Date: 20080403

Docket: IMM-1292-08

Citation: 2008 FC 415

Ottawa, Ontario, April 3, 2008

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

CARLOS YSRAEL LUCIANO ZABALA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction

[1] The Applicant, Mr. Carlos Ysrael Luciano Zabala, a citizen of the Dominican Republic and a one time permanent resident of the United States (U.S.), arrived in Canada on December 10, 2007, using a fraudulent French passport. He expressed his intention to make a refugee claim in Canada. It came to light during the Port of Entry (POE) interview to determine his eligibility to make a claim that he had also been convicted in 1991 in the Commonwealth of Massachusetts, for trafficking in cocaine. He served for five years in prison and was deported from the U.S. in 1996 after his release.

[2] In his POE interview, the Applicant expressed his desire to look for work as a cook in order to pay the person who supplied him with the fraudulent passport. He stated that he did not expect to have difficulty finding work because he speaks English. The Immigration Officer informed him that he might not be able to make a claim due to his serious criminality in the U.S. The Officer informed him that he would be detained for the night and brought before another Immigration Officer the next day who would determine his eligibility.

[3] In her Notes to File, the Officer specified that, although the Applicant expressed his desire to make a claim, he had also expressed a desire to return to his country of origin when the matter of eligibility was raised in regard to the Applicant's past criminality.

[4] The Applicant appeared before another Immigration Officer the next day (December 11, 2007). Although Spanish is his first language, the Applicant declined the services of an interpreter, telling the Immigration Officer that "he would like to try in English". In this interview, the Immigration Officer sought to confirm the Applicant's statement the previous day that he would rather go home than stay in jail until his eligibility to make a claim is determined.

[5] The Officer informed the Applicant that due to his criminality, his claim would be "put on hold" until the impact, if any, of his criminal record on his eligibility is "clarified." The Officer stated that the Applicant would be returned to jail to await an appearance before an immigration judge. The Immigration Officer informed the Applicant that if the judge finds him eligible, then his claim would proceed to the Refugee Protection Division (RPD) for a hearing. The Applicant stated

that he would rather go home since the Officer was unable to tell him exactly how long he would remain in jail.

[6] In light of his stated intention to return to the Dominican Republic, the Applicant was given and signed a form withdrawing his refugee claim on December 11, 2007. On the same day, a Senior Immigration Officer issued an exclusion order against him, after a short hearing, as someone inadmissible to Canada because of his serious criminality.

Pre-Removal Risk Assessment

[7] The Applicant was advised of his right to apply for a Pre-Removal Risk Assessment (PRRA), which he did on February 7, 2008. He alleged in his PRRA submissions that he was threatened by a gang-affiliated person who had lent his friend money. The Applicant alleged that his friend had given him some of the money but did not disclose the source. He claims his friend fled without re-paying the loan and that he became the target of the lender's ire and threats. He alleged that his threat to report this individual to the police resulted in even more severe threats, forcing him to go into hiding. Without ever contacting the police, he fled to Canada. (Motion Record, PRRA Submissions, p. 21.)

[8] In a decision dated February 12, 2008, the PRRA Officer determined the Applicant had failed to rebut the presumption of state protection. The Officer determined that the documentary evidence did not support the Applicant's assertion that repeating the incident to the police would

have been futile due to police corruption and ineffectiveness. Consequently, the claim for protection was rejected.

II. Issues

[9] The Applicant has not met the tri-partite test for an injunction staying his removal from Canada:

a. The underlying litigation, does not raise a serious issue;

b. The Applicant has failed to demonstrate that he will suffer irreparable harm if removed;

c. The balance of convenience favours the Respondent.

III. Analysis

[10] The Supreme Court of Canada has established a tri-partite test for determining whether interlocutory injunctions should be granted pending a determination of a case on its merits, namely, (i) whether there is a serious question to be tried; (ii) whether the litigant who seeks the interlocutory injunction would, unless the injunction is granted, suffer irreparable harm; and (iii) where does the balance of convenience lie, in terms of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction pending a decision on the merits. (*Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302; *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.)

[11] The requirements of the tripartite test are conjunctive; that is, the Applicant must satisfy all three branches of the test before this Court can grant a stay of removal. (*Toth*, above, *RJR-MacDonald*, above.)

[12] The issuance of a stay is an extraordinary remedy wherein the Applicant needs to demonstrate "special and compelling circumstances" that would warrant "exceptional judicial intervention". (*Ikeji v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 573, [2001] F.C.J. No. 885 (QL).)

[13] The Applicant has failed to demonstrate "special or compelling" circumstances in this case that would warrant a judicial stay of removal. The Applicant has failed to demonstrate any serious issue with respect to either the conduct of the Immigration Officer or the PRRA Officer's decisions rejecting his application for protection.

[14] In the alternative, the motion should be dismissed on its merits as not satisfying the tri-partite test set out in *RJR-MacDonald*, above.

A. Serious Issue

(1) **Withdrawal of the Refugee Claim**

[15] There is no merit to the Applicant's attempt to blame the POE Immigration Officer for his decision to withdraw his claim. The Applicant claims that he should have been allowed the services of an interpreter since English is not his first language. He states, at paragraph 12 of his affidavit

that he was asked to sign a number of documents, which he did without knowing that he had signed away his right to make a claim. The Applicant's assertions are not credible.

[16] First, this Applicant's contention that the absence of an interpreter made it difficult for him to comprehend what he was doing is unworthy of belief. The Applicant resided in the U.S. from 1982-1996, the year he was deported. His claim that he did not understand the exchange that had occurred between him and the Immigrations Officers.

[17] It is also noteworthy that the Applicant stated to two different Officers that he wanted to leave Canada rather than spend time in jail while his eligibility was considered. In his December 10, 2007, interview, the Applicant stated that he would rather go home than remain in jail.

