Federal Court  Cour fédérale

Date: 20220526

Docket: IMM-3675-22

Citation: 2022 FC 765

Ottawa, Ontario, May 26, 2022

PRESENT: Mr. Justice Norris

BETWEEN:

RODICLEY PIMENTEL DOS SANTOS AND VINICIUS CESAR ELIAS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. OVERVIEW

[1] The applicants are citizens of Brazil. They are subject to a removal order that requires them to depart Canada no later than May 31, 2022. They have applied for an order staying the removal order pending the final determination of their application for leave and judicial review of a decision dated February 11, 2022, refusing their application for permanent residence in

Canada under section 25 of the *Immigration and Refugee Protection Act*, SC 2001, c 27, ("*IRPA*") on humanitarian and compassionate ("H&C") grounds.

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

II. PRELIMINARY ISSUE – EXTENSION OF TIME

[3] The applicants have requested an extension of time to commence their application for leave and judicial review, which was submitted late. The respondent does not oppose the request. I agree that an extension is warranted. An order will therefore issue granting the extension of time.

III. BACKGROUND

[4] The applicants are a common law gay couple. They have been living in Canada since February 2017, when they fled Brazil because of their fear of persecution on the basis of their sexual identity. On the basis of advice they received at the time, the applicants did not make a claim for refugee protection in Canada. Instead, in August 2017 they submitted an application for permanent residence on H&C grounds. That application was refused in August 2019. The applicants applied for a pre-removal risk assessment in March 2020. It was refused in June 2021.

[5] On April 2, 2020, the applicants submitted a second H&C application. It was based on two main factors: the applicants' establishment in Canada and the adverse conditions in Brazil, including the risks they would face there as gay men.

[6] The second H&C application was refused in a decision dated February 11, 2022. A Senior Immigration Officer concluded that, considered as a whole, the circumstances of the case did not warrant relief.

[7] The Officer determined that the applicants had demonstrated a degree of establishment in Canada but it was not exceptional and was mitigated somewhat by the fact that for some periods of time the applicants were working in Canada without authorization. As a result, the Officer gave only "moderate weight" to this factor. The Officer gave only "some weight" to adverse country conditions. Among the reasons for this was that while the evidence demonstrated that Brazil would be "less than ideal" for the applicants because of their sexual identity, the Officer was not satisfied that they would be at risk because of this. In particular, the Officer noted that while there "may be some discrimination against those in the LGBT community" in Brazil, the applicants had not presented sufficient evidence to establish that they would be specifically targeted or personally at risk.

[8] Notably, the Officer stated that "the purpose of section 25 of the Act is to give the Minister the flexibility to deal with extraordinary situations which are unforeseen by IRPA where humanitarian and compassionate grounds compel the Minister to act."

[9] The applicants have applied for judicial review of this decision on the basis that it is unreasonable. They seek a stay of their removal pending the final determination of that application.

IV. ANALYSIS

A. *The Test for a Stay of Removal*

[10] The test for obtaining an interlocutory stay of a removal order is well-known. The applicants must demonstrate three things: (1) that the underlying application for judicial review raises a "serious question to be tried;" (2) that they 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: 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, [2018] 1 SCR 196 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.

[11] The purpose of an interlocutory order like the one sought here is to ensure that the subject matter of the underlying litigation will be preserved so that effective relief will be available should the applicants be successful on their application for judicial review: see *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 24. A decision to grant or refuse such interlocutory relief is a discretionary one that must be made having regard to all the relevant circumstances:

see *Canadian Broadcasting Corp* at para 27. As the Supreme Court stated in *Google Inc*, "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).

[12] In the present case, under the first part of the test, the threshold for establishing a serious question to be tried is a low one. The applicants only need 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 at para 25.

[13] 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". It concerns the nature of the harm rather than its magnitude (*ibid.*). Generally speaking, irreparable harm is harm that cannot be quantified in monetary terms or that could not be cured for some other reason even if it can be quantified (e.g. the other party is judgment-proof).

[14] To establish irreparable harm, the applicants 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). They 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; *United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 at para 7.

[15] As I have stated elsewhere, in my view, 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. See *Singh v Canada (Citizenship and Immigration)*, 2021 FC 846 at para 29. As well, 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. 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. See *Singh* at para 31.

[16] The third part of the test requires an assessment of which party would suffer greater harm from the granting or refusal of a stay of the removal order pending a decision on the merits of the application for judicial review. To meet this part of the test, the applicants must establish that

the harm they would suffer if the stay is refused is greater than the harm the respondent would suffer if the stay is granted. The harm found under the second part of the test is considered again at this stage, only now it is assessed in comparison with other interests that will be affected by the Court's decision. This weighing exercise is neither scientific nor precise: see *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2020 FCA 181 at para 17. But this is not to say it is unprincipled. On the contrary, it is at the heart of the determination of what is just and equitable in the particular circumstances of the case at hand.

[17] Taking a step back, while each part of the test is important, and all three must be met, they are not discrete, watertight compartments. Each part focuses the Court on factors that inform its 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 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.

[18] 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 to be Tried

[19] I am satisfied that the underlying application for judicial review raises grounds that are neither frivolous nor vexatious. I will have more to say about the grounds for review immediately below.

(2) Irreparable Harm

[20] I am satisfied that removal of the applicants prior to the final determination of the application for leave and judicial review of the negative H&C decision would render nugatory any remedy that might be granted in relation to the underlying application for judicial review in the event that the applicants were successful on that application. This is sufficient to satisfy the second part of the test because of the strength of the underlying application for judicial review.

[21] In my view, the applicants have raised at least two clearly arguable grounds challenging the Officer's decision. One is that the Officer imposed an erroneous legal test by requiring the applicants to provide evidence of a personalized risk of discrimination. This is inconsistent with the analysis of H&C relief in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61. As the majority held there, requiring such evidence to establish entitlement to H&C relief not only undermines the humanitarian purpose of subsection 25(1) of the *IRPA*, it also "reflects

an anemic view of discrimination that [the Supreme Court of Canada] largely eschewed decades ago" (at para 54).

[22] The second clearly arguable ground raised by the applicants is that the Officer erred in applying an erroneous legal test by finding that their case would warrant relief only if it presented an "extraordinary situation." In my view, the applicants raise a strong argument that the Officer imposed a significantly more onerous threshold than was adopted in *Kanthasamy* (at paras 30-35), one that also shifts the decision-maker's attention away from the real question at issue – namely, whether relief is warranted in the circumstances of this particular case (as opposed to in comparison with others). The Officer's decision echoes language (whether "exceptional" *simpliciter* or "exceptional and extraordinary") that this Court has found to be erroneous when applied as a legal standard or prerequisite for relief: see, for example, *Zhang v Canada (Citizenship and Immigration)*, 2021 FC 1482 at paras 22-29; see also *Damian v Canada (Citizenship and Immigration)*, 2019 FC 1158 at paras 18-21.

[23] Where, as is the case here, the Court is satisfied that the applicants have raised clearly arguable grounds for review, disrupting the *status quo* by removing them from Canada prior to the final determination of the application for leave and judicial review would deprive them of the right to a meaningful and effective remedy in relation to that application. This is because, in the event that they were to succeed on that application and the matter is remitted for redetermination, a key circumstance they rely on in arguing for H&C relief – namely, that a reasonable and fair minded person would want to relieve them of the misfortune of having to return to Brazil and face all the risks that this would entail so that they could apply for permanent residence in

Canada – would have been rendered entirely beside the point. This would also be true of their establishment in Canada, another factor on which they rely in their H&C application. In short, failing to maintain the *status quo* would leave the applicants with a materially weaker H&C application in the event that their application for judicial review is allowed and the matter is ordered to be reconsidered. This is a circumstance that could not be remedied in any other way. This is sufficient to constitute irreparable harm.

[24] Before leaving this part of the test, it is important to underscore that, in approaching the issue of irreparable harm as I have, the strength of the underlying application for judicial review is a critical consideration. In the present case, this is what has elevated the risk of remedial injustice from the speculative or merely hypothetical to a "real probability". However, to be clear, the applicants were not required to establish – nor have I found – that their application for judicial review is likely to succeed. Rather, I have simply found that their application is sufficiently strong to give rise to a real risk of remedial injustice if they were required to leave Canada before it is finally determined. This is sufficient to satisfy the second part of the test. In contrast, grounds for review that satisfied the first part of the test because they were not frivolous or vexatious but which nevertheless did not appear strong may not support such a finding. Of course, in such a case, a party seeking a stay could still seek to satisfy the second part of the test by establishing other forms of irreparable harm.

[25] The applicants also rely on other forms of irreparable harm in this case. Since I have found that the loss of a meaningful and effective remedy in the underlying proceeding is

sufficient to meet the second part of the test, it is not necessary to assess the other forms of irreparable harm they advance.

(3) Balance of Convenience

[26] I am also satisfied that the balance of convenience favours the applicants.

[27] In assessing the balance of convenience, in addition to the applicants' 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). The applicants are 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) is detrimental to the public interest: see *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: see *Canadian Council for Refugees* at para 27.

[28] Further, the impact on the public interest of suspending the effect of an act by a public authority is a matter of degree that varies depending on the subject matter of the litigation. As the Supreme Court noted in *RJR-MacDonald*, the impact on the public interest of exempting an individual litigant from the application of lawfully enacted legislation is less than suspending the effect of that legislation entirely. The impact of suspending temporarily the implementation of a

removal order is arguably of an even lesser degree than this (although again the precise calibration of that impact will depend on the particular circumstances of the case).

[29] The applicants are subject to removal because they overstayed their legal status as visitors to Canada. This is an important consideration in assessing the public interest. However, the only "inconvenience" to the respondent if the applicants are not removed now and their application for judicial review is dismissed is that their removal from Canada will have been delayed; it will not have been frustrated entirely. On the other hand, the "inconvenience" to the applicants of losing the right to a meaningful remedy is significant and, as I have determined above, irreparable. This interest is not confined to the applicants; it is shared by the public and by the administration of justice, a factor that also tips the balance in favour of a stay. In the particular circumstances of this case, this outweighs the public interest in the immediate enforcement of the removal order.

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

V. CONCLUSION

[31] Balancing all of the relevant considerations, I am satisfied that it is more just and equitable for the respondent to bear the risk that the outcome of the underlying litigation will not accord with the outcome on this motion than it would be for the applicants to bear that risk. A stay of removal is the only way to ensure that the subject matter of the litigation is preserved so that effective relief will be available should the applicants be successful on their application for

judicial review (cf. *Google Inc* at para 24). The countervailing considerations are insufficient to outweigh this fundamentally important consideration.

[32] Accordingly, the motion is granted. The applicants shall not be removed from Canada prior to the final determination of the underlying application for leave and judicial review.

ORDER IN IMM-3675-22

THIS COURT'S ORDER is that

1. The request for an extension of time to commence the application for leave and judicial review is granted.
2. The motion for a stay of removal is granted.
3. The applicants shall not be removed from Canada until their application for leave and judicial review of the decision dated February 11, 2022, refusing their application for permanent residence in Canada on humanitarian and compassionate grounds is finally determined by the Court.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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