Federal Court  Cour fédérale

Date: 20101217

Docket: IMM-6931-10

Citation: 2010 FC 1301

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, December 17, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

DOLORES ADRIANA ESPIDIO GOMEZ
VALERIA ALAENTZI MARTINEZ ESPIDIO
DIEGO EMILIANO MARTINEZ ESPIDIO

Applicants

and

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

Respondents

REASONS FOR ORDER AND ORDER

I. Introduction

[1] [18] What is in issue . . . is the extent to which the granting of stays might become a practice which thwarts the efficient operation of the immigration

> legislation. It is well known that the present procedures were put in place because a practice had grown up in which many cases, totally devoid of merit, were initiated in the court, indeed were clogging the court, for the sole purpose of buying the appellants further time in Canada. There is a public interest in having a system which operates in an efficient, expeditious and fair manner and which, to the greatest extent possible, does not lend itself to abusive practices. This is the public interest which in my view must be weighed against the potential harm to the applicant if a stay is not granted. (Emphasis added.)

French version:

> [18] [...] il faut se demander à quel point le fait d'accorder des sursis risque de devenir une pratique qui contrecarre l'application efficace de la législation en matière d'immigration. Chacun sait que la procédure actuelle a été mise en place parce qu'une pratique s'était développée par laquelle de très nombreuses demandes, tout à fait dénuées de fondement, étaient introduites devant la Cour et encombraient les rôles, uniquement pour permettre aux appelants de demeurer plus longtemps au Canada. Il y va de l'intérêt public d'avoir un régime qui fonctionne de façon efficace, rapide et équitable, et qui, dans la mesure du possible, ne se prête pas aux abus. Tel est, à mon avis, l'intérêt public qu'il faut soupeser par rapport au préjudice que pourrait éventuellement subir le requérant si un sursis n'était pas accordé.

Membreno-Garcia v. Canada (Minister of Employment and Immigration), [1992] 3 F.C. 306, 55 FTR 104).

[2] Justice Barbara Reed, in *Membreno-Garcia*, above, reflected on the subject of stays as they affect society at large. It is incumbent that consideration be given to the separation of powers by which the three branches of government operate; thus, the legislator legislates, the executive branch executes and it is for the judicial branch but to interpret legislation in keeping with the intention of the legislator. Constitutional supremacy, in its conception, ensures that each branch of government recognize its solemn responsibility to constitutional supremacy from which the very separation of powers devolves.

II. Judicial proceedings

[3] On December 13, 2010, the applicants served the respondents with a motion to stay the execution of a removal order made against them.

[4] This stay motion is accompanied by an Application for Leave and for Judicial Review (ALJR) of a decision by a pre-removal risk assessment (PRRA) officer made on August 30, 2010, which determined that the applicants had failed to demonstrate humanitarian and compassionate considerations warranting their being granted permission to remain in Canada to file their application for permanent residence.

[5] The applicants' departure for Mexico is scheduled for December 21, 2010, at 5:15 a.m.

III. Facts

[6] Unless otherwise stated, the following facts are from the PRRA officer's summary in the August 30, 2010, decision.

[7] The principal applicant, Dolores Adriana Espidio Gomez, and her two minor children are Mexican citizens. They arrived in Canada on May 1, 2007, and claimed refugee protection that very day.

[8] On February 9, 2009, the refugee protection claim was rejected by the Immigration and Refugee Board (IRB) on the ground that the applicants had failed to seek the state protection available to them in Mexico.

[9] The applicants then filed an ALJR of the IRB's decision. This application was dismissed on June 3, 2009 by Justice Yves de Montigny of this Court.

[10] On November 5, 2009, the applicants filed an application for permanent residence in Canada on humanitarian and compassionate (H&C) grounds.

[11] On December 16, 2009, the applicants filed a PRRA application with Citizenship and Immigration Canada (CIC).

[12] On December 29, 2009, they filed further written submissions in support of their PRRA application.

[13] On August 23, 2010, the PRRA application was rejected.

