Federal Court  Cour fédérale

Date: 20221104

Docket: IMM-7325-22

Citation: 2022 FC 1509

Ottawa, Ontario, November 4, 2022

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

FELIPE ARTURO OLAYA SALCEDO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

ORDER AND REASONS

I. Overview

[1] The Applicant, Felipe Arturo Olaya Salcedo, brings a motion for a stay of removal from Canada, scheduled to take place on November 8, 2022.

[2] The Applicant requests that this Court order a stay of his removal to Colombia until the determination of an underlying application for leave and judicial review of the refusal of his refugee claim by the Refugee Protection Division ("RPD").

[3] For the reasons that follow, this motion is dismissed. I find that the Applicant does 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 Colombia.

[5] In 2019, the Applicant began volunteering at the Funcuartes Foundation (the "Foundation") in Colombia, to help underprivileged youth. Beginning in January 2021, the Applicant claims he was repeatedly approached by members of the Revolutionary Armed Forces of Colombia ("FARC"), demanding that he work with them to recruit young members of FARC through his connections at the Foundation. The Applicant claims that in July 2021, FARC members threatened that if he did not work with them, he would be deemed a military target, after which he filed a complaint with the police. An officer who received this complaint advised the Applicant to leave Colombia.

[6] The Applicant arrived in Canada on August 1, 2021 and made a claim for refugee protection. The Applicant claims that after he left Colombia, his parents and girlfriend were targeted several times by FARC dissidents, asking for his whereabouts. The Applicant fears a

risk of persecution upon return to Colombia, and the risk of cruel and unusual treatment or punishment.

[7] The RPD refused the refugee claim in a decision dated July 12, 2022, finding that an internal flight alternative ("IFA") was available to the Applicant. The Applicant applied for leave and judicial review of this refusal on August 3, 2022. On October 18, 2022, the Canada Border Services Agency ("CBSA") issued a Direction to Report for the Applicant's removal to Colombia, scheduled for November 8, 2022. The Applicant submitted a request for deferral of his removal with CBSA, which was denied on October 28, 2022.

III. **Analysis**

[8] 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.

[9] 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*

[10] 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).

[11] The Applicant submits that the RPD refused his claim for refugee protection without full and reasonable consideration of the evidence proffered by the Applicant, and erred in conducting a forward-looking analysis of the risk facing the Applicant upon return to Colombia. The Applicant submits that the subject of the underlying application for judicial review constitutes a serious issue to be tried.

[12] The Respondent submits that there is no serious issue to be tried because the RPD reasonably considered the proposed IFAs, whether they pose a serious risk of persecution to the Applicant, and whether the Applicant could find safety there.

[13] Having reviewed the parties' motion material and the underlying decision, I agree that there is a serious issue to be tried. The underlying application for judicial review raises issues surrounding the RPD's proper consideration of the evidence regarding the risk facing the Applicant in Colombia. This is a sufficiently serious issue to satisfy this first prong of the test.

B. *Irreparable Harm*

[14] 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], 25 Imm. L.R. (2d) 120, 79 FTR 107 (FCTD); *Horii v Canada*, [1991] FCJ No 984, [1992] 1 FC 142 (FCA)).

[15] The Applicant submits that he would face irreparable harm upon removal to Colombia. The Applicant submits that there is sufficiently non-speculative and credible evidence of past assaults and threats against him and his family members at the hands of FARC.

[16] The Respondent submits that the Applicant failed to provide clear evidence of irreparable harm. The Respondent contends that the RPD thoroughly assessed the Applicant's allegation of risk, based on the evidence he provided, and this same evidence is used as the basis for the Applicant's submission regarding irreparable harm in this stay motion.

[17] I agree with the Respondent. The Applicant relies on the same evidence of risk that was before the RPD in assessing his refugee claim. The RPD reasons exhibit a thorough assessment of this risk. There is no additional, non-speculative and non-generalized evidence upon which to determine that the Applicant would face irreparable harm upon removal to Colombia. The

Applicant's submissions on irreparable harm are largely general and unspecific. This second prong of the test is therefore not met.

C. *Balance of Convenience*

[18] 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 p. 342; *Metropolitan Stores Ltd.* at p. 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.

[19] The Applicant submits that the balance of convenience favours the Applicant because he will suffer greater harm if removed than the Respondent would face if the removal is stayed. The Applicant contends that the evidence of irreparable harm indicates that the balance of convenience lies in his favour.

[20] The Respondent submits that the Applicant bears the onus to show that there is a public interest in staying his removal. In this case, the Respondent submits that the evidence of risk does not sufficiently outweigh the public interest in enforcing the removal order.

[21] The insufficient evidence of irreparable harm is determinative of this motion. I find that the Applicant has not provided sufficient evidence to indicate that the balance of convenience favours granting the stay of his removal.

[22] Ultimately, the Applicant does not meet the tri-partite test required for a stay of removal. This motion is therefore dismissed.

ORDER in IMM-7325-22

THIS COURT ORDERS that the motion for a stay of the Applicant's removal to Colombia on November 8, 2022 is dismissed.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-7325-22
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