Federal Court  Cour fédérale

Date: 20180406

Docket: IMM-1498-18

Citation: 2018 FC 375

Ottawa, Ontario, April 6, 2018

PRESENT: The Honourable Mr. Justice Grammond

BETWEEN:

JOY OBIAGELI IHEONYE
JANELLE NE'SOOCHI IHEONYE

Applicants

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS

[1] The applicants, Ms. Joy Obiageli Iheonye and her daughter Janelle Ne'Soochi Iheonye, bring a motion for a stay of their removal from Canada scheduled for April 9, 2018. The motion was heard earlier today by teleconference. These are my reasons for granting the motion.

I. Facts and Underlying Decision

[2] The applicants are citizens of Nigeria. The minor applicant, whom I will call by her first name, Janelle, is now ten years old. She has lived significant parts of her life in the United States, where her mother, Ms. Iheonye, was studying. As a result of matrimonial difficulties, the applicants moved back and forth between Nigeria and the United States in recent years.

[3] The applicants came to Canada on foot, at Roxham Road in Saint-Bernard-de-Lacolle, on July 1, 2017. Because of a prior claim, they were unable to claim refugee status and were offered the opportunity to apply for a pre-removal risk assessment [PRRA] instead. Their application was denied on January 29, 2018. They did not seek judicial review of that decision.

[4] The applicants were then informed that their removal was scheduled for April 9, 2018. On March 28, 2018, they applied to an Enforcement Officer for a deferral of their removal, because of a pending application to stay in Canada on humanitarian and compassionate [H&C] grounds, which they made the same day, and because Janelle should be allowed to complete her school year.

[5] On March 29, 2018, the Enforcement Officer denied the application. As to the best interests of Janelle, he wrote the following:

> Keeping in mind the best interest of the child, understanding that her parent's wish is to allow her complete school year [*sic*], I consider that the daughter is not at a terminal level (6^{th} primary or 5 secondary) and find that it would not be an excessive burden to have her continue her studies in Nigeria at the middle of the year.

[6] The applicants sought judicial review of the decision of the Enforcement Officer. In the context of that application, they brought a motion for the stay of their removal.

II. Analysis

[7] On a motion for stay of removal, this Court applies the same test as for interlocutory injunctions. The Supreme Court of Canada recently restated the test as follows:

> At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.
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> (*R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12, references omitted)

[8] This three-pronged test is well-known. It had been set out in earlier decisions of the Supreme Court (*Manitoba (Attorney General) v Metropolitan Stores Ltd.*, [1987] 1 SCR 110; *RJR — MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR*]). It was also applied in the immigration context in *Toth v Canada (Minister of Employment and Immigration)*, 1988 CanLII 1420 (FCA). Of course, the application of this test is highly contextual and fact-dependent.

A. *Serious Question to be Tried*

[9] In *RJR*, the Supreme Court stated that the "serious question to be tried" criterion is a relatively low threshold (*RJR* at 337). However, the Supreme Court also said that a more demanding test must be applied where the interim relief sought has the practical effect of deciding the underlying action (*RJR* at 338-339). This is the case where an application for judicial review is brought against a decision of an Enforcement Officer refusing to defer removal. In that context, a motion for stay of removal gives the applicant what he or she is asking for in the underlying application. For that reason, the Federal Court of Appeal stated that the applicant must show "quite a strong case" (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paras 66-67 [*Baron*]), keeping in mind that the applicable standard of review on the merits is reasonableness.

[10] The Federal Court of Appeal and this Court have said on several occasions that the Enforcement Officer's discretion to defer removal is very limited, but that one example of a proper exercise of that discretion is to allow a child to finish a school year in Canada. A recent example is the *Lewis* decision:

> Thus, neither *Kanthasamy* nor the Children's Convention required the Enforcement Officer in this case to undertake a full-blown assessment of the best interests of Mr. Lewis' daughter or to grant the requested deferral until Mr. Lewis' last minute H&C application was decided by a ministerial delegate. Rather, the Enforcement Officer was only required to consider the short-term best interests of the child.
>
> In previous cases, such short-term best interests have been found to include matters such as the need for a child to finish a school year during the period of the requested deferral […]

> (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paras 82-83; see also *Baron* at paras 49, 51 and 54)

[11] In this case, the applicants submitted evidence of research results showing that changing schools may be detrimental to a child's educational achievement. While their lawyer asserted that this evidence shows that transfers that occur in the middle of the school year are more detrimental than those occurring at the end of a year, the materials do not draw such a distinction. Nevertheless, it is a matter of common sense that a transfer in the middle of a year would be more detrimental. The decisions of the Federal Court of Appeal mentioned above seem to be based on that common-sense presumption.

[12] The Enforcement Officer, in the passage quoted above, seems to have adopted a hard-and-fast rule to the effect that the need to complete a school year would be considered only where the year in question is a "terminal year." In doing so, he appears to have fettered his discretion and to have significantly narrowed the scope of the discretion recognized by the Federal Court of Appeal.

[13] Of course, the fact that the Enforcement Officer has discretion to defer removal to allow a child to complete a school year does not mean that this discretion must be exercised in favour of the applicant in every case. Nevertheless, I note that the Enforcement Officer does not appear to have considered a number of factors peculiar to this case, which would have favoured a deferral:

- We are now in April, relatively close to the end of the school year;

- Although there is a factual dispute between the parties, it appears that Janelle never went to school in Nigeria;

- Janelle has already undergone a number of moves in her life;

- Janelle was affected by the death of her older sister.

[14] In light of all the circumstances, I am of the opinion that the applicants have shown a "strong case."

B. *Irreparable Harm*

[15] The second prong of the RJR test relates to irreparable harm. In assessing that second criterion, it must be borne in mind that a certain degree of hardship is inherent in removal from Canada (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 51, [2015] 3 SCR 909 at para 23). Such hardships may not be taken into account, lest the entire scheme of the Act be defeated.

[16] Where the motion for stay of removal is made in the context of an application for judicial review of the decision of an Enforcement Officer not to defer removal, there is a large degree of duplication between the first and second criteria of the RJR test (*Kanumbi v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 336 at para 23 [*Kanumbi*]).

[17] However, counsel have directed me to apparently conflicting decisions of this Court regarding whether the disruption of a school year constitutes irreparable harm (contrast *Commissiong v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 539, with *Kakonyi v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 1410).

[18] Given the urgency of the matter, I will state my views succinctly.

[19] The Federal Court of Appeal held that the need to finish a school year may constitute a valid reason to defer removal, even though it recognized that such deferral may be ordered only in narrow circumstances. This must mean that being forced to change schools in the middle of the year may cause sufficiently serious prejudice. If it must be considered by the Enforcement Officer in making a deferral decision, I fail to see why it could not be considered by this Court when assessing irreparable harm.

[20] Moreover, the course of one's childhood cannot be changed retroactively. Children are particularly sensitive to the way their lives unfold. It seems to me that this is an obvious example of a harm fits the definition given by the Supreme Court of Canada:

> "Irreparable" refers to the nature of the harm suffered rather than its magnitude. It is harm which either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other.
>
> (*RJR* at 341)

[21] For the reasons mentioned above at paragraphs [12]-[14], I am of the view that the interruption of Janelle's school year would amount to irreparable harm.

C. *Balance of Convenience*

[22] At this last stage of the RJR test, prejudice to the applicant must be balanced against prejudice to the respondent who is prevented from enforcing the law.

[23] Relying on *Kanumbi*, counsel for the respondent argues that the applicants' illegal entry in Canada, as well as the fact that they overstayed their visa in the United States, shows a contempt for immigration laws that disentitles them from any remedy.

[24] It appears that the applicants are among the large number of people who, last year, came to Canada from the United States without reporting to a customs office as required by the law. I do not wish to comment upon the motives of those people, the advice that may have been given to them nor the general socio-political context that gave rise to this wave of illegal border crossing. It seems to me, however, that the illegality inherent in this manner of entering Canada is not such that it disentitles all these people from seeking a remedy from this Court, which would be the result of the respondent's argument.

[25] I would add that the applicants do not have any criminal record and did not fail to report to the authorities once in Canada. Ms. Iheonye also found employment quickly. Thus, the applicants' situation is far removed from the facts of *Kanumbi*, which I need not repeat here.

[26] Lastly, as I will explain later, the stay of removal will be granted only until the end of the school year. Thus, the inconvenience imposed on the respondent is of limited duration.

[27] Thus, I find that the balance of convenience is in the applicants' favour.

III. Remedy

[28] Initially, the applicants asked the Enforcement Officer to defer removal until their H&C application is determined or, in the alternative, until the end of the current school year. Before this Court, the applicants do not rely on their pending H&C application, but only on the need to allow Janelle to finish her school year. Thus, they seek judicial review of only one aspect of the Enforcement Officer's decision. It follows that they can only ask for a remedy that relates to the part of the decision that they are challenging. That means that the stay of removal should only be granted until the end of the school year.

[29] Nevertheless, counsel for the applicants argues that the stay should last until the underlying application for judicial review is finally determined. I do not agree.

[30] In many cases where the decision of an Enforcement Officer is challenged, the motion for stay of removal will give the applicant what he or she is seeking and the application for judicial review will never proceed on the merits. It is precisely for that reason that a higher threshold is applied with respect to the first part of the *RJR* test.

[31] Thus, this judgment will give the applicants what they were asking of the Enforcement Officer. The underlying application will obviously become moot. Moreover, as a practical matter, the application would likely be heard sometime in the fall and we would run in the same difficulty of Janelle being forced to interrupt a school year.

[32] In conclusion, I will issue an order staying the applicants' removal from Canada until June 30, 2018, a few days after the end of the school year.

JUDGMENT

THIS COURT'S JUDGMENT is that the motion for a stay of the removal of the applicants is granted until June 30, 2018.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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