[14] On August 30, 2010, the H&C application was rejected.

[15] On November 19, 2010, the negative H&C and PRRA decisions were delivered to the principal applicant by hand.

[16] On November 25, 2010, the applicants filed an ALJR of the negative H&C and PRRA decisions in the Federal Court.

[17] The ALJR of the H&C decision is the application underlying this motion.

[18] On November 29, 2010, a removal officer gave the applicants the order to leave Canada. They must leave the country on December 21, 2010.

IV. Issue

[19] Have the applicants shown that they met the three criteria set out in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302, 11 A.C.W.S. (3d) 440 (F.C.A.) allowing them to obtain a judicial stay of the removal order against them?

Applicable tests

[20] To obtain a judicial stay of a removal order, an applicant must show that he or she meets the following three test criteria:

i. there is a serious issue to be tried;

ii. the applicant will suffer irreparable harm; and

iii. the weighing of the balance of convenience.

(*Toth*, above.)

V. Analysis

[21] As the respondents argue, and the Court agrees with their position, this motion does not meet the test established in *Toth*. More particularly, the applicants have not demonstrated a serious issue in their underlying ALJR and have not provided credible evidence of irreparable harm awaiting them in their country of origin.

A. Serious issue

[22] In this case, the applicants' ALJR does not raise a serious issue. In fact, the H&C decision that is the basis of the ALJR is entirely reasonable and supported by the evidence submitted to the officer.

[23] In order to meet the test of a serious issue to be tried, the applicants had to demonstrate the presence of an issue with "reasonable chances of succeeding" in the proceeding attached to their stay motion (*Mejia v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 658, [2009] F.C.J. No. 824 (QL/Lexis), at paragraph 18).

[24] Under subsection 11(1) of the IRPA, a person who wishes to immigrate to Canada must file an application for permanent residence **from outside Canada**.

[25] Subsection 25(1) of the IRPA, however, provides that the Minister has the discretion to facilitate a person's admission to Canada or to grant an exemption from any applicable criteria or obligation of the IRPA if the Minister is of the opinion that it is justified by H&C considerations.

[26] As Justice Montigny wrote in *Serda v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 356, 146 A.C.W.S. (3d) 1057,

> [20] One of the cornerstones of the *Immigration and Refugee Protection Act* is the requirement that persons who wish to live permanently in Canada must, prior to their arrival in Canada, submit their application outside Canada and qualify for, and obtain, a permanent resident visa. Section 25 of the Act gives to the Minister the flexibility to approve deserving cases for processing within Canada. This is clearly meant to be an exceptional remedy, as is made clear by the wording of that provision . . . . (Emphasis added.)

[27] The decision-making process for H&C applications is **exceptional and discretionary** and serves only to determine whether the granting of an exemption is justified: *De Leiva v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 717, [2010] F.C.J. No. 868 (QL/Lexis), at paragraph 15.

[28] The onus was on the applicants to prove that the hardship they would face, if they were required to file their application for permanent residence from outside the country, **would be unusual and undeserved or disproportionate**, the test adopted by the Federal Court of Appeal (*Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358 (F.C.A.) at paragraph 23).

[29] The IP5 – Immigration Applications in Canada made on Humanitarian or Compassionate Grounds manual, prepared by the Minister of Citizenship and Immigration Canada, provides guidelines on what is meant by humanitarian and compassionate grounds:

5.6. The assessment of hardship	**5.6. Évaluation des difficultés**
The assessment of hardship in an H&C application is a means by which CIC decision-makers	L'évaluation des difficultés dans une demande CH est un moyen pour les décideurs de

may determine whether there are sufficient H&C grounds to justify granting the requested exemption(s).

CIC de déterminer s'il existe des circonstances d'ordre humanitaire suffisantes pour justifier l'octroi de la dispense demandée.

Individual H&C factors put forward by the applicant should not be considered in isolation when determining the hardship that an applicant would face; rather, hardship is determined as a result of a global assessment of H&C considerations put forth by the applicant. In other words, hardship is assessed by weighing together all of the H&C considerations submitted by the applicant.

