Date: 20060120

Docket: IMM-7663-05

Citation: 2006 FC 52

BETWEEN:

**STEVEN WYNN KUBBY, MICHELE KUBBY,
BROOKE KUBBY AND CRYSTAL KUBBY**

Applicants

- and -

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER

PINARD J.

[1] The applicants, Steven Wynn Kubby, his wife, Michele Kubby, and their children, Brooke and Crystal Kubby, are failed refugee claimants from the United States. They claimed that they needed refugee protection because Steven Wynn Kubby used marihuana for medical purposes. In November 2003, their refugee claims were rejected by the Immigration and Refugee Board (the "Refugee Board"), whose decision was subsequently upheld by this Court in July 2005.

[2] Subsequently, the applicants submitted an application for a Pre-Removal Risk Assessment, essentially repeating the same allegations of risk that they had made before the Refugee Board. In November 2005, the application was rejected by a Pre-Removal Risk Assessment Officer (the "PRRA Officer") whose decision is now being challenged by the applicants by way of an application for leave and for judicial review.

[3] This is a motion for a stay of the enforceable removal order against the applicants pending the disposition of their application for leave and for judicial review of the PRRA Officer's decision.

[4] The following relevant underlying facts are set out at length in the Refugee Board's detailed reasons for its decision rejecting the applicants' refugee claims:

- Mr. Kubby and his family are all citizens of the United States. In 1968, Mr. Kubby was diagnosed with adrenal cancer and he began using marihuana for medical reasons in the early 1980s. He was able to use marihuana in California without incident for more than sixteen years.
- In 1995, California voters approved Proposition 215, also known as the *Compassionate Use Act*. The *Compassionate Use Act* provides that it is not an offence under the state *Health and Safety Code* for a person to cultivate or possess marihuana if he or she is cultivating or possessing it for his or her personal medical purposes upon the recommendation or approval of a physician. It has been estimated that there are tens of thousands of persons using marihuana for medical purposes in California and numerous

organizations that distribute or dispense marihuana to persons for medical purposes currently operating in the state. Numerous other states in the United States have also passed medical marihuana legislation.

- The federal *Controlled Substances Act* still prohibits the manufacture, distribution and possession of marihuana. However, 99% of marihuana arrests are made by state or local officials who do not enforce federal laws. Further, the federal authorities tend to focus on large scale drug trafficking and, because of limited resources, do not generally get involved in minor drug investigations and prosecutions.
- In July 1998, law enforcement officials in California executed a search warrant on the Kubby's residence and found, among other things, an indoor 265-plant marihuana grow-operation. Mr. Kubby was arrested and charged with various marihuana-related offences under the California *Health and Safety Code* including cultivating marihuana and possession of marihuana for sale. He was also charged with several other drug offences including possession of mescaline and psilocyn.
- Mr. Kubby claimed that he was growing the marihuana for his own medical purposes as provided for by the *Compassionate Use Act*.
- In December 2000 following a lengthy jury trial, Mr. Kubby was not convicted of any of the marihuana-related offences because the jury accepted his medical marihuana defence. However, he was convicted of other drug offences including possession of mescaline and psilocyn.
- In March 2001, the Court sentenced Mr. Kubby to 120 days in custody, which he could serve by way of house arrest, a fine and three years probation. The Court also directed

that Mr. Kubby could use marihuana during his period of house arrest and probation. It is noteworthy that the Court took regular breaks during the trial to allow Mr. Kubby to use marihuana.

- Mr. Kubby was supposed to surrender himself to the state authorities in July 2001 to begin serving his sentence. However, in April 2001, he and his family left the United States and came to Canada. To date, Mr. Kubby has not returned to the United States to serve his sentence.

[5] In order to succeed and obtain the requested stay, the applicants need to demonstrate that they have raised a serious issue to be tried, that they would suffer irreparable harm if the stay was not granted and that the balance of convenience favours granting the stay. This three-part test is conjunctive and the applicants must satisfy all three parts to be successful (see *Toth v. Canada (M.E.I.)* (1988), 86 N.R. 302 (F.C.A.)). I find that the applicants have failed on all three counts.

