Federal Court Cour fédérale

Date: 20240614

Docket: IMM-10071-24

Citation: 2024 FC 921

Toronto, Ontario, June 14, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ABIDEEN OLALEKAN OLADIPUPO

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

[1] The Applicant, Abideen Olalekan Oladipupo, brings a motion for a stay of his removal from Canada, scheduled to take place on June 17, 2024.

[2] The Applicant requests that this Court stay his removal from Canada pending the disposition of an underlying application for leave and judicial review of a negative deferral request rendered by an officer (the "Officer") of Canada Border Services Agency ("CBSA").

[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 his removal.

I. **Facts and Underlying Decisions**

[4] The Applicant is a 63-year-old citizen of Nigeria. He arrived in Canada in 2016 and made a claim for refugee protection.

A. *Procedural history*

[5] From June 5, 2016, to July 19, 2016, the Applicant was held in detention. He had been alleged to be inadmissible under section 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). This allegation was eventually dropped owing to insufficient evidence.

[6] In a decision dated September 7, 2018, the Applicant's refugee claim was refused by the Refugee Protection Division ("RPD"). In a decision dated March 22, 2019, the Refugee Appeal Division ("RAD") refused the Applicant's appeal of the RPD's decision. In a decision dated September 5, 2019, this Court refused leave of the RAD's decision.

[7] The Applicant has made a number of humanitarian and compassionate ("H&C") applications. All of them have been refused. Additionally, on December 7, 2022, Immigration, Refugees and Citizenship Canada ("IRCC") received the Applicant's application for a pre-removal risk assessment ("PRRA"). In a decision dated January 29, 2024, IRCC refused this PRRA application.

[8] On April 2, 2024, the CBSA received a deferral of removal request from the Applicant. On April 3, 2024, the CBSA refused this request.

[9] On April 5, 2024, the Applicant was scheduled for removal from Canada. The Applicant failed to appear for this removal. On April 8, 2024, the CBSA issued a warrant against the Applicant.

[10] On May 6, 2024, this warrant was executed and the Applicant was detained in immigration holding. On May 13, 2024, the Applicant was scheduled to be removed from Canada, but this removal was cancelled.

[11] On June 4, 2024, a removal interview was conducted and a direction to report for removal was issued to the Applicant. On June 10, 2024, the CBSA received the deferral for request under review.

[12] In a decision dated June 13, 2024, the Officer refused the Applicant's deferral request.

[13] The Officer found that there was evidence that the Applicant was not struggling with mental health issues, and found that in an interview conducted with the Applicant on June 10, 2024, there was no mention of his mental or physical health being affected by removal, did not show concern about being left at the airport in Nigeria, and appeared to have family and friends in Nigeria. The Officer found that portions of the testimony from the June 10 interview

contradicted statements in his affidavit and in an intake interview at the Centre for Addiction and Mental Health ("CAMH").

[14] The Officer further found that the Applicant "chose not to invest into his mental health while in Canada and failed to ensure his psychological well-being and ability to care for himself when he clearly had the funds to do so," and that none of his evidence showed he was unfit or unable to fly. Finally, the Officer found that the Applicant's pending H&C reconsideration request and temporary resident permit ("TRP") application were not bars to removal.

B. *The Applicant's circumstances*

[15] The facts forming the basis for the Applicant's attempt to defer his removal are harrowing. I will not recall them all, the events of this past month sufficing to show his vulnerability.

[16] On Monday, May 6, 2024, when the Applicant was detained in immigration holding and told he would be removed to Nigeria in a post-arrest interview, the Applicant began injuring himself.

[17] On Tuesday May 7, 2024, the Applicant was in immigration custody and was told once more that he would be removed to Nigeria. He attempted to end his own life, and was admitted to a hospital until Friday, May 10, 2024, whereupon he was returned to an immigration holding centre. That day, the Applicant attempted to end his own life once more. He was admitted to the CAMH until Saturday, May 11, 2024, whereupon he was returned to immigration holding.

[18] On June 10, 2024, CBSA conducted an interview with the Applicant regarding his removal from Canada.

[19] On June 13, 2024—yesterday—the Applicant was informed that his deferral of removal request had been denied. The Applicant once more engaged in self-harm, attempting to end his own life. A document has been provided to this Court that I will highlight, but of which I will say no more. It was handwritten by the Applicant, where he entitled it a "Note for my children."

C. *Notable evidence*

[20] The Court is in receipt of a number of documents from the parties that bear mentioning.

[21] In a sworn affidavit dated June 13, 2024, made by an enforcement officer of CBSA (the "Affiant") who is the lead escort officer for the Applicant's removal, the Affiant stated that the CBSA "has been diligently making arrangements for the Applicant's travel and arrival in Nigeria." One such arrangement is that the Affiant had spoken with a Liaison Officer and that this Liaison Officer had "reached out" to a hospital in Nigeria, this hospital having "confirmed they would admit the Applicant to their facility upon arrival if required and would provide ambulance services to transport him from the airport to the hospital."

[22] This evidence has been directly contradicted. In an affidavit dated June 14, 2024, provided by the Applicant, there are attached emails from this Nigerian hospital regarding the Applicant. One email states that: "Currently, our bed space is fully occupied." Another states

that the hospital has "made no confirmations" about the Applicant's care arrangements and that the hospital had "only received a generic enquiry email" about the Applicant.

[23] Furthermore, there are two letters from doctors regarding the Applicant's health. The first is dated May 13, 2024, written by a doctor specializing in cosmetics. The second is dated June 13, 2024, written by a family doctor. The doctors' areas of specialty came to light at the hearing for this matter, pointed out by counsel for the Applicant.

[24] The two letters say the same thing, verbatim—and essentially nothing more: "The patient appears to be free of any serious communicable illness/mental health issues." There is no analysis or description of the Applicant's afflictions. There is no indication of what the evaluations entailed. Both evaluations appear in standard-form letters with the same content, other than the differing signatures of the doctors approximately one month apart. And both names of the doctors appears on both letters with their phone numbers, names, and credentials. Notably, the May 13, 2024, evaluation was written shortly after the Applicant had made multiple attempts on his own life.

II. **Analysis**

[25] 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.

[26] 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*

[27] 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*”).

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

[29] Before turning to the tri-partite test, I note that there is no equitable bar to the Court hearing this motion. The Applicant comes to the Court with “clean hands,” having been

forthright about his criminal history and history of non-compliance with immigration laws (*Gracia v Canada (Citizenship and Immigration)*, 2021 FC 158 at para 31).

[30] On this first prong of the tri-partite test, the Applicant submits that the Officer had the duty to grant and jurisdiction for granting the deferral of removal given the Applicant's history of suicidal attempts and lack of treatment in Nigeria, that there are serious concerns with the fairness of the procedure in rendering the deferral decision, and that the Officer failed to engage with the Applicant's requests for a reconsideration of his most recent H&C application and his TRP request.

[31] The Respondent submits that the deferral is reasonable, the evidence of suicidal risk not justifying a deferral in these circumstances.

[32] I agree with the Applicant. Briefly, the Applicant has established serious issues with the Officer's inattentiveness to the submissions put forth regarding the Applicant's repeated and recent efforts to commit suicide (*Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21 at para 74, citing *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 127-128) and the Applicant's lack of opportunity to know the case against him (*Canadian Pacific Railway Company v Canada (Attorney General)*, 2018 FCA 69 at para 56), given the Applicant's mental afflictions in the past month, the evidence that the Officer cherry-picked from the interview with the Applicant during this crisis, and the Applicant's lack of opportunity to respond to this evidence. As counsel for the Applicant rightly put it, the Applicant did not have anyone to speak to about this interview despite his circumstances at the time.

[33] The Respondent's submissions on this branch of the tri-partite test warrant commentary. They will not be the only submissions who so do in this motion.

[34] As noted above, the Respondent claims that the CBSA has made efforts to ensure care arrangements for the Applicant upon arrival in Nigeria. The Respondent's evidence to substantiate this claim is ostensibly the Affiant stating that a Liaison Officer "reached out" to a hospital in Nigeria with the hospital confirming that they would "admit the Applicant to their facility upon arrival."

[35] This statement is without any corroboration or attached communications with said Liaison Officer. And as noted above, this evidence is directly contradicted by emails from this facility stating that there are no beds at this facility, and that there has only been a general inquiry about the Applicant's care.

[36] This is not merely troubling litigation tactics from the Respondent—a Minister of the Canadian government—whereby they attempt to smuggle equivocal evidence into a record to support their position. This conduct borders on—and very closely borders on—misleading the Court. The Court expects frankness, especially given that the Affiant is the lead escort officer in this matter and is a representative of the Canadian government.

[37] Given the urgency of this matter and its truncated timeline, one can reasonably imagine a scenario wherein different counsel for the Applicant had not filed evidence demonstrating that

the CBSA had not, in fact, made care arrangements for the Applicant upon arrival in Nigeria, despite the statements otherwise.

[38] In that scenario, the Court would have had only the Affiant's evidence that the CBSA had made care arrangements in Nigeria for an individual who has attempted to end his own life a day ago. The Court could have taken the Affiant's word for it.

[39] I am deeply unsettled when I contemplate this scenario. The Respondent appears not to be. At the hearing, the Respondent cited a "miscommunication" to explain this evidence.

[40] Let me be clear: I caution the Respondent strongly in engaging in such conduct. The integrity of this Court's proceedings is in hand; the Respondent's duties of candour are in question; and an individual's life is at stake.

B. *Irreparable Harm*

[41] 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)).

[42] The Applicant submits that his long history of suicidal ideations and efforts ground a finding of irreparable harm, especially given the lack of treatment available in Nigeria.

[43] The Respondent submits that there are measures in place in Nigeria such that the Applicant would not face irreparable harm upon removal, and that the Applicant had not led any evidence to establish that he made efforts to obtain care in Nigeria. Furthermore, the Respondent submits that "the Applicant's mental health status alone is not sufficient to establish irreparable harm" and that the Applicant is requesting an indefinite stay.

[44] I agree with the Applicant. It is now trite law that risks of suicide can establish irreparable harm (*Tillouine v Canada (Public Safety and Emergency Prepredness)*, 2015 FC 1146 at para 13, citing *Melchor v Canada (Solicitor General)*, 2004 FC 372, at para 12, *Bodika-Kaninda v Canada (Citizenship and Immigration)*, 2011 FC 1484, at para 13, *Sparhat v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1384, *Koca v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 473, at para 25, *Mazakian v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 1248, at para 33; cited with approval in, for example, *Singh v Canada (Citizenship and Immigration)*, 2023 CanLII 102909 (FC), *Nrejaj v Canada (Public Safety and Emergency Preparedness)*, 2023 CanLII 123029 (FC), *Choi v Canada (Citizenship and Immigration)*, 2021 CanLII 103640 (FC), *AB v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 1301 at para 27, *Castro Ramirez v Canada (Citizenship and Immigration)*, 2023 FC 1243 at para 22, *Aguayo Lopez v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 859 at para 42, *Rivera Marquez v Canada (Public Safety and Emergency Preparedness)*, 2023 CanLII 50936 (FC), *Jalloh v Canada (Citizenship and*

Immigration), 2023 FC 18 at para 38 (citing *Karkarod v Canada (Citizenship and Immigration)*, 2022 FC 1471 at para 35), *Alayaki v Canada (Public Safety and Emergency Preparedness)*, 2022 CanLII 112134 (FC) at para 28). Contrary to the Respondent's submission, the Applicant's mental status is sufficient to establish irreparable harm in this motion.

[45] At the hearing for this matter, the Respondent submitted that a suicidal risk must be "imminent" to establish irreparable harm.

[46] Yesterday. The Applicant attempted to end his own life yesterday. I seriously question the Respondent's judgment—and the Respondent's understanding of the word "imminent"—when the evidence is clear that the Applicant attempted to end his own life yesterday, an attempt amongst many others.

[47] An "imminent" risk of someone taking their own life does not, contrary to the Respondent's logic, require that someone succeed in it. I have warned of such reasoning before (*Yousef v Canada (Public Safety and Emergency Preparedness)*, 2023 FC 1600 at paras 22-23).

[48] I am further troubled the evidence provided by the Respondent that the Applicant is fit to fly, in the form of the doctors' notes—one doctor being experienced in cosmetics, the other a family doctor.

[49] As mentioned above, these documents are essentially copies of one-another. The only real difference in their content is the two different doctors' signatures, and the dates. All that

could be said to be probative in this evidence is the phrase parroted verbatim in both: “The patient appears to be free of any serious communicable illness/mental health issues.”

[50] This is a pitiful justification for an evaluation of the Applicant’s profile. The Applicant has a history of dire mental health issues. He has attempted to take his own life multiple times in the past month. These events overwhelmingly point to dire medical needs.

[51] When considering the weight to attach to these notes for this motion, they are not only of no assistance to the Respondent. They are not worth the paper that they are written on. Irreparable harm is demonstrably established in these circumstances.

C. *Balance of Convenience*

[52] 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, “[w]here 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.

[53] The Applicant submits that the balance of convenience is in his favour, denying this motion vitiating the Applicant's ability to challenge the deferral decision during a time of severe mental heath issues (whilst in detention) while only delaying the Respondent's interest in removing the Applicant expeditiously. Furthermore, the Applicant submits that his private interest and the public interest align in having the deferral request subject to judicial review (*Erhire v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 941 ("*Erhire*") at para 83).

[54] The Respondent submits that the balance of convenience is in their favour, the Applicant having been convicted of criminal offences and the Respondent having a duty to remove the Applicant expeditiously.

[55] I agree with the Applicant. The balance of convenience is in his favour, the "public interest in ensuring that justice is done in the underlying application for judicial review" (*Erhire* at para 83) outweighing the Respondent's interest in enforcing removal expeditiously under section 48(2) of the *IRPA*. This is especially so given that the Applicant has established serious issues with the Officer's decision, as well as irreparable harm upon removal to Nigeria.

[56] A final note in this matter. The Respondent's conduct throughout these proceedings have been unnerving, approaching unacceptable. The facts of this matter are tragic. The Applicant has faced much, and survived much.

[57] The Respondent submits that "[g]ranting a stay in the circumstances of this case would also be contrary to the spirit, principles, and objectives of the *IRPA*." I disagree.

[58] The equitable nature of the remedy sought in this matter would be devoid of meaning if it could not account for the Applicant's suffering. And thus he has met the tri-partite test required for a stay of removal. This motion is granted.

ORDER in IMM-10071-24

THIS COURT ORDERS that the Applicant's motion is granted and his removal stayed pending the disposition of the underlying application for leave and judicial review.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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