Federal Court  Cour fédérale

Date: 20230605

Docket: IMM-6609-23

Citation: 2023 FC 784

Ottawa, Ontario, June 5, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

GURMUKH SINGH

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, Gurmukh Singh, brings a motion for a stay of his removal from Canada, scheduled to take place on June 6, 2023.

[2] The Applicant requests that this Court order a stay of his removal to India until the determination of an underlying application for leave and judicial review of the refusal of his

deferral request by an Inland Enforcement Officer (the "Officer") of the Canada Border Services Agency ("CBSA").

[3] For the reasons that follow, this motion is dismissed. The Applicant does not meet the tri-partite test required for a stay of his removal.

II. Facts and Underlying Decisions

[4] The Applicant is a 44-year-old citizen of India. His spouse and children reside in India.

[5] The Applicant arrived in Canada in 2014. He made a claim for refugee protection in November 2017. In March 2021, the Applicant also submitted an application for permanent residence ("PR"), under the temporary public policy for refugee claimants working in the healthcare sector during the COVID-19 pandemic. In September 2021, by request of Immigration, Refugees and Citizenship Canada, the Applicant withdrew his pending refugee claim in order to continue the processing of his PR application.

[6] The Applicant's PR application was refused in a letter dated May 3, 2022, on the basis that he did not meet the eligibility requirements under the temporary public policy. The Applicant also applied for a Pre-Removal Risk Assessment ("PRRA"), for which he received a negative decision on April 6, 2023.

[7] The Applicant's application for leave and judicial review of the refusal of his PR application was dismissed by this Court, while his application for leave and judicial review of the negative PRRA decision is still pending.

[8] CBSA issued a Direction to Report for the Applicant's removal from Canada on April 21, 2023. The Applicant requested a deferral of his removal on April 27, 2023. The Officer refused the deferral request in a decision dated May 25, 2023.

III. Analysis

[9] The tripartite test for the granting of a stay is well established: *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA) ("*Toth*"); *Manitoba (A.G.) v Metropolitan Stores Ltd*., 1987 CanLII 79 (SCC), [1987] 1 SCR 110 ("*Metropolitan Stores Ltd*"*); RJR-MacDonald Inc. v Canada (Attorney General)*, 1994 CanLII 117 (SCC), [1994] 1 SCR 311 ("*RJR-MacDonald*"); *R v Canadian Broadcasting Corp*, 2018 SCC 5 (CanLII), [2018] 1 SCR 196.

[10] The *Toth* test is conjunctive, in that granting a stay of removal requires the applicant to establish: (i) a serious issue raised by the underlying application for judicial review; (ii) irreparable harm that would result from removal; and (iii) the balance of convenience favouring granting the stay.

A. *Serious Issue*

[11] In *RJR-MacDonald*, the Supreme Court of Canada established that the first stage of the test should be determined on an "extremely limited review of the case on the merits" (*RJR-MacDonald* at 314). This Court must also bear in mind that the discretion to defer the removal of a person subject to an enforceable removal order is limited. The standard of review of an enforcement officer's decision is that of reasonableness (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 (CanLII), [2010] 2 FCR 311 at para 67) ("*Baron*"). A decision refusing to defer removal requires the Applicant to meet an elevated standard with respect to the first *Toth* requirement of a serious issue for trial, pursuant to *Baron.*

[12] The Applicant submits that the underlying application raises serious issues about the reasonableness of the CBSA's refusal of the deferral request. The Applicant submits that the Officer fundamentally misapprehended the facts and evidence, signalled by the Officer's statement that the Applicant had access to a humanitarian and compassionate ("H&C") application when the Applicant claims that he did not.

[13] The Respondent submits that there is no serious issue because the Officer reasonably assessed the Applicant's deferral request, in light of the facts and evidence. The Respondent contends that the Officer's mention of the H&C application is clearly a reference to the PR application made under the temporary public policy. The Respondent submits that aside from this error in nomenclature, the Applicant does not raise a serious issue regarding the substance of the Officer's deferral decision.

[14] Having reviewed the parties' motion materials and the underlying decision, I agree that there is a serious issue to be tried. The underlying application for judicial review raises issues surrounding the Officer's proper assessment of the Applicant's circumstances, sufficient to meet the first prong of the *Toth* test.

B. *Irreparable Harm*

[15] At the second stage of the test, applicants are required to demonstrate that irreparable harm will result if relief is not granted. Irreparable harm does not refer to the magnitude of the harm; rather, it is a harm that cannot be cured or quantified in monetary terms (*RJR-MacDonald* at 341). This Court must be satisfied on a balance of probabilities that the harm is not speculative, but does not have to be satisfied that the harm will occur (*Xu v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 746, 79 FTR 107 (FCTD); *Horii v Canada C.A.)*, [1991] FCJ No 984, [1992] 1 FC 142 (FCA)).

[16] The Applicant submits that he will suffer irreparable harm if returned to India. The Applicant submits that he will be denied the opportunity to argue the underlying applications for judicial review. He submits that the pain of separation from his family, friends, and employment is unquantifiable and constitutes irreparable harm. The Applicant further submits that he faces risk and threat to his life as a Khalistan activist in India.

[17] The Respondent submits that the Applicant has not made out this prong of the test for a stay of removal. The Respondent notes that in order to establish irreparable harm, the Applicant must provide evidence of something more than the inherent consequences of deportation, such as

family separation (citing *Melo v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No 403 (QL) at para 21). The Respondent submits that the Applicant's allegations of risk regarding his status as a Khalistan activist have already been assessed by a PRRA officer and found not to be well-founded. The Respondent contends that these same allegations cannot then serve as a basis for establishing irreparable harm in a stay motion, and that the Applicant has not raised any allegation of ongoing risk that he would face him upon return to India.

[18] I agree with the Respondent and do not find that irreparable harm is made out in this case. The Applicant provided insufficient evidence to establish that the normal consequences of his removal—such as separation from his family and his employment—rise to the level of irreparable harm in his case. The Applicant's allegation that he is at risk of persecution in India due his Khalistan activism was the same allegation at the center of his PRRA application, which the PRRA officer found not to be well-founded. The same allegations of risk that have been assessed by a competent trier of fact cannot provide the basis for establishing irreparable harm in a stay motion (*Jean v Canada (Citizenship and Immigration)*, 2009 FC 593 at para 56). I further agree with the Respondent that the Applicant has not demonstrated that he continues to face the same risk now that he allegedly faced when he initially left India in 2014.

C. *Balance of Convenience*

[19] The third stage of the test requires an assessment of the balance of convenience—a determination to identify which party will suffer the greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits (*RJR-MacDonald* at 342; *Metropolitan Stores Ltd* at 129). It has sometimes been said, "Where the Court is satisfied that a

serious issue and irreparable harm have been established, the balance of convenience will flow with the Applicant" (*Mauricette v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 420 (CanLII) at para 48). However, the Court must also consider the public interest to uphold the proper administration of the immigration system.

[20] The Applicant submits that the balance of convenience favours granting the stay of removal. He submits that the risk of harm he faces upon removal outweighs the inconvenience to the Respondent in being unable to enforce removal.

[21] The insufficient evidence of irreparable harm is determinative of this motion. Nonetheless, the balance of convenience weighs in favour of the Respondent. Subsection 48(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, states that removal orders must be enforced as soon as possible. Lacking sufficient evidence of irreparable harm, the balance of convenience favours the Minister in enforcing the removal order expeditiously.

[22] Ultimately, the Applicant does not meet the tri-partite test required for a stay of removal. This motion is therefore dismissed.

ORDER in IMM-6609-23

THIS COURT ORDERS that the Applicant's motion for a stay of removal is dismissed.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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