Federal Court  Cour fédérale

Date: 20111109

Docket: IMM-7836-11

Citation: 2011 FC 1294

Vancouver, British Columbia, November 9, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

DURAN ARTIGA, JUAN RAMON

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] This Court has held that a removals officer does not perform an adjudicative function and any duty on that officer to provide reasons is minimal. In fact, the Court in *Boniowski v Canada (MCI)*, 2004 FC 1161 (QL/Lexis), stated the following in regards to the adequacy of reasons provided by an enforcement officer in response to a deferral request:

> [11] … any reasons requirement was fulfilled in the decision letter of September 12, 2003 where the officer indicated that she had received and reviewed the applicants' submissions, and her decision was not to defer removal …

[2] In her decision, the officer specifically states that she considered the Applicant's request to defer removal based on the current "environmental disaster" in El Salvador. Further, the officer advised that in the course of her investigation into country conditions in El Salvador, she observed that CBSA had not conferred a Temporary Suspension for Removal (TSR) or Administrative Deferral of Removal designation on El Salvador. In addition, the officer pointed out that the Department of Foreign Affairs and International Trade (DFAIT) had not declared an official travel warning for El Salvador (Michelle Cruz Affidavit, Exhibit "Z" [Cruz Affidavit]).

II. Introduction

[3] The Applicant, Mr. Juan Ramon Duran Artiga, is scheduled to be removed from Canada on November 11, 2011. The Applicant is seeking a stay of his removal order until his application for leave and for judicial review of the refusal of his deferral request is determined.

[4] The Court is in agreement with the position of the Respondent that the Applicant's motion be dismissed as he has failed to establish the elements necessary to obtain a stay of his removal order. First, the Applicant has failed to raise a serious issue with respect to the refusal of his deferral request. Second, the Applicant has not shown that he will suffer irreparable harm. Third, the balance of convenience does not favour the Applicant.

III. Background (A longer background is provided as the Applicant has a spousal sponsorship application in current process.)

[5] Mr. Juan Ramon Duran Artiga was born in Chalatenango, San Salvador, El Salvador, on January 3, 1986. After being attacked by MS-13 members in mid-2005, the details of which are set

out in his Personal Information Form (PIF), Mr. Duran Artiga left El Salvador and made his way to Canada, arriving on or about September 2005.

[6] Mr. Duran Artiga met Ms. Dora Castillo in or about December 2008.

[7] Ms. Castillo was born September 17, 1983 in San Salvador. Her father, Mr. Nicolas Argueta, travelled to Canada alone and claimed refugee status in March 1987. Following his successful claim, he brought his wife, Ms. Marina Castillo, and his three children, Dora, Maritza and Jose, to Canada. They arrived in September 1994.

[8] Ms. Castillo's eldest daughter, Lizette Nathalie Castillo, was born on February 8, 2003. Lizette's father, Mr. Ronald Ochoa, is from Honduras. He was deported from Canada back to Honduras when Ms. Castillo was only three months pregnant. By the time Lizette was born, Mr. Ochoa was already married to another woman in Honduras. Neither Lizette nor Ms. Castillo has any relationship with Mr. Ochoa.

[9] Ms. Castillo has a second daughter; Enny Alejandra Vargas Castillo, who was born on November 8, 2006. Enny's father, Mr. Jose Vargas, left the family when Enny was only one-month-old. Neither Lizette nor Ms. Castillo has any relationship with Mr. Vargas.

[10] When Ms. Castillo met Mr. Duran Artiga, she was a single mother of two daughters and living on social assistance.

[11] Ms. Castillo and Mr. Duran Artiga's relationship grew quickly. He attended church regularly, did not drink, and preferred to stay in as a family rather than go out with friends. Three months after they began dating, Ms. Castillo and Mr. Duran Artiga moved in together.

[12] In November 2009, Ms. Castillo learned that she was pregnant. Mr. Duran Artiga had been living in Canada without status for approximately four years.

[13] In December 2009, Mr. Duran Artiga applied for refugee status.

[14] They were married on June 12, 2010, with Ms. Castillo's family and church friends present. Ms. Castillo gave birth to Jeremy Nathaniel Duran Castillo on August 26, 2010. Mr. Duran Artiga is a dedicated father to Lizette, Enny and Jeremy. Lizette and Enny both call him "daddy".

[15] In February 2011, Mr. Duran Artiga received notice of his right to a Pre-Removal Risk Assessment (PRRA). Ms. Castillo and Mr. Duran Artiga both swore that they were surprised by this notice because they believed that he had a right to a hearing. Ms. Castillo and Mr. Duran Artiga met with Mr. Robin Bajer, a lawyer, who inquired of the Immigration and Refugee Board regarding his refugee hearing. At that point, they learned that his refugee claim had been deemed abandoned. Both Ms. Castillo and Mr. Duran Artiga swore that they did not receive the notice for the hearing.

[16] They proceeded to fill out the PRRA on their own, without legal assistance.

[17] Ms. Castillo and Mr. Duran Artiga also began the process of filling out an application for the Spouse or Common Law Partner in Canada class. It took them time to fill out the application. They also had to collect documents, such as his police clearance, from El Salvador and have them translated. Again, they did it without the benefit of legal advice. It also took them a significant amount of time to save the money for the processing fee.

[18] The in-land application was submitted to Vegreville, in August 2011. The receipt for postage, as well as for application fees, is included in the Applicant's Record.

[19] Mr. Duran Artiga received his negative PRRA decision at an interview with Canada Border Services Agency (CBSA) on October 5, 2011. At that same meeting, he received a letter which stated he had to bring an issued airline ticket to an interview with the CBSA officer on October 13, 2011, with a departure date of no later than October 20, 2011.

[20] Mr. Duran Artiga attended the meeting with the CBSA officer on October 13, 2011. Counsel filed a request for a deferral of Mr. Duran Artiga's removal in person. At that meeting, Mr. Duran Artiga informed the officer that he could not afford a flight back to El Salvador. He was informed that CBSA would make the travel arrangements.

[21] The deferral request was based on the harm that would come to Ms. Castillo and the three children if Mr. Duran Artiga was removed. Mr. Duran Artiga is currently the primary provider for his family. In all of his time in Canada, Mr. Duran Artiga was only on social assistance for four months. He works as a roofer with Mr. Wilmer Alvarez. He has worked with Mr. Alvarez for more

than a year and a half. He makes approximately $200 a day and works six days a week if weather permits. Ms. Castillo is not on social assistance and Mr. Duran Artiga supports the entire family.

[22] At the end of September, Ms. Castillo obtained a part-time job at the Suzy Shier in Brentwood Mall. If he is not working, Mr. Duran Artiga will take care of the children when she is at work. He also picks up the girls from school if Ms. Castillo cannot because of work or other commitments.

[23] In addition to his employment, Mr. Duran Artiga also helps Ms. Castillo with chores around the house, including feeding Jeremy, cleaning the house, buying groceries, baby food, diapers and other necessities.

[24] The Regional Program Manager of CBSA officer refused the request to defer removal on October 14, 2011.

[25] On October 21, 2011, Mr. Duran Artiga voluntarily appeared for his removal as directed at the Vancouver International Airport. Mr. Duran Artiga was flown to Toronto. In Toronto, he was put on a flight along with two other deportees. At the last minute, he was pulled off the flight. CBSA gave him a letter to report to their office in Toronto on Monday morning.

[26] Mr. Duran Artiga spent Saturday and Sunday night in a hotel, which he paid for, and went to their office on Monday morning. Mr. Duran Artiga was then flown back to Vancouver on Monday night.

[27] As instructed by CBSA, he then attended a meeting with the CBSA officer on the morning of October 25, 2011. He was told at that meeting that CBSA was going to try to get another travel document as soon as possible, and remove him again as soon as possible.

[28] On October 28, 2011, another request for deferral was submitted. The request relied on the facts and materials from the first deferral request and made additional submissions about the current flooding in El Salvador. Information about the disaster was not included in the October 13, 2011 deferral request, as the floods had not yet happened.

[29] On October 31, 2011, the CBSA officer refused the second deferral request.

[30] On November 2, 2011, the Applicant filed an application for leave and for judicial review of the officer's decision of November 1, 2011.

IV. Issue

[31] In order for a stay to be granted, an applicant must establish all three of the following elements of the test for injunctive relief:

1. The underlying application for leave and for judicial review of the removal officer's decision raises a serious issue to be tried;
2. He/she will suffer irreparable harm if the stay is not granted; and
3. The balance of convenience favours him/her.

(*Toth v Canada (MEI) (*1988), 86 NR 302, 11 ACWS (3d) 440 (FCA)

[32] The Court is in agreement with the Respondent that the Applicant has not met his burden in this case.

