Federal Court  Cour fédérale

Date: 20230124

Docket: IMM-518-23

Citation: 2023 FC 113

Ottawa, Ontario, January 24, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

MANJEET SINGH

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, Manjeet Singh, brings a motion for a stay of his removal from Canada, scheduled to take place on January 26, 2023.

[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

deferral request by an Inland Enforcement Officer (the "Officer") of the Canada Border Services Agency ("CBSA").

[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 36-year-old Sikh citizen of India. His wife and two children reside in India.

[5] The Applicant has been residing in Canada since May 2018 and has been working full-time since 2019. He has been employed as a truck driver since April 2019 and continued this work throughout the COVID-19 pandemic. He has not received social assistance in Canada. The Applicant is also involved in the Sikh community, through attendance at Sikh temples and volunteering.

[6] The Applicant arrived in Canada on May 30, 2018. On November 16, 2018, he made a claim for refugee protection. The Refugee Protection Division ("RPD") refused the Applicant's claim in a decision dated July 21, 2021. The Refugee Appeal Division ("RAD") dismissed the Applicant's appeal of the RPD's decision on December 14, 2021. This Court refused the Applicant's application for leave and judicial review of the RAD's decision on April 18, 2022.

[7] On December 23, 2022, the Applicant submitted a request to CBSA to defer his removal, which was received by CBSA on January 11, 2023.

[8] On December 24, 2022, the Applicant submitted an application for permanent residence on humanitarian and compassionate ("H&C") grounds, which is still pending.

[9] On January 12, 2023, CBSA served the Applicant with a Direction to Report for removal, scheduled for January 26, 2023.

[10] On January 18, 2023, CBSA refused the Applicant's deferral request.

III. Analysis

[11] 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.

[12] 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*

[13] 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). This Court must also bear in mind that the discretion to defer the removal of a person subject to an enforceable removal order is limited. 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) ("*Baron*"). A decision refusing to defer removal requires the Applicant to meet an elevated standard with respect to the first *Toth* requirement of a serious issue for trial, pursuant to *Baron.*

[14] The Applicant submits that the underlying application raises serious issues about the reasonableness of the CBSA's refusal of the deferral request, specifically that the Officer unreasonably assessed the impact of removal on the pending H&C application and failed to adequately assess the best interests of the child ("BIOC"). The Applicant contends that these are sufficiently serious issues to meet the low threshold at the first prong of the *Toth* test.

[15] The Respondent submits that there is no serious issue because the Officer reasonably assessed and refused the Applicant's deferral request.

[16] Having reviewed the parties' motion materials 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 Officer's proper assessment of the Applicant's circumstances and the BIOC, which are sufficiently serious to meet the first prong of the test.

B. *Irreparable Harm*

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

[18] The Applicant submits that he will suffer irreparable harm if returned to India. He submits that his removal will jeopardize his pending H&C application, as demonstrated by the statistics indicating that H&C applications are refused at much higher rates for applicants outside Canada in comparison to applicants in Canada. The Applicant further submits that the BIOC warrant granting a stay of his removal because he is the sole financial provider for his wife and two children in India. The Applicant claims that he regularly sends money to India for his children's essential expenses and his family would suffer without his employment in Canada.

[19] The Respondent submits that there is no irreparable harm caused by the Applicant's removal. The Respondent contends that the Applicant's allegations regarding risks in India were adequately assessed by the RPD and RAD, his assertions of risk as a Sikh farmer and the impact of the COVID-19 pandemic are insufficient to constitute irreparable harm, and the alleged risks associated with financial support for his family are the inherent consequences of deportation. On the BIOC factor, the Respondent notes that the Applicant was previously working in India prior to coming to Canada, and submits that the Applicant provided no objective evidence to establish that he and his family are in a precarious financial situation.

[20] I agree with the Respondent and do not find that irreparable harm is made out in this case. While I do not wish to undermine the Applicant's role as the sole provider for his family in India, the Applicant provided insufficient evidence to establish that his removal would result in financial difficulty for his family and children that rises to the level of irreparable harm. The short-term interests of the Applicant's children do not establish irreparable harm in this case. Their longer-term interests will be assessed by an H&C officer in a thorough BIOC assessment.

C. *Balance of Convenience*

[21] 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.

[22] The Applicant submits that the balance of convenience favours granting the stay of removal. The Applicant emphasizes that he has a pending H&C application, is eligible for a Pre-Removal Risk Assessment in three months, and has a pending civil claim.

[23] The insufficient evidence of irreparable harm is determinative of this motion. Nonetheless, the balance of convenience weighs in favour of the Respondent. Subsection 48(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, states that removal orders must be enforced as soon as possible. Lacking sufficient evidence of irreparable harm, the balance of convenience favours the Minister in enforcing the removal order expeditiously.

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

ORDER in IMM-518-23

THIS COURT ORDERS that the Applicant's motion to stay his removal is dismissed.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-518-23
STYLE OF CAUSE:	MANJEET SINGH v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 23, 2023
ORDER AND REASONS:	AHMED J.
DATED:	JANUARY 24, 2023

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