Federal Court Cour fédérale

Date: 20240112

Docket: IMM-495-24

Citation: 2024 FC 57

Ottawa, Ontario, January 12, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ANKIT KUNDU

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, Ankit Kundu, brings a motion for a stay of his removal from Canada, scheduled to take place on January 16, 2024.

[2] The Applicant requests that this Court stay his removal from Canada until the determination of an underlying application for leave and judicial review of a negative deferral to

remove request rendered by an officer (the "Officer") of Canada Border Services Agency ("CBSA").

[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] On September 2, 2016, the Applicant entered Canada. On September 3, 2016, he was issued study and work permits, respectively.

[6] On July 23, 2019, the Applicant was convicted of sexual interference pursuant to section 151 of the *Criminal Code*, RSC 1985, c C-46 ("*Code*"). The Applicant was sexually involved with an underage girl. He attempts to explain this situation by stating that he was unaware of her age. He maintains the girl's parents have apologized to him, recognizing that he had been deceived and conveying remorse for how the situation was handled.

[7] To note, this provision of the *Code* provides that it is a crime for an individual "who, for a sexual purpose, touches, directly or indirectly, with a part of the body or with an object, any part of the body of a person under the age of 16 years" [emphasis added]. The Applicant was sentenced to 90 days' imprisonment and released after 60 days.

[8] On July 30, 2019, the Applicant was subject to section 44 of the *IRPA* report, being inadmissible for serious criminality under section 36(1)(a) of the *IRPA*. On September 19, 2019, the Applicant was issued a deportation order.

[9] On November 5, 2019, the Applicant filed a pre-removal risk assessment ("PRRA"). On July 6, 2020, the PRRA was refused.

[10] On December 25, 2022, the Applicant was engaged. He and his partner have a young son together.

[11] Between 2021 and 2023, the CBSA was unable to remove the Applicant due to a lack of proper travel documentation. On December 1, 2023, the Applicant was issued travel documentation. On December 18, 2023, he was issued a direction to report for removal.

[12] On January 3, 2024, the Applicant submitted a deferral of removal request. On January 10, 2024, this deferral request was refused. The Officer found that insufficient evidence had been tendered to demonstrate the Applicant and his partner's mental health issues, respectively, warranted a deferral of removal, nor did his separation from his infant and partner and his pending humanitarian and compassionate ("H&C") application.

III. **Preliminary Issue**

[13] The Respondent submits that the Minister of Citizenship and Immigration was made a party to these proceedings, but that the proper respondent is the Minister of Public of Safety and

Emergency Preparedness. The Applicant agrees and I agree. The Minister of Citizenship and Immigration is removed as a party and the style of cause is hereby amended to include only the Minister of Public Safety and Emergency Preparedness as the proper Respondent.

IV. **Analysis**

[14] 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.

[15] 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*

[16] 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). This Court must also bear in mind that the discretion to defer the removal

of a person subject to an enforceable removal order is limited. 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) ("*Baron*").

[17] A decision refusing to defer removal requires the Applicant to meet an elevated standard with respect to the first *Toth* requirement of a serious issue for trial, pursuant to *Baron.*

[18] On this first prong of the tri-partite test, the Applicant submits that his underlying application for leave and judicial review raises the serious issues of the Officer failing to consider the Applicant's attempts to normalize his immigration status in Canada, taking a dismissive approach to the care of the Applicant's child, and misapprehending the evidence tendered for the deferral request, especially regarding his partner's mental health issues.

[19] The Respondent submits that the Applicant has not raised a serious issue. The Respondent maintains that the Officer appropriately considered the evidence about the Applicant's partner and her support network in Canada, as well her mental health issues, and appropriately relied on jurisprudence stating that disruption of family life is an inevitable consequence on removal. The Respondent maintains that the Officer reasonably considered the evidence surrounding the impact of removal upon the Applicant's child and partner, and did not commit a reviewable error in deeming the Applicant's partner's letter as an affidavit or characterizing the Applicant's conviction as an "indictable evidence." The Respondent further maintains that the Applicant failed to establish that his child would grow up without a father.

[20] Having reviewed the materials, I agree with the Respondent. The Applicant has not raised a serious issue in the Officer's decision. The Applicant did not furnish sufficient evidence regarding his partner's mental health issues, but the Officer nonetheless acknowledged the evidence of her particular circumstances and concluded that it was insufficient to justify a deferral of removal with reference to the relevant law on this matter. The same is true for the Officer's reasoning about the effects removal would have upon the Applicant's infant. I further agree with the Respondent that the record does not establish that the Applicant's infant will grow up without him and that the other raised "issues" are insufficiently serious to ground a stay of removal, especially in light of the elevated threshold from *Baron*.

B. *Irreparable Harm*

[21] 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 (CA)*, [1991] FCJ No 984, [1992] 1 FC 142 (FCA)).

[22] The Applicant submits that the second prong of the *Toth* test is established. The Applicant maintains that his child will suffer irreparable harm should he be removed "due to a potential decline in [the child's] mother's mental state," and because the Applicant will not be able to support his partner and have no relationship with his son. The Applicant additionally

submits that he is at risk of torture including beatings, rape, and murder, if his criminal charges become known to individuals in India.

[23] The Respondent submits that the harms alleged by the Applicant, including the potential decline in his partner's mental health, her requirement to care for the infant by herself, the fact he will have "little to no" relationship with the infant, and the risks he faces upon return to India, do not indicate risks that amount to irreparable harm.

[24] The failure to establish a serious issue is dispositive of this matter. The Applicant fails to lead non-speculative evidence that he would face irreparable harm upon removal to India (*Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31). While the Court can sympathize, the potential for decline in his partner's mental health has not been established through sufficient objective evidence. The doctor's comments about her health, for example, are vague, merely stating that she has "mental health problems." While she has attested to her mental health issues in the past, I do not find it sufficiently particular to establish that the Applicant's removal would result in irreparable harm. Additionally, the Applicant's submissions regarding the risks he faces in India are speculative, the objective evidence only tangentially being connected to his circumstances.

[25] I appreciate that the Applicant's partner may, for a time, bear the brunt of raising the infant child if she remains in Canada without the Applicant. But I find, in these circumstances, that the Applicant has not shown this form of harm is "beyond the inherent notion of deportation

itself" (*Melo v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15140 (FC) at para 21). I therefore find that the Applicant has not established irreparable harm.

C. *Balance of Convenience*

[26] 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.

[27] The Respondent submits that the Minister's interest in executing a removal order expeditiously under section 48(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 21, outweighs the Applicant's stated interests.

[28] The Applicant failing to establish a serious issue and irreparable harm is dispositive of this matter. I nonetheless find the balance of convenience weighs in favour of the Respondent in enforcing removal expeditiously under subsection 48(2) of the *IRPA*, as buttressed by the Applicant's serious criminal record in Canada (*Alu Aldabat v Canada (Citizenship and Immigration)*, 2021 FC 277 at para 22).

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

ORDER in IMM-495-24

THIS COURT ORDERS that:

1. The Applicant's motion is dismissed.

2. The style of cause is amended effective immediately to name the Minister of Public Safety and Emergency Preparedness as the proper Respondent.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-495-24
STYLE OF CAUSE:	ANKINT KUNDU v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	BY VIDEOCONFERENCE
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