Federal Court  Cour fédérale

Date: 20210817

Docket: IMM-2431-21

Citation: 2021 FC 846

Ottawa, Ontario, August 17, 2021

PRESENT: Mr. Justice Norris

BETWEEN:

SATGUR SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. OVERVIEW

[1] The applicant is a citizen of India who has been living in Canada since 2012. On January 9, 2019, he was found inadmissible due to criminality and ordered deported.

[2] The applicant applied for a pre-removal risk assessment ("PRRA") under section 112(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*"). A Senior Immigration

Officer rejected the application in a decision dated January 29, 2021. The applicant has applied for leave and judicial review of this decision under subsection 72(1) of the *IRPA*.

[3] The applicant has been directed to report for removal to India. Consequently, he has moved for an order staying his removal pending the final determination of his application for leave and judicial review of the negative PRRA decision.

[4] The applicant was originally directed to report for removal on May 29, 2021. I heard this motion on May 18, 2021, and reserved my decision. Very shortly after the hearing, the flight on which the applicant had booked his ticket was cancelled. As a result, the motion was held in abeyance pending confirmation of a new removal date. Recently, the Canada Border Services Agency ("CBSA") set a new removal date of September 8, 2021. I am advised that, as instructed by the CBSA, the applicant has obtained a ticket for an indirect flight to India. (There are still no direct flights between Canada and India due to the COVID-19 pandemic.)

[5] Given the passage of time since the motion was first heard as well as the ever-evolving situation with the COVID-19 pandemic, both parties were given the opportunity to file supplementary evidence and written submissions.

[6] As I explain in the reasons that follow, I am denying this motion because the applicant has not established that he would suffer irreparable harm if he is required to return to India at this time.

II. BACKGROUND

[7] The applicant was born in January 1982 in the village of Sheron Patti Biggi, District of Sangrur, Punjab, India. He served in the Indian army from October 1999 until May 2009. He was honourably discharged. After working for a few years in the United Arab Emirates, the applicant came to Canada in October 2012 on a work permit. He worked as a truck driver. His immediate family – his wife and two daughters – remained in India. Members of the applicant's extended family also still live in India.

[8] On or about July 23, 2018, the applicant was convicted of impaired driving and failing to stop at the scene of an accident. (The incident giving rise to the charges occurred in March 2017.) As a result, on January 9, 2019, a report was prepared under section 44(1) of the *IRPA* stating that the applicant is inadmissible to Canada due to criminality. That same date, a deportation order was issued.

[9] The applicant was offered and took up the opportunity to submit a PRRA application. On March 6, 2020, he provided affidavits and written submissions in support of the application.

[10] The applicant alleged that in India he would face serious risks to his life from an uncle, with whom his family had been involved in a long-standing property dispute, and from members of the Indian army, because of his expressed sympathies for the Kashmiri people when he was in the army. The applicant further alleged that his uncle had contacted the local police and the military with false allegations about his continuing support for the independence of Kashmir.

[11] In the decision rejecting the PRRA application, the Senior Immigration Officer summarized their assessment of the evidence as follows:

> The client does not advance persuasive evidence from which I can conclude that he was targeted by his uncle, either directly or via family members who had sided with him, nor that his uncle was implicated in the death of his father in 1987. Likewise, the client has not effectively rebutted the presumption of state protection, as he does not indicate that he reported to police the threats that he received from the individuals who intercepted him upon returning from New Delhi, nor did he escalate, via the means available to him, the complaint he made subsequent to the incident in which he was hit by a van while riding his bike, and received death threats the following day. Finally, the client does not persuasively evidence that the individuals who threatened him, whom he believed to be military personnel, continue to have an interest in pursuing the client in the present day, more than eight years after his departure from the country.

[12] On this basis, the Senior Immigration Officer concluded that the applicant had failed to establish that, if he were to return to India, there was more than a mere possibility of risk of persecution under any Convention grounds (as set out in section 96 of the *IRPA*) and, further, that the applicant had failed to establish, on a balance of probabilities, that he faced a risk of torture, a risk to life, or a risk of cruel and unusual treatment or punishment (as described in section 97(1)(a) or (b) of the *IRPA*).

[13] As noted, the applicant has applied for leave and judicial review of this decision. His Application Record was filed on May 12, 2021. The respondent's Record was filed on June 9, 2021. The applicant's Reply was filed on June 21, 2021.

[14] In the meantime, on May 10, 2021, the applicant submitted a request to the CBSA to defer his removal. The request was based on the prevailing conditions in India as a result of the

COVID-19 pandemic. A CBSA Inland Enforcement Officer refused the request on May 14, 2021. Although the deferral request and the negative decision were both filed in connection with the present motion, the latter decision has not been challenged by way of judicial review. The present motion concerns only a stay of the deportation order pending the final determination of the application for leave and judicial review of the negative PRRA decision.

III. ANALYSIS

A. *The Test for Staying Removal*

[15] The test for obtaining an interlocutory stay of removal is well-known. The applicant must demonstrate three things: (1) that the underlying application for judicial review raises a serious question to be tried; (2) that he 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 the injunction pending a decision on the merits of the judicial review application) favours granting the stay: see *Toth v Canada (Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123 (FCA); *R v Canadian Broadcasting Corp*, 2018 SCC 5 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 at 334.

[16] An interlocutory order of this kind is an extraordinary and equitable form of relief. Its purpose is to ensure that the subject matter of the litigation will be preserved so that effective relief will be available should the applicant be successful on his application for judicial review:

see *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 24. A decision to grant or refuse such relief is a discretionary one that must be made having regard to all the relevant circumstances: see *Canadian Broadcasting Corp* at para 27. As *Google Inc* states, "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" (at para 25).

[17] While each part of the test is important, and all three must be met, they are not discrete, watertight compartments. Each part emphasizes factors that inform the Court's overall exercise of discretion in a particular case: *Wasylynuk v Canada (Royal Mounted Police)*, 2020 FC 962 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: see *RJR-MacDonald* at 339; *Wasylynuk* at para 135; *Spencer v Canada (Attorney General)*, 2021 FC 361 at para 51; *British Colombia (Attorney General) v Alberta (Attorney General)*, 2019 FC 1195 at para 97 (rev'd on other grounds 2021 FCA 84); *Gill v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 1075 at para 20. See also Robert J Sharpe, "Interim Remedies and Constitutional Rights" (2019) 69 UTLJ (Supp 1) at 14.

[18] Taken together, the three parts of the test help the Court to assess and assign what has been termed the risk of remedial injustice (see Sharpe, above). They guide the Court in answering the following question: Is it more just and equitable for the moving party or the responding party to bear the risk that the outcome of the underlying litigation will not accord with the outcome on the interlocutory motion?

B. *The Test Applied*

(1) Serious Question

[19] In the present case, the threshold for establishing a serious question to be tried is a low one. The applicant only needs to show that his 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 at para 25.

[20] The applicant challenges the PRRA officer's assessment of the evidence, arguing that the officer made adverse credibility findings without providing the applicant with a hearing. The applicant also challenges the officer's state protection analysis. I do not consider any of the grounds upon which the applicant challenges the decision to be strong but nor do I consider them to be so devoid of merit as to be frivolous or vexatious.

(2) Irreparable Harm

[21] In my view, the determinative consideration in this case is the second part of the test – namely, whether the applicant will suffer irreparable harm if he is required to return to India before his application for judicial review is finally determined.

[22] Under this part of the test, "the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant[']s 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". It concerns the nature of the harm rather than its magnitude (*ibid.*).

[23] Generally speaking, irreparable harm is harm which cannot be quantified in monetary terms or which could not be cured for some other reason even if it can be quantified (e.g. the other party is judgment-proof). This notion of what is or is not reparable is easily understood in private law and commercial disputes. It is perhaps more difficult to incorporate in a case where the underlying litigation is an application for judicial review, damages are not available in any event, and other interests besides economic ones are paramount.

