Federal Court Cour fédérale

Date: 20230619

Docket: IMM-7028-23

Citation: 2023 FC 859

Vancouver, British Columbia, June 19, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

ALICIA AGUAYO LOPEZ
MARCO ANTONIO CHAIREZ MOLINA

Applicants

and

MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

I. OVERVIEW

[1] The applicants, Alicia Aguayo Lopez and Marco Antonio Chairez Molina, are citizens of Mexico. They have been ordered to leave Canada. After being directed to report for removal on June 26, 2023, the applicants asked a Canada Border Services Agency ("CBSA") Inland Enforcement Officer to defer their removal. On June 5, 2023, the officer refused this request.

The applicants have applied for leave and judicial review of that decision. They now seek a stay of the removal orders pending the final determination of their application for judicial review of the officer's decision.

[2] For the reasons that follow, I am satisfied that the applicants have met the three-part test for a stay. This motion will, therefore, be granted.

II. BACKGROUND

[3] Mr. Chairez Molina and Ms. Aguayo Lopez were both born in Mexico in 1971. They met in 1991, when they were 19 years of age. At the time, Ms. Aguayo Lopez was the mother of two children, one of whom is disabled.

[4] Soon after they met, the applicants migrated together to the United States. Their first child together was born in the United States in 1995. That same year, they were able to arrange for Ms. Aguayo Lopez's other two children to join them there. The applicants eventually had two more children together. Those children were also born in the United States.

[5] Mr. Chairez Molina initially had work permits in the United States. After his last work permit expired in 2007, he remained there without status. Ms. Aguayo Lopez never had legal status in the United States.

[6] In November 2013, Mr. Chairez Molina travelled to Mexico to care for his ailing father. When he attempted to return to the United States two weeks later, he was refused entry.

Sometime after this, Ms. Aguayo Lopez joined Mr. Chairez Molina in Mexico. All of their children stayed in the United States. They remain there today.

[7] The applicants attempted to re-enter the United States illegally twice (in March and October 2015) but both times they were apprehended and returned to Mexico. While they were in Mexico, for the most part the applicants lived in Nayarit State with Ms. Aguayo Lopez's father.

[8] In November 2015, the applicants made arrangements for a human smuggler (also known as a "coyote") to assist them to enter the United States irregularly. However, instead of helping them cross the border, the coyote and his associates kidnapped the applicants and held them for ransom. Both applicants were subjected to severe abuse during this time. They were released after five days when their son paid a ransom of $800. The kidnappers kept their mobile phones and documents, including their birth certificates, passports, and driver's licences.

[9] After they were released, the applicants returned to Nayarit.

[10] In April 2017, the applicants entered Canada as visitors. They submitted claims for refugee protection in November 2017. The claims were based on their fear of harm at the hands of the group that had kidnapped and abused them in 2015.

[11] The claims were initially rejected by the Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada ("IRB"). However, the applicants successfully

appealed the RPD's decision to the Refugee Appeal Division ("RAD") of the IRB and a new hearing before the RPD was ordered. Following that new hearing, in November 2021, the RPD rejected the claims again. The RPD found the applicants' account of their kidnapping to be credible. The RPD concluded, however, that the applicants are not Convention refugees or persons in need of protection because they have a viable internal flight alternative ("IFA") in both Merida and Mexico City. Specifically, the RPD found that the agents of persecution did not have the means or motivation to pursue the applicants in either city and it was reasonable for the applicants to relocate there.

[12] The applicants appealed this decision to the RAD. The RAD dismissed the appeal in April 2022. As did the RPD, the RAD found that the applicants' account of their kidnapping was credible. While accepting that the applicants had a genuine subjective fear arising from their experiences in 2015, the RAD found that their fear of future risk in their "home area" of Nayarit was not objectively well-founded because the agents of persecution had no connection to that area. The RAD therefore held that an IFA analysis was not required because there was no need for the applicants to relocate from Nayarit to avoid future harm in Mexico.

[13] The applicants applied for judicial review of the RAD's decision. In a decision dated April 14, 2023, Justice Fothergill dismissed the application, concluding that the RAD's decision was reasonable: see *Molina v Canada (Citizenship and Immigration)*, 2023 FC 554.

[14] Meanwhile, since they have been in Canada, the applicants have been diagnosed with serious physical and psychological conditions that have required significant ongoing medical and

psychotherapeutic treatment. Of particular note is that the applicants suffer from post-traumatic stress disorder as a result of the 2015 kidnapping.

[15] On May 5, 2023, the applicants submitted an application for permanent residence on humanitarian and compassionate ("H&C") grounds under subsection 25(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). (While ordinarily a failed refugee claimant who has sought judicial review of the decision rejecting the claim for protection must wait for 12 months from the release of the decision denying the application for judicial review before making an H&C application, the applicants relied on the exception under paragraph 25(1.21)(a) of the *IRPA* for individuals who would be at risk because of the inability of their country of nationality to provide them with adequate health or medical care.) The applicants provided further submissions on May 25, 2023. The H&C application is based primarily on the applicants' need to remain in Canada to avoid the psychological trauma they would suffer if they had to return to Mexico and to ensure that their serious health care needs are met.

[16] When the applicants submitted their claims for refugee protection in 2017, they were served with conditional departure orders. Those departure orders came into effect with the release of the decision dismissing the application for judicial review of the RAD's decision: see paragraph 231(1)(b) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("*IRPR*"). With the departure orders now in effect, under subsection 224(1) of the *IRPR*, the applicants were required to leave Canada no later than May 14, 2023. Having failed to do so, their departure orders have become deportation orders.

[17] On May 25, 2023, the applicants were notified by the CBSA that they would be removed from Canada on June 26, 2023, or soon thereafter.

[18] On June 1, 2023, the applicants submitted a request to the CBSA for a deferral of their removal "for a minimum of seven months or until such time as a stage 1 decision on the H&C application can be made." The applicants submitted that, given their significant physical and mental health care needs, and given that health care in Mexico is either inadequate or would be inaccessible to them, they were at risk of serious deleterious health consequences and even of death by suicide if they were required to return to Mexico. If the applicants were to receive a positive Stage 1 assessment – also called approval in principle – this would trigger a stay of the removal orders under section 233 of the *IRPR* pending the final determination of their H&C application. The applicants therefore sought a deferral in order to maintain the status quo until a Stage 1 decision had been made.

[19] In a decision dated June 5, 2023, a CBSA Inland Enforcement Officer refused to defer the applicants' removal. The officer noted that she has little discretion to defer removal. Deferral of removal "is a temporary measure intended to alleviate exceptional circumstances." It requires "compelling evidence of serious detriment resulting from the enforcement of the removal order as scheduled." The officer found that it was outside the scope of her discretion to defer removal pending a decision on the recently submitted H&C application, as the applicants were requesting. (The officer noted that the current processing time of such applications is 22 months.) The officer also observed that many of the factors relied on by the applicants in requesting deferral were really H&C factors but it is not the responsibility of an enforcement

officer to "conduct a preliminary or mini H&C analysis" or to assess the merits of an H&C application (quoting *Newman v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 888 at para 19).

[20] The officer accepted that the applicants have complex medical needs for which they are receiving care in Canada. The officer also accepted that the health services that may be available in Mexico "will not be as specialized in comparison to the services available in Canada." The officer also noted, however, that "there has been no evidence presented to me to indicate that there are no medical services available to them in Mexico." The officer then stated the following:

> Mr. Chairez Molina and Mrs Aguayo Lopez were informed of their removal on May 25, 2023 with a removal date of June 26, 2023 or soon thereafter. This affords them adequate time to work with their physicians in Canada to establish a continuity of care plan prior to the removal date for their care upon their return to Mexico. Further, allegations that removal may cause death or severe harm due to a lack of medical care in the country of removal is not short term deferral, but a request to stay in Canada indefinitely. Of note, Mexican immigration has resources for housing, healthcare, shelter, education, health services etc. that can be made available to individuals while they are being repatriated upon arrival in Mexico. I am willing to work with your clients to ensure they have the appropriate contacts and information to access these services prior to their removal to Mexico.

[21] The officer therefore refused the request for a deferral of removal.

III. ANALYSIS

A. *The Test for an Interlocutory Stay*

[22] An interlocutory stay is a form of equitable relief requiring the exercise of the Court's discretion having regard to all the relevant circumstances (*R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 27). The purpose of such an order is to ensure that the subject matter of the underlying litigation will be preserved so that effective relief will be available should the applicants be successful on their application for judicial review (*Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 24). The fundamental question is whether the granting of the order "is just and equitable in all of the circumstances of the case. This will necessarily be context-specific" (*Google Inc* at para 25).

[23] A party seeking a stay pending the determination of an application for judicial review must demonstrate three things: (1) that the application for judicial review raises a "serious question to be tried;" (2) that the moving party will suffer irreparable harm if a 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 stay pending a decision on the merits) favours granting the stay: see *Toth v Canada (Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123 (FCA); *Canadian Broadcasting Corp* 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.

[24] When asked to grant an interlocutory stay, the Court must determine whether it is 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. The three part test helps guide this discretionary determination. While each part of the test is important, and all three must be met, they are not discrete, watertight compartments. Each part focuses on specific factors that bear on the exercise of the Court's discretion in a particular case (*Wasylynuk v Canada (Royal Mounted Police)*, 2020 FC 962 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; *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 FC 1195 at para 97 (rev'd on other grounds 2021 FCA 84); and *Power Workers Union v Canada (Attorney General)*, 2022 FC 73 at para 56.

B. *The Test Applied*

(1) Serious Issue

[25] To establish a serious issue, it is usually only necessary for the moving party to show that at least one of the grounds raised in the underlying application for judicial review is not frivolous or vexatious: see *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. However, one exception to the usual rule is "when the result of the interlocutory motion will in effect amount to a final determination of the

action" (*RJR-MacDonald* at 338). In such circumstances, the Court must undertake "a more extensive review of the merits" (*RJR-MacDonald* at 339).

[26] This is the case here. If granted, a stay of removal effectively grants the relief sought in the underlying judicial review application – namely, the setting aside of the refusal to defer removal: see *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682, 2001 FCT 148 (CanLII) at para 10; and *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311 at paras 66-67 (per Nadon JA, Desjardins JA concurring) and para 74 (per Blais JA). As a result, to grant the relief sought, the Court must be satisfied, after a hard look at the grounds advanced in the underlying application, that at least one ground carries with it a likelihood of success: again, see *Wang* and *Baron*.

[27] I am satisfied that the applicants have identified grounds for review that raise serious issues meeting this elevated threshold. These grounds relate to the officer's conclusion that no additional time was necessary to establish a continuity of care plan that would meet the applicants' short-term health care needs if they are removed from Canada.

[28] It is well-established that only a limited discretion is available to an Inland Enforcement Officer to defer removal: see *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paras 54-61; *Revell v Canada (Citizenship and Immigration)*, 2019 FCA 262 at para 50; *Toney v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1018 at para 50; and *Gill v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 1075 at paras 15-19. At the same time, this discretion is a key safety valve for limiting the risk of harm

that the general rule – a foreign national who is subject to an enforceable removal order must leave Canada immediately – might otherwise occasion: see *Canadian Council for Refugees v Canada (Citizenship and Immigration)*, 2023 SCC 17 at paras 148-164; see also *Atawnah v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 144, [2017] 1 FCR 153 at paras 13-23.

[29] As the officer in the present case observed, strictly speaking, it is not the responsibility of an enforcement officer to effectively decide an H&C application: see *Newman* at para 19; see also *Shpati v Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 286 at para 45. It must be said that, to a significant degree, the applicants were essentially asking the officer to do just that. Moreover, while the applicants' circumstances are highly sympathetic, it is difficult to see how a deferral until the recently submitted H&C application is decided could come within the proper bounds of the officer's discretion, as those bounds have been delineated in the jurisprudence cited in the previous paragraph. Even the applicants' more limited request for a deferral for seven months to allow time for a first stage decision to be made on the H&C application was not supported by any evidence that a decision would or should be made within that timeframe.

[30] Nevertheless, when the issue is raised, enforcement officers are required to assess the potential impact of removal on the well-being of the party being removed, including risks associated with illness and the loss of access to specialized health care in Canada, even if this factor has also been raised in a pending H&C application. In the present case, the inability of the Mexican health care system to meet the applicants' short term needs was squarely raised in the

deferral request. If, as the applicants contended, the Mexican health care system is simply unable to meet their needs (either because the necessary treatment is not available or, if it is available, it would be inaccessible to the applicants because of their personal economic circumstances), this is necessarily the case for both their long and short term needs. The applicants' position in this regard was supported by evidence from their health care providers in Canada as well as country conditions evidence demonstrating the inadequacies of the Mexican health care system.

[31] Despite the breadth of many of the grounds advanced in the deferral request, the officer understood that she had to consider the impact of removal on the applicants' short term welfare. The officer concluded that a deferral of removal was not warranted because the applicants had been given a month to establish a continuity of care plan and, in any event, there are resettlement services in Mexico that can assist the applicants in this regard once they are there. Consequently, there was no need to defer removal in order to ensure the applicants' short term welfare.

[32] In my view, the applicants have identified serious issues concerning the reasonableness of this conclusion in at least two respects. First, this conclusion is inconsistent with the country conditions evidence that the care the applicants require is simply not available to them in Mexico. The officer does not meaningfully engage with that evidence before reaching a contrary conclusion, raising a serious concern that she was not actually alert and sensitive to the matter before her (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 128).

[33] Second, the only evidence in the record before the officer concerning resettlement services is an October 2021 Foreign Affairs-Interior-Finance-Labor Joint Press Release provided by the applicants. It describes the Mexican government's plans for assisting repatriated citizens in obtaining identification, housing, employment, and similar social services. While there is a passing reference in the press release to the government of Mexico also working to provide "health and psychosocial care" to repatriated citizens, no details whatsoever are provided. In the complete absence of any information about these resources in the decision, there is a serious question as to the reasonableness of the officer's reliance on their existence in concluding that the applicants' short term medical needs will be met in Mexico. More particularly, this absence of information leaves a fundamental gap in the officer's reasoning (*Vavilov* at paras 95-96).

[34] In sum, I am satisfied that the applicants have raised serious issues meeting the elevated threshold as to whether the officer's decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker (*Vavilov* at para 85).

[35] The applicants also raise the issue of whether the officer relied not only on the evidence in the record concerning resettlement services but also on extrinsic information about health services for repatriated citizens in reaching the conclusion that a deferral is not warranted. The officer's statement that she could provide the applicants with contact information for assistance in obtaining medical services in Mexico certainly suggests that she was relying on additional information to which the applicants were not privy. The applicants submit that, if this is so, the requirements of procedural fairness were not met because the applicants did not know the case

they had to meet: see *Canadian Pacific Railway Co v Canada (Attorney General)*, 2018 FCA 69 at para 56. I am satisfied that this, too, is a serious issue meeting the elevated threshold.

[36] Finally, it should go without saying that my assessment of the merits of the underlying application for judicial review is solely for the purpose of this motion. It in no way binds any other judge who may be called upon to consider the judicial review application in some other connection.

(2) Irreparable Harm

[37] 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.*). The question at this stage is whether, if the stay is refused, the applicants will suffer any harm that cannot be remedied in the event that their application for judicial review is successful.

[38] To establish irreparable harm, the applicants 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). They 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.

[39] The applicants contend that, if they are required to return to Mexico now, there is a real probability that they will suffer irreparable harm in the form of a serious decline in their physical and mental health due to the inadequacies of the Mexican health care system. Indeed, they maintain that they are at risk of suicide. At the moment, these harms are only apprehended; they are harms that are expected to occur at some future time, if at all, if the applicants are removed from Canada to Mexico. As Justice Gascon observed in *Letnes v Canada (Attorney General)*, 2020 FC 636, "The fact that the harm sought to be avoided is in the future does not necessarily make it speculative. It all depends on the facts and the evidence" (at para 57; see also *Delgado v Canada (Citizenship and Immigration)*, 2018 FC 1227 at paras 14-19; and *Wasylynuk* at para 136).

