Federal Court Cour fédérale

Date: 20161027

Docket: IMM-4371-16

Citation: 2016 FC 1194

Montréal, Quebec, October 27, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

RAJEEV DHEER
HARPREET KAUR
DIVYANSHI DHEER

Applicants

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

[1] This is a motion for a stay of execution of the removal order that is currently pending with respect to the Applicants. The departure from Canada is scheduled for October 30, 2016.

[2] The Applicants arrived in Canada, from India, on May 13, 2012. We are told that they made a refugee claim shortly thereafter. The three are Indian nationals aged 35, 26 and 5 years old. Their refugee claim was dismissed by a decision dated January 7, 2006.

[3] In essence, the Refugee Protection Division [RPD] concluded that the testimony of the principal Applicant, the father, suffered from significant credibility gaps. Basically, the principal Applicant claims that following the hiring of an individual in December 2011, the police suspected him to be a militant and, by association, the claimant would have been arrested and tortured a few times over the next four months. Having obtained a visa to come to Canada in April 2012, the Applicants arrived in mid-May.

[4] The application for leave in order to launch the judicial review application was dismissed on April 13, 2016. Evidently, a judge of this Court concluded that there was not even a fairly arguable case to argue (*Bains v Minister of Employment and Immigration)*, (1990) 109 NR 239) for the relief proposed to be sought. On September 29, 2016, a request for a deferral of removal was filed and that request was denied on October 14, 2016. It is that refusal of a deferral request that is the subject of a judicial review application. In support of that judicial review application, a stay of removal is sought, presumably pursuant to s 18.2 of the *Federal Courts Act*.

[5] It should be noted that is also pending an application to be issued a permanent residence visa from within Canada where the Applicants are arguing that humanitarian and compassionate considerations are present, as is permitted by s 25 of the *Immigration and Refugee Protection*

Act, SC 2001, c 27 [IRPA]. It is expected that the application will not be heard for many months, maybe not before some two and a half years.

[6] As is well known, in order to prevail, the Applicants must satisfy the tripartite test enunciated in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, as applied in the immigration context in *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 [*Toth*]. The three prongs of the test must be satisfied in order for the Applicants to prevail. The branches of the test are:

1. That there exists a serious issue to be determined in the underlying judicial review application;
2. That if the stay is not granted the applicants will suffer irreparable harm and;
3. The balance of convenience favours the applicants.

[7] The serious issue is presented as being an arguable case. That is mistaken. Moreover, the case law refers to the test for a serious issue to be simply that the issue is neither frivolous nor vexatious. However, there are exceptions to the rule as found in *RJR-Macdonald*. As put bluntly by Justice Pelletier, then of this Court, in *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FCR 682:

> I am therefore of the view that where a motion for a stay is made from a removal officer's refusal to defer removal, the judge hearing the motion ought not simply apply the "serious issue" test, but should go further and closely examine the merits of the underlying application. (para 10)

Later, at the end of paragraph 11, Justice Pelletier states what is the test to be applied in those circumstances:

> It is not that the tri-partite test does not apply. It is that the test of serious issue becomes the likelihood of success on the underlying application since granting the relief sought in the interlocutory application will give the applicant the relief sought in the application for judicial review.

[8] It follows that the Applicants must establish that there is the likelihood of success that they can challenge the decision of the removal officer on judicial review.

[9] The case put forth by the Applicants consists of arguing that the interests of the children and the protection of the family life are jeopardized and that, as such, the decision of the removal officer would be likely overturned on judicial review. Furthermore, the Applicants continue to argue that they are in some form of jeopardy, in spite of the clear finding of the RPD in its decision of January 2016, finding left undisturbed by this Court.

[10] There is in my view very little likelihood of success in putting forth these arguments. That is because of the very limited jurisdiction of the removal officer and a number of binding authorities from the Federal Court of Appeal that do not recognize the kind of arguments put forward in this case.

[11] It is s 48 of the IRPA that governs. It reads:

Enforceable removal order	Mesure de renvoi
48 (1) A removal order is enforceable if it has come into force and is not stayed.	48 (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
Effect	Conséquence
(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible.	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être exécutée dès que possible.

This is the situation in which the Applicants find themselves. There is an enforceable removal order and it is the duty of the removal officer to enforce it as soon as possible.

[12] The removal officer is not without any discretion when a removal order is to be enforced. However, the Federal Court of Appeal in *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311 [*Baron*], is a binding authority for the proposition that "[i]t is trite law that an enforcement officer's discretion to defer removal is limited." (para 49). Nadon J.A., with the support of Desjardins J.A., found at para 50:

> [50] I further opined that the mere existence of an H&C application did not constitute a bar to the execution of a valid removal order. With respect to the presence of Canadian-born children, I took the view that an enforcement officer was not required to undertake a substantive review of the children's best interests before executing a removal order.

That approach found echo in the reasons of Blais J.A. (as he then was) who wrote that "H&C applications are not intended to obstruct a valid removal order". (para 87)

[13] A different bench of the Federal Court of Appeal reached the same conclusion in *Shpati v Minister of Public Safety and Emergency Preparedness*, 2011 FCA 286, [2012] 2 FCR 133, where Evans J.A., on behalf of the Court, ruled that "enforcement officers are not intended to make, or to remake, PRRAs or H&C decisions" (para 45). This is in effect what the Applicants argue should have been done by the removal officer. They speak of the better life the children would enjoy in Canada and of the family life that should be enhanced and cherished. That leads to the conclusion "that the humanitarian application that they have submitted should be studied before any deportation" (Memorandum of facts and law, para 13). Unfortunately for the Applicants, such is not the state of the law. These are not considerations that are to be taken into account at the stage of removal.

[14] The Applicants also complained about the decision made the by Refugee Protection Division. Furthermore, they submit that there continues to be a culture of impunity in India for the police.

[15] One can read the following two paragraphs taken from paragraph 51 of the decision in *Baron*:

> – The Minister is bound by law to execute a valid removal order and, consequently, any deferral policy should reflect this imperative of the Act. In considering the duty to comply with section 48, the availability of an alternate remedy, such as a right to return, should be given great consideration because it is a remedy other than failing to comply with a positive statutory obligation. In instances where applicants are successful in their H&C applications, they can be made whole by readmission.
>
> – In order to respect the policy of the Act which imposes a positive obligation on the Minister, while allowing for some discretion with respect to the timing of a removal, deferral should be reserved for those applications where failure to defer will

> expose the applicant to the risk of death, extreme sanction or inhumane treatment. With respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety. (Emphasis in original.)

[16] The insurmountable difficulty faced by the Applicants is that their claim to being threatened in India was found to be not credible and this Court refused to intervene by denying the authorization to launch a judicial review application. The story as told by the principal Applicant was not believed. There are not new facts since the Refugee Protection Division decision: merely the same allegations are presented again. It follows that there is no serious issue and the motion for a stay of the execution of the removal order must be dismissed.

[17] I note however that the application would also have failed the irreparable harm branch of the test. The Applicants have argued before this Court that their life in India will be different. The focus is put on the children of the couple (there is a younger child who is not concerned with this motion because the child was born in Canada). The prospects of the children would not be as good if they have to go to India where there is "a danger of extreme poverty, no job and no money for this family". Furthermore, the Applicants raise again the danger the principal Applicant would face because he would have to hide from the police. Again, this issue was canvassed before the RPD and the credibility of the principal Applicant did not survive.

[18] As the Federal Court of Appeal found in *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126;

> [15] General assertions cannot establish irreparable harm. They essentially prove nothing:

> It is all too easy for those seeking a stay in a case like this to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court's satisfaction – that the harm is irreparable.

(*Stoney First Nation v. Shotclose*, 2011 FCA 232 at paragraph 48.) Accordingly, "[a]ssumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight": *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255 at paragraph 31.

[16] Instead, "there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted": *Glooscap*, *supra* at paragraph 31. See also *Dywidag Systems International, Canada, Ltd. v. Garford Pty Ltd.*, 2010 FCA 232 at paragraph 14; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 at paragraph 12; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraph 17.

Obviously, in this case, that demonstration has not been made.

[19] In case there would be any doubt that this case law would apply in the immigration context, Chief Justice Richard wrote in *Atwal v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427, 330 NR 300, that "irreparable harm must constitute more than a series of possibilities" (para 14). There is also guidance, of a binding nature, coming from the Federal Court of Appeal on the nature of the harm to be considered. In *Selliah v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, Evans J.A. wrote:

> [13] The removal of persons who have remained in Canada without status will always disrupt the lives that they have succeeded in building here. This is likely to be particularly true of young children who have no memory of the country that they left. Nonetheless, the kinds of hardship typically occasioned by removal cannot, in my view, constitute irreparable harm for the

> purpose of the *Toth* rule, otherwise stays would have to be granted in most cases, provided only that there is a serious issue to be tried: *Melo v. Canada (Minister of Citizenship and Immigration)* (2000), 188 F.T.R. 29.

[20] The Court in *Selliah* also concluded that the risk of persecution (in this case, Sri Lanka) was not personal, as opposed to general. The Court relied on the Refugee Board and the PRRA officer that had concluded that the person was not at personal risk. We have a similar situation here where the Applicants argue that there is a culture of impunity in India, which would at best constitute a general risk, and that the Refugee Protection Division (and this Court for refusing to grant leave) was mistaken in finding that there is no personal risk. That issue has been dealt with.

[21] It follows that, in spite of the spirited argument made on behalf of the Applicants, the motion for a stay of the execution of the removal of the Applicants, scheduled for October 30, 2016, must be dismissed.

ORDER

THIS COURT ORDERS that the motion for a stay of the execution of the removal of the Applicants, scheduled for October 30, 2016, is dismissed.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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