Federal Court  Cour fédérale

Date: 20101021

Docket: IMM-5908-10

Citation: 2010 FC 1019

[ENGLISH TRANSLATION]

Montreal, Quebec, October 21, 2010

In the presence of the Honourable Justice Pinard

BETWEEN:

Edgardo ARITA
Etelvina GOMEZ ARITA

Applicants

and

THE MINISTER OF PUBLIC
SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

[1] The Applicants are applying for a stay of their removal order for a departure to Honduras on October 23, 2010.

[2] The request is connected with the application for leave and judicial review of a decision by a pre-removal risk assessment (PRRA) officer to remove the Applicants regardless of their

application for exemption based on humanitarian and compassionate considerations (H&C application).

[3] The PRRA officer's decision was communicated to the Applicants on September 17, 2010. However, it was not until October 12, 2010 that the Applicants filed their application for leave and judicial review of that decision. Therefore this motion for a stay is associated with an application for leave filed after the deadline.

[4] In their notice of application for leave, the Applicants claim that the delay is due to the fact that their attorney was outside Canada from September 22, 2010 to October 5, 2010. That claim is not supported by an affidavit or any objective evidence. Thus, the Applicants failed to demonstrate that there is justification for the delay "for the entire period of the delay" (see *Beilin et al. v. Minister of Employment and Immigration* (1994), 88 F.T.R. 132).

[5] In *Butt v. Solicitor General*, 2004 FC 1032, Justice Luc Martineau, as it appears in the following excerpts, dismissed the motion for a stay for lack of a serious issue, since the applicants had failed to provide a valid explanation for the late filing of the application for leave and judicial review [TRANSLATION]:

> [4] Since the time extension is a precondition for consideration of their application for leave, the applicants must also, for the purposes of this application for a stay, demonstrate that the request for a time extension in their application for leave raises a serious issue. To do so, the applicants must provide me with evidence that enables me to find that there is reasonable cause for the Court to extend the time. In this regard, the case law requires the applicants to demonstrate that they had intended to challenge the decision in question for the entire period of the request for a time extension, but were prevented from doing so due to factors beyond their control: *Semenduev v. Minister*

> *of Employment and Immigration*, [1997] F.C.J. No. 70 at paragraph 2 (T.D.) (QL). These conditions are clearly not met in this case.
>
> [. . .]
>
> [9] Since the applicants failed to provide me with evidence enabling me to find that their request for a time extension raises a serious issue, it follows that I am unable to find that their application for judicial review raises a serious issue. Since the first requirement of the three-part test (serious issue, irreparable harm and balance of convenience) set out in *Toth v. Canada (M.E.I.)* (1988), 86 N.R. 302 (F.C.A.), (1988), 6 Imm.L.R. (2d) 123 (F.C.A.) was not met in this case, this application for a stay must be denied.

See, to the same effect, *Dessertine et al. v. Minister of Citizenship and Immigration* (August 14, 2000), IMM-3931-00; *Paredes v. Minister of Citizenship and Immigration* (October 20, 1997), IMM-3889-97; *Shellner v. Minister of Citizenship and Immigration* (April 23, 1996), IMM-1378-96 and*Semenduev*, *supra*.

[6] In any event, I am of the opinion, after hearing the parties' attorneys and reviewing the case, that the application for a stay is without merit, for the following additional reasons:

a. Removal officers' discretion to defer removal is very limited. For H&C applications, they justify a deferral only if they are based on a threat to personal safety, which is not the case here. The Applicants have not established that there are any special considerations that could justify departing from this principle (see *Wang v. Canada (M.C.I.)*, [2001] 3 F.C. 682; *Baron v. Minister of Public Safety and Emergency Preparedness*, 2009 FCA 81; *Adviento v. Minister of Citizenship and Immigration*, 2003 FC 1430 and *Prasad v. Minister of Citizenship and Immigration*, 2003 FCT 614).

Regarding the Applicants' arguments based on the *Canadian Charter of Rights and Freedoms* (the Charter) and on international law, it is well established that removing an individual after a complete pre-removal risk assessment is not a breach of sections 7 and 12 of the Charter (see *Suresh v. Canada (M.C.I.)*, [2002] 1 S.C.R. 3; *Chieu v. Canada (M.C.I.)*, [2002] 1 S.C.R. 84; *Al Sagban v. Canada (M.C.I.)*, [2002] 1 S.C.R. 133). With respect to section 3 of the *Convention Against Torture*, Justice Martineau stated the following in *Sidhu v. Minister of Citizenship and Immigration*, 2004 FC 39 [TRANSLATION]:

> [26] Paragraph 97(1)(a) of the Act specifically refers to the concept of torture within the meaning of the first section of the Convention and therefore incorporates the principles set out in section 3 of it. As such, the answer to this question appears in the legislation itself and the matter does not need to be certified.

Thus, the Applicants failed to establish that there is a serious issue in their underlying application for leave and judicial review.

b. The separation from family cited by the applicants does not, under the circumstances, constitute irreparable harm, which must be harm beyond what is inherent in the consequences of deportation (see *Melo v. Canada (M.C.I.*), [2000] F.C.J. No. 403 (T.D.) (QL)).

As for the risks of return cited by the Applicants, it is important to note that their refugee claim was already assessed by the Refugee Protection Division, whose negative decision was upheld by this Court. In addition, the risks of return were carefully assessed by the PRRA officer, who found that there are no personal risks for the Applicants. There is no evidence that this PRRA decision was challenged before this Court.

c. In this context, it is in the public interest to apply subsection 48(2) of the *Immigration and Refugee Protection Act*, S.C. (2001), c. 27, which requires the Minister to remove any person subject to an enforceable removal order as soon as the circumstances permit.

[7] For all these reasons, the Applicants' application for a stay is denied.

ORDER

The Applicants' application for a stay is denied.

"Yvon Pinard"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5908-10
STYLE OF CAUSE:	Edgardo ARITA, Etelvina GOMEZ ARITA v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Montreal, Quebec
DATE OF HEARING:	October 18, 2010
REASONS FOR ORDER AND ORDER:	Mr. Justice Pinard
DATE OF REASONS:	October 21, 2010

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