[40] As I have discussed elsewhere (see *Singh v Canada (Citizenship and Immigration)*, 2021 FC 846 at para 29; and *Canada (Public Safety and Emergency Preparedness) v Erhire*, 2021 FC 908 at para 37), in my view, the idea of a "real probability of harm," particularly as applied to apprehended future harms, is fundamentally a qualitative as opposed to a quantitative assessment. The harm that is relied on certainly cannot be merely hypothetical or speculative but at the same time it is unrealistic to demand evidence establishing a precise level of risk when the

harm to which the relief is directed will only occur in the future, if at all. As well, as Justice Grammond held in *Cerrato v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1231, "the true overall risk of irreparable harm will always be a function of both the likelihood of the harm occurring and its size or significance should it occur. A sound analytical approach should take this into account" (at para 22).

[41] In applying the second part of the test for an interlocutory stay in the deferral context, the Court must also bear in mind that fundamental rights may be engaged. When this is the case, the Court has an important responsibility for ensuring that these rights are respected and protected. Among other things, this means that the Court "can, and often does, consider a request for a stay of removal in a more comprehensive manner than an enforcement officer can consider a request for deferral" (*Tapambwa* at para 87) and that the Court "has more leeway than an enforcement officer when considering a request for a stay" (*Revell* at para 51).

[42] Looking first at the risk of suicide, it is indisputable that, if there is a real probability of the applicants becoming suicidal, this would satisfy the second part of the test: see *Tiliouine v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1146 at para 13; and *Konaté v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 703 at paras 12-22. However, I am not satisfied that the evidence establishes a real probability of this outcome if the applicants were to be removed to Mexico at this time. In my view, the concerns of the applicants' health care providers in this regard, while obviously genuine, are largely speculative. They are based on a series of contingencies that are simply too remote to meaningfully assess at this time.

[43] On the other hand, I am satisfied on the basis of the medical evidence and country conditions evidence that, if they are removed to Mexico before the underlying application for judicial review is determined, there is a real probability that the applicants will suffer irreparable harm in the form of a serious decline in their physical and mental health.

[44] This risk of harm in Mexico is the same as that assessed by the deferral officer. As Justice Grammond observed in *Gill* (at para 22), “given that the CBSA officer’s role is to assess the harm flowing from the removal of the applicant, the first two prongs of the *RJR* test overlap significantly.” This overlap can cut both ways. On the one hand, the court may be persuaded that the officer’s determination deserves some weight – perhaps even significant weight – in its own independent assessment of irreparable harm. On the other hand, if persuaded under the first part of the test that there is a serious flaw in the officer’s determination, the court can be expected to give much less weight, if any, to that determination in its assessment of irreparable harm. Given that I have found that there are serious questions raised regarding the reasonableness and fairness of the officer’s decision in this case, I give no weight to the officer’s conclusion that the applicants would not be at risk of irreparable harm if they were removed to Mexico at this time.

[45] On my assessment of the record on this motion, it is clear that, without the treatment they are currently receiving in Canada, the applicants face a significant risk of serious adverse health outcomes. It is also clear that the applicants are unlikely to be able to receive the treatment they require in Mexico. In my view, this evidence is sufficient to demonstrate that the applicants face a real probability of harm if they are required to leave Canada at this time. Moreover, that harm

could not be cured if the applicants were ultimately successful on the underlying application for judicial review.

[46] For these reasons, I am satisfied that the applicants have met the second part of the test.

(3) Balance of Convenience

[47] The third part of the test requires an assessment of which party would suffer greater harm from the granting or refusal of a stay of the removal orders pending a decision on the merits of the application for judicial review. To meet this part of the test, the applicants must establish that the harm they would suffer if the stay is refused is greater than the harm the respondent would suffer if the stay is granted. The harm found under the second part of the test is considered again at this stage, only now it is assessed in comparison with other interests that will be affected by the Court's decision. This weighing exercise is neither scientific nor precise (*Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2020 FCA 181 at para 17 [*Canadian Council for Refugees (FCA)*]). It is, however, at the heart of the determination of what is just and equitable in the particular circumstances of the case at hand.

[48] In assessing the balance of convenience, since this is a case involving the actions of a public authority, the public interest must be taken into account (*RJR-MacDonald* at 350). In particular, the applicants are subject to valid and enforceable removal orders. These orders were made pursuant to statutory and regulatory authority. They are therefore presumed to have been made 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. The timely enforcement of removal

orders helps protect the integrity of Canada's immigration system. An action that suspends the effect of the orders (as would an interlocutory stay) is therefore presumed to be detrimental to the public interest (*c.f. RJR-MacDonald* at 346 and 348-49). Whether this is sufficient to defeat a request for an interlocutory stay in a given case will, of course, depend on all the circumstances of the case, including how long the effect of the removal orders would be suspended (*Canadian Council for Refugees (FCA)* at para 27).

[49] In addition to the fact that the applicants are subject to valid and enforceable removal orders, counsel for the Minister submits that two other considerations weigh in the Minister's favour in the balance of convenience: one is the applicants' failure to comply with US immigration law; the other is the applicants' failure to comply with Canadian immigration law.

[50] In my view, the fact that the applicants did not comply with US immigration law is simply irrelevant. In a motion such as this, the public interest determination is limited to the impact of the decision to grant or refuse the stay on Canadian interests. Those interests are unaffected by the fact that the applicants did not comply with the immigration laws of another country.

[51] On the other hand, I do agree that a moving party's failure to comply with Canadian immigration law is a relevant consideration. Depending on the circumstances, it can even be a sufficiently weighty consideration to disentitle the party from obtaining the relief it seeks. In the present case, however, I find that the applicants' failure to comply with Canadian immigration law to be of negligible significance.

[52] The applicants were in Canada for approximately one month after their visitor status expired before they submitted their claims for refugee protection. As well, the applicants failed to leave Canada immediately after their application for judicial review of the negative RAD decision was dismissed. In assessing the significance of these facts (especially the latter one), I place particular weight on the following observation by Justice Fothergill in his decision dismissing the application for judicial review (at paras 40 and 41):

> The circumstances surrounding the Applicants' kidnapping and the severe abuse they suffered are horrific. If either the "compelling reasons" exception or the second prong of the IFA analysis applied to their situation, it is possible they would benefit from them. However, as a matter of law, they do not.
>
> As the RAD wrote at the conclusion of its decision:
>
>> While I recognize that the Appellants have highlighted humanitarian and compassionate factors with respect to their health situations and post-traumatic stress, it is not within the jurisdiction of the RAD or the RPD to consider such factors in the refugee determination process. However, there is a separate and distinct process available to them to make an application for permanent residence based on humanitarian and compassionate factors, pursuant to section 25 of the IRPA.

[53] It bears repeating that, after the application for judicial review was dismissed, the applicants moved expeditiously to prepare and submit a comprehensive H&C application.

[54] In my view, the conduct of the applicants cited by counsel for the Minister adds very little if any weight to the Minister's side of the scale when assessing the balance of convenience.

[55] Finally, there are no other factors that weigh on the respondent's side of the scale. For example, there is no suggestion that the applicants pose a danger to the public or that they are a flight risk.

[56] In sum, the only "inconvenience" to the Minister if the applicants are not removed now and their applications for judicial review are ultimately dismissed is that their removal from Canada will have been delayed; it will not have been frustrated entirely.

[57] On the other hand, the "inconvenience" to the applicants in the form of the serious risks to their health and well-being if they are removed from Canada now is significant and, as I have determined above, irreparable. It is in the applicants' own interests that this outcome be avoided while the legal soundness of the decision to refuse their request for deferral is being determined. It is also in the public interest. The integrity of Canada's immigration system depends on a great deal more than the timely enforcement of removal orders. Allowing removal to proceed despite serious reasons to believe that the decision to enforce removal is legally flawed would undermine the integrity of Canada's immigration system, not enhance it.

[58] For these reasons, I am satisfied that the balance of convenience favours the applicants. The applicants have, therefore, met the third part of the test.

IV. CONCLUSION

[59] Balancing all of the relevant considerations, I am satisfied that it is just and equitable to grant a stay of the applicants' removal. The motion will, therefore, be granted. The applicants

shall not be removed from Canada prior to the final determination of the underlying application for leave and judicial review.

ORDER IN IMM-7028-23

THIS COURT ORDERS that

1. The motion is granted.
2. The applicants shall not be removed from Canada prior to the final determination of their application for leave and judicial review of the June 5, 2023, decision of the Inland Enforcement Officer refusing their request to defer their removal.

"John Norris"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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