Federal Court  Cour fédérale

Date: 20200622

Docket: IMM-2709-20

Citation: 2020 FC 716

Montréal, Québec, June 22, 2020

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

DAVID ROGER REVELL

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

JUDGMENT AND REASONS
(Delivered orally from the Bench on June 19, 2020)

I. Preamble

[1] If the Applicant is to be deported, it will only be when medical specialist professionals in epidemiology deem it safe for the Applicant and the public in his midst, at every juncture of deportation and destination, to have followed each and every health precaution necessary, as determined at present, and/or, as determined in the future. Then, dependent on date of the deportation of the Applicant, as per state of the art (in respect of the give and take of

continuously changing measures put in place as changes in statistics in COVID-19 cases occur), under the circumstances deemed acceptable and/or required by established medical protocol, it will be contingent on the Applicant's underlying Application for Leave and for Judicial Review [Underlying Application] before the matter of removal can be revisited.

II. Reasons

[2] The Applicant, David Roger Revell, is requesting for an Order staying the execution of the removal order scheduled to be executed June 23, 2020, until such time as his Underlying Application has been finally determined.

[3] Mr. Revell is a 56-year-old citizen of the United Kingdom [UK] who has been a permanent resident of Canada since 1974. The Applicant currently resides in Provost, Alberta where he has worked as an oil well technician. The Applicant grew up in Kelowna, British Columbia, where he raised his family and ran several businesses.

[4] In March 2008, the Applicant was convicted in Vancouver of possession of cocaine for the purpose of trafficking and trafficking in cocaine, offences under the *Controlled Drugs and Substances Act*, SC 1996, c 19, for which he received a global sentence of 5 years imprisonment.

[5] Following his conviction, the Canada Border Service Agency [CBSA] invited the Applicant to make submissions as to why the section 44(1) Report of inadmissibility for serious criminality should not be referred to an admissibility hearing. CBSA decided that Mr Revell should simply be issued a warning letter regarding his criminal record and the effect of any

further involvement with the criminal justice system on his immigration status in Canada; however, the letter was never sent, and the Applicant heard nothing further from CBSA in response to his submissions.

[6] In 2013, Mr. Revell pled guilty to two assault charges after he threw a remote control at his ex-girlfriend during an argument, charges for which he received probation and a suspended sentence. These charges were unrelated to the 2008 conviction. This conviction led CBSA to revive the criminal inadmissibility report that had been on hold. Following new submissions from Mr. Revell, CBSA decided that the section 44(1) Reports should this time be referred to an admissibility hearing.

[7] Mr. Revell's request for reconsideration of the decision to refer the matter was denied. He then sought leave for judicial review of both the decision to refer him to an admissibility hearing pursuant to subsection 44(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] and the decision to refuse reconsideration. Leave was denied in both applications.

[8] At the hearing on admissibility, the Immigration Division found Mr. Revell inadmissible pursuant to both paragraphs 36(1)(a) of the IRPA (serious criminality) and 37(1)(a) of the IRPA (organized criminality) (*Canada (Minister of Public Safety and Emergency Preparedness) v Revell,* [2016] I.D.D. No. 44). As a result, he had no right of appeal to the Immigration Appeal Division, nor could he make an application for Humanitarian and Compassionate considerations for an exemption from the requirements of the Act. Mr. Revell sought judicial review of this decision, but this Court refused the application for judicial review (*Revell v Canada (Citizenship and Immigration)*, 2017 FC 905). The Federal Court of Appeal confirmed the decision in *Revell*

v Canada (Citizenship and Immigration), 2019 FCA 262 [*Revell FCA*], and leave to appeal to the Supreme Court was denied on April 2, 2020 (*David Roger Revell v Minister of Citizenship and Immigration*, 2020 CanLII 25169 (SCC)).

