Federal Court  Cour fédérale

Date: 20240503

Docket: IMM-7634-24

Citation: 2024 FC 687

Toronto, Ontario, May 3, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

ANGELO ANTHONI SERPA RAMOS

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, Angelo Anthoni Serpa Ramos, brings a motion for a stay of his removal from Canada, scheduled to take place on May 4, 2024.

[2] The Applicant requests that this Court stay his removal from Canada pending the disposition of an underlying application for leave and judicial review of a refused deferral request made by an officer (the "Officer") of Canada Border Services Agency ("CBSA").

[3] For the reasons that follow, this motion is granted. I find that the Applicant has met the tri-partite test required for a stay of removal.

II. **Facts and Underlying Decisions**

[4] The Applicant is a 35-year-old citizen of Peru. On December 15, 2021, the Applicant arrived in Canada, whereupon he made a claim for refugee protection. In a decision dated October 30, 2023, the Refugee Protection Division ("RPD") rejected his claim, finding that he had a viable flight alternative in Peru.

[5] The Applicant states that in Canada, he formed a common-law relationship with his partner in September 2022, and cares for her daughters.

[6] The Applicant states that on November 5, 2023, he was attacked by three men outside of his house and taken to the hospital (where he remained for five days), leaving him seriously injured. A medical note confirms the Applicant has a deteriorated cognitive function with attendant health issues, and a psychotherapist's assessment report confirms that there is a "high probability" that the Applicant suffers from post-traumatic stress disorder. The Applicant's partner, per her statement, has taken care of the Applicant since his health worsened. The

Applicant maintains that owing to his recovery from the attack, he did not see the RPD decision until November 15, 2023.

[7] In a direction to report dated April 11, 2024, the Applicant was scheduled to be removed from Canada. In submissions dated April 27, the Applicant sought a request for a deferral of that removal.

[8] In a decision dated May 1, 2024, the Officer refused the Applicant's deferral request. The Officer found that the Applicant's medical issues did not warrant deferring removal, including the Applicant failing to establish that he would be unable to fly, the fact he had not been examined by a psychologist nor a psychiatrist or would be unable to continue care with his Canadian psychotherapist, a lack of evidence regarding the need for or inability to seek care in Peru, the fact there were others who could support him in Peru, and insufficient evidence demonstrating a need for medical attention "acutely" or since the Applicant had been released from the hospital. The Officer did not accept the Applicant's partner's permanent residence claim and the timing of when the Applicant received the RPD decision as warranting deferral. Moreover, the Officer found that the best interests of the children ("BIOC") did not warrant a deferral and that there was no evidence that "there will be no options" for employment for the Applicant in Peru. The Officer further acknowledged the RPD's decision, finding that there were medical and cognitive issues presented to the RPD, and acknowledged the impact of COVID-19. The Officer overall concluded that a deferral of removal was not warranted.

[9] On April 29, 2024, the Applicant brought this motion before the Court to stay his removal.

III. **Analysis**

[10] 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.

[11] 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*

[12] 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). This Court must also bear in mind that the discretion to defer the removal of a person subject to an enforceable removal order is limited. 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) ("*Baron*").

[13] A decision refusing to defer removal requires the Applicant to meet an elevated standard with respect to the first *Toth* requirement of a serious issue for trial, pursuant to *Baron.*

[14] On this first prong of the tri-partite test, the Applicant submits that the Officer failed to account for his medical needs and the risk he would face upon return to Peru, failed to account for the short-term BIOC of his stepchildren, and erred with respect to the Applicant's partner's permanent residence application and the Applicant's attempt to re-open his RPD decision appeal. The Applicant further submits that the Officer overlooked evidence of his establishment in Canada and the hardship he would face upon removal to Peru.

[15] The Respondent submits that the Officer reasonably considered the Applicant's medical needs, the BIOC, and the Applicant's establishment and hardship upon removal. The Respondent further submits that the Applicant's partner's permanent resident application is not an impediment to removal, nor is the Applicant's pending application for leave and judicial review of the RPD's decision. Additionally, the Respondent submits that the Officer reasonably found that the new evidence risk did not warrant a deferral.

[16] I agree with the Applicant. While the Officer acknowledged the evidence of a new risk in Peru (*i.e.*, the handwritten note sent from the Applicant's brother stating "accidents happen"

with bullets on top of the note), there is a serious issue with how the Officer factored this evidence into the analysis required for alleged new risks at the deferral stage as set out in *Atawnah v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 144 at paragraphs 14-15. I further find there is a serious issue with the Officer's findings regarding the medical and familial support the Applicant could find in Peru, given my concern with these findings' general lack of justification and transparency, as well as justification in light of the evidence provided (*Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 99-101). The first prong of the *Toth* test is established.

B. *Irreparable Harm*

[17] 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)).

[18] The Applicant submits that the Officer misapprehended the Applicant's risk of irreparable harm, and that irreparable harm is established given his medical circumstances and the state of Peruvian healthcare. The Applicant further submits that separation from the stepchildren establishes irreparable harm and that he faces harm in Peru based on evidence of conditions in Peru, as well as the new evidence of risk.

[19] The Respondent submits that the Applicant's evidence of his medical circumstances does not establish irreparable harm, nor does separation from his family or the new evidence of risk.

[20] I agree with the Applicant. The Court has held that "the fact that there has been change in circumstances concerning the Applicant that may adversely affect the risks of his removal and such risks have yet to be properly assessed constitutes irreparable harm" (*De Leon v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 1235 at para 35, cited in *Hoang v Canada (Public Safety and Emergency Preparedness)*, 2023 CanLII 89637 (FC); see also, for example, *Shittu v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 1037 at para 26). I find this holding to be applicable in these circumstances, especially considering the serious issues with the Officer's findings above. The second prong of the *Toth* test is established.

C. *Balance of Convenience*

[21] 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, "[w]here 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.

[22] The Applicant submits that the harm he faces upon removal cannot be remedied, while the Respondent's interest in removing the Applicant expeditiously can be remedied pending the outcome of the Applicant's partner's permanent residence application or the Applicant's judicial review application regarding the RPD decision.

[23] The Respondent submits that the interest in enforcing the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*") outweighs the Applicant's interests.

[24] I agree with the Applicant. Given that he has established serious issues with the Officer's decision and irreparable harm upon removal to Peru, I find that the Applicant's interests outweigh the Respondent's interest in enforcing removal expeditiously under section 48(2) of the *IRPA*.

[25] Ultimately, the Applicant has met the tri-partite test required for a stay of removal. This motion is granted.

ORDER in IMM-7634-24

THIS COURT ORDERS that the Applicant's motion for a stay of removal pending the disposition of his underlying application for leave and judicial review of the refused deferral request.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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