Federal Court Cour fédérale

Date: 20230324

Docket: IMM-3824-23

Citation: 2023 FC 414

Ottawa, Ontario, March 24, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

CARLOS ARTURO ARTEAGA MANNSBACH

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, Carlos Arturo Arteaga Mannsbach, brings a motion for a stay of his removal from Canada, scheduled to take place on March 27, 2023.

[2] The Applicant requests that this Court order a stay of his removal to Colombia until the determination of an underlying application for leave and judicial review of the March 21, 2023 decision of a Canada Border Services Agency officer (the "Officer") not to defer the Applicant's removal pursuant to section 48 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[3] For the reasons that follow, this motion is granted. I find that the Applicant has met the tri-partite test required for a stay of removal.

II. **Facts and Underlying Decision**

[4] The Applicant is a citizen of Colombia and Venezuela, and a gay man.

[5] Although a Colombian citizen, the Applicant has only ever lived in Colombia for eight months from April 2015 to December 2015. He claims that he sold his residence in Venezuela to try and rebuild his life in Colombia, but was unable to find employment while in Colombia. He claims that he was rejected for all jobs he applied to, despite his qualifications, and was told that his Venezuelan education would be of limited assistance.

[6] For the first month of his trip with Colombia, the Applicant stayed with his uncle. However, his uncle was not accepting of his sexual orientation and told the Applicant that he could not stay with him any longer. The Applicant therefore rented his own residence. He

eventually ran out of his savings and had no other way to support himself. He could not rely on his family for financial support.

[7] The Applicant first travelled to Canada in January 2016 on a visitor's visa. He then renewed his visitor status until January 15, 2017. In June 2017, the Applicant made a claim for refugee protection on the basis of his fear of persecution in Venezuela and Colombia as a gay man, and his fear of persecution in Venezuela due to his overt opposition against the ruling party.

[8] In a decision dated July 18, 2018, the Refugee Protection Division ("RPD") refused the Applicant's refugee claim. The Refugee Appeal Division ("RAD") dismissed the Applicant's appeal of the RPD's decision on July 31, 2020. This Court dismissed the Applicant's application for leave and judicial review of the RAD's decision on March 15, 2021.

[9] In July 2022, the Applicant applied for a Pre-Removal Risk Assessment ("PRRA"). The negative PRRA decision was served to him on February 14, 2023, finding that the evidence indicated only discrimination, not persecution against LGBTQ+ individuals in Colombia.

[10] On February 11, 2023, the Applicant's representative filed an application for permanent residence on humanitarian and compassionate ("H&C") grounds on the Applicant's behalf.

[11] The Applicant is currently in Canada on an open work permit, which is valid until October 24, 2023. He has been working as a building superintendent since October 15, 2020.

[12] During his time in Canada since 2016, the Applicant has been living with his aunt and her family. The Applicant claims that his aunt was one of the first to accept him when he came out as gay and considers her as a second mother. His aunt has been diagnosed with terminal cancer and the Applicant claims that she is nearing the end of her life.

[13] The Applicant was served with a Direction to Report on March 3, 2023, informing him to appear for removal scheduled on March 27, 2023. The Applicant submitted a request to deferral his removal with CBSA, which was refused on March 21, 2023.

III. **Analysis**

[14] The tripartite test for the granting of a stay is well established: *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA) ("*Toth*"); *Manitoba (A.G.) v Metropolitan Stores Ltd*., 1987 CanLII 79 (SCC), [1987] 1 SCR 110 ("*Metropolitan Stores Ltd.*"*); RJR-MacDonald Inc. v Canada (Attorney General),* 1994 CanLII 117 (SCC), [1994] 1 SCR 311 ("*RJR-MacDonald*"); *R v Canadian Broadcasting Corp,* 2018 SCC 5 (CanLII), [2018] 1 SCR 196.

[15] The *Toth* test is conjunctive, in that granting a stay of removal requires the applicant to establish: (i) a serious issue raised by the underlying application for judicial review; (ii) irreparable harm that would result from removal; and (iii) the balance of convenience favouring granting the stay.

A. *Serious Issue*

[16] In *RJR-MacDonald*, the Supreme Court of Canada established that the first stage of the test should be determined on an "extremely limited review of the case on the merits" (*RJR-MacDonald* at 314). The standard of review of an enforcement officer's decision is that of reasonableness (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 (CanLII), [2010] 2 FCR 311 ("*Baron*") at para 67).

[17] The Applicant submits that the application for judicial review of the Officer's decision raises serious issues about its reasonableness, specifically with respect to the Officer's assessment of the totality of the Applicant's evidence, whether the findings accorded with this evidence, and whether the Officer was responsive to the Applicant's submissions. The Applicant submits that this is sufficient to raise a serious issue to meet the first prong of the *Toth* test.

[18] The Respondent submits that there is no serious issue to be tried because the Officer reasonably refused to exercise their limited discretion to defer the Applicant's removal, on the basis of the evidence available.

[19] Having reviewed the parties' motion material and the underlying decision, I agree that there is a serious issue to be tried. The underlying application for judicial review raises issues surrounding the reasonableness of the Officer's decision and whether the Officer properly addressed the Applicant's evidence and arguments. This is a sufficiently serious issue to satisfy this first prong of the test.

B. *Irreparable Harm*

[20] At the second stage of the test, applicants are required to demonstrate that irreparable harm will result if relief is not granted. Irreparable harm does not refer to the magnitude of the harm; rather, it is a harm that cannot be cured or quantified in monetary terms (*RJR-MacDonald* at 341). This Court must be satisfied on a balance of probabilities that the harm is not speculative, but does not have to be satisfied that the harm will occur (*Xu v Canada (Minister of Employment and Immigration)* [1994], 25 Imm. L.R. (2d) 120, 79 FTR 107 (FCTD); *Horii v Canada (C.A.)*, [1991] FCJ No 984, [1992] 1 FC 142 (FCA)).

[21] The Applicant submits that he would face irreparable harm upon removal to Colombia. Firstly, he claims that his separation from his terminally ill aunt, who has been like a mother to him, means that he would unable to be present for her impending death and unable to support his cousin during her mother's death. The Applicant also submits that he would face uniquely harmful economic hardship upon return to Colombia, as a gay Venezuelan man.

[22] The Respondent submits that the Applicant failed to provide clear evidence of irreparable harm. The Respondent notes that the Applicant provided insufficient evidence that his aunt's death is imminent and submits that in any event, the Applicant relies on the harm faced by third parties rather than irreparable harm to himself. The Respondent further submits that family separation caused by the Applicant's removal is an inherent consequence of deportation and does not rise to the level of irreparable harm.

[23] I disagree. I find that irreparable harm is made out in the Applicant's case and is the determinative issue on this motion. In my view, characterizing the Applicant's argument on this issue as relying on harm to a third party to establish harm to himself is reductive of the true nature of his submissions. In fact, the Applicant's aunt is one of his closest family members, who not only took him in when he arrived in Canada in 2016, but accepted him after he came out as gay when other family members did not accept him. The Applicant submits that his aunt has been like a second mother to him, and now she is terminally ill and nearing death. The Applicant's aunt states the following in her letter proffered in support of his deferral request:

> My heart breaks at the thought of having to spend my last days without him. This is why I am asking you, from my deathbed, that you have mercy and let his presence continue to fill my days with joy, support, and unconditional love.

[24] In the Applicant's circumstances, I find that his removal would cause irreparable harm due to the dire health situation of his aunt and his resulting inability to be present for her imminent death. In *Tesoro v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 148 ("*Tesoro*"), the Federal Court of Appeal found that the relevant question is whether the applicant's family separation will result in "more than 'the usual consequences of deportation'" and therefore "sufficiently serious to rise above the level of 'mere inconvenience'" (at para 35). If he is removed and must then await the processing of his H&C application, it is most likely that the Applicant will never see his aunt again (*Tesoro* at para 41, citing *Belkin v Canada (Minister of Citizenship and Immigration)*, 1999 CanLII 8451 (FC)). In my view, the Applicant's situation and his aunt's medical reality rises above the level of a mere inconvenience or a usual consequence of removal.

[25] In written and oral submissions, the Respondent repeated that there is no proof that the Applicant's aunt's death is imminent. Providing evidence to prove when exactly a family member will die is an undue and impossible standard. It demands certainty in a situation that belies certainty. The facts on the record are that the aunt is in palliative care, is nearing the end of her life as evidenced by her own statement that she is on her deathbed, is one of the Applicant's closest family members, and her time with the Applicant is running out. In my view, this situation demonstrates imminence.

[26] Paired with the evidence demonstrating that the Applicant would suffer unique economic hardship as a gay Venezuelan man living in Colombia, who has experienced barriers to employment firsthand during his time there, I find that the Applicant's circumstances rise to the level of irreparable harm.

C. *Balance of Convenience*

[27] The third stage of the test requires an assessment of the balance of convenience—a determination to identify which party will suffer the greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits (*RJR-MacDonald* at p. 342; *Metropolitan Stores Ltd.* at p. 129). It has sometimes been said, "Where 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 (CanLII) at para 48). However, the Court must also consider the public interest to uphold the proper administration of the immigration system.

[28] The Applicant submits that the balance of convenience favours the Applicant because he will suffer greater harm if removed than the Respondent would face if the removal were stayed. The Applicant notes that he has complied with Canadian law during his time here. The Applicant contends that the evidence of irreparable harm indicates that the balance of convenience lies in his favour.

[29] The Respondent submits that the balance of convenience lies in favour of enforcing the removal order expeditiously, as per section 48 of *IRPA*. The Respondent notes that the Applicant has had the benefit of three separate risk assessments, all of which have been negative, and his care therefore should be finalized by enforcing removal.

[30] I find that the balance of convenience flows with the evidence of irreparable harm and therefore weighs in favour of the Applicant. His personal circumstances are such that he would face greater harm upon removal to Colombia than the Respondent would face in not being able to enforce removal expeditiously.

[31] Ultimately, the Applicant meets the tri-partite test required for a stay of removal. This motion is therefore granted.

ORDER in IMM-7325-22

THIS COURT ORDERS that:

1. This motion is granted.

2. The Applicant's removal to Colombia on March 27, 2023 is stayed pending the final disposition of his leave and judicial review in relation to the March 21, 2023 decision of the CBSA to refuse his deferral request.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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