Date: 20090428

Docket: IMM-1624-09

Citation: 2009 FC 423

Ottawa, Ontario, April 28, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

REY RODRIGUEZ Jorge Luis

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] The case law has established that removal officers have limited discretion to defer a removal by reason of special or compelling circumstances:

> [37] It is well-established law that the discretion to defer a removal is very limited. It would be contrary to the purposes and objects to the Act to expand, by judicial declaration, a removal officer's limited discretion so as to mandate a "mini H & C" review prior to removal (*Davis v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1628 at para. 4 (T.D.) (QL); *John v. Canada (Minister of Citizenship and Immigration)* 2003 F.C.J. No. 583 (T.D.) (QL))....

(*Adviento v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1430, 242 F.T.R. 295; also, *Simoes v. Canada (Minister of Citizenship and Immigration)* (2000), 187 F.T.R. 219, 98

A.C.W.S. (3d) 422 at para. 12; *Williams v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 853, 116 A.C.W.S. (3d) 89 at para. 21; *Prasad v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 614, 123 A.C.W.S. (3d) 533 at para. 32; *Griffiths*, above).

II. Introduction

[2] The applicant, a citizen of Peru, has brought a motion to stay his removal to that country, which is to take place on April 30, 2009.

[3] This motion is joined with an application for leave brought against a decision dated March 25, 2009, by the enforcement officer refusing an administrative deferral of the applicant's removal.

III. Facts

[4] The applicant, Jorge Luis Rey Rodriguez, is a citizen of Peru. He, his former spouse, Rosa Maria Benavides Carrasco, and their two children arrived in Canada on October 27, 2005, and claimed refugee protection on their arrival.

[5] Their claim was rejected by the Refugee Protection Division (RPD) in a decision dated May 23, 2006.

[6] The application for leave and judicial review challenging the RPD's decision was dismissed on October 13, 2006.

[7] On December 27, 2006, the applicant, his former spouse and their children brought an application for permanent residence based on humanitarian and compassionate grounds (H&C).

[8] The applicant also brought an application for a pre-removal risk assessment (PRRA), received by Citizenship and Immigration Canada (CIC) on December 20, 2007.

[9] The applicant and his former spouse were divorced on September 11, 2008.

[10] His former spouse then married Daniel Paquette, a Canadian citizen. She filed a new application for permanent residence supported by the sponsorship of Mr. Paquette.

[11] The applicant claims that he has been in a conjugal relationship with a Canadian citizen, Martha Marcias Pineda, since March 2008.

[12] The applicant's H&C and PRRA applications were refused on December 16, 2008.

[13] On February 20, 2009, the applicant brought two applications for leave, one with respect to the PRRA decision and the other with respect to the H&C decision.

IV. Analysis

[14] In order to evaluate the merits of the motion to stay, the Court must determine whether the applicant meets the tests laid down by the Federal Court of Appeal in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.)

[15] In this proceeding , the Federal Court of Appeal adopted three tests that it imported from the case law on injunctions, specifically from the Supreme Court of Canada decision in *Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110. These three tests are as follows:

- the existence of a serious question;
- the existence of irreparable harm; and
- the weighing of the balance of convenience.

[16] The applicant failed to demonstrate that there was a serious question to be tried in his application for leave respecting the officer's decision, that irreparable harm would result from his removal to Peru or that his inconvenience would be greater than that caused to the public interest in ensuring that the immigration process provided for in the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), follows its course.

A. Serious question

[17] The enforcement of a removal order is governed by section 48 of the IRPA:

48. (1) A removal order is enforceable if it has	**48.** (1) La mesure de renvoi est exécutoire depuis

come into force and is not stayed.	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 it must be enforced as soon as is reasonably practicable.	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.

[18] The case law has established that removal officers have limited discretion to defer a removal by reason of special or compelling circumstances:

> [37] It is well-established law that the discretion to defer a removal is very limited. It would be contrary to the purposes and objects to the Act to expand, by judicial declaration, a removal officer's limited discretion so as to mandate a "mini H & C" review prior to removal (*Davis v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 1628 at para. 4 (T.D.) (QL); *John v. Canada (Minister of Citizenship and Immigration)* 2003 F.C.J. No. 583 (T.D.) (QL))….

(*Adviento*, above; also, *Simoes*, *Williams*, *Prasad* and *Griffiths*, above)

[19] In the case at bar, the applicant asked the removal officer to stay his removal on the grounds that he had two applications for leave and a sponsorship application pending.

[20] The applicant did not demonstrate that he had submitted to the removal officer evidence that could constitute sufficient justification for the officer to exercise his discretion, which is limited to deferring the removal **by reason of special or compelling circumstances**:

> [45] The order whose deferral is in issue is a mandatory order which the Minister is bound by law to execute. The exercise of deferral requires justification for failing to obey a positive obligation imposed by statute. That justification must be found in the statute or in some other legal obligation imposed on the Minister which is of

> sufficient importance to relieve the Minister from compliance with section 48 of the Act [*Immigration* Act, R.S.C. (1985), c. I-2]…. (Emphasis added.)

