Federal Court  Cour fédérale

Date: 20240517

Docket: IMM-8247-24

Citation: 2024 FC 756

Ottawa, Ontario, May 17, 2024

PRESENT: Mr. Justice Norris

BETWEEN:

JAIME ALBERTO TORRES PENA
JAQUELINE TORRES ORTIGOZA
VANESSA DAYANA TORRES TORRES

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

I. OVERVIEW

[1] The applicants are citizens of Colombia. They have been directed to report for removal from Canada on May 19, 2024. On May 7, 2024, they asked the Canada Border Services Agency (CBSA) to defer their removal. In a decision dated May 14, 2024, a CBSA Inland Enforcement Officer refused their request. The applicants have applied for leave and for judicial

review of this decision. They now seek an order staying their removal pending the final determination of the judicial review application.

[2] For the reasons that follow, this motion will be dismissed.

II. BACKGROUND

[3] Jaime Alberto Torres Pena and Jaqueline Torres Ortigoza are a married couple. Cristian Jaidiver Torres Torres and Vanessa Dayana Torres Torres are, respectively, their son and daughter.

[4] The family left Colombia together in May 2014 as a result of what they allege had been many years of targeting for extortion, threats, and violence by the *Ejército de Liberación Nacional* (ELN), an illegal armed group, and settled in New Jersey. After living in the United States without status for six years, the family entered Canada in June 2020 and claimed refugee protection.

[5] The Minister submitted a written intervention in the applicants' proceedings before the Refugee Protection Division (RPD). Among other things, the Minister submitted that Cristian was excluded from refugee protection due to a criminal conviction for domestic violence in the United States. The Minister also provided evidence that two of the documents the applicants were relying on to support their claims (a victim's registration document and a police report) were not authentic.

[6] The RPD heard the applicants' claims for protection on April 4 and June 6, 2023. It rejected the claims in a decision dated October 13, 2023.

[7] In summary, the RPD found as follows:

- There are serious reasons to consider that Cristian Jaidiver Torres Torres committed a serious offence, as described in Article 1F(b) of the *Refugee Convention*, and he is therefore excluded from refugee protection pursuant to section 98 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*).

- Since the applicants had not established a nexus to a *Convention* ground, their claims would be examined under section 97 of the *IRPA* only.

- Mr. Torres Pena was not forthright in his testimony about the documents the family was relying on to corroborate their claims or how the documents were obtained.

- Mr. Torres Pena had not provided a clear answer to the Minister's concerns with respect to the genuineness of two documents (a victim's registration document and a police report). The RPD was satisfied on a balance of probabilities that the documents are fraudulent.

- Given the testimony of Mr. Torres Pena that all their documents were provided by the same person in Colombia (referred to in the decision as "G", the first letter of his last name), the RPD found that none of the applicants' documentary evidence was reliable.

- The applicants lived in the United States between 2014 and 2020 without seeking refugee protection despite claiming to have left Colombia because of threats to their lives.

Mr. Torres Pena explained that they could not find anyone who spoke their language (Spanish) to assist them until a year after their arrival and, in any event, it did not occur to them to seek protection. The RPD found it "very unlikely that they would not be able to find Spanish speaking resources in this regard for a full year after their arrival if they had an intention to seek protection. The panel finds that their lack of doing so is an indication that their issues in Colombia were not as they described."

- The RPD found that the applicants "are generally not credible and have not credibly established that any of the events they described in Colombia occurred."

[8] As noted above, the RPD's decision is dated October 13, 2023. It was released to the applicants on October 17, 2023.

[9] The applicants had been permitted to enter Canada from the United States and make a refugee claim because they had a close family member in Canada. Since this precluded the applicants from appealing the RPD's decision to the Refugee Appeal Division (see *IRPA*, paragraph 110(2)(d)), their only recourse was an application for leave and for judicial review to this Court. No such application was brought.

[10] Cristian is not a party to the present motion. No information concerning his present circumstances was provided.

[11] The applicants allege that on October 25, 2023 (that is, less than two weeks after the RPD's decision), the ELN issued a public statement naming Mr. Torres Pena and

Ms. Torres Ortigoza (among others), seeking information about their whereabouts, and stating that they will be executed. This public statement was recorded in a video. The video depicts five masked men standing in a wooded area in front of a banner with the letters "ELN" on it. The men are dressed in camouflage combat fatigues and are brandishing firearms. One is standing behind a table on which a laptop computer is sitting. The video is two minutes and 43 seconds in duration. It is in the Spanish language. A certified English translation of the video was prepared on behalf of the applicants.

[12] As discussed further below, it is not clear when, exactly, the applicants obtained this video. The most that can be said is that it must have been sometime prior to March 18, 2024. This is because the applicants obtained an opinion concerning the authenticity of the video from Gimena Sanchez-Garzoli. Ms. Sanchez-Garzoli is the Director of the Washington Office on Latin America, a human rights advocate, and a leading expert on Colombia. Ms. Sanchez-Garzoli provided her opinion in a sworn declaration dated March 18, 2024. She does not state when she received the video or from whom.

[13] It appears that Ms. Sanchez-Garzoli's opinion was sought as support for an application for permanent residence on humanitarian and compassionate (H&C) grounds prepared following the RPD's negative decision. That application was originally submitted to Immigration, Refugees and Citizenship Canada on February 11, 2024. For reasons that are not material to the present matter, it was re-submitted on March 7. 2024. Mr. Torres Pena swore an affidavit in support of that application on May 6, 2024.

[14] Meanwhile, the CBSA directed the applicants to attend for a pre-removal interview on April 15, 2024. On April 24, 2024, the CBSA gave the applicants a Direction to Report for removal on May 19, 2024.

[15] On May 7, 2024, the applicants requested that the CBSA defer their removal. They based this request on two grounds. First, they sought deferral of their removal until they became eligible to submit a request for a pre-removal risk assessment (PRRA). Under paragraph 112(2)(c)(i) of the *IRPA*, they are ineligible to submit a PRRA application until October 12, 2024. Placing particular weight on the video as new evidence of risk, the applicants submitted that there was a live issue as to their risk in Colombia that should be fully assessed in a PRRA application. Second, the applicants sought deferral to permit them to remain in Canada until a decision was made on their recently submitted H&C application. While the full H&C application is not before the Court, it appears that the applicants relied on the new evidence of risk in this regard as well, presumably as evidence of the hardship they would face if required to submit an application for permanent residence from outside Canada.

[16] The deferral request was supported by a letter from counsel for the applicants dated May 7, 2024. The letter articulates clearly and in detail why the applicants were seeking a deferral of their removal. Along with the letter, counsel provided, among other things, screenshots of the video, an English transcript of the video, the expert declaration of Ms. Sanchez-Garzoli dated March 18, 2024, Ms. Sanchez-Garzoli's *curriculum vitae*, and the affidavit from Mr. Torres Pena sworn on May 6, 2024. All of the enclosures were listed in an Index of Documents.

[17] As noted, a CBSA Inland Enforcement Officer refused the deferral request in a decision dated May 14, 2024. As reflected in the decision, the officer understood the request to have three components: (1) Pre-Removal Risk Assessment; (2) Application for Permanent Residence – Humanitarian and Compassionate Case; and (3) Risk. Under each of these headings, the officer set out some relevant background facts. The officer then concluded as follows with respect to each component:

> This request does not confer any status under the Immigration and Refugee Protection Act or its regulations.
>
> This request does not constitute a statutory or regulatory stay of removal under the Immigration and Refugee Protection Act or its regulations.
>
> This is not an impediment to removal.

[18] Accordingly, the officer refused the request to defer removal.

III. ANALYSIS

A. *The Test for a Stay*

[19] The test for obtaining an interlocutory stay of a removal order is well-known. The applicants must demonstrate three things: (1) that the underlying application for judicial review raises a "serious question to be tried;" (2) that they will suffer irreparable harm if the stay is refused; and (3) that the balance of convenience (i.e. the assessment of which party would suffer greater harm from the granting or refusal of a stay pending a decision on the merits of the judicial review applications) favours granting a stay: see *Toth v Canada (Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123 (FCA); *Canadian Broadcasting Corp,* at

para 12; *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110; and *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 334.

[20] The purpose of an interlocutory order like the one sought here is to ensure that the subject matter of the underlying litigation will be preserved so that effective relief will be available should the applicants be successful on their application for judicial review (*Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 24). A decision to grant or refuse such interlocutory relief is a discretionary one that must be made having regard to all the relevant circumstances (*R v Canadian Broadcasting Corp*, 2018 SCC 5, [2018] 1 SCR 196 at para 27). As the Supreme Court stated in *Google Inc*, "The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific" (at para 25).

[21] In addition, in cases where a risk on removal is alleged, the Court's jurisdiction to order a stay of removal serves the important purpose of ensuring that a party is not removed before any risks they may face in the country to which they are be removed have been properly assessed. In applying the test for a stay, this Court "can, and often does, consider a request for a stay of removal in a more comprehensive manner than an enforcement officer can consider a request for deferral" (*Tapambwa v Canada (Citizenship and Immigration)*, 2019 FCA 34 at para 87; see also *Atawnah v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 144 at paras 16-23). Put another way, "the Federal Court has more leeway than an enforcement officer when considering a request for a stay" (*Revell v Canada (Citizenship and Immigration)*, 2019 FCA 262 at para 51). The Court effectively acts as a safety valve to ensure that removal does not occur in

the face of a flawed assessment of risk by an administrative decision maker tasked with making this assessment (*Abu Aldabat v Canada (Citizenship and Immigration)*, 2021 FC 277 at para 18). This power to preserve the status quo is a necessary precondition to the effective exercise of judicial review in risk cases. It is also necessary for the effective protection of fundamental human rights. That being said, it is also the case that a stay motion is not meant to be an opportunity to reargue risks that have been adequately assessed by previous decision makers (*Abu Aldabat*, at para 35; *Melay v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 1406 at para 14).

B. *The Test Applied*

[22] As I will explain, I have concluded that the applicants have not met either the first or the second parts of the test. It is therefore not necessary to address the third part.

(1) Have the applicants established a serious issue?

[23] The applicants accept that, to satisfy the first step of the test for a stay, they must meet an elevated threshold to establish a serious question to be tried. Typically the threshold is a low one; an applicant only needs to show that at least one of the grounds raised in the underlying application for judicial review is not frivolous or vexatious: *RJR-MacDonald*, at 335 and 337; see also *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at para 11 and *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 25. However, one exception to the usual rule is “when the result of the interlocutory motion will in effect amount to a final determination of the action” (*RJR-MacDonald*, at 338). In such circumstances,

the Court must closely scrutinize the merits of the underlying application and the moving party must meet an elevated threshold to be entitled to interlocutory relief.

[24] This is the case here. If granted, a stay of removal effectively grants the relief sought in the underlying judicial review application – namely, the setting aside of the refusal to defer removal: see *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682, 2001 FCT 148 (CanLII) at para 10; and *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311 at paras 66-67 (per Nadon JA, Desjardins JA concurring) and para 74 (per Blais JA). In such circumstances, the Court must undertake "a more extensive review of the merits" (*RJR MacDonald*, at 339). The Court must be satisfied, after a hard look at the grounds advanced, that at least one ground carries with it a likelihood of success in the underlying application: again, see *Wang* and *Baron*.

[25] The parties agree, as do I, that the standard of review of the officer's decision is reasonableness. Accordingly, to satisfy the first part of the test for a stay, the applicants must establish a likelihood that they will be able to demonstrate in the underlying application for judicial review that the officer's decision is unreasonable. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 85). To succeed in the underlying application for judicial review, they must persuade the reviewing court that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov*, at para 100).

[26] The applicants sought deferral on two grounds: first, to afford them time to become eligible to submit an application for a PRRA; and second, to permit them to remain in Canada until a decision is made on their recently submitted H&C application.

[27] Subsection 48(2) of the *IRPA* provides that an enforceable removal order "must be enforced as soon as possible." Furthermore, it is well-established that only a limited discretion is available to an Inland Enforcement Officer to defer removal: see *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paras 54-61; see also *Toney v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1018 at para 50 and *Gill v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 1075 at paras 15-19.

[28] The refusal to defer removal pending a decision on the H&C application can be disposed of quickly. The applicants submitted their H&C application approximately three months ago. The current processing time for such applications is 24 months. The applicants have not contested the reasonableness of the officer's conclusion that deferral on this basis was not warranted. In any event, given the well-established constraints on the officer's discretion, a reviewing court is unlikely to find that it was unreasonable for the officer to decline to defer removal on this basis.

[29] The focus of the present motion was the reasonableness of the officer's refusal of the request to defer removal on the basis that the applicants would be at risk of death in Colombia at the hands of the ELN. As set out above, this request was based on what the applicants submitted was credible new evidence establishing this risk – namely, the video of the message from the

ELN in which they were mentioned by name. While this is the same risk assessed by the RPD, the video post-dates the RPD's decision and, as a result, was not considered by that tribunal.

[30] While an Inland Enforcement Officer's discretion to defer removal is limited, it is indisputable that an officer must defer removal where an applicant would be exposed to a risk to life or physical integrity upon returning to their country of nationality (*Baron*, at para 51; *Melay*, at para 15). Indeed, "deferring removal in such circumstances is essential to the safeguard of the rights guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*" (*Melay*, at para 15).

[31] Where deferral is sought on the basis of new evidence bearing on a risk of harm, an officer is required to assess the risk alleged and determine if a deferral is warranted until a full risk assessment can be conducted (*Atawnah*, at paras 18-23 and 27; *Peter v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 51 at para 7; *Obaseki v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 936 at paras 6-9). The evidence in support of the risk at the deferral stage need not be conclusive but it must be clear and compelling (*Atawnah*, at para 21).

[32] In the present case, the officer did consider the new evidence presented by the applicants. The officer notes in the decision that submissions in support of the deferral request included screenshots as well as a transcript of a video purported to have been made by the ELN in Colombia. According to the transcript of the video (which the officer quotes in the decision), Mr. Torres Pena and Ms. Torres Ortigoza (among others) are threatened with death by name.

The officer notes the opinion of Ms. Sanchez-Garzoli that the video is authentic. The officer also notes that "screenshots of the ELN video are undated; however, according to submissions made to this office, the video was produced in the Mountains of Colombia on October 25th, 2023." The officer thus recognized that, on its face, the new evidence post-dated the RPD's decision.

[33] While the officer did consider the new evidence, his assessment of that evidence leaves much to be desired. Like other parts of the decision, under the heading "Risk", the officer's reasons for concluding that the new evidence did not warrant a deferral of removal are highly formulaic, as if a standardized template were being followed. As can be seen in the following (which is the complete discussion under this heading), there is little in the way of analysis to justify the outcome:

> Jaime Alberto Torres Pena and his family left Colombia on May 28th, 2014 and have resided in the USA for 6 years and in Canada for 4 years.
>
> The video was produced 12 days following the RPD's decision. No other information, footage, letters, texts or transcripts have been submitted to this office showing that the ELN has been interested in the whereabouts, or have been searching for, Jaime Alberto Torres Pena and his family since leaving Colombia on May 28th, 2014.
>
> This office has not received any information as to how the video was found, located or obtained.
>
> Counsel has suggested that this is a new risk affecting the return of Jaime Alberto Torres Pena and his family to Colombia. Based on the information provided to this office, the risk associated with the ELN has already been assessed and refused by the RPD.
>
> This request does not confer any status under the Immigration and Refugee Protection Act or its regulations.
>
> This request does not constitute a statutory or regulatory stay of removal under the Immigration and Refugee Protection Act or its regulations.

> This is not an impediment to removal.

[34] I agree with the applicants that this part of the decision is lacking in transparency and intelligibility. The officer makes a number of statements of fact (the video is said to have been released on October 25, 2023, 12 days after the RPD's decision; there was no information as to how the video was "found, located or obtained;" there was no other information suggesting the ELN had expressed an interest in the applicants since they left Colombia on May 28, 2014) but he does not explain the connection between these facts and the ultimate conclusion that the risk demonstrated by the new evidence "is not an impediment to removal." Furthermore, the officer's statement that there was no information as to how the video was "found, located or obtained" is incorrect. There was such information in the affidavit from Mr. Torres Pena that was provided in support of the deferral request. As discussed below, there are many serious problems with that evidence. The point for present purposes, however, is that the officer obviously overlooked that evidence entirely. As well, the officer does not express a view one way or the other concerning Ms. Sanchez-Garzoli's opinion that the video is authentic. Finally, while it is true that the risk the applicants alleged is the same one "assessed and refused" by the RPD, the request for deferral was based on new evidence that was not considered by the RPD.

[35] Despite all of these flaws in the decision, I am not persuaded that a reviewing court is likely to find that they undermine the reasonableness of the decision. I consider the misapprehension of the evidence concerning the provenance of the video to be the most significant flaw. However, I am satisfied that it is an immaterial error. This is because, given the many frailties of that evidence (as discussed below), I am satisfied that the result would inevitably have been the same. In other words, the evidence in Mr. Torres Pena's affidavit

explaining how he obtained the video could not reasonably have led the officer to a different conclusion on the ultimate issue of whether the video reasonably called into question the RPD's conclusion that the applicants would not be at risk in Colombia.

[36] The officer's failure to address Ms. Sanchez-Garzoli's opinion concerning the authenticity of the video raises a different issue. In this respect, the officer did not misapprehend the evidence; instead, he failed to address the opinion in any way. While it would certainly have been better if the officer had addressed this evidence directly (especially given the importance attributed to that evidence in counsel's submissions in support of the deferral request), the failure to do so does not impugn the reasonableness of the decision. This is because, even if the officer were to accept the opinion at face value, this could not reasonably lead to a different result.

[37] The reasonableness of the officer's decision must be determined against the backdrop of the adverse credibility findings by the RPD concerning the applicants' claims to have been targeted by the ELN in the first place. Given the applicants' reliance on new evidence, those findings cannot be taken as determinative without first assessing the new evidence. At the same time, it is not unreasonable to view the new evidence in light of those earlier findings, among other things. The reasonableness of the officer's decision must also be determined against the backdrop of the applicable legal test (for new evidence of risk to warrant the exercise of discretion to defer removal until the risk can be assessed fully, it need not be conclusive but it must be clear and compelling). Viewing the decision against these backdrops and in light of the record before the officer, and notwithstanding the flaws I have identified, I am satisfied that a

reviewing court is likely to conclude that the officer's determination that the new evidence was insufficient to warrant a deferral of removal is reasonable.

[38] In sum, the applicants have certainly raised arguable issues concerning the reasonableness of the officer's decision. However, this is not sufficient to meet the elevated threshold applicable here. They must establish a strong case that the officer's decision is unreasonable. For the reasons just stated, I find that they have failed to do so. Consequently, they have not met the first part of the test for a stay.

(2) Have the applicants established a real risk of irreparable harm?

[39] Under this part of the test, the question is whether any adverse impact on the applicants' interests that would result from refusing a stay could not be remedied if they were ultimately successful in their judicial review application (*RJR-MacDonald*, at 341). This is what is meant by describing the harm that must be established as "irreparable". It concerns the nature of the harm rather than its magnitude (*ibid.*).

[40] The applicants submit that their very lives will be at risk if they must return to Colombia. There is no question that this constitutes irreparable harm. The determinative issue is whether they have established that they actually face this risk.

[41] Given that this is the same risk the applicants relied on in seeking deferral, there can be a large degree of overlap between the first and second parts of the test for a stay. Nevertheless, the two parts of the test must be kept conceptually distinct. As Justice Grammond observed in

Obafemi-Babatunde v Canada (Citizenship and Immigration), 2023 FC 633: “The first stage pertains to the reasonableness of a prior decision regarding the risks to which the applicant would be exposed upon returning to their country. At the second stage, the Court must form its own opinion regarding these risks” (at para 13). The role previous decisions addressing risk play in the Court’s assessment will vary with the circumstances (*Obafemi-Babatunde*, at para 14).