Quand on détermine les difficultés auxquelles un demandeur s'expose, il faut examiner les circonstances d'ordre humanitaire qu'il fait valoir globalement et non isolément. En d'autres mots, les difficultés sont évaluées en soupesant ensemble toutes les circonstances d'ordre humanitaire soumises par le demandeur.

Unusual and undeserved hardship

Difficultés inhabituelles et injustifiées

The hardship faced by the applicant (if they were not granted the requested exemption) would be, in most cases, unusual. In other words, a hardship not anticipated by the Act or Regulations;

Les difficultés auxquelles s'exposerait le demandeur (s'il n'obtenait pas la dispense demandée) seraient, dans la plupart des cas, inhabituelles. En d'autres mots, il s'agit de difficultés non prévues à la *Loi* ou au *Règlement*;

and

et

The hardship faced by the applicant (if they were not granted the requested exemption) would be, in most cases, the result of circumstances beyond the person's control.

Les difficultés auxquelles s'exposerait le demandeur (s'il n'obtenait pas la dispense demandée) seraient, dans la plupart des cas, le résultat de circonstances indépendantes de sa volonté.

OR

OU

Disproportionate hardship

Difficultés démesurées

Sufficient humanitarian and compassionate grounds may also exist in cases that would not meet the "unusual and undeserved" criteria but where the hardship of not being granted the requested exemption(s) would have an unreasonable impact on the applicant due to their personal circumstances.	Il peut aussi exister des circonstances d'ordre humanitaire suffisantes dans des cas où les difficultés entraînées par le refus de la dispense ne seraient pas considérées comme « inhabituelles et injustifiées », mais auraient des répercussions déraisonnables sur le demandeur en raison de sa situation personnelle.

(Emphasis added.)

[30] The standard of review applicable to H&C applications is reasonableness:

> *Standard of review*
>
> [7] An H&C application, including the assessment of the best interests of the child, is to be held to a standard of reasonableness as many of the findings are questions of mixed fact and law and the determination is highly discretionary (*Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190; *Markis v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 428, 71 Imm. L.R. (3d) 237 at paragraphs 20 and 21; *Laban v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 661, [2008] F.C.J. No. 819 paragraphs 13 and 14). The question of whether or not the Officer applied the correct legal test has been found to be a question of law and held to a standard of correctness (*Markis* at paragraph 19). (Emphasis added.)

(*Garcia v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 677, [2010] F.C.J. No. 805 (QL/Lexis) at paragraph 7; also, *Medina v. Canada (Minister of Citizenship and Immigration)*, 2010 FC 504, [2010] F.C.J. No. 611 (QL/Lexis) at paragraphs 22–23.)

[31] In this case, it is clear that the applicants have failed to show that the ALJR raised any serious question whatsoever.

[32] First of all, it is worth recalling that the filing of an application for permanent residence from the applicants' country of origin is a situation set out in the IRPA, and therefore not a situation that can be characterized as unusual or undeserved. Therefore, the PRRA officer had to determine whether the circumstances would cause disproportionate hardship for the applicants if they had to return to their country to file their application for permanent residence there.

[33] **With regard to the applicants' establishment in Canada**, contrary to what they state in their memorandum, the PRRA officer did indeed consider their degree of establishment in Canada in making the decision.

[34] However, the PRRA officer determined that the applicant's degree of establishment did not justify an exemption from their legal obligation to file their application for permanent residence from Mexico.

[35] The fact is that the applicant and her children have been in the country for only three and a half years. The applicant worked for only a few months during that time, and the PRRA officer's review of her file casts serious doubt on the legality of her activities.

[36] The applicant states that she has worked since July 2009, when she did not yet have a work permit. She also allegedly received social assistance benefits until July 31, 2010, even though she likely had a job.

[37] Last, her assets are minimal and her bank account is at zero. As well, although the applicant states having a brother and a cousin in Canada, she has not provided any evidence demonstrating that their presence here would cause her disproportionate hardship if she had to be separated from them.

[38] Consequently, it is evident that the PRRA officer examined the applicants' situation in detail. His findings, made on the basis of the evidence before him, were entirely reasonable. There is no doubt that the applicants' establishment in Canada is not such as would cause them disproportionate hardship in the event that they return to Mexico.

[39] Nowhere do the applicants state what evidence might have been ignored by the PRRA officer. They merely make one general, unfounded allegation that is clearly insufficient to substantiate their argument.

[40] **With regard to the best interests of the children**, one need only read the decision to see that the PRRA officer did examine their situation and weighed the impact on them of a removal to Mexico.

[41] In so doing, the PRRA officer found that the children were still relatively young and had been in Canada for a short time. In particular, the PRRA officer underscored that both children had spent the greater part of their lives in Mexico.

[42] The PRRA officer also considered the principal applicant's submissions that her children would suffer from malnutrition and would not have access to adequate health care if they had to return to Mexico. However, the officer noted that the principal applicant had not filed any evidence to that effect and emphasized in his decision that the children had not had any medical problems during their time spent in Mexico. In the absence of evidence, the Court can only conclude that the applicant's children are in excellent health and that there is no medical contraindication for their journey and return to their country.

[43] The applicants' vague allegations that the interests of the children were not considered in this decision are wholly without merit. Everything indicates that the PRRA officer was "alert, alive and sensitive" to the interests of the children (*Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] 2 S.C.R. 817, at paragraph 75), but nonetheless correctly found that their situation was not unusual and did not warrant an exemption from their obligation to return to their country of origin to file their application there.

[44] The applicants have failed to identify any other serious issue that could have been raised by the underlying decision. The decision was entirely reasonable and provides no justification whatsoever for this Court to grant a judicial stay. Since the decision raises no serious issue, the applicants' motion should be dismissed accordingly.

[45] Moreover, the Court is also of the opinion that the applicants would not suffer irreparable harm if they were to return to their country of origin.

B. Irreparable harm

[46] The applicants make the following allegations of risk:

(a) risk of psychological torture from the fact that the father of the minor children could petition for and receive legal custody of them

(b) risk of illness, malnutrition and danger for the children owing to the fact that they would not obtain the same care and/or level of education in Mexico as they would in Canada

(c) application for judicial review rendered moot following the applicants' removal

[47] It should be noted that in their motion, the applicants make no allegations of a risk of physical violence from the former spouse.

[48] Furthermore, the IRB noted that at the time of the hearing on December 5, 2008, the principal applicant did not fear being subjected to physical violence from her former spouse if she were to return to Mexico. She also stated that her former spouse had never been violent with the children.

[49] The IRB not only noted those important admissions by the principal applicant, but also noted that even if the former spouse were to be violent, the applicants would be able to seek protection in Mexico. This decision was upheld by this Court.

[50] The PRRA and H&C decisions both came to that same conclusion, confirming the lack of risk for the applicants.

[51] The IRB noted that the principal applicant's fear was, rather, of losing legal custody of her children if she were to return to Mexico.

[52] In the PRRA and H&C applications and at the stage of this stay motion, the applicants are alleging that the former spouse might obtain custody of his children, causing irreparable harm.

[53] The applicants did not file any evidence demonstrating the irreparable harm that could be caused by a change of custody. The principal applicant merely submitted that it would be [TRANSLATION] "psychological torture" if her former spouse were to apply for and receive custody of the children. She did not file any evidence to support such a submission. The principal applicant fears a legal measure, that is, the determination of her children's custody.

[54] The notion of irreparable harm was defined by the Court in *Kerrutt v. Canada (Minister of Employment and Immigration)* (1992), 53 F.T.R. 93, 32 A.C.W.S. (3d) 621 as being the removal of a person to a country where there is a danger to the person's safety or life.

