Federal Court Cour fédérale

Date: 20230926

Docket: IMM-11755-23

Citation: 2023 FC 1301

Vancouver, British Columbia, September 26, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

AB, CD, EF, GH (THROUGH THEIR LITIGATION GUARDIAN AB), AND IJ (THROUGH THEIR LITIGATION GUARDIAN AB)

Applicants

and

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 September 27, 2023.

[2] The Applicants request that this Court order a stay of their removal until the determination of an underlying application for leave and judicial review of a refused deferral request and their pre-removal risk assessment ("PRRA") and humanitarian and compassionate ("H&C") application.

[3] For the reasons that follow, this motion is granted. I find that the Applicants meet the tri-partite test required for a stay of removal.

II. **Facts and Underlying Decision**

[4] The Applicants are a family of five from Colombia.

[5] In August 2019, they entered Canada and made claims for refugee protection.

[6] In a decision dated September 22, 2021, the Refugee Protection Division ("RPD") refused their claims. In a decision dated March 8, 2022, the Refugee Appeal Division ("RAD") dismissed the Applicants' appeal of the RPD's decision. This Court dismissed the Applicants' application for leave and judicial review of the RAD's decision in a decision dated September 30, 2022.

[7] On January 5, 2023, the Applicants' H&C application was received by Immigration, Refugees and Citizenship Canada ("IRCC").

[8] On February 6, 2023, the Applicants were scheduled for removal from Canada. They failed to appear for removal and a warrant was issued for their arrest by the Canadian Border Services Agency ("CBSA").

[9] In a letter dated April 4, 2023, IRCC returned the Applicants' H&C application, stating that less than twelve months had passed since their refugee claims had been refused.

[10] On May 5, 2023, the warrant was executed and the Applicants were arrested and detained. On May 10, 2023, they were released from detention.

[11] On May 31, 2023, the CBSA received a request for deferral from the Applicants, which was granted to facilitate the remainder of the school year.

[12] On July 10, 2023, the Applicants' updated H&C application was received by IRCC.

[13] On September 7, 2023, the Applicants were served with a Direction to Report for removal by CBSA, scheduled for September 27, 2023.

[14] On September 12, 2023, the Applicants submitted their request to CBSA to defer their removal for 49 hours, until they were eligible to submit a PRRA application so a PRRA officer could assess the risk faced by two of the family members and so an immigration officer could consider their H&C application.

[15] In a decision dated September 20, 2023, their deferral request was refused.

III. **Analysis**

[16] 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.

[17] 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*

[18] 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) ("*Baron*").

[19] 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.*

[20] On this first prong of the tri-partite test, the Applicants submit that they raise several serious issues that warrant a stay of removal, especially in light of two of the children's risks not having yet been assessed by an immigration officer and an officer's duty to defer removal where it is in a child's short-term best interests to do so.

[21] The Respondent submits that there is no serious issue because the Officer reasonably found that the Applicants had not established risk or hardship upon return to Colombia, that the Officer reasonably refused deferral in light of their previous deferred removal order, that their H&C application cannot be a bar to removal, and that their allegations of risk have already been assessed by the RPD, RAD, and Federal Court.

[22] Having reviewed the parties' motion materials, I agree that there is a serious issue to be tried insofar as a deferral officer should be attentive to whether the Applicants have had an opportunity for a risk assessment in a PRRA and consideration of H&C factors in an H&C application before their removal (*Etienne v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 415 at paras 53-54).

B. *Irreparable Harm*

[23] 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)).

[24] The Applicants submit that irreparable harm is established as two of the children—one being an environmentalist and the other potentially being a gender-diverse or LGBTQ+ person—are at a real risk of persecution and/or mistreatment in light of country condition evidence about Colombia and that that removal prior to a risk assessment and evaluation of the best interests of the children would deprive them of a meaningful legal remedy. The Applicants further maintain that return to Colombia will expose the children to significant and irreparable harm to their mental health.

[25] The Respondent submits that irreparable harm is not established, as the Applicants have not shown they will face a personalized risk or harm upon return, that the best interests of the children will not be met if removed from Canada, nor that they would be unable to continue their H&C application from abroad. The Respondent further submits that the Applicants make the same allegations of risk that have already been assessed by the RPD, RAD, and Federal Court, which does not establish irreparable harm.

[26] I agree with the Applicants. While they have not provided clear and convincing evidence at a sufficient level of particularity demonstrating that the two children would themselves face

harm for their political beliefs and gender identity, respectively (*Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31; *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at paras 15-16), I am satisfied that the Applicants have provided clear and convincing evidence that they, and especially the young boy and mother currently suffering from mental health issues, would face irreparable harm upon removal.

[27] I take particular note of evidence demonstrating that the mother in this application has had suicidal ideations in light of these removal proceedings. I disagree with the Respondent that the pain suffered here is the sort of mental affliction that will occur in any removal context (*Palka v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 165). The legal concept of "irreparable harm" would be hollow if it could not recognize the form of harm that leads an individual to contemplate taking their own life (*Tiliouine v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1146 at para 13). This Court is impelled to recognize that thoughts of suicide, as the mother here withstood to spare her family pain, can establish irreparable harm. I find that the second prong of the *Toth* test has been made out.

C. *Balance of Convenience*

[28] 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.

[29] The Applicant submits that the Respondent's interest in removal is outweighed by the legal imperatives to avoid removal to places where a person may be subjected to grave harm without carefully assessing that harm first and protecting the best interests of the children.

[30] The Respondent submits that the balance of convenience favours the Minister, as the Applicants seek "extraordinary equitable relief," have delayed and hindered in their removal in the past, thus going into this motion without clean hands, and that the Applicants have had the benefit of a full and fair removal consideration, as well as numerous risk assessments.

[31] The balance of convenience weighs in favour of the Applicants. The integrity of the Canadian immigration system is served by allowing an opportunity for the Applicants to have their risks and H&C factors fully considered by Canadian immigration officials. The Applicants sought a deferral of a few days of their removal so they could submit their PRRA, and both the Applicants' and the Canadian public's interests are furthered by preserving an immigration system that affords the opportunity to have one's risks comprehensively assessed before removal. The legal requirement that removal orders be enforced as soon as possible (*Immigration and Refugee Protection Act*, SC 2001, c 27, s 48(2)) does not outweigh these interests.

[32] Ultimately, the Applicants meet the tri-partite test required for a stay of removal. This motion is therefore granted.

ORDER in IMM-11755-23

THIS COURT ORDERS that the Applicants' motion for a stay of removal is granted.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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