

Federal Court



Cour fédérale

**Date: 20230608**

**Docket: IMM-12176-22**

**Citation: 2023 FC 815**

**Ottawa, Ontario, June 8, 2023**

**PRESENT: The Honourable Mr. Justice Ahmed**

**BETWEEN:**

**DINH DUNG NGUYEN  
THI QUYNH MAI TRAN**

**Applicants**

**and**

**THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS**

**Respondent**

**ORDER AND REASONS**

**I. Overview**

[1] The Applicants bring a motion for a stay of their removal from Canada, scheduled to take place on June 11, 2023.

[2] The Applicants request that this Court order a stay of their removal to Vietnam until the determination of an underlying application for leave and judicial review of the negative decision by the Refugee Protection Division (“RPD”) dated November 16, 2022.

[3] For the reasons that follow, this motion is dismissed. I find that the Applicants do not meet the tri-partite test required for a stay of removal.

## II. Facts and Underlying Decision

[4] Dinh Dung Nguyen (the “Principal Applicant”) is a 24-year-old citizen of Vietnam. He was engaged to and later became common law partners with Thi Quynh Mai Tran (the “Associate Applicant”). The two have a child together.

[5] On November 24, 2017, the Associate Applicant was issued a study permit valid until July 31, 2020. On December 15, 2017, the Associate Applicant entered Canada on a study permit. On March 17, 2018, the Principal Applicant was also issued a study permit, valid until March 30, 2019. The Principal Applicant entered Canada on a study permit on March 27, 2018.

[6] The Associate Applicant applied to extend her study permit on or around April 24, 2020. Immigration, Refugees and Citizenship Canada (“IRCC”) refused this extension application on July 10, 2020. The Associate Applicant submitted another extension application on July 20, 2020, which was approved on July 23, 2020, extending the validity of her study permit until July 31, 2023.

[7] The Applicants made a claim for refugee protection on November 5, 2021. The Applicants claimed that they face a serious possibility of persecution in Vietnam at the hands of the Vietnamese government. The core allegation in the claim was that in October 2017, the Principal Applicant contacted activists in Vietnam through Facebook to organize protests against the Vietnamese Communist Party. The Applicants claimed that government authorities learned of the plan, at least five of the activists were jailed; the Principal Applicant deleted his Facebook account, and lived in hiding in Vietnam from November 2017 to March 2018.

[8] On March 10, 2022, the Applicants were issued work permits valid until March 10, 2023.

[9] In a decision dated November 16, 2022, the RPD found that the Applicants' refugee claim had no credible basis pursuant to subsection 107(2) of *Immigration and Refugee Protection Act, SC 2001, c 27* ("IRPA"). The Applicants filed an application for leave and judicial review of the negative RPD decision on December 1, 2022.

[10] The Principal Applicant's work permit was extended on May 24, 2023, valid until May 24, 2024. The decision on the Associate Applicant's application to extend her work permit is still pending.

[11] The Applicants were served with a Direction to Report for removal on May 16, 2023, scheduled for June 11, 2023.

### 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). 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).

[15] The Applicants submit that the underlying application raises serious issues about the reasonableness of the RPD's finding that their refugee claim has no credible basis. Specifically, the Applicants submit that the RPD failed to properly apply to the relevant test for a no credible basis finding under subsection 107(2) of *IRPA*, and drew erroneous credibility findings about the Applicants' claim and evidence.

[16] The Respondent submits that there is no serious issue because the RPD reasonably assessed the Applicant's claim and rendered its finding in light of the facts and evidence.

[17] 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 RPD's proper assessment of the Applicant's evidence, particularly given the severe consequences of a no credible basis finding under subsection 107(2). These issues are sufficient to meet the first prong of the *Toth* test.

#### B. *Irreparable Harm*

[18] 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)).

[19] The Applicants submit that they will suffer irreparable harm if returned to Vietnam. The Applicants submit that a finding of irreparable harm flows from the several serious issues raised in the RPD's finding that their claim has no credible basis, which consequently deprived the Applicants of a regulatory stay of removal or a right to appeal to the Refugee Appeal Division. The Applicants further submit that the potential mootness of the underlying application for leave and judicial review of the RPD decision contributes to the finding that they would face irreparable harm if removed.

[20] The Respondent submits that the Applicants have not made out this prong of the test for a stay of removal. The Respondent notes that irreparable harm must constitute more than a serious of possibilities and cannot be based simply on assertions or speculation. The Respondent submits that the Applicants have not provided any evidence to demonstrate that they would face irreparable harm upon removal and any harm alleged is based in speculation or on the first prong of the *Toth* test.

[21] I agree with the Respondent and do not find that irreparable harm is made out in this case. The Applicants' submissions at this stage of the test for a stay of removal largely reiterate their submissions under the first prong and, in so doing, fail to provide any new evidence of a risk that they face if returned to Vietnam. They have not shown, or even submitted, that the Vietnamese authorities continue to pose a threat to them such that they would face irreparable harm if a stay were not granted. Instead, the Applicants mainly submit that irreparable harm is made out because of the severe consequences of the RPD's finding and because the underlying application would be rendered moot. This is insufficient to make out irreparable harm in this case.

C. *Balance of Convenience*

[22] 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.

[23] The Applicants submit that the balance of convenience favours granting the stay of removal. They submit that the risk of harm they face upon removal outweighs the inconvenience to the Respondent in being unable to enforce removal.

[24] 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 *IRPA*, 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.

[25] Ultimately, the Applicants do not meet the tri-partite test required for a stay of removal. This motion is therefore dismissed.

**ORDER in IMM-12176-22**

**THIS COURT ORDERS that:**

1. The Applicants' motion for a stay of their removal is dismissed.
2. The style of cause is changed to reflect only the Minister of Public Safety and  
Emergency Preparedness as the proper Respondent in this stay motion.

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"Shirzad A."

Judge

**FEDERAL COURT**  
**SOLICITORS OF RECORD**

**DOCKET:** IMM-12176-22

**STYLE OF CAUSE:** DINH DUNG NGUYEN AND THI QUYNH TRAN v  
THE MINISTER OF PUBLIC SAFETY AND  
EMERGENCY PREPAREDNESS

**PLACE OF HEARING:** BY VIDEOCONFERENCE

**DATE OF HEARING:** JUNE 8, 2023

**ORDER AND REASONS:** AHMED J.

**DATED:** JUNE 8, 2023

**APPEARANCES:**

Gavin MacLean FOR THE APPLICANTS

Margherita Braccio FOR THE RESPONDENT

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