Federal Court  Cour fédérale

Date: 20221007

Docket: IMM-7307-22

Citation: 2022 FC 1387

Ottawa, Ontario, October 7, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

VARINDER SINGH

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, Varinder Singh, brings a motion for a stay of removal from Canada, scheduled to take place on Monday, October 10, 2022.

[2] The Applicant requests that this Court order a stay of his removal to India until the determination of an underlying application for leave and judicial review of the refusal of his permanent residence application under the In-Canada Spousal Sponsorship Family Class.

[3] For the reasons that follow, this motion is dismissed. I find that the Applicant did not meet the tri-partite test required for a stay of removal.

II. **Facts and Underlying Decision**

[4] The Applicant is a 25-year-old citizen of India. He first entered Canada in 2017, as a student in Edmonton, Alberta. In 2018, the Applicant began a relationship with Taranpreet Bains (Ms. "Bains"). The two began living together in August 2020 and were married on November 25, 2020.

[5] In June 2021, the Applicant submitted an application for permanent residence under the In-Canada Spousal Sponsorship Family Class. The Applicant claims that he and Ms. Bains had been living together for 10 months at the time of this application.

[6] In October 2021, Applicant and Ms. Bains claim they had an argument that became escalated such that the police were involved. On November 24, 2022, the Applicant signed a peace bond. The Applicant claims that his "alcohol issue" led to the incident and has made efforts to address this issue. The Applicant claims there have been no similar incidents since October 2021, and that his relationship with Ms. Bains has improved.

[7] On December 8, 2021, the Applicant met with two Canada Border Services Agency ("CBSA") officers, who asked him about the incident with his wife in October 2021. The CBSA officers informed the Applicant that his spousal sponsorship application was withdrawn. The Applicant informed them that neither he nor Ms. Bains had withdrawn the application. Ms. Bains, who was present outside the room as this conversation took place, spoke with the CBSA officers after the Applicant and confirmed that she had not withdrawn the application and did not intend to do so.

[8] The CBSA officers asked the couple to return after an hour. Upon their return, the officers gave the Applicant an exclusion order, based on the expiry of his status in Canada. The officers informed them that the Applicant had contacted Immigration, Refugees and Citizenship Canada ("IRCC") to cancel his sponsorship application because the couple were going to file for a divorce after the incident in October 2021, which the Applicant denied doing and stated that the two did not want a divorce.

[9] On July 22, 2022, the Applicant's spousal sponsorship application was refused and he was issued a Voluntary Departure Order. On August 3, 2022, CBSA issued the Applicant's removal details, stating that he was scheduled to be removed on August 27, 2022. Also on August 3, 2022, the Applicant's previous counsel filed for an application for leave and judicial review of the refusal of the spousal sponsorship application.

[10] The Applicant then retained his current counsel, who requested reasons for this refusal from the Respondent's counsel on August 18, 2022, in order to perfect the application for leave and judicial review. The Respondent's counsel denied this request on August 19, 2022.

[11] The Applicant filed for an interim interim stay with this Court. My colleague Justice Gleeson granted the interim interim stay, staying the removal until September 7, 2022 unless otherwise ordered, and ordering that the Applicant be provided reasons for the refusal of his sponsorship application.

[12] The reasons of the immigration officer (the "Officer") are contained in a letter to the Applicant dated July 22, 2022, and the Global Case Management System ("GCMS") notes, which form part of the reasons for the decision. The GCMS notes state that the sponsor, Ms. Bains, is a victim of family violence and she contacted the call centre on September 13, 2021 to request that the sponsorship application no longer be processed, but that Ms. Bains never submitted a signed withdrawal form, as requested.

[13] The GCMS notes also state that the Applicant contacted the call centre on November 25, 2021 to state that he had physically abused Ms. Bains and the two were no longer living together. Upon contacting Ms. Bains, however, the Officer learned that she was not sure if she wanted to withdraw the application as she is in an abusive relationship with the Applicant. The GCMS notes go on to list certain documentary evidence provided by the Applicant in his spousal sponsorship application. The Officer concluded that the Applicant had not satisfied that the

application should be granted, on the basis of limited evidence to support that he and Ms. Bains are in a *bona fide* relationship.

[14] Earlier GCMS notes dated April 14, 2022 state that an IRCC officer spoke with Ms. Bains and she indicated that she was unsure whether she wanted to withdraw her application. Ms. Bains informed IRCC that she was living with the Applicant at this time and was being occasionally assaulted by him.

[15] On application for judicial review, the Applicant claims that the Officer erred by failing to consider the material evidence regarding the genuineness of his marriage to Ms. Bains, and breached the duty of procedural fairness owed to the Applicant by not allowing him an opportunity to respond to any doubts or concerns about his application.

[16] The motion for an interim stay was heard on September 7, 2022 and dismissed on September 8, 2022. On September 16, 2022, CBSA issued the Applicant's removal details. The Applicant submitted a request to defer his removal with CBSA on October 5, 2022. The Applicant is now scheduled to be removed on October 10, 2022.

III. **Analysis**

[17] 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.

[18] 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*

[19] 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).

[20] On this first prong of the tri-partite test, the Applicant submits that the Officer refused the spousal sponsorship application without regard for the material evidence pointing to the genuineness of their marriage. The Applicant contends that the Officer engaged in an unreasonable assessment of the application and breached his duty of procedural fairness by failing to allow the Applicant to respond to the Officer's concerns. The Applicant submits that the subject of the underlying application for judicial review of the Officer's decision constitutes a serious issue to be tried.

[21] The Respondent submits that there is no serious issue to be tried because the underlying refusal of the Applicant's spousal sponsorship application bore the hallmarks of reasonableness and was procedurally fair.

