**Date: 20070524**

**Docket: IMM-5794-06**

**Citation: 2007 FC 547**

**Ottawa, Ontario, May 4, 2007**

**PRESENT: THE HONOURABLE MR. JUSTICE HARRINGTON**

**BETWEEN:**

**CESAR-AUGUSTO FAJARDO**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR ORDER AND ORDER

[1] Mr. Cesar-Augusto Fajardo was granted refugee status by the Canadian authorities while he was still in Guatemala, his native land. Thus, at the age of 25, he arrived in Canada in 1989.

[2] Ten years after his arrival in Canada, Mr. Fajardo was found guilty of assault against his spouse. He was then convicted for two offences that are punishable by a potential maximum penalty of at least five years of imprisonment. Under the former

*Immigration Act*, R.S.C. 1985, c. I-5 (the Act) that applies in this case, the Immigration and Refugee Board, on February 10, 2000, that Mr. Fajardo was then, inadmissible in Canada, and that, therefore, he had to be deported from Canada, as provided for in subsection 32(2) of the Act. The applicant decided, however, to appeal from the decision whereby he was ordered to be removed. Following that, a decision was rendered on May 9, 2001 whereby he was granted a stay of execution of the removal order for a period of five years. That stay was granted under several conditions that the applicant undertook to observe at the time that decision was delivered.

[3] In November 2002, at the time of review of the stay, the Immigration Appeal Division (IAD) decided to maintain the same conditions that had been imposed at the time, upon the consent of both parties. Finally, it was last year that the final review of the stay of execution in this case took place.

[4] The IAD was of the view that Mr. Fajardo had not observed the conditions that had been imposed on him and that he had not established, at the hearing, on the balance of probabilities and as per the facts of the case, grounds for which he should not be removed from Canada; therefore, the IAD held that the removal order was legally valid, and thus effective as of that date. Therefore, it set aside the stay and dismissed the appeal.

[5] Mr. Fajardo is seeking judicial review of that decision.

**ANALYSIS**

[6] At the outset, it is relevant to say that, in support of his arguments, Mr. Fajardo and his spouse have submitted to this Court additional affidavits that were not before the IAD at the time it rendered its decision in September 2006. Needless to say, the Minister asked the Court to decline to take into account that additional evidence, and then asked, should the Court decide otherwise, to itself file additional evidence that also called for the consideration of the Court.

[7] Having heard those submissions at the hearing, I stated that nothing warranted any deviation from the general rule to the effect that, in judicial review proceedings, the Court will only consider evidence that was before the tribunal when the latter rendered its decision. Of course, there can always be exceptions in special circumstances, but in this case, it cannot be said that the record reveals any.

[8] In this case, two of the conditions that were imposed on Mr. Fajardo to have maintained the stay to which he was entitled and on which the decision of the IAD was based call for particular attention. The first relates to the employment of the applicant. Mr. Fajardo was to make reasonable efforts to secure and keep full-time employment in Canada. The second relates to the criminal past of the applicant. Mr. Fajardo was to follow or continue to follow a psychological treatments or receive counselling to address violent behaviour.

[9] On May, 2001, the member stated as follows:

> [TRANSLATION]… You will appear before me. I am looking at you, straight in the eyes, and I am telling you that I will remember, I have carefully noted everything that occurred in this file, I will review my notes and believe you me, if I see that you have made no efforts to control your violent behaviour, and… that you have not observed the conditions, believe you me, it will be an uphill battle for you to convince me that you should stay in Canada. So I hope that you are taking this seriously and … [(…)]

[10] Since 2001, Mr. Fajardo made very little effort, indeed none, to find employment. However, he is the father of several children from several spouses and he alleges that, today he is taking care of a number of them. Despite that, the IAD stood by the very letter of the condition and opined that Mr. Fajardo had a duty to make reasonable efforts to secure and keep full-time employment, which he has not done.

[11] At his point, I must note that I am uncomfortable with the position of the IAD as to this aspect of the case, since it appears not to take into account the work done at home by a parent who responds to the numerous needs of a child. I am afraid that, on the part of the IAD, such a notion of family life according to which a father must have employment outside the household, is a stereotype and that it thereby gives credence to an unfavourable social attitude concerning child care, even though child care is quite natural and essential to ensure sound development of Canadian children.

[12] In addition, the IAD found that Mr. Fajardo had not made reasonable efforts to obtain the services of a daycare centre. Should it be inferred that, in Canada, parents are

not authorized to take care of their own children themselves? This might be the case, I sure hope not. I am rather of the view that a parent who wants to personally provide care to his own children is entitled to do so.

[13] Fortunately, having carefully read the record, I have been able to put things in perspective. Briefly, Mr. Fajardo is on welfare, he does not live with his current spouse, and he practices sports during weekends and has made no effort to find employment.

[14] That being said, it would not be appropriate for me now to examine that aspect of the case in view of my limited authority.

[15] The case law is well settled. Decisions made by the IAD as to questions of fact and as to questions attracting the preponderance of the evidence standard must stand, unless they are patently unreasonable. In any event, the Court should not disturb such decisions, even though it would have reached a different conclusion from that of the tribunal if it had been called to rule on it in the first place: *Grewal v. Canada (Minister of Citizenship and Immigration)* 2003 FC 960 and *Vong v. Canada (Minister of Citizenship and Immigration),* 2004 FC 1317.

[16] In these proceedings, the crucial issue is raised by the second condition noted hereinabove. Mr. Fajardo has not followed or continued to follow psychological treatments or counselling to address his violent behaviour. In fact, he is of the view that he does not

need it. In the circumstances, that is not for him to say, and from the pronouncements of the courts that have convicted Mr. Fajardo in criminal proceedings, the truth is otherwise. In addition, that was a condition that he had personally undertaken to observe when a stay was ordered.

[17] In view of the circumstances, the decision of the IAD is not patently unreasonable.

[18] As of this day, Mr. Fajardo may apply for a pre-removal risk assessment and, of course, his spouse may sponsor him.

[19] For the above reasons, this application for judicial review is dismissed. There is no question of general importance to be certified in this case.

**ORDER**

**THIS COURT ORDERS** that this application for judicial review be dismissed.

There is no question of general importance to be certified in this case.

"Sean Harrington"
Judge

Certified true translation
François Brunet, LLB, BCL

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-5794-06 |
| **STYLE OF CAUSE:** | CESAR-AUGUST FAJARDO v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | Montréal, Quebec |
| **DATE OF HEARING:** | May 9, 2007 |
| **REASONS FOR ORDER AND ORDER BY:** | Harrington J. |
| **DATED:** | May 24, 2007 |

**APPEARANCES:**

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| Isabelle Brochu | FOR THE RESPONDENT |

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