Federal Court Cour fédérale

Date: 20240213

Docket: IMM-1868-24

Citation: 2024 FC 245

Toronto, Ontario, February 13, 2024

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

KURTIS OMERO DOUGLAS

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

[1] The Applicant seeks a stay of his removal to Jamaica, which is scheduled for tomorrow, February 14, 2024.

[2] For the reasons set out below, the application for a stay of removal will be granted.

I. Context

[3] The Applicant and his mother left Jamaica for the United States in 1995. He was convicted of a series of offences in the United States and served time in prison. He was deported from the United States and sent to Jamaica in 2012. Two months later, he travelled to Canada using a false passport. The Applicant is married to a Canadian, and has two biological children and one step-daughter. His daughter and step-daughter live with him and his wife in Canada, while his son lives in the United States.

[4] In 2013, the Applicant was arrested by the Canada Border Services Agency and found inadmissible to Canada for serious criminality. He spent several months in detention before being released on a bond. Since then, he has been issued a series of work permits. In December 2015, the Applicant was charged with use and possession of an unauthorized credit card, identity documents and theft from mail. He was convicted in January 2017 and received a conditional discharge and probation for 12 months.

[5] On December 14, 2015, the Applicant submitted an application for permanent residence in Canada under the Spouse or Common Law Partner in Canada Class ("the Inland Spousal application"), based on his wife's sponsorship. He says that he submitted an application for permanent residence from within Canada based on humanitarian and compassionate considerations ("the H&C request") in March 2017, and his counsel at the time requested that his H&C request be considered "co-extensively with the processing of the… Inland Spousal matter."

[6] The Applicant was subject to removal proceedings in March 2017, but this Court issued a stay on April 13, 2017. His challenge to the prior decision was upheld: *Douglas v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 1148.

[7] The Applicant's Inland Spousal application was refused on August 3, 2018 because he was found to be inadmissible for serious criminality.

[8] The Applicant was once again subject of removal proceedings, and on January 23, 2024, he made a request that his removal be deferred based on the best interests of his daughter (so that she could complete her school year), and pending a determination of his outstanding H&C request. He also argued he would face hardship if he was forced to return to Jamaica.

[9] The Officer refused to defer the Applicant's removal. On the best interests of the child, the Officer noted the evidence about the Applicant's role in his daughters' lives in Canada and the support he provides for his wife in caring for them. The Officer acknowledged the stress and difficulty that would be associated with their separation, but found that the daughters would remain in Canada with their mother and would have the support of their extended family who also live here.

[10] In regard to the request to defer pending the determination of the H&C claim, the Officer reviewed the Applicant's counsel's submissions on the point, but then noted that the Inland Spousal sponsorship application was denied in August 2018, and the Respondent's computer system stated:

> Subject has requested consideration on [H&C] Grounds. Per the Public Policy for Spouses, given that subject is inadmissible for

> criminal conviction, he is not eligible for H&C reassessment of this application. If he wishes to pursue an H&C assessment, a new kit and fee is required under the H&C category.

[11] The Officer stated that a search of the files did not indicate that another H&C had been submitted. Based on this, the Officer concluded: "I am satisfied that there is no outstanding application for permanent residence with H&C consideration in process and therefore further consideration will not be given to the request to defer [the Applicant's] removal on the basis of an outstanding H&C application."

[12] On the issue of hardship, while the Officer acknowledged the difficulties associated with family separation and the negative impact on the Applicant's wife and children, this was found to be a normal consequence of removal. The Officer summarized the other evidence on this point, and concluded that a deferral was not warranted because of hardship.

[13] The Applicant has filed an application for leave and for judicial review in regard to the negative deferral decision. He has also sought a stay of removal pending the determination of this application.

II. Issues

[14] The only issue is whether a stay of removal should be granted in these circumstances.

III. Analysis

[15] In considering whether to grant a stay of removal, this Court applies the same test as for interlocutory injunctions. The Supreme Court of Canada has stated the test as follows:

> At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.
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> (*R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12, references omitted)

[16] This three-pronged test is well-known. It had been set out in earlier decisions of the Supreme Court: *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110; *RJR — MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR MacDonald*]. It was also applied in the immigration context in *Toth v Canada (Minister of Employment and Immigration)*, (1988) 86 NR 302, 1988 CanLII 1420 (FCA). The application of this test is highly contextual and fact-dependent. It bears repeating that the Supreme Court of Canada has recently emphasized that "[u]ltimately, the question is whether granting the injunction would be just and equitable in all the circumstances of the case" (*Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 1).

