Date: 20220308

Docket: IMM-1578-22

Citation: 2022 FC 317

Ottawa, Ontario, March 8, 2022

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

LINDA ERUNWON GARRICK

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Added Respondent for Motion

ORDER AND REASONS

[1] The Applicant moves for an Order staying her removal to Nigeria, scheduled to be executed on March 10, 2022, until her application for leave and judicial review of a negative

Pre-Removal Risk Assessment decision made December 8, 2021 [the PRRA Decision], is considered and finally determined.

[2] The Respondent opposes the motion, submitting that the Applicant has failed to meet the tripartite test of serious issue, irreparable harm and balance of convenience established in *Toth v. Canada (Minister of Employment and Immigration)*, (1988) 86 NR 302 (FCA).

[3] On July 5, 2016, the Applicant entered Canada from the United States at Fort Erie, Ontario. The Applicant submitted a refugee claim alleging that she fears prosecution in Nigeria because of her sexual orientation.

[4] On October 25, 2016, the Applicant's claim was rejected by the Refugee Protection Division [RPD]. The Applicant was successful in an application for judicial review of the RPD decision. The RPD re-determined the Applicant's claim, and in a decision dated January 10, 2019, the RPD again dismissed her claim for protection and determined that she had not established that she faced a risk of persecution in Nigeria because of sexual orientation.

[5] Specifically, as the PRRA officer notes, "the panel determined that the applicant's allegations were not credible on a balance of probabilities and that she had not credibly established on a balance of probabilities that she is a lesbian." The Applicant did not apply for judicial review of the RPD decision.

[6] Prior to the Applicant applying for judicial review of the RPD's original refusal of her claim, she failed to attend a scheduled removal. As a result, an immigration warrant was issued for the Applicant on February 15, 2017. This warrant continued in force until she was eventually arrested on February 15, 2021.

[7] In June of 2020, the Applicant submitted an application for permanent residence based on humanitarian and compassionate considerations. The H&C officer conducted an evaluation of the Applicant's circumstances, including, to the extent permitted, her allegation that she would face hardship upon return due to her sexual orientation. The officer concluded that relief was not warranted on H&C grounds [the H&C Decision]. Specifically, the officer held that the "evidence before me is insufficient to mitigate the findings of the RPD." The Applicant has not sought leave and judicial review of the H&C Decision.

[8] On April 28, 2021, the Applicant applied for a PRRA. The officer issued a negative PRRA Decision on December 8, 2021 because the Applicant had not satisfactorily established that she faces possible persecution or a personal forward-looking risk if returned to Nigeria. The PRRA officer also found that the Applicant had not provided sufficient new evidence to challenge the RPD's credibility determination.

[9] For the reasons that follow, this motion will be dismissed.

Serious Issue

[10] It is accepted that for the purposes of this motion, a serious issue in the underlying application is one that is neither frivolous nor vexatious. In her memorandum, the Applicant states the following to be the serious issues:

> 13. The most salient issues to be raised in the Applicant's JR Application of her negative PRRA decision are set out in the Applicant's JR Record and argued in the Submissions.
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> 14. In her JR, the Applicant submitted the following issues:
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> > i. Did the Officer breach the Applicant's right to procedural fairness by not providing her an oral hearing?
> >
> > ii. Did the Officer err in relying on the Applicant's RPD decision when analysing the present risks facing the Applicant in Nigeria?
> >
> > iii. Did the Officer err in determining that the new evidence failed to challenge the decisions of the RPD and RAD?
> >
> > iv. Did the Officer err by failing to conduct a sur place analysis in its Reasons?

This recitation of the issues raised in the application for leave and judicial review is the extent of her submissions on this motion on serious issue.

[11] The Respondent submits, "it is important for this Court to exercise vigilance in cases involving a negative PRRA decision and to satisfy itself that the issues raised by the Applicant are truly serious issues and not issues that merely have the appearance of seriousness."

[12] In *Cardoza Quinteros v Canada (Citizenship and Immigration)*, 2008 FC 643, I wrote regarding the serious issue prong of the test:

> [13] The threshold cannot automatically be met simply by formulating a ground of judicial review which, on its face, appears to be arguable. It is incumbent on the Court to test the grounds advanced against the impugned decision and its reasons, otherwise the test would be met in virtually every case argued by competent counsel.
>
> [14] Where the decision that underlies the stay application is a negative PRRA decision which the applicant claims exposes him to persecution or subjects him to a danger of torture or a risk to life or cruel or unusual treatment or punishment, it may be that once the serious issue test has been satisfied the remaining two tests will, in most instances, also be met: *Figurado v. The Solicitor General of Canada*, 2005 FC 347 at paragraph 45.
>
> [15] That being so, it seems to me that the Court must exercise vigilance in cases involving a negative PRRA decision to satisfy itself that the issues raised by an applicant are truly serious issues and not issues that merely have the appearance of seriousness.

[13] Similarly, in *Molnar v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 325, at paragraph 12, the late Justice Blanchard observed: “While the threshold for establishing a "serious issue" is not high for the purposes of a stay application, there is still a minimum burden upon an Applicant to show that there is at least an arguable case arising from the issues in the underlying application for judicial review.”

[14] I very much doubt that the Applicant has established a serious issue in the underlying application. This is especially the case when no analysis is offered in the memorandum of why these are serious issues meeting the tri-partite test. However, I need not explore that further as I find that she has not established that she will suffer irreparable harm if the stay is not granted.

Irreparable Harm

[15] The applicant submits that if she is returned to Nigeria she will "suffer persecution based on her sexual orientation which is forbidden in Nigeria." She further submits that the potential mootness of the underlying judicial review "is a relevant consideration for the irreparable harm analysis."

[16] I agree with the Respondent that the Applicant's alleged sexual orientation "has never been credibly established before any decision maker, in spite of the Applicant's [sic] having had numerous opportunities to do so." That risk has been examined and rejected by the RPD, the H&C officer, and the PRRA officer. Only the last finding is challenged in this Court.

[17] Risks previously assessed cannot amount to irreparable harm on a stay motion: see *Yafu v Canada (Citizenship and Immigration)*, 2016 FC 125 at para 5; *Ellero v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 1364 at para 45-47; *Nalliah v Canada (Solicitor General)*, 2004 FC 1649 at para 18; *Pierre v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 887.

[18] Her allegation that absent a stay of removal she is at risk in Nigeria because of her sexual orientation is exactly the risk that has been previously assessed and rejected. It cannot be the basis here for a finding of irreparable harm.

[19] The Applicant submits, "potential mootness of the underlying judicial review application resulting from removal of the applicant is a relevant consideration for the irreparable harm analysis." She references *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 [*Shpati*] at paragraph 40: "Potential mootness is a consideration that the Federal Court is better placed to take into account when weighing all the factors relevant under the tripartite test for determining a motion for a judicial stay" [emphasis added].

[20] She fails to reference the statement preceding that observation at paragraph 38 of *Shpati*:

> [P]otential mootness of the underlying judicial review application resulting from the removal of the applicant does not necessarily constitute irreparable harm to the applicant under the tripartite test so as to warrant the grant of a judicial stay: *El Ouardi v. Canada (Solicitor General)*, 2005 FCA 42 at para. 8; *Palka v. Canada (Minister of Public Safety and Emergency Preparedness)* 2008 FCA 165 at para. 20.

[21] As the Federal Court of Appeal notes at paragraph 30 of *Shpati*:

> [E]ven though an applicant's removal from Canada renders her or his application for judicial review of a PRRA moot, the Court may nonetheless exercise its discretion to hear it on the basis of the factors set out in *Borowski v. Canada (Attorney General)*, 1989 CanLII 123 (SCC), [1989] 1 S.C.R. 342. If the Court decides to hear the application despite its mootness and subsequently sets aside the PRRA decision, the Minister could permit the applicant to return to Canada pending the re-determination of the PRRA. In these circumstances, the PRRA application would not be moot.

[22] The jurisprudence is clear that irreparable harm must be established by clear, convincing, and non-speculative evidence. Given this, and the observations above from the Federal Court of Appeal in *Shpati*, it is my view that potential mootness of the underlying application is more

appropriate to consider under the heading of balance of convenience, not under the heading of irreparable harm, as it is far too speculative to support a finding of irreparable harm.

Balance of Convenience

[23] Even considering the possible mootness of the underlying application, I find that the balance rests with the Respondent. The Applicant has had numerous decision makers examine her claims of risk and they have always been rejected. The issues raised in the underlying application are such that leave being granted is unlikely in my view.

[24] Moreover, the Applicant has previously been in breach of our immigration laws. She failed to report for removal and was subject to an arrest warrant for a number of years. She also failed to disclose some of her immigration proceedings in this motion, such as the failed H&C application.

[25] These considerations tip the balance in favour of the Minister.

ORDER in IMM-1578-22

THIS COURT ORDERS that the motion for a stay of removal be dismissed.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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