Federal Court Cour fédérale

Date: 20230125

Docket: IMM-13107-22

Citation: 2023 FC 122

Ottawa, Ontario, January 25, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ATINUKE MUTIAT OLASEHINDE
OLUWAMUREWA OLUWADIMIMU OLASEHINDE

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicants bring a motion for a stay of their removal from Canada, scheduled to take place on January 26, 2023.

[2] The Applicants request that this Court order a stay of their removal to Nigeria until the determination of an underlying application for leave and judicial review of the refusal of their permanent residence application on humanitarian and compassionate ("H&C") grounds by an Immigration Officer (the "Officer") of Immigration, Refugees and Citizenship Canada ("IRCC").

[3] For the reasons that follow, this motion is granted. I find that the Applicants meet the tri-partite test required for a stay of removal.

II. Facts and Underlying Decision

[4] The Principal Applicant, Atinuke Mutiat Olasehinde (Ms. "Olasehinde"), is a 48-year-old citizen of Nigeria. The Secondary Applicant is Ms. Olasehinde's 22-year-old biological son, Oluwamurewa Oluwadimimu Olasehinde (Mr. "Olasehinde"), who is also a citizen of Nigeria and resides with Ms. Olasehinde in Canada. Ms. Olasehinde's spouse and other son, who is adopted, both reside in Nigeria.

[5] Ms. Olasehinde and Mr. Olasehinde arrived in Canada on July 27, 2017. They submitted an application for refugee protection on the basis that Mr. Olasehinde would be forced to undergo tribal markings and scarring as part of tribal customs if returned to Nigeria. The Refugee Protection Division ("RPD") refused their claim in a decision dated October 10, 2019, on the basis of an available internal flight alternative. The appeal of the RPD's decision, the Refugee Appeal Division ("RAD"), was dismissed on February 24, 2020. This Court refused the application for leave and judicial review of the RAD's decision on October 21, 2020.

[6] The Applicants submitted a Pre-Removal Risk Assessment ("PRRA") application. The Applicants also submitted an application for permanent residence on H&C grounds, which was received by IRCC on December 6, 2021.

[7] The Applicants' H&C application included evidence of their establishment in Canada, including their gainful employment and study. Ms. Olasehinde obtained a "Personal Support Worker" certificate in November 2020. She worked and continues to work as a personal support worker throughout the COVID-19 pandemic. Mr. Olasehinde is currently a university student at York University. The Applicants also claim they have integrated into their community through employment, volunteering, and building connections.

[8] Both Ms. Olasehinde and Mr. Olasehinde suffer from severe depression and anxiety. They are taking medication for their mental health issues and have been referred for counselling and psychotherapy assessments. Both Applicants are also experiencing suicidal ideation, according to the psychotherapy reports provided by a registered psychotherapist.

[9] On November 28, 2022, the Applicants received a letter from CBSA inviting them to a meeting to receive their PRRA determination. During this meeting with CBSA on December 13, 2022, the Applicants were informed that both their PRRA and H&C applications had been refused. The Officer refused the Applicants' H&C application on the grounds that they provided insufficient evidence of hardship resulting from their removal to Nigeria and their establishment in Canada was not shown to be exceptional.

III. Analysis

[10] The tripartite test for the granting of a stay is well established: *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA) ("*Toth*"); *Manitoba (A.G.) v Metropolitan Stores Ltd*., 1987 CanLII 79 (SCC), [1987] 1 SCR 110 ("*Metropolitan Stores Ltd*"*); RJR-MacDonald Inc. v Canada (Attorney General),* 1994 CanLII 117 (SCC), [1994] 1 SCR 311 ("*RJR-MacDonald*"); *R v Canadian Broadcasting Corp,* 2018 SCC 5 (CanLII), [2018] 1 SCR 196.

[11] The *Toth* test is conjunctive, in that granting a stay of removal requires the applicant to establish: (i) a serious issue raised by the underlying application for judicial review; (ii) irreparable harm that would result from removal; and (iii) the balance of convenience favouring granting the stay.

A. *Serious Issue*

[12] In *RJR-MacDonald*, the Supreme Court of Canada established that the first stage of the test should be determined on an "extremely limited review of the case on the merits" (*RJR-MacDonald* at 314). The standard of review of an enforcement officer's decision is that of reasonableness (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 (CanLII), [2010] 2 FCR 311 at para 67).

[13] On this first prong of the tri-partite test, the Applicants submit that the underlying application for leave and judicial review raises issues regarding the reasonableness of the Officer's H&C assessment that are neither frivolous nor vexatious, and therefore meet the low threshold for a serious issue.

[14] The Respondent submits that there is no serious issue because the underlying application for judicial review is merely a disagreement with the Officer's weighing of the evidence and fails to point to any reviewable errors committed by the Officer in the H&C assessment.

[15] Having reviewed the parties' motion material and the underlying decision, I agree that there is a serious issue to be tried. The underlying application for judicial review raises issues surrounding the Officer's proper consideration of the evidence regarding the Applicants' establishment in Canada and the hardship facing them upon removal to Nigeria. This is sufficiently serious to satisfy this first prong of the test.

B. *Irreparable Harm*

[16] At the second stage of the test, applicants are required to demonstrate that irreparable harm will result if relief is not granted. Irreparable harm does not refer to the magnitude of the harm; rather, it is a harm that cannot be cured or quantified in monetary terms (*RJR-MacDonald* at 341). This Court must be satisfied on a balance of probabilities that the harm is not speculative, but does not have to be satisfied that the harm will occur (*Xu v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 746, 79 FTR 107 (FCTD); *Horii v Canada (C.A.)*, [1991] FCJ No 984, [1992] 1 FC 142 (FCA)).

[17] The Applicants submit that they will suffer irreparable harm if returned to Nigeria. The Applicants submit that their removal would cause a material change to their establishment in Canada, which is a central consideration in the underlying H&C application. They further submit that Mr. Olasehinde's education would be adversely impacted, as he would be forced to leave Canada during his second year at university. More significantly, the Applicants submit that their removal would cause irreparable harm in terms of their mental health conditions, for which the Applicants receive medication, require ongoing treatment, and would not receive adequate mental health services in Nigeria. The Applicants are both experiencing suicidal ideation that they claim would worsen upon their removal, as corroborated by the psychotherapy reports proffered as evidence. The Applicants submit that these factors rise to the level of irreparable harm.

[18] The Respondent submits that the Applicants' medical documentation does not meet the high threshold for irreparable harm at this stage of the *Toth* test. The Respondent notes that the Applicants' medical notes attribute their stressors to the threat of deportation, and submits that depression and anxiety are the usual consequences of deportation. The Respondent further submits that the psychotherapy reports are based on a single phone session and were filed immediately prior to filing the Applicants' stay motion, which lessen their probative value and render them insufficient to establish irreparable harm.

[19] I disagree. I find that irreparable harm is made out in the Applicants' case and is the determinative issue on this motion. The Applicants have submitted significant evidence to demonstrate that their removal will result in irreparable, if not fatal, harm to their mental

wellbeing. According to the psychotherapy reports, Ms. Olasehinde "is at increased risk of suicide," her "suicidal thoughts will likely worsen" upon return to Nigeria, and "she is deemed not fit to travel by airplane at this point in time due to the severity of her mental health condition." Mr. Olasehinde also has "active suicidal thoughts" and "his suicidality will likely worsen." I do not agree that these circumstances amount to the usual consequences of deportation. This evidence sufficiently rises to the level of irreparable harm.

C. *Balance of Convenience*

[20] The third stage of the test requires an assessment of the balance of convenience—a determination to identify which party will suffer the greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits (*RJR-MacDonald* at 342; *Metropolitan Stores Ltd* at 129). It has sometimes been said, "Where the Court is satisfied that a serious issue and irreparable harm have been established, the balance of convenience will flow with the Applicant" (*Mauricette v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 420 (CanLII) at para 48). However, the Court must also consider the public interest to uphold the proper administration of the immigration system.

[21] The Applicants submit that the balance of convenience flows in favour of granting a stay of their removal. They submit that the harm that would befall them upon their removal outweighs the inconvenience to the Respondent in executing deportation expeditiously.

[22] While I find that the issue of irreparable harm is determinative of this motion, I agree that the balance of convenience lies in favour of granting a stay of removal. I take particular note of

Ms. Olasehinde's personal commitment and sacrifice to aid vulnerable communities in Canada throughout the COVID-19 pandemic as a personal support worker. She placed herself at the frontlines to protect Canadians, in spite of her personal challenges (*Mohammed v Canada (Citizenship and Immigration)*, 2022 FC 1 at paras 42-43). It is therefore in the public interest that equitable relief in the form of a stay be granted in the Applicants' case.

[23] Ultimately, the Applicants meet the tri-partite test required for a stay of removal. This motion is therefore granted.

ORDER in IMM-13107-22

THIS COURT ORDERS that:

1. The Applicants' motion to stay their removal is granted.

2. The Applicants' removal to Nigeria, currently scheduled for January 26, 2023, is stayed pending the final disposition of the underlying application.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-13107-22
STYLE OF CAUSE:	ATINUKE MUTIAT OLASEHINDE AND OLUWAMUREWA OLUWADIMIMU OLASEHINDE v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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