Federal Court  Cour fédérale

Date: 20101025

Citation: 2010 FC 1047

Ottawa, Ontario, October 25, 2010

PRESENT: The Honourable Mr. Justice Harrington

Docket: IMM-36-10

BETWEEN:

PAOLO MARIO ZAVALA REYES,
EVELYN TORRES REYES,
ELVIS ZAVALA REYES

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

Docket: IMM-1397-10

AND BETWEEN:

PAOLO MARIO ZAVALA REYES,
EVELYN TORRES REYES,
ELVIS ZAVALA REYES

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDERS

HARRINGTON J.

[1] The cornerstone date of this case is March 12, 1997. Elvis Zavala Reyes was four years old. That was the day an arrest warrant was issued against his parents for failing to attend a meeting with a Canadian immigration officer. His father, Paolo Mario Zavala Reyes, his mother Evelyn Torres Reyes, and young Elvis, had left Chile and had come to Canada in 1996 to claim refugee status. Their claim was deemed abandoned later that year.

[2] The warrant was only executed in April 2007. They had gone underground, although it must be said there was not much of an effort to find them. They then sought a pre-removal risk assessment (PRRA) and applied for permanent resident status from within Canada on humanitarian and compassionate grounds (H&C). The decisions went against them.

[3] They applied for leave and for judicial review of both decisions. While those applications were pending an enforcement officer sought to remove them pursuant to s. 48 of the *Immigration and Refugee Protection Act* (IRPA) which stipulates that if a person who is removal ready does not voluntarily leave, he is to be removed as soon as is "reasonably practicable." They asked the enforcement officer to defer removal pending the outcome of their applications before this Court. He refused. They then applied for judicial review of that decision and moved for a stay of removal pending the outcome of the three applications for judicial review. I granted a stay in the application for judicial review of the enforcement officer's decision not to defer (IMM-1397-10) and dismissed

the motion in the other two applications on the grounds of mootness. Subsequently leave was denied with respect to the PRRA, but granted both with respect to the H&C and the decision of the enforcement officer not to defer. These reasons extend to both judicial reviews. Although reasons for granting the stay were not given, it is common ground, as counsel were the same and the matter was heard the same week, that the reasons in *Shpati v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2010 FC 367, apply.

[4] The prime focus of the H&C application was the family's establishment in Canada. They have never been on the welfare line, have been gainfully employed and are engaged in the community. Their application was prepared by an immigration consultant, not a lawyer, and was not the best. It was said that young Elvis had finished school but nevertheless his report cards had been submitted. They suggest that he has a learning disability. Even if this disability was not specifically drawn to the decision maker's attention by way of a red hand, it was submitted that it was self-evident from the record that the best interests of Elvis were not taken into account, as required by s. 25 of IRPA. On the contrary, I find that Elvis' interests were taken into account, including his bilingualism in English and Spanish. The officer was of the view that neither he nor the family would suffer underserved, undue or disproportionate hardship if they were required to follow the rules and apply for permanent resident status from outside Canada. Furthermore, the interests of the child are only one factor to take into account (*Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 F.C. 358).

[5] The officer was of the view that the negative factors outweighed the positive. Mr. Zavala Reyes knew he was required to report to immigration officers in 1997 for a possible removal. He failed to comply with a notice to appear, yet made no attempt to regularize his status for nine years. By ignoring the notice to report, he chose to live in the shadows. He and his wife worked for many years without work permits and did not file tax returns.

[6] The officer referred to the decision of this Court in *Serda v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 356, 146 A.C.W.S. (3d) 1057, which is to the effect that it would defeat the purpose of IRPA if the longer an applicant were to live illegally in Canada the better his or her changes were to be allowed to stay here. I agree.

[7] More recently, the Federal Court of Appeal, per Mr. Justice Nadon, discussed such conduct in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, 309 D.L.R. (4th) 411, at para. 64:

> Events of this type, i.e. where persons fail to comply with the requirements of the Act or act in a way so as to prevent the enforcement thereof, should always be high on the list of relevant factors considered by an enforcement officer. It is worth repeating what this Court said at paragraph 19 of its Reasons in *Legault, supra*. Although the issue before the Court in *Legault, supra*, pertained to the exercise of discretion in the context of an H&C application, the words of Décary J.A. are entirely apposite to the exercise of discretion by an enforcement officer:
>
> > [19] In short, the *Immigration Act* and the Canadian immigration policy are founded on the idea that whoever comes to Canada with the intention of settling must be of good faith and comply to the letter with the requirements both in form and substance of the Act. Whoever enters Canada illegally contributes to falsifying the

> immigration plan and policy and gives himself priority over those who do respect the requirements of the Act. The Minister, who is responsible for the application of the policy and the Act, is definitely authorised to refuse the exception requested by a person who has established the existence of humanitarian and compassionate grounds, if he believes, for example, that the circumstances surrounding his entry and stay in Canada discredit him or create a precedent susceptible of encouraging illegal entry in Canada. In this sense, the Minister is at liberty to take into consideration the fact that the humanitarian and compassionate grounds that a person claims are the result of his own actions.
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> [Emphasis added in the Baron decision.]

[8] Had the family reported to the immigration officer as they were required to in 1997, young Elvis would have been back home and could not have been used as an excuse for the family to stay. Indeed, his learning disabilities may be somewhat of a red herring as no reports from psychologists or other professionals were filed to offer the officer any guidance as to how he personally would fare in Chile.

[9] The submission is that the officer is visiting the sins of the father upon the innocent son. I would rather characterize this as an instance where the principal applicant comes to Court with unclean hands and is not entitled to an equitable remedy.

[10] Turning now to the decision of the enforcement officer, he is an officer of the Canada Border Services Agency and thus, the respondent Minister originally named as the Minister of

Citizenship and Immigration should be the Minister of Public Safety and Emergency Preparedness. The order will reflect that change.

[11] I am of the view that the enforcement officer erred in law in refusing to grant an administrative stay on the basis that if the applicants succeeded in their PRRA they would be entitled to return to Canada. The reasons in the just released decision of *Shpati v. Canada (Minister of Public Safety and Emergency Preparedness et al.)*, 2010 FC 1046, apply.

[12] However, there is a fundamental distinction between Mr. Shpati's situation and that of the Zavala Reyes family. The Ministers and Mr. Shpati are still engaged in a live controversy in that his application for judicial review of the refusal to allow him to apply for permanent residence from within Canada was granted. However, both the Zavala Reyes' applications for permanent residence from within Canada (H&C) and PRRA were dismissed. In my opinion, the decision of the enforcement officer not to defer has now become moot and should be dismissed on that basis.

[13] A copy of these reasons is to be placed in both Court docket nos. IMM-36-10 and IMM-1397-10.

"Sean Harrington"
Judge

Ottawa, Ontario
October 25, 2010

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-36-10
STYLE OF CAUSE:	Paolo Mario Zavala Reyes et al. v. MCI
AND DOCKET:	IMM-1397-10
STYLE OF CAUSE:	Paolo Mario Zavala Reyes et al. v. MPSEP
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	September 14, 2010
REASONS FOR ORDER:	HARRINGTON J.
DATED:	September 25, 2010

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