Federal Court  Cour fédérale

Date: 20240821

Docket: IMM-14877-24

Citation: 2024 FC 1299

Toronto, Ontario, August 21, 2024

PRESENT: Madam Justice Go

BETWEEN:

ANGELO WACLAW CZUDOWSKI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

I. Overview

[1] Mr. Angelo Waclaw Czudowski [Applicant] seeks a stay of removal to Poland, scheduled for August 21, 2024. The Applicant was given Direction to Report on August 13, 2024. The Applicant submitted a request to defer his removal dated August 16, 2024 [deferral request]. The Applicant then filed an application for leave and for judicial review [ALJR] of a deemed

decision denying his removal and to seek a stay of his removal pending the determination of the underlying ALJR.

[2] In a decision dated August 20, 2024, an Inland Enforcement Officer [Officer] denied the Applicant's deferral request [Decision].

[3] Having considered the materials filed by the parties, and having heard the parties' submissions, I am granting the application for a stay.

II. Context

[4] The Applicant is a citizen of Poland of Roma ethnicity. His spouse and one of their minor children are also Polish citizens. They came to Canada in July 2022 and claimed refugee status. The Applicant was only entitled to a Pre-Removal Risk Assessment [PRRA] due to his previous refugee claim in Canada when he was a minor. The Applicant's PRRA was denied. The Applicant's spouse and child's claim was accepted. The couple also has a Canadian-born child born in February of 2024.

[5] In April 2024, the couple filed an application for permanent residence [PR] in Canada based on the spouse's Convention refugee status. The Immigration, Refugee and Citizenship Canada [IRCC] acknowledged receipt of their PR application, with the eligibility decision pending. IRCC has invited the Applicant and his family to submit biometrics and medical examinations.

[6] Previously, a removal officer issued a direction requiring the Applicant to report for removal on May 15, 2024. The officer decided to defer the removal because the Applicant was facing certain criminal changes. The Crown withdrew the charges with respect to one matter upon the Applicant's completion of 20 hours of community service. The officer decided to defer the removal for a short period of time in an effort to respect the court order and in the absence of specific details from the Crown [Previous Deferral Decision].

[7] In his latest deferral request, the Applicant asked the Officer to defer his removal for four to six months on the following basis:

a. A statutory stay of removal is in force if there is a pending court matter whereby the removal would contravene a court order for a person to appear in court in person. CBSA has option to seek an agreement with the Crown to resolve charges if it wishes to proceed with removal. No such agreement was reached or presented to the Applicant.

b. The Applicant's role in caring for his spouse who has serious health issues, and the best interest of the minor children including a pre-schooler and Canadian-born baby;

c. The PR application of the Applicant's spouse and child, to which the Applicant has been added as an applicant is at a stage where approval in principle is expected imminently.

[8] On August 16, 2024, the Applicant attended at the provincial criminal court and was advised by the presiding judge that his case will be adjourned to August 30, 2024. Counsel also wrote to the Officer noting that the Crown did not object to the adjournment and did not advise of any arrangements made with CBSA.

[9] Included in the Respondent's motion record is an affidavit of a CBSA Officer, J.S., who declared that a request was made on February 6, 2024 to have the charges stayed against the

Applicant for his removal from Canada, and that on March 20, 2024, the Crown had agreed to have all charges stayed pending the successful removal and a completed confirmation of departure.

III. Issues and Legal Test for Obtaining a Stay

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

[11] In order to obtain a stay, the Applicant must meet the tripartite test articulated by the Supreme Court of Canada in *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110, *RJR-MacDonald v Canada (Attorney General)*, [1994] 1 SCR 311 and *R v Canadian Broadcasting Corp*, 2018 SCC 5, which is the test to be applied to stays of removal: *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302, 11 ACWS (3d) 440 (FCA).

[12] A stay of removal is warranted only if all three elements of the test are satisfied, namely: (i) the underlying application for judicial review raises a serious issue; (ii) the moving party will suffer irreparable harm if the stay is not granted and the removal order is executed; and (iii) the balance of convenience favours the granting of the order.

