Federal Court Cour fédérale

Date: 20230915

Docket: IMM-11327-23

Citation: 2023 FC 1244

Ottawa, Ontario, September 15, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

AKIN RICHARD OLUWAFEMI
OLUFUNKE OLUWAFEMI

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicants, Akin Richard Oluwafemi ("Principal Applicant") and Olufunke Oluwafemi ("Associate Applicant"), bring a motion for a stay of their removal from Canada, scheduled to take place on September 19, 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 deferral request by an Inland Enforcement Officer (the "Officer") of the Canada Border Services Agency ("CBSA").

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

II. **Facts and Underlying Decisions**

[4] The Applicants are citizens of Nigeria. The Principal Applicant is 67 years old and his wife, the Associate Applicant, is 53 years old. Their six children live in Nigeria.

[5] The Applicants arrived in Canada on May 1, 2019. The Refugee Protection Division ("RPD") refused the Applicants' claim in reasons on August 24, 2020. The Refugee Appeal Division ("RAD") dismissed the Applicants' appeal of the RPD's decision on February 25, 2021. This Court dismissed the Applicants' application for judicial review of the RAD's decision on April 18, 2023.

[6] On July 20, 2023, CBSA served the Applicants with a Direction to Report for removal, scheduled for September 19, 2023.

[7] On August 30, 2023, the Applicants submitted a request to CBSA to defer their removal. On September 8, 2023, the CBSA refused the Applicants' deferral request.

III. **Analysis**

[8] 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.

[9] 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*

[10] 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) ("*Baron*"). 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.*

[11] On this first prong of the tri-partite test, the Applicants submit that the underlying application raises issues about the reasonableness and procedural fairness of the CBSA's refusal of the deferral request, specifically in its CBSA's refusal to provide its reasons for refusing the Applicants' request and failure to consider relevant supporting documentation.

[12] The Respondent submits that there is no serious issue because the Applicants failed to put forward any evidence in their request for deferral.

[13] Having reviewed the parties' motion materials, I agree that there is no serious issue to be tried, in light of the elevated standard with respect to the first *Toth* requirement. I agree with the Respondent that it was open to the Officer to find that the Applicants insufficiently explained why the arrest warrant and alleged fear of the police were not brought before the RPD and only shortly before removal to the CBSA, and that the documentary evidence was general and insufficient to show that the Applicants faced personalized risks in Nigeria.

B. *Irreparable Harm*

[14] 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)).

[15] The Applicants submit that they will suffer irreparable harm if returned to Nigeria. They submit that their removal would expose them to harm in the hands of state agents in Nigeria and that there is credible documentary evidence to support this fact.

[16] The Respondent submits that the Applicants have failed to establish clear and convincing evidence of irreparable harm that is not speculative and have not provided evidence of a "new" risk that would displace the findings of the RPD, RAD, and Federal Court.

[17] The failure to establish a serious issue raised by the underlying application for judicial review is determinative of this motion. Nonetheless, irreparable harm is not made out in this case. I agree with the Respondent that the Applicants have provided insufficient evidence to establish that their removal would result in harm in the hands of Nigerian police. The Applicants provided evidence of an active warrant for the arrest of the Principal Applicant and documentary evidence stating that detained or arrested individuals are subject to cruel and unusual punishment. However, the Applicants have not provided clear and convincing evidence at a level of particularity demonstrating that they themselves would face harm from the Nigerian police, and their submissions that they would face torture and/or cruel and unusual punishment upon arrest or detention is speculative (*Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31; *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at paras 15-16). Such speculation cannot displace the risk findings of the RPD, RAD, and the Federal Court's decision.

C. *Balance of Convenience*

[18] 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.

[19] The Applicants submit that the balance of convenience favours granting the stay of removal. The Applicants submit that while a stay of removal would interfere with CBSA's duties, the potential hazard faced by the Applicants weighs in favour of granting the stay. The Applicants further submit that this Court has jurisdiction to grant stays to protect the integrity of proceedings before the Court.

[20] The Respondent submits that the balance of convenience favours dismissing the motion for a stay of removal in order to uphold the proper administration of the immigration system.

[21] The failure to meet the first two prongs of the test is determinative of this motion. Nonetheless, the balance of convenience weighs in favour of the Respondent. Subsection 48(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, states that removal orders must

be enforced as soon as possible. The balance of convenience favours the Minister in enforcing the removal order expeditiously given that the Applicants did not furnish sufficient evidence of irreparable harm.

[22] Ultimately, the Applicants did not meet the tri-partite test required for a stay of removal. This motion is therefore dismissed.

ORDER in IMM-11327-23

THIS COURT ORDERS that the Applicants' motion for a stay of removal is dismissed.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Adetayo Akinyemi	FOR THE APPLICANTS
Leanne Briscoe	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Adetayo Akinyemi Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT