Federal Court Cour fédérale

**Date: 20221104**

**Docket: IMM-2895-22**

**Citation: 2022 FC 1510**

**Ottawa, Ontario, November 4, 2022**

**PRESENT: The Honourable Mr. Justice Ahmed**

**BETWEEN:**

**SEBASTIAN HOYOS GRAJALES**
**YEIMI VANESSA GIL CARDONA**
**DANNA HOYOS GIL**

**Applicants**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondents**

# ORDER AND REASONS

## I. Overview

[1] The Applicants bring a motion for a stay of their removal from Canada, scheduled to take place on November 5, 2022.

[2] The Applicants request that this Court order a stay of their removal to Colombia until the determination of an underlying application for leave and judicial review of the refusal of their refugee claim by the Refugee Protection Division ("RPD").

[3] For the reasons that follow, this motion is granted. I find that the Applicants meet the tri-partite test required for a stay of removal.

## II. **Facts and Underlying Decision**

[4] The Principal Applicant, Sebastian Hoyos Grajales (Mr. "Hoyos"), is a 37-year-old citizen of Colombia. He is married to Yeimi Vanessa Gil Cardona (Ms. "Cardona"). The two have a seven-year-old daughter, Danna Hoyos Gil ("Danna"). They also have a son, who is seven months old and was born in Canada.

[5] In January 2021, while Mr. Hoyos was visiting the United States from Colombia, he was informed that his cousin, Stephen Grajales (Mr. "Grajales") and his friend had been kidnapped by members of the Revolutionary Armed Forces of Colombia ("FARC"). Mr. Grajales was detained for over six months and could not be located. Mr. Grajales' family received a ransom video, confirming the kidnappers' identity as FARC members and demanding over 100 million Colombian pesos.

[6] While still in the United States, Mr. Hoyos learned that Ms. Cardona, who was in Colombia, was receiving ominous phone calls soon after the kidnapping of Mr. Grajales. Ms. Cardona and Danna left Colombia to join Mr. Hoyos in the United States. The Applicants

arrived in Canada on March 25, 2021, and applied for refugee protection. Mr. Hoyos's Basis of Claim form included the circumstances of his cousin's death, as well as details of his uncle's death, his father's death, and other family members who fled Colombia and were granted refugee status in Canada. Mr. Hoyos claims that Danna has been suffering from anxiety and acute stress after the kidnapping of Mr. Grajales.

[7] In a decision dated March 9, 2022, the RPD denied the Applicants' refugee claim on the basis that two internal flight alternatives ("IFA") are available to the Applicants, and they that failed to establish that either of these IFAs would pose a risk to their safety.

[8] The Canadian Border Services Agency ("CBSA") issued a Direction to Report for the Applicants' removal, scheduled for 11:50 PM on October 13, 2022. The Applicants submitted a motion to stay this removal, which was denied in an Order of this Court on October 12, 2022.

[9] The Applicants claim they were prepared for their departure on October 13, 2022. Mr. Hoyos and Ms. Cardona spoke with Danna about their removal, and Danna witnessed her parents packing to leave. During the evening of October 13, 2022, Danna entered a state of acute stress and experienced a panic attack, which resulted in breathing issues. Mr. Hoyos and Ms. Cardona took Danna to the emergency department at a hospital in Hamilton, Ontario around 6:30 PM, and did not leave the hospital until the next morning. Mr. Hoyos claims that the attending physician at the hospital expressed concern over Danna's mental state, and prescribed her anxiety medication. The Applicants' motion record includes a copy of this prescription and letters from a social worker attesting to Danna's condition and need for urgent support.

[10] While at the hospital, between 9:00 PM to 10:00 PM, a CBSA officer called Mr. Hoyos, who informed the officer of his daughter's situation. Mr. Hoyos also claims that he updated his counsel about the situation and his call with CBSA.

[11] Mr. Hoyos claims that on October 20, 2022, he received another call from a CBSA officer, who asked multiple times whether Mr. Hoyos was a person by another name. Mr. Hoyos asked the officer who they were, to which the officer replied "immigration" and hung up.

[12] Mr. Hoyos claims that on October 29, 2022, his aunt informed him that immigration authorities were looking for him and gave Mr. Hoyos the number of the individual who had been calling. While on the phone with his aunt, Mr. Hoyos claims he received another call, but did not answer because he was speaking with his aunt. The call did not reveal a name or where it was coming from. He claims that he called the number given to him by his aunt without hesitation, and spoke to someone who informed him that immigration authorities were looking for him. He provided his aunt's address, explained that he was staying there, and provided specific information about where he was, so as not to evade authorities. Mr. Hoyos claims that about 20 minutes later, CBSA officers arrived at the home and arrested him. Witnessing this arrest, Danna began to cry, scream, and became visibly hysterical, in the presence of the CBSA officers. Mr. Hoyos claims that Danna saw him being placed in handcuffs and begged the officers not to take her father away.

[13] On October 29, 2022, Mr. Hoyos was placed in detention and informed that he would be removed to Colombia without his family, with no explanation for the separation. Mr. Hoyos

reached his counsel on the following Monday, which was the earliest he could contact her, and asked her to apply to stay his removal. Ms. Cardona informed Mr. Hoyos that Danna had been crying hysterically over the weekend, and was not eating or sleeping well.

[14] On November 1, 2022, while at counsel's office Ms. Cardona received a phone call from a CBSA officer, who was not aware of Danna's medical situation, nor that this Court had made a production order in the underlying judicial review application. Mr. Hoyos claims that the Applicants' counsel explained the Applicants' circumstances to the CBSA officer in detail, and sent the officer the production order and medical evidence regarding Danna.

[15] Mr. Hoyos claims that he attended his detention review on November 1, 2022 and November 2, 2022. He claims that the Immigration Division ("ID") found his testimony to be credible. The ID found that Mr. Hoyos's evidence contradicted the evidence disclosed by the CBSA. Mr. Hoyos was released on November 2, 2022, and immediately met with their counsel to formally retain her for the present application to stay his removal.

[16] In his affidavit, Mr. Hoyos states that at no point was he attempting to evade immigration authorities. He contacted the CBSA while at the hospital on the night of the Applicants' scheduled removal, remained in his home until he was no longer able to be there due to his lease ending, and provided a CBSA officer with his exact whereabouts when contacted. He expresses extreme concern for Danna's mental health, and fears for his life if he were to return to Colombia.

[17] Mr. Hoyos is scheduled to be removed on November 5, 2022. On November 3, 2022, Ms. Cardona was also served with a Direction to Report for her removal, also scheduled for November 5, 2022. The Applicants' motion record does not include a Direction to Report concerning Danna.

## III. **Analysis**

[18] The tripartite test for the granting of a stay is well established: *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA) ("*Toth*"); *Manitoba (A.G.) v Metropolitan Stores Ltd*., 1987 CanLII 79 (SCC), [1987] 1 SCR 110 ("*Metropolitan Stores Ltd.*"*); RJR-MacDonald Inc. v Canada (Attorney General),* 1994 CanLII 117 (SCC), [1994] 1 SCR 311 ("*RJR-MacDonald*"); *R v Canadian Broadcasting Corp,* 2018 SCC 5 (CanLII), [2018] 1 SCR 196.

[19] The *Toth* test is conjunctive, in that granting a stay of removal requires the applicant to establish: (i) a serious issue raised by the underlying application for judicial review; (ii) irreparable harm that would result from removal; and (iii) the balance of convenience favouring granting the stay.

### A. *Serious Issue*

[20] In *RJR-MacDonald*, the Supreme Court of Canada established that the first stage of the test should be determined on an "extremely limited review of the case on the merits" (*RJR-*

*MacDonald* at 314). The standard of review of an enforcement officer's decision is that of reasonableness (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 (CanLII), [2010] 2 FCR 311 at para 67).

[21] The Applicants submit that the production order issued by this Court for the underlying application for leave and judicial review of the negative refugee claim decision indicates that there is a strong likelihood of leave being granted, which indicates that the issues raised in the underlying application are neither frivolous nor vexatious, and therefore meet the low threshold for a serious issue. The Applicants submit that the underlying application raises serious issues about the reasonableness of the RPD's refusal of their refugee claim.

[22] The Respondent submits that a production order does not automatically lead to leave being granted, and the refusal of the Applicants' previous stay motion already considered this production order. There is therefore no serious issue.

[23] Having reviewed the parties' motion material and the underlying decision, I agree that there is a serious issue to be tried. The underlying application for judicial review raises issues surrounding the RPD's proper consideration of the evidence regarding the risk facing the Applicants in Colombia. This is a sufficiently serious issue to satisfy this first prong of the test.

[24] I take particular note of the Applicant's submission on this motion that the underlying RPD decision reveals a clear ignorance to the existence of Danna, let alone her best interests. I reproduce the following excerpts of the transcript of the underlying RPD hearing, between the

Board Member ("BM") and Ms. Cardona, the Secondary Claimant ("SC"), given the serious nature of this dismissiveness:

> SC: Well I felt a lot of fear because by that time we already knew that Steven had been kidnapped and so the very first thing that I did was call Sebastian to tell him what had happened.
>
> BM: Did you report this to the authorities?
>
> SC: No.
>
> BM: Why not?
>
> SC: Because of fear.
>
> BM: What were you fearing?
>
> SC: That something could happen to me or my daughter.
>
> BM: Who would do this? Who would harm you?
>
> […]
>
> BM: Do you have a child?
>
> SC: Yes.
>
> BM: Who is this child? Oh, yes right a minor claimant, I'm sorry. Ok. Was there an active investigation that was happening regarding Stevens kidnapping?

[25] Danna is one of the Applicants in this motion, and a claimant in the underlying refugee claim. She is central to the Applicants' narrative and it raises a serious issue that the RPD appears dismissive of her existence. Ultimately, the issues raised in the underlying application are sufficiently serious to meet this first prong of the tri-partite test.

B. *Irreparable Harm*

[26] At the second stage of the test, applicants are required to demonstrate that irreparable harm will result if relief is not granted. Irreparable harm does not refer to the magnitude of the harm; rather, it is a harm that cannot be cured or quantified in monetary terms (*RJR-MacDonald* at 341). This Court must be satisfied on a balance of probabilities that the harm is not speculative, but does not have to be satisfied that the harm will occur (*Xu v Canada (Minister of Employment and Immigration)*, [1994] 25 Imm. L.R. (2d) 120, 79 FTR 107 (FCTD); *Horii v Canada*, [1991] FCJ No 984, [1992] 1 FC 142 (FCA)).

[27] The Applicants submit that they will suffer irreparable harm if returned to Colombia. Specifically, the Applicants point to the detailed affidavit of Mr. Hoyos, outlining his daughter's fragile mental health, who suffers from acute anxiety resulting from the loss of family members and the fear of losing her father. The Applicants cite *Thomas v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1477, where this Court granted a stay motion and found irreparable harm to be made out based on the best interests of the applicant's child ("BIOC"). The Applicants also rely on *Danyi v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 112, where this Court found that psychiatric evidence concerning the child's short term best interests was significant in when assessing the reasonableness of an enforcement officer's decision. The Applicants submit that the evidence attesting to Danna's fragile mental health, her need for anxiety medication and ongoing counselling support, her experiences of trauma, and her strong connections to her community in Canada, all indicate that removal would result in irreparable harm, specifically in the context of Danna's best interests.

[28] The Respondent submits that the Order of this Court denying the Applicants' previous stay motion already concluded that irreparable harm was not made out. The Respondent also notes that the family are being removed together, and the Applicants provide insufficient evidence to show that Danna's mental health would suffer upon her own removal, or that she could not access anxiety medical or counselling in Colombia. The Respondent contends that being upset about leaving a community, stress, and anxiety are a natural consequence of removal, and does not amount to irreparable harm.

[29] I find that irreparable harm is made out in the Applicants' case and is the determinative issue on this motion. I take particular issue with the Respondent's central submission that the evidence of stress or anxiety shown in this case is a natural consequence of removal. In my view, a seven-year-old child experiencing acute stress and anxiety attacks, requiring anxiety medication at her young age, and triggered by the trauma of losing her family members and the persistent fear of losing her parents, cannot be accepted as a "natural" consequence of removal.

[30] The Applicants submitted several pieces of documentary evidence, including letters from Danna's Primary Care Social Worker stating that she was referred for urgent counselling following her emergency room visit on October 13, 2022, was experiencing "high levels of stress" and "an acute panic attack" due to the fear of losing her father, and her plan for bi-weekly counselling. The evidence also includes a prescription for anxiety medication, a record of the hospital visit on October 13, 2022, a letter from the Applicants' family physician attesting to Danna's fragile mental condition, and evidence of future appointments to address this condition. This cumulative evidence clearly reveals a risk to Danna's best interests if the Applicants are

removed, showing a cogent and direct connection between removal and Danna's mental wellbeing. Contrary to the Respondent's submission, this evidence could not have been before Justice Lafrenière in the previous stay motion, because it occurred on and after October 13, 2022. The events of October 13, 2022 exhibited the reality of the harm that may befall Danna if the Applicants are removed. This evidence sufficiently rises to the level of irreparable harm.

[31] I also take issue with the Respondent's submission that the family is being removed as a unit and the Applicants provided insufficient evidence of irreparable harm facing Danna if she is removed alongside her parents. The fact that the family is being removed together does not displace the clear risk to the BIOC revealed by the evidence. It does not discount or compensate for Danna's acute fear of losing her father, or the trauma of losing her uncle that resulted in mental suffering. This proposition does not reveal a sensitivity to the BIOC affected by removal and, ultimately, the irreparable harm in the Applicants' case turns on the BIOC.

C. *Balance of Convenience*

[32] The third stage of the test requires an assessment of the balance of convenience—a determination to identify which party will suffer the greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits (*RJR-MacDonald* at 342; *Metropolitan Stores Ltd.* at 129). It has sometimes been said, "Where the Court is satisfied that a serious issue and irreparable harm have been established, the balance of convenience will flow with the Applicant" (*Mauricette v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 420 (CanLII) at para 48). However, the Court must also consider the public interest to uphold the proper administration of the immigration system.

[33] The Applicants submit that the balance of convenience weighs in their favour, given the evidence of irreparable harm. While I find that the issue of irreparable harm is determinative of motion, I agree that the balance of convenience lies in favour of granting this stay motion.

[34] The Respondent submits that the Applicants have "unclean hands" due to their failure to appear for removal on October 13, 2022, and the balance of convenience therefore favours the expeditious enforcement of their removal. I find it troubling that the Respondent would characterize the parents' necessary action during their seven-year-old child's medical emergency as constituting "unclean hands". This suggests an expectation that Mr. Hoyos and Ms. Cardona should have prioritized traveling to Pearson Airport for their removal, over tending to their young child, while she was in a state of acute anxiety and distress. I note that in oral submissions, the Respondent further submitted that Danna's parents did not meaningfully prepare Danna for their removal, given her medical condition, and only disclosed their removal to her on October 13, 2022, therefore worsening the mental impact of the news.

[35] The Respondent's submissions regarding the parents' actions in caring for their seven-year-old child beg the question of what Mr. Hoyos and Mr. Cardona could have done for Danna that *would* have been deemed acceptable by the Respondent. Had the parents chosen to appear at the airport for their removal instead of taking their child to the hospital, would they have been labeled as unfit parents? Had they told Danna of their scheduled removal in the days prior to prepare her for it, would they have still been faulted for overburdening their child with this difficult news, much earlier than necessary? It offends the principles of natural justice to impugn

the Applicants for acting as fit parents are expected to, and then characterize these acts as constituting “unclean hands”.

[36] Ultimately, the Applicants meet the tri-partite test required for a stay of removal. This motion is therefore granted.

**ORDER in IMM-2895-22**

**THIS COURT ORDERS that**:

1. The Applicants' motion to stay their removal is granted.

2. The Applicants' removal to Colombia, currently scheduled for November 5, 2022, is stayed pending the final disposition of the underlying application.

"Shirzad A."
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IM-2895-22 |
| **STYLE OF CAUSE:** | SEBASTIAN HOYOS GRAJALES, YEIMI VANESSA GIL CARDONA AND DANNA HOYOS GIL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | NOVEMBER 4, 2022 |
| **ORDER AND REASONS:** | AHMED J. |
| **DATED:** | NOVEMBER 4, 2022 |

**APPEARANCES:**

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| Leanne Briscoe | FOR THE RESPONDENTS |

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