Federal Court  Cour fédérale

Date: 20230929

Docket: IMM-11420-23

Citation: 2023 FC 1320

Vancouver, British Columbia, September 29, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

BASTIAN RODRIGO SALAS SALAMANCA

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, Bastian Rodrigo Salas Salamanca, brings a motion for a stay of his removal from Canada, scheduled to take place on October 1, 2023.

[2] The Applicant requests that this Court stay his removal until the determination of an underlying application for leave and judicial review of a negative decision of the Refugee Appeal Division ("RAD").

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

II. **Facts and Underlying Decision**

[4] The Applicant is a citizen of Chile.

[5] On October 29, 2019, the Applicant entered Canada and subsequently made a claim for refuge status.

[6] In a decision dated January 23, 2023, the Refuge Protection Division ("RPD") refused the Applicant's claim. In a decision dated August 8, 2023, the RAD dismissed the appeal.

[7] On September 8, 2023, the Applicant filed an application for leave and judicial review of the RAD decision and sought an extension of time to file this application, as it was submitted after the deadline of August 30, 2023. Given that the Applicant sought an extension, his departure order was not automatically stayed pursuant to subsection 231(4) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 and went into effect.

[8] On September 22, 2023, the Applicant was served with a Direction to Report for removal.

III. **Analysis**

[9] 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.

[10] 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*

[11] 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).

[12] On this first prong of the tri-partite test, the Applicant submits that his underlying application for leave and judicial review of the RAD decision raises the serious issue of failing to adequately consider documentary evidence of his current risk of harm in Chile, especially in selectively using certain pieces of evidence and ignoring contradictory evidence.

[13] The Respondents submit that no serious issue has been established, as the RAD demonstrably grappled with a variety of documentary evidence and the Applicant's own evidence to reach the conclusion that he was not at risk in Chile.

[14] Having reviewed the parties' materials, I agree with the Respondents. The Applicant has led insufficient evidence that the underlying application for leave and judicial review raises a serious issue with respect to the RAD's treatment of the evidence, particularly in relation to selective reliance upon certain portions of the documentary evidence. Counsel for the Respondents rightfully note that the RAD considered a variety of evidence to support the conclusion that conditions in Chile have changed such that the Applicant would no longer be at risk. I find that the Applicant's issue with the RAD decision amounts to a request that the Court reweigh the evidence considered by the RAD, a request that a reviewing court cannot generally entertain on judicial review (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at para 125). As such, no serious issue has been established and the Applicant has not met the first prong of the *Toth* test.

B. *Irreparable Harm*

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

[16] The Applicant submits that he would suffer irreparable harm if returned to Chile, established by evidence of credible threats made against him of physical harm, abduction, or death. The Applicant maintains that agents of harm could easily locate and target him.

[17] The Respondents submit that irreparable harm is not established, as the Applicant primarily relies upon evidence before the RPD and RAD, both of whom found that there was insufficient evidence demonstrating that he faced a possibility of persecution upon return.

[18] I agree with the Respondents. While the failure to establish a serious issue is dispositive of this motion, I do not find that the Applicant has furnished sufficient evidence of risk should he be returned to Chile. The Applicant has not pointed to any objective evidence that demonstrates a personalized risk of harm in Chile (*Barre v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 783), especially in light of the conclusion drawn by the RAD about the

improved conditions in Chile since the Applicant fled. I further find that the Applicant has led only speculative evidence to establish that his whereabouts would be easily accessible to those seeking to locate and target him, contravening the principle that risk tantamount to irreparable harm must be established by clear, non-speculative evidence (*Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31; *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at paras 15-16). The Applicant has not established the second prong of the *Toth* test.

C. *Balance of Convenience*

[19] 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.

[20] The Applicant submits that the balance of convenience favours him, as he has presented compelling evidence that returning to Chile would place his safety and life in imminent danger, and that denying this motion would deny the Applicant the opportunity for a thorough and fair assessment of his situation in accordance with principles of international human rights and

refugee protection. The Applicant maintains that it is in the public interest to ensuring that vulnerable individuals are not subject to harm when their cases are pending before the Court.

[21] The Respondents submit that the balance of convenience weighs in favour of the Minister, as the Applicant has had opportunities before the RPD and RAD to demonstrate risks upon return to Chile, and both tribunals found that the situation in Chile has changed such that, absent further evidence from the Applicant, he would not be at risk upon return. The Respondents maintain that this factor and the fact that the public interest supports protecting the administration of the Canadian immigration system support a finding that the balance of convenience lay with the Minister.

[22] The failure to establish a serious issue and irreparable harm are dispositive of this motion. Nonetheless, there is no evidence to support the Applicant's submissions that he has not had a thorough and fair review of his situation such that a stay of his removal is warranted, especially considering that he has here failed to establish that he would face irreparable harm upon return. In my view, the proper administration of the Canadian immigration system through enforcing this removal order as soon as possible (*Immigration and Refugee Protection Act*, SC 2001, c 27, s 48(2)) tips the balance of convenience in favour of the Minister.

[23] Ultimately, the Applicant has not met the tri-partite test required for a stay of removal. This motion is therefore dismissed.

ORDER in IMM-11420-23

THIS COURT ORDERS that:

1. The Applicant's motion for a stay of removal is dismissed.

2. "The Minister of Public Safety and Emergency Preparedness" is added as a Respondent to this motion.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-11420-23
STYLE OF CAUSE:	BASTIAN RODRIGO SALAS SALAMANCA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	SEPTEMBER 29, 2023
ORDER AND REASONS:	AHMED J.
DATED:	SEPTEMBER 29, 2023

APPEARANCES:

Atif Aziz Anastasia Vulpe	FOR THE APPLICANT
Suzy Flader	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Dominion Law Group Barristers and Solicitors Surrey, British Columbia	FOR THE APPLICANT
Attorney General of Canada Vancouver, British Columbia	FOR THE RESPONDENTS