Federal Court  Cour fédérale

Date: 20180817

Docket: IMM-3943-18

Citation: 2018 FC 842

Ottawa, Ontario, August 17, 2018

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

AMJAD FUDHAYL HAMMAD ABDULRAHMAN

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

[1] The Applicant seeks a stay of removal, scheduled for August 19, 2018. He received a Notice of Removal on August 10, 2018, and immediately sought a deferral of his removal by filing his request with the Canada Border Services Agency on August 14, 2018. In view of the urgency of the matter, on August 15, 2018, he also filed a notice of motion and motion record seeking a stay of removal in this Court.

[2] By way of background, the Applicant is a citizen of Sudan and Eritrea who was born and raised in Saudi Arabia. He arrived in Canada on December 13, 2016, and made a refugee claim on the basis that he is bisexual. This claim was refused by the Refugee Protection Division ("RPD"), and his appeal to the Refugee Appeal Division ("RAD") was dismissed, both essentially on the basis that he lacked credibility. The Applicant changed his story about what happened to him in Saudi Arabia on several occasions, and the RPD did not find his evidence to be credible. He produced some new evidence before the RAD, but given the nature of this evidence the RAD found it not to be admissible. His refugee claim was dismissed. The Applicant has not sought judicial review of the RAD decision.

[3] In support of both the deferral request and the motion for a stay of removal, the Applicant has produced new evidence. The key evidence is an e-mail from an individual who states that she is a transgender woman who met the Applicant on a dating application called "Grindr" – an app which caters to gay, bisexual and transgender individuals. In this document she states that she had exchanges with the Applicant through this app for about two weeks, after which she went to his house and they had sex. She further states that the relationship did not continue, and that she "decided to stop communicating" with the Applicant. However, when contacted to provide information in support of his claim for a deferral or stay of removal, she states "I can truthfully say that his claim for protection based on his sexual orientation is truthful despite my feelings towards him…".

[4] On August 16, 2018, a CBSA Officer denied the Applicant's deferral request. The Officer described the procedural history of the matter, and noted that by virtue of s. 112(1)(b.1)

of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*] the Applicant was not eligible for a pre-removal risk assessment for one year since his appeal was denied by the RAD.

[5] The Officer states the following as a description of the responsibilities of an officer considering a deferral request: "I am tasked with assessing whether compelling evidence has been presented to justify the delay of removal for the assessment of allegations of new of [sic] risk or new evidence of risk that post-dates the RPD and RAD decision."

[6] Having considered the new evidence produced by the Applicant, the crux of the Officer's analysis is set out:

> I note that the risk allegation raised in the deferral request parallels the risk allegation raised before the RPD and RAD, primarily that Mr. Abdulrahman faces risk upon return to Sudan as a bisexual man. I am not satisfied that Mr. Abudlrahman has submitted new and compelling and objective evidence that post-dates the RPD and RAD to warrant a deferral of removal for a further risk assessment. I am satisfied that Mr. Abdulrahman had an opportunity to have his due process and make a claim for convention refugee status before the RPD and his claim was refused by the RPD and RAD. Mr. Abdulrahman raised his risk profile as a bisexual man before the RPD and the RPD was not satisfied that Mr. Abdulrahman is bisexual… I am not satisfied that the evidence presented with the deferral request is new evidence of risk that post-dates the RPD and RAD decision, and that Mr. Abdulrahman could not have reasonably established before the RPD and RAD his alleged identity as a bisexual man, including providing evidence of his relationships.

[7] The Applicant has launched a judicial review of the refusal of his deferral request, and also brought this motion for a stay of removal.

[8] The statutory basis for a stay of removal is found in section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7, which provides that this Court may make interim orders pending the final disposition of an application for judicial review. In considering such relief, the Court applies the same test as for interlocutory injunctions. The Supreme Court of Canada recently restated the test as follows:

> At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.
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> (*R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12, references omitted)

[9] This three-pronged test is well-known. It has been applied in the immigration context in *Toth v Canada (Employment and Immigration)*, 1988 CanLII 1420 (FCA). The application of this test is highly contextual and fact-dependent.

I. Serious Issue

[10] In many cases, the serious issue branch of the test is not a high threshold. However, in cases where the stay is requested following a refusal to defer removal, it has been found that a higher threshold applies, which requires the Applicant to demonstrate a "likelihood of success" or "quite a strong case" in regard to the underlying application for leave and judicial review (*Wang v Canada (Citizenship and Immigration),* 2001 FCT 148, [2001] 3 FC 682; and *Baron v*

Canada (Public Safety and Emergency Preparedness), 2009 FCA 81, [2010] 2 FCR 311 at para 67).

[11] The Applicant argues that he has met this higher threshold. The Officer applied the wrong test in regard to new evidence – it is not only evidence which post-dates the RPD or RAD decision which can be considered, but also evidence which has emerged where there is a reasonable explanation as to why it was not produced earlier. If this evidence of risk is credible, it must be assessed.

[12] Further, the Applicant argues that the Officer fettered his discretion in refusing to delve deeper into the new evidence of risk on the basis that the RPD and RAD had made credibility findings against the Applicant; the Officer's decision states: "as an enforcement officer, I am not qualified to assess the merits of a decision rendered by the RPD and the RAD." The Applicant submits that this is an indication that the Officer did not properly consider the new evidence.

[13] The law requires an assessment of individual risk before removal. This is not meant to re-do the risk assessments done by the RPD and RAD, and in most cases the focus is on a new risk which has emerged, sometimes because of a change in the conditions of the country to which the person will be returned. However, it is clear that if there is evidence of a new or increased risk faced by the applicant, "the officer must assess that risk and determine if a deferral of removal is warranted" (*Toth v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1051, para 23, cited with approval and emphasis added by the Federal Court of Appeal in *Atawnah v Canada (Public Safety and Emergency Preparedness*), 2016 FCA 144, para 20 [*Atawnah*]).

[14] The Court of Appeal has found that "[t]he evidence in support of the risk need not be conclusive. The mere fact that the evidence involves an element of speculation is not determinative" (*Atawnah*, para 21). And although in many cases the evidence of risk will be "new" in the sense that it relates to an event which post-dates the refugee determination hearing, that is not always a requirement.

[15] There are instances where the risk is not "new" in that sense; rather, it is evidence which has emerged in relation to a risk which has not been assessed by a competent decision-maker. In *Etienne v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 415 [*Etienne*], the Court held at para 54 that the risks an enforcement officer is required to consider include risks that have never been assessed by a competent decision-maker (cited with approval in *Atawnah*, at para 22). If there is a good reason why this evidence was not produced before, and it is credible and directly relevant to risk, it must be assessed before the person can be removed.

[16] In this case, I find that neither the RPD nor the RAD assessed the risk to the Applicant as a bisexual man facing return to Sudan – since they found he lacked credibility, and therefore his claim to be bisexual was not believed, it was not necessary to assess this risk. However, faced with new evidence that appears on its face to substantiate this claim – the e-mail from his former sexual partner – the Officer simply concluded, without explanation, that the evidence was not new, compelling, and objective. I find that the Officer has stated and applied the wrong test for consideration of new evidence in a case such as this.

[17] I also find that the Officer has not followed the guidelines set out in the CBSA Operational Bulletin relating to deferral decisions. This Bulletin was cited in *Etienne*, and it

states that officers are to consider new evidence, noting that "new evidence may substantiate an allegation of risk that was previously considered. Similarly, evidence that pre-dates the last risk assessment may arise for which there are reasons it was not presented before the last risk assessment." That is precisely the situation here.

[18] The Respondent notes that the new evidence is contained in an e-mail, rather than a sworn or signed document, and that it should not be accepted as meeting the evidentiary threshold required for the grant of an interlocutory injunction that will have the effect of halting a process that involves carrying out a clear legislative duty to remove a person "as soon as possible" (*IRPA*, s. 48(2)). The Respondent also argues that the Applicant could have brought forward better evidence in support of his claim before the RPD or RAD.

[19] The Applicant explains that since he was not in an ongoing relationship with the author of the e-mail – that person states that she had cut off communication with the Applicant – it is understandable that he was not able to produce this evidence sooner. The Applicant argues this evidence is "new" (in the sense it was not considered by the RPD or RAD), objective (it comes from a third party with no ongoing relationship with the Applicant), and compelling (if believed, it is direct evidence which substantiates the Applicant's claim that he is bisexual). He also states that in other cases this Court has accepted similar types of unsworn evidence in support of a stay of removal: see *Tabari v Canada (Citizenship and Immigration)*, 2018 CanLII 59733 (FC) [*Tabari*].

[20] In the circumstances, and in view of the urgent nature of the stay, and of the reality that the Applicant was pursuing both a deferral decision and the application for a stay in parallel –

both within a very short time-frame – I have decided that this evidence is sufficient to meet the threshold required. Similar evidence was accepted in *Tabari*, and while it is obviously preferable to have evidence by way of sworn affidavits, this is not an absolute requirement. Each case must be assessed on its merits, and the weight to be attributed to the evidence involves consideration of several factors, including whether it is in the form of a sworn statement.

[21] For these reasons, I find that the Applicant has met the threshold of establishing quite a strong case in relation to the underlying judicial review of the refusal to defer removal.

II. Irreparable Harm

[22] There is considerable overlap between the arguments and evidence in support of the serious issue and irreparable harm elements of the test in this case. The RPD and RAD concluded that the Applicant was not credible, and in particular his claim that he is bisexual was not accepted. Thus, they did not analyze in any detail the nature of the risks that he faced upon return to Sudan. The RPD did note, however, "[t]he panel is satisfied that the claimant would face unpleasantness if not outright persecution if he returns to either Eritrea or Sudan and is discovered to be bisexual as he alleges" (para 25).

[23] It is not seriously disputed that gay, lesbian, or bisexual persons in Sudan face serious risks of personal harm, rising to the level of death. The documentary evidence is clear on this point, and the Respondent does not challenge this point.

[24] I find, on the evidence, that the Applicant has established irreparable harm associated with being returned to Sudan.

III. Balance of Convenience

[25] In view of the findings above, I find that the balance of convenience weighs in favour of the Applicant.

[26] Canada has an interest in the prompt removal of persons whose refugee claims have not been upheld (as articulated in s. 48(2), cited above). Canada also has an interest in respecting its obligations under the *Canadian Charter of Rights and Freedoms*, in particular the right to "life, liberty and security of the person" set out in s. 7, as described by the Supreme Court of Canada in *Suresh v Canada (Citizenship and Immigration)*, [2002] 1 SCR 3. Canada also has an interest in living up to its solemn undertakings in international law, most particularly the United Nations Convention Relating to the Status of Refugees.

[27] In view of this, and the nature of the risk of harm associated with the return of a bisexual man to Sudan, the balance of convenience weighs in favour of the Applicant.

ORDER in IMM-3943-18

THIS COURT'S JUDGMENT is that the application for a stay of removal pending the determination of the Applicant's application for judicial review is granted.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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