[9] In parallel, the removal process moved on. Following a pre-removal interview in November 2019, the Applicant was scheduled for removal on December 13, 2019 but was later cancelled due to the leave to appeal to the Supreme Court. On April 23, 2020, CBSA contacted the Applicant to discuss removal, and on May 7, 2020 the Applicant was notified of the new removal date of June 20, 2020 (which was later changed to June 23, 2020 due to changes in flight). On June 2, 2020, the Applicant sought a Deferral of Removal. On June 12, 2020, CBSA refused the request for Deferral of Removal. This last decision is the decision under review in the Underlying Application [Decision].

[10] The Applicant requested a Deferral of Removal in light of the COVID-19 global pandemic; as such, the removal of the Applicant should be deferred "until the curve of infection recedes in the UK (United Kingdom) to a level that permits the UK to withdraw its quarantine order." The Applicant submits that a removal at this time would infringe his rights protected under section 7 and section 12 of the *Canadian Charter of Rights and Freedoms,* Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11 [*Charter*].

[11] The Applicant submits that the UK has been one of the countries most affected by COVID-19. Due to the quarantine order in force, the Applicant will have to self-isolate for at least 14 days in the UK or face a £1,000 fine. Mr Revell claims that he simply does not have the funds to pay for a hotel, or the delivery of food therein. The Applicant has no family or other

support system in the UK, and no place to live: apart from a brief 10-day visit in 1990, the Applicant has never returned to the UK, and his entire family, including his common law partner, his children, his siblings and his grandchildren reside in Canada. In other words, the Applicant will be fully uprooted from Canada and expected to reinstall alone, with limited funds, in the UK in the midst of a global pandemic.

[12] The tripartite test to be satisfied in a motion for a stay of removal from Canada is well known, Mr. Revell has to demonstrate, on a balance of probabilities, that:

> 1. the Underlying Application raises a serious issue to be tried;
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> 2. he will suffer irreparable harm if he is removed to the United Kingdom; and
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> 3. the balance of convenience favours the granting of the stay.
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> (*RJR-MacDonald Inc. v Canada* (*Attorney General*), [1994] 1 SCR 311 at 348 (SCC) [*RJR MacDonald*]; *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12 [*CBC*]; *Toth v Canada* (*Minister of Employment and Immigration*) (1988), 86 NR 302 (FCA) [*Toth*]; *Akyol v Canada (Minister of Citizenship & Immigration)*, 2003 FC 931 at para 7 [*Akyol*].)

[13] The tripartite test is conjunctive such that Mr. Revell must meet each of the three prongs of the test (*Janssen Inc. v Abbvie Corporation*, 2014 FCA 112).

[14] Where a motion for stay of removal is based on the same risk as alleged in the Deferral of Removal application, there is no substantive difference between the issues that are relevant to the first and second prongs of the RJR test; however, the standard applied is different. Under the first prong, the Applicant need only show that his arguments are not frivolous, thus demonstrating a serious question (*Mauricette v Canada (Public Safety and Emergency*

Preparedness), 2008 FC 420 at para 15 [*Mauricette*]). Under the second prong; however, the Applicant must demonstrate that he is likely to suffer irreparable harm. Hence, the real issue is that of irreparable harm since a positive finding in the second prong of the test will imply a serious (i.e. non-frivolous) question to be tried.

[15] Turning to the second prong of the tri-partite test, Mr. Revell must demonstrate, on a balance of probabilities, that he will suffer irreparable harm if he is removed to the UK (*RJR MacDonald*, *CBC*, *Toth* and *Akyol*, above); however, the harm in question awaits the future, and is therefore uncertain: the Applicant is only required to prove a likelihood of harm, not certainty of harm (Ali v Canada (Citizenship and Immigration), 2007 FC 751 at para 33). To quote my colleague Justice Grammond, this Court is ultimately assessing a risk of harm, which should be demonstrated on a balance of probabilities:

> [15] Thus, irreparable harm can be analyzed from two angles: the level of risk and the standard of proof. There is no fixed threshold or minimum level of risk, in particular when the harm is very serious, such as death. We would not require that, for instance, death must be more likely than not or that there be more than a 50% probability of death. We would surely not deport someone to a 30% probability of death. But a minimal risk, or the risk of a harm that is inherent in the removal process, would not count. In any event, in the absence of a method to quantify such risks, it is meaningless to require a specific level of probability.
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> **[16] The level of risk must not be confused with the standard of proof of that risk. In principle, the standard is the same as in all civil cases, namely, proof on a balance of probabilities. In deciding what is sufficient to establish such proof, the nature and seriousness of the risk must weigh in the balance. Motions for stay of removal often deal with allegations of risk to life or physical integrity that are far removed from the risks at stake in cases such as RJR or CBC. The resources at the disposal of the applicant must also be kept in mind. One should not expect the amount of evidence that one sees, for example, in commercial litigation.** Moreover, when the risk results from unlawful activities, evidence of that risk will rarely be direct and

> conclusive. People who engage in unlawful activities will rarely provide evidence of it, even less so in advance. [Our emphasis.]
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> (*Delgado v Canada (Citizenship and Immigration)*, 2018 FC 1227.)

[16] As previously confirmed by this Court, there are no set conditions that must be met in order for an Officer to exercise his/her discretion to defer removal; therefore, where there are compelling circumstances that make it necessary for the Officer to defer removal, then, justice would require that the Officer exercise that discretion (See *Mauricette*, above, at para 23).

[17] Mr. Revell submits that if a stay of his scheduled removal is not granted, he faces a serious probability of risk to his life, liberty and security, as a result of which he will be irreparably harmed. Moreover, the Applicant submits that to remove him at this time would be a grossly disproportionate treatment, infringing on his section 12 *Charter* rights.

[18] Although a deferrals officer lacks jurisdiction to grant *Charter* remedies, it is trite law that administrative decision-makers are obliged to exercise discretionary authority in a manner that is consistent with the *Charter*. This approach is best summarized by the Supreme Court in *Law Society of British Columbia v Trinity Western University*, 2018 SCC 32:

> [58] Under the precedent established by this Court in Doré and Loyola, the preliminary question is whether the administrative decision engages the Charter by limiting Charter protections — both rights and values (Loyola, at para. 39). If so, the question becomes "whether, in assessing the impact of the relevant Charter protection and given the nature of the decision and the statutory and factual contexts, the decision reflects a proportionate balancing of the Charter protections at play" (Doré, at para. 57; Loyola, at para. 39). **The extent of the impact on the Charter protection must be proportionate in light of the statutory objectives.** [Our emphasis.]

[19] This Court agrees with the Applicant: in light of the COVID-19 pandemic, the Applicant would suffer an irreparable harm if he were to be removed at this time.

[20] In front of the Federal Court of Appeal, the Applicant was contesting the constitutionality of his removal. While dismissing his appeal, the Federal Court of Appeal highlighted the fact that the arguments raised by the Applicant were premature:

> [52] There are thus a number of safety valves in the IRPA ensuring that the deportation process as a whole is in accordance with the principles of fundamental justice. The admissibility hearing before the ID is clearly not the last step in that complex process, and every person, including the applicant, is provided with an opportunity to have his or her Charter rights fully assessed before being removed from Canada. The Judge did not err in finding that Mr. Revell could reiterate the submissions that could not be entertained by the PRRA officer if and when he seeks a deferral of his removal at a later stage of his deportation process (FC Reasons at para. 110).
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> […]
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> [57] For all of the foregoing reasons, I am of the view that the Judge did not err in dismissing Mr. Revell's section 7 arguments as being premature and in finding that an inadmissibility determination does not engage section 7. This finding is sufficient to dispose of the appeal. I will nevertheless address the questions identified above in order to provide a complete answer to the certified questions.
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> (*Revell FCA*, above, at paras 52 and 57.)

