Federal Court  Cour fédérale

Date: 20190920

Docket: IMM-4161-19

Citation: 2019 FC 1196

Ottawa, Ontario, September 20, 2019

PRESENT: Mr. Justice Pentney

BETWEEN:

A.C., R.M., A.M.M., A.E.D.M., A.D.M.

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Context and Procedural History

[1] The Applicant, A.C., seeks a stay of removal to Mexico, scheduled for September 20, 2019.

[2] For reasons which will become clear below, on the consent of the parties the Court has determined that it is in the interests of justice that the names of the Applicants should not be included in these reasons, and instead they shall be identified by initials. The Court file is not

otherwise closed. In the circumstances of this case, this strikes an appropriate balance between the open court principle and the privacy interests of the Applicants: *EF v Canada (Citizenship and Immigration)*, 2015 FC 842, at para 8; *AB v Canada*, 2018 FC 237.

[3] This case has taken an unusual procedural turn, as will be explained below. It is necessary to review the background to this matter before addressing the substance of the argument on the stay motion.

[4] The case involves a husband (hereinafter referred to as A.C., or the Applicant) and his common law wife (R.M.), together with two of their three children (A.M.M., 17 years old, and A.E.D.M., 12 years old), who are all citizens of Mexico. Their youngest child (A.D.M., 7 years old) was born in Canada, and so he is a Canadian citizen. The eldest child, A.M.M., is the wife's son from a previous relationship who resides with the couple.

[5] A.C. arrived in Canada from Mexico in May 2007, and he filed a claim for refugee protection. R.M. and their two children arrived in September 2007, and they were added to his refugee claim. The refugee claim was refused in June 2008, and the family was scheduled for a pre-removal interview in February 2009. They did not report, and have been living in Canada without status ever since.

[6] In June 2018, the family submitted an application for permanent residence on humanitarian and compassionate (H&C) grounds. In May 2019, A.C. was arrested by the Canada Border Services Agency and held in detention for four days. He was subsequently released from custody.

[7] On June 6, 2019, the Applicant's request for H&C relief was refused. The Applicants filed an application for leave and judicial review of the negative H&C decision, but as of this date no decision has been made on their leave application. A Direction to Report was issued on August 16, 2019, with a departure to Mexico scheduled for September 20, 2019. The Applicants have sought a stay of removal, pending a determination of their application for leave and judicial review.

[8] In support of their stay application, the Applicants filed substantial evidence about the medical condition of R.M. and their children. Included in this evidence are notes and reports from medical professionals that make reference to R.M.'s psychological condition, including that she experienced childhood sexual abuse and that she has Post-Traumatic Stress Disorder (PTSD) as well as major depressive disorder. The notes also indicate that she stated to her treating physicians that she had experienced problems in her relationship with her husband, including some domestic violence early in their relationship, as well as incidents of non-consensual sexual activity with him. Notes that are more recent indicate that she stated that A.C. had used the services of prostitutes, and that this had triggered her trauma memories and increased her symptoms. These matters have been mentioned in a few reports, including ones dated from 2012, 2014, and July 2018.

[9] Based on this information, late on September 16, 2019 (that is, the day prior to the hearing of the stay motion) the Respondent issued a deferral of the removal for R.M. and the children. The Court was apprised of this in a supplementary affidavit from R.M. that was filed on the morning of September 17, 2018. The Respondent did not object to the filing of this late

affidavit, but did make submissions as to the weight that should be attributed to it. There were substantial submissions on this point, which will be addressed below.

[10] This turn of events means that the application for a stay initially filed in relation to the removal of the entire family was transformed into an application only on behalf of A.C. The evidence which had been submitted in support of the stay, as well as the written arguments, was obviously not specifically directed to this, because that was not the situation until the day prior to the argument. The matter was argued on this basis, and this decision will only address the application for the stay on behalf of A.C.

II. Issue

[11] The only issue is whether a stay of removal should be granted to prevent the removal of A.C. from Canada.

III. Analysis

[12] The statutory basis for a stay of removal is found in section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7, which provides that this Court may make interim orders pending the final disposition of an application for judicial review. In considering such relief, the Court applies the same test as for interlocutory injunctions. In *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12, [2018] 1 SCR 196 [*CBC*] the Supreme Court of Canada recently stated 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.
>
> [Footnotes omitted.]

[13] This three-pronged test is well-known. It had been set out in earlier decisions of the Supreme Court (*Manitoba (AG) v Metropolitan Stores Ltd*, [1987] 1 SCR 110; *RJR – MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR – MacDonald*]). It was also applied in the immigration context in *Toth v Canada (Employment and Immigration)*, (1988) 86 NCR 302, 6 IMM LR (2d) 123 (FCA).

[14] The test is conjunctive, so an applicant must meet all three elements of the test. However, the test is ultimately an equitable one – and so an overall assessment must be made, such that a weaker case on one element is not necessarily fatal, if one or other of the remaining elements is found to weigh heavily in the applicant's favour. As the Supreme Court of Canada recently stated, in *Google Inc v Equustek Solutions Inc*, 2017 SCC 34, [2017] 1 SCR 824 at para 25: "The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific."

A. *Serious Issue*

[15] The "serious issue" test is not a high standard. It is often summarized as merely requiring a claim which is neither "frivolous nor vexatious": *RJR – MacDonald* at 337. This standard is less exacting than the test used to evaluate whether leave should be granted pursuant to section

72 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [*IRPA*]: *Brown v Canada (Citizenship and Immigration)*, 2006 FC 1250, at para 5.

[16] An issue arises in this case as to whether the serious issue must be assessed in regard to the underlying application for judicial review of the H&C decision, which relates to all of the family members, or only in relation to an aspect of that decision which relates to A.C., since he is the only one currently subject to removal. I find that the logic of the serious issue threshold requires an assessment of it against the underlying judicial review, rather than only in relation to A.C. for the reasons that follow.

[17] The Court is being asked to issue interlocutory relief, and its jurisdiction to do so in this situation arises only when an application is launched, or in emergency circumstances where an undertaking to serve and file such an application is made: see *Wang v Canada (Citizenship and Immigration)*, 2001 FCT 148, at para 32; *D'Souza v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 1304, para 40. The relief is interlocutory pending the determination of the underlying application for leave and judicial review.

[18] The "serious issue" threshold exists to prevent such interlocutory relief from being granted where the main claim has no chance of success. That prevents a moving party pursuing a meritless claim from obtaining some benefit over the short term (simply by filing for interlocutory relief) that they will most assuredly not receive over the long term (when their underlying claim is dismissed). The courts have established the serious issue element as a low threshold to prevent such abuse of the system. It is to be assessed on a preliminary basis because

an interlocutory order is usually dealt with as a matter of urgency, so there is limited time to prepare a complete record or to fully consider the merits of the underlying matter.

[19] In this case, the H&C decision concerned the claim of the entire family and the judicial review seeks to overturn that decision on behalf of the entire family. It is not apparent, as a matter of law or common sense, why, in the particular circumstances of this case, the unilateral action of the Respondent to defer removal of the wife and children should somehow change the nature of the serious issue to be assessed in relation to that judicial review application. I will examine this aspect of the test in relation to the issues which have been raised in regard to the overall H&C decision.

[20] The Applicants claim that two serious issues have been raised in regard to the H&C decision: whether the officer's assessment of the best interests of the children was unreasonable, and whether the officer reasonably assessed the factors of establishment and hardship. They argue that the officer did not actually determine what is in the children's best interests, but rather only focused on whether they would suffer hardship by returning to Mexico with their parents. The officer erred by not considering the alternative scenario – that the children would, in fact, stay in Canada. Given the evidence that the children have lived much of their lives in Canada, and the evidence regarding A.M.M.'s particular medical needs, the officer committed a reversible error.