V. Analysis

A. *Serious Issue*

(1) Elevated threshold and standard of review

[33] The Court of Appeal has stated that an elevated standard for serious issue applies to a stay motion arising from a refusal to defer an applicant's removal because the stay, if granted, effectively grants the relief sought in the underlying judicial review application. Accordingly, rather than simply applying the "serious issue test," the Court must closely examine whether, on its merits, the underlying application is likely to succeed (*Baron v Canada (MPSEP)*, 2009 FCA 81, [2010] 2 FCR 311 at para 66 [*Baron*]).

[34] In determining whether a serious issue exists, the Court must keep in mind that the discretion of an enforcement officer to defer removal is limited. In *Baron*, above, the Court characterized the discretion of the enforcement officer in considering a request for deferral.

[35] In order to respect the policy of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA) 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 (*Baron*, above, at para 51).

[36] Further, the standard of review applicable to the deferral decision of an enforcement officer is reasonableness. Accordingly, the Court only intervenes if the decision of the enforcement officer falls outside the "range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Baron*, above, at paras 67 and 74); *Canada (MPSEP) v Shpati*, 2011 FCA 286 at para 27).

(2) Country Conditions in El Salvador

[37] The Applicant argues that the CBSA Regional Program Manager fettered her discretion when she refused to grant the Applicant's deferral request on the basis of flooding in El Salvador. The Respondent submits that the officer considered all of the relevant evidence and determined that current country conditions in El Salvador did not warrant a deferral of the Applicant's removal from Canada.

[38] This Court has held that a removals officer does not perform an adjudicative function and any duty on an officer to provide reasons is minimal. In fact, the Court in *Boniowski v Canada (MCI)*, 2004 FC 1161 (QL/Lexis), stated the following in regards to the adequacy of reasons provided by an enforcement officer in response to a deferral request:

> [11] … any reasons requirement was fulfilled in the decision letter of September 12, 2003 where the officer indicated that she had received and reviewed the applicants' submissions, and her decision was not to defer removal …

[39] In her decision, the officer specifically states that she considered the Applicant's request to defer removal based on the current "environmental disaster" in El Salvador. Further, the officer advised that in the course of her investigation into country conditions in El Salvador, she observed that CBSA had not conferred a Temporary Suspension for Removal (TSR) or Administrative

Deferral of Removal designation on El Salvador. In addition, the officer pointed out that the Department of Foreign Affairs and International Trade (DFAIT) had not declared an official travel warning for El Salvador (Michelle Cruz Affidavit, Exhibit "Z", RMR, Tab 1 at p 91 [Cruz Affidavit]).

[40] The officer's decision to not defer the Applicant's removal based on flooding in El Salvador was reasonable and does not give rise to a serious issue.

(3) Best interests of children

[41] The Applicant argues that the officer ignored evidence regarding potential risks that would be faced by the Applicant's children if he were to be removed from Canada. Given the narrow discretion afforded to a removals officer with respect to granting a temporary deferral, the officer properly considered all the relevant facts before her and reasonably concluded that the Applicant had failed to establish the grounds to warrant a deferral.

[42] The officer properly considered the best interests of the Applicant's children in accordance with the aforementioned law. In expressly addressing the best interests of the Applicant's children the officer stated:

> I have also considered the best interest of his children, highlighting short term options. His children are Canadian Citizens and can therefore travel to El Salvador and stay with Mr. DURAN ARTIGA or they can stay in Canada to be with their biological mother. In both scenarios the children will have access to either parent. If the children stay in Canada they will have additional support from their extended family. If the children travel with Mr. DURAN ARTIGA then their mother can travel to El Salvador to visit him or the family has the option of moving to El Salvador so the family unit can stay

> together. This removal will not place the children at risk. [Emphasis added).

[43] The officer's consideration of the best interests of the Applicant's children met the limited obligation placed on removals officer to consider such interests. In fact, the officer went further than was required of her when considering the best interests question.

[44] In conclusion, the Applicant has failed to raise a serious issue in regards to the officer's deferral decision.

B. *Irreparable Harm*

[45] The evidence in support of irreparable harm must be clear and non-speculative. Specifically, the Court must be satisfied that irreparable harm will occur if the relief sought is not granted. In the present case, there is no clear and non-speculative evidence that the Applicant's removal will result in irreparable harm to any party (*Wade v Canada (MCI)*, [1995] FCJ No 579 (QL/Lexis) at paras 3-4).

(1) Country Conditions in El Salvador

[46] The Applicant argues that it would be unsafe for him to return to El Salvador at the current moment due to flooding in the country. The evidence regarding potential risks to the Applicant as a result of flooding are speculative at best. Further, documentary evidence indicates that flood conditions in El Salvador have significantly subsided in recent days.

[47] Irreparable harm is a strict test in which serious likelihood or jeopardy to an applicant's life or safety must be demonstrated (*Malagon v Canada (MCI)*, 2008 FC 1068 at paras 2 and 57).

[48] In this regard, this Court in *Yvonne v Canada (MPSEP)*, 2011 FC 820 stated:

> [34] An irreparable harm: "must […] be much more substantial and more serious than personal inconvenience or hardship. Rather, it must be based on a threat to the life or security of the person, or an obvious threat of ill treatment in the country of origin. Irreparable harm is harm which is irrevocable or permanent" (*Perry v Canada (MPSEP)*, 2006 FC 378, para 29).

[49] The evidence regarding potential risks to the Applicant as a result of flooding is based on speculation. Further, documentary evidence indicates that flooding in El Salvador has significantly subsided in recent weeks. For instance, a recent USAID report dated October 24, 2011, points out that flood conditions in El Salvador have considerably improved as rainfall has decreased significantly and river levels have gradually begun to subside. Further, the CBSA enforcement officer was informed by the Canadian Embassy in San Salvador via e-mail that, as of November 2, 2011, the situation in and around the capital had returned to normal and that the international airport in San Salvador is fully operational (USAID – Update on Central America Floods, October 24, 2011, RBOA, Tab C(4); Cruz Affidavit, Exhibit "AA", RMR, Tab 1 at p 93).

[50] The Applicant, in the present case, has failed to demonstrate that the current flooding in El Salvador would seriously jeopardize his life or safety. Accordingly, irreparable harm has not been established.

(2) Impact on Family

[51] The Applicant has failed to demonstrate irreparable harm if removed to El Salvador on the basis of the impact his removal will have on his wife and children.

[52] The Applicant argues that irreparable harm will ensue if he is removed to El Salvador because his wife and children depend on him financially and his family will suffer both emotional and psychological harm as a result of the separation. The ensuing consequences of removal cited by the Applicant are speculative and do not go beyond the usual hardships, loss and sorrow associated with deportation. While the situation faced by the Applicant's wife and his children will, without question, be a challenge, the Applicant's wife has a number of immediate family members, including parents, a brother and a sister, living within the Vancouver region, who could assist her with the care of her three children.

[53] Further, the Applicant argues that he currently has an inland spousal sponsorship application in process, and that if removed he would have to reapply as an overseas applicant. In Canada spousal applications operate independently of the deportation process. Moreover, knowing that he was subject to an enforceable removal order, the Applicant could have chosen to submit an overseas sponsorship application or an inland application on Humanitarian and Compassionate (H&C) grounds, either of which would continue to be processed after his removal from Canada. The Applicant instead elected to file an application that requires him to be in Canada for processing.

[54] For all these reasons, the Applicant has failed to make out irreparable harm.

C. *Balance of Convenience*

[55] The balance of convenience in this case favours the Minister. In assessing the balance of convenience, the Court must consider the public interest in the enforcement of laws that have been enacted by democratically-elected legislatures. The IRPA requires that a removal order be enforced

as soon as is reasonably practicable. There is a public interest in enforcing removal orders in an efficient, expeditious and fair manner and in supporting the efforts of those responsible for doing so (IRPA at s 48; *RJR- MacDonald Inc v Canada (AG*), [1994] 1 SCR 311, at para 68-71).

[56] In addition, the Applicant has had the opportunity to receive the benefit of two different risk assessments, a refugee determination as well as a pre-removal risk assessment. The Applicant is now the subject of a valid removal order. Consequently, it is in the public interest to provide finality to the process. Otherwise, the integrity and fairness of, along with the public confidence in, Canada's system of immigration control will be compromised (*Selliah v Canada (MCI)*, 2004 FCA 261at para 21-22).

[57] In these circumstances, the public's interest in the proper and effective administration of Canada's immigration controls outweighs the Applicant's desire to delay his removal. Consequently, the balance of favour lies with the Respondent.

VI. Conclusion

[58] The Applicant has failed to establish any of the three elements necessary for this Court to grant an order staying execution of the removal order. Consequently, the Applicant's motion to stay the execution of the removal order is denied.

JUDGMENT

THIS COURT'S JUDGMENT is that the Applicant's motion to stay the execution of the removal order be denied.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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