[21] Further within the decision, the Federal Court of Appeal upheld the finding of the Federal Court that the security interests of the Applicant were not engaged (at that time); however, the Federal Court of Appeal did also highlight the particular situation of the Applicant for which it had great sympathy:

> [77] The point at which the psychological impact of state action meets the threshold to trigger section 7 rights is obviously not easily determined. As Chief Justice Lamer put it in G.(J.), "[d]elineating the boundaries protecting the individual's psychological integrity from state interference is an inexact science" (at para. 59). **That being said, I would be inclined to think that uprooting an individual from the country where he has spent the better part of his life (and all of his adult life) and deporting him to a country that he barely knows and where he has no significant relationships, where his prospects of employment are at best grim, and where it is highly unlikely that he will ever be able to reunite with his immediate family, goes beyond the normal consequences of removal. The harms alleged here are arguably far greater than the ones the Supreme Court referred to in G.(J.) as the "ordinary stresses and anxieties that a person of reasonable sensibility would suffer as a result of government action" (ibid.).** Contrary to the situation that was considered in *Stables v Canada (Citizenship and Immigration)*, 2011 FC 1319, 400 F.T.R. 135 [Stables], **there is evidence tending to show that the stresses Mr. Revell would experience if removed to his country of origin would be far greater than the normal consequences of deportation.** [Our emphasis.]

[22] With this statement from the Federal Court of Appeal in mind, this Court would be hard-pressed not to find the current context of a global pandemic to be sufficient to tip the scale in favor of the Applicant. Certainly, as the Officer has pointed out, absent the global pandemic Mr. Revell would still have to relocate in the UK and rebuild his life abroad by himself with his limited funds. This would be a risk of a harm that is inherent in the removal process, which does not engage in and of itself the security and liberty of the affected person (*Medovarski v Canada (Minister of Citizenship and Immigration); Esteban v Canada (Minister of Citizenship and Immigration)*, 2005 SCC 51 at para 56); however, the Officer has failed to consider the aggravated context of the global pandemic. It is one thing to re-establish oneself in a country the Applicant does not know, it is quite another to do so when the world has been turned upside-down by COVID-19. This context would most certainly lead to grave peril for the Applicant and,

perhaps, others in his midst, if his quarantine is not respected due to such proposed air travel and waystations where he may find himself.

[23] Regarding the final prong of the tri-partite test for the issuance of a stay of removal, this Court clearly finds that the balance of convenience favours the granting of a stay. Mr. Revell does not appear to be an imminent danger to the public in Canada or to be a flight risk; as noted by the Officer in respect of his rehabilitation as has been specified. The Court duly notes that the Applicant has collaborated at every step in the removal process. Clearly, the personal harm that would be inflicted upon him if he is removed to the UK far outweighs any public interest that might be involved in his removal from Canada at this time, recognizing the immediately current statistics of COVID-19 cases in the UK and number of fatalities.

III. Conclusion

[24] If the Applicant is to be deported, it will only be when medical specialist professionals in epidemiology deem it safe for the Applicant and the public in his midst, at every juncture of deportation and destination, to have followed each and every health precaution necessary, as determined at present, and/or, as determined in the future. Then, dependent on date of the deportation of the Applicant, as per state of the art (in respect of the give and take of continuously changing measures put in place as changes in statistics in COVID-19 cases occur), under the circumstances deemed acceptable and/or required by established medical protocol, it will be contingent on the Applicant's underlying Application for Judicial Review before the matter of removal can be revisited.

JUDGMENT in IMM-2709-20

THIS COURT'S JUDGMENT is that this motion is granted contingent on the Applicant's underlying Application for Judicial Review before the matter of removal can be revisited.

"Michel M.J. Shore"
Judge

FEDERAL COURT

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MOTION HELD BY TELECONFERENCE ON JUNE 19, 2020, BETWEEN MONTRÉAL, QUÉBEC, TORONTO, ONTARIO AND VANCOUVER, BRITISH COLUMBIA

JUDGMENT AND REASONS:	SHORE J.
DATED:	JUNE 22, 2020

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