Federal Court  Cour fédérale

Date: 20230804

Docket: IMM-9542-23

Citation: 2023 FC 1080

Ottawa, Ontario, August 4, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

HASAN ATHULA THILANKA KURUNGURE NANAYAKKARAGE

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, Mr. Nanayakkarage, brings a motion for a stay of his removal from Canada scheduled to take place on August 9, 2023.

[2] The Applicant requests that this Court order a stay of his removal to Sri Lanka 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. I find that the Applicant does not meet the tripartite test required for a stay of his removal.

II. **Facts and Underlying Decisions**

[4] The Applicant is a citizen of Sri Lanka who came to Canada aboard the MV AS Elenia in November 2020. His wife remains in Sri Lanka and he identifies as a bisexual man.

[5] The Applicant claims that he has been a target of political persecution who has been framed for the death of a cyclist. He says he will face tremendous hardship if he is forced to return to Sri Lanka and undoubtedly faces impending arrest without state protection.

[6] On December 10, 2021, the Applicant submitted a Pre Removal Risk Assessment ("PRRA") application, which the Immigration, Refugees and Citizenship Canada ("IRCC") denied on January 12, 2022 (the "First PRRA").

[7] This Court previously granted a stay of removal on February 3, 2022. The IRCC subsequently redetermined the PRRA and on January 17, 2023, rejected the PRAA again.

[8] The Applicant submitted a request for reconsideration of his PRAA on April 24, 2023 with new information that had arisen regarding a warrant for his arrest in Sri Lanka. The request for reconsideration included letters from family members attesting to the fact that police had contacted and questioned them on the Applicant's whereabouts.

[9] On June 9, 2023, the CBSA issued a removal order against the Applicant. On July 17, 2023, the Applicant filed a deferral of removal request, which the Officer denied on August 3, 2023.

[10] On August 1, 2023, the IRCC determined that it would not exercise its jurisdiction to reconsider the Applicant's PRRA application.

[11] On July 28, 2023, the Applicant filed an application for leave and judicial review in this Court against the Officer's refusal to defer the request.

III. **Analysis**

[12] 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.

[13] 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*

[14] 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*").

[15] A decision refusing deferral of an applicant's removal requires an applicant to meet an elevated standard with respect to the first *Toth* requirement of a serious issue for trial, pursuant to *Baron.*

[16] On this first prong of the tripartite test, the Applicant submits that there are three serious issues raised. First, the Applicant argues there is an issue of procedural fairness raised by the Officer's reasons. Second, he asserts that his impending arrest in Sri Lanka raises significant personal safety concerns. Third, he claims the change of power in Sir Lanka does not affect his risk of political persecution if he is forced to return.

[17] The Respondent explains that there is no serious issue, as the Applicant's circumstances do not support future risk of harm or persecution. The Respondent argues the Applicant has not met his evidentiary burden and the Applicant's risk has been thoroughly considered through the First PRRA and the request for reconsideration.

[18] I agree with the Applicant that there is a serious issue to be tried. The underlying application for judicial review raises issues regarding the Officer's proper assessment of the potential risks that the Applicant faces, as well as procedural fairness considerations. This is sufficient to meet the elevated threshold set out in *Baron*.

B. *Irreparable Harm*

[19] 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 (CA)*, [1991] FCJ No 984, [1992] 1 FC 142 (FCA)).

[20] The Applicant alleges his personal risk in Sri Lanka will cause him irreparable harm because he faces political persecution from the Sri Lanka Podujana Perumuna ("SLPP") party for supporting the United National Party ("UNP") and the Samagi Jana Balawegaya. He argues that if he returns to Sri Lanka, the police will not intervene to protect him if the SLPP members

pursue him. He claims the Officer failed to consider the "wealth of evidence" that documents the ongoing political instability, economic crisis, and the increase of violence.

[21] The Respondent points out that to establish irreparable harm, there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable harm will result unless a stay is granted: *Adams v Canada (Citizenship and Immigration)*, 2008 FC 256 at para 25 and *Al Salous v Canada (Citizenship and Immigration)*, 2018 FC 990 at para 7. The Respondent also highlights that there is no evidence of an actual warrant in this case.

[22] The Applicant fails to establish any irreparable harm and, in my view, this is the determinative issue in this motion.

[23] I agree with the Respondent that the political and social landscape have significantly changed since the Applicant left in 2020. The Applicant's narrative in the request for deferral outlines how in 2015, Ranil Wickremesinghe contested the seat in Homagama and the Applicant worked for Mr. Wickremesinghe's team distributing flyers and organizing meetings. While the Applicant allegedly faced political persecution when Mahinda Rajapaksa's party was in power – that is no longer the case. As the First PRRA officer commented, Mahinda Rajapaksa resigned as Prime Minister and Basil Rajapaksa has also resigned from Parliament. President Wickremesinghe, the very candidate that the Applicant supported back in 2015, is the current President of Sri Lanka.

[24] Much of the evidence provided pertains to the Applicant's fear of political persecution before the change in power in 2022. I acknowledge that the police station documents are from after the transfer of power, as are several of the letters from family members indicating the police are still searching for him. However, the Applicant does not address this change in power and relies on the letters from family alleging the police are still after him.

[25] It was open to the Officer to find the letters and police documentation insufficient in light of the country condition information and the First PRRA's analysis. Nor is there any new evidence provided in the within motion that demonstrates that the Applicant will face continued political persecution from the very party he served whilst living in Sri Lanka. The record and the Applicant's submissions are silent on why the UNP would persecute him.

[26] In sum, the Officer properly reviewed the evidence and came to a reasonable conclusion open to them on the record. The Applicant's arguments on the state as the agent of persecution and the lack of a viable internal flight alternative fail in light of the significant political changes in the country since 2022.

C. *Balance of Convenience*

[27] 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, "[w]here 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 at para 48). However, the Court must also consider the public interest to uphold the proper administration of the immigration system.

[28] The Applicant submits that the balance of convenience favours him because he will suffer physical and psychological harm. In the Applicant's view, the Minister's interest in effecting expeditious removal can be remedied by an expeditious resumption of removal proceedings, should the Application for Leave and Judicial review be dismissed.

[29] The Respondent submits that to demonstrate that the balance of convenience favours the Applicant, he should establish that there is a public interest not to remove him, relying on *Vieira v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 626 at para 42 and *Fucito v Canada (Citizenship and Immigration)*, 2022 FC 379 at para 29.

[30] The balance of convenience does not favour the Applicant, especially in light of the fact that I have found he has not established irreparable harm under the *Toth* test. Where the "public interest associated with legality is greater than the harm (irreparable or otherwise) or inconvenience to be suffered by the individual litigant, the individual litigant cannot be allowed to override legality" (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112 at para 25). Without establishing irreparable harm, the Applicant is unable to persuade me that the balance of convenience favours him.

[31] Ultimately, the Applicant does not meet the tripartite test required for a stay of his removal. This motion is therefore dismissed.

ORDER in IMM-9542-23

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

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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