(MR at p 12).

[50] In the removals officer's notes, dated May 31, 2011, in which he discusses the issues raised by the Applicant in his letter of May 30, 2011, he also refers to the children involved (RMR, Officer's notes at p 73).

[51] Specifically, the officer noted that the Applicant raised the issue of his separation from his children and argued that they will suffer serious psychological hardship if he is removed. The officer noted, however, that a judge has decided that the children's mother, and not the Applicant, has legal custody of them.

[52] In the circumstances of this case, the evidence indicates that the children's mother will continue to be available to care for them after the Applicant is removed.

[53] It should also be noted that in the notes made by the removals officer in relation to a meeting with the Applicant on April 12, 2011, the children were discussed (RMR, Officer's notes at p 72). The Applicant was told by the removals officer that a date for his departure would be fixed. The Applicant informed the officer that he was ensuring that proper arrangements would be made for his school age children. He asked the officer if the removal could take place after the school year. He then agreed with the officer that the removal would take place on June 25, 2011.

[54] This Court, and the Federal Court of Appeal in *Baron*, above, at paragraph 50, have essentially held that, although a removals officer should give consideration to the best interests of children affected by a removal, he or she is neither obliged nor competent to undertake a substantial review in this regard.

[55] In *Turay*, above, this Court dismissed a judicial review application of a decision of a removals officer not to defer removal. In that case, the removals officer only mentioned that he had turned his mind to the matter of the children's best interests and concluded that the application for

deferral of removal should be refused. The Court canvassed recent and relevant jurisprudence and confirmed, in particular, that "…illegal immigrants cannot avoid execution of a valid removal order simply because they are parents of Canadian born children"; moreover, "…an enforcement officer has no obligation to substantially review the children's best interest before executing a removal order." (Emphasis Added). The Court dismissed the application for judicial review.

[56] In this case, the Applicant did not have a right to appeal the removal order to the IAD; therefore, the possibility of arguing that humanitarian and compassionate considerations, including the best interests of the children affected, justified the granting of a stay by the IAD was not even open to the Applicant, by reason of his serious criminal conduct.

[57] This file included a "report" dated May 25, 2011 from "Emmanuel Aliatas", Psychologist, (Psychologist's Report). This Psychologist is said to be treating the Applicant and his children.

[58] The Psychologist's Report is deemed to have been considered by the removals officer unless the contrary be shown.

[59] It contains statements that the Court does not expect to read from a Psychologist in this kind of document, such as, "Mr. Tsiavos (Mike) is a 38 year old male who spent 32 months in prison for harboring a criminal. He is not a criminal himself and simply made a mistake due to the fact that he is born and raised in another country and did not fully understand the extent of the crime he was committing" (MR at pp 25-26).

[60] The Psychologist's Report provides no details whatsoever as to when and for how long he met and interviewed the Applicant, his children, and possibly other concerned individuals, before reaching his conclusions.

[61] Statements concerning the children are vague and general, and do not provide specific examples of the challenges the children have or might face because of their family circumstances.

[62] It is noted that the Applicant's children are now ten and seven. For five years of his children's lives, the Applicant has already been separated from then during the time that he was in jail.

[63] The Applicant's ex-wife signed a letter stating that it is important that her ex-husband continue to be part of his children's lives.

[64] The removals officer's treatment of the best interests of the children in this case was not unreasonable in light of the evidence before him.

[65] None of the Applicant's arguments demonstrate that the removals officer's decision was unreasonable or that his written reasons were inadequate.

The Applicant minimizes his responsibility for his criminal activities

[66] The Applicant argues that the removals officer erred in focusing on his criminal inadmissibility.

[67] A review of the removals officer's refusal letter and of his notes demonstrates that he did consider all of the issues raised by the Applicant.

[68] The Applicant lost his permanent residence status by operation of law by reasons of his serious criminality.