[24] To establish irreparable harm, the applicant must show that there is "real, definite, unavoidable harm – not hypothetical and speculative harm" (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112 at para 24). He must adduce clear and non-speculative evidence that irreparable harm will follow if the stay is refused. Unsubstantiated assertions of harm will not suffice. Instead, "there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result" unless the stay is granted: *Glooscap Heritage Society* at para 31; see also *Canada (Attorney General) v Canada (Information Commissioner)*, 2001 FCA 25 at para 12; *International Longshore and Warehouse Union, Canada v Canada (Attorney General)*, 2008 FCA 3 at para 25; and *United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 at para 7.

[25] Further, the assessment of the threshold the applicant must meet to discharge his onus under this part of the test must take into account that the injunctive relief is directed to a harm which has not happened yet but is only apprehended and expected to occur at some future time if the applicant is removed from Canada. As Justice Gascon observed in *Letnes v Canada (Attorney General)*, 2020 FC 636, "The fact that the harm sought to be avoided is in the future does not necessarily make it speculative. It all depends on the facts and the evidence" (at para 57). See also *Delgado v Canada (Citizenship and Immigration)*, 2018 FC 1227 at paras 14-19; and *Wasylynuk* at para 136.

[26] The applicant contends that he will suffer irreparable harm if he is required to return to India because of the risks of harm he faces from his uncle, from the Indian military, and from the COVID-19 pandemic. The first two risks were assessed by the Senior Immigration Officer who rejected the PRRA application. While the officer's determination is certainly not binding on me and I must make my own determination concerning the risks the applicant faces, the applicant has not persuaded me that I should reach a different conclusion. I find that the risks he alleges in this connection are entirely speculative. Crucially, apart from the applicant's bare assertions and unsubstantiated beliefs, there is no evidence to support his allegation that his uncle and the military had targeted him in the past, nor is there any evidence that, assuming the applicant had been targeted years ago, his agents of persecution continue to have any interest in him today. In view of this conclusion, it is not necessary to consider the issue of state protection.

[27] Turning to the risks alleged to arise from the COVID-19 pandemic, I begin by noting that this issue was not raised in the PRRA application (nor could it have been, since these risks are

not encompassed by either section 96 or 97 of the *IRPA*). Consequently, there is no determination by the PRRA officer on this issue which would be owed deference by this Court (provided that it is not unreasonable). In this respect, the present case may be contrasted with *Gill v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 1075, which concerned a stay pending judicial review of a negative deferral decision where the deferral request was based, in part, on the risks of contracting COVID-19 if the moving party were removed from Canada to India. As Justice Grammond observed in that case, "given that the CBSA officer's role is to assess the harm flowing from the removal of the applicant, the first two prongs of the *RJR* test overlap significantly" (at para 22); see also the analysis at paragraphs 25-34 of the decision. I am not under any such constraints here, at least with respect to the risks grounded in the COVID-19 pandemic.

[28] That being said, the applicant did request a deferral of removal and the decision denying that request is part of the record on this motion (although, to repeat, it is not the subject of the underlying application for judicial review). The Inland Enforcement Officer assessed the risks removal would pose for the applicant in light of the COVID-19 pandemic and concluded that they did not warrant deferral. This assessment was based on circumstances as they obtained in mid-May and was done within the constraints of the limited discretion available to the officer to defer removal. Circumstances have changed since then and I am not under the same legal constraints. However, given that I have concluded that the applicant's own evidence fails to demonstrate that he would suffer irreparable harm if he were removed to India at this time, it is not necessary to determine what weight, if any, should be given to the deferral decision in assessing the risk of irreparable harm in this case.

