Date: 20080521

Docket: IMM-2291-08

Citation: 2008 FC 643

Vancouver, British Columbia, May 21, 2008

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

JOSE FRANCISCO CARDOZA QUINTEROS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This stay application came on for hearing in the afternoon of May 21, 2008, and was heard on an urgent basis as the Applicant was scheduled to be removed from Canada the next morning. These are my reasons for rejecting the application for a stay.

I. Background

[2] Mr. Cardoza Quinteros has been before this Court twice in recent weeks. Accordingly, the facts involving him are largely set out in the decisions of Justice Hansen dated April 17, 2008 in Court File IMM-3883-07 and of Justice Pinard dated May 2, 2008 in Court File IMM-2013-08.

[3] On February 22, 2008, the Immigration Division determined that Mr. Cardoza Quinteros was a member of the Mara Salvatrucha gang in El Salvador and was accordingly inadmissible to Canada for organized criminality under subsection 37(1)(a) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27. Mr. Cardoza Quinteros initially denied any membership in the Mara Salvatrucha gang. However, he has not challenged the finding of the Immigration Division that he was in fact a member of that gang.

[4] At various points in the Immigration process Mr. Cardoza Quinteros has admitted to involvement in criminal and violent acts as a gang member. Specifically, he admitted having committed, or being complicit in:

(a) Killing and injuring people by throwing hand grenades at them;

(b) Shooting a rival gang member in the chest;

(c) Being present at the beheading of a woman and the displaying of her severed head in the parking lot of the National Police;

(d) Being convicted for armed robbery; and

(e) Witnessing 100-150 murders.

He further admitted to having been arrested 50 to 60 times and having killed an estimated four people.

[5] He claims that he was forced out of the gang in 2004 after being blamed by the gang for a prison riot that resulted in the deaths of 300 persons, including 60 gang members. He left El Salvador on April 4, 2007 and arrived in Canada via Mexico and the United States on September 2, 2007.

[6] As an inadmissible person, Mr. Cardoza Quinteros is subject to deportation. However, he made an application for a Pre-Removal Risk Assessment (PRRA) claiming that he was at risk from his former gang if returned to El Salvador because he had become "a high-profile informant against the Mara Salvatrucha gang" and that his statements in Canada concerning the gang had been reported in Canada and would likely have come to the attention of the gang in El Salvador.

[7] As at the date of the PRRA Officer's decision there was no evidence that the Applicant's statements had been published in El Salvador, but the officer wrote that in reaching his decision he had weighed the possibility that media coverage of recent events involving Mr. Cardoza Quinteros in Canada may have or could arise in El Salvador. The Applicant has filed material on this application indicating that there has now been some coverage of Mr. Cardoza Quinteros's situation in Canada in the El Salvadoran media.

[8] On May 15, 2008, a decision was made on Mr. Cardoza Quinteros's PRRA application. The PRRA Officer concluded that Mr. Cardoza Quinteros would not be subject to risk of torture, risk to life or risk of cruel and unusual treatment or punishment if he were returned to El Salvador.

[9] Mr. Cardoza Quinteros is before this Court seeking a stay of the deportation order against him. He is scheduled to be removed from Canada at 9 a.m. on Thursday, May 22, 2008. He asks that this removal order be stayed until his application for leave and judicial review of the PRRA Officer's decision is determined.

II. Analysis

[10] It is common ground that in order to obtain a stay an applicant must demonstrate: (1) that there is a serious issue to be tried; (2) that the applicant would suffer irreparable harm if no order were granted; and (3) that the balance of convenience favours the granting of the order: *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.).

III. Serious Issue

[11] Mr. Cardoza Quinteros raises the following as serious issues to be tried in his application for leave and judicial review of the PRRA Officer's decision: (1) that it was unreasonable for the officer to find that adequate state protection is available in El Salvador, given Mr. Cardoza Quinteros's circumstances; (2) that the officer erred in failing to consider that El Salvador, in Mr. Cardoza Quinteros's case, is or may be an agent of persecution or harm; and (3) that the officer failed to consider the absence of diplomatic assurances that Mr. Cardoza Quinteros would not be arbitrarily detained, tortured or killed if he were removed from Canada to El Salvador.

[12] The Applicant submits that the threshold for satisfying the Court that there is a serious issue to be tried is low. It was submitted that the Applicant need only demonstrate that the issues being raised are not frivolous or vexatious.

