Federal Court  Cour fédérale

Date: 20240718

Docket: IMM-11929-24

Citation: 2024 FC 1123

Ottawa, Ontario, July 18, 2024

PRESENT: Madam Justice Azmudeh

BETWEEN:

THEESAN THEVARASA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, a citizen of Sri Lanka, has been directed to report for removal from Canada on July 20, 2024. He has applied for an order staying the order for his removal pending the final determination of his Application for Leave and Judicial Review (the "Application") of a decision dated May 7, 2024, refusing his application for a Pre-Removal Risk Assessment

("PRRA") under subsection 112(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, ("IRPA").

[2] I stated at the conclusion of the hearing that I would be granting the stay motion because I was satisfied that the Applicant had met the three-part test for a stay. I also stated that my reasons would follow. These are those reasons.

II. Summary of Relevant Facts and PRRA findings

[3] The Applicant is a 24-year-old citizen of Sri Lanka. He is of Tamil ethnicity and comes from Visvamadu in the Mullaitivu District.

[4] The Applicant is a failed refugee claimant who had alleged to leave Sri Lanka due to ongoing and consistent acts of persecution by Sri Lankan authorities against him and his family. On June 15, 2021, the Refugee Protection Division (the "RPD") rejected his claim on credibility. A large part of the RPD's focus was on the omission of his exact travel route to Canada. The RPD also focused on his return to the country from the Bahamas in 2016 and rejected that the authorities had arrested him in 2018.

[5] In any event, because the Applicant had travelled to Canada via the United States and because of the application of the *Third Safe Country Agreement*, the Refugee Appeal Division did not have jurisdiction to hear his case. This Court subsequently dismissed the Application, and the RPD decision became final.

[6] The Applicant made extensive PRRA submissions that included new evidence on his cumulative residual profile in Canada since the RPD had rejected his claim (*Raza v Canada (MCI)*, 2007 FCA 385), namely that:

- he was a failed refugee claimant returning to Sri Lanka;
- he resided within a large Sri Lankan Tamil diaspora community in Canada and engaged in pro-Tamil (or anti-government) activities in Canada;
- he had a prolonged absence from Sri Lanka since 2018; and
- he did not have a Sri Lankan passport and would return to the country as a failed refugee claimant on a travel document.

[7] The PRRA officer accepted all of the above facts on his cumulative profile individually and without any analysis that would suggest they had turned their mind into the interaction of these factors. In other words, the "cumulative" nature of the Applicant's profile in 2024 was ignored and each of the above factors was assessed individually. For example, the PRRA officer accepted that the Applicant had attended pro-Tamil independence activities, but limited this fact to assessing the *sur place* claim, and found that it was unlikely that the Sri Lankan authorities have learnt about it.

[8] The PRRA officer also acknowledged that the country documents on Sri Lanka strongly suggest that failed refugee claimants who are returned to Sri Lanka would be questioned. Those with a potential link to the Liberation Tigers of Tamil Eelam ("LTTE") could be handed over at to the Criminal Investigation Department ("CID") for further questioning and/or detention. The PRRA officer was privy to country documents on the continued application of the *Prevention of Terrorism Act* ("PTA") that permits arrest and detention on mere suspicion of pro-LTTE

sentiments and support, and imprisonment for up to 18 months without formal charge, and allowing the introduction of confessions into evidence even if extracted with the use of torture.

[9] The PRRA officer referred to the documentary evidence on the persecution of those perceived to have pro-LTTE ties and concluded that it did not apply to the Applicant. The PPRA officer concluded that since the RPD had found the Applicant to lack credibility, and that the Applicant's new evidence was insufficient to overcome the RPD's credibility concerns, the Applicant did not face a serious possibility of persecution or on a balance of probabilities, a personal risk of harm, on his forced return to Sri Lanka.

[10] The PRRA reasons were silent on the potential link between any of the residual profile factors. The Officer never turned their mind into whether the questioning on his long absence from Sri Lanka or presence with the Tamil diaspora in Canada, or his activities in Canada, when the Applicant has a duty to tell the truth, would trigger a further risk factor.

[11] It is also noteworthy to mention that the at the RPD hearing, the Applicant had filed a letter from his father to corroborate his allegations. The RPD rejected the letter because it found that the father was not a disinterested party. For the PRRA, the father provided a sworn affidavit on the ongoing interest of the authorities in the Applicant in 2022 and 2023 and the fact that the authorities believed he was sympathizing with the LTTE. The PRRA officer rejected the affidavit with reasons that mirrored those of the RPD.

III. Analysis

A. *The Test for a Stay of Removal*

[12] To obtain an interlocutory stay of removal, the applicant must demonstrate three things: (1) that the underlying application for judicial review raises a "serious question to be tried;" (2) that the Applicant will suffer irreparable harm if the stay is refused; and (3) that the balance of convenience (i.e., the assessment of which party would suffer greater harm from the granting or refusal of a stay pending a decision on the merits of the judicial review application) favours granting a stay (*Toth v Canada (Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123 (FCA); *R v Canadian Broadcasting Corp*, 2018 SCC 5, [2018] 1 SCR 196 [*CBC*] at para 12; *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110; and *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*] at 334).

