Federal Court  Cour fédérale

Date: 20230412

Docket: IMM-4496-23

Citation: 2023 FC 514

Toronto, Ontario, April 12, 2023

PRESENT: Madam Justice Go

BETWEEN:

Rita HORVATH

Applicant

And

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

[1] Ms. Rita Horvath [Applicant] seeks a stay of her removal to Hungary, scheduled for April 12, 2023, until the final determination of her application for leave and for judicial review of a decision dated April 5, 2023 by an Inland Enforcement Officer [Officer] denying the Applicant's request to defer the execution of the removal order [Decision].

[2] Having considered the material filed by the parties and submissions by counsel, I am dismissing the application for a stay.

I. Context

[3] The Applicant is a Roma citizen of Hungary with a somewhat circuitous immigration history in Canada. The Applicant first entered Canada in December 2015 and initiated a refugee claim. The Refugee Protection Division [RPD] denied the Applicant's claim on March 15, 2016, and the Applicant's appeal was dismissed by the Refugee Appeal Division [RAD] on June 16, 2016. The Applicant was removed from Canada on March 13, 2017. She entered Canada again on December 10, 2019, and initiated a Pre-Removal Risk Assessment [PRRA] on May 14, 2021. The Applicant's PRRA was refused on December 20, 2021.

[4] The Applicant last entered Canada on January 13, 2023. She was found ineligible to make a refugee claim on January 24, 2023 and a deportation order was issued against her. The Applicant submitted an application for permanent resident status on humanitarian and compassionate grounds [H&C application] on March 8, 2023. She was served with a Direction to Report on March 30, 2023. The Applicant made her deferral request on April 4, 2023.

[5] After considering the Applicant's reasons for requesting a deferral of removal including hardship, the H&C application and the best interests of the child [BIOC], the Officer concluded that a deferral of removal is not appropriate in the circumstances of this case.

II. Issues and Legal Test for Obtaining a Stay

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

[7] In order to obtain a stay, the Applicant must meet the tripartite test articulated by the Supreme Court of Canada in *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd*, [1987] 1 SCR 110, 38 DLR (4th) 321, *RJR-MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311, 111 DLR (4th) 385 [*RJR-MacDonald*], and *R v Canadian Broadcasting* Corp, 2018 SCC 5, which is the test to be applied to stays of removal: *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302, 11 ACWS (3d) 440 (FCA).

[8] A stay of removal is warranted only if all three elements of the test are satisfied, namely: (i) the underlying application for judicial review raises a serious issue; (ii) the moving party will suffer irreparable harm if the stay is not granted and the removal order is executed; and (iii) the balance of convenience favours the granting of the order.

[9] The application of this test is highly-contextual and fact-dependent. As the Supreme Court of Canada explained, "[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 Solutions Inc*, 2017 SCC 34 at para 1.

III. Analysis

A. *Serious Issue*

[10] While in many cases, the threshold for the serious issue branch of the test is not high, in cases where the stay is requested following a refusal to defer removal, a higher threshold applies. The Applicant needs 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 (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FC 682; *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311 at para 67*;* and *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 43.

[11] In her written representations, the Applicant raises several serious issues with respect to the Decision:

a. The Officer erred in refusing to grant a temporary deferral of her removal based on the Applicant's pending H&C application. Given her strong H&C grounds, the Applicant argues that she deserves being granted additional time in Canada pending the determination of her H&C application;

b. The Officer erred in refusing to defer the Applicant's removal based on the BIOC pertaining to the Applicant's grandchildren; and

c. The Officer erred in refusing to defer the removal based on the Applicant's physical and mental health.

[12] I am not persuaded by the Applicant's arguments.

[13] With respect to the pending H&C application, the Officer referred to Immigration, Refugees and Citizenship Canada [IRCC] Manuel Chapter IP5-3.2, which states that the filing of an H&C application will not delay an applicant's removal and that the IRCC will continue to

process the H&C application. The Officer also noted that the Applicant's H&C application has only recently begun processing, and that the processing time for an H&C application is currently 25 months. The Officer decided not to defer the Applicant's removal for approximately 24 months to allow for the processing of her H&C application.

[14] As the Respondent notes, and as confirmed by the Chief Justice in *Forde v Canada (Minister of Public Safety and Emergency Preparedness)*, 2018 FC 1029, there are temporal limits on a removal officer's discretion to defer removal, and a removal officer does not have the discretion to defer removal to an indeterminate date: at para 40.

[15] While the Applicant argued at the hearing that her H&C application was made in a timely manner, I reject that argument. The Applicant filed her H&C application only after she received notice with respect to her removal, and after her second removal interview.

[16] In light of the factual and legal constraints arising from this case, I find no serious issue concerning the Officer's decision not to defer the Applicant's removal pending the processing of her H&C application, where the decision is not imminent.

[17] Next, the Officer addressed the BIOC by acknowledging the health issues with regard to the Applicant's granddaughter, S. The Officer then noted that the Applicant's family has been living without her assistance in Canada for years and that the BIOC is more properly addressed in the H&C application process.

[18] The Applicant submits that she has been physically present during most of S's life, and the Officer erred in their remark suggesting otherwise. However, as the Respondent notes, the Applicant was in Hungary, away from her grandchild and daughter for more than two years since S was born in 2018. I also agree with the Respondent that the Officer did acknowledge S's health issue, and the difficulties it poses to the family. I am unable to conclude that the Officer's treatment of the BIOC gave rise to a serious issue.

[19] The Applicant also argues that she requires medical treatment from time to time due to her health conditions, referring to her H&C affidavit about her inability to continuously access the "entire treatment" in Hungary as an ethnic Roma. The Officer noted that the Applicant submitted a report written in 2021 by IG Vital Health, which she previously submitted in support of her PRRA application. While acknowledging the Applicant's submissions with regard to her health issues, the Officer noted that the PRRA decision concluded that the Applicant has not pursued any follow-up treatment. As such, the Officer found that it is unknown if the Applicant has pursued care since her return in January 2023. The Applicant has not pointed to any evidence to counter the Officer's findings. Further, I agree with the Respondent that it was open to the Officer to conclude that the Applicant could continue her treatment plan with IG Vital Health via telehealth, from Hungary.

[20] At the hearing, the Applicant raised a new argument, stating that she is facing new risks arising from domestic violence that was not assessed in her previous refugee claim nor PRRA application. The Applicant pointed to two paragraphs in her affidavit for the H&C application, and one paragraph in her H&C submissions in support of this argument. The Applicant noted

that the entire H&C application was before the Officer, who was therefore required to consider the new risk: *Haghighi v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 372 at para 23.

[21] I am not persuaded by this argument. As noted by the Respondent, the Applicant's grounds for her H&C application pertain to her experiences of discrimination as a Roma in Hungary. The Applicant has not clearly outlined her risks of domestic violence, nor provided any evidnece of domestic violence as part of her deferral request such that it could be considered by the Officer. While I note the Applicant did reference these incidents of domestic violence in her request to defer removal, the Applicant did not name this as one of the grounds for her request. Given the narrow discretion of the Officer to defer removal, I do not find any serious issue arising in this respect.

[22] In conclusion, I find the Applicant has not established there are serious issues to be tried.

B. *Irreparable Harm*

[23] While not necessary for me to do so in view of my findings above, I will consider if there is irreparable harm in this case, to ensure I have considered all the equitable factors that may justify the granting of the stay.

[24] 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: *RJR-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. It may also include specific harms that are demonstrated in regard to any persons directly affected by the removal, and who will be remaining in Canada: *Tesoro v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 148.

[25] The law requires that irreparable harm be established based on evidence, not assertions or speculation: *Atwal v Canada (Citizenship and Immigration)*, 2004 FCA 427 at paras 14-15. However, the test for irreparable harm is also not one of absolute certainty: *Suresh v Canada (Minister of Citizenship and Immigration)*, [1999] 4 FC 206 (C.A.) at para 12.

[26] While I am sympathetic to the Applicant's circumstances, and the challenges she faces as a Roma in Hungary, given my findings above with respect to serious issues, I must reject the Applicant's argument that the potential mootness of the underlying AJLR amounts to irreparable harm.

[27] I do not find the Applicant's submission that her H&C application will become illusory upon removal sufficient for demonstrating irreparable harm. What is more relevant is the evidence with respect to country conditions. In this case, however, the Officer did address the Applicant's general assertions of hardship in Hungary based on the country condition reports, but concluded that there was a lack of evidence showing how the Applicant was personally affected. The same conclusion, in my view, must be reached here.

[28] As such, I conclude that the Applicant has failed to satisfy the test for irreparable harm.

[29] I want to make it clear that the Applicant's failure to establish irreparable harm in a stay motion does not necessarily mean that the Applicant does not have a strong H&C case. The Applicant's H&C application will continue to be processed and should be given the due consideration that it deserves.

C. *Balance of Convenience*

[30] In light of my findings above, the balance of convenience favours the Respondent.

[31] The Respondent asked for an order to amend the style of cause. I so order.

ORDER in IMM-4496-23

THIS COURT ORDERS that

1. The application for a stay of removal pending the determination of the Applicant's application for judicial review is dismissed.
2. The style of cause is amended to change the Respondent to the Minister of Public Safety and Emergency Preparedness.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4496-23
STYLE OF CAUSE:	RITA HORVATH v RESPONDENT TO THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HELF VIA VIDECONFERENCE
DATE OF HEARING:	APRIL 11, 2023
ORDER AND REASONS:	GO J.
DATED:	APRIL 12, 2023

APPEARANCES:

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Nicola Shahbaz	FOR THE RESPONDENT

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