

Federal Court



Cour fédérale

Date: 20201203

Docket: IMM-4426-20

Citation: 2020 FC 1122

Vancouver, British Columbia, December 3, 2020

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

**JORGE MARIANO PINTO GUARDADO
REGINA MARIA HERNANDEZ DE PINTO**

Applicants

and

**THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP**

Respondent

ORDER AND REASONS

[1] The Applicant husband and wife (referred to as “the Applicants”) are representing themselves on this matter and have filed a Motion in writing under Rule 369 of the *Federal Courts Rules* [*Rules*], asking for the following:

- (a) Reinstatement of their judicial review application identified as IMM-4426-20;
- (b) leave to allow the them to represent themselves; and

(c) an extension of time to file their supporting arguments if the Motion is granted.

[2] In support of their Motion the Applicants filed a joint Affidavit dated October 20, 2020.

I. Background

[3] By way of procedural background, on September 21, 2020 an Application for Leave and for Judicial Review (ALJR) was filed on behalf of the Applicants by their then legal counsel. In the ALJR, the Applicants sought review of the decision of the Refugee Appeal Division (RAD) dated August 27, 2020. The RAD dismissed the Applicants' appeal and confirmed the decision of the Refugee Protection Division (RPD).

[4] A Notice of Discontinuance in IMM-4426-20 dated September 21, 2020 was filed on October 8, 2020 by the Applicant's legal counsel. It is this Notice of Discontinuance that the Applicants seek to have lifted.

[5] By way of factual background, the Applicants are citizens of El Salvador who claimed refugee protection in Canada. The Applicants claim they are at risk of persecution in El Salvador in relation to various civil legal matters involving the male applicant. There is also an outstanding criminal charge against the male applicant. The Applicants argue that because of corruption the male applicant will not receive fair treatment before the courts in El Salvador.

[6] The determinative issue for the RPD was the availability of state protection. In other words, the RPD was not satisfied that the Applicants could not seek state protection in El Salvador if necessary.

[7] The Applicants appealed the RPD decision to the RAD. In considering the appeal, the RAD found that the evidence demonstrates that there is an adequately functioning legal system in El Salvador. The RAD also acknowledged that the evidence relating to the functioning of the police force in El Salvador is mixed, however it noted that most of the problems relate to the police lack of effectiveness in responding to gang violence. The RAD noted that there was no evidence that police would not investigate non-gang related threats. The RAD also noted that there was insufficient evidence to establish police corruption in relation to the Applicants' complaints and there was insufficient evidence to establish that the Applicants would face a risk to their lives or physical security.

[8] Overall, the RAD concluded that the Applicants would have access to adequate state protection both from the legal system and from the police in El Salvador.

II. Issues

[9] In their Motion the Applicants seek leave of the court to personally represent themselves. There is no requirement for leave of the Court for this request.

[10] The only issue that needs to be addressed on this motion is if the ALJR should be reinstated.

III. Analysis

[11] The relevant legal test is outlined in *Philipos v Canada (Attorney General)*, 2016 FCA 79 [Philipos] where at paragraph 20 the Court of Appeal confirmed that a discontinued file can only be resurrected if there evidence of “some fundamental event that strikes at the root of the decision to discontinue”.

[12] The only evidence in their Affidavit that could be read as supporting the requested relief is where the Applicants state: “We believe that the COUNSELS who have previously represented us have not taken our process with due care and diligence”. The Applicants also state that they cannot pay for legal counsel.

[13] However, the quality of their previous legal counsel or the fact that they cannot now afford a lawyer, are not issues that strike at the root of the decision to discontinue. On that, there is no evidence that they had been misinformed or that their lawyer acted against their instructions in filing the discontinuance. As well, there is no evidence that they have taken any steps to lodge a complaint of negligent legal representation.

[14] In the circumstances, a bald allegation against legal counsel is insufficient evidence to support the exceptional relief sought by the Applicants on this motion.

[15] In any event, even if the Applicants could establish a “fundamental event” to cause the court to consider lifting the discontinuance, they still must establish that the discontinued proceeding has some reasonable prospect of success (*Philipos* at para 22).

[16] In this regard, I note paragraph 5 of the Applicants’ affidavit where they state that there are documents that they believe “were omitted in our refugee claim process”. It is unclear from this statement if the Applicants are seeking to introduce new evidence or if they are referring to evidence that was before the RAD. Regardless, it is obvious from this statement that the Applicants are raising an issue with the treatment of the evidence by the RAD. Case law is clear that on judicial review it is not the role of the court to reweigh the evidence (*Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, at para 61).

[17] Overall, and considering the Applicants’ evidence, I am not satisfied that the discontinued proceedings have any reasonable prospect of success.

IV. Conclusion

[18] The court has the full power to manage its procedures, and allowing a discontinued proceeding to continue is a discretionary remedy available in exceptional circumstances (*Naboulsi v Canada (Citizenship and Immigration)* 2018 FC 916, para 31). The evidence relied upon by the Applicants falls well short of supporting a request that the Court exercise its discretion to allow the discontinued proceeding to continue.

[19] The Applicants’ Motion is therefore dismissed.

ORDER in IMM-4426-20

THIS COURT'S ORDER is that the Applicants' motion is dismissed.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-4426-20

STYLE OF CAUSE: JORGE MARIANO PINTO GUARDADO AND
OTHERS v THE MINISTER OF IMMIGRATION,
REFUGEES AND CITIZENSHIP

**MOTION IN WRITING CONSIDERED AT VANCOUVER, BRITISH COLUMBIA
PURSUANT TO RULE 369 OF THE *FEDERAL COURTS RULES***

ORDER AND REASONS: MCDONALD J.

DATED: DECEMBER 3, 2020

APPEARANCES:

Jorge Mariano Pinto Guardado
Regina Maria Hernandez De Pinto

THE APPLICANTS ON THEIR OWN BEHALF

Andrew Eyer

FOR THE RESPONDENT

SOLICITORS OF RECORD:

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FOR THE RESPONDENT