[21] The Applicants also contend that the officer erred by giving too little weight to the family's efforts to establish themselves in Canada, because the officer found that much of this had occurred after they failed to report and thereafter evaded the immigration and border services

authorities. The officer gave too much weight to the failure to report. Further, the officer appears to have discounted the establishment because it was not "extraordinary", but that is not the proper approach. The exceptional relief for H&C considerations provided for in section 25 of *IRPA* exists to address cases such as this, and it is an error to discount establishment simply because it occurred during the time that the Applicants were out of status in Canada. The officer also applied a hardship lens to considering the H&C application, and this is contrary to the jurisprudence.

[22] In view of the preliminary nature of the review required under this element of the test, and the low nature of the threshold, I will simply state that I find that the Applicants have met this element of the test. The claims advanced in regard to the H&C application are not "frivolous or vexatious."

B. *Irreparable Harm*

[23] Irreparable harm refers to harm which cannot be compensated in money; it is the nature rather than the magnitude of the harm which is to be examined: *RJR – MacDonald*, at 135. In the context of a stay of removal, the harm usually relates to the risk to the individual(s) of harm upon removal from Canada. It may also include specific harms that are demonstrated in regard to any persons directly affected by the removal, and who will be remaining in Canada. Any risk of harm that was assessed – and rejected – in prior immigration proceedings cannot form the basis for a finding of irreparable harm at this stage. In those situations, it is a question of whether new harms have emerged.

[24] Here the refugee claim originally advanced by the Applicants in 2007 was denied. The risks A.C. asserted at that time are no longer in issue. In this case, the irreparable harm issue turns mainly on the harm to A.C. caused by separation from his family, and this in turn involves consideration of the harms to his wife and children associated with his removal from Canada. This is said to include the loss of financial support to the family, since he is the sole breadwinner. It also includes the loss of support by A.C. to his wife and children in relation to their psychological difficulties and stresses.

[25] The evidence is complex and somewhat contradictory on these questions, and it must be repeated that when much of this evidence was filed, it was to address the removal of the entire family, not just A.C. Therefore, this evidence does not address the specific harms associated with a possible separation of the family members. In particular, what is missing is evidence regarding the role that A.C. has played in supporting his wife and children beyond his role as breadwinner.

[26] A significant amount of the evidence originally filed in support of the stay application involved medical information about the psychological condition of R.M. and one child, A.M.M. Some of this information related to the fears that the family members expressed related to their possible return to Mexico.

[27] R.M. was first diagnosed with PTSD and major depressive disorder in 2009, and this was confirmed by a further psychiatric assessment in July 2018. She has been prescribed medication and has participated in individual and group counselling and therapy. In a medical assessment dated September 5, 2019, it is reported that R.M. said that she benefits from a supportive church

community, and that her two sisters and father reside in Canada. She reports that she experienced childhood sexual abuse, as well as physical abuse by her first husband.

[28] In earlier medical reports, it is noted that R.M. had indicated difficulties in her spousal relationship, including emotional abuse and non-consensual sexual activity with her spouse. This is reported on several occasions in medical reports dating back to 2012.

[29] More recent medical reports indicate that R.M. has reported that her depression and PTSD symptoms have been triggered by her discovery that her husband has been having sex with prostitutes.

[30] On the basis of this evidence, the Respondent has deferred the removal of the wife and children, since the evidence which has now emerged indicates that she may be a victim of domestic violence. As will be discussed below, the Respondent also points to this evidence in support of its argument that A.C. should be denied the equitable relief of a stay of removal because he does not come before the Court with clean hands.

[31] In response to the Respondent's arguments, and prior to the deferral decision, the Applicants had filed supplementary affidavits, including a further affidavit from R.M. dated September 12, 2019. In this affidavit, R.M. states that she and her common law partner "have had our fair share of relationship problems which include my husband having sexual relationships outside of our relationship." She continues, and basically recants what is reported in the doctors' notes about non-consensual sexual intercourse, and explains that the notes must reflect a problem with her communication to the doctor through a translator. She says that her

husband has received advice, counselling, and support. R.M concludes by stating that after her husband received this counselling he has made great efforts to improve their relationship, and that she wants to continue with their relationship and to have him take an active part in their children's lives.

