Federal Court  Cour fédérale

Date: 20240501

Docket: IMM-6148-24

Citation: 2024 FC 675

Toronto, Ontario, May 1, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ALEX KOKENY

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondents

ORDER AND REASONS

I. Overview

[1] The Applicant, Alex Kokeny, brings a motion for a stay of removal from Canada, scheduled to take place on May 2, 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 Pre-Removal

Risk Assessment ("PRRA") rendered by an officer (the "Officer") of Immigration, Refugees and Citizenship Canada ("IRCC").

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

II. **Facts and Underlying Decisions**

[4] The Applicant is a 21-year-old citizen of Hungary.

[5] In 2009, the Applicant made a refugee claim in Canada with his parents. In 2012, this claim was refused and the Applicant was returned to Hungary. In 2022, he returned to Canada.

[6] On July 4, 2023, IRCC received the Applicant's PRRA application. In a letter dated February 26, 2024, the Applicant was informed that his PRRA application had been rejected. The Applicant stated that he received this negative decision on April 2, 2024.

[7] The Officer acknowledged evidence from the Applicant stating that upon return to Hungary, his father had become a Roma activist and politician, which led to animosity toward the Applicant's family and acts of mistreatment owing to his Roma ethnicity. This includes abuse at school and in June 2022, being assaulted and stabbed by a member of a racist extremist group. The Applicant provided a hospital report for this latter attack and photographic evidence of injuries he sustained.

[8] The Officer found, however, that this report and these photos did not establish a causal link between this attack and his injuries, and gave neither the report nor the photographic evidence any weight. The Officer further acknowledged that the Applicant stated that he reported this incident to the police and believes it was not investigated. However, the Officer found that while the police response "may have been disappointing," it did not establish inability or unwillingness to protect him, and that the Applicant had not substantiated that there was a lack of investigation on the police's part. The Officer concluded the Applicant had not established, as described, that he was a victim of assault in June 2022.

[9] The Officer acknowledged the Applicant's statements that his parents had PRRAs approved and his spouse and son had their refugee claim accepted for similar issues and events that had occurred to all of them, but found that there was not evidence these PRRAs and refugee claim had been accepted. The Officer further found that the country condition evidence did not establish that the Applicant had been personally exposed to conduct that amounted to persecution. The Officer therefore refused his PRRA application.

[10] The Applicant states that on April 9, 2024, he received a direction to report for removal.

[11] That day, on April 9, 2024, the Applicant and his spouse welcomed their newborn son, who was born in Toronto.

[12] On April 28, 2024, the Applicant applied for leave and judicial review of this PRRA decision.

III. **Analysis**

[13] 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.

[14] 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*

[15] 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).

[16] On this first prong of the tri-partite test, the Applicant submits that there are serious issues with several aspects of the Officer's decision, including in failing to consider imputed sexual orientation in the persecution analysis, and making veiled credibility findings about evidence the Applicant proffered.

[17] The Respondent submits that there is no serious issue with the Officer's decision, the Officer having reasonably concluded that the discrimination the Applicant faced did not rise to persecution, that the Applicant had not led sufficient evidence to establish his PRRA claim (there being no credibility findings in the Officer's decision), and that the Officer did not err in failing to consider the Applicant's sexual orientation given the evidence provided and the Applicant's PRRA application submissions.

[18] I agree with the Applicant. There are several serious issues with the Officer's decision. The Officer's decision does not account for what was clear evidence of vicious persecutory acts owing, at least in part, to the Applicant's perceived sexual orientation. There is therefore a serious issue with the Officer's treatment of "all the risk factors put forward by the Applicant, cumulatively" (*Kailajanathan v Canada (Citizenship and Immigration)*, 2017 FC 970 at para 19, citing *K.S. v Canada (Citizenship and Immigration)*, 2015 FC 999 at para 42). There is also a serious issue with the Officer failing to explain, based on the Applicant's robust evidence of mistreatment owing to his Roma ethnicity, "why the discrimination facing the [Applicant] did not constitute persecution" (*Csiklya v Canada (Citizenship and Immigration)*, 2019 FC 1276 at para 24).

[19] Moreover, there is a serious issue with the Officer's treatment of the Applicant's statements about the June 2022 assault as found in his affidavit and the medical report about this incident. The Officer's reasons state that they were not convinced there was sufficient evidence to support the Applicant's allegations that he had been assaulted in June 2022 "as described." However, the Officer's reasons taken with this evidence provided by the Applicant in support of his PRRA application disclose that the Officer was making veiled authenticity findings about this evidence (*Oranye v Canada (Citizenship and Immigration)*, 2018 FC 390 at para 27). The Applicant has established serious issues with the Officer's decision.

B. *Irreparable Harm*

[20] 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)).

[21] The Applicant submits that irreparable harm is established, irreparable harm following a finding of serious issues with the Officer's decision in this motion and the separation of the Applicant from his spouse and newborn child constituting irreparable harm.

[22] The Respondent submits that irreparable harm is not established, irreparable harm not following a finding of serious issues with the Officer's decision and the Applicant not raising other grounds that would rise to irreparable harm.

[23] I agree with the Applicant. He has established his removal would result in irreparable harm, given the evidence before me and the numerous serious issues with the Officer's risk assessment in PRRA decision (*Roman v Canada (Citizenship and Immigration)*, 2021 CanLII 7915 (FC) at para 8, citing *Figurado v Canada (Solicitor General) (F.C.)*, 2005 FC 347 at para 45).

C. *Balance of Convenience*

[24] 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, "[w]here 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.

[25] The Applicant submits that the balance is in his favour given the Officer's flawed decision, his family in Canada, and the fact that a stay would cause the Minister less inconvenience than the Applicant's immediate removal.

[26] The Respondent submits that the balance of convenience is in their favour, the Applicant failing to show that the balance of convenience outweighs the public interest in having the Applicant removed expeditiously.

[27] I agree with the Applicant. The balance of convenience is in his favour. The serious issues with the Officer's decision and finding that irreparable harm would occur upon the Applicant's removal from Canada outweighs the Respondent's interest in having removal enforced expeditiously pursuant to section 48(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27.

[28] Ultimately, the Applicant has met the tri-partite test required for a stay of removal. This motion is granted.

ORDER in IMM-6148-24

THIS COURT ORDERS that the Applicant's motion for a stay of removal pending his underlying application for leave and judicial review is granted.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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