Federal Court  Cour fédérale

Date: 20131217

Docket: IMM-8018-13

Citation: 2013 FC 1256

Toronto, Ontario, December 17, 2013

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

SANDRA GONZALEZ MARTINEZ AND LUIS ENRIQUE SANTIAGO GONZALEZ

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

[1] **UPON** Motion, dated the 16th day of December, 2013, on behalf of applicants, for an Order staying the execution of the removal Order until such time as their Application for leave and judicial review in this matter has been disposed of.

[2] **AND UPON** reading the motion record on behalf of the applicants.

[3] **AND UPON** hearing the parties' counsel in the evening of December 16, 2013. For the reasons that follow, the stay of execution of the removal order with respect to the applicants is dismissed.

[4] The applicants came to the Court literally at the last hour for a stay of the removal Order that is to be executed on December 17th, 2013 at 8:30. The applicants are not the only ones to be faulted, as the respondent has chosen to issue the order with very little time to exercise judicial recourse. Counsel for the respondent was incapable to explain where the urgency came from. This is unfortunate. If the circumstances had been slightly different, I would have been tempted to grant the stay of execution.

[5] However, in this particular case, it must be acknowledged that the applicants do not come to the Court with completely clean hands. Furthermore, they had known since December 11th that their removal would take place on December 17th . It is only on December 13th, after the close of business, that an application was made for a deferral to the inland enforcement officer (deferral officer) with additional submissions made on December 15th. It is not surprising that the decision to review the deferral came earlier yesterday. Counsel for the applicant moved with remarkable diligence by seeking to have the refusal judicially reviewed. The stay application came in support of the leave application for judicial review of the refusal to defer the removal order.

[6] It is not disputed that the *tri-partite* test *of R.G.R MacDonald v. Canada*, [1994] 1 SCR 311 and *Toth v. MEI* (1988), 86 NR 302 controls. Hence, the Court must be satisfied that there is a serious issue to be tried on the judicial review, that irreparable harm to the applicants will arise if

deported, and the balance of convenience favors them. Failure on the part of the applicants on any branch of the test is fatal. In my view, it will suffice to discuss the balance of convenience and the serious issue branches of the test.

[7] The applicants in this case have been without status in this country ever since their arrival in Canada on June 7, 2007. They immediately made a refugee claim which was denied on June 3, 2009. Their leave application for judicial review was also unsuccessful. Their Pre-Removal Risk Assessment was also rejected and arrangements were made for their immediate departure then scheduled for August 5, 2010. They failed to appear and in fact, disappeared. It is only in June of 2013 that the applicants resurfaced when they made an application for permanent residence based on humanitarian and compassionate grounds. It took 6 months for the authorities to locate them and they were arrested on December 10, 2013 (a warrant for their arrest had been issued in August 2010).

[8] There is a considerable public interest in removing from Canada persons that are without status. In this case, the applicants have been fugitive for more than 3 years. A removal Order, following due process of the law, was issued in July 2010. The *Immigration and Refugee Protection Act*, S.C. 2001, C 27, was amended recently (s.48) to limit even more any residual discretion that was left with officers tasked with removing foreign nationals.

[9] In the case at bar, two persons who came to Canada more than six years ago have sought very remedy and have failed. Instead of abiding by the removal order, they chose to abscond for a

long period of time. I find that the balance of convenience favors the respondent, in that respect for the rule of law should prevail in these circumstances.

[10] Furthermore, I fail to see what the serious issue is in this case. Because the remedy sought on the stay application is the same as the one claimed in the underlying judicial review application, I have to "closely examine the merits of the underlying application". (*Wang v. Canada (MCI),* 2001 3 F.C 682, at paragraph 10).

[11] As already indicated, the discretion of the deferral officer is very limited. The deferral officer cannot review the humanitarian and compassionate application. The law orders her to enforce a removal order as soon as possible. It is only if the exercise of that limited discretion is shown to be unreasonable that an applicant can be successful. The notion of reasonability is that which was described by the Supreme Court of Canada in the seminal case of *Dunsmuir v. New Brunswick,* 2008 SCC 9; (2008) 1 SCR 190, at paragraph 47.

[12] Here we have an articulated decision of a deferral officer with which the applicants take issue on three different fronts. First, they claim that the deferral officer fettered her discretion. The applicants argue that the deferral officer refused to deal with what is presented as the very serious grounds for the request, that is that an H&C application is pending and irreparable harm would be caused to one applicant in terms of educational support.

[13] I have reviewed carefully the decision made. The argument presented by the applicants in my view is no more than a disagreement on the weight to be put on the evidence. The decision is in

my estimation eminently reasonable. The deferral officer is not the decision maker on the H&C application and she gave due consideration to the grounds for the request.

[14] Similarly, it is alleged that some evidence was ignored. But I repeat. The discretion of the deferral officer has is limited. The applicants would wish to turn the exercise of a limited discretion into something more akin to a complete review based on humanitarian and compassionate grounds. What is presented as evidence detailing the lack of educational support for one of the applicants if returned to Mexico never rose to the level required to suggest that the decision was not reasonable. Indeed, the deferral officer explained adequately why this argument must fail.

[15] Finally, the applicant raised the best interests of the child. The child in question is 18 years of age. The deferral officer had to be alive and sensitive to the short term interests of the child *(Acevedo v. Canada,* 2007 F.C 401*)*. She was, especially in view of the age of that child. Clearly, the deferral officer was alive and sensitive. The applicants disagree with the assessment made. That is not sufficient. Deference to the decision maker is owed. But in this case, I am satisfied that the deferral officer was even more than alive and sensitive.

[16] As a result, the motion for a stay of the removal order with respect to the two applicants is dismissed.

ORDER

THIS COURT ORDERS that the motion for a stay of the removal order with respect t the two applicants is dismissed.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET: IMM-8018-13

STYLE OF CAUSE: SANDRA GONZALEZ MARTINEZ AND LUIS ENRIQUE SANTIAGO GONZALEZ v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

PLACE OF HEARING: TORONTO, ONTARIO

DATE OF HEARING: DECEMBER 16, 2013

REASONS FOR ORDER AND ORDER: ROY J.

DATED: DECEMBER 17, 2013

APPEARANCES:

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