Federal Court Cour fédérale

Date: 20110310

Docket: IMM-1116-11
IMM-1118-11

Citation: 2011 FC 295

[ENGLISH TRANSLATION]

Ottawa, Ontario, March 10, 2011

PRESENT: The Honourable Mr. Justice Simon Noël

Docket: IMM-1116-11

BETWEEN:

ABELINO HUIX SILVERIO
ANTONIA SANDOVAL ACEVES
REBECCA HUIX
JOEL HUIX

Applicants

AND

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

Respondents

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REASONS FOR ORDER AND ORDER

[1] This is an interlocutory motion to stay a removal order that will become enforceable on March 17, 2011, against the applicant, Abelino Huix Silverio, aimed at sending him back to Guatemala. A removal order is also enforceable against Antonia Sandoval Aceves and the family's two children subject to the motion to have them sent back to Mexico.

[2] The motion is joined to a request for leave to apply for judicial review of the decision of immigration officer Sophie Bisaillon (Officer), dated December 15, 2010, in which the Officer found that Mr. Huix Silverio would not be placed at risk of persecution, torture, death threats, cruel and unusual treatment or a cruel and unusual sentence in the event that he and his family are sent back to Guatemala. In addition, the Officer found that Ms. Sandoval Aceves and her children would not be placed at risk of persecution, torture, death threats, or a cruel and unusual sentence in the event that they were sent back to Mexico.

[3] Furthermore, the interlocutory motion to stay the removal orders is also connected to an application for judicial review of Sophie Bisaillon's decision refusing to exempt the applicants for humanitarian and compassionate considerations from the obligation to file their application for permanent residence from abroad, as required by the *Immigration and Refugee Protection Act*, SC 2001, c. 27 (IRPA).

[4] Though these are two separate applications for judicial review, the stay motion was heard jointly for both cases because the applicants' claims were identical in these cases.

[5] For the stay motion to succeed, the applicants had to prove that there was a serious issue to debate over the application for judicial review, that they were at risk of suffering irreparable harm if they were deported to Mexico and Guatemala, respectively, and that the balance of convenience worked in their favour (*Toth v Canada (Minister of Employment and Immigration)* (1986), 6 Imm LR (2d) 123). It is a cumulative test, in which all the elements must be present to be able to grant the stay.

[6] After having heard the parties and reviewed the documents filed, I have reached the conclusion that the stay motion cannot succeed. Furthermore, given that the dismissal of the stay potentially makes the applications for judicial review moot, the Court must carry out an analysis of the stay motion (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81).

[7] First, the applicants are putting forward issues deemed to be serious, which—according to them—would satisfy the first part of the *Toth* test, above. However, the Court notes that the arguments lack factual and judicial bases; as a result, they must be rejected.

[8] First, the applicants wrongly allege that no written reasons were provided, therefore the decisions are vitiated. However, it is evident that written reasons were given, both for the PRRA application and the motion for humanitarian and compassionate considerations, as appears from the record on its face. It seems as if the applicants did not exercise their right to obtain the written reasons during pre-removal interviews. Counsel for the applicants' tried to argue that an application was filed, but the record proves the opposite. The argument that no reasons were provided must therefore fail.

[9] Counsel also argued that the applicants had requested to be sent back to the same country together. No evidence supports that claim. Instead, evidence reveals that no additional application was made.

[10] The applicants argue that the Officer did not consider the best interests of the children in both her pre-removal risk assessment and her assessment of the motion on humanitarian and compassionate grounds. However, according to the decision regarding the humanitarian and compassionate reasons, the best interests of the children were properly analyzed. The Officer noted that the arguments submitted in this respect were general and were not supported by the evidence. Such an approach is underpinned by applicable case law (see, *inter alia*, *Parsons v Canada (Minister of Citizenship and Immigration)*, 2003 FC 913 and *Buchting v Canada (Minister of*

Citizenship and Immigration), 2003 FC 953). With respect to including the best interests of the children in the PRRA, it was not the appropriate forum to assess these considerations because it falls almost exclusively under the jurisdiction of the application for humanitarian and compassionate considerations, and these are two separate legal systems (*Munar v Canada (Minister of Citizenship and Immigration)*, 2005 FC 1180).

[11] Thus, it seems clear that the best interests of the children were considered. Suffice it to say that the humanitarian and compassionate considerations do not include the inconveniences normally associated with being sent back to another country (*Selliah v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261). In addition, the children will live with their mother, and nothing will prevent the family from eventually reuniting, which could take place in Mexico, Guatemala, or maybe even Canada. This is not a case in which the removal would result in leaving the children alone in Canada.

[12] Another argument suggests that simply filing an application for judicial review is tantamount to a serious question. This is obviously not the case, as unequivocally specified by case law (*Selliah v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261; *Jorge Fabian v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 425; *Kante v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 109). The evidence as submitted does not prove that a serious question actually exists.

[13] Thus, it is clear that all applicants who have not benefitted from a favorable PRRA may remain in Canada simply by judicially contesting this assessment and by obtaining a stay before this

Court (*Bui v Canada (Citizenship and Immigration)*, 2007 FC 1369). This was not Parliament's intention (*Bui v Canada (Citizenship and Immigration)*, 2007 FC 1369). In addition, the Court can only repeat the words of de Montigny J. in *Munar*, above, at paras 32 and 33, when he specified the following:

> Had Parliament wanted to provide for an automatic stay where an application for landing on humanitarian or compassionate grounds had been filed and when children were involved, it could have specifically chosen to do so as it did in certain defined circumstances (see sections 49 and 50 of IRPA). Indeed, the Supreme Court of Canada did not go that far in Baker. In her decision, Madam Justice L'Heureux‑ Dubé explicitly recognized that the H&C decision is an important one since it not only affects the future of individuals' lives in a fundamental manner, but "it may also have an important impact on the lives of any Canadian children of the person whose humanitarian and compassionate application is being considered, since they may be separated from one of their parents and/or uprooted from their country of citizenship, where they have settled and have connections" (paragraph 15). This is a clear recognition that a child can be separated from his parent as a result of a negative H&C decision.

[14] I would add that the case has gone through many stages: a decision made by the Refugee Protection Division, a dismissed application for leave, PRRA application, etc. These decisions prove that the applicants had ample opportunity to be heard many times. Thus, in this respect, the Court cannot substitute itself for the removal risk assessment as established both in the PRRA decision and in the applicants' unsuccessful refugee claim. Unless there is a palpable error, the Court is correct in relying on the fact that the risks alleged by the applicants have already been analyzed (*Akyol v Canada (Minister of Citizenship and Immigration)*, 2003 FC 931; *Kante v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 109; *Paul v Canada (Citizenship and Immigration)*, 2007 FC 398).

[15] Although the Court cannot acknowledge serious questions in the applicants' arguments, it is clear that there is no irreparable harm resulting from the refusal to grant the stay. As specified earlier, the mere existence of an application for judicial review is insufficient. Added to this is the fact that the scope of the decision on humanitarian and compassionate considerations is limited: It merely prevents the applicants from submitting an application for permanent residence from Canada. They will be able to submit an application for permanent residence from their respective countries.

[16] With respect to the removal risk, the Officer's decision is detailed, factually based, and its premise is a negative decision made by the Refugee Protection Division. Furthermore, the risk alleged by Mr. Huix Silverio due to his Mayan ethnicity was reasonably excluded because this risk was not presented before the PRRA application. In addition, as specified by Shore J. in a separate—but just as applicable—context, in *Patterson v Canada (Citizenship and Immigration)*, 2008 FC 406, at para 24:

> In-Canada, spousal applications, like H&C applications, operate independently of the deportation process. They do not have the effect of halting deportations until such applications are determined. Had this been Parliament's intention, the legislation would provide for a statutory stay of removal once such an application has been filed. (Emphasis added)

[17] In any case, it is clear that the balance of convenience in this case favours the respondent, and thus the public, in that there exists a clear and greater interest to see a fair application of the IRPA, in addition to ensuring respect and confidence from the general public in this regard (see, *inter alia*, *Selliah*, above).

[18] Thus, it appears that none of the factors of the conjunctive test in *Toth* are present. The other arguments put forward by the applicants are vague and lack a factual basis, which is not surprising, considering that the Officer’s written reasons were seemingly not considered when the stay motion was written.

[19] Therefore, the stay motion must fail.

ORDER

THE COURT ORDERS that: the motion to stay a removal order is dismissed.

"Simon Noël"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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