Federal Court Cour fédérale

Date: 20191005

Docket: IMM-5945-19

Citation: 2019 FC 1655

Ottawa, Ontario, October 5, 2019

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

ROLANDO HERNANDEZ

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The Applicant seeks a stay of removal, scheduled for October 7, 2019, for Guatemala.

[2] The Applicant received a notice from the Canada Border Services Agency (CBSA) on September 17, 2019, that his removal was scheduled for October 7, 2019 but he did not file a request for an administrative deferral of his removal until September 27, 2019. This deferral request was refused on October 2, 2019.

[3] The Applicant filed an application for leave and judicial review, as well as a motion seeking a stay of removal, on October 3, 2019. The stay motion was heard late on October 4, 2019. These are my reasons for denying the motion for a stay of the Applicant's removal.

I. Context

[4] The Applicant is a citizen of Guatemala. He entered Canada illegally sometime in 2010. Prior to coming to Canada, the Applicant was deported from the United States, after he was convicted of rape (in Canada, sexual assault), for which he served a 36-month sentence.

[5] The Applicant made a refugee claim in 2011. In 2012 the Refugee Protection Division of the Immigration and Refugee Board found him to be ineligible to make a claim based on serious criminality, because of his prior conviction. The Applicant did not seek judicial review of this decision. Nor did he leave Canada in the prescribed period following the dismissal of his refugee claim, so his departure order became a deportation order.

[6] In 2013, the Applicant made a claim for permanent residence on the basis of humanitarian and compassionate (H&C) grounds. That claim was refused in May 2015. The Applicant still did not leave Canada.

[7] In 2019, the Applicant submitted a pre-removal risk assessment (PRRA), which was refused on June 4, 2019, and communicated to the Applicant on July 5, 2019. He did not seek judicial review of this decision.

[8] On September 17, 2019, the Applicant attended an interview and was provided with a departure order with instructions and a detailed itinerary, indicating that his removal from Canada was scheduled for October 7, 2019. On September 27, 2019 he applied for an administrative deferral of his removal, claiming that: (i) he faced a serious risk to his personal safety upon return to Guatemala; (ii) it is in the best interests of his Canadian born child for the removal to be deferred, since she has a serious medical condition and her next medical appointment is November 1, 2019; (iii) he has filed a new H&C application; and (iv) he is not psychologically, emotionally and physically fit to travel.

[9] This deferral request was refused on October 2, 2019. The Applicant has launched an application for leave and judicial review of this decision, and a motion for a stay of his removal.

II. Issues

[10] Two issues arise in this matter: (a) should I exercise my discretion not to hear the application, since it is a "last-minute" request; and if so, (b) should a stay of removal be granted in these circumstances?

III. Analysis

A. *Discretion to refuse to hear a "last-minute" request*

[11] This Court has held that it may refuse to hear last-minute stay applications where there is no explanation for the delay in bringing the matter forward. A stay of removal is extraordinary relief, which should be considered based on the best available evidence, and with time for proper consideration.

[12] The Respondent cites the decision of Mr. Justice Pinard in *Matadeen v Canada (Minister of Citizenship and Immigration)*, IMM-3164-00, June 22, 2000): "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 interests of justice; a stay is an extraordinary procedure which deserves thorough and careful consideration."

[13] Other decisions to the same effect include: *Vaccarino v Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 518 (Strayer J.); *Carling v Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 2086 (Blanchard J.); and *Adel v Canada (Minister of Citizenship and Immigration*, [2002] 2 F.C. 73 (T.D.), in which Justice Pelletier stated, in relation to last-minute stay applications:

> [16] It often happens that counsel who represent immigrants are themselves consulted at the last minute by clients who live in hope that the removal date will never arrive. Moreover, the Federal Court frequently sees cases in which there is very little time between the applicant's summons and the date of removal. What this means is that often the choice of the hearing date for such applications is outside the control of applicants' counsel. But there are other cases in which counsel know in advance that they will have to make an application for a stay. In those cases, the Court has a hard time understanding why the application for a stay is tendered on the day before the date of removal or on the very day itself.
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> [17] This does not do justice to either the respondent or the Court, both of whom must comply with the applicant's deadlines. The respondent is often unable to file its evidence in Court. The Court, for its part, must determine complex questions on the basis of an incomplete record and without the benefit of any period of reflection. The applicant claims a stay by appealing to fairness; he should grant to others what he is claiming for himself. And in this instance, fairness required that the application be presented earlier. It is surprising to me that one can have sufficient information to commence an application for leave and judicial review but be in ignorance about an application for a stay.

(emphasis added)

[14] More recently, the Court has commented on, or exercised, its discretion not to hear stay motions brought at the last minute without an adequate explanation: see, for example: see *Tartik v. Canada (Citizenship and Immigration)*, 2019 FC 558; *Khan v. Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1275*; Beros v Canada (Citizenship and Immigration)*, 2019 FC 325; *Nsungani v. Canada (Citizenship and Immigration)*, 2019 FC 1172; *Feremicael v. Canada (Public Safety and Emergency Preparedness)*, 2019 CanLII 60606 (FC); Yang v. Canada (Public Safety and Emergency Preparedness), 2019 CanLII 82717 (FC).

[15] In this case, I would adopt the following review of the pertinent considerations set out by Justice Grammond in *Beros*:

> [5] Where an applicant does not act diligently in preparing a challenge to his or her removal, this Court has the discretion to decline to hear a motion for stay of removal that was not filed in a timely manner: *El Ouardi v Canada (Solicitor General)*, 2005 FCA 42 (CanLII).
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> [6] In my view, this discretion should be exercised with caution, for several reasons.
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> [7] First, in many cases motions for stay of removal involve a risk to the applicant's life or physical integrity. Those interests are protected by section 7 of the *Canadian Charter of Rights and Freedoms*. This Court's role has been described as a "safety valve" that guarantees that persons are not removed from Canada without due consideration for their Charter-protected interests: *Atawnah v Canada (Citizenship and Immigration)*, 2016 FCA 144 (CanLII) at para 23, [2017] 1 FCR 153. We are reluctant to expose someone to risks of that nature simply because the person did not act as quickly as we would have expected in challenging the removal.
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> [8] Second, we are mindful of the difficulties that persons subject to a removal order may encounter in obtaining legal representation. Applicants may have limited resources. Obtaining legal aid may

> require time. We should not dismiss a motion for stay of removal for reasons that are beyond the applicant's control.
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> [9] Third, the right to ask this Court to stay an administrative process is enshrined in legislation: see section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7. In certain circumstances, a stay is necessary to ensure the effective exercise of this Court's supervisory jurisdiction over federal tribunals.
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> [10] Thus, when a motion for stay of removal is not brought at the earliest opportunity, the motion should include an explanation for the delay and, if possible, evidence supporting that explanation.
>
> [11] There will be cases in which those explanations will not be satisfactory. In those cases, there are important reasons to exercise our discretion to decline to hear the motion for stay of removal.
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> [12] The first reason is that although a risk to the life or security of the applicant may be at issue, the process remains a contradictory one and must be fair to the respondent Minister. Motions for stay of removal raise important and complex issues and deserve careful consideration. Where there is no valid reason to bring such a motion on the eve of the scheduled removal, it is not fair to ask the respondent to prepare a meaningful response in a very short period of time, in particular during weekends. The respondent may have difficulty assembling the relevant materials and preparing submissions that are tailored to the facts of the case. Moreover, it is not in the interests of justice to ask our Court to decide such motions in a hurried fashion.
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> [13] The second reason is that we should not apply the law in a manner that rewards the strategic delaying of filing a motion for stay of removal. If we allowed the filing of such motions at the last minute, applicants could file a record that omits certain facts, hoping that the respondent will be unable to find them quickly. They could try to create an atmosphere of urgency and an impression that the risk they face has not been thoroughly assessed. The interests of justice are better served by the timely filing of motions for stay of removal, allowing both parties to provide the Court will all relevant information.

[16] In this case, the period of delay began when the Applicant received the negative PRRA decision. At that stage, he had already been denied refugee protection, and his H&C request had been turned down. It should be recalled that the Applicant did not seek judicial review of the

negative PRRA decision, so it became final upon expiry of the deadline for bringing such an application.

[17] The next relevant period is between the receipt by the Applicant of the notice to report on September 17, 2019 and the submission of his deferral request on September 27, 2019 followed by the motion for a stay on October 3, 2019. There are no submissions in the written materials of the Applicant to explain these delays.

[18] I also note that significant aspects of the immigration history of the Applicant were not set out in his materials. The serious criminality only came to light in the materials filed by the Respondent, mere hours before the hearing of the motion.

[19] To summarize, the Applicant's stay materials arrived late on a Thursday afternoon, for a removal scheduled very early on the following Monday. The Respondent managed to provide an affidavit and written representations prior to the hearing of the motion, and the motion was heard on Friday night. It bears repeating that the timing of the removal was not a surprise to the Applicant. Yet the delay by the Applicant in making his deferral request or filing his motion for a stay of removal has put the Respondent in the position of having to review the Applicant's materials and prepare its own responding materials within 24 hours.

[20] The Applicant argues that there has been no unreasonable delay. Upon receipt of the notice to report he sought the new evidence he would need to justify a deferral request or a stay of removal. He obtained a letter from his daughter's doctor, as well as a letter from a psychologist regarding his mental state, and then promptly moved for a deferral. The Applicant

states that the officer's delay in responding to that request was the reason he could not file his stay motion earlier.

[21] The Respondent argues that the time should be measured from the Applicant's receipt of the negative PRRA decision, because at that time he was clearly on the final path towards removal. He could have obtained the further medical evidence in July or August, and submitted his request for a deferral of his removal then. This would have avoided the last-minute pressures on the Respondent to gather the necessary material and to file a response to the stay motion. The Respondent also notes that the deferral request was submitted ten days after the Applicant received the notice to report, and the officer provided his decision on that request a mere five days later. There was no undue delay by the officer and the timing of the request was entirely within the control of the Applicant.

[22] In this case, there are several relevant considerations that weigh against hearing this motion. First, the timing considerations are summarized above, and do not need to be repeated. Second, the risk to the Applicant and the concerns he expressed about the best interests of his child have been recently assessed. Third, he had time following receipt of the negative PRRA to obtain the further evidence he needed to submit a deferral request; this is not a situation where the Respondent has given the person little time to prepare for removal. I also note that when the Applicant made his PRRA request, he had to be aware that his removal from Canada was coming soon. Indeed, the very title of the application would have made that evident – a Pre-Removal Risk Assessment

[23] Fourth, there was no explanation for the delay included in the materials filed in support of the stay motion – the key facts could be inferred from the record, but there was no mention of the issue in the written submissions. Finally, the materials filed by the Applicant did not set out his complete immigration history.

[24] Against that, the Respondent was able to provide an affidavit setting out the immigration history as well as its submissions on the stay motion. The Court had some time to review the material just prior to the hearing, and the record was not unduly lengthy or complex. The Applicant has offered an explanation for the final part of the delay, and it does not appear that this was a strategic tactic by the Applicant in an effort to gain a litigation advantage. Finally, the Applicant asserted serious risks to himself and to his daughter, and submitted new evidence in support of these claims.

[25] In the circumstances of this case I decided, after some consideration, to exercise my discretion to hear this application. I would note, however, that if the matter had been determined solely on the basis of the written submissions filed by the Applicant and the Respondent's initial letter objecting to the late filing, it would likely have not been heard because the Applicant did not include any submissions to explain the delay. This is not a risk that applicants should take- if the stay motion is being submitted on an urgent basis, the moving party should explain why in the written materials which are filed in support of the request.

[26] I will now turn to the merits of the stay motion.

B. *Should a stay of removal be granted?*

[27] In considering whether to grant a stay of removal, this Court applies the same test as for interlocutory injunctions. The Supreme Court of Canada recently restated the test as follows:

> At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.
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> (*R v Canadian Broadcasting Corp*, 2018 SCC 5 (CanLII) at para 12, references omitted)

[28] This three-pronged test is well-known. It had been set out in earlier decisions of the Supreme Court: *Manitoba (Attorney General) v Metropolitan Stores Ltd.*, 1987 CanLII 79 (SCC), [1987] 1 SCR 110; *RJR — MacDonald Inc v Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311). It was also applied in the immigration context in *Toth v Canada (Minister of Employment and Immigration)*, 1988 CanLII 1420 (FCA). Of course, the application of this test is highly contextual and fact-dependent.

A. *Serious Issue*

[29] In many cases, the serious issue branch of the test is not a high threshold. However, in cases where the stay is requested following a refusal to defer removal, it has been found that a higher threshold applies, which requires the Applicant to demonstrate a "likelihood of success" or "quite a strong case" in regard to the underlying application for leave and judicial review (*Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FC 682; *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010]

2 FCR 311 at para 67*; Lewis v Canada (Public Safety and Emergency Preparedness),* 2017 FCA 130 at paras 51-56; *Forde v Canada (Public Safety and Emergency Preparedness),* 2018 FC 1029).

[30] This must also be examined in light of the wording of sub-section 48(2) of *IRPA*, which governs the officer's exercise of discretion to defer a removal. The relevant principles have recently been summarized in a concise manner by Justice Walker, in *Toney v. Canada (Public Safety and Emergency Preparedness),* 2019 FC 1018, at para 50, and I would adopt this in its entirety:

> [50] The trio of *Baron*, *Lewis* and *Forde* establish the following:
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> 1. An enforcement officer's discretion to defer removal is very limited and, ultimately, an officer is required to enforce a removal order in accordance with subsection 48(2) of the *IRPA* (*Baron* at paras 51, 80: *Lewis* at para 54; *Forde* at para 36);
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> 2. In the exercise of their discretion, an officer cannot defer removal to an indeterminate date (*Baron* at para 80: *Forde* at paras 36-37, 43);
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> 3. An officer's discretion is not only limited temporally but is also focused on serious, short-term issues relating to the safety of an applicant, ability to travel, immediate medical issues, impending births and deaths and, in the case of children, such considerations as finishing the school year, whether care has been arranged if they are remaining in Canada, or the need for special medical care in Canada (*Baron* at para 51: *Lewis* at paras 55, 83; *Forde* at para 36). The often-quoted language from *Baron* (at para 50) which situates the tone of the inquiry is that deferral should be reserved for those situations involving "the risk of death, extreme sanction or inhumane treatment" to the applicant;
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> 4. The existence of an outstanding H&C or spousal application in Canada is not a bar to removal absent special considerations. Both the timeliness of filing and

> the imminence of any decision on the application are important considerations for an officer *(Baron* at paras 51, 80: *Lewis* at paras 55-58, 80*; Forde* at paras 35-40). As stated in *Forde* (at para 36), even "in such 'special situations,' as discussed below, there are important temporal limits on a removal officer's discretion to defer removal".

[31] As will become clear below, in these types of cases there is often considerable overlap between the "serious issue" and "irreparable harm" elements of the test.

[32] In this case, the Applicant's deferral request was based on four arguments: (i) that he faced a serious risk to his personal safety upon return to Guatemala; (ii) that it is in the best interests of his Canadian born child for the removal to be deferred, since she has a serious medical condition and her next medical appointment is November 1, 2019; (iii) that he has filed a new H&C application; and (iv) that he is not psychologically, emotionally and physically fit to travel.

[33] I am not persuaded that the Applicant has met the high threshold for a "serious issue" in regard to the underlying judicial review application regarding the refusal to defer removal.

[34] First, the risks to the Applicant upon his return to Guatemala have been recently assessed by the PRRA officer as well as the deferral officer, and he did not submit any evidence to demonstrate that new risks have emerged. The deferral officer took into account the information on the overall country conditions, as well as the more recent information about a travellers' alert that had been issued in relation to certain areas of the country. There is no serious challenge raised in regard to this analysis.

[35] Second, the Applicant asserted that his daughter's best interests had not adequately been considered by the officer. This was the primary argument put forward in support of the serious issue element of the test. The Applicant asserts that his daughter's serious medical condition could not adequately be monitored or treated if she was to be removed to Guatemala, and he indicated that since he was the sole income earner for the family, his daughter would have to accompany him if he is removed.

[36] I agree with the Respondent that the evidence does not support this claim. The Applicant's daughters are Canadian citizens, and neither they nor his common law wife are subject to this removal order. Although their economic situation will likely change if the Applicant is removed, there is no evidence demonstrating why they would have to leave with him, and given the medical concerns for the daughter there is every reason to believe that the mother and children would remain in Canada to continue her monitoring and treatment here.

[37] Furthermore, the medical evidence about the daughter's condition indicates that she has had this condition since birth, and that she is subject to ongoing monitoring. She has regular appointments scheduled for November 2019, as well as January and March 2020. There is no indication of any recent change in her condition, or any urgent medical treatment that she requires. Her treating physician states that the medical system in Guatemala "may not be equipped" to treat or monitor her condition, but there is no information to indicate how the doctor came to that opinion.

[38] Next, the Applicant claims that his removal should be delayed because he has recently filed a new H&C request. The record shows that this H&C request was returned to the Applicant

because it was incomplete; he says that a new and complete application has been submitted, but the Respondent's system does not confirm that it has been received. Leaving that aside, the jurisprudence is clear that the filing of a request for H&C relief is not a bar to removal, absent special circumstances. There are no special reasons in this case to justify a stay on this basis.

[39] Finally, the Applicant submits that he is not psychologically, emotionally and physically fit to travel. In support of this he filed a letter dated September 27, 2019 from a Registered Psychologist. The letter indicates that the assessment was based on "one lengthy counselling/interview session". It states that the Applicant "has been dealing with extreme stress and depression/anxiety related to possible deportation…" and then reviews what the Applicant stated about his reasons for fearing a return to Guatemala. The letter ends by stating "I have little doubt that it would be in the best interests of [the Applicant] to remain in Canada. I strongly advise allowing him to remain in this country for his own well-being and the well-being of his family."

[40] I give this letter little weight in this context for several reasons. First, it is based on a single consultation; this is not the product of a long-term doctor-patient relationship. Second, it does not actually contain a medical diagnosis, but rather simply reports what the Applicant "has been dealing with." There is no reason to doubt that the prospect of being removed to Guatemala has caused the Applicant extreme stress, depression and anxiety, but that is not a medical diagnosis. Finally, the doctor does not prescribe any medication or immediate, short-term treatment or counselling; rather, an immigration remedy is proposed as the solution. This has been commented upon unfavourably by the Court in the recent past, and I would simply repeat

and adopt these concerns (see, for example: *Hernadi v Canada (Public Safety and Emergency Preparedness)*, 2018 CanLII 126350 (FC)).

[41] I therefore give this medical report little weight. It bears repeating that I do not doubt that the prospect of removal to Guatemala has caused the Applicant stress, anxiety and depression. There is no evidence, however, to support a conclusion that this renders him unfit to travel or that it goes beyond the usual disruption and heartbreak associated with being removed from one's family and connections to Canada. This is an unfortunate, but anticipated and ordinary, result of removal.

[42] For all of the above reasons, I am not persuaded that the Applicant has met the higher threshold to demonstrate a serious issue in relation to the deferral decision. In light of my conclusion on this issue, it is not necessary to consider in depth the other two elements of the test, and so I will merely summarize the most relevant considerations.

B. *Irreparable Harm*

[43] As noted above, there is considerable overlap between the arguments and evidence in support of the serious issue and irreparable harm elements of the test in this case. For the reasons explained above, I do not find that the Applicant has demonstrated that he will experience irreparable harm upon his return to Guatemala.

[44] The law requires that irreparable harm be established based on evidence, not mere speculation. As I have explained above, the evidence does not demonstrate a new immediate risk of harm, and the risks to the daughter associated with her medical condition are not established

because she is not under a removal order. The Applicant has not demonstrated irreparable harm to the degree of certainty demanded by the jurisprudence.

C. *Balance of Convenience*

[45] In view of the findings above, I find that the balance of convenience weighs in favour of the Respondent.

[46] Canada has an interest in the prompt removal of persons whose refugee claims have not been upheld (as articulated in s. 48(2), cited above). Canada also has an interest in respecting its obligations under the *Canadian Charter of Rights and Freedoms*, in particular the right to "life, liberty and security of the person" set out in s. 7, as described by the Supreme Court of Canada in *Suresh v Canada (Citizenship and Immigration)*, [2002] 1 SCR 3. Furthermore, Canada has an interest in living up to its solemn undertakings in international law, most particularly the United Nations Convention Relating to the Status of Refugees. The jurisprudence summarized above provides guidance on how these interests are reconciled and balanced in assessing a stay of removal.

[47] In this case, I have found that the alleged risks to the Applicant have been assessed, and that the short-term best interests of his children have been considered. On this basis, I find the balance of convenience weighs in favour of the Respondent.

JUDGMENT in IMM-5945-19

THIS COURT'S JUDGMENT is that the application for a stay of removal pending the determination of the Applicant's application for judicial review is denied.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5945-19
STYLE OF CAUSE:	ROLANDO HERNANDEZ v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	OCTOBER 4, 2019
JUDGMENT AND REASONS:	PENTNEY J.
DATED:	OCTOBER 5, 2019

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