[32] On the day of the hearing of the stay, a further affidavit by R.M. was filed, in which she notes that the Respondent has deferred the removal of herself and her children, but she indicates that she has decided that if her husband is removed from Canada, she and her children will leave with him because they need his emotional and financial support. R.M. states that she believes it is in the best interests of the family that they stay together, and if her husband is removed from Canada this will mean that she will leave as well, because "it is most important that we keep our family intact."

[33] The Respondent submits that these recent affidavits should be given very little weight because they contradict the statements made on several occasions to doctors during the course of private sessions, and are being introduced now in the context of immigration proceedings. The earlier statements are inherently more reliable. Further, the Respondent argues that the recent statements of R.M. should be viewed in the context of the behaviours associated with battered wife syndrome, as recognized by the Supreme Court of Canada in cases such as *R v Lavallée*, [1990] 1 SCR 85.

[34] A.C. cautions that the Court should not automatically discount the evidence of R.M., nor accept as true the brief and untested statements about non-consensual sexual intercourse in the doctors' notes.

[35] There are several relevant aspects of irreparable harm in relation to the situation of A.C., but the argument rests on two main elements: (i) the financial impact on his family of the departure of the main income earner who supports the family; and (ii) the impact on him and his family of separation, and the loss to his wife and children of his ongoing support. As noted previously, the evidence that the Applicants filed in support of the stay does not address these in any detail, because they were not facing family separation at that time.

[36] The facts of this particular case are unusual, not least because of the very recent deferral of the removal of the wife and children, and the emergence of concerns about whether A.C. has engaged in sexual and emotional abuse of his spouse. The recent affidavit evidence by the wife, recanting her earlier statements and saying that her husband has redeemed himself with the benefit of counselling and guidance is not supported by any independent evidence from any of those counsellors, nor did R.M. receive independent advice prior to providing this evidence. The procedural guidelines that have been developed in many contexts to address the particular situation of women who may have experienced sexual or spousal violence or abuse have not been followed here: see, as one example, the IRB *Chairperson Guidelines 4: Women Refugee Claimants Fearing Gender-Related Persecution*.

[37] In addition, the evidence submitted did not address the impacts of family separation, because until late in the day prior to the hearing, the Direction to Report included all of the family members.

[38] The onus is on the applicant to establish irreparable harm with credible and non-speculative evidence that demonstrates that harm will occur between the date of the application

for the stay and the determination of the underlying judicial review: *Atwal v Canada (Citizenship and Immigration)*, 2004 FCA 427 [*Atwal*]; *Palka v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 165. Therefore, one outcome of this analysis could be that the application should be dismissed because A.C. has not provided evidence that demonstrates that he will suffer irreparable harm. The difficulty with this conclusion is obvious – the evidence may not have been provided because the hardships associated with separation of the family were not a consideration when the materials were filed.

[39] I am not persuaded that A.C. has met his burden to demonstrate irreparable harm caused by his removal from Canada. However, I am also not prepared to dismiss this application on the basis that the evidence of irreparable harm is lacking given the unique circumstances of this particular case, and despite my doubts on the matter.

[40] This leads to a consideration of the third element.

C. *Balance of Convenience*

[41] The third stage of the test "requires an assessment of the balance of convenience, in order to identify which party would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits" (*CBC*, at para 12). The expression often used is "balance of inconvenience." The factors which must be considered in assessing this element of the test are numerous and will vary with the circumstances of each case (*RJR – MacDonald*, at 342).

[42] In stay of removal cases, the Court must take into account that Canada has an interest in the prompt removal of persons whose refugee claims have not been upheld (as articulated in subsection 48(2) of *IRPA*). This is not merely a matter of administrative convenience, it goes to the wider public interest in ensuring confidence in the integrity of the immigration program as a whole: *Vieira v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 626, at paras 42-45; *Atwal*, at para 19.

[43] A stay of removal is an extraordinary discretionary and equitable relief. The Respondent is correct to point to the jurisprudence that finds that a party who seeks such relief must come to court with clean hands. However, not every breach of *IRPA* will disentitle an applicant from obtaining such relief. The strict requirements of the law are softened somewhat by provisions such as section 25 that permits discretionary relief to be granted even to persons who have failed to report for removal and lived without status in Canada. I cannot ignore this in considering the equities of this case.

[44] I am deeply troubled by the allegations of spousal sexual and emotional abuse, but this is not a criminal or family law court. My task is to determine whether a stay of removal is warranted. And in doing so, I must have regard to all of the evidence including that which points to the wrongdoing of the Applicant.

[45] In light of the order I am making in this case, it is not necessary for me to make a final decision on this question. I would note, however, that this remains an issue of concern and it may yet tip the balance against the Applicant when the matter comes back for consideration.

IV. Conclusion

[46] Based on the analysis above, I am not prepared either to grant or deny the stay requested. Instead, I will grant an interim stay of removal, for a period of 30 days. During this period, the Applicant, A.C. will not be removed from Canada. I will remain seized of this matter, and on or before the expiry of the 30-day period a new hearing will be set down.

[47] The Applicant will be provided an opportunity to file further evidence in regard to his application for a stay of his removal, and the Respondent will be given the opportunity to cross-examine on any affidavits that have been filed or are subsequently filed by the Applicant, as well as to file their own evidence. The Applicant will be allowed to cross-examine on any affidavits filed by the Respondent. In this regard I would make two comments for the assistance of the parties.

[48] First, the Court has commented on several occasions on the weight that should be attributed to medical evidence obtained in the context of immigration proceedings, where the treatment or remedy that is prescribed by the medical professional is an immigration outcome rather than a course of medical treatment, such as therapy or counselling, or a prescription. Much of the recent evidence filed in this case fits into this category. In assessing it, I will give it the weight that it deserves. In this regard, I can do no better than to refer the parties to the recent commentary of Justice Alan Diner, in *Hernadi v Canada (Public Safety and Emergency Preparedness)*, 2018 CanLII 126350:

> 6. Here, after a long history of medical care, the Applicant, who was 64 years of age, provided scant corroborating evidence of psychiatric care or illness. Instead, she provided one psychological

> report (from Dr. Pilowsky), based on (a) a single visit, (b) resulting in a clinical opinion of "depression and high anxiety" unaccompanied by treatment and/or a follow-up plan other than a strong recommendation that she remains in Canada, (c) specifically drafted for the purposes of an application to remain in Canada, and (d) based primarily on what has been reported by the person who is facing removal (the Applicant). The contrast for an expert report appears stark: while rich in immigration advocacy, it does not mention the type of assessment testing or tools used.

[49] Second, I have noted the submissions of the Respondent about the weight that should be given to the recent evidence of R.M. recanting her previous reports to the medical professionals and stating that her husband has reformed his ways. I have explained why this evidence may be given diminished weight. This is simply noted in light of the opportunities that the additional 30 days present, both to seek outside support and independent advice, if that is desired, and to consider the type of evidence that might be provided on these questions.

[50] For these reasons, I am granting an interim stay of removal for 30 days. I will remain seized of this matter and on or before the expiry of the 30-day period, a new hearing date will be set.

[51] A Direction will be issued setting out a schedule for the filing of new evidence.

ORDER in IMM-4161-19

THIS COURT ORDERS that:

1. An interim stay of removal for a period of thirty (30) days is granted.

2. I will remain seized of the matter.

3. Directions will be issued setting out a schedule for the filing of further evidence.

4. The matter will be set down for hearing on or before the expiry of the 30-day period.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4161-17
STYLE OF CAUSE:	A.C., R.M., A.M.M., A.E.D.M., A.D.M. v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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