[55] This decision was followed in *Calderon v. Canada (Minister of Citizenship and Immigration)* (1995), 92 F.T.R. 107, 54 A.C.W.S. (3d) 316, in which the Court stated the following in respect of the definition of irreparable harm established in *Kerrut*, above:

> [22] . . . This is a very strict test and I accept its premise that irreparable harm must be very grave and more than the unfortunate hardship associated with the breakup or relocation of a family.

[56] Since the principal applicant has admitted that she fears **neither for her physical safety nor for that of her children**, the elements of the test in *Kerrut*, above, have clearly not been met.

[57] Furthermore, the fact that the former spouse has a legal right to custody which he may lawfully exercise may be an inconvenience for the principal applicant, who is accustomed to having exclusive custody by default in Canada; nonetheless, that does not correspond to the definition of harm established in *Calderon*, above, that is, a danger to her life.

[58] It is clear from reading *Calderon*, above, that the mere possibility that there may be a legal breakup of the family is not irreparable harm.

[59] The applicants submit that the children are at risk of illness, malnutrition and danger because in Mexico, they would not receive the same quality of care and education as in Canada.

[60] The children are of primary school age, and there is no evidence in the record that they have any health problems or particular difficulties.

[61] These alleged risks are purely speculative and are not supported whatsoever by the evidence.

[62] In the H&C and PRRA decisions, the PRRA officer assessed those allegations. Each of the decisions made at that stage noted the lack of evidence in this regard.

[63] In *Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, 131 A.C.W.S. (3d) 547, the Federal Court of Appeal wrote the following:

> [13] The removal of persons who have remained in Canada without status will always disrupt the lives that they have succeeded in building here. This is likely to be particularly true of young children who have no memory of the country that they left. Nonetheless, the kinds of hardship typically occasioned by removal cannot, in my view, constitute irreparable harm for the purpose of the *Toth* rule, otherwise stays would have to be granted in most cases, provided only that there is a serious issue to be tried: *Melo v. Canada (Minister of Citizenship and Immigration)* (2000), 188 F.T.R. 29. (Emphasis added.)

[64] The PRRA officer made a decision regarding the interests of the children in the event of a return to Mexico. Furthermore, it was already shown that the officer's H&C decision, which deals with the issue, is reasonable. That decision found that the children are young and have only attended school in Canada for a very short time. Returning them to the country where they spent the majority of their lives will not cause them irreparable harm.

[65] Last, the applicants submit that their ALJR would be futile with regard to the relief sought if they had to return to Mexico. They submit that this would constitute irreparable harm.

[66] Such an argument has already been considered by the Federal Court of Appeal:

> [69] It is also clear, in my respectful opinion, that there was no basis for him to conclude that irreparable harm would occur if the removal order was not stayed. As this Court and the Federal Court have constantly repeated, one of the unfortunate consequences of a removal order is hardship and disruption of family life. However, that clearly does not constitute irreparable harm. To paraphrase the words of Pelletier J.A. found at paragraph 88 of his Reasons in *Wang*, supra, family hardship is the unfortunate result of a removal order which can be remedied by readmission if the H&C application is successful. Further, the fact that the appellants' children might have to pursue their education in Spanish,

because of their parents' removal to Argentina, clearly does not constitute irreparable harm.

. . .

[86] Under subsection 11(1) of the IRPA, a foreign national wishing to establish permanent resident status must apply for a visa before entering Canada. The IRPA makes it clear that H&C applications are intended to be used only as exceptions to this requirement. H&C applications are meant to allow for an application to be processed from within Canada where the Minister considers that humanitarian and compassionate grounds make this exemption justified:

25. (1) The Minister shall, upon request of a foreign national in Canada who is inadmissible or who does not meet the requirements of this Act, and may, on the Minister's own initiative or on request of a foreign national outside Canada, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them, taking into account the best interests of a child directly affected, or by public policy considerations.	**25.** (1) Le ministre doit, sur demande d'un étranger se trouvant au Canada qui est interdit de territoire ou qui ne se conforme pas à la présente loi, et peut, de sa propre initiative ou sur demande d'un étranger se trouvant hors du Canada, étudier le cas de cet étranger et peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des circonstances d'ordre humanitaire relatives à l'étranger — compte tenu de l'intérêt supérieur de l'enfant directement touché — ou l'intérêt public le justifient.
(2) The Minister may not grant permanent resident status to a foreign national referred to in subsection 9(1) if the foreign national does not meet the province's selection criteria applicable to that foreign national.	(2) Le statut ne peut toutefois être octroyé à l'étranger visé au paragraphe 9(1) qui ne répond pas aux critères de sélection de la province en cause qui lui sont applicables.

> [87] H&C applications are not intended to obstruct a valid removal order. Where a PRRA has revealed that the applicants are not at risk if they are returned, then the applicants are intended to make future requests for permanent residence from their home country.
>
> [88] In the appellants' case, the H&C application is still pending. It is my view that this still does not prevent their removal. Removing the appellants will not cause irreparable harm to them or their Canadian-born children. Should a new removal date be scheduled, the appellants are likely to ask the enforcement officer for a deferral. I believe my colleague's indication that new facts would need to be put forward to support such a request is optimistic. These appellants have continued to raise the same arguments throughout their dealings with immigration officials in Canada and the likelihood that they will continue to raise these arguments, or versions thereof consistent with the passing of time, is high. (Emphasis added.)

(*Baron v. Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 F.C.R. 311).

[67] The applicants' argument is therefore flawed, since their removal is no obstacle to the processing of their H&C application. By analogy, their removal is no obstacle to the consideration of their ALJR, which is made on the basis of their H&C application (*Alliu v. Canada (Citizenship and Immigration)*, 2009 FC 550, 178 A.C.W.S. (3d) 422 at paragraphs 14 *et seq*.).

[68] Consequently, they have failed to demonstrate irreparable harm.

C. Balance of convenience

[69] In the absence of a serious issue and irreparable harm, the balance of convenience weighs in favour of the public interest, that is, that the immigration process set out under the IRPA be

followed (*Mobley v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 65 (QL/Lexis)).

[70] In fact, subsection 48(2) of the IRPA provides that a removal order must be enforced as soon as it is reasonably practicable.

[71] As a result, the balance of convenience weighs clearly in favour of the respondents.

> (iii) Balance of convenience
>
> [21] Counsel says that since the appellants have no criminal record, are not security concerns, and are financially established and socially integrated in Canada, the balance of convenience favours maintaining the *status quo* until their appeal is decided.
>
> [22] I do not agree. They have had three negative administrative decisions, which have all been upheld by the Federal Court. It is nearly four years since they first arrived here. In my view, the balance of convenience does not favour delaying further the discharge of either their duty, as persons subject to an enforceable removal order, to leave Canada immediately, or the Minister's duty to remove them as soon as reasonably practicable: IRPA, subsection 48(2). <u>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</u>.
> (Emphasis added.)

(*Selliah*, above.)

[72] The applicant had every opportunity to make her various applications to remain in Canada. One by one, they were rejected by the Refugee Protection Division (RPD) and the PRRA officer and dismissed by the Federal Court.

[73] The time has come for the respondents to enforce the IRPA and for the applicants to leave the country. Once they have done so, there will be nothing barring the applicants from filing an application for permanent residence from Mexico, as provided by the IRPA. Their recourses to remain in Canada have now been exhausted, and their situation does not present sufficient positive elements to justify an exemption from the general principle.

[74] Therefore, the balance of convenience weighs in the respondents' favour, which should thus cause the applicants' motion to be dismissed.

VI. Conclusion

[75] The applicants have failed to show that they meet the three test criteria for a stay. Consequently, this stay motion is dismissed.

ORDER

THE COURT ORDERS that the motion to stay the execution of the removal order be dismissed.

"Michel M.J. Shore"
Judge

Certified true translation
Sarah Burns

FEDERAL COURT

SOLICITORS OF RECORD

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