Federal Court  Cour fédérale

Date: 20180412

Docket: IMM-1608-18

Citation: 2018 FC 400

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, April 12, 2018

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

LUCY FRANCINETH GRANADOS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

ORDER AND REASONS

[1] Today, on an urgent basis, I heard by teleconference the motion for a stay filed by the applicant, Lucy Francineth Granados, who is seeking to prevent the execution of her imminent removal to Guatemala, which is scheduled for April 13, 2018—tomorrow morning at 9:00 a.m.

[2] The applicant, age 41, is a citizen of Guatemala. She is the mother of three children, who are 13, 17 and 20 years old. They reside in Guatemala and live with their grandmother and the applicant's brother in San Agustín Acasaguastlán, a rural area where they feel safer and where the cost of living is lower than in the country's capital. The applicant, who is single, is solely responsible for financially supporting them with her income from housekeeping work. Note that the applicant arrived in Canada in April 2009 and claimed refugee protection following the threats and extortion that she allegedly faced in 2008 from the Maras, a criminal gang, when her family was living in the capital. Her claim for refugee protection and application for a pre-removal risk assessment [PRRA] were rejected on February 21, 2011, and May 14, 2012, respectively—her account was deemed not to be credible and there were no serious grounds to believe that she would be exposed to personal risks, torture, a risk to her life or a risk of cruel and unusual treatment or punishment, to which the population of Guatemala generally appears not to be exposed. Since no application for leave and judicial review was filed against those two final decisions, the removal order that was issued against the applicant became fully enforceable in May 2012.

[3] On August 15, 2012, the applicant was to be removed to Guatemala. However, after all the arrangements had been made for her voluntary departure, the applicant failed to appear at the airport on the day of her departure, supposedly because she had not heard the alarm on her clock. On August 22, 2012, an arrest warrant was issued for the applicant. After that, the Canada Border Services Agency [the Agency] lost all contact with the applicant.

[4] In September 2017, the applicant decided to apply for permanent residence on humanitarian and compassionate considerations [HC application]. However, the applicant's

personal address on the HC application was not her own, and the only point of contact was her counsel. In short, the applicant wanted to stay in hiding while her HC application was being reviewed. In fact, she worked under the table with no permit during all those years—none of her employers wanted to provide letters confirming her work in support of her HC application. That said, since 2014, the applicant has been actively involved as a volunteer in various non-governmental organizations and built a vast network of acquaintances in the Latin American community. Numerous community and rights protection organizations decided to support her in her efforts to gain permanent residence in Canada.

[5] In January 2018, the Agency was made aware of her HC application. After intensive searches to track down the applicant, on March 20, 2018, Agency officers arrested her in an apartment in Montréal; she was overcome by a panic attack and tried to flee, and the officers had to call for backup to bring her under control. That appeared to exacerbate the applicant's psychological state, especially since she states that she was molested during the arrest. The applicant is still in custody—her flight risk was rated as being high during detention reviews. The applicant was to be deported on March 27, 2018, but the removal could not be enforced; on March 26 and 27, 2018, she was urgently hospitalized at the Centre hospitalier de l'université de Montréal [CHUM], supposedly following a cardiopulmonary arrest. The applicant's removal was therefore postponed to April 13, 2018. In the meantime, on March 29, 2018, an application for an administrative stay was filed by her counsel, who referred to her medical condition, her role of providing financial support for her children and the existence of a pending HC application. The application for a stay was dismissed by the enforcement officer on April 9, 2018.

[6] On April 9, 2018, *mandamus* proceedings were instituted on the applicant's behalf to force the respondent, the Minister of Citizenship and Immigration, to make a decision on her HC application before any deportation. The applicant is collaterally attacking the reasonableness of the enforcement officer's decision not to postpone the removal—counsel for the applicant informed the Court at this morning's hearing of her intention to imminently serve and file an application for leave and judicial review, if necessary. The Minister of Public Safety and Emergency Preparedness is therefore also party to the proceedings. This motion for a stay was served on April 10, 2018.

[7] To obtain a stay from the Court, the applicant must demonstrate that there is a serious issue to be tried, that she would suffer irreparable harm if the Court does not grant her motion and that the balance of convenience weighs in her favour (*Toth v. Canada (Minister of Employment and Immigration)* (1988), 6 Imm LR (2d) 123, 86 NR 302 (FCA)). The serious issue test is particularly demanding following an enforcement officer's refusal to postpone a removal and grant an administrative stay (*Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paragraph 67 [*Baron*]; *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 at paragraph 11).

[8] On the contrary, the respondents submit that the applicant does not meet any of the three aforementioned criteria, which are conjunctive, while the Court should alternatively dismiss the motion for a stay because the applicant does not have "clean hands." Despite the fact that the applicant lived in hiding for more than five years, her counsel argues that it is in the public interest to consider the merit of the applicant's arguments, along with her personal situation in

light of the irreparable harm alleged, while considering the fact that the balance of convenience weighs in her favour.

[9] The principle whereby a judge may summarily dismiss an application that requires the Court to exercise its discretion or equitable jurisdiction is well known (*Canada (Minister of Citizenship and Immigration) v. Thanabalasingham*, 2006 FCA 14 [*Thanabalasingham*]; *Moore v. Canada (Citizenship and Immigration)*, 2009 FC 803), and was even cited to refuse to hear a motion for a stay because the moving party did not have clean hands (*D'Souza v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 1304; *Cox v. Canada (Public Safety and Emergency Preparedness)*, 2016 FC 1268). As the Federal Court of Appeal explained at paragraph 10 of *Thanabalasingham*, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights.

[10] However, under subsection 48(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act], if a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the Minister of Public Safety and Emergency Preparedness must ensure that the order is enforced as soon as possible. The applicant is without status and has been living in Canada illegally since May 2012. She explains that she did not want to resolve her situation with the immigration authorities during those years because she was afraid, depressed and did not know that she could file an HC application. However, what we clearly understand is that the applicant, who always acted according to her conscience, did not want and still does not want to leave Canada; it is only in Canada that she feels safe and can

provide for the financial needs of her family in Guatemala. If she receives permanent residence, she will then be able to sponsor her family members and ensure that they have a better future than in Guatemala, which is recognized as being one of the most dangerous countries to live in Latin America.

[11] Nevertheless, the simple fact of having a pending HC application does not entitle a person to a stay, especially when it was filed recently. However, the applicant's removal will not terminate her HC application and, in the event of a favourable decision, the applicant could be authorized to return to Canada, even though her counsel states that her chances are slim. By waiting more than five years after her PRRA application was rejected to file her HC application, the applicant appears to have made a voluntary calculation so that she could demonstrate establishment in Canada. This was a tactical decision and she must now live with the consequences (*Palka v. Canada (Public Security and Emergency Preparedness)*, 2008 FCA 165 at paragraphs 13 and 14). Can she now at the same time force the Minister of Citizenship and Immigration to make a decision on her HC application as soon as possible on the pretext that more than six months have passed since she filed it in September 2017?

[12] Counsel for the applicant submits that foreign nationals who live in hiding in Canada will not be encouraged to submit an HC application if they risk being deported to their country before the Minister of Citizenship and Immigration has ruled on the merits of such an application. At the same time, he argues that, on the merits of the case, the Court should not only issue a writ of *mandamus*, since the applicant has been awaiting a favourable decision for more than six months, but also declare that any HC application filed more than six months before a deportation date must be reviewed before deportation is enforced.

[13] Without ruling on the merit of the applicant's submissions, I note that the Federal Court of Appeal appears to have adopted a much more nuanced view of the rights that foreign nationals may have to remain in Canada once they have exhausted all remedies and a removal order becomes enforceable. In addition, in 2009, it noted the following in *Baron* at paragraphs 64 and 65:

> [64] Events of this type, i.e. where persons fail to comply with the requirements of the Act or act in a way so as to prevent the enforcement thereof, should always be high on the list of relevant factors considered by an enforcement officer. It is worth repeating what this Court said at paragraph 19 of its Reasons in *Legault* [*Legault v. MCI*, 2002 FCA 125], *supra*. Although the issue before the Court in *Legault*, *supra*, pertained to the exercise of discretion in the context of an H&C application, the words of Décary J.A. are entirely apposite to the exercise of discretion by an enforcement officer:
>
> > [19] In short, the *Immigration Act* and the Canadian immigration policy are founded on the idea that whoever comes to Canada with the intention of settling must be of good faith and comply to the letter with the requirements both in form and substance of the Act. Whoever enters Canada illegally contributes to falsifying the immigration plan and policy and gives himself priority over those who do respect the requirements of the Act. The Minister, who is responsible for the application of the policy and the Act, is definitely authorised to refuse the exception requested by a person who has established the existence of humanitarian and compassionate grounds, if he believes, for example, that the circumstances surrounding his entry and stay in Canada discredit him or create a precedent susceptible of encouraging illegal entry in Canada. In this sense, the Minister is at liberty to take into consideration the fact that the humanitarian and compassionate grounds that a person claims are the result of his own actions.
> >
> > [Emphasis added]
>
> [65] Thus, if the conduct of the person seeking a deferral of his or her removal either discredits him or creates a precedent which encourages others to act in a similar way, it is entirely open to the

> enforcement officer to take those facts into consideration in determining whether deferral ought to be granted. Neither enforcement officers nor the courts, for that matter, should encourage or reward persons who do not have "clean hands."

[14] Additionally, to qualify as irreparable, the cited harm must not simply be a typical and inherent consequence of removal (*Atwal v. Canada (Citizenship and Immigration)*, 2004 FCA 427 at paragraph 16 with cited case law). In this case, the applicant did not demonstrate that her removal to Guatemala would expose her to a personal risk. In the circumstances, the harm she would suffer remains highly speculative because she is no more at risk than the whole of Guatemala's population. In addition, the general documentary evidence on the situation in a given country is generally not sufficient to establish irreparable harm, and it falls to the applicant to demonstrate that she would be personally exposed to a risk.

[15] The applicant is a vulnerable woman who is experiencing an enormous amount of stress and whose psychological balance is very delicate. With respect to the medical problems cited by the applicant, including her heart condition that is undiagnosed despite the episode on March 26, 2018, nothing indicates that they cannot be treated in Guatemala. Furthermore, it appears clear from the reading of the grounds provided by the enforcement officer that her medical condition was taken into consideration. Thus, the medical documents submitted by the applicant in her application to postpone the removal were duly assessed by a physician. In his assessment, Dr. Louvish made the following conclusion:

> **To sum up**: In the absence of any current objective medical evidence indicating any clinically significant ongoing sequelae due to Ms. Granados' medical history of syncope, it is reasonable to conclude that it would not preclude her from air travel at this time. As such, based on the medical documentation available for review and within all reasonable medical certainty, Ms. Granados is

> deemed medically fit for air travel to be repatriated to her country or origin (Guatemala) via commercial airliner.
>
> Notwithstanding the above, it would be advisable that Ms. Granados is accompanied by a nurse escort on the flight to Guatemala to help with the potential exacerbation of her situational anxiety.

[16] Lastly, in this case, the balance of convenience favours the respondents. The applicant received two unfavourable administrative decisions, neither of which was challenged before the Federal Court. She has been in Canada without status for nearly six years. In my view, the balance of convenience does not favour delaying further the discharge of either her duty, as a person subject to an enforceable removal order, to leave Canada immediately, or the Minister of Public Safety and Emergency Preparedness' duty to remove her as soon as reasonably practicable: refer to subsection 48(2) of the IRPA. 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 (*Ghanaseharan v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261 at paragraph 22).

[17] For these reasons, the motion for a stay is dismissed.

ORDER in IMM-1608-18

THE COURT ORDERS that the motion for a stay be dismissed.

"Luc Martineau"
Judge

Certified true translation
This 9th day of October 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1608-18
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