[29] Returning to the test for a stay, as I understand it, particularly as applied to apprehended future harms, the idea of a "real probability" of harm is fundamentally a qualitative as opposed to a quantitative assessment. The harm that is relied on certainly cannot be merely hypothetical or speculative but at the same time it is unrealistic to demand evidence establishing a precise level of risk when the harm to which the relief is directed will only occur in the future, if at all. This is especially so when the harm at issue is infection by a potentially deadly virus the understanding of which continues to develop on a daily basis, as does the scope and scale of the pandemic both globally and in India in particular.

[30] Another nuance that must be considered when the risk in question is the risk of infection by COVID-19 is that this risk is also present in Canada. Thus, the relevant assessment is of the relative difference between the risks to the applicant in Canada should the *status quo* be continued and the risks to him if he is required to return to India.

[31] Further, the idea of a "real probability" should not be understood as setting a threshold for establishing irreparable harm that will unduly foreclose access to the third part of the test, where the balancing of interests that is the essence of the exercise of equitable discretion is carried out. To do so would be inconsistent with the principle noted above that a holistic approach should be taken to the three parts of the test. After all, it is only in the third part of the test that the Court would determine whether, if there is a real risk of irreparable harm, it is an *unacceptable* risk having regard to all of the circumstances of the case.

[32] Applying these principles, I find that the applicant has not demonstrated that, if removed, he faces a real risk of irreparable harm because of the current conditions in India due to the COVID-19 pandemic.

[33] I begin by observing that none of the evidence relied on by the applicant speaks to any personalized risk he faces. Instead, the applicant mainly relies on reporting of national trends with the pandemic in India and argues that placing him in the midst of the conditions prevailing there would put him at a real risk of irreparable harm. Understandably, the respondent counters with other evidence relating to comparative national trends in India and in Canada. When this matter was heard in May, the respondent pointed to data showing that, adjusted for population, the rates of COVID-19 infections and deaths in Canada and India were roughly comparable during the second week of May 2021. The respondent argued on this basis that the applicant would be at no greater risk of infection in India than he was in Canada. (More recent evidence suggests that since May the scale of the pandemic in India has diminished significantly but, as we all know from recent experience with successive waves, there is no guarantee that this trend will continue.)

[34] In the absence of any expert evidence to support the parties' respective arguments, I do not accept that a *national* rate of infection or death is a meaningful measure of the risk of infection or death for a particular person. This is because national rates inevitably obscure local variations. As is well-known, in Canada there have been dramatic differences in rates of infection from one province to another, from one city to another, and even from one

neighbourhood to another. Consequently, I do not consider the evidence of national trends particularly probative of the question of the risk to the applicant himself.

[35] Moreover, at this time it is generally accepted that one's risk of infection in a given situation is not static; rather, it depends on many dynamic factors. As the mechanisms of transmission are currently understood, one's risk of being infected depends on many different things such as one's ability to remain isolated from others, one's ability to maintain social distancing when around others, how long one is exposed to others, environmental conditions such as air flow and ventilation, the nature of the variants in the community, access to personal protective equipment, and so on. While the number of infected people in a given place is certainly not irrelevant, it is far from the only factor that determines the risk of infection. Similarly, one's risk of a serious adverse outcome if one becomes infected depends on many individual factors including age, pre-existing medical conditions, access to effective health care, and so on. It is also generally accepted that a very important factor in controlling the risk of infection and, if one were to become infected, the risk of serious adverse outcomes, is being vaccinated.

[36] To be clear, I am not making any findings about how in fact COVID-19 is transmitted, how the risk of infection is reduced, or the risk of serious adverse outcomes if one does become infected. Rather, I am taking notice of some key elements of the current understanding of COVID-19 that are shaping the public health response to the pandemic in Canada right now. That Canada's public health response is guided by this understanding does not admit of reasonable dispute. Whether that understanding turns out to be correct is an entirely different

question. The point is that this understanding (which continues to evolve) is the best available framework within which to assess risk in a given case.

