Federal Court Cour fédérale

Date: 20210624

Docket: IMM-1506-21

Citation: 2021 FC 664

Ottawa, Ontario, June 24, 2021

PRESENT: Mr. Justice Norris

BETWEEN:

DAMIJIDA KAMBASAYA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

ORDER AND REASONS

I. OVERVIEW

[1] The applicant has been directed to report for removal to Nigeria, his country of nationality, on June 29, 2021. He has moved for an order staying his removal pending the final determination of an application for leave and judicial review challenging the rejection of his application for permanent residence from within Canada on humanitarian and compassionate

("H&C") grounds. The judicial review application has been perfected and is awaiting the Court's disposition at the leave stage.

[2] For the reasons that follow, I am granting the motion.

II. BACKGROUND

[3] The applicant was born in Nigeria in October 1980. He entered Canada in May 2008 to attend a friend's wedding.

[4] In January 2010, the applicant pled guilty to dangerous operation of a motor vehicle causing death and dangerous operation of a motor vehicle causing bodily harm. The offences were committed on October 19, 2008. The applicant's brother, who was one of the passengers in a vehicle the applicant was driving when it crashed, was killed. Other passengers in the vehicle were injured. The applicant was sentenced to imprisonment for 15 months concurrent on both charges. The applicant also pled guilty to a related charge of failure to comply with a recognizance. He was sentenced to concurrent imprisonment for 30 days on this charge.

[5] Prior to these guilty pleas, in September 2009, the applicant pled guilty to fraud under $5000, uttering a forged document, and obstruct peace officer. The underlying conduct related to the fraud and uttering charges related to the applicant's attempt to open a bank account using a forged document. The circumstances of the obstruct peace officer charge are not disclosed in the record before me. The applicant was sentenced to one day in custody concurrent on all charges

after having been given credit for 14 days in pre-sentence custody. It appears that the applicant entered a very early guilty plea.

[6] As a result of his criminal record, the applicant is inadmissible to Canada due to serious criminality.

[7] The applicant is pursuing an application for a record suspension under section 3 of the *Criminal Records Act*, RSC 1985, c C-47. This application remains outstanding; indeed, it appears it has not been submitted yet because of delays in obtaining the necessary supporting documents. These delays have been due, if only in part, to the COVID-19 pandemic and its impact on day-to-day court operations.

[8] In May 2013, the applicant was sponsored for permanent residence by his then-wife.

[9] As a result of the breakdown of his marriage, the applicant abandoned the spousal sponsorship application and, instead, in November 2019 applied for permanent residence from within Canada on H&C grounds under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). The application was based primarily on the applicant's establishment in Canada, the hardship he would face if he had to return to Nigeria, and the best interests of his three Canadian-born children ("BIOC"). The three children are now aged 8, 6, and 3. They live with their mother but the applicant shares joint custody and guardianship with his ex-wife. He also has regular visitation (or "parenting time") rights.

[10] The H&C application was refused by a Senior Immigration Officer in a decision dated January 5, 2021. In a separate decision the same officer denied the applicant's application for a pre-removal risk assessment under subsection 112(1) of the *IRPA.* Counsel for the applicant confirmed that this decision has not been challenged by way of judicial review.

[11] As noted, the applicant has applied for leave and judicial review of the refusal of his H&C application. The application has been perfected and is now ready for a decision from the Court at the leave stage.

[12] While these various applications have been underway, the applicant applied for and was granted Temporary Residence Permits ("TRP") under subsection 24(1) of the *IRPA*. The first one was valid until July 2020. The second one is valid until August 9, 2021.

[13] On or about April 22, 2021, the applicant was directed to report for removal from Canada on May 11, 2021. Following submissions from the applicant's counsel relating to the still-valid TRP, the applicant's removal was cancelled by the Canada Border Services Agency ("CBSA").

[14] By letter dated May 25, 2021, the CBSA informed the applicant that once a new departure date was set, his TRP would be cancelled shortly before that date. The applicant was told that removal was estimated to be within three to four weeks of the date of the letter.

[15] By letter dated May 31, 2021, the applicant was directed to report for removal on June 29, 2021. He was also told that his TRP would be cancelled on or around June 25, 2021. No reasons for doing so were provided.

[16] On or about June 15, 2021, with the assistance of counsel, the applicant submitted an application for an extension of his TRP as well as an open work permit. Counsel requested that this application be dealt with on an expedited basis. To date, no decision has been made.

[17] The applicant now seeks a stay of his removal pending the final determination of his application for leave and judicial review of the refusal of his H&C application.

[18] This motion was heard by teleconference on June 24, 2021.

III. ANALYSIS

A. *The Test for a Stay of Removal*

[19] The test for obtaining an interlocutory stay of a removal order is well-known. The applicant must demonstrate three things: (1) that the underlying application for judicial review raises a "serious question to be tried;" (2) that he will suffer irreparable harm if the stay is refused; and (3) that the balance of convenience (i.e. the assessment of which party would suffer greater harm from the granting or refusal of the injunction pending a decision on the merits of the judicial review application) favours granting the stay: see *Toth v Canada (Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123 (FCA); *R v Canadian Broadcasting Corp*,

2018 SCC 5, [2018] 1 SCR 196, at para 12; *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110; and *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 334.

[20] An interlocutory order like a stay of removal is an extraordinary and equitable form of relief. Its purpose is to ensure that the subject matter of the litigation will be preserved so that effective relief will be available should the applicant be successful on his application for judicial review: see *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 24. A decision to grant or refuse such relief is a discretionary one that must be made having regard to all the relevant circumstances: see *Canadian Broadcasting Corp* at para 27. As the Supreme Court stated in *Google Inc*, "The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific" (at para 25).

[21] In a case such as this, under the first part of the test, the threshold for establishing a serious question to be tried is a low one. The applicant only needs to show that the application is not frivolous or vexatious: *RJR-MacDonald* at 335 and 337; see also *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at para 11 and *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 25.

[22] Under the second part of the test for a stay, "the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the

interlocutory application" (*RJR-MacDonald* at 341). This is what is meant by describing the harm that must be established as "irreparable". It concerns the nature of the harm rather than its magnitude (*ibid.*).

[23] Generally speaking, irreparable harm is harm which cannot be quantified in monetary terms or which could not be cured for some other reason even if it can be quantified (e.g. the other party is judgment-proof). This notion of what is or is not reparable is easily understood in private law and commercial disputes. It is perhaps more difficult to incorporate in a case where the underlying litigation is an application for judicial review, damages are not available in any event, and other interests besides economic ones are paramount.

[24] To establish irreparable harm, the applicant must show that there is "real, definite, unavoidable harm – not hypothetical and speculative harm" (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112 at para 24). He must adduce clear and non-speculative evidence that irreparable harm will follow if the stay is refused. Unsubstantiated assertions of harm will not suffice. Instead, "there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result" unless the stay is granted: *Glooscap Heritage Society* at para 31; see also *Canada (Attorney General) v Canada (Information Commissioner)*, 2001 FCA 25 at para 12; *International Longshore and Warehouse Union, Canada v Canada (Attorney General)*, 2008 FCA 3 at para 25; *United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 at para 7.

[25] This requirement is especially apt for what has been termed *quia timet* stays or injunctions: see *Wasylynuk v Canada (Royal Mounted Police)*, 2020 FC 962 at para 136 and the cases cited therein. As I understand it, the risk of future harm in such cases is distinct from and independent of the legal issues in the underlying litigation (e.g. a risk of hardship in the country of removal or the breakdown of a parenting relationship). The applicant's motion is based in part on these types of future risks. However, as will be discussed below, my finding that removal now would cause irreparable harm to the applicant is based on different considerations.

[26] Under the third part of the test, the applicant must establish that the harm he would suffer if the stay is refused is greater than the harm the respondent would suffer if the stay is granted. This weighing exercise is neither scientific nor precise: see *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2020 FCA 181 at para 17. But this is not to say it is unprincipled. On the contrary, it is at the heart of the determination of what is just and equitable in the particular circumstances of the case at hand.

[27] In assessing the balance of convenience, in addition to the applicant's interests, the public interest must be taken into account since this is a case involving the actions of a public authority (*RJR-MacDonald* at 350). The applicant is subject to a valid and enforceable removal order. It was made pursuant to statutory and regulatory authority. It is therefore presumed that it is in the public interest. Further, under subsection 48(2) of the *IRPA*, a removal order "must be enforced as soon as possible" once it is enforceable. It is also presumed that an action that suspends the effect of the order (as would an interlocutory stay) is detrimental to the public interest: see *RJR-MacDonald* at 346 and 348-49. Whether this is sufficient to defeat a request for an interlocutory

injunction in a given case will, of course, depend on all the circumstances of the case. This can also depend on how long the effect of the deportation order would be suspended: see *Canadian Council for Refugees* at para 27.

[28] Further, the impact on the public interest of granting an interlocutory injunction is a matter of degree and this can vary depending on the subject matter of the litigation. As the Supreme Court noted in *RJR-MacDonald*, the impact on the public interest of exempting an individual litigant from the application of lawfully enacted legislation is less than suspending the effect of that legislation entirely. The impact of suspending temporarily the implementation of a removal order is arguably of an even lesser degree than this (although again the precise calibration of that impact will depend on the particular circumstances of the case).

[29] The assessment of which party would suffer greater harm from the granting or refusal of the injunction pending a decision on the merits of the underlying judicial review application is not necessarily a straightforward, binary determination. This is because the public interest is not necessarily a monolithic concept that weighs exclusively on the respondent's side of the scale. For example, the public has a clear interest in seeing that justice is done in the underlying application for judicial review. This includes providing the applicant with a meaningful remedy and effective relief should he succeed in his challenge to the H&C decision. The applicant himself shares this interest not only with the public but also with the administration of justice.

[30] Taking a step back, while each part of the test is important, and all three must be met, they are not discrete, watertight compartments. Each part focuses the court on factors that

inform its overall exercise of discretion in a particular case: *Wasylynuk* at para 135. The test should be applied in a holistic fashion where strengths with respect to one factor may overcome weaknesses with respect to another: see *RJR-MacDonald* at 339; *Wasylynuk* at para 135; *Spencer v Canada (Attorney General)*, 2021 FC 361 at para 51; and *British Colombia (Attorney General) v Alberta (Attorney General)*, 2019 FC 1195 at para 97 (rev'd on other grounds 2021 FCA 84). See also Robert J Sharpe, "Interim Remedies and Constitutional Rights" (2019) 69 UTLJ (Supp 1) at 14. Together, the three parts of the test help the Court to assess and assign what has been termed the risk of remedial injustice (see Sharpe, above). They guide the Court in answering the following question: Is it more just and equitable for the moving party or the responding party to bear the risk that the outcome of the underlying litigation will not accord with the outcome on the interlocutory motion?

B. *The Test Applied*

(1) Serious Question to be Tried

[31] I am satisfied that the grounds raised by the applicant in his application for leave and judicial review of the refusal of his H&C application are neither frivolous nor vexatious.

(2) Irreparable Harm

[32] I am satisfied that removal prior to the final determination of the application for leave and judicial review of the negative H&C decision would render nugatory any remedy that might be granted in relation to the underlying application for judicial review in the event that the applicant was successful on that application. This is sufficient to satisfy the second part of the test. I will

address the merits of the underlying application further, under the balance of convenience part of the test. For the purpose of this part of the test, it is sufficient to find that the applicant has raised at least one clearly arguable ground challenging the officer's decision.

[33] To be clear, I am not relying on the personal risks or hardships the applicant alleges he would face in or in transit to Nigeria, whether from COVID-19 or otherwise. Neither is it necessary for present purposes to determine whether the impact of the applicant's removal on his children constitutes irreparable harm. The deprivation of the right to a meaningful remedy is sufficient to demonstrate that removal would cause irreparable harm.

[34] The respondent relies on jurisprudence establishing that removal while an H&C application is pending generally does not constitute irreparable harm: see *Palka v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 165 at paras 13-15 and the cases following it, including, for example, *Gafoor v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 893 at para 38. However, those cases do not address the present situation, where the H&C application has already been refused and what is at issue is removal while a judicial review application of that decision is pending.

[35] In written argument, the respondent asserts, without any supporting authority, that since it is "well established that removal before an H&C application is determined does not constitute irreparable harm," "it should also then follow that removal before an [application for leave and judicial review] on an H&C refusal also does not constitute irreparable harm." I cannot agree. The two situations are entirely distinct. The central issue in the present situation is the

applicant's right to a legal remedy in relation to the underlying application for judicial review and the role of the Court in safeguarding that right (unless sufficiently compelling countervailing considerations justify a different outcome under the third part of the test). This issue is not in play at all when removal is contemplated while an H&C application is still pending.

[36] Where, as is the case here, the Court is satisfied that the applicant has raised at least one clearly arguable issue, disrupting the status quo by removing him from Canada prior to the final determination of the application for leave and judicial review would deprive him the right to a meaningful remedy in relation to that application. This is because, in the event that he were to succeed on the underlying application and the matter is remitted for redetermination, key circumstances relevant to that reconsideration – including the applicant's establishment in Canada and his relationship with his children – would have changed in material ways that cannot be undone or otherwise compensated for. This is sufficient to constitute irreparable harm in the circumstances of this case.

(3) Balance of Convenience

[37] I am also satisfied that the balance of convenience favours the applicant. In reaching this conclusion, I acknowledge that generally the removal of individuals who are inadmissible due to serious criminality is in the public interest and that this supports the respondent's position: see *Mohamed v Canada (Citizenship and Immigration)*, 2012 FCA 112 at para 34. However, the offences giving rise to the applicant's inadmissibility are now quite dated. There is no suggestion that the applicant poses a danger to the public. I also place significant weight on the fact that, until now, the applicant's criminal inadmissibility has not stood in the way of his being

granted two TRPs. The TRPs were granted by decision makers who evidently were satisfied that the applicant's demonstrated need to be in Canada outweighed (on a temporary basis) the public interest in removing him because of his serious criminality: see *IRPA*, subsection 24(1). I also note that, while a TRP may be cancelled at any time, it appears that the only reason for cancelling the present one is to facilitate the applicant's removal. It is not due to any misconduct on the applicant's part. Further, given that the Court is prepared to move forward with the application for judicial review now, the standard timetable for readying the matter for a hearing should not exceed by much the period of validity of the current TRP if that permit were left undisturbed. In the circumstances, I find the public interest in removal at this time is modest. Consequently, the impact of a stay on this interest would likewise be modest.

[38] On the other hand, the "inconvenience" to the applicant of losing the right to a meaningful remedy is significant. As I have discussed above, this interest is not confined to the applicant; it is shared by the public and by the administration of justice.

[39] In assessing the balance of convenience, I have given considerable weight to the merits of the underlying application. The applicant has challenged the H&C decision on a number of grounds but for present purposes it suffices to say that I have found the applicant's challenge to the BIOC determination on procedural fairness grounds to be clearly arguable.

[40] In assessing this ground, the reviewing court will be required to conduct its own analysis of the process followed by the decision maker and determine for itself whether the process was fair having regard to all the relevant circumstances, including those identified in *Baker v Canada*

(Minister of Citizenship and Immigration), [1999] 2 SCR 817 at paras 21 to 28: see *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 54; and *Elson v Canada (Attorney General)*, 2019 FCA 27 at para 31. This is functionally the same as applying the correctness standard of review: see *Canadian Pacific Railway Co* at paras 49-56 and *Canadian Association of Refugee Lawyers v Canada (Immigration, Refugees and Citizenship*), 2020 FCA 196 at para 35. I have assessed the applicant's arguments with this standard of review in mind.

[41] The officer determined that the BIOC issue "constitutes the most compelling aspect" of the H&C application; as a result, the officer gave it "very careful consideration." However, I am satisfied that the applicant has raised a clearly arguable issue in challenging the decision on the basis that the requirements of procedural fairness were breached because the officer's assessment of the evidence relevant to this issue went beyond an assessment of its sufficiency and crossed over into an assessment of its credibility without first giving the applicant an opportunity to try to address the officer's concerns with that evidence.

[42] For these reasons, I am therefore satisfied that the balance of convenience favours the applicant.

IV. CONCLUSION

[43] Balancing all of the relevant considerations, I am satisfied that it is more just and equitable for the respondent to bear the risk that the outcome of the underlying litigation will not accord with the outcome on this motion than it would be for the applicant. A stay of removal is the only way to ensure that the subject matter of the litigation is preserved so that effective relief

will be available should the applicant be successful on his application for judicial review (cf. *Google Inc* at para 24). The countervailing considerations are insufficient to outweigh this fundamentally important consideration.

[44] Accordingly, the motion is granted. The applicant shall not be removed from Canada prior to the final determination of the underlying application for leave and judicial review.

ORDER IN IMM-1506-21

THIS COURT ORDERS that

1. The motion is granted.
2. The applicant shall not be removed from Canada until his application for leave and judicial review of the decision dated January 5, 2021, refusing his application for permanent residence in Canada on humanitarian and compassionate grounds is finally determined by the Court.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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