Date: 20070614

Docket: IMM-2277-07

Citation: 2007 FC 626

Ottawa, Ontario, June 14, 2007

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

JEFFERSON VIEIRA, MARCIA LIMA VIEIRA

Applicants

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

INTRODUCTION

[1] There is no legal basis or foundation for the Applicants' assertion that a fiduciary relationship exists between a person without status in Canada and the Canadian government, based upon purported statements made by a Minister of the former government in regard to possible or potential changes to the Canadian immigration system. Neither the former government nor the current one enacted any legislation, nor did it put into effect any rules or regulations in regard to such purported statements. The Applicants have shown no legal basis for their assertion. An assertion by the Applicants, selectively referring to cases in respect of a fiduciary duty in a non-

immigration context, does not make it such. (The exception is *Medawatte v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2005 FC 1374, [2005] F.C.J. No. 1672 (QL), and that is an immigration case which deals with solicitor negligence in a very different context than the present one, as discussed in paragraphs 27 to 33 inclusively.)

In regard to the notion of fiduciary duty, significant note is taken of the following jurisprudence, excerpts of which are quoted below:

> [6] I take the view that this action sounds solely in negligence. In argument, plaintiff's counsel attempted to assert claims based upon alleged breach of fiduciary duty, but not only was such breach not alleged, and therefore, cannot now be relied upon, but also in my view, there are no facts shown by the plaintiff which would support the essentials of a claim for breach of fiduciary duty. The plaintiff has not shown that he was particularly vulnerable, indeed the material before me indicates quite clearly that from an early stage after his arrival in Canada, he obtained the assistance of legal aid and had legal advice given to him. In my view, while it is true that the categories of fiduciary duty are not closed, they do not include the duties owed by Immigration Officials to immigrants who are in a position to and do obtain legal assistance for their dealings with the Department.

(*Farzam v. Canada (Minister of Citizenship and Immigration),* 2003 FCT 140, [2003] F.C.J. No. 203 (QL).)

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship…

(*Guérin v. Canada*, [1984] 2 S.C.R. 335.)

JUDICIAL PROCEDURES

[2] The Applicants, citizens of Brazil, have been in Canada without status due to remaining beyond the period permitted by their visas. They filed a Humanitarian and Compassionate (H&C) application in 2003 which was refused in February 2005, and the Applicants were issued exclusion orders in June 2005. They subsequently hired Worker Canada to assist in regularizing their status. In February 2006, the Applicants submitted a Pre-Removal Risk Assessment (PRRA) application alleging a fear of return to Brazil, and later made their submissions in support. In March 2007, the Applicants submitted a second H&C application which included allegations of past negligence and inadequate advice on the part of counsel for Worker Canada. The PRRA was rejected and a decision to that effect was given to the Applicants in person on May 14, 2007, together with a Direction to Report for removal. No application for leave has been filed from the negative PRRA and the time for doing so has expired. A new Direction to Report for Removal was issued on May 17 with a removal date of June 14, 2007.

[3] The Applicants submitted a request for deferral on May 28, 2007, with further submissions on May 31, 2007, requesting that removal be deferred due to the recently filed second H&C application. The Applicants alleged they would have filed the H&C application much earlier except for the inadequate advice they received from counsel for Worker Canada. The Officer declined to defer removal on the basis of an H&C application that had only recently been filed. The Applicants have not met the test for a granting of a stay of removal as they have shown no serious issue on any standard and certainly not, on the elevated standard to be considered with regards to the Removal

Officer's decision. Furthermore, they have not shown irreparable harm as the allegations of risk in Brazil have already been considered and rejected in the context of their PRRA Application.

BACKGROUND

[4] The Applicants entered Canada as visitors in 1998. An H&C application was filed in 2003 with a spouse included as a related dependant on the application; the H&C application was refused in February 2005. The Applicants were issued exclusion orders in June 2005.

[5] Rather than file another H&C application, the Applicants signed on with Worker Canada, an entity which was (unsuccessfully) attempting to work towards regularizing the status of their clients.

[6] The Applicants filed a PRRA application in February 2006. They received a negative decision in person on May 14, 2007, together with a Direction to Report for removal. The Applicants subsequently purchased their own tickets and a new Direction to Report was issued on May 17, 2007, with a removal date of June 14, 2007 at 11:10 p.m. Leave has not been sought with respect to the negative PRRA and the time for doing so has expired. (PRRA Decision; Affidavit of Salima Sajan sworn June 11, 2007, Exhibit "A"; Direction to Report for Removal, Affidavit of Salima Sajan, Exhibit "B".)

[7] On May 28, 2007, the Applicants faxed a request for a deferral of removal based upon a new H&C application having been submitted in March 2007. The Officer thoroughly considered all the submissions and evidence and determined that the existence of the recently submitted H&C

application was not a sufficient basis on which to defer removal. The Applicants were advised of the decision by letter dated June 4, 2007, and also provided the Notes to File explaining the rationale for the refusal. (Refusal letter and Notes to File, Applicant's Record, at pp. 3 and 9-12.)

[8] The Applicants subsequently filed the within motion for a stay of removal with regards to the Officer's refusal to defer.

ISSUE

[9] Have the Applicants demonstrated that they meet the tri-partite test for granting a stay of the removal from Canada?

ANALYSIS

Preliminary matter

[10] The Applicants state in the notice of motion that it is for an Order amending the application for leave. The Applicants have provided no information as to any amendments requested to be made nor any submissions in support of the request. If that is actually the Applicants' intention rather than a typographical error, the Applicants have failed to address or justify, any amendment to the application for leave. The Court will therefore proceed on the basis that this motion is solely for a stay of removal.

Test for granting a stay

[11] In accordance with the jurisprudence of this Court, in order for the Applicants to succeed on this motion, they must demonstrate that all of the three elements of the tri-partite test identified by the Federal Court of Appeal in *Toth v. Canada (Minister of Employment and Immigration)* (F.C.A.), [1988] F.C.J. No. 587 (QL), have been established. Accordingly, the Applicants bear the burden of establishing that (i) a serious issue will be tried; (ii) they will suffer irreparable harm if the removal order is executed; and (iii) the balance of convenience favours them rather than the Minister. (*RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311 (QL).

[12] The Applicants have not demonstrated that they meet the tri-partite test for granting a stay of their removal from Canada. In particular, they have not demonstrated that there is a serious issue to be tried in respect of the Enforcement Officer's decision not to defer their removal, they will not suffer irreparable harm if removed to Brazil, and the balance of convenience favours the Minister.

[13] The requirements of the tripartite test are conjunctive. That is, the Applicants must satisfy all three branches of the test before this Court can grant a stay of proceedings. (*Toth*, above; *RJR-MacDonald*, above.)

[14] The issuance of a stay is an extraordinary remedy wherein the Applicants need to demonstrate "special and compelling circumstances" that would warrant "exceptional judicial intervention". The usual finding is to the effect that Applicants are not entitled to a stay. *Tavaga v. Canada (Minister of Employment and Immigration)* (1991), 15 Imm. L.R. (2d) 82 (F.C.T.D.),

[1991] F.C.J. No. 614 (QL); *Shchelkanov v. Canada (Minister of Employment and Immigration)* [1994] F.C.J. No. 496 (F.C.T.D.) (QL); *Canada (Minister of Citizenship and Immigration) v. Harkat*, 2006 FCA 215, [2006] F.C.J. No. 934 (QL), at para. 10.)

[15] If the Applicants fail in any branch of the test, there is no need to review the other branches of the test. (*Canada (Minister of Citizenship and Immigration) v. Fast*, 2002 FCA 292, [2002] F.C.J. No. 1036 (QL), at para. 8.)

[16] The Applicants have failed to demonstrate special or compelling circumstances in this case that would warrant deferral of removal or judicial intervention. The Applicants have failed to demonstrate any serious issue with respect to the Enforcement Officer's decision not to defer their removal.