[13] The threshold cannot automatically be met simply by formulating a ground of judicial review which, on its face, appears to be arguable. It is incumbent on the Court to test the grounds advanced against the impugned decision and its reasons, otherwise the test would be met in virtually every case argued by competent counsel.

[14] Where the decision that underlies the stay application is a negative PRRA decision which the applicant claims exposes him to persecution or subjects him to a danger of torture or a risk to life or cruel or unusual treatment or punishment, it may be that once the serious issue test has been

satisfied the remaining two tests will, in most instances, also be met: *Figurado v. The Solicitor General of Canada*, 2005 FC 347 at paragraph 45.

[15] That being so, it seems to me that the Court must exercise vigilance in cases involving a negative PRRA decision to satisfy itself that the issues raised by an applicant are truly serious issues and not issues that merely have the appearance of seriousness.

[16] An allegation that the PRRA Officer's decision was not reasonable based on the evidence before him appears to be a serious issue but may not be when one explores the decision at issue and the reasoning behind it. Further, while it is not the role of the Court in a stay application to conduct a full judicial review of the decision, when considering whether a serious issue has been raised some consideration must be given to the considerable deference that will be shown to that officer's decision if and when a judicial review is conducted. In this respect, the following observations of the Supreme Court of Canada in *Dunsmuir v. New Brunswick*, 2008 SCC 9, paras. 47 to 49 must to be kept in mind.

> Reasonableness is a deferential standard animated by the principle that underlies the development of the two previous standards of reasonableness: certain questions that come before administrative tribunals do not lend themselves to one specific, particular result. Instead, they may give rise to a number of possible, reasonable conclusions. Tribunals have a margin of appreciation within the range of acceptable and rational solutions. A court conducting a review for reasonableness inquires into the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes. In judicial review, reasonableness is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process. But it is also concerned with whether the decision falls within a range of possible,

acceptable outcomes which are defensible in respect of the facts and law.

The move towards a single reasonableness standard does not pave the way for a more intrusive review by courts and does not represent a return to pre-*Southam* formalism. In this respect, the concept of deference, so central to judicial review in administrative law, has perhaps been insufficiently explored in the case law. What does deference mean in this context? Deference is both an attitude of the court and a requirement of the law of judicial review. It does not mean that courts are subservient to the determinations of decision makers, or that courts must show blind reverence to their interpretations, or that they may be content to pay lip service to the concept of reasonableness review while in fact imposing their own view. Rather, deference imports respect for the decision-making process of adjudicative bodies with regard to both the facts and the law. The notion of deference "is rooted in part in a respect for governmental decisions to create administrative bodies with delegated powers" (*Mossop*, at p. 596, *per* L'Heureux-Dubé J., dissenting). We agree with David Dyzenhaus where he states that the concept of "deference as respect" requires of the courts "not submission but a respectful attention to the reasons offered or which could be offered in support of a decision": "The Politics of Deference: Judicial Review and Democracy", in M. Taggart, ed., *The Province of Administrative Law* (1997), 279, at p. 286 (quoted with approval in *Baker*, at para. 65, *per* L'Heureux-Dubé J.; *Ryan*, at para. 49).

Deference in the context of the reasonableness standard therefore implies that courts will give due consideration to the determinations of decision makers. As Mullan explains, a policy of deference "recognizes the reality that, in many instances, those working day to day in the implementation of frequently complex administrative schemes have or will develop a considerable degree of expertise or field sensitivity to the imperatives and nuances of the legislative regime": D. J. Mullan, "Establishing the Standard of Review: The Struggle for Complexity?" (2004), 17 *C.J.A.L.P.* 59, at p. 93. In short, deference requires respect for the legislative choices to leave some matters in the hands of administrative decision makers, for the processes and determinations that draw on particular expertise and experiences, and for the different roles of the courts and administrative bodies within the Canadian constitutional system.

[17] Keeping firmly in mind the exhortation of the Supreme Court that "deference as respect" requires that the Court pay respectful attention to the reasons offered or which could be offered in support of a decision, I am of the view that when an applicant seeks a stay of a removal order in circumstances such as exist here, the alleged grounds of review must be subjected to some meaningful level of scrutiny before accepting that they are, in fact, serious issues.

[18] Where the Court is satisfied that the applicant will be unsuccessful in establishing that the decision, or a part of it, fails to meet the reasonableness analysis set out in *Dunsmuir*, it should reject a submission that the decision is unreasonable to be a serious issue to be tried. This is not to suggest that the Court on a stay application should engage in a detailed analysis, rather, it is to say that the Court must engage in more than a cursory analysis.

