Federal Court  Cour fédérale

Date: 20220317

Docket: IMM-2245-22

Citation: 2022 FC 370

Ottawa, Ontario, March 17, 2022

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

GEORGE ECCLESTON FLOWERS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] The Applicant seeks a stay of his removal to Jamaica, which is scheduled for March 18, 2022.

[2] He argues that he faces risk of death because of the public reaction to his previous crimes, and he submits that the Pre-Removal Risk Assessment (PRRA) decision that found he was not at sufficient risk to warrant protected status in Canada is flawed.

[3] For the reasons set out below, the application for a stay of removal will be granted.

I. Context

[4] The Applicant arrived in Canada as a 6 year old child in 1976. He has had some difficulties in his life here. The Applicant has a long history of criminality, including 18 convictions for offences including robbery, assault, use of a firearm to commit an indictable offence, living off the avails of prostitution, possession and trafficking in a narcotic, and attempting to obstruct justice.

[5] In 1996, the Applicant was diagnosed with HIV. This led to a number of legal consequences. The record shows that he initially refused to disclose the names of past sexual contacts who would be at risk. Between 1997 and 2002, three women provided information to Toronto Public Health indicating that they had tested positive for HIV and identifying the Applicant as a sexual contact. As a consequence of this, a section 22 Order was issued under the Ontario *Health Protection and Promotion Act*; these orders are used when individuals are not compliant with measures to reduce the risk of transmission of a contagious disease. Some years later, a section 102 Order was issued by a judge requiring the Applicant to uphold the requirements of the section 22 Order, thus indicating further efforts were deemed necessary in order to have the Applicant comply with the measures needed to reduce the risk of HIV transmission.

[6] Further concerns about the Applicant's behaviour emerged from subsequent relationships. In 2012, a police investigation resulted in the issuance of an arrest warrant against the Applicant, involving 13 counts of Aggravated Sexual Assault involving six women. By the time the arrest warrant was issued, the Applicant had gone to Jamaica. He says it was because his

mother was very ill; he left for Jamaica in 2012, his mother did not pass away until 2017, and there is no information in the record about her illness. When contacted by the Toronto Police Service about the arrest warrant, the Applicant initially indicated he would return to Canada to face the charges, but he then decided to "pursue [his] rights as a Jamaican citizen to remain in the country." (Applicant's PRRA Affidavit].

[7] In 2012, the Government of Canada initiated extradition proceedings against the Applicant relating to three charges of Aggravated Sexual Assault arising from his failure to inform his sexual partners of his HIV status. The evidence indicates that despite the fact that he was involved in long-term relationships with all three of the victims, he did not disclose his HIV status to any of them. It should be noted that these offences occurred many years after he was initially diagnosed and counselled about the need to advise partners of his status, and after he had been subject to the section 22 and section 102 Orders seeking to ensure his compliance with public health requirements to reduce transmission risk.

[8] The Applicant was detained in Jamaica pending the determination of the extradition request. This took several years, because the question of whether reckless transmission of HIV was included in Jamaica's common law offence of aggravated sexual assault was not clear. The matter went to the Supreme Court of Jamaica, which ruled in 2017 that reckless HIV transmission was included in the offence. As such, they permitted the extradition to proceed in 2017.

[9] On September 23, 2020, the Applicant pled guilty to three counts of aggravated sexual assault, and received a sentence of 14 years imprisonment. He received credit for the equivalent

of 12 years pre-sentence custody because of the time he had spent in detention in Jamaica. After several unsuccessful attempts, the Applicant was granted parole on December 31, 2021, and he was then taken into immigration detention because he was subject to a removal order from Canada. As of the time of this hearing, he was still in immigration detention.

[10] On February 11, 2022, the Applicant applied for a PRRA, based on the risk he faced because of the notoriety his criminal case had received in Jamaica while he contested the extradition. On February 21, 2022, a PRRA Officer (Officer) denied his request.

[11] The Applicant has brought an Application for Leave and Judicial Review of the PRRA decision, and on March 14, 2022, he filed a motion for a stay of his removal pending the determination of the challenge to the PRRA decision. The Respondent filed submissions opposing the stay on March 15, 2022, and the matter was heard on an urgent basis later that day.

II. Issue

[12] The only issue is whether a stay of removal should be granted in these circumstances.

[13] A related question arises on the facts of this case, which is whether the Applicant's request for equitable relief should be denied because he does not come to Court with "clean hands" – which can be a basis to refuse to hear the matter, and also a basis to deny a stay after hearing it on the merits.

III. Analysis

[14] In considering whether to grant a stay of removal, this 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.
>
> (*R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12, references omitted)

[15] 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. It was also applied in the immigration context in *Toth v Canada (Minister of Employment and Immigration)*, (1988) 86 N.R. 302, 1988 CanLII 1420 (FCA). Of course, the application of this test is highly contextual and fact-dependent. It bears repeating that the Supreme Court of Canada has recently emphasized that "[u]ltimately, the question is whether granting the injunction would be just and equitable in all the circumstances of the case." (*Google Inc. v Equustek Solutsion Inc.* 2017 SCC 34 at para 1).

[16] Because a stay of removal is equitable relief, the "clean hands" doctrine applies. Consistent with the way the parties presented their arguments, I will deal with this first before considering the three-part test for interlocutory relief.

A. *Is the Applicant barred from relief because he does not come to Court with "clean hands"?*

[17] The Respondent argues that the Applicant's request should be dismissed at a preliminary stage, because he does not come before the Court with clean hands. The Respondent points to the Applicant's lengthy history of undermining judicial and administrative processes, including his many convictions for breach of recognizance and for failing to attend court, as well as his conviction for obstruction of justice. In addition, the Respondent contends that the Applicant's history of trying to evade Canadian justice by fleeing to Jamaica and then fighting his extradition also implicate the integrity of judicial processes.

[18] Furthermore, the Respondent contends that the Applicant's description of his criminal offences is objectionable, in particular the statement in the Applicant's written submissions that the aggravated sexual assaults did not involve violence or coercion. The Respondent submits that:

> [I]t is an affront to claim that knowingly transmitting HIV to multiple women – whose consent to sex had clearly not been given in these circumstances, and who were indeed coerced into having sex with the Applicant through his material omissions, and whose mental and physical health have been forever seriously negatively impacted – were not acts involving coercion and violence.

[19] Finally, the Respondent notes that the Applicant was ordered removed from Canada in 1993 for serious criminality. The Immigration Appeal Division provided him the benefit of an equitable stay of his removal, but subsequently the Applicant continued to commit serious offences, including the aggravated sexual assaults that resulted in his extradition and for which he received a 14 year prison sentence.

[20] Based on all of this, the Respondent contends that the Applicant's request for equitable relief should be denied at the outset because he does not come before the Court with clean hands.

[21] The Applicant argues that he should not be denied a hearing on the merits of his application, because much of the criminality the Respondent points to is dated, it does not relate to the current proceeding, and he has made full disclosure of his criminal record and has acknowledged the grave harm his offences caused to the victims. The Applicant submits that the clean hands doctrine should not be interpreted so broadly as to deny him relief simply because he has been convicted of crimes in the past. Doing so in this case would involve removing him from Canada without any serious consideration of the risk he faces in Jamaica, or any review of the flaws in the PRRA decision. This would be contrary to the *Charter of Rights and Freedoms*.

[22] In *Canada (National Revenue) v Cameco Corporation*, 2019 FCA 67, the Federal Court of Appeal states that "clean hands" is "an equitable doctrine, under which a party may be disentitled to relief to which it was otherwise entitled as a consequence of past conduct or bad faith. Importantly," the Court continues, "for past conduct to justify a refusal of relief, the conduct must relate directly to the very subject matter of the claim" (at para 37, references omitted).

[23] It is not necessary to engage in a lengthy discussion of the clean hands doctrine as it is applied by this Court. That has been done recently by my colleague Justice Norris, in *Erhire v. Canada (Public Safety and Emergency Preparedness)*, 2021 FC 941[*Erhire*]. Justice Norris decided that in the circumstances of that case the claimant's lack of clean hands should be

considered in assessing the overall equities of the matter at the balance of convenience stage of the analysis, rather than as a preliminary matter. I agree with this approach.

[24] It is worth noting that the Applicant's criminal record and history of not complying with court orders does not bear directly on the questions before the Court – which relate to whether the Applicant has any basis to question the PRRA decision, and if so, whether he has demonstrated that a stay of removal should issue. In this respect, the clean hands issue in this case is not as compelling as that raised in *Erhire*, where some of the claimant's misconduct related directly to not cooperating with the removal process and not complying with orders relating directly to that process.

[25] For this reason, I will consider the clean hands aspect of the matter under the balance of convenience factor. In note here that I agree with the Respondent's characterization of the Applicant's aggravated sexual assault offences, but I also note that the Applicant has acknowledged the grave harm he has caused.

B. *Should the Applicant's request for a stay of removal be granted?*

(1) Serious Issue

[26] Because this case rests on the underlying challenge to the PRRA decision, the serious issue branch of the test is not a high threshold. It is often described as whether the claimant's case is "frivolous or vexatious" (*RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at pp. 335 and 337).

[27] The Applicant contends that the PRRA decision is flawed in several ways, in particular the Officer's fundamentally misapprehension of evidence. The Applicant points to the Officer's finding that "I note that, the applicant does not allege there have been any threats made against him when or since the [newspaper] articles were published." He alleges that this flies in the face of both the submissions he made and the evidence he submitted showing repeated violent threats had been made against him, both by other prisoners, prison guards, and in response to the newspaper articles that had been published about his crimes during the course of the extradition hearings.