[18] In his December 11, 2007, interview, the Applicant declined the use of an interpreter because he wanted to try in English. A record of that interview does not show that the Applicant had any difficulty whatsoever understanding the officer or officer comprehending what the Applicant had to say. Indeed, the exchange between the two about the Applicant's stated desire to not pursue a refugee claim is instructive:

> (Immigration Officer:)
> LAST NIGHT YOU TOLD THE OFFICER THAT YOU WANTED TO GO HOME. IS THAT TRUE?
>
> (Applicant:)
> WHAT IS GOING OT HAPPEN TO ME?
>
> (Immigration Officer:)
> BECAUSE OF YOUR CRIMINALITY, YOUR REFUGEE CLAIM WILL BE PUT ON HOLD UNTIL THE ISSUE CONCERINING YOUR

> CRIMINALITY IS CLAIRIFIED. IN THE MEANTIME, YOU WILL RETURN TO THE JAIL AND WAIT FOR SCHEDULING TO SEE THE IMMIGRATION JUDGE. IF A POSITIVE DECISION IS MADE BY THE JUDGE, YOUR REFUGEE APPLICATION WILL BE PUT FORWARD FOR CONSIDERATION BY THE IRB.
>
> (Applicant:)
> HOW LONG WILL I STAY IN JAIL?
>
> (Immigration Officer:)
> I HAVE NO IDEA
>
> (Applicant:)
> IN THAT CASE I WILL GO HOME.

[19] It was after the above exchange that he was given the withdrawal of claim form, which he signed. The Applicant had no difficulty knowing or understanding the nature or significance of the form he signed.

(2) <u>No Error in PRRA Decision</u>

[20] The PRRA Officer's decision rejecting the claim for protection does not raise a serious issue. The Officer considered that the documentary evidence did not support the Applicant's assertion that police corruption and ineffectiveness would have resulted in no protection.

[21] There is also no merit to the Applicant's argument that the speed at which his application was considered raises a serious issue. It is worth remembering that the Applicant was convicted and jailed on January 28, 2008, for using false identification to enter Canada and had previously had a cocaine trafficking conviction which resulted in serving a five year term in prison during the time

when the Applicant was residing in the U.S. Having withdrawn his refugee claim and in light of his criminal record, there was every indication that he would remain in detention until his removal.

[22] Against backdrop, the processing of his PRRA application was reasonable. The PRRA Officer's finding of the Applicant's failure to rebut the presumption of state protection is supported by the latter's own statement that he did not report the alleged threats on his life to the Dominican authorities or seek protection.

B. Irreparable Harm

[23] For the purposes of a stay of removal, "irreparable harm" is a very strict test. It implies the serious likelihood of jeopardy to the applicant's life or safety. Irreparable harm is very grave. It must be more than unfortunate hardship, including breakup or dislocation of family. (*Duve v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 387 (QL))

[24] The evidence in support of harm must be clear and non-speculative. (*John v. Canada (Minister of Citizenship and Immigration)*, [1999] F.C.J. No. 915 (QL), *Wade v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 579 (QL).)

[25] There is no clear and convincing evidence of irreparable harm in this case. The Applicant never sought state protection, as the PRRA Officer properly determined. Even if his allegation of risk is true, he has failed to show that the PRRA Officer's determination, made after consulting the publicly available country documents, that the Dominican Republic is capable of protecting him, is unreasonable.

[26] The Applicant failed to discharge the burden that the jurisprudence, including *Ward*, *Villafranca*, *Kadenko*, etc, imposes on all those who seek Canada's protection by failing to demonstrate that his country of origin is either unwilling or unable to protect him from the individual whom he alleges was threatening him. The Applicant, by failing to contact any law enforcement agency for help in the face of the alleged threats before fleeing to Canada, the PRRA Officer was within her right to determine that he is neither a Convention refugee nor a person in need of protection. (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689, *Canada (Minister of Employment and Immigration) v. Villafranca*, [1992] F.C.J. No. 1189 (F.C.A.) (QL), *Kadenko v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 1376 (QL).)

[27] As for his claim that his removal will render moot his application to re-instate his refugee claim, the record shows that that application is based on false statements. It is also recognized that the Applicant resided for fourteen years in the U.S. during which he was residing legally therein.

C. <u>Balance of Convenience</u>

[28] The public interest is to be taken into account when considering the balance of convenience and weighing it together with the interests of private litigants. The balance of any inconvenience that the Applicant might suffer as a result of his removal from Canada does not outweigh the public interest which the Respondent Minister seeks to maintain in the application of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), specifically, his interest in executing removal orders as soon as reasonably practicable. (*Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110; IRPA, ss. 48(2).)

[29] The Federal Court of Appeal has confirmed that the Minister's obligation to remove 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." (*Selliah v. Canada (Minister of Citizenship & Immigration)*, 2004 FCA 261, para. 22.)

[30] The Applicant has not demonstrated that the balance of convenience favours the non-application of the law or that his desire to stay in Canada outweighs the public interest.

IV. Conclusion

[31] For all of the above reasons, the Applicant's motion for a stay of the execution of the removal from Canada is dismissed.

ORDER

THIS COURT ORDERS that the Applicant's motion for a stay of the execution of the removal from Canada be dismissed.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1481-08
STYLE OF CAUSE:	CARLOS YSRAEL LUCIANO ZABALA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING:	April 2, 2008 (by Teleconference)
REASONS FOR ORDER AND ORDER:	SHORE J.
DATED:	April 3, 2008

APPEARANCES:

Ms. Stella Iriah Anaele	FOR THE APPLICANT
Mr. Bernard Assan	FOR THE RESPONDENT

SOLICITORS OF RECORD:

STELLA IRIAH ANAELE Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENT