Federal Court Cour fédérale

Date: 20210217

Docket: IMM-788-21

Citation: 2021 FC 158

Ottawa, Ontario, February 17, 2021

PRESENT: Mr. Justice Norris

BETWEEN:

BRAYAN RODRIGUEZ GRACIA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] The applicant seeks an order staying the execution of a deportation order under which he is to be removed to Colombia. He seeks the stay until his application for leave and judicial review of the decision (dated January 25, 2021) rejecting his application for a pre-removal risk assessment ("PRRA") has been disposed of by this Court. The applicant's Motion Record was filed on February 12, 2021. He is scheduled to be removed on February 19, 2021.

[2] For the reasons that follow, the motion is dismissed.

[3] As a preliminary matter, counsel for the respondent requests an amendment to the style of cause to remove the Minister of Public Safety and Emergency Preparedness as a respondent. Since the underlying application for judicial review concerns the denial of a PRRA application, the Minister of Citizenship and Immigration is the sole appropriate respondent. Counsel for the applicant opposes this request, arguing that the Minister of Public Safety and Emergency Preparedness must be named to ensure that an order staying the applicant's removal would be effective against the Canada Border Services Agency ("CBSA"), the body responsible for executing the deportation order. I agree with counsel for the respondent that, in the event that a stay were ordered, section 50(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*") would address the applicant's concern and that it is therefore not necessary to name the Minister of Public Safety and Emergency Preparedness to ensure that a stay ordered by this Court would be complied with by the CBSA. Accordingly, the style of cause will be amended to remove the Minister of Public Safety and Emergency Preparedness.

[4] The applicant was born in Colombia in July 1987. He entered Canada on July 11, 2018, using a fraudulent Mexican passport. He was granted temporary resident status without a visa and a six month Electronic Travel Authorization as a visitor. In January 2019, the applicant applied for and was granted an extension of his visitor status until December 30, 2019.

[5] The applicant and several other individuals were arrested by members of the York Regional Police ("YRP") on August 16, 2019. The applicant was charged with conspiracy to

commit an indictable offence (robbery). The charge was the result of an investigation by the YRP Hold Up Squad into targeted armed robberies of wholesale jewellery and precious metals sales persons in the Toronto area. It was alleged that the applicant and others used surveillance techniques and tracking devices to monitor potential targets' movements in order to find the opportune time to rob them. It was alleged that when the arrests were made on August 16, 2019, the police interrupted ongoing efforts by the applicant and six other individuals to track a wholesale jewellery salesman who was visiting Canada to attend the Canadian Jewellery Expo. At the time of their arrest, all the individuals produced Mexican passports that were suspected to be fraudulent. (Fingerprint evidence linked the applicant to a similar scheme in California in October 2008, where he was living at the time. Following his criminal conviction in relation to that scheme and the completion of his sentence, the applicant was deported to Colombia in 2010.)

[6] Following his arrest, the applicant was interviewed by the CBSA. According to the record of that interview, the applicant informed CBSA that he had entered Canada using a fraudulent Mexican passport. He had come to Canada to find work because life in Colombia was hard. When asked about his health, the applicant stated that he had bullet wounds in both feet as a result of a shooting in Colombia approximately three years earlier. He explained that he had been with a friend when the latter was murdered and he sustained the gunshot wounds as a result of the targeting of his friend.

[7] On September 30, 2019, a report was prepared under section 44(1) of the *IRPA* stating the officer's opinion that the applicant is inadmissible to Canada for reasons of organized

criminality under section 37(1)(a) of the Act. This report was referred to the Immigration Division of the Immigration and Refugee Board of Canada for an admissibility hearing. No determination has been made by the Immigration Division as of yet.

[8] On March 20, 2020, the applicant pled guilty to conspiracy to commit an indictable offence (robbery). He received a sentence of one day in jail, having been given credit for the equivalent of one year for his pre-sentence custody. (The applicant spent 218 days in custody until the final disposition of the matter.)

[9] On March 24, 2020, another report was prepared under section 44(1) of the *IRPA* stating the officer's opinion that the applicant is inadmissible to Canada for serious criminality under section 36(1)(a) of the Act. This report was based on the applicant's March 20, 2020, conviction. On March 27, 2020, a delegate of the Minister confirmed this determination under section 44(2) of the *IRPA* and issued a deportation order pursuant to section 228(1)(a) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[10] On April 2, 2020, the applicant was ordered released from immigration custody on terms and conditions, including the condition that he reside in Laval, Quebec, with his bondsperson.

[11] In early October 2020, the applicant was arrested in Ontario by members of the YRP and charged with conspiracy to commit an indictable offence (robbery) and criminal harassment. The offences are alleged to have been committed on or about October 1, 2020. The applicant's alleged conduct leading to the charges appears to be similar to that which resulted in the

March 20, 2020, conviction – namely, the targeting of a jeweller for robbery. Police allegedly interrupted the surveillance of a target who owns a jewellery store when they arrested the applicant and another person.

[12] Counsel for the applicant informed the Court at the hearing of this motion that the new charges were withdrawn by the Crown on January 25, 2021.

[13] Following notification from the YRP, on October 6, 2020, the applicant was arrested by the CBSA under the *IRPA* for violating the conditions of his release. The applicant continues to be held in custody under the *IRPA*.

[14] On October 16, 2020, the applicant was notified by the CBSA of his right to submit an application for a pre-removal risk assessment ("PRRA"). The applicant submitted a PRRA application with the assistance of counsel. He alleges his father had been a member of the paramilitary who had committed several murders. The applicant produced documentation to establish that his father had been convicted of murder in 1997. The applicant claimed that he would be at risk if returned to Colombia because the families or associates of his father's victims would seek him out to exact retribution for his father's crimes. He claimed, in fact, that he had been shot in the legs for this reason in Bogota in January 2016. He also produced an affidavit from his mother stating that she had suffered a gunshot wound in 1990 in retribution for her husband's crimes. She also stated for the next several years she continued to receive threats. The applicant also provided country condition evidence demonstrating the existence of a

"revenge culture" in Colombia and an affidavit from a lawyer in Colombia who offered his opinion that effective state protection would not be available for the applicant in Colombia.

[15] The PRRA application was refused on January 25, 2021. The officer accepted the applicant's account of his father's crimes and his own past experiences. However, the officer determined that the applicant had failed to rebut the presumption of state protection.

[16] The applicant has applied for leave and judicial review of this decision. He contends that there was a breach of procedural fairness because the officer made adverse credibility findings without conducting an oral hearing. The applicant also contends that the officer erred in assessing the "level of harm (death)" the applicant might suffer if returned to Colombia and in concluding that the applicant had not rebutted the presumption of state protection.

[17] The applicant now seeks a stay of his removal pending the final determination of his application for judicial review of the PRRA decision.

[18] A stay of an enforceable order is a form of extraordinary, equitable relief requiring the exercise of the Court's discretion having regard to all the relevant circumstances (cf. *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 27). As the Supreme Court of Canada has noted in a related context, the fundamental question is whether staying the applicant's removal is just and equitable in all of the circumstances of the case. This will necessarily be a context-specific determination. See *Google Inc v Equustek Solutions Inc,* 2017 SCC 34 at para 25.

[19] A motion such as this generally falls to be determined under the well-known three-part test. As the moving party, the applicant must establish: (1) that the underlying application for judicial review raises a "serious question to be tried;" (2) that he will suffer irreparable harm if a stay is refused; and (3) that the balance of convenience (i.e. the assessment of which party would suffer greater harm from the granting or refusal of the stay pending a decision on the merits) favours granting the stay: see *Toth v Canada (Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123 (FCA); *R v Canadian Broadcasting Corp*, 2018 SCC 5, [2018] 1 SCR 196 at para 12; *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110; and *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 334.

[20] Over and above the elements of this test, when determining whether to grant relief such as that the applicant is seeking, the Court may consider whether a party comes to the Court with "clean hands." In *Canada (Citizenship and Immigration) v Thanabalasingham*, 2006 FCA 14, Evans JA held that, "if satisfied that an applicant has lied, or is otherwise guilty of misconduct, a reviewing court <u>may</u> dismiss the application without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief" [emphasis in original] (at para 9). As Evans JA went on to explain, in exercising this discretion, a reviewing court "should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights" (at para 10). While Evans JA was speaking in terms of the discretion to refuse to determine an application for judicial review on its merits, there is no question that the same discretion applies in respect of a request for interlocutory relief.

[21] Evans JA offered a non-exhaustive list of factors to consider in the exercise of this discretion (at para 10):

- the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question;
- the need to deter others from similar conduct;
- the nature of the alleged administrative unlawfulness and the apparent strength of the case; and
- the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.

