Federal Court Cour fédérale

Date: 20240212

Docket: IMM-2380-24

Citation: 2024 FC 278

Ottawa, Ontario, February 12, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

RAHUL KALER

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, Rahul Kaler, brings a motion for a stay of removal from Canada, scheduled to take place on February 13, 2024.

[2] The Applicant requests that this Court stay his removal from Canada pending the disposition of an underlying application for leave and judicial review of a negative deferral decision 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 Decisions

[4] The Applicant is a 26-year-old citizen of India. He has been married to his spouse since September 2020. He arrived in Canada in 2015 on a study permit.

[5] On February 1, 2020, the Applicant was charged with impaired driving. He was convicted and sentenced to three days in jail, ordered to pay two fines, and issued a driving prohibition.

[6] The Applicant had two removal interviews in 2023 and two deferred removals. The Applicant was invited to provide further medical documentation regarding his wife's condition, but no new documents were received as of December 15, 2023. The Applicant had another removal interview in 2024 and was advised that his removal would take place on February 13, 2024.

[7] The Applicant submitted another deferral request, and in a decision dated February 8, 2024, the Officer denied this request.

III. Preliminary Issue

[8] The Respondent submits that the named Respondent in this matter should be the Minister of Public Safety and Emergency Preparedness. I agree. The style of cause is changed

immediately, replacing the Minister of Citizenship and Immigration with the Minister of Public Safety and Emergency Preparedness as the named Respondent.

IV. Analysis

[9] 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.

[10] 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*

[11] 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*").

[12] 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.*

[13] On this first prong of the tri-partite test, the Applicant submits that his underlying application for leave and judicial review raises issues with the Officer's decision that are neither vexatious nor frivolous. I note that this is not the standard for serious issues on deferral of removal requests, as per *Baron*.

[14] The Respondent submits that the Applicant has not raised a serious issue. The Respondent maintains that the Applicant has failed to submit his leave application's memorandum of fact and law for this motion. The Respondent also submits that, in any event, the Officer's decision is reasonable.

[15] Having reviewed the materials, I agree with the Respondent. The memorandum of fact and law that the Applicant relies upon for establishing a serious issue has not been provided to the Court for this motion. The Applicant has therefore not met his onus to establish a serious issue (*Atwal v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427 ("*Atwal*") at para 14).

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

[17] The Applicant submits that he will face irreparable harm if removed from Canada, owing to his wife's health conditions and the best interests of the child.

[18] The Respondent submits that the Applicant has failed to establish irreparable harm, as the Applicant has not provided clear evidence that his wife's condition amounts to irreparable harm and that the evidence indicates the Applicant's spouse can care for herself and their child.

[19] I agree with the Respondent. The Applicant's evidence regarding his wife's condition is insufficiently clear, convincing, and non-speculative so as to establish irreparable harm (*Atwal* at para 14). I acknowledge that the Officer was particularly alert to the spouse's medical condition (even asking the Applicant for further documentation); and I agree, for the purposes of this motion, that there is little evidence other than the doctor's brief medical note regarding the wife's condition to establish irreparable harm. I agree with counsel for the Respondent, that the

evidence establishes the Applicant's wife is receiving care and can continue to receive care in Canada. In this case, the evidence does not meet the threshold for establishing 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 Applicant submits that the balance of convenience lies in his favour, based on the evidence tendered and there being "no corresponding public need for him to be deported."

[22] The Respondent submits that the balance of convenience is in the Respondent's favour, the Minister bearing a duty under section 48(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 to remove the Applicant expeditiously and the Applicant having a criminal conviction.

[23] I agree with the Respondent. The balance of convenience is in the Respondent's favour. The Minister has a duty to remove foreign nationals like the Applicant expeditiously.

Furthermore, the Applicant's criminal conviction sees the balance of convenience weigh "heavily" in the Respondent's favour (*ES v Canada (Citizenship and Immigration)*, 2022 CanLII 106384 at para 43, citing *Thanabalasingham v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 486). Despite counsel for the Applicant downplaying the seriousness of the Applicant's offence, counsel for the Respondent rightly noted that it was luck that the Applicant's actions did not injure others or himself, rather than the casual nature of his crime.

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

ORDER in IMM-2380-24

THIS COURT ORDERS that:

1. The Applicant's motion for a stay of removal is dismissed.

2. The style of cause is amended to replace the Minister of Citizenship and Immigration as named Respondent with the Minister of Public Safety and Emergency Preparedness.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2380-24
STYLE OF CAUSE:	RAHUL KALER v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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