A. *Serious Issue*

[17] In many cases, the serious issue branch of the test is not a high bar. However, in cases where the stay is requested following a refusal to defer removal, it has been found that a higher threshold applies, which requires the Applicant to demonstrate a "likelihood of success" or "quite a strong case" in regard to the underlying application for leave and judicial review (*Wang v Canada (Minister of Citizenship and Immigration),* 2001 FCT 148, [2001] 3 FC 682; and *Baron v Canada (Minister of Public Safety and Emergency Preparedness),* 2009 FCA 81, [2010] 2 FCR 311 [*Baron*] at para 67*; Lewis v Canada (Public Safety and Emergency Preparedness),* 2017 FCA 130 at para 43).

[18] The Applicant argues he has met the higher threshold. First, he submits that the Officer failed to consider his submission that his wife and daughters would be forced to leave with him for Jamaica because of the difficulties they would face if they stayed in Canada. The Applicant says that the Officer completely failed to engage with that submission and therefore the deferral decision is unreasonable.

[19] Second, on the outstanding H&C application, the Applicant asserts that he was never advised that a new H&C application was required, and that the IRCC Operational Bulletin 544 – 22 August 2013 provides that a H&C request should be held in abeyance while an Inland Spousal application is dealt with. If the spousal request is denied then the H&C request should be processed. The Applicant contends that the Officer's statement is therefore wrong in law and contrary to IRCC practice.

[20] This is confirmed, according to the Applicant, by information he received when he phoned IRCC to inquire about the status of his H&C, as well as by the IRCC email dated February 1, 2024, responding to his request for a status update. This email states: “We verified the information on file and are pleased to confirm that the H&C submission was received by the responsible office. If further information is needed during the processing of your application, the responsible officer may contact you.”

[21] The Applicant argues that this email and an earlier phone response he received gave rise to a legitimate expectation on his part that his H&C request would be processed. The deferral decision does not grapple with this, and instead relies on internal note that are either incomplete or incorrect.

[22] The Respondent argues that no serious issue has been established, applying the higher threshold that applies since the underlying decision was a refusal to defer removal.

[23] At the outset, I will simply state that I am not satisfied that the Applicant’s argument about the Officer’s finding regarding the status of the H&C claim constitutes a serious issue. This aspect of the matter will be further discussed under irreparable harm.

[24] However, I find that the Applicant has established a serious issue in regard to the Officer’s failure to engage with his submission that his daughter’s school year would be interrupted because his wife and the children would accompany him to Jamaica. As the Respondent acknowledged, this submission is not mentioned in the Officer’s decision.

[25] I underline here that the Officer may well have had good reasons to discount this claim, including the fact that the wife's evidence focused on the challenges they would face if the Applicant left Canada, and she did not address any difficulties she or the children would face if they moved to Jamaica. In addition, there was no concrete evidence supporting the assertion that the family was planning to leave – no plane tickets or other proof supporting this aspect of the claim. Another point the Officer could have relied on was that the wife and children were under no legal obligation to leave Canada, and any choice they made could not be a basis to defer the Applicant's removal.

[26] The Officer could have taken all of that into account in rejecting this aspect of the Applicant's deferral request. What the Officer could not do, however, was ignore it. That contravenes the basic thrust of the *Vavilov* framework, which requires responsive justification for decisions: *Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65; *Mason v Canada (Citizenship and Immigration)*, 2023 SCC 21.

[27] I am satisfied that this constitutes a serious issue that meets the higher threshold.

B. *Irreparable Harm*

[28] Irreparable harm refers to harm which cannot be compensated in money; it is the nature rather than the magnitude of the harm that is to be examined: *RJR MacDonald* at 135. In the context of a stay of removal, the harm usually relates to the risk to the individual(s) of harm upon removal from Canada. It may also include specific harms that are demonstrated in regard to any persons directly affected by the removal, and who will be remaining in Canada: *Tesoro v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 148.

[29] In this case, the Applicant submits that he and his daughter will experience irreparable harm if she is forced to leave Canada before she completes her school year, noting that she is in Grade 6 – the final year of elementary school.

[30] The Applicant acknowledges that the case-law indicates that in most cases the existence of an outstanding application for status in Canada will not be a basis for a stay. However, in *Baron* it was recognized that "special circumstances" may justify a deferral of removal where an application for status has not been determined. The Applicant submits that IRCC's unexplained failure to process his H&C claim in the 7 years since it was submitted, or the 5.5 years since the Inland Spousal application was refused, constitutes the type of special circumstances that warrant the grant of a stay.

[31] The Respondent argues that the Applicant failed to take reasonable steps to verify the status of his H&C claim, and so he cannot now argue that any delay in dealing with it constitutes irreparable harm. In addition, the Respondent asserts that irreparable harm must be to the Applicant as an individual, and harm to his family members cannot be taken into account.

[32] On this point, the record in this case is an unsatisfactory muddle. On the one hand, the deferral decision indicates that IRCC's position was that once the Inland Sponsorship was denied because the Applicant was inadmissible, the associated H&C request was terminated and the Applicant needed to file a new one if he wanted to pursue that route. There is no evidence in the record showing that IRCC ever informed the Applicant of this, however.

[33] In addition, the Applicant swears that he telephoned IRCC and was advised that his H&C application was in process, and he produced a copy of an email response from IRCC dated February 1, 2024, stating that his H&C submission had been received and he would be contacted if more information was required. This contradicts the Officer's statement that the H&C had been terminated.

[34] The Applicant claims that this is not an ordinary case, and so it fits within the special circumstances exception set out in *Baron*.

[35] I agree.

[36] The unexplained failure to advise the Applicant that his H&C request was terminated (if that is actually what happened), and the equally unexplained failure to process it in the intervening 5.5 years since the Inland Spousal application was rejected (if the phone call and email indeed reflect that the H&C is indeed still "live"), brings this case out of the usual run of situations involving outstanding applications for status.

[37] While I agree with the Respondent's assertion that the Applicant was less than diligent in following up on the status of his H&C, the fact remains that when he asked about it, he was given information from IRCC that indicated it was in progress. This directly contradicts the Officer's statement in the deferral decision.

[38] An unexplained failure to process an application for over five years might well constitute a basis to defer removal, especially if no part of the delay could be attributed to the claimant.

That is the case here – there is no suggestion that the Applicant failed to respond to requests for information or otherwise impeded the processing of his H&C. Similarly, an unexplained failure to advise the Applicant that his H&C was terminated as a consequence of the decision on the Inland Spousal request means that he has been denied any opportunity to try to rectify the situation – either by challenging the decision or filing a new H&C.

[39] I am persuaded that the Applicant has met the test for establishing irreparable harm, in the very unusual circumstances of this particular case. This is based on the evidence in the record regarding the status of his H&C, and the unexplained failure to advise him it was terminated, or the failure to process it in a timely way. This is evidence, not speculation, and meets the test in *Atwal v Canada (Citizenship and Immigration)*, 2004 FCA 427.

C. *Balance of Convenience*

[40] In view of the findings above, I find that the balance of convenience weighs in favour of the Applicant.

[41] There can be no doubt that Canada has an interest in the prompt removal of persons whose refugee claims have not been upheld (as articulated in s. 48(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27), and that this is not merely a matter of administrative convenience. It goes to the wider public interest in ensuring confidence in the integrity of the immigration program as a whole: *Vieira v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 626; *Selliah v Canada (Citizenship and Immigration)*, 2004 FCA 261 at para 22.

[42] In addition, I note that there is ample case-law supporting the Respondent's argument that where a claimant has been convicted of criminal offences, the balance of convenience will often weigh in favour of removal.

[43] However, in the unusual circumstances of this particular case, I am satisfied that the balance of convenience favours the Applicant. He should not be removed until his underlying application for judicial review is determined.

[44] I am therefore granting a stay of removal, pending the determination of the Applicant's application for leave and for judicial review.

ORDER in IMM-1868-24

THIS COURT'S ORDER is that the application for a stay of removal pending the determination of the Applicant's application for judicial review is granted.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1868-24
STYLE OF CAUSE:	KURTIS OMERO DOUGLAS v. THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	FEBRUARY 13, 2024
ORDER AND REASONS:	PENTNEY J.
DATED:	FEBRUARY 13, 2024

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