[13] This Court has held repeatedly that the purpose of an interlocutory order is to ensure that the subject matter of the underlying litigation will be preserved so that effective relief will be available should the applicant be successful on their application for judicial review (*Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34 [*Google*] at para 24).

[14] I also note that the decision to grant or refuse this interlocutory relief is a discretionary one that must be made having regard to all the relevant circumstances (*CBC,* at para 27). As the Supreme Court of Canada stated in *Google,* at paragraph 25: "The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific."

[15] While each part of the test is important, and that the test is conjunctive, they are not discrete, watertight compartments. Each part focuses on the Court on factors that inform its overall exercise of discretion in a particular case (*Wasylynuk v Canada (Royal Mounted Police)*, 2020 FC 962 [*Wasylynuk*] at para 135). The test should be applied in a holistic fashion where strengths with respect to one factor may overcome weaknesses with respect to another (*RJR-MacDonald* at 339; *Wasylynuk* at para 135; *Spencer v Canada (Attorney General)*, 2021 FC 361 at para 51; *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 FC 1195 at para 97 (rev'd on other grounds 2021 FCA 84); and *Power Workers Union v Canada (Attorney General)*, 2022 FC 73 at para 56. See also Robert J Sharpe, "Interim Remedies and Constitutional Rights" (2019) 69 UTLJ (Supp 1) at 14).

(1) Serious Issue

[16] In this case, the threshold for establishing a serious question to be tried is a low one. The Applicant only needs to show that the Application for judicial review is not frivolous or vexatious (*RJR-MacDonald* at 335 and 337; see also *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at para 11 and *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 [*Glooscap Heritage Society*] at para 25 and *Abazi v M.C.I.* [2000] F.C.J. No. 429, at para 5.)

[17] I agree with the Applicant that in this case, the PRRA officer ignored the Applicant's cumulative profile, as it was before them. Firstly, they deferred entirely and solely to the RPD's residual profile assessment, finding that the Applicant's cumulative profile does not expose him to a risk, because it did not in 2017 when he returned to the country from the Bahamas. This was

before his long stay in Canada and his activities in this country. In concluding this, mirroring the RPD reasons, credibility emerged as a central theme in the PRRA decision.

[18] The Applicant's 2017 profile, as it was assessed by the RPD, cannot be reasonably compared to his 2024 profile before the PRRA officer, particularly as a failed refugee claimant, having resided in Canada (not the Bahamas) amongst a large and active Tamil Diaspora.

[19] I also agree with the Applicant that the PRRA officer conducted a highly-selective analysis of the country condition evidence (*Kuka v Canada (MCI)*, 2024 FC 209, *Ariyaratnam v Canada (MCI)*, 2010 FC 608, Crampton, C.J. *Amarasingam v Canada (MCI)*, 2023 FC 655). For example, the PRRA officer relied on a recent document from a UK-based fact-finding mission that had concluded that the general treatment of returnees are not bad. The same document qualified it by stating that those suspected of LTTE links could further face abduction or torture. The PRRA officer's analysis cherry picked the first and completely ignored the qualifying sections of the same documents.

[20] This Court has repeatedly stated that when a decision-maker faces potentially contradictory evidence and prefers one set over the other, they must clearly state why (*Ehigiator v Canada (Citizenship and Immigration)*, 2023 FC 308 at paras 52, 71-73; *Barril v Canada (Citizenship and Immigration)*, 2022 FC 400 at para 17).

[21] In doing so, the PRRA officer treated each aspect of the Applicant's profile in complete isolation without remembering the whole of the Applicant's profile. The PRRA officer ignored

the extensive country documents and submissions in the context of how each aspect of his profile contributed to his cumulative profile. In *Vilvarajah v Canada (MCI)*, 2018 FC 349, Justice Diner warns against the attempt to carve up one's cumulative profile.

[22] I also agree with the Applicant that while the PRRA officer tried to articulate their analysis in the context of "sufficiency" of evidence, they based their decision on credibility. I agree with the Respondent that the PRRA officers are bound by the RPD's credibility findings; however, this is only extended to the findings before the RPD. The same does not apply to the new evidence not before the RPD, such as allegations of ongoing interests in the Applicant and the treatment of the father's affidavit (which mirrored the treatment of his letter by the RPD).

[23] I am guided by this Court in *Kailajanathan v Canada (MCI)*, 2017 FC 970 at paragraph 21 where this Court warned against the limits of relying on RPD's credibility findings when assessing the Applicant's new profile.

[24] By making these findings on the PRRA decision, I am certainly not suggesting that the outcome of the Application for judicial review is a foregone conclusion. However, it is obvious that the grounds for review are clearly neither frivolous nor vexatious. The Applicant therefore meets the first part of the test.

(2) Irreparable Harm

[25] Under the second part of the test, "the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be

remedied if the eventual decision on the merits does not accord with the result of the interlocutory application" (*RJR-MacDonald* at 341). This is what is meant by describing the harm that must be established as "irreparable." Irreparable harm concerns the nature of the harm rather than its magnitude (*RJR-MacDonald* at 341) and is generally a harm that cannot be quantified in monetary terms or that could not be cured for some other reason even if it can be quantified.

[26] To establish irreparable harm, the moving party "must demonstrate in a detailed and concrete way that it will suffer real, definite, unavoidable harm – not hypothetical and speculative harm – that cannot be repaired later" (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112 at para 24). Unsubstantiated assertions of harm will not suffice. The moving party must establish a "real probability" of irreparable harm (*Glooscap Heritage Society* at para 31).

[27] The removal of the Applicant prior to the final determination of his Application for leave and judicial review of the negative PRRA decision would potentially render that Application moot (*Solis Perez v Canada (Citizenship and Immigration)*, 2009 FCA 171 at para 5). I acknowledge that the Respondent argued that this Court could continue to exercise its discretion to hear the Judicial Review of the underlying PRRA decision.

[28] This is a not a pronouncement that the potential mootness of an underlying application for judicial review would necessarily constitute irreparable harm. It is factual and it must be determined in the individual circumstances of the particular case at hand (*El Ouardi v Canada*

(Solicitor General), 2005 FCA 42 at para 8; *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at paras 34-38.)

[29] From my perspective, the PRRA officer's potential errors, including ignoring whether the Applicant's cumulative profile could expose him to a heightened risk of persecution or torture on his arrival to Sri Lanka, is directly linked to the question of irreparable harm, i.e., the risk of persecution or torture on his arrival.

[30] I find that in this case, the second part of the test, i.e., the irreparable harm, is rationally connected to the serious question to be tried. I find that the loss of the right to seek a meaningful and effective remedy in the underlying proceeding amounts to irreparable harm in this case.

(3) Balance of Convenience

[31] To meet this third part of the test, the Applicant must establish that the harm he would suffer if the stay is refused is greater than the harm the Respondent would suffer if the stay is granted. This is assessed in the context of other interests that will be affected by the Court's decision. This weighing exercise is neither scientific nor precise (*Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2020 FCA 181 [*Canadian Council for Refugees*] at para 17). It is at the heart of the determination of what is just and equitable in the particular circumstances of the case at hand.

[32] I am also satisfied that the balance of convenience favours the Applicant.

[33] In assessing the balance of convenience, in addition to the Applicant's interests, the public interest must be taken into account since this is a case involving the actions of a public authority (*RJR-MacDonald* at 350). As the Respondent submitted, the Applicant is subject to a valid and enforceable removal order. It was made pursuant to statutory and regulatory authority. It is therefore presumed that it is in the public interest. Further, under subsection 48(2) of the *IRPA,* a removal order "must be enforced as soon as possible" once it is enforceable. It is also presumed that an action that suspends the effect of the order (as would an interlocutory stay) would be detrimental to the public interest (*RJR-MacDonald* at 346 and 348-49). Whether this is sufficient to defeat a request for an interlocutory stay in a given case will, of course, depend on all the circumstances of the case. This can also depend on how long the effect of the deportation order would be suspended (*Canadian Council for Refugees* at para 27).

[34] However, I agree with the Applicant that public interest does not favour removal to a country where the individual could be persecuted or tortured. Further, I agree with this Court that the interest in ensuring that the Applicant retains the right to a meaningful and effective remedy is not the Applicant's alone. "It is shared by the public and by the administration of justice, a factor that also tips the balance in favour of a stay" (*SKGO v MCI*, 2023 FC 83 at para 29).

[35] There are no aggravating factors in this case to tip the balance against the Applicant. He has clean hands and has been compliant with all his legal obligations. There is no suggestion that he poses any sort of risk to the public at this time.

[36] In the context of this case, the only inconvenience to the Respondent if the Applicant is not removed on July 20, 2024 and his Application for judicial review is dismissed is that his removal from Canada will have been delayed. His removal will only be delayed and not frustrated entirely. On the other hand, the potential prejudice to the Applicant is losing the right to a meaningful remedy. This is significant and irreparable. In the particular circumstances of this case, this outweighs the public interest in the immediate enforcement of the removal order.

[37] For these reasons, I am therefore satisfied that the balance of convenience favours the Applicant.

IV. Conclusion

[38] Balancing all of the relevant considerations, I am satisfied that the Applicant has met the three-part test of a stay of removal.

[39] I grant the Applicant’s motion for a stay of removal. The Applicant shall not be removed from Canada prior to the final determination of the underlying Application for leave and judicial review.

ORDER IN IMM-11929-24

THIS COURT ORDERS that:

1. The motion is granted.

2. The Applicant shall not be removed from Canada prior to the final determination of his Application for leave and judicial review of the negative PRRA decision.

"Negar Azmudeh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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