Date: 20090623

Docket: IMM-2457-09

Citation: 2009 FC 658

Ottawa, Ontario, June 23, 2009

PRESENT: The Honourable Mr. Justice Orville Frenette

BETWEEN:

BACA MEJIA, Neiby Judith

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] This is an application for a stay of an order to remove the applicant to the United States of America (United States) that should have been enforced at noon on May 28, 2009, but she did not appear at the removal location. An arrest warrant has been issued against her.

I. Relevant facts

[2] The applicant, 31 years of age, is a citizen of Honduras. In 2002, she went to the United States where she stayed until March 2003, when she returned to Honduras. In 2003 she went back to the

United States, where she claimed refugee protection, but then came to Canada in September 2003, claiming refugee status. On October 13, 2003, she gave birth to a child in Canada.

II. Proceedings

[3] The applicant's refugee claim was denied on December 3, 2004, and, on January 12, 2005, the Federal Court refused to grant leave for an application for judicial review of this decision.

[4] In September 2006, the applicant filed a pre-removal risk assessment application (PRRA application); it was denied in a decision dated January 11, 2007.

[5] On October 11, 2007, the applicant was removed to the United States.

[6] On January 8, 2009, she came back to Canada. On April 8, 2009, her second PRRA application was denied. On May 15, 2009, she filed an application for judicial review of this last decision.

[7] On May 8, 2009, she was summoned to an interview in Niagara Falls, Ontario with a removal officer, who informed her that she was to be removed from Canada on May 28, 2009, at noon. The applicant asked the officer for additional time since her son had a medical appointment on June 1, 2009, and a dentist appointment on June 16, 2009. The officer told her that she needed to give him written proof of these facts before he could grant her an administrative stay of the removal order. She did not give such documents to the removal officer.

[8] On May 15, 2009, she filed this application for a stay of the removal order until her application for leave and judicial review is disposed of (without indicating to which decision she was referring).

[9] On May 28, 2009, the removal officer contacted the applicant to reiterate that she was scheduled for removal that day at noon. She did not appear at the removal location but her counsel sent the respondent's counsel, on May 29, 2009, copies of the medical and dental documents confirming the dates of the appointments for the child as well as a date (August 13, 2009) for a surgical procedure. The same day, the removal officer responded to Ms. Markaki that an arrest warrant had been issued against her client and that a deferral of the removal was not being contemplated.

III. Preliminary objection

[10] The respondent is objecting to the application on the merits because the applicant violated, with her conduct, the clean hands doctrine and is not entitled to the relief sought. The respondent maintains that the applicant benefited from all of the possible avenues in Canada to avoid removal and failed. She was considered [TRANSLATION] "not credible" in her claims.

[11] The applicant alleges that she did not appear on May 28, 2009, for her removal due to a misunderstanding or confusion because she believed that the removal date had been postponed until her son had attended and benefited from the medical-dental appointments.

[12] The removal officer, with written proof, contradicts this submission and his credibility has not been called into question.

[13] Furthermore, the respondent argues that in 2007, the same scheme was used by the applicant to delay her removal to the United States. The respondent submits that this last proceeding was aimed only at setting aside a second PRRA decision to avoid removal. An arrest warrant against the applicant is outstanding and the respondent submits that, *inter alia*, the Court should dismiss the application for a stay or refuse to hear it. The applicant contests this argument and offers to leave Canada voluntarily if the application for judicial review is dismissed.

IV. Analysis

[14] The case law has held that judicial review proceedings include the authority to not decide or to dismiss applications that, simply because of the applicant's conduct, do not merit the relief sought (*Homex Realty and Development Co. v. Wyoming (Village)*, [1980] 2 S.C.R. 1011; *Canada (Attorney General) v. P.S.A.C.*, [2000] 1 F.C. 146 (T.D.)).

[15] In the context of an application for a stay of the removal of a person, the Federal Court has found that when the applicant did not have clean hands before the Court, the relief sought should not be granted (*Wojciechowski v. The Minister of Citizenship and Immigration* (May 6, 2002), IMM-1986-02 (F.C.T.D); *Parast v. The Minister of Citizenship and Immigration*, 2006 FC 660). In *Thanabalasingham v. The Minister of Citizenship and Immigration* (2006), 263 D.L.R. (4th) 51, the

Federal Court of Appeal decided that on the issue of clean hands, the court should strike a balance and decide if, despite misconduct, the application should be heard on the merits.

[16] In light of this jurisprudence I find that, in this case, despite the fact that the applicant was not considered credible, that her actions verge on scheming and that she is close to abusing her legal remedies, I will still examine the merits of her allegations.

A. *Criteria for a judicial stay*

[17] The Federal Court of Appeal in *Toth v. Canada (M.C.I.)* (1988), 86 N.R. 302, established the three conditions or criteria required to grant a judicial stay suspending the enforcement of a removal order, namely: 1) there is a serious issue to be tried; 2) the applicant would suffer serious and irreparable harm if no stay was granted; 3) the balance of convenience favours the stay order.

B. *The serious issue*

[18] The applicant must demonstrate the presence of one or more serious issues that have reasonable chances of succeeding in the underlying proceeding. The standard for what constitutes a serious issue is generally that of an issue that is not frivolous or vexatious (see *Sowkey v. The Minister of Citizenship and Immigration*, 2004 FC 67; *Fabian v. Le ministre de la Sécurité publique et de la protection civile*, 2009 CF 425, at paragraphs 38 to 41). However, the word “serious” requires a little bit more; the merits must be examined to ensure that the issue has a chance of succeeding (see *Wang v. Canada (M.C.I.)*, [2001] 3 F.C. 682, at paragraph 11).

[19] The applicant raises five issues. First, the PRRA officer committed an error of law by refusing to consider the documents written in Spanish because they had not been translated. The respondent replies that the instructions given by the officer to the applicant, and the forms, clearly indicated that it was up to her to provide the documents on which she relied and a translation in either English or French. This was the second PRRA application and multiple postponements had been initiated by the applicant; this requirement was clear.

[20] In her application on humanitarian and compassionate grounds she alleged that she had learned Canada's two official languages. It was incumbent upon the applicant to provide the officer with the required documents and an acceptable translation. She did not do this.

[21] In *Pareja v. Le ministre de la Citoyenneté et de l'Immigration*, 2008 CF 1333, it was decided that the PRRA officer had not committed an error by not having considered the documents that were written in Spanish and not translated. Consequently, the officer cannot be criticized for this. The officer was also not obligated to remind the applicant of this obligation.

[22] Second, the applicant alleges that the officer should have, under the circumstances, summoned her to an interview. The respondent refers to the conditions listed in section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227, conditions that the applicant did not establish. Even if the conditions had been met, it is only in very exceptional circumstances that an interview is obligatory (see *Kaba v. The Minister of Citizenship and Immigration*, 2006 FC 1113 and *Aoutlev v. The Minister of Citizenship and Immigration et al.*, 2007 FC 111).

[23] Third, the applicant argues that the officer erred in not considering the complaint report made to a New York police officer in 2008. This report was written in Spanish without any translation; therefore, the officer was justified in giving it little probative value.

[24] Fourth, the applicant criticizes the officer for having erred when he decided that she could seek protection in Honduras. The respondent replies that the officer analyzed in great detail the issue of protection of women who are victims of conjugal violence in Honduras and that, even if not perfect, it was adequate. The applicant was considered not credible. She would be removed to the United States, where she came from, which is a democratic state. Therefore, it must be concluded that the officer did not commit an error on this point.

[25] Fifth, the applicant argues that she submitted [TRANSLATION] "new evidence" on the recent situation in Honduras, which the officer disregarded. This allegation cannot be upheld because the conditions for filing new evidence were not met (*Raza v. The Minister of Citizenship and Immigration*, 2007 FCA 385).

C. *Irreparable harm*

[26] In summary, the applicant argues that removal would cause irreparable harm because her son requires medical care and a surgical procedure that she cannot afford in the United States. The respondent replies that the child, being a Canadian citizen who is not subject to removal, can receive medical care in Canada and that his surgery is also not urgent. The applicant can leave him with

relatives or friends in Canada for this care and he can come back for the required surgical procedure. The respondent maintains that these economic considerations do not justify granting the desired stay. The applicant's argument on this point does not stand up to analysis.

[27] The applicant argues that the officer did not consider her fears following threats made by her ex-boyfriend and the father of her child. The respondent explains that the officer did not have any convincing evidence of these allegations. Under these circumstances, this complaint cannot be accepted.

[28] Finally, the removal to the United States does not constitute in itself irreparable harm (see *Radji v. The Minister of Citizenship and Immigration*, 2007 FC 100).

D. *The balance of convenience*

[29] According to subsection 48(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, the respondent is obligated to enforce the removal orders as soon as practicable. Given the factual evidence, the balance of convenience favours the respondent.

V. Conclusion

[30] Since the essential conditions justifying a stay have not been met, the application must be dismissed.

ORDER

The application for a stay of an order of removal to the United States of America, which should have been enforced on May 28, 2009, is dismissed.

"Orville Frenette"
Deputy Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2457-09
STYLE OF CAUSE:	BACA MEJIA, Neiby Judith v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION

CONFERENCE CALL HELD ON JUNE 18, 2009

REASONS FOR ORDER AND ORDER:	FRENETTE D.J.
DATED:	June 23, 2009

APPEARANCES:

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