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Henry v. Canada (Minister of Citizenship and Immigration)

Between
Valerie Beverly Henry, applicant, and
The Minister of Citizenship and Immigration, respondent

[2000] F.C.J. No. 1699

[2000] A.C.F. no 1699

10 Imm. L.R. (3d) 39

100 A.C.W.S. (3d) 1038

Court File No. IMM-5475-00

Federal Court of Canada - Trial Division

O'Keefe J.

Heard: October 20, 2000 by teleconference (Ottawa-Toronto).
Oral judgment: October 20, 2000.

(18 paras.)

Aliens and immigration -- Exclusion and expulsion -- Deportation of persons in Canada -- Deportation order, stay of -- Grounds -- Interests of child.

Application by Henry to stay a deportation order for her removal to Grenada. She entered Canada on a visitor's visa and remained after its expiry. She had a child born in Canada who was now seven years old. She was a single parent, and the sole supporter of her child. She applied for an exemption from the requirement to apply for landing from outside of Canada, on humanitarian and compassionate grounds. The application was denied and she applied for judicial review which had not yet been heard.

HELD: Application allowed. Henry raised a serious issue. The decision of the immigration officer did not take the child's interests sufficiently into consideration. No inquiry was made as to the educational conditions in Grenada. The officer merely concluded that the child could continue his edu-

cation there. Irreparable harm would result in that the child would not receive a proper education, or alternatively, it would result from the child being forced to be separated from his mother in order to continue his education. The balance of convenience also favoured granting the stay pending determination of the judicial review application.

Statutes, Regulations and Rules Cited:

Immigration Act, 1976-77, c. 52, ss. 9(1), 114(2).

Counsel:

Raj Napal, for the applicant.
Diane Dagenais, for the respondent.

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1 **O'KEEFE J.** (Reasons for Order and Order, orally):-- This is an application for a stay of a Deportation Order issued against Valerie Beverly Henry (the "applicant") by the respondent on May 5, 2000.

2 The applicant, a citizen of Grenada, first came to Canada in February, 1990 on a visitor's permit and remained in Canada until December, 1994 when she returned to Grenada. She returned to Canada on June 10, 1996 on a visitor's permit which has expired.

3 While in Canada, she gave birth to a son who is now seven years old. The applicant applied for an exemption to the requirement of subsection 9(1) of the Immigration Act, 1976-77, c. 52 (the "Act") that she apply for and obtain an immigrant visa prior to coming to Canada. The application was made pursuant to subsection 114(2) of the Act (compassionate or humanitarian considerations). That application was denied by letter dated August 8, 2000, which letter the applicant received on August 20, 2000.

4 The applicant is a single parent who supports her son.

5 The applicant, on September 28, 2000, attended a pre-removal interview.

6 This current motion was filed with the Court on October 18, 2000.

7 The applicant has filed an application for judicial review of the denial of her compassionate and humanitarian request.

ISSUES

8

1. Should the supplementary affidavit of the applicant be filed?
2. Should the Deportation Order against the applicant be stayed?

Issue 1

Should the supplementary affidavit of the applicant be filed?

9 I am of the view that the supplementary affidavit of the applicant cannot be filed. This is a second affidavit by the applicant which contains information that was readily available when the first affidavit was filed and could have been included in that affidavit.

Issue 2

Should the Deportation Order against the applicant be stayed?

10 The tests to be applied determine whether or not to grant a stay are the same tests for granting an interlocutory injunction. In Toth v. Canada (Minister of Employment and Immigration), (1988) 86 N.R. 302 (F.C.A.) the Federal Court of Appeal stated at page 305:

> 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. 396 [Footnote 3 appended to judgment]. 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 applicant is required to satisfy all three branches of the tri-partite test.

11 I am satisfied that the applicant has raised a serious issue to be tried. In Baker v. Canada (Minister of Citizenship and Immigration) (1999) 174 D.L.R. (4th) 193 (S.C.C.), L'Heureux-Dubé J. stated at page 230 when speaking of subsection 114(2):

> In my opinion, a reasonable exercise of the power conferred by the section requires close attention to the interests and needs of children. Children's rights, and attention to their interests, are central humanitarian and compassionate values in Canadian society.

12 The immigration officer's assessment of the child's interests in this case was as follows:

> The best interest of the child has been considered and it is believed his best interests lie with his mother. Wherever she may be his disruption in school is minimal as he can go to school back home just as his mother did.

I do not consider that these brief remarks and in particular, the remark, "as he can go to school back home just as his mother did." can be taken to show that the officer paid close attention to the interests and needs of the child. For example, what are the educational conditions like in Grenada? They may be the same as Canada, but that is not addressed. In my opinion, this assessment raises a triable issue.

13 I am not of the view that the failure to grant an interview raises a triable issue in this case.

14 Irreparable harm would result in that either the applicant's child would not receive a proper education or in the alternative, the irreparable harm to the applicant would be the separation of her child from her if he stays in Canada to continue his education.

15 The balance of convenience favours the applicant in that the granting of the stay allows her to have her judicial review application determined and should she lose, then the respondent can then deport her. There should be no great delay in carrying out its obligations under the Act. As well, the applicant is employed and is not a drain on public funds.

16 The application for a stay of the Deportation Order is hereby granted until either the leave for the application for judicial review is denied or if leave is granted, the application for judicial review is finally disposed of by the Courts.

17 As is obvious from my decision, I have not accepted the preliminary arguments of the respondent.

ORDER

18 IT IS ORDERED that the stay of the Deportation Order is granted on the terms listed in paragraph 16 of this decision.

O'KEEFE J.