Federal Court  Cour fédérale

Date: 20101215

Docket: IMM-5939-10

Citation: 2010 FC 1293

[ENGLISH TRANSLATION]

Ottawa, Ontario, December 15, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

GLADIS EUGENIA TABARES SALDARRIAGA
NICOLE MARAVILLA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] In order to assess the merits of the stay motion, this Court must determine whether they met the tests delineated by the Federal Court of Appeal in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 11 ACWS (3d) 440 (FCA)

[2] In this decision, the Federal Court of Appeal took three tests from case law with regard to injunctions, specifically the Supreme Court of Canada's judgement in *Manitoba (A. G.) v. Metropolitan Stores Ltd.*, [1987] 1 SCR 110. These three tests are:

a. Existence of a serious question.

b. Existence of irreparable harm.

c. Assessment of the balance of convenience.

II. Legal Procedure

[3] The applicants, Colombian citizens, filed a motion for a stay of the removal order scheduled to be carried out following a July 12, 2010 decision in which their application for a pre-removal risk assessment (PRRA) was denied.

III. The Facts

[4] The Court refers to the statement of facts as reported in the decision at issue—that of the pre-removal risk assessment (PRRA) officer.

III. Analysis

[5] The three tests in *Toth* above must be met for this Court to grant the requested stay. If one of them is not, this Court cannot grant said stay.

A. Serious question

[6] On December 13, 2010, the respondent filed a reply memorandum against the applicants' application for leave and judicial review (ALJR). In this memorandum, the respondent discusses at least nine aspects warranting the dismissal of the applicants' case that are as much reasons to find that there are no serious questions with which the Court agrees.

[7] The most important argument shows that several pieces of evidence were filed (or should have been filed) with the RPD, indirectly tempting this Court to readdress the merits of this administrative tribunal's 2008 decision. Yet there is *res judicata* regarding this evidence because the applicants' ALJR, with respect to the RPD's decision, was denied on June 25, 2008 by Justice Yves de Montigny (docket no. IMM-1421-08).

B. Irreparable harm

[8] In the stay motion the principal applicant states the following under "With regard to **irreparable harm**" in her affidavit.

> 36. I left my country because of death threats I received from paramilitary troops. I worked in Medellin as a manager for Auto Ram, a used car business, and since November 2002, on orders from my boss, Ramiro Antonio Durango Piza, I paid 500,000 pesos per month to paramilitary troops who identified themselves as "La Terraza." In December 2003, the troops required a much higher amount and when I did not come up with what they wanted, they threatened me with death.
>
> 37. On February 8, 2004, I left Colombia for the United States, where I stayed with no status. On April 13, 2005, I gave birth to my daughter, Nicole Maravilla, an American citizen. She and I arrived in Canada on July 14, 2006 to make a refugee claim on the same day with an authorization from my daughter's father. I have legal custody of my daughter.

> 38. I repeat that I am afraid to return to my country and suffer irreparable harm because of my problems with the La Terraza.paramilitary group. I also fear that my daughter and I will be targeted by paramilitary troops or guerrillas because she is an American citizen.
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> 39. What must be understood is that my family has been targeted by persecution before. My father was kidnapped by Colombian guerrillas in the 80s and my brother, Luciano, was assassinated in the 90s. Late in 2002, my brother-in-law, Adolfo Gonzalez Taborda (my sister Adriana Maria Tabares Saldarriaga's husband) was held prisoner. Adriana and her family came to Canada to make a refugee claim and their claim was accepted.
>
> 40. In Colombia if a family is persecuted by guerrillas, this persecution goes down the generations; such is the case with us. If my daughter and I are deported, we will be in danger because of the problems my family has had with guerrillas, because of persecution by the La Terraza paramilitary group, and because my daughter is an American citizen and these groups (paramilitary and guerrilla) may see us as major targets for money. In addition, we are single women, and they are much more vulnerable in Colombia. (The Court's emphasis, reproduced directly as is, with the exception of what was submitted into evidence).

[9] Yet it is noted that these statements with regard to irreparable harm are the same ones that the applicants made previously (i.e. before the RPD and the PRRA officer), neither of whom accepted them.

[10] Yet this "family persecution" from generation to generation is not completely in keeping with the history that the principal applicant presented before the RPD in 2008 because that tribunal states with a certain degree of surprise that "no members of her family were worried since she left; many of them still live in Medellin."

[11] In any event, in a final attempt to convince this Court in this stay proceeding, the applicants filed, as exhibit E in the principal applicant's affidavit, an additional missive that was neither before

the RPD nor the PRRA officer. This letter, from a certain Lieutenant-Colonel Cesar Martin Gauta Gonzalez, was dated October 21, 2010, three months after the PRRA decision.

[12] Yet a careful read of that letter reveals a document in the content that is quite strangely similar to that of the principal applicant's "brother-in-law's brother" (for its part, that letter was in the evidence before the PRRA officer – "Applicant's record (AR)," dated November 10, 2010, as opposed to page 21 of the motion record dated December 9, 2010). Moreover, the objective stated by its author is exactly the same. From the outset we read in this exhibit E:

(The Court's emphasis).

[13] In short, once again this is an exhibit that aims to confirm what was already (or should have been) stated in the evidence before the RPD and/or the PRRA officer.

C. Balance of convenience

[14] Subsection 48(2) of the IRPA requires the respondent to enforce the applicant's removal order "as soon as possible."

[15] In addition to proving that the underlying ALJR raises a serious question to be dealt with and that the women will suffer irreparable harm if their removal order is not stayed, the persons applying for a stay must prove that, having regard to all the circumstances, the balance of convenience favours granting of the stay (*Metropolitan*, *supra*.; *RJR–MacDonald Inc. v, Canada (Attorney General)*, [1994] 1 SCR 311; *Toth*, *supra*.).

[16] To weigh the balance of convenience, the Court must decide which of the two parties will suffer the greatest harm depending on whether the stay is granted or denied.

[17] In this case, it is submitted that the balance of convenience clearly favours the Minister inasmuch as the applicants did not prove either the existence of a serious question or irreparable harm. For example, as Justice Allan Lutfy found in *Morris v. MCI*, IMM-301-97:

> Having found no serious question or irreparable harm, I have no difficulty in concluding that the balance of convenience favours the enforcement of the removal order by the Minister in accordance with his obligation under section 48 of the Act.

(See also *Akyol v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 931, 124 ACWS (3d) 1119).

[18] Also note that the fact that the applicants already had several remedies since they came to Canada may be considered in the assessment of the balance of convenience (*Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, 132 ACWS (3d) 547).

[19] The balance of convenience clearly favours the Minister. The applicants could not prove that they met the tests for obtaining a stay and consequently, this application cannot be allowed.

IV. Conclusion

[20] Having regard to the preceding, the applicants do not meet any of the three tests applicable to a legal stay of their removal order scheduled to be carried out on December 16, 2010. The applicants' motion for a stay of their removal order is denied.

ORDER

THE COURT ORDERS that the motion for a stay of the applicants' removal order is denied

"Michel M. J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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