Federal Court Cour fédérale

Date: 20230307

Docket: IMM-2586-23

Citation: 2023 FC 317

Ottawa, Ontario, March 7, 2023

PRESENT: The Hon Mr. Justice Henry S. Brown

BETWEEN:

FILIPPO LONGO FECAROTTA

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER

[1] This is a motion by the Applicant for an Order to stay his removal to Sao Paulo, now scheduled for March 8, 2023, pending the determination of an application for leave to apply for judicial review of a decision refusing to defer his removal or for such further and other relief as to this Court seems just. I reviewed the materials filed and heard from counsel on an urgent basis by teleconference on March 7, 2023.

[2] To succeed, the Applicant must meet the requirements of a tripartite test set out by the Federal Court of Appeal in *Toth v Canada (Minister of Citizenship and Immigration)*, [1988]

FCJ 587, 86 NR 302 (FCA), and by the Supreme Court of Canada both in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] SCJ No 17, [1994] 1 SCR 311 and more recently in *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12, namely (1) that there is a serious issue to be tried i.e., an issue that is not frivolous or vexatious, (2) that the Applicant would suffer irreparable harm by reason of removal and (3) that the balance of convenience lies in the Applicant's favour.

[3] That said, on the serious issue branch of the test where a refusal to defer is the subject of the underlying application for leave, as here, the Applicant must also meet a significantly higher established by the Supreme Court of Canada in *R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12, and previously established by the Federal Court of Appeal in *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81. This higher standard requires the Court to take a hard look at the Applicant's motion for a stay, and decide if the underlying application is likely to succeed, i.e., to decide whether the Applicant has quite a strong case.

[4] The standard of review on judicial review of a decision refusing to defer is reasonableness, i.e., is the decision justified given the factual and legal constraints on the decision-maker, is it transparent, intelligible, and without fatal error, as set out in the Supreme Court of Canada's judgment in *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 [*Vavilov*].

[5] I should note as well that reweighing and reassessing evidence and inferences made by the deferral officer below is not the role of this Court on judicial review of the underlying

decision except in exceptional circumstances, nor is it the role of this Court when considering a motion like this to stay the underlying decision: see *Vavilov* at para 125: "[125] It is trite law that the decision maker may assess and evaluate the evidence before it and that, absent exceptional circumstances, a reviewing court will not interfere with its factual findings. The reviewing court must refrain from 'reweighing and reassessing the evidence considered by the decision maker'" [citations deleted]. To the same effect is the decision of the Federal Court of Appeal in *Doyle v Canada (Attorney General),* 2021 FCA 237 [*Doyle*]: "[3] In doing that, the Federal Court was quite right. Under this legislative scheme, the administrative decision-maker, here the Director, alone considers the evidence, decides on issues of admissibility and weight, assesses whether inferences should be drawn, and makes a decision. In conducting reasonableness review of the Director's decision, the reviewing court, here the Federal Court, can interfere only where the Director has committed fundamental errors in fact-finding that undermine the acceptability of the decision. Reweighing and second-guessing the evidence is no part of its role." [Emphasis added]

[6] The law has also established that forced separation from family and its consequences are not sufficient grounds to establish irreparable harm: see the Federal Court of Appeal judgment in *Atwal v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427, which held that irreparable harm with regard to "separation from family consists of the usual consequences of deportation. It is not of the type contemplated by the three-stage test for granting a stay. As stated by Pelletier J.: *Melo v. Canada (Minister of Citizenship and Immigration)*, (2000), 2000 CanLII 15140 (FC), 188 F.T.R. 39 at para. 21: 'If the phrase "irreparable harm" is to retain any meaning at all, it must refer to some prejudice beyond that which is inherent in the notion of deportation itself. To be deported is to lose your job, to be separated from familiar faces and

places. It is accompanied by enforced separation and heartbreak.'" Instead, as established, this Court is required to approach CBSA refusal to defer with respect and considerable deference.

[7] In this case the Applicant came to Canada on a six month visa in 2011 and left. He returned on a study visa in 2013, should have left in 2014 but decided instead to stay here without permission. I am not satisfied that the Applicant is likely to succeed on his attack on the reasonableness of the decision not to defer his removal. However, but only for present purposes, I will assume the first part of the three-part test is met.

[8] On the second part of the test, the onus is on the Applicant to demonstrate, through clear and convincing non-speculative evidence or irreparable harm that the extraordinary remedy of a stay of removal is warranted: *Atwal v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427 [*Atwal*]. Such harm must be forward looking. Further, harm must constitute more than a series of possibilities and may not be based on mere assumptions, speculation or hypotheticals and contingencies. As already noted, absent exceptional circumstances the Court is not to reconsider, reweigh or reassess the evidence before the CBSA Officer. Neither is a motion for a stay an appeal from the decision of the CBSA Officer, nor is it a *de novo* review of the record to arrive at a fresh determination. In addition, the officer's assessment is to be given a great deal of weight. Given the deference the deferral Officer is owed, and the high bar before reweighing and reassessing evidence already considered by CBSA, I am not persuaded that finding is of such exceptional nature to warrant the Court's intervention. Having heard and read the submissions of both counsel, the requirement for clear and convincing non-speculative evidence of irreparable harm is not met in this case such that the Applicant does meet the test of irreparable harm.

[9] The third part of the test asks if the balance of convenience favours the Applicant or the Minister. Given my findings above, the Applicant's situation does not outweigh the Minister's duty to remove "as soon as possible", and therefore he does not succeed on the balance of convenience test.

[10] The Applicant has failed to meet two of the three tests to justify a stay. To succeed he had to meet them all. Therefore this motion to stay must be dismissed.

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

"Henry S. Brown"
Judge