[13] The application of this test is highly contextual and fact-dependent. As the Supreme Court of Canada explained, "[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.

[14] While in many cases, the threshold for the serious issue branch of the test is not high, in cases where the stay is requested following a refusal to defer removal, a higher threshold applies. The Applicant needs to demonstrate a "likelihood of success" or "quite a strong case" in regard to the underlying application for leave and for judicial review: *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FC 682 [*Wang*] at para 11; *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311 at para 67.

IV. Analysis

A. *Serious Issue*

[15] The Applicant submits the following serious issues:

a. The Officer erred in law by not recognizing the statutory stay of removal under section 50 of the *Immigration and Refugee Protection* (SC 2001, c 27) [*IRPA*] and applicable CBSA enforcement manual; and

b. The Officer erred in minimizing the impact of removal on the minor children and the spouse of the Applicant and failed to conduct proper analysis with attention and compassion as mandated by the Supreme Court of Canada.

[16] The Applicant needs to establish at least one serious issue, on the elevated threshold as set out in *Wang* at para 10. Having reviewed the Decision, as well as the evidence and submissions put before the Officer, I find the Applicant has done so.

[17] First, I find there is a serious issue with respect to whether there is sufficient evidence as to the agreement between the CBSA and the Crown that criminal charges will be stayed on the removal of the Applicant, and the scope of the agreement.

[18] Subparagraph 50(a) of the *IRPA* provides that a removal is stayed if a decision that was made in a judicial proceeding would be directly contravened by the enforcement of the removal order. Under para 234 of the *Immigration and Refugee Protection Regulations* (SOR/2002-227) [*IRPR*], subparagraph 50(a) does not apply if there is an agreement between the immigration department and the provincial crown that criminal charges will be withdrawn or stayed on the removal of the person from Canada.

[19] The Applicant submits that there is no evidence of such an agreement on the record, and that the Officer's declaration is insufficient to establish such an agreement exists, citing *Del Milagro v Canada (Minister of Citizenship and Immigration)* 2003 FC 1106 [*Del Milagro*] at para 8.

[20] The Respondent asks the Court not to follow *Del Milagro,* as it is an older case. The Respondent cites *Agbontaen v Canada (Minister of Citizenship and Immigration)* 2023 CanLII 116385 FC [*Agbontaen*] to suggest that *Del Milagro* is no longer followed. However, as the Applicant points out and I agree, *Agbontaen* did not address the issue of sufficiency of evidence of the agreement between the Crown and the CBSA.

[21] While I need not follow *Del Milagro*, and while I have no reason to doubt that an agreement exists, I find there is conflicting evidence about the scope of the agreement between the CBSA and the Crown. I note in the Previous Deferral Decision, the Officer granted the deferral for the Applicant to complete his community service. If there is an agreement for the Crown to drop all charges in order to facilitate the removal, there was no reason for deferring the removal to allow the Applicant to complete his community hours – unless the agreement requires the Applicant to complete such service. If that is the case, then the Applicant's removal should be deferred until he has completed such service. I also note certain discrepancies in the record as to whether the community service hours were related to the charges that were already dropped by the Crown, as the Officer noted in the Previous Deferral Decision, or that were linked to the outstanding charges, as stated in the Applicant's affidavit. The discrepancies, as they are, call into question the scope of the agreement between the Crown and the CBSA upon which subparagraph 50(a) of the *IRPA* and para 234 of the *IRPR* operate. The Decision does not clarify these discrepancies.

[22] Without reviewing the agreement, I am unable to discern the nature of the agreement between the CBSA and the Crown. I agree with the Applicant that it is not his obligation to produce the agreement, which he cannot access, according to the CBSA, unless he files an Access to Information Request.

[23] As an aside, I also note that in the Decision, the Officer made a comment that "CBSA has an obligation to the Crown to remove [the Applicant] as per CBSA's agreement with the Crown." Yet Officer J.S.'s declaration made it clear that it was CBSA who initiated a request to

the Crown to have the charges stayed so that CBSA could remove the Applicant, not the other way around. This Officer's comment raises further questions about the nature of the agreement.

[24] In conclusion, I agree with the Applicant that the insufficient evidence about the agreement that underpins the legal validity of the removal order is a serious issue to be tried.

[25] Second, I also find that the Officer's treatment of the medical evidence raises a serious issue.

[26] In support of his deferral request, the Applicant submitted several letters from Dr. Saleh, the Applicant's family doctor. Dr. Saleh wrote in one of his letters that the Applicant's spouse "is still battling with depression and the children and she depends completely on the help of [the Applicant] to raise the kids and to support them throughout this difficult time." In another letter, Dr. Saleh wrote that the Applicant's spouse "is a known case of postpartum depression."

[27] The Officer gave Dr. Saleh's letters no weight, questioning "how much social time" the doctor spent to have "first-hand knowledge of the family at home." The Officer also found the letters "are not based upon objective medical evidence" as the Officer concluded, by using the word "we", the doctor was expressing a "shared opinion" with his client.

[28] It was one thing for the Officer to question the reliability of Dr. Saleh's opinion about the level of dependency of the Applicant's wife and children on the Applicant for care. However, by giving the doctor's letters no weight, the Officer failed to consider the medical evidence with

regard to the Applicant's spouse's diagnosis of post-partum depression. At the hearing, to her credit, counsel for the Respondent did not dispute that the Applicant's spouse suffers from post-partum depression. The Respondent submitted that the Decision was nevertheless reasonable because there was insufficient evidence about the treatment that the Applicant's spouse requires, and the type of support she needs from the Applicant.

[29] With respect, the Officer did not refuse the deferral request based on insufficient evidence about the Applicant's spouse's medical need. Rather, as noted above, the Officer found no objective medical evidence after giving Dr. Saleh's letters no weight after speculating about why Dr. Saleh used the term "we" in his letter. This constitutes another serious issue.

B. *Irreparable Harm*

[30] Irreparable harm refers to harm which cannot be compensated in money; it is the nature rather than the magnitude of the harm, which is to be examined: *RJR-MacDonald* at 341. In the context of a stay of removal, the harm usually relates to the risk of harm upon removal from Canada. It may also include specific harm that is demonstrated in regard to any persons directly affected by the removal, and who will be remaining in Canada: see *Tesoro v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 148 at para 28.

[31] The law requires that irreparable harm be established based on evidence, not assertions or speculation: *Atwal v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427 at paras 14-15. However, the test for irreparable harm is also not one of absolute certainty: *Suresh v Canada (Minister of Citizenship and Immigration)*, [1999] 4 FC 206 (CA) at para 12.

[32] As noted above, the Applicant provided evidence confirming the Applicant's spouse diagnosis of post-partum depression. The Applicant also provided affidavit to the Officer stating that his wife and children are dependent on him for care.

[33] I agree with the Applicant that the medical evidence submitted in support of the deferral request attesting to the expected harm to the Applicant's spouse and minor children if the Applicant is not removed at this time, is not speculative and is sufficient to show irreparable harm to the Applicant's family members who are directly affected by the removal: *Magana v Minister of Public Safety and Emergency Preparedness*, 2023 CanLII 93094 FC..

C. *Balance of Convenience*

[34] I acknowledge there is a public interest that an enforceable removal order be enforced as soon as possible. In this case, there is a serious issue as to whether or not the removal order is indeed enforceable. Further, taking into consideration the irreparable harm to the Applicant's spouse and minor children on the one hand, and the inconvenience to the Respondent caused by delay in removal on the other, I find that granting the stay until the underlying ALJR is determined would be just and equitable in all the circumstances of the case. The balance of convenience thus lies with the Applicant.

ORDER in IMM-14877-24

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

"Avvy Yao-Yao Go"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-14877-24
STYLE OF CAUSE:	ANGELO WACLAW CZUDOWSKI v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HELD VIA VIDEOCONFERENCE
DATE OF HEARING:	AUGUST 21, 2024
ORDER AND REASONS:	GO J.
DATED:	AUGUST 21, 2024

APPEARANCES:

Milan Tomasevic	FOR THE APPLICANT
Aida Kalaj	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Milan Tomasevic Barrister and Solicitor Mississauga, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT