Federal Court  Cour fédérale

Date: 20200417

Dockets: IMM-1267-20
IMM-1696-20

Citation: 2020 FC 527

Ottawa, Ontario, April 17, 2020

PRESENT: The Honourable Justice Annis

BETWEEN:

MARK ANTHONY PLUMMER

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

AND BETWEEN

XIAOQI YU

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

ORDER AND REASONS

I. Introduction

[1] Due to the unavailability of flights as a result of the Covid-19 crisis, the CBSA cancelled the scheduled removal of the parties in the two matters at hand. This has given rise to opposing views as to whether the Court should dismiss the motions for mootness as submitted by the Respondent, or simply adjourn pending new removal dates provided by the CBSA as requested by the Applicants.

[2] In matter IMM-1267-20, Mr. Plummer's motion sought to stay the Applicant's removal in order to complete the underlying judicial review of a negative Pre-Removal Risk Assessment [the PRRA stay motion]. It is also of some relevance that Mr. Plummer withdrew his application and stay motion in matter IMM-1884-20. These motions were based upon the underlying judicial reviews of a negative humanitarian and compassionate [H&C] request and a refusal to defer his removal by an Enforcement Officer.

[3] Mr. Plummer argues that the Court should adjourn the remaining PRRA stay motion based on "judicial economy". This includes the avoidance of costs thrown away, and concerns about collateral consequences concerning a future bar to access the Court for remedy. I do not find the latter issue a likely outcome for consideration in this matter.

[4] In matter IMM-1696-20, the stay of removal motion advanced by Mr. Yu is to allow for the completion of an underlying judicial review of an unsuccessful H&C decision. The Applicant indicates that if provided a new removal date in the future, which would require the introduction of new evidence that might arise in the interval supporting his argument of irreparable harm, he would then submit a new notice of motion accompanied by the new evidence. I assume this would mean that the Applicant would abandon the first notice of motion, even if I adjourn it.

[5] In addition, the Applicants in both matters rely upon the Court's previous decision in *Okojie v. Canada (MCI)*, 2003 FC 905 [*Okojie*]. In that matter, the Court concluded that the applicant's removal on a proximate later date was part of a "continuing process" of the original stay motion. The applicant's removal was postponed for a short period due to illness preventing him from flying. The Respondent argues that the decision is distinguishable on its facts.

[6] The Respondent further argues that there are no judicial economies created by an adjournment for a number of reasons. First, the *Federal Court Rules* do not permit parties to update their submissions after motion records are served and filed without leave of the Court.

[7] Second, numerous changes could occur in the interval of resolving the Covid-19 pandemic. These include the merits of the judicial reviews being determined, personal circumstances of the Applicant's changing, new relevant case law, a new practice direction affecting the outcomes, policies of the CBSA changing, or a surge in adjourned and delayed stay motions requiring greater judicial resources to deal with updated submissions and further

mootness arguments. In effect, the Respondent argues that litigation by installment is contrary to the spirit of the *Rules* and bears adversely on judicial resources.

II. Motions to stay removal

[8] An order staying a removal will only be granted if the applicant meets all of the applicable tripartite factors described in *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123 (FCA). The applicant must demonstrate that there is a serious issue in the underlying application, that irreparable harm will result from the deportation, and that the balance of convenience lies in favour of deferring deportation.

[9] Normally, a deferral is limited to short-term exigent circumstances. A Court will only grant a longer-term deferral if the evidence demonstrates that the underlying judicial review should be completed. These circumstances are limited to deportations that will expose the applicant to a risk of death, extreme sanctions or inhumane treatment, or where there are special considerations, mostly relating to the personal safety of the applicant, or other persons affected (*Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81at para 51).

[10] The demonstration of a serious issue normally requires only that it not be frivolous or vexatious; quite a low standard being less than that of a probability or likelihood. However, when addressing a decision to refuse to defer removal by an enforcement officer, the applicant must prove an elevated standard of a good case, often referred to as a *prima facie* case. Otherwise, the granting of the stay in an interlocutory application effectively grants the same

relief sought in the applicant's underlying judicial review application seeking to set aside the enforcement officer's decision refusing to defer the applicant's deportation.

[11] To find irreparable harm, the applicant must prove that there is "clear and convincing evidence" that the risk likely will occur. This requires the applicant to demonstrate by detailed and concrete evidence that real, definite, unavoidable harm - not hypothetical and speculative harm - will likely be suffered that cannot be repaired later, *(Janssen Inc. v Abbvie Corporation*, 2014 FCA 112, at para 24; *Gateway City Church v Canada National Revenue*), 2013 FCA 126 at paras 14 – 16; *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at paras 12 and 31).

[12] This is a higher threshold than the regular test for a serious issue. This means that proving a serious issue of risk only to a standard of not being frivolous or vexatious may be insufficient to prove irreparable harm, where the same evidence often serves the same purpose.

III. Mootness

[13] The relevant principles regarding the mootness are set out by the Supreme Court of Canada in *Borowski v Canada (Attorney General)*, [1989] 1 SCR 342 at paras 31 and 34-36 [*Borowski*], as follows with citations removed and my emphasis:

> [31] The first rationale for the policy and practice referred to above is that a court's competence to resolve legal disputes is rooted in the adversary system. The requirement of an adversarial context is a fundamental tenant of our legal system and helps guarantee that issues are well and fully argued by parties who have a stake in the outcome. It is apparent that this requirement may be satisfied if, despite the cessation of a live controversy, the necessary

> adversarial relationship will nevertheless prevail. For example, although the litigant brining the proceeding may no longer have a direct interest in the outcome, there may be collateral consequences of the outcome that will provide the necessary adversarial context…[34] The second broad rational on which the mootness doctrine is based is the concern for judicial economy… It is an unfortunate reality that there is a need to ration scarce judicial resources among competing claimants. The fact that in this Court the number of live controversies in respect of which leave is granted is a small percentage of those that are refused is sufficient to highlight this observation. The concerns for judicial economy as a factor in the decision not to hear moot cases will be answered if the special circumstances of the case make it worthwhile to apply scarce judicial resources to resolve it.
>
> [35] The concern for conserving judicial resources is partially answered in cases that have become moot if the court's decision will have some practical effect on the rights of the parties notwithstanding that it will not have the effect of determining the controversy which gave rise to the action…
>
> [36] Similarly an expenditure of judicial resources is considered warranted in cases which although moot are of a recurring nature but brief duration. In order to ensure that an important question which might independently evade review be heard by the court, the mootness doctrine is not applied strictly… It is preferable to wait and determine the point in a genuine adversarial context unless the circumstances suggest that the dispute will have always disappeared before it is ultimately resolved.

IV. Analysis

A. *Okojie*

[14] As mentioned, both Applicants rely on the Court's previous decision in *Okojie*, and in particular paragraphs 2 and 6, which are as follows with my emphasis:

> [2] The stay application, originally filed on June 11, 2003, with respect to the Applicant's earlier scheduled departure on June 11, was adjourned *sine die* that day, apparently when it was known that the Applicant was unable to travel because of illness. A second notice of removal was later given for removal on July 7, and the

> application for a stay was then returned on short notice and heard on July 3. For purposes of this application the Court treats the two notices of removal as a continuing process, effectively one decision to arrange removal of the Applicant as soon as possible reasonably practicable.
>
> …
>
> [6]… It was argued for the Respondent that the original underlying application for leave and for judicial review, concerning the refusal on July 9 to defer removal, was moot when this matter was heard since the application concerned the decision not to remove the Applicant on June 11. As I have noted, however, I consider the process for removal to have been a continuing one in the circumstances of this case, and the issue raised by the underlying application concerns the fairness of the process and, in particular, whether and if so what measure of attention was paid to humanitarian circumstances raised by counsel for the Applicant when requesting deferral. In my opinion those issues are sufficiently serious, for the responsibilities of the removal officer are (*sic*) here questioned, that the first requirement for a stay, that is that there be a serious issue before the Court, is met.

[15] I agree with the Respondent that the case is distinguishable, but not merely on the basis that it involved a short temporary disruption. To start with, the mootness issue was raised at the stay motion in *Okojie,* and not before the motion was heard, as in these requests for an adjournment. Significantly, the determinative issue was that of fairness, ("the underlying application concerns the fairness of the process").

[16] Indeed, the Court allowed the motion to stay removal, concluding that the enforcement officer had not properly assessed important evidence that could affect the outcome. When a mootness issue is raised in the face of a finding of unfairness, it can be expected that the Court will find the means to dismiss the mootness argument, if one is available. The take-away point

however, is that no issue of fairness or the interest of justice arises in this matter to support the Applicants' reliance on the decision.

[17] In addition, in *Okojie* not only was the delay in removal only a temporary disruption, but it would appear that the record remained unchanged from that first filed. It would be a serious waste of judicial economy if the Applicant had been required to refile a new application and motion to stay, where the only change would be the removal date. These parties acknowledge the possibility that the motion records will require changes due to the exceptional circumstances accompanying the Covid-19 pandemic.

V. Judicial Economy

[18] The Court in *Borowski* noted that mootness often does not stand in the way of proceeding with the adjudication of a matter when there is no cessation of a live controversy and the necessary adversarial relationship prevails. This principle would apply to these matters.

[19] Nonetheless, the overriding issue, if framed as pertaining to judicial economy, is to determine the most appropriate procedure for the canceled stay motions given the likelihood that new directions for removal will issue once some degree of normality returns to operations in Canada and the countries for removal. On this issue, and because of the continuing live controversy and adversarial relationship, I conclude that the motions should be adjourned rather than dismissed for various reasons.

[20] In the first place, the Court is already under a suspension order whereby these matters are adjourned *sine die* due to the Covid-19 pandemic. The suspension order does not mean that a valid mootness argument should be rejected requiring dismissal of the motions. Nonetheless, I do not find that to be the case in these matters.

[21] As one option, I am tempted simply to adjourn the motions *sine die* in accordance with the Court's suspension order, without conditions, when it is not known which ones will apply when the suspension is finally lifted. However, I am in agreement with the Respondent that when this occurs, there may be a blitz-like situation where the Court will be pressed to sort out what matters should proceed, and on what basis. Any forward determination of these issues by setting the conditions to the adjournment at this time, should assist in avoiding the need to turn to the Court for directions in the future.

[22] Second, with respect to the Respondent's arguments, I do not find them to be substantive in the sense of affecting outcomes, as opposed to the procedures relating to outcomes. For example, the argument that the *Federal Court Rules* do not permit parties to update their submissions after motion records are served and filed without leave of the Court will be addressed by my order.

[23] I similarly find speculative and of little consequence the submission that numerous changes could occur in the interval of resolving the Covid-19 pandemic, i.e. relating to the merits of the judicial reviews being determined, personal circumstances of the Applicants changing, new relevant case law or a new practice direction affecting the outcomes, and the policies of the

CBSA changing. I do not consider this to be litigation by installment. Rather, it is a question of determining the optimal means to proceed with new removal dates hopefully incurring a minimum of procedural disruption in the future.

[24] Two scenarios appear likely. First, that with the passing of the Covid-19 pandemic, no changes will be necessary to the records. This assumes that the risk of infection abates significantly in Canada and the target countries of removal, and that the consequences of the pandemic do not create new conditions of irreparable harm on removal. The alternative scenario is that the situation will not positively evolve for a sufficiently long duration or that the conditions may adversely change in the countries for removal.

[25] In the first case, such as that perhaps applying to Mr. Yu on return to China, there may be no, or very limited change in the evidence and submissions. Conversely, in the matter of Mr. Plummer, the benefits of adjournment may be less clear. This is especially the case when it is anticipated that a further request for deferral is likely to be made, accompanied by a new judicial review application, and motion to stay that will repeat past submissions relating to the Applicant's negative H&C decision.

[26] Nevertheless, I am mindful of the issue raised by the Applicants of limiting the costs thrown away, which should similarly apply to the Respondent. With respect to the serious issue factor, the Applicants are unlikely to add to the evidence or amend submissions , given that the records before the PRRA and H&C Officers will not change. Nevertheless, I agree with counsel

representing the Respondent and Mr. Yu that factors underlying irreparable harm may change, which may require additional evidence and submissions.

[27] However, the Court is familiar with parties revising their memoranda for the hearing from those presented on leave applications. This should not be unduly complicated by additional evidence in the record. The problems attaching to amended records appear to be twofold, which may require conditions attaching to an adjournment.

[28] First, it should be a requirement that new memoranda replace the old ones so that the parties and the Court are working from only one document. There may be exceptions when the changes are relatively minimal.

[29] Second, the party amending its record in any fashion should describe the changes to facilitate the opposing party's response. Unfortunately, counsel do not always follow these rules, which necessitates the Court having to request that its judicial law clerk reviews both documents to ensure no muddle occurs at the hearing on what is being submitted by the parties.

[30] Finally, any document referred to in the memoranda, or that will be brought to the Court's attention at the hearing, including excerpts from transcripts, must be identified by page and paragraph.

[31] Based on the Court's foregoing comments, it orders that the stay motions are adjourned *sine die*.

ORDER IN IMM-1267-20 AND IMM-1696-20

THIS COURT ORDERS that:

1. The urgent stay motions in IMM-1267-20 and IMM-6096-20 are adjourned *sine die* without costs;
2. Should replacement dates be provided for the Applicants' deportations in the future, the Applicants are granted leave to file a new replacement, amended or additional motion record, otherwise the motions are to proceed as having been suspended, but on the basis that all references to the removal dates in the filed applications and records are amended to those of the rescheduled removal date;
3. In any case of new filings with the Court, the Applicants are required to replace their previous memoranda with new ones, unless the changes are not significant. Applicants shall identify all significant changes and additions to their records;
4. Parties may not refer to any document at the hearing not identified in their memoranda by page (and preferably by paragraph) in the records without leave, which normally will be conditional on the party identifying the document no later than the day before the hearing.

[32] The Applicant in IMM-1884-20 is permitted to withdraw his application and motion for the stay of his removal that was based upon the negative H&C and deferral decisions, without prejudice to bringing a new motion should his removal be re-scheduled.

"Peter B. Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1267-20
STYLE OF CAUSE:	MARK ANTHONY PLUMMER v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
AND DOCKET:	IMM-1696-20
STYLE OF CAUSE:	XIAOQI YU v THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	APRIL 14, 2020
ORDER AND REASONS	JUSTICE ANNIS
DATED:	APRIL 17, 2020

APPEARANCES:

Tiffani A. Frederick	FOR THE APPLICANT IN IMM-1267-20
Richard Wazana	FOR THE APPLICANT IN IMM-1696-20
Chris Araujo	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Tiffani A. Frederick Frederick Law Company	FOR THE APPLICANT IN IMM-1267-20
Richard Wazana Wazana Law	FOR THE APPLICANT IN IMM-1696-20
Chris Araujo Attorney General of Canada	FOR THE RESPONDENT