[69] The Applicant was not entitled to have his appeal heard by the IAD in order for it to consider humanitarian and compassionate factors, including the interests of the children affected by his removal.

[70] This is the legislative context in which the removals officer was considering the Applicant's request for deferral of his removal.

[71] The evidence before this Court tends to indicate that the Applicant has still not accepted responsibility for his criminal behaviour (MR, Psychologist's Report at pp 25-26).

[72] There is accordingly no evidence that the removals officer improperly "focused" on the Applicant's criminality.

The officer did not err in failing to assess the Applicant's establishment in Canada

[73] Establishment in Canada is one of the factors to be considered in the context of the Applicant's H&C application. It is not a factor to be considered by the removals officer.

The Applicant has not provided convincing evidence that he is unable to travel for medical reasons

[74] In paragraph 56 of the Applicant's memorandum, it is stated that his doctor has forbidden him to travel by air until his heart condition is reassessed.

[75] Nowhere in his affidavit does the Applicant refer to his heart condition.

[76] In fact, even in the letter dated May 30, 2011, in which the Applicant requests a deferral of his removal, there is no mention of a heart condition.

[77] If the Applicant believes that his health prevents him from travelling, one would have expected him to raise this issue with the removals officer in his request to defer his removal.

[78] At page 209 of the Applicant's Motion Record, a copy of a "Certificat médical d'incapacité de travail" dated June 15, 2011 is found. Under the heading "Limitations", there does not appear to be any mention of the Applicant's inability to travel.

[79] At page 210 of the Applicant's Motion Record, a copy of a "Demande de consultation en Cardiologie" is found. This document appears to indicate that the Applicant has had pain for approximately one year, and that the pain has been more frequent for the last 2-3 months. Nowhere is it indicated that the situation is one of particular medical urgency whereby he could not fly for a specific immediate cardiac condition.

[80] The Applicant will be returned to Greece. He has not provided any evidence to establish that the medical treatment he requires would not be available in Greece.

[81] The Applicant cites this Court's decisions in *Tobin, Prasad & Ramada* and argues that this Court has stayed removals where applicants raised health issues (*Tobin v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 325, 156 ACWS (3d) 671; *Prasad v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 614, 123 ACWS (3d) 533; *Ramada v Canada (Solicitor General)*, 2005 FC 1112, 141 ACWS (3d) 1016).

[82] It should be noted that the cases cited by the Applicant all confirm that a removals officer's discretion to defer removal is extremely limited.

[83] In *Tobin*, in particular, Justice Sean Harrington found at paragraph 15 that the applicant faced irreparable harm in that, without treatment, she might become functionally sightless. There was also some issue as to whether the applicant could obtain treatment in her own country.

[84] In this case, it does not appear that the Applicant faces an imminent risk to his health. Moreover, he has not provided any evidence to the effect that he would not be able to obtain treatment in Greece.

[85] In *Dia v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 859, 160 ACWS (3d) 325, this Court refused a stay, finding that HIV treatment was available for the applicant in her own country.

[86] In this case, the Applicant did not raise an issue in relation to his health until eleven days before his removal. He has known since at least December 2008, when he was sentenced in criminal court, that he faced removal from Canada. Since, at the very latest April 12, 2011, when the Applicant met with the removals officer and was given a departure notice, he knew that his removal was imminent. Yet, he did not raise any health issues at that time nor in the May 30, 2011 letter requesting a deferral of his removal.

[87] In all of these circumstances, there is no evidence to support an allegation that the Applicant will suffer irreparable harm if he is removed, notwithstanding the current medical issues that he says he is facing.

[88] For all of the reasons set out above, the Applicant has not raised a serious issue in relation to the exercise of the removals officer's discretion in this case.

[89] Since all of the elements of the tri-partite test must be established, this motion should be dismissed because the Applicant has not raised a serious issue.

IRREPARABLE HARM

[90] The jurisprudence of this Court establishes that "irreparable harm" implies the "serious likelihood of jeopardy to an applicant's life or safety" (*Calderon v Canada (Minister of Citizenship and Immigration)* (1995) 92 FTR 107, 54 ACWS (3d) 107; *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 FC 358; *Kerrutt v Canada (Minister of*

Employment and Immigration) (1992), 53 FTR 93, 32 ACWS (3d) 621 (FCTD); *Simpson v Canada (Minister of Employment and Immigration)* (1993) 63 FTR 77, 40 ACWS (3d) 481).

[91] Irreparable harm has not been established by the Applicant in this case.

[92] In addition, the Applicant says that his ex-wife will be left alone to raise two children without his financial support.

[93] No information is provided as to the means of the Applicant's ex-wife. A letter, dated June 29, 2010, and signed by his ex-wife, indicates that the Applicant pays her $100.00 per week for child support (MR at p 60).

[94] The Applicant says he has been hard-working in Canada. At paragraph 13 of his memorandum, it is stated that he has never collected social assistance.

[95] The Applicant's 2009 income tax return that he filed, in support of this motion, indicates that his only source of income in 2009 was social assistance payments totalling just over $7,000.00 (MR, 2009 Income Tax Return at pp 71-74 at p 72, 3rd line from the bottom of the page).

[96] The Applicant's income tax return for 2010 shows a total income of just over $13,000.00 (MR, 2010 Income Tax Return at pp 189-196 at p 190, last line).

[97] The Applicant also argues that his removal will result in the loss of his investment in a Canadian business that will ultimately mean he has less money to give to his ex-wife for his children. He also relies on the worsening economic situation in Greece. In addition, he says that his current wife cannot accompany him to Greece since she does not speak Greek, and she will not be able to find employment in Greece.

[98] The Applicant married his wife in December of 2010 when he was already facing removal from Canada.

[99] The matters raised by the Applicant are unfortunate, but to be expected, consequences of removal.

[100] The jurisprudence of this Court establishes that “irreparable harm” must be “very grave and more than the unfortunate hardship associated with the break-up or relocation of a family” (*Calderon*, *Legault*, *Kerrutt* and *Simpson*, above).

[101] In *Atwal v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427, 136 ACWS (3d) 109, Chief Justice John D. Richard of the Federal Court of Appeal confirmed that “irreparable harm” must refer to some prejudice beyond that which is inherent in the notion of deportation itself.

[102] The prejudice which the Applicant and his family will suffer is not beyond that which is part of the normal consequences of removal, in particular, for someone who has lived in Canada for a certain period of time.

[103] The Applicant was involved in very serious criminal activity. He is the author of the unfortunate situation which he and his family now face.

[104] None of the Applicant's arguments demonstrate that he will suffer irreparable harm if he is removed before the underlying judicial review application is treated.

BALANCE OF CONVENIENCE

[105] Removal orders must be enforced as soon as is reasonably practicable. It is trite law that the public interest must be considered when this Court evaluates whether the balance of convenience favours the Applicant or the Minister. In this case, in light of all of the foregoing arguments, including the Applicant's serious criminal activity, it is in the public interest that he be removed as planned on June 25, 2011.

[106] The balance of convenience criterion also favours the Minister. For all these reasons, this motion for a stay is dismissed.

ORDER

THIS COURT ORDERS that the Applicant's motion for a stay of the Removal Order be dismissed.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3880-11
STYLE OF CAUSE:	MICHAIL TSIAVOS v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

MOTION HELD VIA TELECONFERENCE ON JUNE 21, 2011 FROM OTTAWA, ONTARIO AND MONTREAL, QUEBEC

REASONS FOR ORDER AND ORDER:	SHORE J.
DATED:	June 22, 2011

ORAL AND WRITTEN REPRESENTATIONS BY:

Maria Stamatelos	FOR THE APPLICANT
Gretchen Timmins	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Waïce Ferdoussi, Attorney Company Montreal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Montreal, Quebec	FOR THE RESPONDENT