[22] In *Canada (National Revenue) v Cameco Corporation*, 2019 FCA 67, the Federal Court of Appeal reiterated that "clean hands" is "an equitable doctrine, under which a party may be disentitled to relief to which it was otherwise entitled as a consequence of past conduct or bad faith. Importantly," the Court continued, "for past conduct to justify a refusal of relief, the conduct <u>must relate directly to the very subject matter of the claim</u>" [references omitted, emphasis added] (at para 37).

[23] Bearing these principles in mind, I have concluded that the applicant is not entitled to the relief he seeks because he does not have clean hands. Specifically, the motion for a stay of removal is supported by an affidavit affirmed by the applicant on February 11, 2021. I find that

this affidavit is seriously deficient to the point of being misleading in the following material respects.

[24] First, apart from some details that can be gleaned from the PRRA decision (which is attached as an exhibit), the applicant's affidavit is essentially silent about his immigration history in Canada. The background set out above in paragraphs 4 to 13 is drawn largely from materials filed by the Minister. The applicant's affidavit says nothing about how he entered Canada using a fraudulent Mexican passport and obtained permission to remain in Canada on the strength of that fraudulent passport. It says nothing about the fact that the applicant had been ordered released from immigration detention in April 2020 on terms and conditions (apart from an indirect reference, as discussed below). It says nothing about the fact that, in addition to the inadmissibility finding due to serious criminality, the applicant had also been reported for inadmissibility due to organized criminality and that the Immigration Division's determination on this issue is still outstanding. The latter omission is especially concerning. Particularly when, as in this case, a stay is sought on an urgent basis, an applicant must provide a complete and accurate account of their immigration history: see *Surmanidze v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1615 at para 18.

[25] I do not accept the submission of counsel for the applicant that it was appropriate to omit all this information because the Minister knows the applicant's immigration history, the real issue on the stay was the risk of harm and the applicant's affidavit therefore focused on that. The Minister may well know the applicant's immigration history but the Court does not. It is the applicant's responsibility to recount that history accurately and completely, not the Minister's.

Further, while the risk of harm is an important issue, it is far from the only issue that is engaged under the tripartite test or, more generally, when equitable relief is sought from the Court.

[26] Second, the applicant states the following about the March 20, 2020, conviction:

> In March 2020, I was convicted of conspiracy to commit an indictable offence, but I pleaded guilty only because I wanted to get out of the custody as I spent 218 days in custody and the courts were closing that day because of COVID 19. I would have to wait a year for trial in a maximum security prison. I did not actually commit any crime of which was charged of [*sic*] as I was only waiting for a construction job. I went there to the court to get criminal bail but lawyers and the Toronto Bail program were pulled because of COVID 19 so I was on my own. If I plead guilty I got time served. If I kept trying to prove my innocence I would be in there for a year or two waiting. We were locked down constantly, no showers for days, COVID 19 coming, courts about to close down. I felt I had no choice.

[27] It is unclear why the applicant included this paragraph in his affidavit unless it was to somehow suggest that it would be unjust to deport him because he should not have been found inadmissible due to serious criminality. Standing on its own, such a collateral attack on the deportation order would be a legal error but would not necessarily be indicative of misconduct in relation to this motion. However, I find his explanation for why he pled guilty unworthy of belief and, further, that it was given to mislead the Court.

[28] The applicant does not state whether or not he was represented by counsel in the criminal proceeding. He has not filed a transcript of the guilty plea and sentencing proceeding. Section 606(1.1) of the *Criminal Code* provides, *inter alia*, that a court may accept a plea of guilty only if it is satisfied that the accused is making the plea voluntarily, that the accused understands that the plea is an admission of the essential elements of the offence, and that the

facts support the charge. In the absence of any evidence to the contrary, I must presume that the judge before whom the applicant entered his guilty plea conducted the necessary inquiry in order to be satisfied of these things as well as all the other aspects of section 606(1.1). Further, I am prepared to presume that the applicant provided answers to this inquiry that so satisfied the judge. Otherwise, the guilty plea would not have been accepted. With his affidavit evidence in this proceeding, the applicant has placed himself on the horns of a dilemma: either he misled the criminal court or he is attempting to mislead this Court. There is no evidence that the applicant has sought to set aside his guilty plea on appeal on the basis that it was involuntary or uninformed and, as such, was therefore invalid. A guilty plea is a formal in-court admission of guilt (*R v Faulkner*, 2018 ONCA 174 at para 85). The applicant's affidavit evidence on this motion is directly contradicted by the admission he made with his guilty plea on March 20, 2020.

[29] Third, the applicant gives the following account of his arrest in October 2020:

> Even in October 2020, I went to collect my property from the police. I know that my release had conditions which I should have followed, however, I thought that as I was myself going to police that I was not in the wrong. I now realize my mistake and I will not break any law or conditions imposed on me. I will be a lawful and respectable resident of Canada.

[30] I am not entirely sure what the applicant is saying here. He appears to be trying to explain his most recent arrest. He seems to be suggesting that it was because of a failure to comply with the terms of his immigration release (although, as noted, he has said nothing else about the latter). He had made a "mistake" and this is what led to his arrest.

[31] Just as a party seeking the equitable remedy of a stay of removal must give a full and frank account of their relevant immigration history, so too must that party give a full and frank account of any criminal history that may be relevant to the issues before the Court. The applicant has not done so. Instead, he seems to be suggesting that he was arrested when one day he simply went to collect his property from the police (what property, he does not say) and somehow found himself accused of breaching of his release conditions. He says nothing about the new criminal charges. This is a very serious omission which could have misled the Court on a material point.

[32] As noted above, counsel for the applicant informed the Court at the hearing of this motion that these new charges were withdrawn at the request of the Crown on January 25, 2021. The applicant's affidavit in support of this motion was affirmed on February 11, 2021, yet it makes no mention of the fact that the charges were withdrawn. Even if it is the case, as counsel for the applicant contends, that it is the applicant's position that there was no evidence to support the charges in the first place and this is why they were withdrawn, the applicant cannot simply pretend that the charges never existed and give an explanation for how he ended up in custody that is incomplete at best.

[33] The respondent points to the applicant's failure to give a full and accurate account of his immigration and criminal history to support its submission that the balance of convenience (the third part of the tripartite test for a stay) favours the respondent. While I agree with the respondent that this should be considered in determining whether to grant the applicant the relief he seeks, in my view in the present case it should be considered under the clean hands principle

as opposed to the balance of convenience. This is because the serious problems with the applicant's affidavit that I have identified above tend to undermine the integrity of this very proceeding as opposed to affecting who would suffer the greater inconvenience from granting or refusing the stay. That being said, in another case the factors indicating a lack of clean hands could be probative of the balance of convenience and thus would properly be considered under that rubric instead.

[34] To be clear, I do not consider the applicant's criminal history to demonstrate that he does not have clean hands. Rather, it is the applicant's failure to provide a full and frank account of that history in his request for equitable relief from this Court that does so. (On the other hand, the applicant's criminal history, including the fact that he has been determined to be inadmissible to Canada on grounds of serious criminality, is relevant to the balance of convenience and would weigh in the Minister's favour: see *Mohamed v Canada (Citizenship and Immigration)*, 2012 FCA 112 at para 34.)

[35] Finally, while I have found for the reasons set out above that the applicant is not entitled to have his request for a stay determined on its merits, I acknowledge that the *Thanabalasingham* factors also track to some extent the first and second parts of the tripartite test (i.e. the strength of the underlying application for judicial review and the impact on the applicant should he be removed). Suffice it to say that I am satisfied that the grounds for review the applicant has raised are weak at best. Given this, there is no concern that permitting the applicant to be removed now would unjustly deprive him of an effective remedy in the underlying application for judicial review (cf. my discussion in *Gray v Canada (Attorney General)*, 2020 FC 1037 at paras 52-54).

As well, the applicant has not provided "evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result" unless the stay is granted: see *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31. Even assuming that the applicant's account of his father's past and the consequences this has had for the applicant and for other members of his family is true and, further, accepting that the applicant's fears are genuine, on the record before me it is speculative to think that unknown parties would still wish him harm and, if they did, that they would be able to locate him.

[36] For these reasons, the applicant's motion to stay his removal from Canada to Colombia is dismissed.

ORDER IN IMM-788-21

THIS COURT ORDERS that

1. The style of cause is amended to remove the Minister of Public Safety and Emergency Preparedness as respondent.
2. The motion for a stay of the order for the applicant's removal from Canada to Colombia is dismissed.

"John Norris"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-788-21
STYLE OF CAUSE:	BRAYAN RODRIGUEZ GRACIA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

HEARING HELD BY TELECONFERENCE ON FEBRUARY 17, 2021 FROM OTTAWA, ONTARIO (COURT) AND TORONTO, ONTARIO (PARTIES)

ORDER AND REASONS:	NORRIS J.
DATED:	FEBRUARY 17, 2021

APPEARANCES:

Arlene Rimer	FOR THE APPLICANT
Monmi Goswami	FOR THE RESPONDENT

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