[28] The Applicant also argues that the Officer also failed to consider the risks he would face in Jamaica because he is HIV positive and because of his particular profile in light of the media of his case. The Applicant notes that the evidence the Officer referred to related to the medical treatment and social supports available to him, rather than addressing the evidence he had submitted showing that police and other state authorities regularly failed to protect HIV positive people from persecution or discrimination.

[29] In light of the very low threshold that applies to this factor, I am prepared to find that the Applicant's arguments about the PRRA decision are not frivolous or vexatious. I do not need to say more, among other reasons because if the Applicant obtains leave on his application for leave and judicial review, a future judge will have an opportunity to assess the merits of the arguments based on more fulsome arguments and with more time to consider it.

[30] For these reasons, I am prepared to find that the Applicant has met the first element of the test.

(2) Irreparable Harm

[31] Irreparable harm refers to harm which cannot be compensated in money; it is the nature rather than the magnitude of the harm which is to be examined: *R.J.R. MacDonald*, at p. 135. In the context of a stay of removal, the harm usually relates to the risk to the individual(s) of harm upon removal from Canada.

[32] The Applicant bears the onus to demonstrate "real, definite, unavoidable harm – not hypothetical and speculative harm" (*Erhire*, at para 65). Unsubstantiated assertions of harm will not suffice; the Applicant must bring forward "evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result" unless the stay is granted (*Erhire* at para 65).

[33] In cases where the decision being challenged relates to an assessment of risk, such as the PRRA in this case, there is considerable overlap between the evidence and arguments on the first issue and those relating to irreparable harm (see *Erhire* at para 67, citing *Canada (Public Safety and Emergency Preparedness) v Thomas*, 2021 FC 456 at para 46).

[34] In this case, the Applicant submits that there is abundant evidence showing that he faces a risk of mob or vigilante justice if he is returned to Jamaica. He provided copies of Jamaican newspaper articles that reported on the crimes that gave rise to his extradition proceedings dating from 2016 and 2017, and the anonymous online comments that had been made following this coverage. Much of this online commentary is extremely negative towards the Applicant, some calling for him to be killed, and some calling for mob or vigilante justice to be exacted.

[35] In addition, the Applicant points to an affidavit sworn by his brother who has returned to Jamaica. In that affidavit, the brother recounts that "[a]lmost every person in Jamaica who learned that I was [the Applicant's] brother would have something terrible to say about him." The brother continues: "But what worries me is the number of people who would directly threaten [the Applicant] to me when they learned that I was his brother. They would say things like 'he better not come back here or he'll get what is coming to him" or "he's a dead man if he ever comes back here" or "he's gonna get tyred when people get a hold of him" The latter reference is to a practice in Jamaica of putting tires around a person's body and lighting them on fire.

[36] The Applicant submits that this is clear and convincing evidence that he faces a risk to his life and security if he is returned to Jamaica, which meets the test for irreparable harm.

[37] The Respondent argues that the Court should weigh this evidence against the Applicant's own course of conduct, noting that his desire to not return to Jamaica directly contradicts the efforts he took to remain in – and return to – that country through and after the course of his extradition proceedings. The Respondent notes that some of the newspaper articles and online comments the Applicant relies on were published in 2016, well before he was extradited. Despite the threats against him that had been published in these online comments, the Applicant continued to fight to remain in Jamaica by opposing his extradition.

[38] In addition, the Respondent points to a newspaper article reporting that after he was extradited to Canada, the Applicant's lawyer brought legal proceedings to have him returned to Jamaica. The Respondent argues that all of these efforts by the Applicant to remain in Jamaica

demonstrate that the anonymous online comments did not give rise to a fear at that time, and it urges the Court to consider this in assessing his evidence now.

[39] In addition, the Respondent argues that the brother's affidavit should be given no weight, because it is a last-minute statement by an obviously interested party, which is lacking in details.

[40] This is a difficult case, because there is much force in the Respondent's argument that the Applicant's position before this Court represents a dramatic about-face when contrasted with his long-standing fight to remain in Jamaica even after his case gained public notoriety and the online threats were published. I also agree with the Respondent that the anonymous online comments published years ago in relation to newspaper coverage of the Applicant's case are not the sort of "clear and convincing" evidence that is needed to establish irreparable harm.

[41] On the other hand, the brother's affidavit speaks to more recent threats, and the brother provides some information to indicate that the Applicant's name is still recognized in Jamaica and that threats against him persist. I would note that this affidavit has not been subject to cross-examination – there was simply no time for the Respondent to consider that, much less actually conduct it. Nor was there an opportunity for the Respondent to gather any evidence which might call into question the brother's evidence, or the continued threats faced by the Applicant.

[42] In the circumstances, I am not prepared to entirely discount the brother's affidavit, even though I find it is lacking in details as to the specifics of the threats that were made against the Applicant, and I agree that it must be assessed considering the brother's interest in the outcome of the matter.

[43] On balance, I am prepared to find that the Applicant has met the irreparable harm threshold, based on the current state of the evidence before the Court. I am not persuaded by the dated, anonymous online threats, but I am also not prepared to entirely discount the sworn statement of the brother.

(3) Balance of Convenience

[44] The weighing of the balance of convenience in this case is not a straightforward exercise. I find there are weight considerations on both sides of the ledger here.

[45] There can be no doubt that Canada has an interest in the prompt removal of persons whose refugee claims have not been upheld. This is a specific requirement that is articulated in s. 48(2) of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27. The jurisprudence recognizes that this is not merely a matter of administrative convenience, it goes to the wider public interest in ensuring confidence in the integrity of the immigration program as a whole: *Vieira v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 626; *Selliah v Canada (Citizenship and Immigration)*, 2004 FCA 261 at para 22.

[46] On the other hand, Canada has an important interest in ensuring that it respects fundamental rights and freedoms, including the fundamental right to have one's risks assessed in a manner that respects the principles of fundamental justice. This includes ensuring the fulfillment, in a substantive and meaningful way, of the obligations Canada has undertaken both through the *Canadian Charter of Rights and Freedoms* and by its adherence to international human rights obligations, most particularly here the *Convention Relating to the Status of Refugees*.

[47] In this case, a number of factors weigh in favour of the Minister, including:

- The Applicant's long record of serious criminality, culminating in convictions for three aggravated sexual assaults that left his victims HIV positive and for which he was sentenced to 14 years in prison, offences which both the sentencing judge and the parole Board labelled as "cowardly and selfish";

- The evidence that shows that although he made some efforts toward rehabilitation, he was also "identified as a problematic inmate with high potential for violence";

- He was granted an equitable stay by the IAD, but despite being given a second chance, he persisted in committing serious crimes over a number of years;

- There is reason to call into question his actual fears of returning to Jamaica, in light of his efforts to prevent his extradition, and to be returned there after he was extradited to Canada.

[48] On the other hand, there are elements that weigh in favour of the Applicant, mainly the question he has raised about the PRRA decision, the finding by the PRRA officer that he was at a "heightened" risk if he returned to Jamaica, and the brother's evidence that he faces a risk of vigilante or mob justice if he is returned to Jamaica.

[49] On balance, based on the record before the Court, I find that the balance of convenience weighs in favour of the Applicant, but only barely. This conclusion flows directly from the state

of the record before the Court at the present time. Based on that record, I find that the harm to the Respondent's interests associated with a delay in the removal of the Applicant does not outweigh the harm to his interests associated with removal in the current circumstances.

[50] The Applicant requested a stay until his Application for Leave and Judicial Review of the PRRA decision is determined. That would be the usual outcome in a case such as this. However, I am not persuaded that this is the only available outcome here.

[51] I am therefore granting a stay of the Applicant's removal pending either: (a) a request by the Minister to re-open the matter, based on further evidence (which could include, for example, cross-examination of the brother on his affidavit, or other evidence relating to the possible harm the Applicant faces because of the notoriety of his criminal record); or (b) the determination of his application for leave and judicial review.

[52] If the Respondent wishes to move to re-open the matter, notice is to be given to the Applicant and the Court, following which the Respondent may serve and file any new evidence and submissions within seven (7) days. The Applicant will then have seven (7) days to serve and file any new evidence or submissions and the Court will fix a date and time for the hearing of the matter.

ORDER in IMM-2245-22

THIS COURT'S ORDER is that the application for a stay of removal is granted, pending either:

(a) the determination of the Applicant's application for judicial review of the PRRA decision; or

(b) the Respondent moving to re-open the matter, based on new evidence;

whichever comes sooner.

If the Respondent wishes to move to re-open the matter, notice is to be given to the Applicant and the Court, following which the Minister may serve and file any new evidence and submissions within seven (7) days. The Applicant will then have seven (7) days to serve and file any new evidence or submissions and the Court will fix a date and time for the hearing of the matter.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2245-22
STYLE OF CAUSE:	GEORGE ECCLESTON FLOWERS v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HEARD BY VIDEOCONFERENCE
DATE OF HEARING:	MARCH 16, 2022
JUDGMENT AND REASONS:	PENTNEY J.
DATED:	MARCH 17, 2022

APPEARANCES:

Anthony Navaneelan	FOR THE APPLICANT
Charles J. Jubenville	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Refugee Law Office Legal Aid Ontario Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT