Federal Court		Cour fédérale

Date: 20080208

Docket: IMM-443-08

Citation: 2008 FC 172

Ottawa, Ontario, February 8, 2008

Present: The Honourable Mr. Justice Shore

BETWEEN:

WAGNER SANABRIA CASTILLO

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

1. Introduction

[1] The applicant did not report for his removal on October 7, 2006. An arrest warrant was issued against him on October 23, 2006. This arrest warrant was executed on October 31, 2007, i.e. one year later.

[2] His failure to report to the airport on October 7, 2006, is enough in itself to dismiss this stay application.

[3] No person should able to benefit from their own wrongdoing. This is why the Court consistently refuses to hear people who do not appear before them with clean hands:

> [2] … Moreover, as the applicant failed to present himself to an interview with Citizenship and Immigration Canada officials, a warrant for arrest was issued against him on July 17, 2002 and executed almost six months later on January 14, 2003. Clearly, the applicant is not presenting himself with clean hands before the Court …

(*Mohar v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 952, [2005] F.C.J. No. 1179 (QL); also, *Chen v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1464, [2003] F.C.J. No. 1901 (QL), paragraph 3)

JUDICIAL PROCEEDING

[4] This is an application filed by the applicant who is seeking an order to stay the enforcement of his removal from Canada to Costa Rica scheduled for February 9, 2008. The stay application is attached to an application for leave and for judicial review of the decision of the enforcement officer, Yee Loch Cheung, employed by the Canada Border Services Agency, dated January 8, 2008, to carry out the applicant's removal.

2. Facts

[5] The respondent refers to the facts set out in the affidavit of Aleksandra Wojciechowski and the exhibits in support of this affidavit as well as facts set out in the affidavit of officer Cheung.

3. Issues

[6] (1) Should the Court exercise its extraordinary power so that it may hear an applicant who did not appear before it with clean hands?

(2) Did the applicant establish that there was a serious issue, irreparable harm and that the balance of convenience is in his favour?

4. Analysis

(A) THE APPLICANT DOES NOT HAVE CLEAN HANDS

[7] The applicant did not report for his removal on October 7, 2006. An arrest warrant was issued against him on October 23, 2006. This arrest warrant was enforced on October 31, 2007, i.e. one year later.

[8] His failure to report to the airport on October 7, 2006, is in itself sufficient to dismiss this stay application.

[9] No person should able to benefit from their own wrongdoing. This is why the Court consistently refuses to hear people who do not appear before them with clean hands:

> [2] … Moreover, as the applicant failed to present himself to an interview with Citizenship and Immigration Canada officials, a warrant for arrest was issued against him on July 17, 2002 and executed almost six months later on January 14, 2003. Clearly, the applicant is not presenting himself with clean hands before the Court…

(*Mohar*, *supra*; also *Chen*, *supra*.)

(B) CRITERIA APPLICABLE TO STAY APPLICATIONS

[10] In order to obtain a stay of the enforcement of the removal order, the applicant must satisfy the three elements of the three-branch test set out in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 6 Imm. L.R. (2d) 123 (F.C.A.). He must show that:

(a) his application for leave and for judicial review raises a **serious issue**;

(b) he could suffer **irreparable harm** if the stay is not granted; and

(c) the **balance of convenience** favours him based on the overall situation of both parties.

(i) Lack of a serious issue

[11] In cases where a stay would provide the relief measures sought in the underlying application, the fact that the issue raised is not frivolous or vexatious is not sufficient to satisfy the "serious issue" requirement. When a stay application is filed in regard to a refusal to defer removal, the judge seized with the application must go beyond applying the "serious issue" test and review in-depth the underlying application (*Wang v. Canada (Minister of Citizenship and Immigration*, 2001 FCT 148, [2001] F.C.J. No. 295 (QL); *Padda v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1081, [2003] F.C.J. No. 1353 (QL), paragraph 6; *Kanagasabapathy v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 441, [2004] F.C.J. No. 544 (QL), paragraph 6).

[12] In his memorandum, the applicant contends that the removal officer failed to use his discretionary power. Further, the applicant claims that filing a permanent residence application based on humanitarian and compassionate considerations justifies deferring his removal.

[13] As it appears from officer Cheung's affidavit, the applicant never asked, during the meetings on January 8 and January 22, 2008, that his removal be deferred for any reason.

[14] Further, it appears from the interview notes dated January 8 that the applicant's wife had not experienced any complications with her pregnancy in the preceding two months (exhibit **K** of the affidavit of Aleksandra Wojciechowski).

[15] A pending application based on humanitarian and compassionate considerations is not in itself a sufficient ground to defer removal. (*Simoes v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 936, paragraph 12; *Wang, supra*, paragraph 45; *Kaur v. (Minister of Citizenship and Immigration)*, 2001 FCT 741, [2001] F.C.J. No. 1082, paragraph 18.)

[16] In these circumstances, the applicant did not establish that the application for leave and for judicial review that he filed in regard to the officer's use of discretionary power had any reasonable chance of success.

(ii) Lack of irreparable harm

[17] The applicant stated that if he is removed from Canada his wife could suffer an abortion if she is deprived of husband's assistance, which is inconsistent with the evidence considered in this matter.

[18] First, the evidence filed with the application is insufficient to establish that the applicant, himself will suffer irreparable harm if he is removed to Costa Rica.

[19] The better part of the jurisprudence of this Court, states that the irreparable harm must be personal to the applicant (*Csanyi v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 758 (QL) (T.D.), paragraph 4).

[20] Second, the interview notes dated January 8 indicate that on that date, the applicant's wife had not experienced any complications in two months.

[21] Third, the applicant did not at any time ask that his removal be deferred based on problems related to his wife's pregnancy when he met with officer Cheung, either on January 8 or 22, 2008 (see the affidavit of officer Cheung).

[22] In *Tobar v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 399; [2002] F.C.J. No. 500 (QL), Mr. Justice J. François Lemieux determined:

> [12] In this case, the evidence went to hardship the family would suffer should he be removed. There are many cases in this Court which hold such evidence is not satisfactory to meet the irreparable harm test.

[23] In *Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, [2004] F.C.J. No. 1200 (QL), the Federal Court of Appeal determined as follows:

> [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 ...

[24] In this case, there is no evidence in the record that would establish the existence of irreparable harm if the applicant were removed to Costa Rica.

(iii) Balance of convenience

[25] In the absence of a serious issue and credible evidence of torture or persecution, the balance of convenience favours the Minister, who has an interest in seeing that the removal order is carried out on the scheduled date (*Morris v. M.C.I.*, IMM-301-97, January 24, 1997 (F.C.)).

[26] In fact, subsection 48(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, provides that a removal order must be enforced as soon as circumstances so permit:

Enforceable removal order	Mesure de renvoi
48. (1) A removal order is enforceable if it has come into force and is not stayed. Effect	48. (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.

Effect	Conséquence
(2) If 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.	(2) L’étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.

5. Conclusion

[27] For all of these reasons, the applicant’s stay application is dismissed.

JUDGMENT

THE COURT ORDERS that the applicant's stay application be dismissed.

"Michel M.J. Shore"

Judge

Certified true translation

Kelley A. Harvey, BCL, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-443-08
STYLE OF CAUSE:	WAGNER SANABRIA CASTILLO v. MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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