Federal Court Cour fédérale

Date: 20240112

Docket: IMM-434-24

Citation: 2024 FC 55

Ottawa, Ontario, January 12, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

BIPINJOT GILL

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, Bipinjot Gill, brings a motion for a stay of his removal from Canada, scheduled to take place on January 15, 2024.

[2] The Applicant requests that this Court stay his removal pending a determination on an underlying application for leave and judicial review of the Direction to Report for removal issued to the Applicant on December 22, 2023.

[3] For the reasons that follow, this motion is dismissed. I find that the Applicant has not met the tri-partite test required for a stay of removal.

II. **Facts and Underlying Decision**

[4] The Applicant is a 26-year old citizen of India.

[5] The Applicant arrived in Canada in 2016 on a student visa. On June 22, 2018, he was granted a two-year diploma from Bow Valley College. His parents and brother are in Canada on temporary visas. His uncle and grandparents are Canadian citizens.

[6] The Applicant has a history of struggling with substance abuse and mental health issues. However, in a letter dated February 15, 2023, a physician determined that the Applicant was not eligible for a "section 16 defence;" namely, one based on not being criminal responsible for reason of mental disorder.

[7] The Applicant also has a history of serious criminality.

[8] On May 18, 2019, the Applicant caused a catastrophic driving incident in Calgary. He was driving well over the speed limit and flew through a red light. Two individuals in the other vehicle were killed instantly and one sustained serious injuries.

[9] On August 14, 2019, the Applicant was involved in a separate driving incident, leading him to be charged with dangerous driving and fleeing from a peace officer. The Applicant was convicted of these crimes on June 8, 2022.

[10] On August 21, 2020, the Applicant was charged with two counts of dangerous driving causing death and one count of dangerous diving causing bodily harm pursuant to sections 320.13(2) and 320.13(3) of the *Criminal Code*, RSC 1985, c C-46. The Applicant was convicted of these crimes on April 13, 2023.

[11] On January 13, 2022, the Applicant was issued an exclusion order for failing to leave Canada by the end of the period authorized for his stay.

[12] On May 5, 2022, the Applicant applied for a pre-removal risk assessment ("PRRA"). No submissions or evidence was tendered in support of this PRRA. On August 3, 2022, this application was refused.

[13] On September 6, 2022, the Applicant was found to be inadmissible to Canada for serious criminality pursuant to paragraph 36(1)(a) of the *Immigration and Refugee Protection Act*, SC 2001 c 27 ("*IRPA*") and was issued a deportation order.

[14] On November 14, 2023, the Applicant was sentenced by a Justice of the Alberta Court of King's Bench to a global conditional sentence of two years less a day and 1 year of probation. The Justice held that the Applicant would serve this sentence in the community living under house arrest, with limited ability to leave his home, and would do 300 hours of community service.

[15] On December 22, 2023, the Applicant received a direction to report for removal, with removal scheduled for January 15, 2024.

[16] On January 9, 2024, the Applicant requested a deferral of removal. On January 12, 2024, this request was refused.

III. **Analysis**

[17] 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.

[18] 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*

[19] 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).

[20] On this first prong of the tri-partite test, the Applicant submits that his conditional sentence is a "term of imprisonment" for the purposes of a statutory stay of removal under section 50(b) of the *IRPA* and that his removal can only occur as soon as it is "able to [be] put in practice" (*Cortes v Canada (Minister of Citizenship and Immigration)*, [2007] FCJ No 117 at para 13).

[21] The Respondent submits that the Applicant does not raise a serious issue with respect to the underlying application for leave and judicial review, as the Applicant impermissibly challenges the Direction to Report for removal. Additionally, the Respondent submits that section 50(b) of the *IRPA* is not a statutory bar to removal pending the completion of his conditional sentence.

[22] Having reviewed the materials, I agree with the Respondent. Irrespective of section 50(b) of the *IRPA*, the Applicant fails to raise a serious issue with respect to his underlying application for leave and judicial review. This application challenges a Direction to Report. But this challenge is meritless. The Direction to Report is an informal communication explaining when the deportation order against the Applicant would be executed, not a decision subject to judicial review. This Direction to Report cannot be subject to judicial review (*Bergman v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 1129 at para 18). As my colleague Justice Rochester recently held, the tripartite test for a stay of removal requires that the underlying application for leave and judicial review raises a serious issue (*Safdar v Canada (Citizenship and Immigration)*, 2023 CanLII 79337 at para 10). There is no valid underlying application for leave and judicial review in this matter. The Applicant therefore cannot raise a serious issue with respect to this application. The first prong of the *Toth* test is not met.

B. *Irreparable Harm*

[23] 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)).

[24] The Applicant submits that raising arguable grounds for review is a sufficient basis for establishing irreparable harm, as is depriving the Applicant of a meaningful and effective judicial review of an arguably flawed decision. The Applicant further submits that the Applicant's removal would result, owing to his circumstances, in his parents and brother having to move back to India, thus losing their right to apply for permanent residence and having a serious impact on their emotional and psychological well-being. Additionally, the Applicant submits that removal from Canada will cause a deterioration of his mental health treatment.

[25] The Respondent submits that the Applicant has not provided any evidence that he or his family will suffer real, definite, and unavoidable harm. The Respondent maintains that the Applicant does not provide evidence of a current mental health assessment with ongoing treatment nor evidence that his mental health would suffer if returned to India, including providing any evidence that the medical care would be unavailable in India. The Respondent further maintains that having the Applicant's underlying application for leave and judicial review rendered moot does not amount to irreparable harm, and that the Applicant has had his risks assessed in his PRRA.

[26] The Applicant failing to establish a serious issue is dispositive of this matter. Nonetheless, I agree with the Respondent that irreparable harm is not demonstrated. Merely having a pending application for leave and judicial review does not necessarily amount to irreparable harm (*Shpati v Canada (Public Safety and Emergency Preparedness)*, 2011 FCA 286 at paras 34-38, cited with approval in *Singh v Canada (Citizenship and Immigration)*, 2023 CanLII 72624). This does not establish irreparable harm in the Applicant's circumstances.

[27] Moreover, the Applicant rightly cites *Tesoro v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 148 for the proposition that family separation can constitute irreparable harm. Here, however, the alleged irreparable harm is not one of family separation, but rather, the Applicant's parents and minor brother allegedly losing the opportunity to pursue an application for permanent residence should they return with the Applicant.

[28] This allegation is baseless. The evidence establishes that the Applicant's parents are here on work permits and his brother here on a study permit, and that they came "on an emergency visa due to [the Applicant's] mental health and the accident [the Applicant] was involved in," per the Applicant's affidavit. There is no evidence that the Applicant's family has applied for permanent residence or is in the process of applying for permanent residence. I do not find that this evidence establishes that the Applicant's family's permanent residence "is likely to be approved, imminently or at all" (*Serinken v Canada (Public Safety and Emergency Preparedness)*, 2021 CanLII 56943) such that irreparable harm is established.

[29] Finally, I do not accept the Applicant's allegations regarding the deterioration of his mental health treatment, if removed from Canada. The Applicant has not established that he will be unable to obtain treatment in India, and "the fact that the care he has access to there may not be of the same quality as that available in Canada does not, in itself, establish irreparable harm" (*Bisram v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 390 at para 22, citing *Adebayo v Canada (Citizenship and Immigration)*, 2019 CanLII 115789). Irreparable harm is not established.

C. *Balance of Convenience*

[30] 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.

[31] The Applicant submits that, given that a serious issue and irreparable harm have been established, the balance of convenience lies in his favour.

[32] The Respondent submits that the balance of convenience lies in the Respondent's favour, the Court having to consider the *IRPA* and the fact the Applicant has a history of serious criminal convictions.

[33] The first two prongs of the tripartite test not having been met is dispositive of this matter. The balance of convenience nonetheless weighs in the Respondent's favour. The Applicant does not come to this Court with "clean hands" (*Abu Aldabat v Canada (Citizenship and Immigration)*, 2021 FC 277 at para 22). The Applicant committed and was convicted for a serious crime. Lives were lost. The families of the victims will never see family members again.

And while the Applicant has struggled with substance abuse and mental health issues, he has been found criminally responsible for his conduct by a competent court of law.

[34] Ultimately, the Applicant has not met the tri-partite test required for a stay of removal. This motion is therefore dismissed.

ORDER in IMM-434-24

THIS COURT ORDERS that the motion is dismissed.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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