Date: 20090121

Docket: IMM-222-09

Citation: 2009 FC 56

Ottawa, Ontario, January 21, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ANTONIO COLLANTES SALAZAR

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary

[1] On January 20, 2009, at 9:48 a.m., the applicant served his motion record on the respondent seeking a stay of removal to the United States scheduled for January 22, 2009, at 8:00 a.m.

[2] The Court could refuse to hear this last-minute application. A hearing at the last minute prejudices the respondent because it does not enable him to adequately prepare.

[3] The applicant could have filed his stay motion within the time limits set out in the *Federal Courts Rules*, SOR/98-106. Indeed, it appears from paragraph 24 of the applicant's affidavit that he

received the notice to appear for the removal on January 7, 2009. However, as it appears from paragraph 26 of his affidavit, he waited until January 16, 2009, before requesting a deferral of the removal. No satisfactory explanation was given for his delay in at least filing this stay motion in the Federal Court.

[4] [7] This Court has stated on numerous occasions that the hearings on applications to stay filed at the last minute, except under exceptional circumstances, do not favour the interests of justice in that they do not enable the respondent in particular to adequately prepare:

> As stated by this Court in numerous occasions, "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 interest of justice. A stay is an extraordinary procedure which deserves thorough and thoughtful consideration (*Matadeen v. The Minister of Citizenship and Immigration*, June 22, 2000, IMM-3164-00 (FCTD)).

(*Melendez v Canada (Minister of Public Safety and Emergency Preparedness)*, 2005 FC 1646, 149 A.C.W.S. (3d) 642).

[5] Similarly, in *Al Asali v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 860, 150 A.C.W.S. (3d) 444, Justice Yves de Montigny found as follows:

> [5] This kind of behaviour must be discouraged, as it abuses the judicial process and prejudices the respondent. The granting of a stay is an exceptional remedy, and it can be denied to those who prefer to wait to the last minute to present their case on short notice, in the absence of an adequate explanation for their delay . . .

II. Facts

[6] In September 2003, the Revolutionary Armed Forces of Columbia (FARC) asked Juan Pablo Collantes, the applicant's son, to collaborate in their activities. He refused and was beaten. The FARC began monitoring the area around the family home.

[7] In November 2003, his sister Luz Stella was followed by individuals who threatened to rape her. The applicant also received a telephone call threatening the entire family.

[8] Also, in Peru, the Shining Path has been watching the applicant's family since 1994 because his father had refused to give them his land. His brother was killed and one of his half-brothers was incarcerated on charges of terrorism.

[9] Juan Pablo, the applicant's son, left Columbia on December 18, 2003, for the United States; the applicant and his daughter, Luc Stella, joined him on January 8, 2004. Together, they arrived in Canada on January 12, 2004, and claimed refugee status at the Saint-Bernard-de-Lacolle border crossing.

[10] On May 13, 2008, the claimant's two applications, the application for a pre-removal risk assessment (PRRA) and the application for permanent residence based on humanitarian and compassionate considerations (APR), were denied by the PRRA officer.

[11] Justice Richard Mosley dismissed two applications for leave and judicial review disputing these last two negative decisions.

[12] A letter dated December 1, 2008, was sent to the applicant, summoning him to attend a pre-removal interview on January 7, 2009.

[13] On January 7, 2009, the applicant met with an enforcement officer.

[14] At this interview, the officer set the departure date for January 22, 2009, at 8:00 a.m., to the United States.

[15] On January 16 , 2009, a request to the officer to defer his removal date was refused.

[16] On January 19, 2009, the applicant filed an application for leave and judicial review (ALJR) disputing the refusal to defer the removal date set for January 22, 2009.

III. Issue

[17] To assess the merits of the stay motion, the Court must determine whether the applicant meets the three jurisprudential criteria established by the Federal Court of Appeal in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.). These three criteria are as follows:

a. the existence of a serious issue;

b. the existence of irreparable harm;

c. the assessment of the balance of convenience.

IV. Analysis

[18] It is to be noted that all three requirements must be met for this Court to grant the requested stay. If one of them is not met, this Court cannot grant the requested stay.

