Federal Court  Cour fédérale

Date: 20111007

Docket: IMM-6759-11

Citation: 2011 FC 1144

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, October 7, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

TEOFILO GYAMPIE MASSONI VASQUEZ

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Preliminary

[1] On a path of crime culminating in his admission of guilt for causing bodily harm and committing aggravated assault, the applicant, together with three individuals, attacked two other

individuals in the Montréal metro: the first was beaten to the ground, and the second was stabbed on the right side of the body, causing a lacerated liver and kidney. The information provided by the police indicates that the applicant committed the stabbing. The incident resulted in criminal charges against the applicant.

[2] Given the circumstances of this case, as described, how could the Court have determined otherwise on the basis of the following considerations?

[3] The applicant's removal 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 (*Selliah v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, at paragraph 22.)

[4] According to legislation, one factor, above all else, weighs heavily in favour of the Ministers in the present matter: the Canadian public's right to be protected from criminal individuals who are not entitled to remain in Canada (*Thanabalasingham v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 486, at paragraphs 18 to 19).

[5] The purpose of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), is to protect the health and safety of Canadians and to maintain the security of Canadian society (paragraphs 3(1)(*h*) and 3(2)(*g*) of the IRPA).

[6] The integrity of the immigration system depends on immigration law being interpreted and administered in support of the legislation; this legislation requires that the prompt removal of those ordered deported must be the rule, and the grant of a stay pending the disposition of legal proceedings, the exception (*Tesoro v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 148, at paragraph 47). As the Court stated with approval in *Thanabalasingham*:

> [19] . . .
>
> 101 . . . In the instant case, we have an immigrant who has had the opportunity to make a better life for himself in Canada and contribute to Canadian society. He chose not to do so, and instead engaged in serious and violent criminal activity, violating and putting at risk the peace and safety of the Canadian public. To grant a stay in these circumstances, in the Respondent's respectful submission, would be contrary to the spirit, principles, and objectives of the IRPA, not to mention the principles underlying this Court's discretion to grant the requested relief.

II. Introduction

[7] The applicant seeks a judicial stay of his removal to Peru, scheduled for October 10, 2011.

[8] The Court agrees with the respondent's position. Since the applicant is inadmissible on grounds of organized criminality and since he has participated in, among other things, acts of violence against the person, the applicant's hands are not clean. Moreover, he does not meet the criteria for granting a stay.

III. Facts

[9] The applicant is 21 years old and a citizen of Peru; he was born in April 1990.

[10] He arrived in Canada in March 2001. He claimed refugee status with his family.

[11] In April 2002, the panel rejected their application on the grounds of non-credibility.

[12] In October 2003, this Court denied them leave to apply for judicial review of that decision.

[13] In April 2005, their pre-removal risk assessment (PRRA) application was rejected.

[14] The applicant left Canada in June 2005, but he later returned.

[15] Between November 2006 and March 2007, he obtained permanent residence.

[16] The applicant became involved in crime. The officer who testified at his inadmissibility hearing raised the following points:

a. In May 2005, the applicant was questioned by police on the premises of a street gang's hangout.
b. In April 2006, a police investigation uncovered that he had uttered death threats against a member of a gang using the Internet.
c. In May 2007, he was with two individuals, one of whom attacked a passerby he believed to be a rival gang member, with a knife and a machete. The following day, the applicant admitted to police officers that he was a member of the 18th Street Gang.
d. In March 2008, he was stopped in the metro since a warrant had been issued for his arrest. Photographs of his tattoos show his rise in the gang.

e. In March 2008, the applicant and two gang leaders were in a hotel room close to a convenience store that had been robbed. The police came to the door of the hotel room, but the individuals fled through the window.

f. In April 2008, the applicant was arrested after being caught in the act of marking the gang's territory with graffiti.

g. In April 2008, the applicant turned up in Sherbrooke in a two-vehicle convoy. In a search, authorities discovered black gloves, a .20 calibre sawed-off firearm, a vice grip, a neck warmer, a hammer, a screwdriver and a knife. Even though he was not charged, the applicant revealed that he had in-depth knowledge of the gang in his comments on the incident, which, again, demonstrated his rise in the gang.

h. In May 2008, the applicant was in the Montréal metro station at Berri Street with three individuals. There, they attacked two individuals: the first was beaten to the ground, and the second was stabbed on the right side of the body, causing a lacerated liver and kidney. The information provided by the police indicates that the applicant committed the stabbing. The incident resulted in criminal charges against the applicant.

i. In November 2008, the police found the applicant and two other individuals in an apartment; one of the individuals was bleeding heavily. The police suspected a settling of accounts between the two other individuals.

j. In November 2008, one of the leaders was killed following a split in the gang; the murder has still not been solved. The applicant shared an apartment with the victim.

k. In July 2009, the applicant committed a robbery at the SAQ. He was convicted of robbery and two counts of breach of conditions.

[17] On June 7, 2010, after having heard this evidence and the applicant's testimony and explanations, the panel found that, as a member of an organized crime organization, the applicant was described at paragraph 37(1)(*a*) of the IRPA and ordered him to be removed.

[18] On September 23, 2010, this Court dismissed the applicant's application for leave to appeal the panel's decision.

[19] On March 16, 2010, the applicant pleaded guilty to one count of causing bodily harm (paragraph 267(*b*) of the *Criminal Code*) and one count of aggravated assault (section 268 of the *Criminal Code*). The applicant was sentenced to 18 months' imprisonment.

[20] On March 25, 2011, the applicant pleaded guilty to failing to comply with conditions of an undertaking to appear (subsection 145(5.1) of the *Criminal Code*). He was sentenced to an additional day in prison.

[21] On September 2, 2011, the removals officer assigned to the case met with the applicant while he was in detention. The applicant confirmed to him that he had not submitted a PRRA application, but that he had submitted an application for human and compassionate consideration (H&C).

[22] On September 30, 2011, counsel for the applicant called the removals officer and orally requested an administrative stay. The only reason supporting that request, which the officer denied, was the H&C application submitted on March 15, 2011.

[23] On October 3, 2011, counsel for the applicant sent the removals officer a letter confirming their conversation.

[24] The same day, the removals officer sent counsel for the applicant a letter confirming his refusal.

[25] On October 4, 2011, the applicant filed the present application for a stay before this Court, the rejection of the administrative stay being the underlying decision.

IV. Issues

[26] (1) Does the applicant come to this Court with clean hands?

(2) Does the applicant's stay application have merit, in light of the test established by the Federal Court of Appeal in *Toth v Canada (Minister of Employment and Immigration)*, (1988), 86 NR 302, 11 ACWS (3d) 440 (FCA)?

V. Analysis

Clean hands

[27] It is well established that a stay application is a discretionary remedy and that those who apply to the Court for such a remedy are required to have clean hands (*Chavez v Canada*

(Minister of Public Safety and Emergency Preparedness), 2006 FC 830, at paragraph 13; also, *Adams v Canada (Minister of Citizenship and Immigration),* 2008 FC 256, at paragraph 2).

[28] The applicant was given many chances to conduct himself in a law-abiding manner. Moreover, he had several opportunities to assert his rights.

[29] Despite this, the applicant engaged in unlawful conduct and acted in defiance of the law, the system and society, by becoming involved in organized crime, and violent criminality, for several years.

[30] This conduct completely delegitimizes his application to the Court for a remedy in equity. It provides sufficient grounds to dismiss the stay application (*Jean v Canada (Minister of Citizenship and Immigration)*, 2009 FC 593, at paragraph 24; *Nozarian c Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2009 CF 612, at paragraph 29 *et seq.*; *Brunton v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 33, at paragraphs 4 to 5).

[31] Allowing the applicant to benefit from a stay at the outcome of the present proceeding would also impair the integrity of the system, while the applicant has never demonstrated any risk should be return to Peru.

[32] This present stay application is dismissed.

The *Toth* test

[33] The applicant does not meet the three criteria that would make it possible to grant a judicial stay:

i. serious issue

ii. irreparable harm; and

iii. a balance of convenience favouring him.

[34] As the *Toth* test is conjunctive, the applicant's failure to establish that the above-mentioned three criteria have been met must result in the dismissal of his stay application (*Jaziri c Canada (Ministre de la Citoyenneté et de l'Immigration)*, 2007 CF 1086, at paragraph 3; *Cruz v Canada (Minister of Citizenship and Immigration)*, 2006 FC 166, at paragraph 3).

(a) Serious issue

[35] The applicant had to establish that there was a serious issue to be tried in regard to the underlying procedure, that is, the removals officer's refusal to grant him an administrative stay.

[36] Moreover, when the underlying decision is the refusal to grant an administrative stay, the Court should not merely apply the serious issue test, but go further, by examining the merit of the application (*Padda v Canada (Minister of Citizenship and Immigration)*, 2003 FC 1081, at paragraph 6).

[37] The applicant therefore has the heavy burden of demonstrating to the Court that the refusal to postpone his removal was unreasonable.

[38] Not only has the applicant not met this burden, but, in addition, his arguments have not demonstrated that the removals officer erred in any way.

[39] The applicant submits a single argument on the subject of the serious issue: that the removals officer's decision was unreasonable because the officer did not provide sufficient reasons for his decision and did not analyse the file.

[40] Case law has taught us that a decision in the form of a letter stating that the application has been reviewed, but that it does not deserve to be allowed, constitutes sufficient reasons for a removals officer (*Charles v Canada (Minister of Citizenship and Immigration)*, 2005 FC 799, at paragraph 8; *Mann v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1763, at paragraph 4; *Boniowski v Canada (Minister of Citizenship and Immigration)*, 2004 FC 1161, at paragraph 11; *Wright v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 113, at paragraphs 17 to 18).

[41] In fact, as pointed out by this Court in *Charles*, even the complete absence of written reasons from a removals officer is not a serious issue (*Charles*, above, at paragraph 8).

[42] Because of the removals officer's role, as provided by the law, case law has established the following:

> [11] . . . The nature of this decision is one where an officer has a very limited discretion, and no actual, formal decision is mandated in the legislation or regulations to defer removal. Instead, the jurisprudence instructs that an officer must acknowledge that she has some discretion to defer removal, if it would not

> be “reasonably practicable” to enforce a removal order at a particular point in time. . . .

(*Boniowski*, above).

[43] The request for an administrative stay was made by counsel for the applicant by telephone. The contents of this oral request were confirmed in writing in a letter from counsel, which makes it clear that the only ground raised in support of the request for an administrative stay was the existence of an H&C application since March 2011, without any further information being provided.

[44] Nothing in the record indicates that the applicant submitted evidence or specific questions to the removals officer demonstrating that there was an obstacle to his removal on the scheduled date.

[45] Decision makers are not obliged to conduct elaborate assessments of matters where the applicants themselves failed to (*Barrak v Canada (Citizenship and Immigration)*, 2008 FC 962, 333 FTR 109, at paragraph 37).

[46] Moreover, it is well established that a pending H&C application is not a reason for deferring a removal (*Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FC 682; *Mann*, above, at paragraph 3).

[47] An exception to this principle is that a removals officer can agree to defer a removal when a pending H&C application was brought on a timely basis but has yet to be resolved due to

backlogs in the system (*Simoes v Canada (Minister of Citizenship and Immigration)* (2000), 187 FTR 219, at paragraph 12).

[48] To be included in that description, an H&C application must have been pending for a sufficiently long period of time. In *Peters v Canada (Minister of Citizenship and Immigration),* 2006 FC 518, at paragraph 6, and in *Jackson v Canada (Citizenship and Immigration),* 2007 FC 201, at paragraph 6b in combination with the hearing date, the Court refused to characterize as such an application that had been pending for only 10 months. In *Barrera v Canada (Minister of Citizenship and Immigration),* 2003 FCT 779, at paragraphs 2 and 9 in combination with the hearing date, the Court determined that the removals officer had not erred in refusing to defer the removal even though an H&C application had been pending for about 15 months and would be so for an additional 12 to 14 months.

[49] The Court will return to this point in its response to the applicant on the subject of irreparable harm, but, for current purposes, it should be noted that nowadays, the normal processing time for an H&C application is up to 20 months (Affidavit of Carole Audette, Exhibit J). The applicant's H&C application has been in the system for only 7 months.

[50] When a removal order is effective, immediate removal is the rule and deferral is an exception (*Wang*, above; *Prasad v Canada (Minister of Citizenship and Immigration),* 2003 FCT 614, at paragraph 29).

[51] The officer's role is to assess whether there are concrete impediments to travel as such (*Ewang v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FC 1360, at paragraph 22), such as illness or travel arrangements (*Pavalaki v Canada (Minister of Citizenship and Immigration)*, [1998] FCJ No 338 (QL); *Simoes*, above; *Wang*, above; *Boniowski*, above). The officer therefore has no jurisdiction to assess long-term H&C factors; these are considered by the H&C officer.

[52] In the absence of any specific and concrete evidence submitted to the officer and demonstrating the applicant's inability to travel on the scheduled date, the applicant cannot argue that the officer erred in keeping the October 10, 2011, departure date.

[53] There is therefore no serious issue to be determined in the present stay application.

[54] This suffices to conclude that the application should be dismissed.

(b) Irreparable harm

[55] "[For the] purposes of a stay of removal, 'irreparable harm' is a very strict test. It implies the serious likelihood of jeopardy to the applicant's life or safety. Irreparable harm is very grave. It must be more than unfortunate hardship, including breakup or dislocation of family . . ." (*Malyy v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 388, at paragraph 17; also, S*ofela v Canada (Minister of Citizenship and Immigration)*, 2006 FC 245; G*olubyev v Canada (Minister of Citizenship and Immigration)*, 2007 FC 394; R*adji v Canada (Minister of Citizenship and Immigration)*, 2007 FC 100, 308 FTR 175).

[56] Moreover, to find irreparable harm, the Court must have evidence of irreparable harm before it (*Atwal v Canada (Minister of Citizenship and Immigration),* 2004 FCA 427, at paragraph 14) to satisfy itself that the irreparable harm will occur if the stay is not granted (*Akyol v Canada (Minister of Citizenship and Immigration)*, 2003 FC 931, at paragraph 7).

[57] The applicant makes vague claims about his establishment in Canada, the interests of his child and the fact that if his H&C application is granted when he is no longer in the country, he will not have the means to return to Canada.

[58] The applicant did not submit any concrete evidence to demonstrate irreparable harm.

[59] The applicant waited until March 15, 2011, to submit an H&C application. Nowadays, an H&C application can take up to 20 months (Affidavit of Carole Audette). Consequently, the applicant himself has reduced his chances of receiving an H&C decision before he leaves the country.

[60] The grounds raised by the applicant are not sufficient to constitute irreparable harm, emotional, family-related and economic upheavals being inherent to removal. Family separation, for example, if that is what is decided, is not irreparable harm within the meaning of the law, but a phenomenon inherent to removal. To find otherwise would render impracticable the removal of individuals who do not have the right to remain in Canada.

[61] In *Legault v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] 4 FC 358, the Federal Court of Appeal pointed out that the best interests of the children, even when they are Canadian, should not be an impediment to the removal of a parent residing in Canada illegally:

> [12] . . . It is not because the interests of the children favour the fact that a parent residing illegally in Canada should remain in Canada (which, as justly stated by Justice Nadon, will generally be the case), that the Minister must exercise his discretion in favour of said parent. Parliament has not decided, as of yet, that the presence of children in Canada constitutes in itself an impediment to any "refoulement" of a parent illegally residing in Canada . . . .

[62] For all of these reasons, the applicant has not proved that he would suffer irreparable harm should he be removed to Peru on October 10, 2011, as scheduled.

[63] This ground alone also justifies the dismissal of the application.

(c) Balance of inconvenience

[64] In the present matter, the balance of inconvenience test assumes particular importance.

[65] Subsection 48(2) of the IRPA provides that a removal order must be enforced as soon as is reasonably practicable.

[66] The applicant's removal 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 (*Selliah*, above, at paragraph 22).

[67] According to legislation, one factor, above all else, weighs heavily in favour of the Ministers in the present matter: the Canadian public's right to be protected from criminal individuals who are not entitled to remain in Canada (*Thanabalasingham*, above, at paragraphs 18 and 19).

[68] The purpose of the IRPA is to protect Canadians and to maintain the security of Canadian society (paragraphs 3(1)(*h*) and 3(2)(*g*) of the IRPA).

[69] In *Thanabalasingham*, above, this Court wrote as follows:

> [18] The Applicant's criminal history is also a strong factor favouring the Respondent in this case. The comments by Justice John Evans in *Tesoro v. Canada(Minister of Citizenship and Immigration)*, [2005] F.C.J. No. 698, 2005 FCA 148 (F.C.A.) at paragraph 47 have equal application here:
>
> > 47 However, if I had determined that Mr. Tesoro's removal would cause irreparable harm, on the ground that the effects of family separation were more than mere inconveniences, I would have located the harm at the less serious end of the range, and concluded that, on the balance of convenience, it was outweighed by the public interest in the prompt removal from Canada of those found to be inadmissible for serious criminality. If the administration of immigration law is to be credible, the prompt removal of those ordered deported must be the rule, and the grant of a stay pending the disposition of legal proceedings, the exception.

[70] For these reasons, the balance of inconvenience clearly favours the public interest in ensuring that the safety of Canadians is guaranteed and the immigration process provided by the Act follows its course.

[71] This reason alone justifies a dismissal of the stay application.

V. Conclusion

[72] In light of all the foregoing, the applicant has not met the requirements established by case law for obtaining a judicial stay. This stay application of removal is dismissed.

JUDGMENT

THE COURT ORDERS the dismissal of the application for a stay of the removal order.

"Michel M.J. Shore"
Judge

Certified true translation
Johanna Kratz, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-6759-11
STYLE OF CAUSE:	TEOFILO GYAMPIE MASSONI VASQUEZ v MINISTER OF CITIZENSHIP AND IMMIGRATION AND MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

APPLICATION CONSIDERED BY CONFERENCE CALL ON OCTOBER 6, 2011, BETWEEN OTTAWA, ONTARIO AND MONTRÉAL, QUEBEC.

REASONS FOR JUDGMENT AND JUDGMENT BY:	SHORE J.
DATED:	October 7, 2011

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