Federal Court  Cour fédérale

Date: 20160925

Docket: IMM-3986-16

Citation: 2016 FC 1118

Ottawa, Ontario, September 25, 2016

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

ANDRIY RYABININ, MARYNA ZADROZHNA VLADYSLAV ZADOROZHNYI, ANDRIY RYABININ

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER

[1] The Applicants seek a stay of their removal to Ukraine scheduled for today.

[2] The Applicants are a father and a mother and their two minor children. They arrived in Canada in August 2015 and sought refugee protection shortly thereafter. On March 14, 2016, their claim for refugee status was found to have no credible basis by the Refugee Protection

Division (RPD). A subsequent Leave Application to judicially review the RPD decision was denied by the Court. On June 13, 2016, the Applicants submitted an application for permanent residence on humanitarian and compassionate considerations pursuant to paragraph 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act).

[3] On August 29, 2016, the Applicants were directed to report for removal to Ukraine on September 10, 2016. Removal was cancelled on September 9. On September 20, 2016, the Applicants were served with a new Direction to Report. They were now scheduled to be removed on September 25, 2016. Upon receipt of the new Direction to Report, they filed with the Canada Border Services Agency (CBSA) a request to defer their removal, claiming that it would not be in the best interest of Vladyslav, aged 15, to be removed to Ukraine at this time given his mental health condition. Vladyslav was diagnosed in June 2016 with Post-traumatic Stress Disorder (PTSD) and Adjustment Disorder with mixed anxiety and depression symptoms after he attempted suicide by taking anti-depressant medication, his fear of returning to his home country being identified as the major trigger of his suicidal attempt.

[4] On September 23, 2016, an Inland Enforcement Officer (the Officer) denied their deferral request. The Officer held that Vladyslav was medically fit to travel provided he is escorted by his parents and a nurse to assist with anxiety. The Officer also noted that Ukrainian state border agents had been contacted by CBSA and would be able to provide further medical assistance to Vladyslav upon his arrival to Kiev, if required. As indicated at the outset of this Order, the Applicants seek a stay of their removal while they pursue an application for leave and judicial review of the Officer's decision which, they claim, is both procedurally unfair and unreasonable.

[5] A stay of removal is an exceptional measure (*Tesero v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 148, at para 47. The tripartite test, set out in *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA) [*Toth*]), provides that for a stay to be granted, an applicant must show: (1) that his underlying application for leave and judicial review raises a serious issue; (2) that he will suffer irreparable harm if the stay is not granted and the removal order is executed, and (3) that the balance of convenience lies in his favour (*RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR*]). This test is conjunctive, meaning that in order to be successful, an applicant must satisfy all three branches of the test (*Vieira v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 626, at para 43).

[6] In a context such as the present one, where a party seeks an order staying the decision of a removal officer not to defer removal, it is also well-settled that the Court "ought not simply apply the 'serious issue test' but should go further, and closely examine the merits of the underlying application" and be satisfied that it has a "likelihood of success" (*Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FC 682, at para 10 [*Wang*]).

[7] The Court must also be mindful that the discretion of a removal officer to defer removals is extremely narrow as the officer's primary task, according to section 48 of the *Immigration and Refugee Protection Act*, SC 2001, c. 27, is to enforce removal orders 'as soon as possible'. That discretion has been held to be restricted to determining when, and not if, removal will be executed and should be exercised only in cases where there is clear evidence of a risk of death, extreme sanction or inhumane treatment or in temporary exigent circumstances, such as

facilitating appropriate travelling arrangements (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81).

[8] Here, even accepting, without deciding it, that the Applicants' application for leave and judicial review of the Officer's decision raises a serious issue within the meaning of *Wang*, I am not satisfied that they have established that they will suffer irreparable harm if removed to Ukraine. As is well established, irreparable harm must be established through clear, convincing and non-speculative evidence and must be something more than the inherent consequences of deportation (*Atwal v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427; *Melo v Canada (Minister of Citizenship and Immigration)*, (2000), 188 F.T.R. 39).

[9] According to the evidence on record, Vladiyslav's mental health problems are recent and they are essentially linked to the prospect of returning to Ukraine. He was first seen by a doctor in late April 2016, that is a few days after the family was informed by CBSA that the removal order pending against them was enforceable and that they had to leave Canada. The suicide attempt occurred four days after the family met again with CBSA and asked to sign a Direction to Report setting up the date of removal to July 2, 2016. Vladiyslav also visited the emergency of the Hospital for Sick Children in Toronto on September 21, 2016 where he was diagnosed with anxiety. This was the day after the family was handed down the current Direction to Report.

[10] This fairly recent condition is in sharp contrast to the situation prevailing in *Tiliouine v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1146, to which the Applicants

refer in their submissions. In that case, where a stay of removal was granted, the applicant had been suffering from severe and chronic PTSD and depression and attempted to her life well before coming to Canada as a result of years of extreme physical and psychological abuse and violence in her home country. Here, there is no evidence that Vladiyslav ever sought or received medical care for mental health issues before coming to Canada. In the affidavit she signed in support of the present motion for a stay, Vladiyslav's mother refers to his nervousness, irritability and fears while the family was still living in Ukraine. However, I note that this description is related to the events that allegedly led the family to leave Ukraine. These events, which formed the basis of the family's refugee claim, were found not to be credible by the RPD. As indicated previously, leave was denied by this Court. These assertions must therefore be taken with caution.

[11] That is not to say that Vladiyslav's current condition is not serious but the evidence on record is that there are measures in place to mitigate the risks of self-inflicted harm and manage his anxiety problems: Vladiyslav is not returning alone to Ukraine, from which he has only been absent for a year, but he is returning there surrounded by his father, mother and younger brother; the family will be travelling with a nurse and Ukrainian border officials will have medical staff available should they be needed upon arrival in Kiev. Further, the Applicants have not demonstrated that Vladiyslav cannot receive the care he needs in Ukraine for his anxiety, PSTD or Adjustment Disorder. The fact that there may be some issues with the Ukrainian health care system does not establish that the care required by Vladiyslav will not be available or rise to the level of irreparable harm. Again, clear, convincing and non-speculative evidence is required to

establish irreparable harm. This threshold regarding the issue of availability or unavailability in Ukraine of the care required by Vladiyslav has not been met.

[12] As sad and disruptive the situation might be for Vladiyslav, a stay of removal is an exceptional measure and I have not been persuaded that the situation in this case is such that a stay of removal is warranted.

THIS COURT ORDERS that the motion is dismissed.

"René LeBlanc"

Judge