Federal Court Cour fédérale

Date: 20230803

Docket: IMM-9607-23

Citation: 2023 FC 1073

Ottawa, Ontario, August 3, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

WALID ALMAKTARI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, Mr. Walid Almaktari, brings a motion for a stay of his removal from Canada, scheduled to take place on August 3, 2023.

[2] The Applicant requests that this Court order a stay of his removal to Yemen until the underlying application for leave and judicial review of the refusal to defer and the determination of a civil claim against the Toronto South Detention Centre ("TSDC").

[3] For the reasons that follow, I dismiss this motion. I find that the Applicant does not meet any branch of the tripartite test required for a stay of his removal.

II. **Facts and Underlying Decisions**

[4] The Applicant is a citizen of Yemen who became a permanent resident of Canada in 1996. He shares four Canadian children with his ex-wife and his three minor children remain in his wife's care.

[5] The Applicant has amassed many criminal convictions in Canada over an almost twenty-year period. He has committed various crimes, including manslaughter and breaking and entering. Canadian courts have deemed the Applicant a long-term offender. Most recently, he was convicted of armed robbery in 2020. The Applicant has completed his criminal sentences but presently remains in immigration detention as a result of the most recent July 12, 2023, Immigration Division ("ID") decision to deny his release from detention.

[6] The Applicant suffers from a substance abuse problem. As a part of his recent release by the Parole Board, one of his conditions is to seek treatment for his substance abuse challenges.

[7] The Applicant has an ongoing personal injury claim against TSDC for a brain injury that he allegedly sustained on August 27, 2022. The Applicant wishes to file an H&C application, however, it does not appear one has been filed as of yet.

[8] The Applicant has a lengthy and repetitive immigration history in Canada: he has been detained repeatedly, starting in 2006. In February 2008, the Applicant lost his permanent residency status due to a determination of serious criminality and a deportation order was issued pursuant to paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[9] On January 13, 2015, Citizenship and Immigration Canada denied the Applicant's pre-removal risk assessment ("PRRA") and he was subsequently transferred to an immigration hold.

[10] The ID has repeatedly detained and released the Applicant. He has frequently violated his release orders, forfeited bond money, and has his bondspersons and the Toronto Bail Program withdraw their support of him.

[11] Following many detentions and releases, the Canadian Border Services Agency ("CBSA") scheduled the Applicant for an escorted removal on July 27, 2023, but the Applicant was unable to sign the Direction to Report. He filed a deferral request, which the CBSA Inland Enforcement Officer (the "Officer") denied on July 25, 2023 (the "July 25 Refusal"). The Applicant filed a motion for a stay in this Court. Although the Court was prepared to hear that

motion, the July 27 removal date was cancelled by virtue of airline flight cancellations and temporary airport closure in Yemen.

[12] Again, on July 31, the Applicant requested a deferral of removal. In support of that deferral request, amongst other letters, the Applicant's father provided a letter on July 21, 2023 explaining the Applicant will face the death sentence if he is sent back to Yemen due to his bisexual orientation. The same Officer denied the second deferral request on August 1, 2023 (the "August 1 Refusal").

[13] On July 31, the Applicant filed this application for a stay of removal challenging the August 1, 2023 refusal.

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.

[16] I note that this Application, in effect, challenges the Officer's decision in both the August 1 Refusal and the July 25 Refusal – as the August 1 Refusal states that the decision should be read in conjunction with the July 25 Refusal. In assessing whether the *Toth* test was met here, I considered both refusals.

A. *Serious Issue*

[17] 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). This Court must also bear in mind that the discretion to defer the removal of a person subject to an enforceable removal order is limited. 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) ("*Baron*").

[18] A decision refusing to defer removal requires the Applicant to meet an elevated standard with respect to the first *Toth* requirement of a serious issue for trial, pursuant to *Baron.*

[19] On this first prong of the tripartite test, the Applicant submits that the threshold is met due to the ongoing humanitarian crisis in Yemen and his minority sexual orientation. In addition, the Applicant asks this Court to consider the best interests of his minor children and the

impact that his removal will have on their development, as well as the fact that he identifies as a bisexual man.

[20] The Respondent argues there is no serious issue here as the Officer reasonably determined that evidence to establish the Applicant's sexual orientation was insufficient. In addition, the Respondent submits that the Applicant's reliance on the country conditions in Yemen ignores that those country conditions do not apply to individuals who are inadmissible to Canada for serious criminality.

[21] Having reviewed the parties' motion material and the Officer's underlying decisions, I do not agree that there is a serious issue to be tried. The Officer considered all relevant evidence in the record, including the father's letter, and came to a reasonable conclusion that there was insufficient evidence on this point.

[22] Risks previously assessed and rejected cannot be relied upon to demonstrate irreparable harm in a subsequent motion for a stay of removal: *Ocaya v Canada (Citizenship and Immigration)*, 2019 CanLII 8561 (FC) at p 4 citing *Saibu v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 103 (CanLII) at para 11, [2002] FCJ No 151 (QL). As such, the Officer reasonably relied on the PRRA assessment's conclusion regarding the Applicant's sexuality. The Officer also reasonably concluded there was insufficient new evidence to change the PRRA's risk assessment.

[23] With respect to the Applicant's children, the Officer also reviewed the evidence on this point in detail. The Officer noted the conflicting evidence from the detention reviews and the evidence in the deferral applications. Based on this record, the Officer reasonably concluded the Applicant's separation from his children was an inherent part of the removal process.

B. *Irreparable Harm*

[24] 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 (CA)*, [1991] FCJ No 984, [1992] 1 FC 142 (FCA)).

[25] The Applicant submits that there is a significant overlap between the irreparable harm and serious issue branches of the *Toth* test. According to the Applicant, his children are still in their early development years and their contact with their father has been "almost completely eliminated" by virtue of his incarceration. The Applicant's removal is not in the best interests of his children ("BIOC") and the Applicant alleges that it will "completely interrupt and irreparably damage" their development progress, which depends on contact with their father.

[26] The Respondent explains that the Applicant's arguments about his children cannot ground a finding of irreparable harm for the purposes of this motion, since irreparable harm

requires evidence going beyond the inherent consequences of deportation (*Melo v Minister of Citizenship and Immigration)*, 2000 CanLII 15140 (FC) at para 21).

[27] I agree. The Officer acknowledged that family separation is an inherent consequence of deportation and there is no evidence here that the Applicant would be unable to communicate with his children. As noted by the Respondent, family separation can also be remedied by readmission, as per the normal course of the *IRPA* (*Patterson v Canada (Citizenship and Immigration)*, 2008 FC 406 at para 31.

[28] Finally, I note that the while Applicant's arguments primarily focus on his sexuality, the country conditions in Yemen, and the BIOC; he also raises his personal injury claim and his forthcoming H&C application. Neither of these considerations establish irreparable harm or a serious issue. Pending litigation is not a bar to deportation: *Cabra v Canada (Citizenship and Immigration)*, 2015 FC 822 at para 21. The Officer properly considered both of these issues.

[29] Consequently, the Applicant has not demonstrated a serious issue or an irreparable harm that flows from the Officer's reasons.

C. *Balance of Convenience*

[30] 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 (at para 48). However, the Court must also consider the public interest to uphold the proper administration of the immigration system.

[31] The Applicant submits that the balance of convenience favours the Applicant. He explains that this is his first request for a stay removal and he has no prior history of abusing this Court's equity. Although the Applicant's criminal history is relevant to the balance of convenience analysis, the Applicant says the completion of his custodial sentence should be considered. This is especially relevant, as he remains in continued detention. In addition, the Applicant argues he should be allowed to continue his head injury claim and his life will be threatened if he is removed.

[32] The Respondent suggests that this stay can be dismissed on balance of convenience alone.

[33] The Respondent submits that the balance of convenience favours the Minister for three reasons. First, where an applicant has a long criminal record and there are high costs associated with incarceration, the balance will favour the Minister. Second, where a public authority seeks to enforce legislation in the public interest, the balance of convenience will favour the Minister. Third, the Respondent indicates that the Applicant remains a danger to the public, in light of recent ID determinations that he should remain in detention.

[34] I agree with the Respondent that the balance of convenience favours the Minister in light of his lengthy and extensive criminal history: see e.g. *Townsend v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 247 at para 6 and *Mohamed v Canada (Citizenship and Immigration)*, 2012 FCA 112 at para 34. The Applicant has many criminal convictions, the latest of which occurred only three years ago and he has shown continued disregard for Canadian criminal law. The Applicant's completion of the custodial portion of his sentence should not weigh in his favour. He remains in detention because of his serious criminality and, according to the ID's determinations, remains a danger to the public.

[35] I also agree that the jurisprudence clearly establishes that where a public authority enforces legislation in the public interest, the balance of convenience favours the Minister: *Ghanaseharan v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261 at para 22 and *Susal v Canada (Citizenship and Immigration)*, 2021 CanLII 117296 (FC) at 12 – 13. It is worth repeating Justice Barne's comments in *Thanabalasingham v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 486 at para 19, which adopted the respondent's submissions as follows:

> Every year this Honourable Court hears hundreds of stay applications. Although illegal, many applicants are hard working, law-abiding people who are simply here in order to improve their lives and the lives of their families. Nonetheless, in order to uphold the immigration scheme and the law, this Court is required to dismiss the motions of most of these would be immigrants. In the instant case, we have an immigrant who has had the opportunity to make a better life for himself in Canada and contribute to Canadian society. He chose not to do so, and instead engaged in serious and violent criminal activity, violating and putting at risk the peace and safety of the Canadian public. To grant a stay in these circumstances, in the Respondent's respectful submission, would be contrary to the spirit, principles, and objectives of the *IRPA*, not

> to mention the principles underlying this Court's discretion to grant the requested relief.

[36] Accordingly, the balance of convenience favours the Respondent. Even if I had found any serious issue or irreparable harm, this factor weighs heavily against granting the relief sought.

[37] Ultimately, the Applicant does not meet any branch of the tripartite test required for a stay of his removal. This motion is therefore dismissed.

ORDER in IMM-9607-23

THIS COURT ORDERS that the Applicant's motion for a stay of his removal is dismissed.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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