[37] I draw two important principles from this understanding. First, an approach to risk based solely on national trends is an oversimplification. Second, the assessment of risk must be grounded in the particular circumstances of the party seeking a stay of removal. Drawing these two principles together, as Justice Grammond stated in a related context, "Evidence concerning the conditions of a particular country is not useful if it cannot be tied to the situation of the applicant" (*Delgado* at para 19). This general proposition was well-established in the Court's jurisprudence even before the emergence of the COVID-19 pandemic.

[38] I pause here to note that when this matter was heard in May, the applicant did not provide any information about his vaccination status. Nor did he provide any information about this in the supplementary evidence he filed after the new removal date was set. It was only from the supplementary affidavit filed by the respondent that the Court learned that the applicant had received two doses of the Moderna vaccine (the second one having been administered around mid-July). Given the duty of the applicant and his counsel to make full and frank disclosure of relevant matters, the applicant should have disclosed this material fact: see *Surmanidze v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1615 at para 18. It should not have been necessary for the respondent to bring this information to the Court's attention.

[39] Apart from the evidence of national infection rates and the consequent health-care crises in India (originally as of May and now more recently), the only evidence the applicant provided

concerning the risk of irreparable harm he faced because of the COVID-19 pandemic is the following statement in his affidavit sworn on May 10, 2021:

> With the current Covid 19 pandemic, I hear that things are really bad in India. I come from a small village where there is hardly any medical care available. People from our village travel to different cities to get their treatment, and a lot of them die before they get to a doctor. The news report about what is happening in India is also very disheartening.

[40] This impressionistic, second-hand evidence falls far short of establishing any probability of harm, let alone a real probability. The applicant has not even established the relevance of the situation in the village he comes from because he has provided no evidence that this is where he would live if he returned to India.

[41] The applicant relies heavily on *Revell v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 716 in support of his argument on irreparable harm. Needless to say, that decision turns on its own particular facts. It is of no assistance in determining whether the applicant himself is at risk. While the COVID-19 pandemic can provide a basis for finding a real risk of irreparable harm, it cannot simply be assumed that the pandemic creates this risk for all persons facing removal from Canada: see *Akagunduz v Canada (Citizenship and Immigration)*, 2021 CanLII 11762 (FC). Despite having had two opportunities to do so, the applicant did not provide any evidence that his personal circumstances would put him at a real risk of harm in India because of the COVID-19 pandemic. To the contrary, the updated evidence from the respondent that the applicant is now fully-vaccinated points strongly in the other direction.

[42] In his supplementary submissions, the applicant argues that the fact that Canada continues to ban direct flights from India is evidence that "the risks posed by Covid-19 continue to exist." That these risks continue to exist in India (and in Canada, for that matter) is beyond dispute. What is in dispute – and what the applicant must establish – is that he is at a real risk of irreparable harm in India because of the pandemic. He has not done so.

[43] Finally, I note for the sake of completeness that the respondent provided evidence of the comprehensive COVID-19 safety protocols in place for flights departing from Canada. The applicant has not taken issue with any of this evidence. While this evidence does not address the fact that the applicant is now transiting through Doha, Qatar (as opposed to travelling directly from Canada to India), the applicant has not provided any evidence to suggest that these protocols are insufficient or that he would otherwise be at a real risk of irreparable harm in transit from Canada to India.

(3) Balance of Convenience

[44] Since all three parts of the test must be met, it is not necessary to address the balance of convenience.

IV. CONCLUSION

[45] For these reasons, the motion to stay the applicant's removal pending the final determination of his application for leave and judicial review of the negative PRRA decision is dismissed.

ORDER IN IMM-2431-21

THIS COURT ORDERS that the motion is dismissed.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2431-21
STYLE OF CAUSE:	SATGUR SINGH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	MAY 18, 2021
ORDER AND REASONS:	NORRIS J.
DATED:	AUGUST 17, 2021

APPEARANCES:

Melissa Keogh	FOR THE APPLICANT
David Knapp	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lee & Company Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT