Federal Court		Cour fédérale

Date: 20100505

Docket: IMM-2226-10

Citation: 2010 FC 494

Montréal, Quebec, May 5, 2010

PRESENT: The Honourable Mr. Justice Mainville

BETWEEN:

SALVATOR PONCE MORENO
MARIA CONCEPCION ORTIZ VALDEZ

Applicants

and

THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

UPON MOTION pursuant to section 18.2 of the *Federal Courts Act*, R.S.C. 1985, c. F-7 submitted by the Applicants for a stay of the enforcement of their removal scheduled for May 8, 2010 until such time as their application for leave and for judicial review has been finally decided regarding a decision of immigration officer Jean Bellavance dated April 15, 2010 rejecting their request for a deferral of removal;

UPON careful review and consideration of the evidence and submissions contained in the Applicants' motion record and in the Respondent's motion record;

UPON holding an oral hearing on this Motion with counsel for all parties present at a special session of the Court held in Montreal on May 4, 2010;

UPON consideration of the tripartite test applicable to this Motion as articulated by the Supreme Court of Canada in *Manitoba (A.G.) v. Metropolitan Stores Ltd.*, [1987] 1 S.C.R. 110 and *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, and applied to stays of removals by the Federal Court of Appeal in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302;

THE COURT ORDERS that this motion for a stay of removal is dismissed for the following reasons:

Background

[1] The Applicants are citizens of Mexico, born respectively in 1947 and 1949, who entered Canada on December 12, 2006. They were refused status as refugees or persons in need of protection pursuant to a decision dated May 9, 2008 of a panel of the Refugee Protection Division of the Immigration and Refugee Board of Canada. The panel recognized that the Applicants were

the subject of threats from unidentified criminals; however, it found that the Applicants had an available internal flight alternative in Mexico.

[2] That decision of the panel was confirmed on judicial review by a decision dated February 5, 2009 of Justice de Montigny.

[3] Following their unsuccessful judicial review application, the Applicants applied for a pre-removal risk assessment. In the course of that assessment, the Applicants submitted new evidence in the form of new alleged threats which their son had received in Mexico, including allegations related to a suspicious accident involving a family relation.

[4] The pre-removal risk assessment was completed on February 23, 2010. The Applicants' allegations were not deemed to invalidate the finding of the Refugee Protection Division panel concerning the availability of an internal flight alternative, since the son had returned to the community where the threats had originated rather than seeking refuge elsewhere in Mexico. Moreover, the allegations concerning the suspicious accident involving a family member were deemed to be nothing more than speculation. This pre-removal risk assessment decision has not been challenged on judicial review.

[5] While their pre-removal risk assessment was still pending, the Applicants also submitted an application for permanent residence from within Canada on humanitarian and compassionate considerations dated July 27, 2009 (the "H&C application"), pursuant to subsection 25(1) of the

Immigration and Refugee Protection Act, S.C. 2001, c. 27 (the "IRPA"). This H&C application raised various issues concerning the best interest of the Applicants' grandchildren living in Canada, the Applicants' establishment in Canada, the hardship they would face if they had to apply from outside Canada, principles of family reunification, and finally their personalized risk of return as set out in their pre-removal risk assessment. This H&C application has yet to be decided upon by the Canadian immigration authorities.

[6] Following the negative pre-removal risk assessment decision of February 23, 2010, the Applicants were informed on March 27, 2010 that the latest day for their departure from Canada was May 8, 2010.

[7] On April 7, 2010 the Applicants, through their legal counsel, requested a deferral of removal until their H&C application is assessed. One of the factors raised in this deferral request concerned the risk faced by the Applicants should they return to Mexico, which risk was further elaborated in additional submissions for deferral submitted by the Applicants on April 13, 2010. These were the same risk factors and related facts as those submitted within the context of the pre-removal risk assessment.

[8] The enforcement officer issued a decision dated April 15, 2010 finding that there were insufficient motives to defer the removal, taking into account the Applicants' submissions and the best interest of the concerned children. Hence the application for leave and for judicial review challenging this decision and submitted April 21, 2010.

Positions of the parties

[9] In this motion for a stay of removal, the Applicants argue that a serious issue is raised as to whether the enforcement officer erred in law in refusing to defer removal pending an assessment of the best interests of the grandchildren within the context of the pending H&C application.

[10] The Applicants further assert that they face irreparable harm should they be removed since their family has been targeted by criminals in Mexico, and also with regard to the best interest of their grandchildren. The Applicants add that the balance of convenience follows the irreparable harm they will suffer.

[11] The Respondent argues that, in this case, an elevated standard applies for a serious issue. The enforcement officer considered the evidence submitted as well as the best interests of the grandchildren and came to a conclusion that fits within a range of possible and acceptable outcomes defensible in fact and law.

[12] The Respondent adds that irreparable harm has not been made out since the risk raised by the Applicants is the same as that which was reviewed in the unchallenged pre-removal risk assessment. Moreover, no irreparable harm to the grandchildren has been established by the Applicants. Finally, the balance of convenience favours the Respondent, who has a statutory duty under subsection 48(2) of the IRPA to enforce a removal order as soon as reasonably practicable.

Analysis

[13] This motion can be decided within the principles recently set out by the Federal Court of Appeal in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, 309 D.LR. (4th) 411; [2009] F.C.J. No. 314 (QL) ("*Baron*") referring approvingly to the decision of Justice Pelletier in *Wang v. Canada*, 2001 FCT 148; [2001] 3 F.C. 682; [2001] F.C.J. No. 295 (QL) ("*Wang*") and to the decision of Justice Nadon in *Simoes v. Canada (Minister of Citizenship and Immigration)* (2000), 187 F.T.R. 219; [2000] F.C.J. No. 936 (QL) ("*Simoes*").

[14] *Baron* instructs, at paragraphs 66 and 67, that the judge hearing a motion to stay a removal within the context of an application for leave and for judicial review of a decision of an enforcement officer refusing to defer a removal should clearly have in mind, first, that the discretion to defer the removal of a person subject to an enforceable removal order is limited, and second, that the standard of review of an enforcement officer's decision is that of reasonableness. Furthermore, since the motion to stay essentially seeks a final decision on the refusal to defer, the applicant must put forward quite a strong case to justify a stay. Consequently, the motion judge should closely examine the merits of the underlying application.

[15] The *Baron* decision itself refers to the *Wang* decision. In *Wang*, Justice Pelletier stated the following at paragraphs 48 and 52 [emphasis added]:

> It has been recognized that there is a discretion to defer removal though the boundaries of that discretion have not been defined. The grant of discretion is found in the same section which imposes the obligation to execute removal orders, a juxtaposition which is not insignificant. At its widest, the discretion to defer should logically be exercised only in circumstances where the process to which deferral

> is accorded could result in the removal order becoming unenforceable or ineffective. Deferral for the mere sake of delay is not in accordance with the imperatives of the Act. One instance of a policy which respects the discretion to defer while limiting its application to cases which are consistent with the policy of the Act, is that deferral should be reserved for those applications or processes where the failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment in circumstances and where deferral might result in the order becoming inoperative. The consequences of removal in those circumstances cannot be made good by re-admitting the person to the country following the successful conclusion of their pending application. Family hardship cases such as this one are unfortunate but they can be remedied by readmission.
> […]
> Turning to the issue in the underlying judicial review, the Removal Officer's refusal to defer the removal pending the disposition of the H&C application, I find no serious issue with regard to the Removal Officer's conduct. As set out above, a pending H&C application on grounds of family separation is not itself grounds for delaying a removal. To treat it as such would be to create a statutory stay which Parliament declined to enact. […]

[16] This approach was approved by the Federal Court of Appeal in *Baron* at paragraph 51 [emphasis in original]:

> Subsequent to my decision in *Simoes, supra*, my colleague Pelletier J.A., then a member of the Federal Court Trial Division, had occasion in *Wang v. Canada (M.C.I.)*, [2001] 3 F.C. 682 (F.C.), in the context of a motion to stay the execution of a removal order, to address the issue of an enforcement officer's discretion to defer a removal. After a careful and thorough review of the relevant statutory provisions and jurisprudence pertaining thereto, Mr. Justice Pelletier circumscribed the boundaries of an enforcement officer's discretion to defer. In Reasons which I find myself unable to improve, he made the following points:
>
> - There are a range of factors that can validly influence the timing of removal on even the narrowest reading of section 48, such as those factors related to making effective travel arrangements and other factors affected by those arrangements, such as children's school years and pending births or deaths.

> - The Minister is bound by law to execute a valid removal order and, consequently, any deferral policy should reflect this imperative of the Act. In considering the duty to comply with section 48, the availability of an alternate remedy, such as a right to return, should be given great consideration because it is a remedy other than failing to comply with a positive statutory obligation. In instances where applicants are successful in their H&C applications, they can be made whole by readmission.
>
> - In order to respect the policy of the Act which imposes a positive obligation on the Minister, while allowing for some discretion with respect to the timing of a removal, deferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. With respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety.
>
> - Cases where the only harm suffered by the applicant will be family hardship can be remedied by readmitting the person to the country following the successful conclusion of the pending application.

I agree entirely with Mr. Justice Pelletier's statement of the law.

[17] Consequently, where the deferral of removal is sought on the grounds of a pending application based on humanitarian and compassionate considerations pursuant to subsection 25(1) of IRPA, absent special considerations, the deferral should only be considered where the a threat to personal safety has been established.