SERIOUS ISSUE

Threshold to demonstrate serious issue high

[17] The threshold for the serious issue branch of the tripartite test is "not frivolous and vexatious"; however, because the granting of the Applicants' motion would effectively give them the relief they seek in their underlying application for leave and for judicial review, it is well-established that this Court must engage in a more extensive review of the merits of the application. This has been confirmed in *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] F.C.J. No. 295 (QL), at para. 11.), wherein Justice Denis Pelletier held that the threshold for the serious issue branch of the tripartite test in motions such as the one at bar is not

frivolous and vexatious, but rather, the "likelihood of success.". (Reference is also made to *RJR Macdonald*, above.)

[18] The Applicants argue that a serious issue is raised from the enforcement officer's refusal to defer removal in the face of the Applicants' pending second H&C application, in light of the circumstances set out therein, and in light of purported "promises and statements made by pending Immigration Ministers" which the Applicants submit they relied upon. The Applicants have failed to demonstrate a serious issue on the elevated threshold of "likelihood of success".

[19] Removal Officers' decisions should be accorded a great deal of deference. Applying the pragmatic and functional approach, the Court held in *Zenunaj v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1715, [2005] F.C.J. No. 2133 (QL), at paras. 19-22, that the appropriate standard of review for decisions on deferral requests is that of patent unreasonableness. This standard has been followed in many other cases, and is consistent with paragraph 18.1(4)(*d*) of the *Federal Courts Act*, R.S.C. 1985, c. F-7, which provides for judicial review only if the Officer "based its decision or order on an erroneous finding of fact that it made in a perverse or capricious manner or without regard for the material before it." (Reference is also made to *Haghighi v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 372, [2006] F.C.J. No. 470 (QL), at paras. 6-7; *Griffiths v. Canada (Solicitor General)*, 2006 FC 127, [2006] F.C.J. No. 182 (QL), at para. 16; *Adomako v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 1100, [2006] F.C.J. No. 1384 (QL), at para. 11; *Munar v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 761, [2006] F.C.J. No. 950 (QL), at para. 13; *Chir v. Canada (Minister*

of Public Safety and Emergency Preparedness), 2006 FC 242, [2006] F.C.J. No. 317 (QL), at paras. 13-14; *Uthayakumar v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 90, [2006] F.C.J. No. 107 (QL), at para. 32; *J.B. v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1720, [2004] F.C.J. No. 2094 (QL), at paras. 23-25; *Arroyo v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 260, [2006] F.C.J. No. 342 (QL), at para. 20; *Hailu v. Canada (Solicitor General)*, 2005 FC 229, [2005] F.C.J. No. 268 (QL), at para. 12; *Prasad v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 614, [2003] F.C.J. No. 805 (QL), at para. 56.)

[20] 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 perhaps in cases of long-standing applications that were brought on a timely basis but have yet to be resolved.

[21] In this case, however, the second H&C application was not filed on a timely basis. The Applicants have known since the day they overstayed and at the latest, since June 2005, when they received the exclusion order that they were clearly at risk of removal from Canada; nevertheless, they waited until March 2007 (only three months ago) when removal was essentially imminent to submit a second H&C application. They instead chose to hire a company that was unsuccessfully attempting to have the status of their various clients regularized based upon some potential immigration policy changes, that were never put into place by the past or current government. An

Applicant should not be able to hinder removal by waiting until essentially the last minute to file an H&C application. (*Maharaj v. Canada (Minister of Citizenship and Immigration),* 2001 FCT 509, [2001] F.C.J. No. 786 (QL), at para. 5; *Simoes v. Canada (Minister of Citizenship and Immigration),* [2000] F.C.J. No. 936 (F.C.T.D.) (QL).)

[22] As Justice Richard Mosley recently stated in *Chavez v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 830, [2006] F.C.J. No. 1059 (QL):

> [18] A removals officer's discretion is limited to considering compelling personal circumstances that may preclude the exercise of the Minister's duty to enforce the Act. Subsection 48(2) provides that "[i]f a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable." There is no obligation on the part of the officer to defer removal pending an H&C application. To hold otherwise, as Justice Simon Noël has 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": *Francis v. Canada (Minister of Citizenship and Immigration)* [1997] F.C.J. No. 31 at paragraph 2 (T.D.) (QL).

[23] Moreover, section 50 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), sets out the circumstances in which, by operation of law, a removal order is stayed. Parliament could have provided for a stay where an H&C was filed but choose not to. Section 48 is also very clear about the duty to remove as soon as reasonably practicable.

[24] The Applicants sought to excuse to the Officer their failure to file a second H&C application earlier on the basis of inadequate legal advice. The Applicants also stated that instead of filing another H&C application, they became “registered clients of Worker Canada, that was relying on promises and statements made by pending Immigration Ministers in order to obtain status for their

clients." Counsel states that "the Ministers did not comply with statements and promises …" (Letter requesting a deferral of removal, Affidavit of Salima Sajan Exhibit "C".)

[25] With regard to the Applicants' asserted reliance on purported statements and promises they were advised were made by a former Minister, there are, every year, statements made about possible changes to immigration plans and policies. Some of those are occasionally adopted in some form by the government while many others are not. Furthermore, there was not and is a moratorium on removals of people in the Applicant's position. Parliament was dissolved in November 2005 and the current government was elected in January 2006. The Applicant has provided no basis or reasons for not having filed a new H&C shortly after the current government came to power, well over a year ago, instead waiting until shortly before receiving the negative PRRA decision to file a new H&C.

[26] What is before this Court is simply and solely the Officer's refusal to defer removal within the narrow limits of her discretion pursuant to the IRPA and as stated by Justice Mosley in *Chavez*, above.

The Applicants alleging solicitor incompetence despite their assertion to the contrary

[27] The Applicants submit that they are not alleging ineffective representation. Instead they are asserting that the action taken on their behalf by Worker Canada resulted from statements purported to be on a Ministerial level. Contrary to the Applicant's assertions they are in fact alleging inadequate or negligent representation, as the evidence shows they have been all along. They allege

that they relied upon the actions and assurances of a third party representing them (specifically Worker Canada's counsel) which was purportedly relying on statements from a previous Minister about possible changes to Canadian immigration. Furthermore, counsel's submissions to the Officer requesting a deferral of removal explicitly state that the reason the Applicants did not file their second H&C long ago was due to having received what they now consider to be inadequate legal advice. The letter states:

> The Applicants take the position that they would have filed an H & C that would have been pending for an unusually long time, had they not received legal advice that they now find inadequate...The Federal Court of Canada has allowed for the overturning of a decision because of allegations of negligence against Counsel. (Emphasis added.)

(Letter dated May 25, 2007 requesting deferral of removal Affidavit of Salima Sajan, Exhibit "C".)

[28] Similarly in the H&C submissions at pages 37 and 38 of the "further evidence" the Applicants referred in the H&C submission to relying on counsel Mr. Richard Boraks, that he lied to them, would not return their calls, and was drunk at the last meeting they had with him, on some unspecified date (i.e. they were inadequately represented).

[29] The jurisprudence is clear that an applicant must be held to their choice of adviser and further, that allegations of professional incompetence will not be entertained unless they are accompanied by corroborating evidence. Such evidence usually takes the form of a response to the allegation by the lawyer in question, or, a complaint to the relevant Bar Association. In this case, the Applicants have made an assertion, without providing any evidence in support of their allegation. A failure to provide notice and an opportunity to respond to counsel whose professionalism is being

impugned is sufficient to dismiss any allegations of incompetence, misfeasance or malfeasance. (*Nunez v. Canada (Minister of Citizenship and Immigration)*, (2000) 189 FTR 147, [2000] F.C.J. No. 555 (QL), at para. 19; *Geza v. Canada (Minister of Citizenship and Immigration)*, (2004) 257 FTR 114, [2000] F.C.J. No. 1401 (QL), *Shirvan v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1509, [2005] F.C.J. No. 1864 (QL), at para 32; *Nduwimana* v. *Canada (Minister of Citizenship and Immigration)*, 2005 FC 1387, [2005] F.C.J. No. 1736 (QL); *Chavez*, above.)

[30] More importantly, the Applicants freely made the choice to become clients of Worker Canada rather than file another H&C application. That does not however change the fact that they were subject to removal orders. As the Officer noted:

> … I am satisfied that Mr. and Mrs. Vieira understood that an H&C application was required of them in order to regularise their status. The fact that they became registered clients of Worker Canada instead of applying for an H&C is unfortunate. The correspondence from WorkerCanada and Richard Boraks clearly indicated that the main goal for WorkerCanada was to obtain status for their clients. The fact that WorkerCanada was relying on potential immigration policy changes to regularize their clients status does not change the fact that Mr. and Mrs. Vieira were still subject to removal orders and needed to regularize their status in order to remain in Canada. (Emphasis added.)

(Notes to File, Applicant's Record pp. 11-12.)

[31] The Applicants acknowledge all in which they had knowingly participated, notwithstanding all signs and information to the contrary. This included having been notified on, at least two occasions, in June 2005, after receiving the negative H&C when they were advised about voluntary departure (and issued an exclusion order), and when having been given the opportunity to file a

PRRA in 2006. Furthermore, in addition to the significant and extensive media coverage of removals of undocumented workers in early 2006, including a March 9, 2006 letter from Mr. Boraks which clearly explains to Worker Canada clients that removals of "undocumented workers" were taking place. (Applicant's Further Evidence, at p. 22.)

[32] The Applicants were entitled to make the choice they did; however, their attempt to regularize their status should not be allowed to hinder or impede the Minister's duty to enforce the provisions of the IRPA, including those dealing with enforcements and removals. In *Prassad v. Canada (Minister of Employment and Immigration)*, [1989] 1 SCR 560, a majority of the Supreme Court of Canada held that the enforcement provisions of then *Immigration Act*, R.S.C. 1985, c. I-2, could not be undermined or impeded by an applicant's attempt to normalize or regularize his/her stay in Canada. The reasoning applies with the same force to the IRPA.

[33] There is no legal basis or foundation for the Applicants' assertion that a fiduciary relationship exists between a person without status in Canada and the Canadian government, based upon purported statements made by a Minister of the former government in regard to possible or potential changes to the Canadian immigration system. Neither the former government nor the current one enacted any legislation, nor did it put into effect any rules or regulations in regard to such purported statements. The Applicants have shown no legal basis for their assertion. An assertion by the Applicants, selectively referring to cases in respect of a fiduciary duty in a non-immigration context, does not make it such. (The exception is *Medawatte*, above, and that is an

immigration case which deals with solicitor negligence in a very different context than the present one, as discussed in paragraphs 27 to 33 inclusively.)

In regard to the notion of fiduciary duty, significant note is taken of the following jurisprudence, excerpts of which are quoted below:

> [6] I take the view that this action sounds solely in negligence. In argument, plaintiff's counsel attempted to assert claims based upon alleged breach of fiduciary duty, but not only was such breach not alleged, and therefore, cannot now be relied upon, but also in my view, there are no facts shown by the plaintiff which would support the essentials of a claim for breach of fiduciary duty. The plaintiff has not shown that he was particularly vulnerable, indeed the material before me indicates quite clearly that from an early stage after his arrival in Canada, he obtained the assistance of legal aid and had legal advice given to him. In my view, while it is true that the categories of fiduciary duty are not closed, they do not include the duties owed by Immigration Officials to immigrants who are in a position to and do obtain legal assistance for their dealings with the Department.

(*Farzam*, above.)

> It should be noted that fiduciary duties generally arise only with regard to obligations originating in a private law context. Public law duties, the performance of which requires the exercise of discretion, do not typically give rise to a fiduciary relationship…

(*Guérin*, above.)

IRREPARABLE HARM

[34] Should this Court find that there is a serious issue, the Applicants must still support their motion with clear and convincing evidence of irreparable harm. Irreparable harm is a strict test in which serious likelihood or jeopardy to the Applicants' life or safety must be demonstrated. Further, irreparable harm must not be speculative nor can it be based on a series of possibilities. In this case,

there is no such clear and non-speculative evidence that the fact that the Applicants are going to be deported will cause irreparable harm to any party. (*Grant v. Canada (Minister of Citizenship and Immigration)*, 2002 FCT 141, [2002] F.C.J. No. 191 (QL); *Mikhailov v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 642 (QL); *Kazmi v. Canada (Minister of Citizenship and Immigration)*, Doc. No. IMM-2126-04, (16 March 2004) (T.D.).)

[35] In order to demonstrate that the harm alleged is irreparable, the Applicants must show that the harm would occur between the time their stay application is denied and the positive decision on their application for leave and for judicial review, or, alternatively, in the time following any positive determination of that application. (*Bandzar v. (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 772 (F.C.T.D.) (QL); *Ramirez-Perez v. (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 724 (F.C.T.D.) (QL).)

Risk allegations already considered by a PRRA Officer, and the PRRA application was denied

[36] The Applicants allege fears of a return to Brazil; however, those same allegations of risk have already been assessed by a PRRA Officer, and they were found not to be at risk if returned to Brazil. Leave has not been sought from the PRRA decision and the time to do so has passed. Accordingly, as the sole basis for a claim of irreparable harm has already been considered and rejected, the Applicants have not shown irreparable harm. (PRRA Decision, Affidavit of Salima Sajan, Exhibit “A”.)

Inherent consequences of removal is not irreparable harm

[37] The Federal Court of Appeal has held that irreparable harm is more than the unfortunate hardship associated with the relocation of the family. As Justice John Maxwell Evans stated in *Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, [2004] F.C.J. No. 1200 (QL):

> [13] The removal of persons who have remained in Canada without status will always disrupt the lives that they have succeeded in building here. This is likely to be particularly true of young children who have no memory of the country that they left. Nonetheless, the kinds of hardship typically occasioned by removal cannot, in my view, constitute irreparable harm for the purpose of the Toth rule, otherwise stays would have to be granted in most cases, provided only that there is a serious issue to be tried:

(Reference is also made to *Lewis v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1271, [2003] F.C.J. No. 1620 (QL), at para. 9; *Aquila v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 36 (T.D.) (QL), at para. 12; *Wang*, above, at para. 48; *Frankowski v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 935 (T.D.) (QL), at para. 7.)

[38] Irreparable harm must be something more than the inherent consequences of deportation. As Justice Pelletier stated in *Melo v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 403 (T.D.) (QL):

> [21] …if the phrase irreparable harm is to retain any meaning at all, it must refer to some prejudice beyond that which is inherent in the notion of deportation itself. To be deported is to lose your job, to be separated from familiar faces and places. It is accompanied by enforced separation and heartbreak…

[39] The Federal Court of Appeal cited *Selliah* and *Melo* with approval in *Atwal v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427, [2004] F.C.J. No. 2118 (QL), and

reiterated that a "series of possibilities" and "the usual consequences of deportation" are insufficient to justify a stay:

> [14] Irreparable harm must constitute more than a series of possibilities. The onus is on the appellant to demonstrate in the evidence that the extraordinary remedy of a stay of removal is warranted.
>
> …
>
> [16] The irreparable harm claimed by the appellant with regard to loss of job and separation from his family consists of the usual consequences of deportation. It is not of the type contemplated by the three-stage test for granting a stay…
>
> (Emphasis added.)

Outstanding H&C application does not constitute irreparable harm.

[40] This Court has found on many occasions that an outstanding H&C application does not constitute irreparable harm. Any person can file an H&C, any number of times, at any time. If a pending H&C application could be characterized as irreparable harm, then any person could file an H&C application repeatedly and therefore indefinitely defer removal. This is not the intention of the Act or Parliament and these Applicants should not be permitted to defer their removal because they chose to file an H&C when their removal was imminent. The H&C application will continue to be processed and if positive they can return to Canada after removal. (*Gakou v Canada (Solicitor General)*, 2005 FC 1267, [2005] F.C.J. No. 1528 (QL).)

[41] The Applicants have failed to establish any genuine possibility of irreparable harm. They filed their second H&C only recently, it will continue to be processed after removal, and the stated fear of return have been thoroughly considered by the PRRA Officer who rejected their application.

In the absence of specific evidence of irreparable harm, the second element of the tri-partite test has not been met.

BALANCE OF CONVENIENCE

[42] If the person seeking a stay order does not establish that he or she will suffer irreparable harm if his or her removal is not stayed, the balance of convenience will favour not staying the removal because staying the removal must be assumed to cause irreparable harm to the public interest. (Hill v. Canada (Minister of Fisheries and Oceans (March 17, 2000) T-284-00 (F.C.T.D.). *Dugonitsch v. Canada (Minister of Employment and Immigration)*, [1992] F.C.J. No. 320 (F.C.T.D.) (QL).)

[43] Furthermore, the balance of convenience does not automatically flow from a finding of serious issue and irreparable harm. The Supreme Court of Canada has stated that each part of the tri-partite test must be established individually. In a recent decision of this Court, Justice Conrad von Finckenstein stated "without commenting on the sufficiency of the Applicant's case, this application must be dismissed for failure to meet the balance of convenience...." (*Dasilao v. Canada (Solicitor General)*, 2004 FC 1168, [2004] F.C.J. No. 1410 (QL), at para. 4.)

[44] In *Dugonitsch*, Justice Andrew MacKay set out the considerations pertinent to assessing balance of convenience:

> That public interest supports the maintenance of statutory programs and the efforts of those responsible for carrying them out. Only in exceptional cases will the individual's interest, which on the evidence is likely to suffer irreparable harm, outweigh the public interest. This is not such an exceptional case.

(Reference is also made to *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110, at 146.)

[45] The inconvenience which the Applicants may suffer as a result of their removal from Canada does not outweigh the public interest in executing removal orders as soon as reasonably practicable in accordance with subsection 48(2) of the IRPA. The Minister's obligation under subsection 48(2) of the IRPA is not simply a question of administrative convenience, but implicates the integrity and fairness of, and public confidence in, Canada's system of immigration control.

Subsection 48(2) of the IRPA

[46] Every year this Court hears hundreds of stay applications. Although illegal, many applicants are hard working, law-abiding individuals who are simply here in order to improve their lives and the lives of their families. Nonetheless, in order to uphold the immigration scheme and the law, this Court is required to dismiss the motions of most of these would be immigrants. In dismissing a motion for a stay, the Federal Court of Appeal in *Selliah*, above, stated:

> [21] Counsel says that since the appellants have no criminal record, are not security concerns, and are financially established and socially integrated in Canada, the balance of convenience favours maintaining the status quo until their appeal is decided.
>
> [22] I do not agree. They have had three negative administrative decisions, which have all been upheld by the Federal Court. It is nearly four years since they first arrived here. In my view, the balance of convenience does not favour delaying further the discharge of either their duty, as persons subject to an enforceable removal order, to leave Canada immediately, or the Minister's duty to remove them as soon as reasonably practicable: IRPA, subsection 48(2). This is not simply a question of administrative convenience, but implicates the integrity and fairness of, and public confidence in, Canada's system of immigration control.

CONCLUSION

[47] For all of the above reasons, the Motion for the stay of removal is dismissed.

ORDER

THIS COURT ORDERS that motion for the stay of removal be dismissed.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2277-07
STYLE OF CAUSE:	JEFFERSON VIEIRA, MARCIA LIMA VIEIRA v. MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	Ottawa, Ontario
DATE OF HEARING: BY TELECONFERENCE:	June 13, 2007
REASONS FOR ORDER AND ORDER:	SHORE J.
DATED:	June 14, 2007

APPEARANCES:

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Mr. David Joseph	FOR THE RESPONDENT

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