Federal Court  Cour fédérale

Date: 20171215

Docket: IMM-5073-17

Citation: 2017 FC 1154

Ottawa, Ontario, December 15, 2017

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

AHMAD HAROON ASHRAFI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] The applicant, a 39-year-old male citizen of Afghanistan, seeks a stay of the removal order currently scheduled for execution on Sunday, December 15, 2017. Since arriving in Canada as a United Nations High Commissioner for Refugees sponsored immigrant in 1997, he has been convicted of a number of criminal offences including robbery, assault with a weapon, assault causing bodily harm, criminal harassment, failure to comply with probation orders, resisting arrest, and possession of controlled substances.

[2] On February 1, 2013 a report under s. 44 of the *Immigration and Refugee Protection Act*, S.C.2001, c.27 (IRPA) was issued and the applicant was referred for an inadmissibility hearing. He failed to appear for the hearing in 2013 and was ultimately arrested on February 26, 2014. On April 3, 2014 the applicant was found to be inadmissible to Canada for serious criminality and a deportation order was issued. An appeal from that decision was subsequently abandoned.

[3] The applicant failed to appear for removal interviews with the Canada Border Security Agency and a warrant was issued for his arrest on June 21, 2017. The warrant was executed on August 25, 2017 while the applicant was in custody at the Ottawa Carleton Detention Center (OCDC) on fresh assault charges. He has been in detention since then. While in detention, the applicant has received repeated misconduct charges and has been placed in segregation to avoid contact with others.

[4] The applicant submitted a Pre-Removal Risk Assessment (PRRA) application on August 16, 2017. Written submissions were made on his behalf by counsel on September 28, 2017 asserting a need for protection under s. 97 of the IRPA. Counsel cited a number of personalized risks that could be faced by the applicant were he to be sent back to Afghanistan:

- Pervasive joblessness as an Afghan deportee and because of perceived mental health issues;
- Homelessness and the likelihood of ending up in a displacement camp, at risk of extortion and assault;

- Forcible recruitment by extremist groups and being targeted by anti-government forces as an Afghan who has lived many years in a Western country;
- Cruel and unusual punishment by tribes perceiving him to be "possessed" due to the appearance of mental illness;
- Absence of state protection or internal flight alternatives in Afghanistan.

[5] In the written submissions, counsel referred to a brief initial assessment conducted by a psychiatrist at the OCDC on August 18, 2017 and requested that the officer wait to make a final decision until January 1, 2018 at which point they hoped to have a more thorough assessment of the applicant's mental status. The services of a psychiatrist had not yet been retained. An arrangement with a psychiatrist was not concluded until mid to late November after the completion of the PRRA.

[6] The PRRA officer completed his assessment on November 10, 2017. The 15 page report reviewed the applicant's background, the risks cited in counsel's written representations and relevant country condition documentation. The PRRA officer did not downplay the potential risks faced by anyone in Afghanistan to-day due to the continuing violence in that country but concluded that the applicant had adduced insufficient evidence to demonstrate that he would face personalized risk and was a person in need of protection as defined in sections 96 and 97 of the IRPA.

[7] The applicant's Application for Leave and Judicial Review of the PRRA officer's decision was filed on November 28, 2017. On this motion for a stay, the applicant submits that there are three serious issues to be determined on the underlying application: 1) the PRRA officer breached his right to procedural fairness in failing to consider his request to wait until after January 1, 2018 to make a decision; 2) the officer failed to conduct a s. 96 analysis; and 3) the officer made unintelligible findings regarding the evidence concerning the risks faced by those with mental illness in Afghanistan.

[8] The applicant further submits that he will face irreparable harm if sent back to Afghanistan. He relies on the same risks asserted in his PRRA submissions.

[9] With regard to the third arm of the test set out in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.), the applicant submits that the balance of convenience weighs in his favour because of the serious issues to be determined and the risk of irreparable harm that he faces: *Figurado v. Canada (Solicitor General*, 2005 FC 347 at para 45.

[10] The threshold for determining whether there is a serious issue to be determined is low. The Court must be satisfied that the case is neither frivolous nor vexatious. While a minimal inquiry into the merits is required, it should not be prolonged: *Telecommunications Workers Union v. Canadian Industrial Relations Board and Telus Communications Inc*. 2005 (F.C.A.) 83.

[11] If leave is granted in this matter, the PRRA officer's decision on the substantive merits of the application will be reviewed on the standard of reasonableness: *Benko v Canada (Minister of Citizenship and Immigration)*, 2017 FC 1032 at para 15. It is not clear to me that on review, applying that standard, that the officer would be found to have erred in assessing whether there was sufficient evidence to demonstrate a well-founded fear of persecution or a personalized risk to the applicant under either s. 96 or s.97 of the IRPA.

[12] The applicant, through his counsel, focused his submissions to the PRRA officer on personalized risk under section 97. It is clear from the reasons, however, that the officer turned his mind to s. 96 as well as to s. 97. The officer was attentive to the submissions respecting the possibility that the applicant would encounter discrimination amounting to persecution on Convention grounds. I am not persuaded that a serious issue arises from the officer's analysis in that respect.

[13] The procedural fairness issue has caused me greater concern. It would have been preferable for the officer and the Court to have a more complete medical history in this case including hospital records relating to surgery which the applicant says he had some two years ago. But that history was not in the record before the officer and it is not before the Court at this time.

[14] The request to defer a decision until January 1, 2018 was made in such a hesitant manner ("should you require a more conclusive psychiatric assessment of Haroon to render your assessment") that the officer could hardly be faulted for giving it little consideration.

Particularly, when the record before the officer contained no firm evidence that the applicant in fact suffers from a mental illness. At best, it suggested further inquiry would be appropriate and pointed to anger management and substance abuse issues.

[15] In any event, the identification of a serious issue on the *Toth* test would not have resolved this motion for the applicant has failed to establish that he will suffer irreparable harm if removed to Afghanistan. Irreparable harm cannot be speculative or based on a series of possibilities: *Akyol v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No.1182. In this instance, the applicant's submissions are replete with speculation about potential harms he might encounter if he is identified as a Western returnee or a person suffering from mental health problems. This is not a case where the applicant has no prior experience with the country of his birth. He left it as a teenager, speaks one of the official languages and has extended family members still living there. Moreover, the documentary evidence consulted by the officer indicates that there are governmental and non-governmental services available to returnees.

[16] The argument that the applicant will stand out as a person with mental health problems is not borne out by the August 18, 2017 mental status exam which identified no visible problems in his appearance or affect. Any personality disorder that he may suffer from appears to have manifested itself in an inability to control his temper and avoid substance abuse.

[17] In this case, the balance of convenience clearly weighs against the applicant and in favour of the Minister's duty to execute the removal order. The applicant's criminal activity began within two years of his arrival in Canada; he has been convicted of several serious offences in

the ensuing twenty years; he has failed to demonstrate an ability to control his behaviour; and he comes before the Court seeking the grant of an extraordinary remedy without clean hands in his dealings with the authorities.

[18] The one factor in the applicant's favour is that he appears to have supportive siblings. Unfortunately, in the circumstances, that is not enough to persuade the Court that it should intervene on his behalf.

ORDER IN IMM-5073-17

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

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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STYLE OF CAUSE:	AHMAD HAROON ASHRAFI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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APPEARANCES:

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