A. Serious issue

[19] The applicant's stay motion is attached to an application for leave disputing the officer's refusal to defer the removal date.

[20] The officer has very limited discretion. Among the factors that an applicant can raise and that can permit an officer to defer the removal, there are, as this Court decided in *Vieira*, illness, impediments to travelling and perhaps in cases of long-standing applications that were brought on a timely basis but have yet to be resolved; that is not the case here.

> [20] The discretion that a Removal officer may exercise is very limited, and in any case, is restricted to when a removal order will be executed. In deciding when it is "reasonably practicable" for a removal order to be executed, a removal officer may consider various factors such as illness, other impediments to travelling, and perhaps in cases of long-standing applications that were brought on a timely basis but have yet to be resolved.

(*Vieira v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 626, 158 A.C.W.S. (3d) 450).

[21] In *Arroyo v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 260, 146 A.C.W.S. (3d) 525, this Court reiterated the principle of an enforcement officer's limited

discretion and stated that it is not the officer's role to re-evaluate all the humanitarian and compassionate factors in a case:

> [20] It is trite law that a removals officer has limited discretion to defer the removal of a person who subject to an enforceable removal order. If there is a valid and enforceable removal order, immediate removal should be the rule and deferral the exception. Furthermore, a deferral decision ought only to be set aside if it was patently unreasonable. (*Immigration and Refugee Protection Act*, S.C. 2001, c. 27, s. 48; *Padda* v. *Canada (M.C.I.)* 2003 FC 1081; *Hailu* v. *Canada (Sol. Gen.)*, 2005 FC 229.)
>
> [22] Moreover, a removals officer does not have to defer a person's removal simply because that person intends to file, or has filed an H & C application. Furthermore, the removals officer is not obligated to evaluate the merits of any outstanding H & C application or conduct his or her own assessment of the possible H & C factors (*Padda, supra*; *Morello, supra*).

(Also, *Sharma v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1144, 161 A.C.W.S. (3d) 957 at para. 22).

[23] The applicant's situation is not a source of a judicial stay.

[24] A removals officer can intervene only for departure arrangements, or compelling or imminent situations. The applicant's situation does not correspond to such situations, and the officer did not err by refusing to defer the date of his removal (page 8 of the applicant's motion record):

> [21] The Court has established that removals officers have limited discretion to defer a removal **by reason of special or compelling circumstances**.
>
> > [37] It is well-established law that the discretion to defer a removal is very limited. It would be contrary to the purposes and objects to the Act to expand, by judicial declaration, a removal officer's limited discretion so as to mandate a "mini H&C" review prior to removal (*Davis v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1628 paragraph 4 (T.D.) (QL); *John v. Canada*

> *(Minister of Citizenship and Immigration)* 2003 F.C.J. No. 583 (T.D.) (QL).

(*Adviento*, above; See also: *Simoes*, above; *Williams*, above; *Prasad*, above; *Griffith*, above.)

[22] The applicant did not demonstrate that she had submitted evidence to the removals officer that could constitute sufficient justification for the officer to exercise his discretion, which is limited to deferring a removal **by reason of special or compelling circumstances:**

> [45] The order whose deferral is in issue is a mandatory order which the Minister is bound by law to execute. **The exercise of deferral requires justification for failing to obey a positive obligation imposed by statute**. That justification must be found in the statute or in some other legal obligation imposed on the Minister which is of sufficient importance to relieve the Minister from compliance with section 48 of the Act [*Immigration Act*, R.S.C. 1985, c. 1-2]. (Emphasis added.)

(*Wang*, above)

[23] The applicant simply states in her affidavit that the officer [TRANSLATION] "refused to stay the removal despite the fact that I told him about the ongoing sponsorship proceedings" (paragraph 16, Affidavit of the Applicant, page 12 of the **Motion Record**).

[24] It is settled law that a pending sponsorship application is not *per se* an obstacle to removal.

> [52] Turning to the issue in the underlying judicial review, the Removal Officer's refusal to defer the removal pending the disposition of the H & C application, I find no serious issue with regard to the Removal Officer's conduct. As set out above, a pending H & C application on grounds of family separation is not itself grounds for delaying a removal. To treat it as such would be to create a statutory stay which Parliament declined to enact. *Green v. Canada (Minister of Employment and Immigration)*, [1984] 1 F.C. 441 (C.A.), (1983) 49 N.R. 225, cited in *Cohen v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 589, (1995), 31 Imm. L.R. (2d) 134, per Noël J. (as he then was).

(*Wang*, above; See also: *Banwait v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 522, paragraphs 17 to 19 (T.D.) (QL).)

> [25] The applicant clearly did not submit any evidence that could constitute justification for the removals officer to defer the removal.
>
> [26] Considering all of the foregoing, the applicant failed to raise a serious issue in support of her motion. The motion for a stay of removal could be dismissed on this ground alone.

(*Mendoza Duran v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 738, [2007] F.C.J. No. 988 (QL)).

[25] The applicant claims that the rest of his family, who are in Columbia, are planning to settle in Canada.

[26] Right now, that contention is speculative.

[27] The applicant has not demonstrated the existence of a serious issue.

B. Irreparable harm

[28] In this case, the applicant had the opportunity on several occasions to assert that his life and safety were at risk in his country. The Immigration and Refugee Board (IRB), the Federal Court and the PRRA officer determined that there was no risk for the applicant.

[29] In the part entitled [TRANSLATION] "Irreparable harm", the applicant bases his harm on the risks that were assessed on his PRRA and HC application.

[30] In addition, the Court confirmed the PRRA decision by refusing to grant the ALJR filed against that decision.

[31] Therefore, the PRRA officer's findings are accepted as facts, and the applicant has not demonstrated the existence of irreparable harm.

[32] It is important to point out that the notion of irreparable harm was defined by the Court in *Kerrutt v. Canada (Minister of Employment and Immigration)* (1992), 53 F.T.R. 93, 32 A.C.W.S. (3d) 621, by Justice Andrew McKay, as the return of a person to a country where his or her safety or life is in jeopardy.

[33] This decision was followed by Justice Sandra Simpson where, in *Calderon v. Canada (Minister of Citizenship and Immigration)* (1995), 92 F.T.R. 107, 54 A.C.W.S. (3d) 316, she stated the following with respect to the definition of irreparable harm established in *Kerrutt*, above:

> [22] . . . This is a very strict test and I accept its premise that irreparable harm must be very grave and more than the unfortunate hardship associated with the breakup or relocation of a family.

[34] With respect to the applicant's separation from his two children in Canada, the jurisprudence is well established with respect to the principle that family separation is not irreparable harm but a usual consequence of deportation:

> [36] . . .
>
> [TRANSLATION]
>
> Regarding the applicant's separation from his spouse, it is well established in the jurisprudence that such a separation is not, in itself, irreparable harm (see, for example, *Celis v. Canada* (*Minister of Citizenship and Immigration*), [2002] F.C.J. No. 1679 (F.C.T.D) (QL), 2002 FCT 1231; *Parsons v. Canada* (*Minister of Citizenship and Immigration*), [2003] F.C.J. No. 1161 (FC) (QL), 2003 FC 913; *Damiye v. Canada* (*Minister of Citizenship and Immigration*), [2001] F.C.J. No. 70 (F.C.T.D.) (QL); *Melo v. Canada* (*Minister of Citizenship and Immigration*), [2000] F.C.J. No. 403 (F.C.T.D.) (QL); *Selliah v. Canada* (*Minister of Citizenship and Immigration)*, [2004] F.C.J. No. 1200 (FCA) (QL), 2004 FCA 261).
>
> *(Samee c. M.C.I. & MSPPC*, No. IMM-3616-07, September 25, 2007, Pinard J. (F.C.).

(*Camara v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 1089,

[2008] F.C.J. No. 1377 (QL)

[35] As Justice Denis Pelletier stated in *Melo v. Canada (Minister of Citizenship and*

Immigration), 188 F.T.R. 39, [2000] F.C.J. No. 403 (F.C.T.D.) (QL):

> [21] These are all unpleasant and distasteful consequences of deportation. But if the phrase irreparable harm is to retain any meaning at all, it must refer to some prejudice beyond that which is inherent in the notion of deportation itself. To be deported is to lose your job, to be separated from familiar faces and places. It is accompanied by enforced separation and heartbreak. There is nothing in Mr. Melo's circumstances which takes it out of the usual consequences of deportation.

