Federal Court  Cour fédérale

Date: 20130621

Docket: IMM-3477-13

Citation: 2013 FC 697

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, this 21st day of June 2013

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

SUZANY CHARITO MENDEZ VALDEZ
CHRISTIAN FERNA MENDEZ
KIANA SOLYAMI DONIS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] Each time an issue must be decided it becomes a challenge because rarely are solutions clear-cut. There are cases that involve particular circumstances which make the decision-making even more burdensome. This is one of them.

[2] The principal applicant is requesting a stay of the removal order to be enforced on June 25, 2013. She is the mother of the two other applicants, her young children.

[3] The principal applicant is a citizen of Guatemala; the two other applicants are American citizens. The principal applicant left her country in 2000; she lived in the United States until she arrived in Canada on November 14, 2009, at the point of entry in Stanstead, Quebec. At the time, she and her family were coming from Florida.

[4] The evidence shows that the reason for the family's arrival in Canada was medical treatment. The applicant clearly suffers from a serious renal disorder requiring her to receive hemodialysis treatments three times a week. The medical evidence established that, without treatment, she would die within four to seven days. Indeed, upon her arrival in Canada in November 2009, she had undergone treatment in the United States three days before. Her state was so precarious that she was immediately taken to the Centre hospitalier de l'Université de Sherbrooke where she underwent emergency dialysis. Medical follow-up was provided by the institution and the numerous letters contained in her medical record from practitioners, including those from the Head of (the Division of) Nephrology, all stress the seriousness of the problems experienced by the principal applicant, describing them as end-stage renal disease.

[5] Upon their arrival in Canada, the applicants made a claim for refugee protection, which was rejected on September 15, 2011. Leave for judicial review was denied on February 4, 2012. A pre-removal risk assessment application also proved unsuccessful on August 6, 2012.

[6] An application for permanent residence on humanitarian and compassionate grounds was filed on February 4, 2013. It is reported that no decision has been rendered as yet.

[7] A deportation order was issued on April 19 and the deportation was scheduled to take place on June 25, 2013. In the face of that order, an application for a so-called "administrative" stay was filed on May 2; the application was dismissed on May 6. An application for leave and judicial review of that decision was filed on May 15, 2013. No decision has yet been made. That is, in fact, the legal remedy underlying this application for stay.

[8] Before considering the application for a stay of removal, it is necessary to comment on the status to date. It seems clear from the record that the principal applicant came to Canada to benefit from, some would say take advantage of, the public health system. In addition, her immigration situation, which was precarious when she came to Canada claiming refugee status, has now become that of a person without status. She seeks to obtain permanent residence on humanitarian and compassionate grounds.

[9] As argued by counsel for the respondent, the applicant has known for months now that she is subject to deportation to her country. She knows better than anyone how precarious the state of her health is. However, it is clear from the record that instead of seeking to ensure that medical resources are available to her upon her arrival in Guatemala, if she were to return, she rather endeavoured to show that those resources would not be there upon her arrival.

[10] Nor is the evidence any more satisfactory on the government's end. The attempt to demonstrate that resources may exist in Guatemala is late and insufficient in my opinion. After all, the evidence shows that access to hemodialysis is a matter of life or death. Certainty as to the availability of resources appears crucial to me. Not only is it a matter of life or death, but death could be imminent if treatment is not available next week.

[11] Counsel for the government, and this is entirely to her credit, made an effort to inform the Court. She argues that medical resources exist, but the evidence in that regard is sparse. Said evidence consists in a Web site that points to the existence of four dialysis centres in Guatemala and succinct e-mails from the Regional Medical Office of Citizenship and Immigration Canada which state, without elaborating, that "[D]ialysis and nephrology specialist care are available in Guatemala" and provide, on June 17, 2013, the names of the specialists the principal applicant may try to contact in Guatemala. Moreover, counsel states that treatment would be free, referring to a Web site in Spanish of which a part translated by a Department of Justice counsel.

[12] Although the Court is indebted to counsel for her efforts, the fact remains that, for a matter of life or death, possibly in the short term, there is a form of improvisation caused in part only by the principal applicant's inertia. To bring this into focus, it is sufficient to note that she endeavoured to emphasize the seriousness of her health condition and made a general argument about the lack of resources in Guatemala, supported by a letter dated May 20, 2013. Said letter, addressed to the principal applicant's treating physician in Canada, allegedly came from the "Vice-Minister of Health" of Guatemala; she advises that "[T]he expenses of the process involving hemodialysis are so high, and the machines operating sometimes are not enough to cover all the patients, and the

attention should prioritize the health conditions in every case" (English translation of the original letter written in Spanish). The letter concludes, also succinctly, that hemodialysis is "limited in some cases to once per week."

[13] It is in this context that it is necessary to decide whether a stay should be granted. The well-known test in the subject matter must be applied:

1. Is there a serious issue to be tried before the appropriate decision-maker;
2. Will irreparable harm be caused to the applicant;
3. Does the balance of convenience favour the applicant.

See *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA) and *RJR - MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311. In order for the applicant to succeed, she must satisfy the Court that she meets each element of the tripartite test.

[14] It seems to me that the status of the record is such that the principal applicant meets the irreparable harm element. To date, there is insufficient evidence in the record to support the finding that, if returned to Guatemala, her life would not be in jeopardy. In other words, the evidence is at best equivocal, in addition to being sparse, in regard to that issue.

[15] The balance of convenience issue certainly makes it possible to weigh the importance for the Ministers of maintaining the integrity of the immigration system. However, balanced against that is the principal applicant's health condition. As I indicated earlier, the evidence presented by the government regarding the health care services relevant to our case must be improved before making a finding. Although inertia can be held against the principal applicant, I am not prepared to find that

she comes before this Court in bad faith with dirty hands. The principal applicant is destitute and vulnerable. Furthermore, as I explained at the hearing, if a stay is granted in this case, the onus will be on the principal applicant to make the efforts required to obtain the necessary services for her condition if the most recent steps she has taken in the immigration process prove unsuccessful. The granting of a stay would not be a guarantee that other stays would be granted as well.

[16] If it is true, as she claims, that the principal applicant is not a danger to Canada, it is nevertheless true that she entered Canada illegally with a view to obtaining health care services. The record shows that she does not work and does not have support from a spouse. Government resources are being made available to a person and her family who have entered the country illegally. In my view, what concludes the matter is the still uncertain situation on the access to heath care services in the country where she would be returned. While the integrity of the immigration system should be weighed against the use of Canadian government resources, the fact remains that if the applicant were returned to Guatemala without having access to treatment she requires, the consequence would be tragic. Thus, the balance of convenience, at this point, is in her favour. Of course that balance would be broken if the evidence of availability of care is improved and reasonable steps are not taken by the applicant.

[17] The question then remains whether there is a serious issue to be tried, thus providing grounds for a stay of the removal order. The three elements of the tripartite test must be satisfied in order for the applicants to be granted the stay.

[18] The legal remedy underlying the application for stay on which the Court must rule is the application for leave and judicial review of the refusal to grant an administrative stay by the Border Services Officer. The enforcement officer refused the stay on May 6, 2013. The issue to be resolved is therefore whether there is a serious issue to be tried in light of this judicial review.

[19] The tripartite test for a stay, as for other areas of law, provides that the issue shall be deemed serious if it is not frivolous, vexatious or futile. The respondent argues that the test in this type of case is rather that of reasonableness. I agree. This Court's decision in *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FC 682 [*Wang*], is an excellent example of the applicants' burden when challenging a removal officer's refusal to stay removal and seeking to stay their removal pending judicial review. I reproduce paragraph 10 of *Wang*:

> [10] The Supreme Court of Canada has held that the test of "serious issue to be tried" is simply that the issue being raised is one which is not frivolous. *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 at para 44, [1994] S.C.J. No. 17. On the other hand, to succeed in the underlying judicial review, the applicant will have to show that the decision not to defer was subject to review for error of law, jurisdictional error, factual error made capriciously, or denial of natural justice. *Federal Court Act*, R.S.C. 1985 c. F-7 subsection 18.1(4). The result is that if the stay is granted, the relief sought will have been obtained on a finding that the question raised is not frivolous. If the stay is not granted and the matter proceeds to the application for judicial review, the applicant will have to demonstrate a substantive ground upon which the relief sought should be awarded. The structure of the process allows the applicant to obtain his/her relief on a lower standard on the interlocutory application, notwithstanding the fact that the relief is the same as that sought in the judicial review application. It is this congruence of the relief sought in the interlocutory and the final application which leads me to conclude that if the same relief is sought, it ought to be obtained on the same basis in both applications. I am therefore of the view that where a motion for a stay is made from a Removal Officer's refusal to defer removal, the judge hearing the motion ought not simply apply the "serious issue" test, but should

> go further and closely examine the merits of the underlying application.

[20] Without disposing of the underlying judicial review, the "serious issue" element is examined not to find out whether the issue is not futile but rather to determine the likelihood that the underlying application could be allowed. As Justice Pelletier, as he then was, explained in *Wang*, above, a higher bar is necessary when the application for a stay seeks to obtain the same remedy as that sought by the underlying judicial review.

[21] In the case at bar, the principal applicant claims that the Removal Officer did not adequately consider that she is not a danger. Furthermore, the best interests of the children and the family's integration into Canadian society should have been in their favour. In my view, those arguments may have some weight in the application for permanent residence on humanitarian and compassionate grounds. However, the Removal Officer's discretion is very limited at that stage. Section 48 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, was recently amended to better delineate this type of discretion:

48. (1) A removal order is enforceable if it has come into force and is not stayed.	**48.** (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être exécutée dès que possible.

In my view, it is unlikely that such arguments could be successful; this could not be a serious issue.

[22] I believe the other two arguments have a better of chance of being accepted upon judicial review, namely, the assessment of the medical evidence and the existence of an application for permanent residence on humanitarian and compassionate grounds.

[23] The Removal Officer indicates that he was satisfied with the "medical evidence," which I consider to be very limited. When you look at this evidence, taken from Web sites whose value has not been established, add to it the cursory statements made by Citizenship and Immigration Canada's Medical Services (see *Arrechavala de Roman v Minister of Public Safety and Emergency Preparedness*, IMM-9467-12, order of September 14, 2012), and compare it to the needs of the applicant to stay alive, it seems to me that it is far from clear whether if the applicant were to return to Guatemala on June 25, 2013, she would receive the care that is vital to her. The evidence provided by the respondent must be improved to bridge the gap between the respondent's evidence of the existence of certain resources, nothing more, and the real needs of the principal applicant. Furthermore, this gap that needs to be bridged is somewhat amplified by the equivocal letter of the Vice-Minister of Health of Guatemala.

[24] There is a likelihood that the underlying application for judicial review of the refusal to grant an administrative stay could be successful, thus allowing for an adequate, and more complete, examination when processing the application for permanent residence on humanitarian and compassionate grounds. The government could provide evidence of availability, to the degree required, of the medical care the principal applicant requires in the short term to survive. Indeed, all relevant considerations could be assessed, including the principal applicant's inertia or, worse, her resistance, if any.

[25] In light of the ambiguous, and insufficient, evidence and the type of issue under consideration, the Removal Officer's decision could likely be reversed. This is a serious issue within the meaning of the three-part test. With respect, the unique facts of the case and the vulnerable situation in which the principal applicant would be placed requires a more in-depth examination, with higher evidence than that provided to date.

ORDER

Therefore, the Court orders a stay of the removal scheduled for June 25, 2013, pending the Court's final decision on the application for leave and the judicial review of the refusal to grant an administrative stay, with said negative decision being rendered on May 6, 2013.

"Yvan Roy"
Judge

Certified true translation
Daniela Guglietta, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3477-13
STYLE OF CAUSE:	SUZANY CHARITO MENDEZ VALDEZ, CHRISTIAN FERNA MENDEZ, KIANA SOLYAMI DONIS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Montréal, Quebec
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APPEARANCES:

Juliana Rodriguez	FOR THE APPLICANT
Michèle Joubert	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Caza, Gagnon, Lawyers Sherbrooke, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada	FOR THE RESPONDENT