[19] With this framework, I turn to consider the alleged serious issues pleaded by the Applicant.

A. *Was it unreasonable for the officer to find that adequate state protection is available in El Salvador?*

[20] The PRRA Officer correctly noted that there is a presumption that a state is capable of protecting its citizens: *Ward v. Canada (Minister of Employment and Immigration)* (1993), 103 D.L.R. (4th) 1 (S.C.C.). The burden is on an applicant to rebut this presumption by providing “clear and convincing confirmation of the state's inability to protect...absent an admission by the national’s state of its inability to protect that national". The officer further noted that *Ward* proposes that “except in situations of complete breakdown of the state apparatus, it should be assumed that the state is capable of protecting a claimant".

[21] The PRRA Officer then reviewed information gathered from a number of country fact sheets and concluded:

> Taken together, this evidence supports the finding that the government of El Salvador demonstrates a serious intent and the necessary state structures to combat the gang violence problem, notwithstanding the limited successes reportedly realized to date.

[22] The Applicant argued before the PRRA Officer that the only protection that would be available to him would be under the government's Center for Victims and Witnesses and that this was ineffectual. The officer reviewed and relied on the most recent US Department of State Country Report on Human Rights Practices in El Salvador, (2007). He notes that the report indicates that as of September there were 1,369 persons in “some type of police witness or victim protection program” and that “the government’s Centre for Victims and Witnesses provided shelter and

protection to 50 victims, 40 witnesses, and 19 confessed criminals". After reciting the appropriate passages from that report, he concludes:

> While it is very disturbing that at least two persons who had availed themselves of the protection of the state were killed during the year, this evidence supports the finding that a much larger group of individuals were effectively protected by the state. By this evidence I find the mechanisms for the protection of victims, witnesses and even criminals under threat are in place that would offer adequate though not necessarily perfect protection to the applicant in El Salvador.

[23] The officer conducted a thorough review of the evidence before him. He correctly analyzed and characterized the risk to the Applicant from his former gang. In my view, he reached a decision on the availability of state protection for Mr. Cardoza Quinteros that was without question within the range of possible acceptable outcomes which are defensible in respect of the facts and law. In my view, the Respondent is correct in asserting that this issue raised by the Applicant is really a disagreement with the conclusions drawn by the PRRA Officer on the evidence before him and is not a serious issue that would support a stay of the removal order.

B. *Did the officer err in failing to consider that El Salvador is or may be an agent of persecution or harm?*

[24] Mr. Cardoza Quinteros did not raise any allegation in his submissions to the PRRA Officer that El Salvador might itself be an agent of harm. It was raised by the PRRA Officer because there was documentary evidence before him that indicated that some gang members or persons perceived to be gang members because of their gang tattoos have experienced arbitrary detention or detention under harsh conditions, including treatment rising to the level of torture, at the hands of the state.

[25] The officer's conclusion in this respect is as follows:

> The applicant submits that he is no longer a member of a gang and has no outstanding criminal charges. These circumstances, in conjunction with the fact that his tattoos do not indicate a specific gang affiliation, and are situated in a manner that would enable him to largely conceal them with clothing, causes me to find that there are no probable grounds to believe that he would be targeted for treatment constituting a risk to his life, torture or cruel and unusual treatment or punishment by state actors or by criminal actors targeting perceived gang members.

[26] The Applicant submits that the officer's determination that he can conceal his tattoos is either perverse or capricious given that one tattoo is on the back of his right hand. I do not agree. Even a tattooed hand may be hidden from sight. More troubling however, is the officer's assertion that the tattoos did not indicate a "specific gang affiliation".

[27] I note that Mr. Cardoza Quinteros in his Personal Information Form filed in support of his refugee claim denied that his tattoos were gang related. Accordingly, it may well have been open to the PRRA Officer to find that the tattoos were not indicative of any specific gang. Nonetheless, in my view the weight of the evidence points to them being specifically indicative of the Mara Salvatrucha gang.

[28] As was pointed out by the Applicant, the officer who detained Mr. Cardoza Quinteros at Immigration for questioning did so because he understood that the tattoos he observed were known to be El Salvadoran gang tattoos. If they are known as such in Canada, it is reasonable to conclude that they would be even more quickly identified in El Salvador. If the PRRA Officer is in error with

respect to the identifiable nature of the tattoos, does this raise a serious issue with respect to whether the officer erred in failing to find that El Salvador may be an agent of persecution that will target the Applicant?

[29] It is incumbent that the PRRA Officer's entire decision is considered when answering that question. I note that there was other evidence that was before the PRRA Officer which supports the view that this error is inconsequential to the assessment of the reasonableness of the officer's conclusion.

[30] The PRRA Officer reproduces the transcript of an interview with Mr. Cardoza Quinteros in which he described his involvement in criminal acts and acts of violence as a gang member. The PRRA Officer notes: "He stated that he had been arrested 50-60 times and his most serious conviction was for armed robbery". There is no evidence that Mr. Cardoza Quinteros did not have his tattoos when he was previously arrested nor was there any evidence that he was subjected to any harm at the hands of the authorities while arrested. These arrests occurred when Mr. Cardoza Quinteros was an admitted gang member.

[31] The Applicant argues that these arrests occurred before the sort of threatened state action feared commenced. However, there was evidence that Mr. Cardoza Quinteros remained in El Salvador from 2004 to 2007 when the alleged threatened state action was occurring, with short periods of illegal travel into the United States. There was no evidence offered by him to indicate that he was in any manner subjected to abuse by the state during this period. In fact, he provided evidence that in December 2005 he fought with a gang member "who was then taken away by the

police". This, if anything, supports the conclusion reached by the PRRA Officer that state protection is available to Mr. Cardoza Quinteros and that there is no probable threat from state authorities.

[32] Accordingly, in my view, the PRRA Officer did properly consider whether El Salvador is or may be an agent of persecution or harm. In my view, his finding that there are no probable grounds to believe that Mr. Cardoza Quinteros would be targeted for harmful treatment by state authorities is without question within the range of possible acceptable outcomes which are defensible in respect of the facts and law and thus is not a serious issue to be tried.

C. *Did the officer err in failing to consider the absence of diplomatic assurances that Mr. Cardoza Quinteros would not be arbitrarily detained tortured or killed if he were removed from Canada to El Salvador?*

[33] Mr. Cardoza Quinteros submits that since the PRRA Officer acknowledged the existence of objective grounds to believe that Mr. Cardoza Quinteros faces a serious danger from the Mara Salvatrucha gang and from government authorities, it was incumbent on the Respondent to seek and obtain assurances from the government of El Salvador that he would receive the best possible protection. He cites as authority for the impact such assurances have the decision of Justice de Montigny in *Sing v. Canada (Minister of Employment and Immigration)*, 2007 FC 361, para. 87.

[34] The Respondent in his Memorandum of Fact and Law responds as follows:

> …cases involving diplomatic assurances are unique and applicable to particular circumstances. In the case at bar, Mr. Cardoza Quinteros has not provided any evidence that the El Salvadoran authorities

> have a particular interest in him, or that he is wanted in El Salvador for prosecution of a crime for which the death penalty or other punishment will be meted. There is no reason why Canada would seek diplomatic assurances regarding Mr. Cardoza Quinteros, or that the non-existence of such an assurance demonstrates an error on the part of the PRRA officer. Mr. Cardoza Quinteros does not face a prima facie risk, and the PRRA officer found that state protection was adequate and available to him.

[35] In my view the finding of the PRRA Officer that state protection was available and, while not perfect, was adequate, is a complete answer to the submission of the Applicant that the PRRA Officer erred in failing to consider the absence of diplomatic assurances. Accordingly, I find that this issue is not a serious issue to be tried.

IV. Conclusion

[36] I am not persuaded that Mr. Cardoza Quinteros has raised any serious issue that would warrant the grant of a stay of the removal order. Having failed to meet one of the branches of the tripartite test, this application for a stay will be dismissed. It is not necessary that I examine whether the Applicant has met the other two branches of the *Toth* tripartite test.

ORDER

THIS COURT ORDERS that the application for an Order pursuant to s. 18.2 of the *Federal Courts Act* upon short notice pursuant to Rule 362(2) of the *Federal Courts Rules*, staying the Deportation Order against the Applicant, until the Application for Leave and for Judicial Review is determined on its merits is dismissed.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2291-08
STYLE OF CAUSE:	JOSE FRANCISCO CARDOZA QUINTEROS v. THE MIINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Vancouver, BC
DATE OF HEARING:	May 21, 2008
REASONS FOR ORDER AND ORDER:	ZINN J.
DATED:	May 21, 2008

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