[42] To establish irreparable harm, the applicants must show that there is “real, definite, unavoidable harm – not hypothetical and speculative harm” (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112 at para 24). They must adduce clear and non-speculative evidence that irreparable harm will follow if the stay is refused. Unsubstantiated assertions of harm will not suffice. Instead, “there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result” unless the stay is granted: *Glooscap Heritage Society*, at para 31; see also *Canada (Attorney General) v Canada (Information Commissioner)*, 2001 FCA 25 at para 12; *International Longshore and Warehouse Union, Canada v Canada (Attorney General)*, 2008 FCA 3 at para 25; and *United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 at para 7. That being said, as Justice Gascon observed in *Letnes v Canada (Attorney General)*, 2020 FC 636, “The fact that the harm sought to be avoided is in the future does not necessarily make it speculative. It all depends on the facts and the evidence” (at para 57).

[43] In support of this part of the test, the applicants rely primarily on the new evidence of risk represented by the video. Having considered all of the evidence before me, including evidence

that the officer failed to assess expressly or even at all, I do not find the video to be convincing evidence that the applicants would be at risk in Colombia.

[44] First, strictly speaking, there is no admissible evidence as to the provenance of the video. One must remember that, unlike administrative or even adjudicative proceedings under the *IRPA*, the rules of evidence apply in a motion to stay removal under section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7. None of the applicants provided an affidavit in support of this motion. Instead, an employee of applicants' counsel swore an affidavit that sets out evidence that should have come directly from at least one of the applicants. While an affidavit sworn by Mr. Torres Pena is attached as part of an exhibit to the employee's affidavit, it was prepared in support of the H&C application and not for the present motion. Thus, strictly speaking, that affidavit is hearsay; it is an out of court statement tendered for the truth of its contents. No explanation has been offered for why it was necessary to present the evidence in this form.

[45] Furthermore, assuming without deciding that it is appropriate on this motion to consider Mr. Torres Pena's affidavit for the truth of its contents, it does not provide credible evidence about the provenance of the video.

[46] Mr. Torres Pena explains how he obtained the video as follows:

> On 25 October 2023, a communique was issued against our family by the ELN. The ELN continues to be active in our region and made the community aware that they were going to broadcast a communique. This is how my friend, Wilson Guerrero, who still lives in our community became aware of the video and sent it to me by Whatsapp. Wilson asked me to delete the conversation for his safety, which I of course did.

[47] There are many problems with this account. While Mr. Torres Pena gives a first-hand account of how *he* obtained the video (he received it from Mr. Guerrero), the account of how Mr. Guerrero obtained the video is second hand hearsay. There is no explanation for why a first hand account from Mr. Guerrero was not obtained. Furthermore, even taking Mr. Guerrero's account at face value, it does not explain how ELN "broadcast" the communique or how exactly Mr. Guerrero obtained it. Moreover, Mr. Torres Pena does not provide any evidence as to when exactly he received the video from Mr. Guerrero, a matter within his personal knowledge.

[48] As well, the destruction of the evidence of communications between Mr. Torres Pena and Mr. Guerrero regarding the video is very concerning. Even accepting for the sake of argument that Mr. Guerrero asked Mr. Torres Pena to delete the conversation for his (Mr. Guerrero's) safety, Mr. Torres Pena does not explain why he thought deleting the conversation on *his* device in Canada was necessary for Mr. Guerrero's safety in Colombia. Nor does he explain why he did not try to preserve the conversation in some form before deleting the original. After all, the very reason he would have wanted the video is to be able to rely on it in a legal proceeding, as he now does on this motion.

[49] Surprisingly given their recent experience with the RPD, there is no indication that the applicants sought any legal advice before destroying this important evidence. I accept the representation of applicants' present counsel that she was not acting for the applicants when Mr. Torres Pena deleted the conversation with Mr. Guerrero. As well, counsel submits that the applicants are not sophisticated individuals. Be that as it may, they were represented by a lawyer before the RPD. I have no information about when that retainer ended. In any event, at the

material time, the applicants would have been aware of the RPD's findings concerning the inauthentic documents they had filed in support of their refugee claims as well as its adverse credibility findings. Whether witting or not, their failure to preserve the record of how they obtained the video seriously diminishes the credibility and reliability of that evidence.