(*Wang v. Canada (Minister of Citizenship and Immigration)*, [2001] 3 F.C. 682, 2001 FCT 148)

[21] The applicant alleges in his affidavit that his spouse filed a sponsorship application that is still pending and that he has two applications for leave pending, one with respect to the H&C decision and the other with respect to the PRRA decision.

[22] It is settled law that an H&C application sponsored by a spouse is not an impediment to an applicant's removal (*Patterson v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 406, 166 A.C.W.S. (3d) 300 at para. 21; *Zenunaj v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1715, 144 A.C.W.S. (3d) 927; *Shchelkanov v. Canada (Minister of Citizenship and Immigration)* (1994), 76 F.T.R. 151, 47 A.C.W.S. (3d) 783; *Okoawoh v. Canada (Minister of Citizenship and Immigration)* (1996), 60 A.C.W.S. (3d) 816, [1996] F.C.J. No. 24 (F.C.T.D.) (QL)).

[23] A pending landing application does not raise a serious question. The applicant may submit an application from outside Canada in the normal course of the process as a member of the family class.

[24] In Canada, spousal applications, like H&C applications, operate independently of the removal process. They do not have the effect of halting removals until such applications are determined. Had this been Parliament's intention, the legislation would have provided for a

statutory stay of removal once such an application has been filed (*Patterson* and *Shchelkanov*, above).

[25] The applicant did not submit any evidence that could constitute justification for the removal officer to defer the removal.

[26] There is no indication in the CIC file on the applicant that the applicant has a pending sponsorship application.

[27] As for the pending applications for leave with respect to the PRRA and H&C decisions, the IRPA does not provide that the filing of an application for leave would result in a stay of removal (section 48 of the IRPA and section 230 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations)).

[28] Moreover, the applicant did not in any way demonstrate that there is a serious question concerning these decisions.

[29] Contrary to the applicant's allegations in his written submissions, he was asked by CIC for an update of his H&C application file. An interview was held in the presence of the applicant and his counsel on November 25, 2008.

[30] In the case at bar, his removal could not be deferred on this basis, given the specific circumstances.

B. Irreparable harm

[31] In the case at bar, the applicant alleges that he would suffer irreparable harm if he were to be removed to Peru because of: (1) his potential separation from his spouse and his spouse's children; (2) the risk of not being able to receive adequate care; (3) the risk of facing his assailants.

[32] The fact that the applicant will be separated from his spouse is not a sufficient reason to find that he would suffer irreparable harm if he were removed.

[33] The applicant did not in any way demonstrate that he or his spouse would suffer irreparable harm if he were to be removed to Peru.

[34] In addition, there is nothing in the record to demonstrate that the applicant's spouse submitted a sponsorship application.

[35] The following is stated in *Malagon* v. *Canada (Minister of Citizenship and Immigration)*, 2008 FC 1068, [2008] F.C.J. No.1586 (QL):

> [2] In regard to upsetting the family and the separation that must be endured by Ms. Malagon's spouse, this is not irreparable harm, but rather a phenomena inherent to removal (*Malyy v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 388, 156 A.C.W.S. (3d) 1150 at paragraphs 17-18; *Sofela v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 245, 146 A.C.W.S. (3d) 306 at paragraphs 4 and 5; *Radji v. Canada (Minister of Citizenship and*

> *Immigration)*, 2007 FC 100, 308 F.T.R. 175 at paragraph 39). To find otherwise would render impracticable the removal of individuals who do not have the right to reside in Canada. Further, as pointed out in *Golubyev v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 394, 156 A.C.W.S. (3d) 1147 at paragraph 12: irreparable harm is a strict test in which serious likelihood of jeopardy to the applicant's life or safety must be demonstrated.
>
> ...
>
> [57] In regard to the family upsets and the separation that Ms. Malagon's spouse will have to endure, this is not irreparable harm, but rather a phenomenon inherent to removal (*Malyy*, *supra*; *Sofela*, *supra*; *Radji*, *supra*). To find otherwise would render impracticable the removal of individual who do not have the right to reside in Canada. Further, as pointed out in *Golubyev v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 394, 156 A.C.W.S. (3d) 1147 at paragraph 12: irreparable harm is a strict test in which serious likelihood or jeopardy to the applicant's life or safety must be demonstrated.