[22] Having reviewed the parties' motion material and the underlying decision, I agree with the Applicant that there is a serious issue to be tried. The underlying application for judicial review raises issues surrounding the Officer's proper consideration of the evidence regarding the genuineness of the Applicant's relationship and the preservation of the duty of fairness owed to the Applicant. This is a sufficiently serious issue to satisfy this first prong of the test.

B. *Irreparable Harm*

[23] 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*, [1991] FCJ No 984, [1992] 1 FC 142 (FCA)).

[24] The Applicant submits that the underlying decision constitutes irreparable harm to the Applicant in that all future attempts to cohabitate in Canada are irrevocably prejudiced. The Applicant cites this Court in *Kambasaya v Canada (Citizenship and Immigration)*, 2021 FC 664 ("*Kambasaya*"), which states that irreparable harm is made out where, "in the event that [an

application] were to succeed on the underlying application and the matter is remitted for redetermination, key circumstances relevant to that consideration … would have changed in material ways that cannot be undone or otherwise compensated for" (at para 36). In light of the requirement of cohabitation for a spousal sponsorship application—as stipulated by the IRCC manual regarding spousal sponsorship applications, and section 124 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227—the Applicant submits that his removal prior to the determination of the underlying application for judicial review would render the outcome of the review nugatory since he would no longer be in Canada, cohabiting with Ms. Bains.

[25] The Respondent submits that irreparable harm must be more than the inherent consequences of deportation, requiring clear and convincing evidence. The Respondent further submits that the Federal Court of Appeal has found that an appeal being rendered nugatory by a removal does not constitute irreparable harm on its own (*El Ouardi v Canada (Solicitor General)*, 2005 FCA 42 at para 8; *Palka v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 165 at paras 18-20). The Respondent notes that this Court has recently addressed the finding in *Kambasaya* and found it to be applicable to only specific circumstances (*Solis Olvera v Canada (Citizenship and Immigration)*, 2022 CanLII 77632 (FC)).

[26] I agree with the Respondent that irreparable harm is not made out in the Applicant's case. Firstly, while the Applicant claims that his removal and consequent interruption of his cohabitation with Ms. Bains would prejudice any future applications or redetermination of the underlying sponsorship application, this removal would not be the first time that his cohabitation with Ms. Bains would be interrupted. According to GCMS notes dating November 25, 2021, the

Applicant contacted IRCC to notify that his marriage had "dissolved beyond repair because [he] physically abused [his] wife," the two were "no longer live together," and Ms. Bains was "withdrawing her spousal sponsorship application for me" and "applying for a divorce." Not only is it reasonable for the Officer to have considered this evidence in assessing the genuineness of the Applicant's marriage, the Applicant has already admitted to being the cause for an earlier interruption of his cohabitation with and relationship to Ms. Bains, already risking the success of his spousal sponsorship. This undermines the crux of the Applicant's submission that this removal would cause him irreparable harm.

C. *Balance of Convenience*

[27] 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, "Where 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.

[28] The Applicant submits that the balance of convenience favours the Applicant because the harm he would face upon his removal is much greater than any inconvenience caused to the Respondent. Specifically, the Applicant submits that he is only seeking a stay until the outcome of the underlying application for judicial review, that he is not a flight risk and has cooperated

with immigration authorities, and that he has no criminal record and is therefore not a risk to the Canadian public.

[29] The Respondent submits that the public interest favours the Applicant's removal, and that the lack of irreparable harm caused to the Applicant determines that the balance of convenience lies with the Respondent.

[30] The insufficient evidence of irreparable harm is determinative of this motion. Nonetheless, the balance of convenience weighs in favour of the Respondent in this case. In *Kambasaya*, my colleague Justice Norris states that the analysis under this prong should consider the public interest, and "is at the heart of the determination of what is just and equitable in the particular circumstances" (*Kambasaya* at para 26). There is a significant contradiction between the Applicant's evidence and the GCMS notes in this case. The Applicant claims that his abuse of Ms. Bains was a singular incident, that he has sought treatment for his alcohol issue since this incident, and that neither he nor Ms. Bains ever contacted IRCC to withdraw the sponsorship application.

[31] The GCMS notes paint a different story. The notes detail correspondence between Ms. Bains and the Officer, in which Ms. Bains apparently expressed that she was unsure whether to withdraw the application because she is in an "abuse relationship [sic]" and "occasionally assaulted". The notes show that the Applicant himself had, at an earlier date, admitted that his abuse caused Ms. Bains to want to withdraw her sponsorship and seek a divorce, which directly contradicts the Applicant's narrative on this motion.

[32] The GCMS notes allude to a *pattern* of abuse that goes beyond the single incident that the Applicant claims in his evidence. "Occasional assaults", an "abusive relationship", and the dissolving of a marriage "beyond repair", are not typically phrases used to describe a singular mistake in an otherwise happy marriage, although even one such incident is one too many. The GCMS notes allude to the potential pressure on Ms. Bains to not withdraw her sponsorship of the Applicant, perhaps as a symptom of fear and control in an abusive situation. This undermines the credibility of the very evidence that the Applicant claims was not considered by the Officer in the underlying refusal. It calls into the question the affidavits filed in support of this motion by both the Applicant and Ms. Bains, which are almost identical and assert that the two have a positive relationship. The Applicant's underlying application for judicial review does not explain or compensate for these contradictory narratives, aside from asserting that this correspondence did not occur. That is not enough.

[33] In these circumstances, the public interest in removal should be given considerable weight and the impact of removal on the Applicant's potential future applications does not outweigh the convenience favouring the Respondent. Ultimately, the Applicant does not meet the tri-partite test required for a stay of removal. This motion is therefore dismissed.

ORDER in IMM-7307-22

THIS COURT ORDERS that the Applicant's motion for a stay of removal is dismissed.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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