Date: 20060628

Docket: IMM-3395-06

Citation: 2006 FC 830

Toronto, Ontario, June 28, 2006

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

GERALD LIZANO CHAVEZ, FRANCELLA SOSSA BRENES, KIMBERLY LIZANO SOSSA, GERALD LIZANO SOSSA

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

[1] This is a motion for an Order staying the removal of the applicants, currently scheduled to take place on July 2, 2006, until such time as an application for leave and for judicial review has been disposed of by the Court. The underlying application is for judicial review of the decision of an Expulsions Officer, communicated to the applicants on June 19, 2006, refusing to defer their removal.

BACKGROUND

[2] The applicants are a family from Costa Rica. Mr. Gerald Lizano Chavez, has been in Canada since May 2001. His wife, Francella Sossa Brenes, and their children Gerald and Kimberly arrived later that year. A third child, Joshlynn, was born in Canada.

[3] The applicants made a claim for refugee protection on May 28, 2002. Their claim was heard jointly with that of Ms. Sossa Brenes' brother, Guillermo, over three days in December 2002, March and July, 2003 and a decision was rendered by the Refugee Protection Division, Immigration and Refugee Board, on September 8, 2003. The Board found that as adequate state protection was available to the claimants in Costa Rica, there was no serious possibility that they would be persecuted in that country and were not persons in need of protection within the meaning of section 97 of the *Immigration and Refugee Protection Act* S.C. 2001, c.27 (the "Act"). Leave for judicial review of that decision was subsequently denied.

[4] An application for a pre-removal risk assessment ("PRRA") was filed on the applicants' behalf on July 12, 2004. As their removal was then scheduled for September 1, 2004 and they were beyond the deadline for an administrative stay, the applicants applied for and were granted a stay of execution of the removal order by this Court until such time as the PRRA was completed. In a decision dated December 8, 2004, the officer conducting the assessment found that the applicants had submitted no new evidence of risk and had failed to rebut the presumption of state protection. The officer considered the applicants' evidence and the documentary evidence respecting the availability of state protection and the treatment of children in Costa Rica.

[5] Removal was again scheduled. On February 14, 2005, just two days before the new removal date, the applicants applied to this Court for a further stay. Justice James O'Reilly refused to hear the motion for several reasons: no serious issue had been identified; the underlying application was out of time and no principled justification for an extension of time had been disclosed in the applicants' submissions; the applicants' sole ground for requesting a stay was that they had purportedly filed (this was disputed) an application for humanitarian and compassionate consideration; no request for deferral had been made; the applicants had had several months to make arrangements for their departure; and no explanation for the last minute motion had been provided.

[6] The applicants failed to appear for removal as directed on February 16, 2005 and as a result warrants for their arrest were issued. On April 27, 2006 Ms. Sossa was arrested. Mr. Lizano was not present at the time and Ms. Sossa did not disclose his whereabouts but advised the Canada Border Services Agency officers that Kimberly and Gerald were at school. The officers picked up the two children from their school and took them with their mother to the Immigration Holding Centre. The children were later released. A detention hearing was held for Ms. Sossa on May 2, 2006 and detention was continued with a further review scheduled for May 9th.

[7] On May 8, 2006 the applicants' counsel requested deferral of the applicants' removal until the end of the school year, offered to have Mr. Lizano surrender and indicated that his clients were willing to purchase their own tickets to return to Costa Rica. After some discussion, it was agreed that Mr. Lizano would surrender on May 9, 2006 and that both he and his wife would be released on a cash bond on the understanding that they would produce airline tickets for the family to depart no

later than July 2, 2006. The surrender took place; both adult applicants were released and returned on May 12, 2006 with the tickets for a July 1, 2006 departure. On May 19, 2006, they were served with a direction to report, along with the two minor applicants, for removal on July 1, 2006.

[8] Subsequent to these events, the family made a new PRRA application that was received by the PRRA unit on June 5, 2006. They also submitted an application for permanent residence based on humanitarian and compassionate grounds ("H&C"), which was received by the processing centre on May 24, 2006. On June 6, 2006 the family requested deferral of their removal based on the filing of these two applications. The decision of the expulsions officer refusing the request was communicated to counsel for the applicants on June 19, 2006.

ISSUES

[9] In considering this motion, I must apply the conjunctive tripartite test, set out in *Manitoba (Attorney General) v. Metropolitan Stores Ltd*, [1987] 1 S.C.R. 110 and *R.J.R. MacDonald Limited v. Canada (Attorney General.)* [1994] 1. S.C.R. 311 and applied by the Federal Court of Appeal to stays of deportation in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302, namely that there is a serious issue to be tried, that the applicants would suffer irreparable harm if removed to their country of origin and that the balance of convenience lies in their favour.

[10] An elevated standard applies to a stay motion arising from a refusal to defer an applicant's removal because, if ordered, the stay effectively grants the relief sought in the underlying judicial review application: *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148

(T.D.). Accordingly, it is necessary to go further than to simply consider the serious issue test and to closely examine the merits of the underlying application.

[11] In their written submissions on this motion with respect to the serious issue branch of the *Toth* test, the applicants contend that the officer was required to provide reasons for her decision and had failed to do so, that deferral should have been granted in light of the newly filed H&C and PRRA applications and that the best interests of the children had not been considered by the expulsions officer.

[12] In oral argument at the hearing, counsel for the applicants chose to focus his submissions primarily on the effect of the publicity generated by the apprehension of the minor applicants at their school on April 27, 2006, extensively covered by the media in Canada and in Costa Rica, as new evidence of a heightened the risk of harm to the applicants upon their return.

ANALYSIS

[13] In this motion, the applicants seek the exercise of the Court's extraordinary discretionary authority to stay the execution of valid removal orders. This Court has frequently held that the equitable remedy of a stay can be denied to those who do not come to the Court with clean hands, in that they have deliberately disobeyed or ignored the law: *Manohararaj v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 376.

[14] On the face of the record before me, the applicants have failed to report for removal as required and failed to keep the immigration authorities apprised of their whereabouts resulting in the issuance and execution of warrants for their arrest. This alone would justify dismissal of the motion.

[15] The applicants allege that they were misled by their former lawyer. They allege that they believed that the lawyer had filed an H&C application on their behalf and kept the immigration authorities informed as to their whereabouts. They assert that they believed that they could wait for the outcome of the H&C application and disregard the direction to report for removal in February 2005.

[16] An allegation about misfeasance or nonfeasance by a lawyer is easily made and difficult to disprove unless the lawyer is given notice and an opportunity to respond. Counsel advised me during the hearing that no notice was given to the lawyer in question that his professionalism was to be impugned in these proceedings, and no complaint had been made to the Law Society. That alone would be sufficient to discount the allegation. But even if the lawyer failed to adequately represent their interests, the responsibility to comply with the law rests with the applicants and not the lawyer. It was their responsibility to abide by the removal order and to keep the immigration authorities informed. Justice O'Reilly's Order of February 15, 2005 made it clear that no H&C application had been received by Citizenship and Immigration. The applicants were thus put on notice that the application had not been filed and they remained subject to the removal order.

[17] With respect to the question of the expulsion officer's reasons, as I stated in *Boniowski v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1161, deferral decisions involve the

exercise of a very narrow discretion by the officer and the procedural requirements are, at best, minimal. In any event, the failure of the applicants to request the officer's reasons in the form of her notes to file is a complete answer to this complaint: *Marine Atlantic Inc. v. Canadian Merchant Service Guild* (2000), 258 N.R. 112 (F.C.A.).

[18] A removals officer's discretion is limited to considering compelling personal circumstances that may preclude the exercise of the Minister's duty to enforce the Act. Subsection 48(2) provides that "[i]f 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." There is no obligation on the part of the officer to defer removal pending an H&C application. To hold otherwise, as Justice Simon Noël has observed, "would, in effect, allow claimants to automatically and unilaterally stay the execution of validly issued removal orders at their will and leisure by the filing of the appropriate application. This result is obviously not one which Parliament intended": *Francis v. Canada (Minister of Citizenship and Immigration)* [1997] F.C.J. No. 31 at paragraph 2 (T.D.) (QL).

[19] The filing of a fresh PRRA application may signal that there is new evidence of risk to the applicants in their country of origin that was not considered in any earlier risk assessment. Counsel's letter of June 1, 2006 to the PRRA Unit states that the media attention in Costa Rica arising from the case had resulted in a well-founded fear that the applicants would be at risk upon return and that their high profile would make it harder for the Costa Rican government to protect them. The letter cites as an illustration, an article published in the Diaro Extra on May 1, 2006 quoting Ms. Sossa's brother, Wendell, as to the reasons for the family's fear of return. Other

excerpts filed on this motion from the Costa Rican papers, in the original Spanish and in English translation, report the story and indicate the precise date on which the family is expected to return.

[20] However, the evidence of risk is materially the same as that presented by the applicants to the Refugee Protection Division in their claim for protection and in their first PRRA application. The applicants allege that they are at risk of harm from elements of the Office of Judicial Investigation (a police agency) in Costa Rica through the involvement of two of Ms. Sossa's brothers, Guillermo and Henry, in exposing the activities of corrupt officers.

[21] The expulsion officer's notes were filed as part of the respondent's record on this motion. The notes make it clear that the officer considered the allegation of increased risk due to media coverage of the case but concluded that a deferral to await the outcome of the new PRRA was not appropriate in the circumstances and history of the case, including the fact that any disclosure of information had been at the instance of the applicants.

[22] It was inappropriate for the officer to attribute the media attention to the applicant's actions as there was no evidence before her that they had instigated the publicity. Rather, it stemmed from the incident involving the apprehension of the children, which attracted criticism about the enforcement procedures of the respondent's officers. It was not surprising that such attention would spread to Costa Rica or that details about the case, including the new removal date, would be disclosed.

[23] Nonetheless, the officer did not err in my view in concluding that there had not been such a change of circumstances as would justify a finding that removal “as soon as practicable” could not be effected. As Justice Dubé observed in *Jamal v. Canada (Minister of Citizenship and Immigration)* 2001 FCT 494 (T.D.), persons who allege a new risk at the eleventh hour do so at the peril that it will not be given much weight. As he stated at paragraph 7, "...a removal officer may only entertain such an application where the alleged risk is obvious, very serious and could not have been raised earlier."

[24] Two tribunals had previously found that the applicants had failed to rebut the presumption that the state of Costa Rica would be willing and able to provide protection to them. There would have had to be clear and objective evidence before the officer that the factual situation in Costa Rica had changed significantly with respect to the central finding in those previous risk assessments. There was no evidence submitted to the officer, nor to the Court on this motion, that the authorities in Costa Rica would no longer be able to provide state protection as a result of the media attention. Indeed the evidence suggests that the Costa Rican government has expressed concern about the applicants, indicating a willingness to provide protection rather than an unwillingness to do so.

[25] I am also satisfied that the expulsions officer adequately considered the interests of the children, including the Canadian born child. The reality is that the youngest child must accompany the family unless they wish to make arrangements to leave her with relatives in this country. That is their choice to make, not the officer’s. With respect to the older children, a deferral was granted to allow them to complete their school year. This flexible accommodation was, in my view, consistent with the legislative mandate to enforce removal “as soon as is reasonably practicable”. But the

officer was not required to go further to consider whether the children's longer term interests would be better served in Canada than in Costa Rica. That function is served by the exercise of the Minister's discretion under s.25 of the Act.

CONCLUSION

[26] I find that the applicants have not established that there is a serious issue to be tried with respect to the expulsion officer's decision to refuse a further deferral. Accordingly, this motion will be dismissed. If it was necessary to consider whether the risk of irreparable harm had been established, I would conclude, for reasons similar to those expressed above, that it has not been made out. Further, in light of the applicants' failure to comply with the law in the past, the balance of convenience branch of the *Toth* test does not favour them.

[27] I note in concluding that a considerable amount of material has been filed on this motion from supporters of the Lizano-Sossa family, attesting to their hard work in establishing themselves within the community since arriving here and to their personal attributes. These factors will no doubt be taken into consideration in the family's current H&C application which can continue, despite their removal. However that is a decision for the Minister to make, not the Court.

[28] As a procedural matter, the style of cause on this motion will be amended to reflect the change in Ministerial responsibilities for the Canada Border Services Agency from the Minister of Citizenship and Immigration to the Minister of Public Safety and Emergency Preparedness.

ORDER

THIS COURT ORDERS that the application for a stay of removal is dismissed. The style of cause is amended to replace the title of the respondent with that of the Minister of Public Safety and Emergency Preparedness.

"Richard G. Mosley"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

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STYLE OF CAUSE:	GERALD LIZANO CHAVEZ, FRANCELLA SOSSA BRENES, KIMBERLY LIZANO SOSSA, GERALD LIZANO SOSSA APPLICANTS and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS RESPONDENT
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