(Also: *Javier* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 445, 160 A.C.W.S. (3d) 526 at para. 17 ; *Sahota* v. *Canada (Minister of Citizenship and Immigration)* (2002) FCT 331, 112 A.C.W.S. (3d) 1119 at paras. 5-6; *Melo* v. *Canada (Minister of Citizenship and Immigration)* (2000), 188 F.T.R. 39, 96 A.C.W.S. (3d) 278 at paras. 20-21; *Saibu* v. *Canada (Minister of Citizenship and Immigration)* (2002), 2002 FCT 103, 111 A.C.W.S. (3d) 980 at para. 10; *Kerrutt v. Canada (Minister of Citizenship and Immigration)* (1992), 53 F.T.R. 93, 32 A.C.W.S. (3d) 621; *Calderon* v. *Canada (Minister of Citizenship and Immigration)* (1995), 92 F.T.R. 107, 54 A.C.W.S. (3d) 316).

[36] The applicant alleges that he would receive inadequate care if he returned to Peru.

[37] The applicant's claims in this regard are vague and purely speculative. They are not in any way supported by the evidence in the record.

[38] The applicant claims that if he were to return to his country he would be at risk from his assailants.

[39] The RPD dismissed the applicant's application for protection. The RPD found that the applicant had not provided clear and convincing evidence that Peru could not protect him.

[40] It should be recalled that this Court confirmed the reasonableness of the RPD's decision by dismissing the application for judicial review of this decision.

[41] The applicant's PRRA application was refused for the following reasons:

a. The officer emphasized that the applicant's risk had already been assessed by the RPD, which found that the applicant was not a Convention refugee or a person in need of protection;
b. The officer indicated that the two documents submitted by the applicant were dated prior to the RPD hearing. He added that the list of the RPD's exhibits includes an information laid with the PNP (P-12) and a request for personal guarantees (P-14). Thus, the officer found that these documents were available at the time of the RPD hearing and that they do not constitute fresh evidence;
c. The officer also stressed that these two documents support events that are not new facts in the record;

d. It has been established that the applicant was unable to prove that Peru could not protect him and that he did not take sufficient steps to claim his country's protection;

e. The officer reported that the only new fact presented in his PRRA application concerned the telephone calls received by the applicant's mother. However, this fact could not be taken into consideration to support the applicant's fear of returning because, first, this fact was not supported by evidence; second, the applicant did not claim that these "telephone calls" were threats; and, third, it was observed that the identity of the individuals who telephoned the applicant's mother was unknown;

f. In addition, the PRRA officer noted that the government in place when the applicant was threatened in 2005 was that of Alejandro Toledo, but that Alan Garcia of the Popular Revolutionary Party Alliance came to power on June 4, 2006. Consequently, there was no further reason to fear assault since the denunciations were made against the previous government;

g. Finally, the PRRA officer found that even if corruption and impunity exist in Peru, the applicant is not directly at risk in his country following this change in government.

[42] The remarks of this Court in this regard are relevant:

> [55] The risks of return were already assessed in two administrative proceedings, by the panel and by the officer, and both made the same findings. Further, this Court confirmed the reasonableness of the Board's decision refusing the ALJR against the Board's decision. Since the order of this Court, the situation has not changed, as the PRRA confirmed.
>
> [56] This Court has often held that allegations of risk determined to be unfounded by both the Board and the PRRA cannot serve as a basis for establishing irreparable

> harm in the context of an application to stay (*Singh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 145, 137 A.C.W.S. (3d) 156). This principle relative to credibility is adaptable in the context of the failure to reverse the presumption of state protection. (Emphasis added.)

(*Malagon*, above; also, *Javier*, above at paras. 15-16)

[43] The applicant did not discharge his burden of showing that he would suffer irreparable harm if he returned to Peru.

C. Balance of convenience

[44] Subsection 48(2) of the IRPA imposes the obligation of enforcing removal orders as soon as is reasonably practicable.

[45] In the case at bar, given the lack of a serious question and irreparable harm, the balance of convenience favours the Minister, who has an interest in the removal order issued against the applicant being enforced on the date set for it, that is, April 30, 2009 (*Mobley v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 65 (Q.L.)).

[46] The case law of this Court also holds that when the balance of convenience is assessed, the notion of public interest must be taken into account (*Membreno-Garcia v. Canada (Minister of Employment and Immigration)*, [1992] 3 F.C. 306, 55 F.T.R. 104; *Blum v. Canada (Minister of Citizenship and Immigration)* (1994), 90 F.T.R. 54, 52 A.C.W.S. (3d) 1099).

[47] Consequently, the balance of convenience favours the public interest in ensuring that the immigration process provided for in the IRPA follows its course.

V. Conclusion

[48] For all of these reasons, the motion to stay is dismissed.

JUDGMENT

THE COURT ORDERS that the motion to stay be dismissed.

"Michel M.J. Shore"
Judge

Certified true translation
Susan Deichert, LLB

FEDERAL COURT

SOLICITORS OF RECORD

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