Federal Court Cour fédérale

Date: 20230802

Docket: IMM-9394-23

Citation: 2023 FC 1065

Ottawa, Ontario, August 2, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

IMTIAZ MOHAMED
FARAH MOHAMED
WAHEEDA MOHAMED
RAFEEK MOHAMED

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

ORDER AND REASONS

I. Overview

[1] The Applicants bring a motion for a stay of their removal from Canada, scheduled to take place on August 3, 2023.

[2] The Applicants request that this Court order a stay of their removal to Guyana until the determination of an underlying application for leave and judicial review of the refusal of their application for permanent residence on humanitarian and compassionate (“H&C”) grounds.

[3] For the reasons that follow, this motion is dismissed. I find that the Applicants do not meet the tri-partite test required for a stay of removal.

II. Facts and Underlying Decisions

[4] Imtiaz Mohamed (the “Principal Applicant”), Farah Mohamed (the “Associate Applicant”), and their two adult children (collectively, the “Applicants”) are citizens of Guyana.

[5] The Applicants claim to have owned and operated a flourishing business in Guyana. In September 2016, the Applicants’ store was allegedly robbed at gunpoint, while the Associate Applicant and her brother were working there. The two were assaulted, sexually abused, and beaten by the armed robbers. The Associate Applicant was traumatized, particularly given her previous experiences of childhood sexual abuse at the hands of her father, and her brother died by suicide shortly after the incident.

[6] After allegedly filing a police report, the Principal Applicant began receiving threatening phone calls, informing that his family would be harmed if he did not halt the police investigation. The Applicants’ store was allegedly robbed again in October 2016 and January 2017. The Applicants sold the property for money and used the money to flee Guyana on June 22, 2017. The Applicants travelled to Canada, where they made a claim for refugee protection.

[7] The Applicants' claim was rejected, as well as their appeal of this refusal to the Refugee Appeal Division and their subsequent Pre-Removal Risk Assessment application. The Applicants then submitted their application for permanent residence on H&C grounds in January 2023, on the basis of the best interests of the child ("BIOC") affected hardship upon return to Guyana, and establishment in Canada.

[8] On May 12, 2023, the Canada Border Services Agency ("CBSA") served the Applicants with a Direction to Report for removal, scheduled for August 3, 2023. The Applicants' previous immigration representative filed a request for deferral of the removal with CBSA. The Applicants' current counsel provided additional submissions in support of the deferral request in a letter to CBSA, dated July 13, 2023. CBSA refused this deferral request on July 20, 2023.

[9] An immigration officer (the "Officer") refused the Applicants' H&C application in a decision dated July 25, 2023.

III. **Analysis**

[10] 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.

[11] 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*

[12] 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 at para 67).

[13] On this first prong of the tri-partite test, the Applicants submit that the Officer failed to apply the correct considerations in assessing the country conditions, erred in the assessment of the BIOC factor, and erred in assessing the Applicants' establishment. The Applicants submit that these issues are sufficient to meet the low threshold at the first prong of the *Toth* test.

[14] The Respondents submit that the Officer was aware of the applicable test, whose finding was entirely consistent with the relevant jurisprudence. Further, the Respondents submit that the Officer did not err in the assessment of the BIOC factor, in that the Officer clearly stated that it was in the child's best interest to remain with his mother, and reasonably found that insufficient evidence had been presented. Lastly, the Respondents submit that the H&C Officer's findings were clear and gave a detailed engagement with the evidence presented.

[15] 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 Officer's assessment of the H&C factors raised by the Applicants. This is a sufficiently serious issue to satisfy this first prong of the test.

B. *Irreparable Harm*

[16] 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] FCJ No 746, 79 FTR 107 (FCTD); *Horii v Canada (C.A.)*, [1991] FCJ No 984, [1992] 1 FC 142 (FCA)).

[17] The Applicants submit that they would face irreparable harm upon removal to Guyana in several aspects. They submit that they would experience irreparable harm to their mental health, particularly in light of the evidence demonstrating the Associate Applicant's suicidality. The Applicants further submit that Mr. Rafeek, one of the adult children Applicants, would lose access to his personal injury claim if he is absent from Canada; that family separation and stress associated with the Applicants' removal would, in their case, exceed the normal consequences of removal; that the best interests of Liam, the Principal Applicant's 3-year-old grandchild, favour granting the stay of removal, and; that the pending application for judicial review of the H&C

refusal would be rendered moot. The Applicants submit that all these factors rise to the level of irreparable harm sufficient to meet the second prong of the test.

[18] The Respondents submit that the Applicants' submissions do not meet the threshold of clear and convincing evidence of irreparable harm. Specifically, the Respondents submit that the evidence of the Associate Applicant's suicidality is speculative, unsupported by the facts, and overshadowed by the Associate Applicant's credibility issues. The Respondents further submit that there is insufficient evidence to demonstrate that Mr. Rafeek, would lose his ability to participate in his personal injury claim if deported; that there is no objective evidence that Liam would be at higher risk of kidnapping or discrimination, and; that there is no merit to the Applicants' submission that they would inevitably suffer harm because their application for judicial review would be rendered moot by their removal. Therefore, the second prong of the test is not met, as the Applicants failed to demonstrate irreparable harm.

[19] I do not find that the Applicants have provided sufficient evidence that they would face irreparable harm upon removal to Guyana. I agree with the Respondents that there is insufficient evidence of irreparable harm with respect to the Associate Applicant's mental health condition, with no plan outlining a proposed timeline for continued care or any efforts to investigate possible continued care for the Associate Applicant in Guyana.

[20] There is also insufficient evidence of irreparable harm with respect to Mr. Rafeek's accident, such as the lack of available care in Guyana or the inability to arrange for alternatives for potential examinations for discovery in his personal injury claim. The Applicants did not

provide sufficient evidence to establish that Liam, the Principal Applicant's infant grandchild, would face irreparable harm if he accompanied his immediate family members to Guyana upon their removal.

[21] As for family separation and the evidence of generalized risks in Guyana, I do not find that these factors rise to the level of irreparable harm in the Applicants' case. The Applicants have not demonstrated that family separation in their case exceeds the normal consequences of removal, or that the evidence of generalized risks in Guyana would result in specific harm to the Applicants.

C. *Balance of Convenience*

[22] 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 342; *Metropolitan Stores Ltd* at 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.

[23] The Applicants submit that the balance of convenience favours granting the motion because they will suffer greater harm if removed than the Respondents would face if the removal

were stayed. The Applicants contend that the evidence of irreparable harm indicates that the balance of convenience lies in their favour.

[24] The insufficient evidence of irreparable harm is determinative of this motion. That being said, subsection 48(2) of the *Immigration and Refugee Protection Act,* SC 2001, c 27, states that removal orders must be enforced expeditiously. The inconvenience that the Applicants may face as a result of removal does not outweigh the Respondents interest in enforcing the removal order expeditiously.

[25] Ultimately, the Applicants do not meet the tri-partite test required for a stay of their removal. This motion is therefore dismissed.

ORDER in IMM-9394-23

THIS COURT ORDERS that the Applicants' motion for a stay of their removal to Guyana on August 3, 2023 is dismissed.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-9394-23
STYLE OF CAUSE:	IMTIAZ MOHAMED, FARAH MOHAMED, WAHEEDA MOHAMED AND RAFEEK MOHAMED v THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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