Serious Issue

[6] The standards of review for PRRA Officers' decisions have recently been solidified in *Kim v. Canada (M.C.I.)*, [2005] F.C.J. No. 540, at para. 19, where, after conducting a full and extensive pragmatic and functional analysis, Mosley J. stated:

> ... I conclude that in the judicial review of PRRA decision the appropriate standard of review for questions of fact should generally be patent unreasonableness, for questions of mixed law and fact, reasonableness simpliciter, and for questions of law, correctness. I am fortified in my conclusions by the positions taken by my colleagues in other recent PRRA decisions

(see also *Tekie v. Canada (M.C.I.),* [2005] F.C.J. No. 30; *Figurado v. Canada*, [2005] F.C.J. No. 458; *Singh v. Canada (M.C.I.),* [2004] 3 F.C.R. 323 at para. 12; *Gonulcan c. Canada (M.C.I.),* [2005] F.C.J. No. 44; *Demirovic v. Canada (M.C.I.),* [2005] F.C.J. No. 1540; *Kandiah v. Canada (Solicitor General),* [2005] F.C.J. No. 1307.)

[7] To the extent that the issues raised by the applicants in their underlying application for leave and for judicial review concern the appreciation of the facts made by the PRRA Officer, the applicants would, at judicial review, have the burden of showing that this appreciation is patently unreasonable, i.e. clearly irrational. In light of the relevant evidence, including the affidavits from two lawyers in the United States regarding another American citizen, Steven Puck, which are dealt with further in these reasons, not only do I fail to see how the applicants can meet such a heavy burden, but I am also of the view that they cannot demonstrate that the PRRA Officer based her decision on an erroneous finding of fact that she made in a perverse or capricious manner or without regard for the material before her (see para. 18.1(4)(d) of the *Federal Courts Act*), nor that the inferences drawn by the latter could not have been reasonably drawn. Under such circumstances, it is trite law that this Court may not substitute its own appreciation of the facts for that made by the PRRA Officer. Therefore, the underlying application for leave and for judicial review does not raise any serious issues with respect to the PRRA Officer's appreciation of the facts.

[8] Concerning the issues raised by the applicants with respect to an apprehension of bias on the part of the PRRA Officer and the violation of the applicants' rights under sections 7 and 12

of the *Canadian Charter of Rights and Freedoms*, at judicial review the applicants would bear the burden of showing that the PRRA Officer's decision is incorrect. The applicants have failed to convince me that there is a serious issue to be tried.

[9] The applicants have provided no evidence whatsoever to support their allegations of personal bias on the part of the PRRA Officer. Concerning their allegation of institutional bias, the applicants simply refer to this Court's decision in *Say v. Canada (The Solicitor General of Canada)* 2005 FC 739. However, the applicant's argument in *Say* was based on the fact that the PRRA Unit was part of the Canada Border Services Agency (the "CBSA") rather than Citizenship and Immigration Canada ("CIC") at the material time. In the present case, the PRRA Unit was part of CIC when the PRRA Officer made her decision. Furthermore, both this Court and the Court of Appeal found that the PRRA Unit possessed the requisite degree of institutional independence even when it was part of the CBSA, rather than CIC (*Say v. Canada (The Solicitor General of Canada)* 2005 FC 739; aff'd 2005 FCA 422).

[10] As for the applicants' *Charter* argument, it is supported by neither the relevant facts as properly assessed by the PRRA Officer, nor the law. Canadian law does not give a foreign national such as Steven Wynn Kubby a right to reside in Canada simply because he or she may be able to obtain some preferred medical treatment or other benefit in Canada that he or she may not enjoy in his or her country of nationality (*Chiarelli v. Canada (Minister of Employment and Immigration)*, [1992] 1 S.C.R. 711; *Medovarski v. Canada (Minister of Citizenship and Immigration)* 2005 SCC 51.

Irreparable Harm

[11] It is well established that the applicants must show that the irreparable harm alleged is not speculative nor based on a series of possibilities. The applicants must satisfy this Court that the alleged harm will occur if their return to the United States is not stayed (see, for example, *Akyol v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 931, and *Atakora v. Canada (M.C.I.)*, [1993] F.C.J. No. 826 (T.D.) (QL)).

[12] In the case at bar, the applicants merely and essentially argue that Steven Wynn Kubby would be detained by American law enforcement officials, that he would be denied marihuana while in detention and that he would likely die as a result of being denied marihuana.

[13] Both the Refugee Board and the PRRA Officer found that Steven Wynn Kubby failed to establish either that he would be incarcerated if he returned to the United States or that he would be denied adequate medical care if he were incarcerated. When Steven Wynn Kubby was originally sentenced, the Court directed that he could serve his period of custody under house arrest and also that he could use marihuana during his period of house arrest. Furthermore, as the Refugee Board noted, even if Steven Wynn Kubby were incarcerated, officials in the United States are responsible for ensuring that persons committed to custody receive proper and necessary medical care, and there was evidence showing that both State and federal institutions are capable of taking care of the medical needs of persons in custody.

[14] I agree with the respondent that it remains speculative at this time to conclude that Steven Wynn Kubby would be incarcerated and denied adequate medical care while incarcerated. The evidence before me is essentially composed of the same elements that were before the Refugee Board and those that were before the PRRA Officer. As the PRRA Officer found, the two affidavits regarding Mr. Tuck's alleged experience when he returned to the United States do not establish that Steven Wynn Kubby would be denied adequate medical care in the United States. Steven Wynn Kubby has not shown that he is similarly situated to Mr. Tuck. Furthermore, the affidavits regarding Mr. Tuck's experience are contradicted by other evidence, including evidence specifically concerning medical treatment available to persons in custody in the State of Washington from Daniel Satterberg, Chief of Staff of the King County Prosecuting Attorney's Office. There is also nothing to prevent Steven Wynn Kubby (or the other applicants) from returning directly to California to deal with his outstanding matters. It is noteworthy that when Mr. Tuck returned to California, the State did not pursue most of the charges against him. Instead, he was convicted only of four misdemeanor counts of failure to appear, was placed on probation and was ordered to pay a fine.

Balance of Convenience

[15] In May 2002, the Adjudication Division of the Refugee Board found that Mr. Kubby was inadmissible to Canada on criminality grounds and made a removal order against him. Removal orders were also subsequently issued against Ms. Kubby and the children because they had overstayed their visitor visas. Since they arrived in Canada more than four years ago, the applicants have received a negative decision from the Refugee Board following a lengthy

hearing and this Court has upheld that decision. Furthermore, as we have seen above, no serious issues have been raised with respect to the subsequent pre-removal risk assessment made by a proper officer and no irreparable harm has been demonstrated in the event the applicants are sent back to the United States. Under such circumstances, the public interest clearly does not favour delaying further the respondent's statutory duty to enforce the removal order against the applicants "as soon as reasonably practicable" (see subsection 48(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 21).

Conclusion

[16] For all the above reasons, the requested stay is denied, and therefore the motion is dismissed.

(Sgd.) "Yvon Pinard"

JUDGE

FEDERAL COURT

NAMES OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-7663-05

STYLE OF CAUSE: STEVEN WYNN KUBBY et al.

- and -

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

PLACE OF HEARING: Vancouver, BC

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REASONS FOR ORDER BY: PINARD J.

DATED: January 20, 2006

APPEARANCES:

Michele Kubby	FOR APPLICANTS
R. Keith Reimer	FOR RESPONDENT

SOLICITORS OF RECORD:

Michele Kubby Sun Peaks, BC	FOR APPLICANTS
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR RESPONDENT