Federal Court  Cour fédérale

Date: 20221026

Dockets: IMM-9686-22
IMM-9705-22

Citation: 2022 FC 1471

Vancouver, British Columbia, October 26, 2022

PRESENT: Madam Justice Go

BETWEEN:

OFER KOREN KARKAROD

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] Mr. Ofer Koren Karkarod [Applicant] seeks a stay of removal to Israel, scheduled for November 1, 2022, until the final determination of the applications for leave and for judicial review of (i) a decision dated June 29, 2022 by a Senior Enforcement Officer [Officer] denying the Applicant's application for permanent residence on humanitarian and compassionate grounds [H&C Decision], and/or (ii) a decision of the same date by the Officer rejecting the Applicant's Pre-Removal Risk Assessment application [PRRA Decision].

[2] Having considered the material filed by the parties, and having heard the submissions of counsel for the respective parties, I am granting the Applicant's motions for a stay of his removal.

I. Context

[3] The Applicant, a citizen of Israel, came to Canada in December 2016 from the United States, and made a refugee claim in January 2017 based on his alleged fear of harm from loan sharks to whom he owed money. The Refugee Protection Division [RPD] rejected the Applicant's claim, finding the Applicant not credible in his material allegations. The Applicant appealed the negative decision and the Refugee Appeal Division [RAD] dismissed his appeal in August 2020.

[4] While in Canada, the Applicant was diagnosed with Post-Traumatic Stress Disorder [PTSD], anxiety and depression. The Applicant has been receiving medical treatment for his mental health conditions since 2017.

[5] The Applicant made a PRRA application in September 2021 and an H&C application in December 2021. The Applicant received the negative PRRA Decision and H&C Decision on September 21, 2022 and submitted an application for leave for judicial review of both decisions in October 2022.

II. Issues and Legal Test for Obtaining a Stay

[6] The only issue is whether a stay of removal should be granted in these circumstances.

[7] In order to obtain a stay, the Applicant must meet the tripartite test articulated by the Supreme Court of Canada in *Manitoba (Attorney General) v Metropolitan Stores (MTS) Ltd*, [1987] 1 SCR 110 [*Manitoba*], *RJR-MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*], and *R v Canadian Broadcasting Corp*, 2018 SCC 5, which is the test to be applied to stays of removal: *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302, 11 ACWS (3d) 440 (FCA).

[8] A stay of removal is warranted only if all three elements of the test are satisfied, namely: (i) the underlying application for judicial review raises a serious issue; (ii) the moving party will suffer irreparable harm if the stay is not granted and the removal order is executed; and (iii) the balance of convenience favours the granting of the order.

[9] The application of this test is highly contextual and fact-dependent. As the Supreme Court of Canada explained, "[u]ltimately, the question is whether granting the injunction would be just and equitable in all the circumstances of the case": *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 1.

III. Analysis

A. *Serious Issue*

[10] The Applicant argues that the Officer made several reviewable errors in the H&C Decision with respect to their findings concerning the evidence of the Applicant's mental health, such as the Officer's error in discounting the medical opinions, the impact of the removal of the

Applicant on his mental health, and the Applicant's risk of suicide. The Applicant also argues that the Officer unreasonably assessed the Applicant's evidence of establishment.

[11] I need not address all the arguments made by the Applicant.

[12] I find that there is a serious issue to be tried with respect to the Officer's discounting of the medical opinions, which in turn may have undermined the reasonableness of the Officer's other findings as they relate to the hardship faced by the Applicant due to his mental health conditions.

[13] In support of his H&C application, the Applicant submitted a number of medical reports from several health practitioners who have treated him since 2017. These reports included a letter dated October 14, 2021 from Dr. Lisa Andermann, a psychiatrist from the Centre for Addiction and Mental Health [CAMH], who has been the Applicant's treating physician since 2017.

[14] In her letter, Dr. Andermann confirmed, among other things, that the Applicant has been presenting with chronic symptoms consistent with major depressive disorder and anxious features, and some symptoms of PTSD. She opined on the negative impact of removal on the Applicant.

[15] The Officer found in the H&C Decision:

> I accept Dr. Andermann and the medical professionals at CAMH expert opinions regarding the applicant's medical diagnosis, and

> regarding the medical treatment prescribed since he became a patient at CAMH. However, similar to my assessment above, I am unable to give weight to the reports other findings as the assessors were not present to witness the events leadings up to the applicant's arrival in Canada.

[16] Elsewhere in the H&C Decision, the Officer noted:

> I understand that Dr. Andermann worries for the applicant's safety. However, notwithstanding the aforementioned observations, I find that the medical assessment reports provided do not determine the degree of negative impact the applicant would face should he be returned to Israel. Rather, they indicate that the applicant's mental state has a potential to worsen should he be returned to Israel. I find this to be speculative as the assessors did not witness the applicant's series of events in Israel, therefore the information provided in the assessors' report concerning the circumstances of the applicant's life is not objective, but rather it was provided to the assessor by the applicant during their sessions. In addition, I am cognizant that the negative impact is linked to exposure to "the same threats and stressors again," which I find are unestablished with sufficient credible evidence.

[17] I agree with the Applicant that, in making these findings, the Officer erred by discounting psychological evidence because a report's author did not witness events that may have led to the alleged mental health condition, contrary to *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 [*Kanthasamy*] at paragraph 49.

[18] I come to this conclusion because I find that the Officer mischaracterized Dr. Andermann's opinion that the negative impact on the Applicant's mental health is linked solely to the alleged events in Israel.

[19] My reading of the medical report suggests that Dr. Andermann came to her opinion in light of the events that have transpired since the Applicant arrived in Canada. For instance, Dr. Andermann noted in her report that the Applicant "reported that he did not have any mental health problems prior to coming to Canada. He spent his first 1.5 months here in detention, an experience that he found humiliating and traumatic. He attributed many of his difficulties to the stress of this ordeal".

[20] Later in the same report, Dr. Andermann noted that the supports the Applicant received in Canada have maintained his stability over the past several years, and losing these supports "would be very detrimental to [the Applicant's] mental health". Dr. Andermann ended by stating that, in her professional opinion, "removal, or prospect of removal from Canada would lead to a deterioration of [the Applicant's] mental state, with worsening depression, anxiety, and potential for re-traumatization and precipitation of a suicidal crisis".

[21] It would appear from these passages that Dr. Andermann did not opine that the Applicant would experience deterioration of mental health due to the events that may have happened in Israel, but rather due to the loss of the support the Applicant has relied on in Canada. The Officer's discounting of Dr. Andermann's report on the basis that she did not witness the events in Israel calls into question the reasonableness of the H&C Decision, making it a serious issue to be tried.

[22] I do not accept the Respondent's argument in their written submission that *Kanthasamy* can be distinguished because the psychological report in that case was introduced solely as

evidence of the applicant's mental health. Here, Dr. Andermann's report was also submitted as evidence of the Applicant's mental health, and not as evidence of the alleged events in Israel.

[23] As the Applicant's H&C application was based largely upon the allegation that his mental health would deteriorate upon removal to Israel, I find the Officer's erroneous assessment of Dr. Andermann's report constitutes a serious issue to be tried. As such, I find that the first branch of the tripartite test is satisfied on this error alone. I need not consider the other errors alleged by the Applicant.

B. *Irreparable Harm*

[24] 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 para 64. 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 harm that is demonstrated in regard to any persons directly affected by the removal, and who will be remaining in Canada: see *Tesoro v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 148 at para 28.

[25] The law requires that irreparable harm be established based on evidence, not assertions or speculation: *Atwal v Canada (Citizenship and Immigration)*, 2004 FCA 427 at paras 14-15. However, the test for irreparable harm is also not one of absolute certainty: *Suresh v Canada (Minister of Citizenship and Immigration)*, [1999] 4 FC 206 (CA) at para 12.

[26] Irreparable harm may arise from a risk to life, liberty, or safety that the individual would be exposed to if removed to their country of origin: *Begashaw v Canada (Minister of Citizenship and Immigration)*, 2009 FC 462 at para 54, citing *Sivakumar v Canada (Minister of Employment and Immigration)*, [1996] 2 FC 872 (CA); *Hernandez v Canada (Solicitor General)*, [1993] FCJ No 950 (TD); *Membreno-Garcia v Canada (Minister of Employment and Immigration)*, [1992] 3 FC 306 (TD); *Suresh v Canada* (1998), 49 CRR (2d) 131, 77 ACWS (3d) 163.

[27] I find that there is clear, compelling and non-speculative evidence that removal will result in irreparable harm in the form of psychological damage to the Applicant, as evidenced in the psychological reports submitted by the Applicant, including the report from Dr. Andermann and the other qualified health professionals who have treated the Applicant.

[28] Dr. Andermann expressed concerns about the Applicant's heightened risk of suicide, as well as the deterioration of his mental health, which could follow the withdrawal of support that has provided the Applicant with stability over the past several years. Other health professionals who have been treating the Applicant similarly expressed concerns about the harm to his mental health. Vanessa Wright, a nurse practitioner at CAMH, opined that "deportation to Israel would result in significant harm to [the Applicant's] mental state".

[29] Letters from members of the social work and health professional team that has been working with the Applicant confirm Dr. Andermann's opinion about the Applicant's reliance on his support system in Canada.

[30] There was also evidence before the Officer concerning the Applicant's suicidal ideation stemming as far back as 2017.

[31] I agree with the Applicant that the amount of medical evidence from health professionals not retained specifically for the purposes of preparing an immigration report, who have opined that the Applicant has a history of suicidal ideation, lends further credence to the concerns expressed by Dr. Andermann that removal or prospect of removal from Canada would lead to "precipitation of a suicidal crisis".

[32] At the hearing, the Respondent argued that the Court should take what the health professionals say, and not go beyond. The Respondent submitted that Dr. Andermann's opinion was limited to that of a "potential" of re-traumatization and precipitation of suicidal crisis. The Respondent further suggested that the Court must still consider whether the Applicant would have access to available treatment in Israel in determining irreparable harm.

[33] The Applicant submitted in reply that the use of the word "potential" does not render the medical opinion speculative. The Applicant argued that this was the responsible way for Dr. Andermann to phrase her opinion as it is not her role to predict, with certainty, the consequence of removal. I agree.

[34] I also agree with the Applicant that suicidal crisis, which is at the most serious end of the depression spectrum, is itself an irreparable harm.

[35] This Court has found that “significant psychological damage” and “suicidal behaviour” could constitute irreparable harm: *Tiliouine v Canada (Public Safety and Emergency Preparedness)*, 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.

[36] The Respondent argues that this Court and the Court of Appeal have held that depression and anxiety arising from the prospect of being deported is the sort of issue that will re-occur in any deferral context: *Palka v Canada (Minister of Public Safety and Emergency Preparedness)*, 2008 FCA 165; *Kandiah v Canada (Solicitor General)*, 2004 FC 322. However, I find the cases cited by the Respondent distinguishable to the facts in this case, as there was substantive evidence from several health care professionals, who have long-term treatment relationships with the Applicant, attesting to his ongoing mental health issues and the prospect of a suicidal crisis.

[37] As such, I am satisfied that irreparable harm has been established.

C. *Balance of Convenience*

[38] In the third branch of the test, the Court has to consider where the balance of convenience lies, taking into consideration the public interest to be weighed together with the interests of private litigants: *Manitoba* at paras 34, 38.

[39] While I acknowledge that the Applicant has already had the benefit of decisions by the RPD, RAD, and the Officer who determined the PRRA and H&C applications, I also consider that the Applicant does not have any criminal record in Canada, nor any negative immigration history.

[40] Given the irreparable harm in the form of suicidal crisis, which potentially impacts the Applicant's health and well-being, I find that the balance of convenience lies with the Applicant.

Since the application for leave and judicial review of the PRRA Decision is likely to be heard and determined on the same schedule as the application for leave and judicial review of the H&C Decision, it is unnecessary to address the Applicant's arguments regarding the existence of a serious issue to be determined in respect of the reasonableness of the PRRA Decision. I will however grant the stay motion pending a final determination of both the H&C and the PRRA Decisions.

ORDER in IMM-9686-22 and IMM-9705-22

THIS COURT ORDERS that:

1. The Applicant's motions are granted and his removal is stayed pending the determination of the Applicant's applications for leave and, if leave is granted, pending the determination of his applications for judicial review.

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-9686-22 AND IMM-9705-22
STYLE OF CAUSE:	OFER KOREN KARKAROD v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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