[50] Finally, given the account of how the video was obtained from Colombia, the applicants' history of obtaining inauthentic documents from individuals in that country to support their claims for protection in Canada (as found by the RPD, a finding the applicants never contested) casts a pall over other evidence coming from similar sources. Significantly, the applicants have not said that the video and the fraudulent documents were provided by different people. Standing on its own, the applicants' history of reliance on fraudulent evidence may not have been determinative if there had been better evidence as to the provenance of the video. However, that history raises concerns about the genuineness of the video that are not dispelled by the highly unsatisfactory evidence about its provenance. To the contrary, that evidence only magnifies those concerns.

[51] I must also consider the opinion of Ms. Sanchez-Garzoli that the video is authentic. I also accept that Ms. Sanchez-Garzoli is a highly qualified and recognized expert on the human rights situation in Colombia. I understand her to be saying that, in her opinion, the video records a message that is actually from the ELN. I do not understand her to be offering an opinion on when the message was released, when the video was recorded, or by whom.

[52] Ms. Sanchez-Garzoli bases her opinion that this is a genuine message from the ELN on the following factors: (1) the "protocol and language used by the ELN member who makes the announcement are consistent with other ELN videos"; and (2) the "background, uniforms, even radio noises, and computer laptops are typical of such videos."

[53] In my view, Ms. Sanchez-Garzoli's opinion has little probative value on the issue of whether the message is actually from the ELN or, instead, is a well-made imitation of an ELN message or a manipulation of a genuine message. As a result, her opinion does not overcome the serious problems with the provenance of the video set out above.

[54] For the sake of completeness, I acknowledge the respondent's concerns that, at times, Ms. Sanchez-Garzoli's affidavit strays into inappropriate advocacy and that, through this affidavit, the applicants are effectively engaging in a collateral attack on the RPD's decision. These are valid concerns. Nevertheless, it is not necessary to decide whether they are sufficient to invalidate the opinion as a whole. This is because, for the reasons I have just set out, even taking Ms. Sanchez-Garzoli's opinion concerning the authenticity of the message in the video at face value, it is insufficient to overcome all the other difficulties with that evidence.

[55] In sum, the RPD concluded that the applicants are not persons in need of protection under section 97 of the *IRPA* because they had not credibly established that any of the events in Colombia they described occurred. The RPD reached this conclusion because it found that the applicants were not credible in their testimony and that their documents were not authentic. The applicants did not challenge the RPD's decision by way of judicial review. They now rely on

new evidence to establish that they are at risk in Colombia. Given that the RPD found the applicants not to be credible and to have relied on fraudulent evidence, they bear a heavy burden of persuading me that the new evidence they have put forward overcomes the RPD's credibility concerns (*Obafemi-Babatunde*, at para 18). Viewed on its own and against the backdrop of the RPD's decision, the video is far from convincing evidence that the applicants would be at risk in Colombia if they were to return there now. As a result, the applicants have failed to meet the second part of the test for a stay.

IV. CONCLUSION

[56] For these reasons, the applicants have not met the test for a stay of their removal. This motion must, therefore, be dismissed.

[57] Finally, the original style of cause names the respondent as the Minister of Citizenship and Immigration, however, the proper respondent in this matter should be the Minister of Public Safety and Emergency Preparedness: *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, s 5(2) and *IRPA*, s 4(2). Accordingly, as part of this order, the style of cause is amended to name the respondent as the Minister of Public Safety and Emergency Preparedness.

ORDER IN IMM-8247-24

THIS COURT ORDERS that

1. The style of cause is amended to reflect the Minister of Public Safety and Emergency Preparedness as the correct respondent; and

2. The motion is dismissed.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-8247-24
STYLE OF CAUSE:	JAIME ALBERTO TORRES PENA ET AL v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MAY 15, 2024
ORDER AND REASONS:	NORRIS J.
DATED:	MAY 17, 2024

APPEARANCES:

Penny Yektaeian	FOR THE APPLICANTS
Hannah Shaikh	FOR THE RESPONDENT

SOLICITORS OF RECORD:

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