[36] Finally, in *Selliah (Minister of Citizenship and Immigration)*, 2004 FCA 261, [2004] F.C.J.

No. 1200 (QL), the Federal Court of Appeal wrote the following:

> [13] The removal of persons who have remained in Canada without status will always disrupt the lives that they have succeeded in building here. This is likely to be particularly true of young children who have no memory of the country that they

> left. Nonetheless, the kinds of hardship typically occasioned by removal cannot, in my view, constitute irreparable harm for the purpose of the *Toth* rule, otherwise stays would have to be granted in most cases, provided only that there is a serious issue to be tried: *Melo v. Canada (Minister of Citizenship and Immigration)*, (2000), 188 F.T.R. 29.

[37] In addition, at paragraph 8 of the part entitled [TRANSLATION] "Irreparable harm", the applicant refers to section 7 of the *Charter*, saying that everyone has the right to life, liberty and security of the person.

[38] This is what the Court stated on this point in the context of a stay motion:

> [37] It is clearly established in case law that the removal of a person from Canada is not contrary to the principles of natural justice and that the enforcement of a removal order is not contrary to sections 7 and 12 of the *Charter*. (*Canada (Minister of Employment and Immigration) v. Chiarelli*, [1992] 1 S.C.R. 711, at pages 733-735; *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539 at paragraph 46; *Isomi Canada (Minister of Citizenship and Immigration)*, 2006 FC 1394, [2006] F.C.J. No. 1753 (QL), at paragraph 32 (Simon Noël J.).)

(*Aoutlev Canada (Minister of Citizenship and Immigration)*, 2007 FC 111, [2007] F.C.J. No. 183 (QL).

[39] The applicant has not proven the existence of irreparable harm.

C. Balance of convenience

[40] In the part entitled [TRANSLATION] "Balance of convenience", the applicant refers to a pending application for permanent residence.

[41] There is nothing that shows such a situation in this case.

[42] The applicant says that he is able to support himself and that he is not a danger to the public.

[43] In *Selliah*, above, the Federal Court of Appeal stated that such criteria do not demonstrate that the balance of convenience lies in an applicant's favour.

> [21 Counsel says that since the appellants have no criminal record, are not security concerns, and are financially established and socially integrated in Canada, the balance of convenience favours maintaining the *status quo* until their appeal is decided.
>
> [22] I do not agree. They have had three negative administrative decisions, which have all been upheld by the Federal Court. It is nearly four years since they first arrived here. In my view, the balance of convenience does not favour delaying further the discharge of either their duty, as persons subject to an enforceable removal order, to leave Canada immediately, or the Minister's duty to remove them as soon as reasonably practicable: IRPA, subsection (48)2. This is not simply a question of administrative convenience, but implicates the integrity and fairness of, and public confidence in, Canada's system of immigration control.

[44] In the absence of a serious issue and irreparable harm, the balance of convenience favours the Minister, who has an interest in seeing to the effective and timely implementation of the deportation order (*Mobley v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 65 (QL)).

[45] Indeed, subsection 48(2) of the IRPA states:

48. (1) Enforceable removal order – A removal order is enforceable if it has come into force and is not stayed.	**48.** (1) Mesure de renvoi – La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait

(2) Effect – If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as it reasonably practicable.	pas l'objet d'un sursis. (2) Conséquence – l'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.

V. Conclusion

[46] Based on all of the foregoing, the applicant does not meet the jurisprudential criteria for obtaining a judicial stay.

JUDGMENT

THE COURT ORDERS that the application for a stay is dismissed.

"Michel M.J. Shore"
Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Anthony Karkar	FOR THE APPLICANT
Steve Bell	FOR THE RESPONDENT

SOLICITORS OF RECORD:

ANTHONY KARKAR, Counsel Montréal, Quebec	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT