Federal Court		Cour fédérale

Date: 20100920

Docket: IMM-5405-10

Citation: 2010 FC 938

Toronto, Ontario, September 20, 2010

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

**ORLANDO SANABRIA VARGAS, GLADYS SANCHEZ,
ANA MARIA SANABRIA SANCHEZ, DAYANA SANABRIA**

Applicants

and

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

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicants bring a motion, on short notice, for an order staying their removal from Canada to Colombia, which is currently scheduled for Tuesday, September 21, 2010. They seek a stay pending final disposition of their application for leave and judicial review of a refusal to defer their removal.

[2] I have considered the written records and the able submissions made by both counsel and have directed myself as to the conjunctive tri-partite test in *Toth v. Canada (Minister of Employment*

and Immigration), (1988) 86 N.R. 302 (F.C.A) and the higher threshold of "likelihood of success" as established by this Court in *Wang v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 682 where an applicant is seeking to review a refusal of an Enforcement Officer to exercise his or her discretion to defer removal. I have concluded that this motion must be dismissed.

[3] The applicants are a family. Orlando Sanabria Vargas, the principal claimant, left Colombia on October 31, 1987 and entered the United States of America illegally. He claimed that he did so to escape from Fuerzas Armadas Revolucionarias de Colombia – Ejército del Pueblo (FARC). He was apprehended; however he skipped bail and remained in the USA. His wife, Gladys Sanchez and his daughter Ana Maria Sanabria Sanchez, joined him in the USA in September 1989. While living in the USA the couple had two further children, Orlando Sanabria and Dayana Sanabria; both are citizens of the USA. The family entered Canada from the USA on April 3, 2008 and made a claim for refugee protection based on the father's experiences with FARC. Orlando has returned to the USA and has joined the military.

[4] The refugee claim was dismissed by the Board on July 13, 2009 and a subsequent application for leave to judicially review that decision was denied by this Court on November 2, 2009.

[5] The applicants then submitted an application for a Pre-Removal Risk Assessment (PRRA) on September 8, 2009. A negative decision was made on the PRRA application on February 24,

2010. An application for leave to judicially review that decision was denied by this Court on May 4, 2010.

[6] The applicants requested and were granted a deferral of removal on March 3, 2010 in order that Dayana Sanabria could complete her grade 10 school year.

[7] On March 22, 2010 the applicants submitted an application for permanent residence on humanitarian and compassionate grounds, which remains outstanding.

[8] On September 2, 2010 the applicants were served with a Direction to Report which scheduled the removal they now seek to stay. By letter dated September 13, 2010, the applicants requested a deferral of the removal to Colombia. A negative decision on that request was made on September 16, 2010. That is the decision that underlies this motion.

[9] The deferral request set out two bases for the request: the first was specific to Ana and the second specific to Dayana. I agree with the respondent that based on the materials before the Court it would be possible to stay Ana's removal, thus permitting her to remain in Canada, while dismissing the stay request for the remaining family members. Because Dayana is a minor (aged 16) if a stay is granted that affects her, then her parents' removal must also be stayed. The same is not the case with Ana, who is 26. She is an adult and can care for herself. I note that she also has a partner in Canada.

[10] The request for deferral is based firstly on the submission that Ana has two pending applications. The first is to the Immigration and Refugee Board to re-open her refugee claim and the second is a second PRRA application. Both are based on her sexual orientation; Ana is lesbian. She says that this relevant fact was not raised as a ground of risk in either the initial refugee claim due to the incompetence of counsel (against whom a compliant has been filed to the Law Society of Upper Canada) or in her initial PRRA. The reason why her sexual orientation was not raised in the first PRRA is less certain in my mind. The applicants' record includes an affidavit from their PRRA counsel (who was not counsel on the refugee claim) who states that he was told by Ana of her sexual orientation after the PRRA application had been prepared. She told him that the family's first lawyer who dealt with their refugee claim had been informed of her sexual orientation but "told her that her case was based on her father's circumstances, and that her being gay was not relevant to that." The PRRA lawyer also states that "I recall that it was too late to include the fact of her sexual orientation in the PRRA application, but since I knew that the family was planning to file an application for permanent residence on humanitarian and compassionate grounds, I mentioned that this was certainly an issue of relevance to that application."

[11] The Enforcement Officer considered this request and the basis for it. The Officer noted that the risk based on sexual orientation had never been previously put forward, although there were numerous opportunities when it could have been. From this the Enforcement Officer concludes: "This demonstrates to me that the risk allegation brought forth by Ana is neither sufficient in nature nor timely."

[12] The Enforcement Officer then examines the explanation for not raising the risk earlier; namely the incompetence of counsel and concludes: "… every person has the right to legal counsel, though should they choose to exercise that right, the responsibility for the outcome of any proceedings still rests with the individual, and not their chosen counsel."

[13] It is submitted that the irreparable harm to Ana is intertwined with the serious issues allegedly raised in the application, which the applicants state is whether the Enforcement Officer made an unreasonable decision and violated Ana's section 7 Charter rights by refusing to defer removal pending a new risk assessment.

[14] I agree with the respondent that the applicants have not shown on these facts that they are likely to be successful on the underlying judicial review application, which is the test Justice Pelletier, as he then was, set out in *Wang*.

[15] Choices were made by these applicants' two former counsel not to raise Ana's sexual orientation in either the refugee application or the first PRRA. Current counsel for the applicants says that they were negligent in not so doing. Counsel for the respondent submits that the decisions made were "strategic choices" made by counsel. It is not clear and obvious to me, based on the record, that the failure to raise Ana's sexual orientation as a risk was negligence on counsel's part. It seems clear from the affidavit of their second counsel that the first counsel decided to proceed on the basis of the father's risk. That was a decision he made which hindsight shows was a bad one; but was it negligent? I find that the facts in *Mathon v. Canada (Minister of Employment and*

Immigration), [1988] F.C.J. No. 707, relied on by the applicants, are distinguishable. In *Mathon* a decision had been made to proceed with an application for redetermination and the applicant had signed the necessary paperwork but her counsel then failed to file it in the time set out by the legislation. That differs from the current situation where there was no decision made to raise her sexuality at the Board or in the PRRA application, despite it being known by two separate counsel in time to raise it. It is worth noting that contrary to the affidavit of counsel, the PRRA application had not been determined when he learned of Ana's sexuality and the application could have been amended.

[16] It is also of note that Ana never raised her sexuality as a risk when she wrote to the Enforcement Officer on March 3, 2010 seeking the deferral to permit her sister to finish her school year. It is noted that she stated therein that if the deferral was granted "we promise to purchase our own airline tickets to return to our country." No tickets were purchased by the applicants despite being granted the deferral. More importantly, Ana does not suggest that she fears returning but rather appears to be quite willing to return if the deferral is granted. This, in part supports the statement of the Enforcement Officer that "the risk allegation brought forth by Ana is neither sufficient in nature nor timely."

[17] I further do not accept that the applicants are likely to be successful with respect to the claim that the Enforcement Officer fettered his discretion and failed to consider the new risk allegations that were raised in the second PRRA application provided to him. This Court has held that an Enforcement Officer has a duty to consider new risk allegations where the risk is "obvious, very

serious <u>and could not have been raised earlier:</u>" *Jamal v. Canada (Minister of Citizenship and Immigration)*, 2001 F.C.T. 494, para. 7. Even accepting that the first two criteria are met, the last most certainly is not. The Enforcement Officer was not required to conduct a quick risk assessment based on the allegation of sexual orientation when the applicants raised it for the first time at the eleventh hour and it could have been raised and determined previously.

[18] I find that there is no irreparable harm to Dayana if the removal order is not stayed.

[19] The applicants requested a deferral for six months based on Dayana's psychological condition. Medical evidence was submitted to the Enforcement Officer that she hears voices and sees visions and that she is depressed. A medical report states that "Dayana could be presenting with prodromal symptoms of Schizophrenia" and an assessment requires a stable environment for the next 4 to 6 months. There is no medical report or evidence from which I can conclude, on the balance of probabilities, that Dayana is likely to be suffering from Schizophrenia. It is speculative. I base this in part on the fact that, although written two months earlier, the second medical report outlines the same symptoms and its author writes that "there was no other evidence of any major psychiatric disorder at this time." Further, the evidence of depression, as the respondent, submitted, strongly points to it being related to the uncertainties of her status. The second report states that Dayana "presents with depressed mood, which is felt to be an adjustment reaction to the impending possible deportation, and the fears around this."

[20] Both parties took the view that the balance of convenience would rest with the applicants if they had met the first two criteria. They have not met them. In my view, given that the applicants have had the benefit of most avenues of the Canadian immigration system, without success, and given that they have had the benefit of one deferral of removal, the balance of convenience rests with the Minister.

[21] For these reasons, the motion is dismissed.

ORDER

THIS COURT ORDERS that the motion for a stay is dismissed.

"Russel W. Zinn"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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