[18] In this case, the personal safety of the Applicants is not at issue. The Refugee Protection Division of the Immigration and Refugee Board of Canada and the officer who carried out the pre-removal risk assessment both found that the Applicants had an internal flight alternative available to

them within Mexico. The Refugee Protection Division decision was confirmed by the Federal Court, and the pre-removal risk assessment has not been challenged. Absent new evidence to the contrary, the enforcement officer did not have the authority to ignore or to overturn these decisions.

[19] Consequently, the only issue here is whether the pending H&C application is in and of itself a sufficient reason to defer the removal. In other words, does a pending H&C application constitute one of the special considerations referred to in *Wang* and *Baron* which could allow the enforcement officer to defer the removal of the Applicants? I am of the opinion that the enforcement officer did not act unreasonably in finding that the particular facts of this case did not constitute such special considerations.

[20] As noted by Justice Nadon in *Baron* at paragraph 50, the mere existence of an H&C application does not constitute a bar to the execution of a valid removal order. Moreover, with respect to the presence of Canadian-born children, an enforcement officer is not required to undertake a substantive review of the children's best interests before executing a removal order. In so finding, Justice Nadon was reiterating his comments in *Simoes* at paragraphs 12 to 14:

> In my opinion, the discretion that a removal officer may exercise is very limited, and in any case, is restricted to when a removal order will be executed. In deciding when it is "reasonably practicable" for a removal order to be executed, a removal officer may consider various factors such as illness, other impediments to travelling, and pending H&C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system. […]
> With respect to pending H&C applications, certainly, the mere existence of such an application cannot bar the execution of a valid removal order. "To hold otherwise," as Noël J. aptly 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."
> Regarding H&C applications involving Canadian children, I cannot subscribe to the view submitted by the Applicant -- namely, that the removal officer must defer removal of a parent with Canadian children pending the determination of their H&C application […]

[21] *Simoes* does set out that a removal officer may consider a pending H&C application that was brought on a timely basis but has yet to be resolved due to backlogs in the system. Justice Zinn has noted in the recent decision of *Williams v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 274, [2010] F.C.J. No. 318 (QL) at paragraph 36 that there appears to be no analysis or discussion of the rationale for this proposition; however, Justice Zinn notes that the rational may be that the Minister should not be allowed to rigorously enforce his duty of removal when he has been delinquent in his duty to process applications that may make the removal unnecessary or invalid.

[22] Perhaps an enforcement officer may defer the removal if the decision on the H&C application is imminent, thus possibly avoiding multiple displacements for the applicants should their H&C application be accepted; and perhaps the length of time for which an H&C application has been pending may be a factor in determining if a decision on the application is impeding; however the simple fact that an H&C application has been pending for a long rather than a short time does not appear at first glance to justify a deferral absent special circumstances: see the comments of Justice Blais in *Baron* at para. 80. Moreover, it is questionable, in light of *Baron*, if a pending H&C application, even if processed for a long time, is in and of itself sufficient to justify a

deferral of removal without some risk to the applicant's personal safety being demonstrated. However, I need not decide these issues in this case since it is clear here that the review of the H&C application by the Minister is not untimely nor is there any indication that a decision on the H&C application is imminent. In such circumstances I do not believe the enforcement officer acted unreasonably in refusing to defer the removal of the Applicants.

[23] It is useful to keep in mind that an application pursuant to subsection 25(1) of the IRPA seeks to obtain an exemption from a legal requirement of that act, and a decision to grant or not to grant such an application is a discretionary exercise of ministerial authority. Though the exercise of that discretion is subject to judicial review, the simple fact that such an application has been submitted does not, by and in itself, grant a right to remain in Canada. The Applicants have been found not to be Convention refugees or persons in need of protection by both the panel of the Refugee Protection Division and by the officer responsible for the pre-removal risk assessment. They consequently no longer have a right to remain in Canada, and the simple fact of having submitted an H&C application does not grant them that right. Absent special circumstances or a risk to their personal safety being demonstrated, it was within the removal officer's authority not to grant them a deferral of removal on the basis that their H&C application was pending.

[24] The argument of the Applicants based on irremediable harm should they be removed is fully dealt with by the decisions of the Refugee Protection Division panel and of the pre-removal risk assessment officer, who all found that the Applicants may avail themselves of an internal flight

alternative in Mexico. Moreover, no evidence of irremediable harm on the Applicants' grandchildren has been submitted.

[25] In such circumstances, the balance of convenience also favours the Respondent.

[26] The motion for a stay of removal is therefore dismissed.

"Robert M. Mainville"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2226-10
STYLE OF CAUSE:	SALVADOR PONCE MORENO ET AL. v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Montréal, Quebec
DATE OF HEARING:	May 4, 2010
REASONS FOR ORDER:	MAINVILLE J.
DATED:	May 5, 2010

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