

Federal Court



Cour fédérale

Date: 20230118

Docket: IMM-12654-22

Citation: 2023 FC 76

Ottawa, Ontario, January 18, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

DALWINDER SINGH

Applicant

and

**THE MINISTER OF PUBLIC SAFETY AND
EMERGENCY PREPAREDNESS**

Respondent

ORDER AND REASONS

[1] The applicant is a citizen of India. He sought refugee protection in Canada but his claim was rejected by the Refugee Protection Division (“RPD”) of the Immigration and Refugee Board of Canada (“IRB”). The applicant appealed the RPD’s decision to the Refugee Appeal Division (“RAD”) of the IRB. In a decision dated June 28, 2022, the RAD dismissed the appeal and confirmed the RPD’s determination that the applicant is not a Convention refugee or a person in need of protection.

[2] The applicant received the RAD's decision on June 30, 2022. It appears that, less than two weeks later, he retained a lawyer in Montreal to commence an application for leave and judicial review of the RAD's decision. However, due to an error by the Montreal lawyer in calculating the date by which the notice of application was to be served and filed pursuant to paragraph 72(2)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, the notice was served and filed almost two weeks late. The Montreal lawyer included a request for an extension of time in the notice of application, citing his own calculation error as the basis for the request. The Court File Number for this other matter is IMM-7132-22.

[3] The applicant's application record in IMM-7132-22 was filed on August 17, 2022. The respondent's record was filed on September 16, 2022. Notably, the respondent did not oppose the request for an extension of time. A decision on the leave application is still pending.

[4] On November 22, 2022, the applicant was directed to report for removal from Canada on January 18, 2023.

[5] On November 24, 2022, with the assistance of a different lawyer, the applicant requested what was referred to as a stay of removal from the Canada Border Services Agency ("CBSA"). Quite properly, the Inland Enforcement Officer assigned to the matter treated the request as a request for a deferral of removal. The sole ground advanced in support of the request was that, since the applicant had applied for judicial review of the RAD's decision and a decision on that application was still pending, he was entitled to a stay of removal under subsection 231(1) of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 ("IRPR").

[6] In a decision dated December 21, 2022, the Inland Enforcement Officer determined that, because the notice of application was filed out of time and an extension of time was therefore required, pursuant to subsection 231(4) of the *IRPR*, the applicant was not entitled to a stay of removal under subsection 231(1) of the *IRPR*. In the absence of any other reason being advanced for deferring the applicant's removal, the officer refused the request.

[7] The applicant has applied for leave and judicial review of the negative deferral decision. He has also sought an order staying his removal from Canada pending the final determination of that application.

[8] The applicant's stay motion came before me for a hearing on January 17, 2023.

[9] As I explained at outset of the hearing, I was concerned that there was a risk of an injustice in this case.

[10] On the one hand, there is an avenue for seeking relief that the applicant has not pursued – namely, a motion to the Court for a stay of his removal pending the final disposition of his application for leave and judicial review of the negative RAD decision. The power to grant such an order flows from section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7, which provides that this Court “may make any interim orders that it considers appropriate” pending the final disposition of an application for judicial review. A motion for a stay of removal would be determined under the well-known tripartite test guiding the exercise of the Court's discretion: see *Toth v Canada (Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123 (FCA);

R v Canadian Broadcasting Corp, 2018 SCC 5, [2018] 1 SCR 196 at para 12; *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110; and *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 334. This avenue is available to individuals like the applicant who are not entitled to the benefit of a statutory stay of removal: see *Toth*; see also *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223 at para 25; and *Gerald v Canada (Citizenship and Immigration)*, 2022 CanLII 86326.

[11] On the other hand, from the materials filed by the parties on the present motion, it appeared to me that the underlying application for leave and judicial review of the negative deferral decision was so lacking in merit that the applicant would be unable to meet even the low threshold of establishing a ground for review that was not frivolous or vexatious and that, as a result, the motion for a stay of removal would have to be dismissed. Significantly, while the applicant now submits that the Inland Enforcement Officer should have exercised their discretion to defer removal because the late-filing of the notice of application in IMM-7132-22 was not due to any fault on the part of the applicant, this argument was not advanced in the original request.

[12] While being cognizant that the Court should be very careful not to second-guess the decisions of counsel, I am concerned that the failure to seek an interlocutory stay of removal in relation to the application for leave and judicial review of the negative RAD decision and, instead, to pursue an ill-conceived request for a “stay” from the CBSA were errors on counsel’s part that give rise to the risk of a miscarriage of justice. My concerns are compounded by the fact that the applicant’s ineligibility for a statutory stay of removal under subsection 231(1) of the *IRPR* is due solely to an error on the part of his Montreal lawyer.

[13] After I shared these concerns with the parties, counsel for the applicant was able to obtain instructions from his client. He advised that the applicant had instructed him that he wished to take up the opportunity to bring a motion for a stay of removal pending the final determination of his application for leave and judicial review of the negative RAD decision if that opportunity were extended to him. Very fairly, counsel for the respondent acknowledged the Court's concerns and left the matter in my hands.

[14] For these reasons, as I indicated at the conclusion of the hearing on January 17, 2023, I have determined that it is in the interests of justice to grant an interim stay of the applicant's removal so that the applicant may have the opportunity to bring a motion for an interlocutory stay of his removal in Court File IMM-7132-22, so that the respondent may have an opportunity to file responding materials, and so that the Court may have an opportunity to determine that motion on its merits.

ORDER IN IMM-12654-22

THIS COURT ORDERS that

1. The motion for an interlocutory stay of removal in IMM-12654-22 is adjourned *sine die*.
2. The order for the applicant's removal is stayed on an interim basis pending the final determination of a motion for an interlocutory stay of removal in IMM-7132-22.
3. The applicant shall serve and file his motion record in IMM-7132-22 no later than January 31, 2023.
4. The respondent shall serve and file its motion record no later than February 14, 2023.
5. Following receipt of both parties' motion records, the Registry will contact the parties to arrange a date for the hearing of the motion.
6. I will remain seized with this matter.

"John Norris"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-12654-22

STYLE OF CAUSE: DALWINDER SINGH v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

PLACE OF HEARING: HELD BY VIDEOCONFERENCE

DATE OF HEARING: JANUARY 17, 2023

ORDER AND REASONS: NORRIS J.

DATED: JANUARY 18, 2023

APPEARANCES:

Harsimran Makkar FOR THE APPLICANT

Nadine Silverman FOR THE RESPONDENT

SOLICITORS OF RECORD:

Harsimran Makkar Law Professional Corporation FOR THE APPLICANT
Brampton, Ontario

Attorney General of Canada FOR THE RESPONDENT
Toronto, Ontario