Federal Court  Cour fédérale

Date: 20181207

Docket: IMM-5813-18

Citation: 2018 FC 1231

Toronto, Ontario, December 7, 2018

PRESENT: Mr. Justice Grammond

BETWEEN:

EDWIN ROBERTO MEDINA CERRATO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

[1] The applicant, Mr. Edwin Roberto Medina Cerrato, brings a motion for a stay of his removal from Canada scheduled for tomorrow, December 8, 2018. I grant this motion, because I find that removing him to his home country, Honduras, would expose him to a serious risk of irreparable harm.

I. Facts and Underlying Decision

[2] Mr. Medina, a citizen of Honduras, came to Canada in 2016 on a temporary worker permit. As he worked for an employer other than the employer for which the permit had been issued, the Canadian Border Services Agency [CBSA] issued a removal order against him on May 9, 2017.

[3] In March 2018, Mr. Medina applied for a pre-removal risk assessment [PRRA]. He alleged that, while in Honduras, he denounced the ruling National Party as well as the actions of a local businessman and gangster who is linked to the same political party. As a result of this, he says he was the victim of an extortion attempt and death threats. His application was denied on September 18, 2018. The PRRA officer did not believe the evidence that the threats to Mr. Medina's life were linked in any way to his political affiliation or were orchestrated by the local businessman. The officer also found that the evidence of systematic violence and criminal gang activity in Honduras established only a generalized risk, not one personal to Mr. Medina.

[4] Mr. Medina also filed an application for relief on humanitarian and compassionate [H&C] grounds in June 2018. This application was denied on September 24, 2018.

[5] Mr. Medina began an application for leave and for judicial review of the decision of the PRRA officer (file number IMM-5813-18) and a separate application for leave and judicial review of the H&C decision (file number IMM-5814-18). In the context of the application

brought in respect of the PRRA decision, he brought a motion to this Court for the stay of his removal.

II. Analysis

[6] The *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], does not require a judicial authorization to remove a foreign national from Canada. In that sense, a stay of removal is an exceptional remedy, as it interferes with the normal administrative process as prescribed by Parliament in section 48 of the Act.

[7] 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 granting such relief, we apply 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)

[8] This three-pronged test is well-known. It had been set out in earlier decisions of the Supreme Court (*Manitoba (Attorney General) v Metropolitan Stores Ltd.*, [1987] 1 SCR 110;

RJR — MacDonald Inc v Canada (Attorney General), [1994] 1 SCR 311 [*RJR*]). It was also applied in the immigration context in *Toth v Canada (Minister of Employment and Immigration)*, 1988 CanLII 1420 (FCA). Of course, the application of this test is highly contextual and fact-dependent.

[9] Before I turn to the components of the RJR test, I must address the issue of extension of time.

A. *Extension of Time*

[10] The application for leave and judicial review was filed on November 26, 2018, whereas the PRRA decision was communicated to Mr. Medina on November 6, 2018, twenty days earlier. The time limit for the filing of an application, however, is fifteen days after the date the decision was communicated to the applicant (s. 72(2)(b) of the Act).

[11] In deciding whether to allow an extension of time, the Court is guided by the following questions:

> (1) Did the moving party have a continuing intention to pursue the application?
>
> (2) Is there some potential merit to the application?
>
> (3) Has the Crown been prejudiced from the delay?
>
> (4) Does the moving party have a reasonable explanation for the delay?
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> (*Canada (Attorney General) v Larkman*, 2012 FCA 204 at para 61)

[12] In this case, the application contains a statement to the effect that the delay is explained by the fact that Legal Aid Ontario took a number of days before accepting to cover Mr. Medina's legal fees pertaining to this proceeding. The delay of five days does not cause any prejudice to the Minister and it is obvious that Mr. Medina has always had a continuing intention to pursue this matter. The extension of time is granted.

B. *Serious Question to be Tried*

[13] In *RJR*, the Supreme Court stated that the "serious question to be tried" criterion is a relatively low threshold (*RJR* at 337). In the administrative law context, this must be assessed while keeping in mind that the applicable standard of review is reasonableness.

[14] At the hearing, both parties advanced wide-ranging arguments impugning or supporting the PRRA decision. In the context of a motion to stay, however, it is unnecessary to argue at length on this issue or to engage in a comprehensive review of the record, as the threshold is low. In particular, the fact that some elements of the PRRA application were not in the record before me, with the consequence that I do not know which country condition documents were submitted to the PRRA officer, does not preclude a finding that there is a serious question to be tried.

[15] I have reviewed the PRRA decision, Mr. Medina's affidavit in support of his PRRA application and the most important country condition documents. I conclude that it is possible to argue that the PRRA officer overlooked important information, reached unreasonable conclusions or made veiled credibility findings.

[16] In this regard, counsel for the Minister disputed the fact that the PRRA officer had to apply the well-known presumption of truth mentioned in *Maldonado v Minister of Employment and Immigration*, [1980] 2 FC 302 (CA). I note, however, that in Citizenship and Immigration Canada's manual for PRRA officers, which was filed in evidence by Mr. Medina, one finds the following statement: "Although testimony and evidence filed by the applicant is presumed to be true, this presumption may be rebutted," which is precisely what *Maldonado* says (at 305).

[17] In the context of a motion for stay of removal, the usual practice is to refrain from making detailed comments on the merits of the underlying application, in order to preserve the freedom of the judge who will hear the merits. Thus, I will not analyze the matter further and I will simply say that I am satisfied that Mr. Medina has raised serious questions to be tried.

C. *Irreparable Harm*

[18] The second prong of the *RJR* test relates to irreparable harm.

[19] How does an applicant prove irreparable harm in the context of a motion for a stay of removal? Typically, applicants will say that returning to their country will expose them to a risk of death, torture, arbitrary detention or arrest or other forms of violence. One must not lose sight, however, that the harm in question will take place in the future. By nature, its occurrence is uncertain. We are, in truth, assessing risk. This is why applicants are only required to prove a likelihood of harm, not certainty of harm (*Ali v Canada (Citizenship and Immigration)*, 2007 FC 751 at para 33; see also Robert J. Sharpe, *Injunctions and Specific Performance*, 5th ed (Toronto: Thomson Reuters, 2017) at paras 2.60, 2.390 and 2.418).

[20] Thus, irreparable harm can be analyzed from two angles: the level of risk and the standard of proof. There is no fixed threshold or minimum level of risk, in particular when the harm is very serious, such as death. We would not require that, for instance, death must be more likely than not or that there be more than a 50% probability of death. We would surely not deport someone to a 30% probability of death. But a minimal risk, or the risk of a harm that is inherent in the removal process, would not count. In any event, in the absence of a method to quantify such risks, it is meaningless to require a specific level of probability.

[21] The level of risk must not be confused with the standard of proof of that risk. In principle, the standard is the same as in all civil cases, namely, proof on a balance of probabilities. In deciding what is sufficient to establish such proof, the nature and seriousness of the risk must weigh in the balance. Motions for stay of removal often deal with allegations of risk to life or physical integrity that are far removed from the risks at stake in cases such as *RJR* or *CBC*. The resources at the disposal of the applicant must also be kept in mind. One should not expect the amount of evidence that one sees, for example, in commercial litigation. Moreover, when the risk results from unlawful activities, evidence of that risk will rarely be direct and conclusive. People who engage in unlawful activities will rarely provide evidence of it, even less so in advance.

[22] Nevertheless, some evidence is required, and it has been variously described as “real,” “clear,” “convincing” or “non-speculative” (see, for example, *Kreszta v Canada (Public Safety and Emergency Preparedness)*, 2018 CanLII 106470 at para 10; *Arokkiyanathan v Canada (Citizenship and Immigration)*, 2018 CanLII 103411 at para 2; *Patel v Canada (Citizenship and Immigration)*, 2018 FC 882). These adjectives are a useful reminder that a stay of removal is an

exceptional remedy that cannot be granted lightly. They should not, however, be used as a proxy for a requirement of certainty or more than 50% probability. Like the adjectives used to characterize hardship in the context of humanitarian and compassionate decisions, they do not create separate hurdles that an applicant must overcome (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 33, [2015] 3 SCR 909). In this connection, I find the following explanation by Chief Justice Richards of the Saskatchewan Court of Appeal particularly enlightening:

> Given this underlying reality, it seems wrong to demand that a plaintiff seeking an injunction must prove to a high degree of certainty that he or she will suffer irreparable harm if the injunction is not granted. In many situations, this approach would self-evidently frustrate the balancing exercise which a court should be undertaking in deciding if interlocutory relief is warranted. For example, assume that failure to grant a plaintiff an injunction involves only a medium probability that the plaintiff will suffer irreparable harm. But, assume as well that, if such harm is incurred, it will be catastrophic. If the analysis ends at the point of the plaintiff being unable to establish the prospect of irreparable harm to a high level of certainty, a full balancing of the risks concerning the relevant non-compensable damages will not be possible. In other words, the true overall risk of irreparable harm will always be a function of *both* the likelihood of the harm occurring and its size or significance should it occur. A sound analytical approach should take this into account.
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> (*Mosaic Potash Esterhazy Limited Partnership v Potash Corporation of Saskatchewan Inc*, 2011 SKCA 120 at para 59)

[23] In many cases, the harm alleged is the same kind of harm to which the refugee protection system is addressed. Thus, refugee law concepts, such as state protection or reavailment, may be useful in assessing irreparable harm. Likewise, determinations of risk made by other decision-makers in the refugee protection system are relevant to the inquiry and will often be given much weight if they were based on the same evidence and if they are not affected by an obvious flaw.

In other words, a motion for stay of removal is usually not the appropriate forum to reargue harms that have been adequately assessed by previous decision-makers (see, e.g., *Goshen v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1380 at para 6; *Lebrun v Canada (Citizenship and Immigration)*, 2018 FC 663 at para 15).

[24] The risk of irreparable harm will often be proven through a combination of country condition evidence (such as the reports contained in the national documentation packages maintained by the Immigration and Refugee Board) and evidence that proves that the applicant is personally at risk. Evidence concerning the conditions in a particular country is not useful if it cannot be tied to the situation of the applicant.

[25] In this case, there is absolutely no doubt that the situation in Honduras is catastrophic. A recent mission report of the Immigration and Refugee Board describes it as "one of the most violent countries that is not at war." The homicide rate is among the highest in the world. Powerful criminal gangs are omnipresent and impose their laws on citizens. The same report also notes that "there are a significant number of cases where returnees were killed shortly after they returned to Honduras," although the causes of that phenomenon are unclear.

[26] In a report dated July 2016, the United Nations High Commissioner for Refugees identifies no less than sixteen profiles of persons who may be at risk of persecution and who may be in need of international refugee protection. These profiles include "witnesses and victims of crimes committed by gangs and other organized criminal groups," "persons with certain political

profiles," including members of the LIBRE Party and the Liberal Party, and "human rights defenders and other social and political activists."

[27] To a significant degree, Mr. Medina's situation corresponds to a number of those profiles. In his affidavit, he explained that he has always been an outspoken critic of the ruling National Party, participated in demonstrations and expressed his opinions on Facebook. His father was a Liberal regional councillor. Mr. Medina himself was a member of the Liberal Party and is now a member of the LIBRE Party.

[28] Before he left Honduras in 2016, Mr. Medina was the victim of extortion and death threats. He was fired from his employment shortly after refusing a demand for money made by persons with political ties. After he complained to the police about the incident, he received an anonymous phone call. The caller told him to stop criticizing the National Party and made threats of "consequences" to his family. A few days later, Mr. Medina was intercepted by four masked and armed men who stole money from him and made threats to kill him and his family if he remained in the country. The men mentioned that Mr. Medina was still speaking against the National Party. Mr. Medina made another complaint to the police and left the country shortly afterwards.

[29] Thus, Mr. Medina's story is consistent with country condition evidence that shows that people with profiles similar to his can be targeted.

[30] At the hearing, counsel for the Minister argued that many aspects of Mr. Medina's story lacked corroboration or that his actions were inconsistent with a genuine fear of risk. Some of those concerns may be valid to a certain extent. Some of those concerns could possibly have been alleviated if the exhibits to Mr. Medina's affidavit had been filed in the court record, which would have been more useful than certain voluminous country condition documents that were only tangentially relevant. But in the context of an urgent motion, it is not possible to dispel each and every doubt. I have to make a decision based on what the record says, not on what it does not say.

[31] In the end, it is impossible to state with absolute certainty that Mr. Medina will be killed if he is removed to Honduras. Nevertheless, the evidence before me shows that there is a serious risk that he will be the target of violent crime, as he was in the past. Given the inherent seriousness of the harm in question and what we know about organized crime in Honduras, I am of the view that the risk is sufficiently serious to warrant a stay of removal. This is not a case of mere speculation.

[32] In the result, I conclude that Mr. Medina meets the test of irreparable harm.

D. *Balance of Convenience*

[33] At this last stage of the *RJR* test, prejudice to the applicant must be balanced against prejudice to the respondent who is prevented from enforcing the law. It has sometimes been said that "[w]here 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 at para 48). Nevertheless, balance of convenience is not a purely formal criterion. The conduct of the applicant, for example where the applicant has a significant criminal record or has a history of evading immigration authorities, may strengthen the interest of the state in enforcing the removal. However, none of these factors are present in this case.

[34] I conclude that the balance of convenience favours Mr. Medina.

[35] In conclusion, the three *RJR* criteria are met and I will issue an order staying Mr. Medina's removal from Canada.

ORDER in IMM-5813-18

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

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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