Federal Court Cour fédérale

Date: 20180325

Docket: IMM-1364-18

Citation: 2018 FC 335

Ottawa, Ontario, March 25, 2018

PRESENT: The Honourable Mr. Justice Grammond

BETWEEN:

ALI MANTO

Applicant

and

MINISTER OF IMMIGRATION, CITIZENSHIP AND REFUGEES
MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Mr. Ali Manto, brings a motion for a stay of his removal from Canada scheduled for later today, March 25, 2018. The motion was heard earlier today by teleconference. These are my reasons for granting the motion.

I. Facts and Underlying Decision

[2] Mr. Manto is a citizen of Turkey of Kurdish ethnicity and Alevi faith. He came to Canada in 2016 and claimed refugee status. He said that he supported opposition parties and participated in "leftist" demonstrations. He also claimed to be a conscientious objector to military service.

[3] The Refugee Protection Division [RPD] rejected his claim on June 29, 2016. The RPD held that Mr. Manto's fears were related to the "general climate of violence in Turkey" and that the treatment of the Kurdish population may amount to discrimination, but not persecution. With respect to conscientious objection, the RPD found that penalties for avoiding conscription were imposed under a law of general application and did not amount to persecution. Moreover, the RPD found that Mr. Manto was not a genuine conscientious objector, as he had not expressed that view publicly while in Turkey.

[4] On July 15, 2016, there was an attempted coup in Turkey.

[5] Mr. Manto appealed to the Refugee Appeal Division [RAD]. The RAD rendered its decision on November 21, 2016 and took into account the change of circumstances in the wake of the attempted coup. Nevertheless, the RAD concluded that Mr. Manto did not "have the profile that would make him the target of the current government's purge of those it views as its opponents." The RAD generally agreed with the RPD's conclusions with respect to conscientious objection.

[6] In light of the attempted coup, the Canadian government allowed Turkish nationals to request a pre-removal risk assessment [PRRA] in spite of the restrictions set forth in the *Immigration and Refugee Protection Act*, SC 2001, c 27 [Act]. Mr. Manto thus applied for a PRRA. His application was denied, largely for the reasons given by the RPD and RAD. He was informed of that decision on March 19, 2018. On the same occasion, he was given a notice to appear at Pearson Airport on March 25 for removal. He was detained by the Canadian Border Services Agency [CBSA] in the meantime.

[7] Mr. Manto applied for judicial review of the PRRA decision. In the context of that application, he brought a motion for the stay of his removal.

II. Analysis

[8] The Act does not require a judicial authorization to remove a foreign national from Canada. In that sense, a stay of removal is an exceptional remedy, as it interferes with the normal administrative process.

[9] The statutory basis for a stay of removal is found in section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7, which provides that this Court may make interim orders pending the final disposition of an application for judicial review. In granting such relief, we apply the same test as for interlocutory injunctions. The Supreme Court of Canada recently restated 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.
>
> (*R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12, references omitted)

[10] 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*]). It was also applied in the immigration context in *Toth v Canada (Minister of Employment and Immigration)*, 1988 CanLII 1420 (FCA). Of course, the application of this test is highly contextual and fact-dependent.

A. *Serious Question to be Tried*

[11] In *RJR*, the Supreme Court stated that the "serious question to be tried" criterion is a relatively low threshold (*RJR* at 337). In the administrative law context, this must be assessed while keeping in mind that the applicable standard of review is reasonableness.

[12] Mr. Manto asserts that the PRRA officer made three reviewable errors: (1) failure to assess the evidence of the further deterioration of the conditions in Turkey after the RAD's decision; (2) failure to take into account the risk that Mr. Manto will be imprisoned if he objects to military service, contrary to international human rights norms which require that an alternative form of service be provided to conscientious objectors; (3) reliance on the RAD's flawed

conclusion to the effect that Mr. Manto's assertions were insufficient to prove that he was a conscientious objector.

[13] In the context of a motion for stay of removal, the usual practice is to refrain from making detailed comments on the merits of the underlying application, in order to preserve the freedom of the judge who will hear the merits. For that reason, I will simply say that I am satisfied that Mr. Manto has raised serious questions to be tried.

B. *Irreparable Harm*

[14] The second prong of the RJR test relates to irreparable harm. In assessing that second criterion, some principles must be borne in mind. First, a certain degree of hardship is inherent in removal from Canada (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 51, [2015] 3 SCR 909 at para 23). Such hardships may not be taken into account, lest the entire scheme of the Act be defeated. Second, a motion for stay of removal is not the appropriate forum to reargue harms that have been adequately assessed by previous decision-makers (see, e.g., *Goshen v Canada (Public Safety and Emergency Preparedness)*, 2011 FC 1380 at para 6).

[15] Mr. Manto asserts four types of harm: (1) harm to his spouse; (2) general persecution of Alevi Kurds; (3) the consequences of conscientious objection; (4) the fact that his removal would prevent him from benefitting from the results of the underlying application for judicial review.

[16] First, Mr. Manto submitted the affidavit of his common-law spouse. She is from Turkey and claimed refugee status upon coming to Canada. She describes the facts giving rise to her

claim as well as the severe psychological consequences that those facts had on her. She asserts that all of her family remained in Turkey and that Mr. Manto is her only support in Canada. Family separation is a frequent consequence of removal from Canada and does not, without more, constitute irreparable harm. However, in the present case, without prejudging her application for refugee status and without going into the details, I am satisfied that the harm to Mr. Manto's spouse goes beyond hardship inherent in removal and deserves to be considered in the context of the second prong of the RJR test.

[17] Second, Mr. Manto relies on the evidence of mistreatment of Alevi Kurds, leftists or persons who criticize the current Turkish government. This was argued before the RPD and RAD. The RAD, in a decision issued after the July 2016 attempted coup, found that Mr. Manto's profile was not that of someone who would attract the attention of Turkish authorities. On that issue, I am inclined to accept the RAD's conclusion. Even taking into account the extension of the repression in Turkey over the last year, I have not been persuaded that Mr. Manto is likely to be targeted for his real or perceived opposition to government. Mr. Manto's profile, however, may increase the risk of other kinds of harm that he alleges.

[18] The third kind of harm alleged by Mr. Manto raises the difficulty I alluded to earlier. Where an allegation of harm has been found not to constitute persecution under section 96 or risk under section 97 of the Act, it is difficult to consider it in support of a motion for stay of removal. However, where the issue was not satisfactorily addressed by previous decision-makers, such harm may become relevant. Assessing whether this is the case will necessarily require a closer look at the merits of the underlying application than is necessary for the

assessment of the first prong of the RJR test (see, e.g., *Ahmed v Canada (Citizenship and Immigration)*, 2015 FC 936).

[19] Following *Ates v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 322 and *Hinzman v Canada (Citizenship and Immigration)*, 2007 FCA 171, this Court has often held that penalties imposed on conscientious objectors to military service do not amount to persecution under section 96 of the Act. However, some cases suggest that in certain circumstances the treatment of conscientious objectors may rise to a level that amounts to persecution (*Walcott v Canada (Citizenship and Immigration*), 2011 FC 415 at para 35; *Tindungan v Canada (Citizenship and Immigration)*, 2013 FC 115, [2014] 3 FCR 275; *Basbaydar v Canada (Citizenship and Immigration)*, 2014 FC 158; *Storozhuk v Canada (Citizenship and Immigration)*, 2017 FC 74 at para 24). In a case involving Turkey, Justice Russell Zinn noted that:

> In this case, the reasons do permit the court to appreciate why the RPD found that the treatment in Turkey would amount to persecution; namely, the treatment that conscientious objectors receive from the authorities. The relevant treatment is not simply repeated terms of imprisonment. Rather, the record shows that conscientious objectors are viciously assaulted and inhumanely treated by authorities and others at the encouragement of the authorities simply because they have refused military service. Accordingly, the RPD's decision is well within the range of reasonable outcomes.
>
> (*Canada (Citizenship and Immigration) v Akgul*, 2015 FC 834 at para 12)

[20] The RPD, the RAD and the PRRA officer dealt with that issue by holding that Mr. Manto was not a genuine conscientious objector. They did not perform an analysis of how conscientious objectors would be treated in Turkish prisons, in particular in light of the worsening of the

human rights conditions in Turkey after the attempted coup and the widespread allegations of torture.

[21] For the purpose of assessing irreparable harm, the situation should be analyzed from the perspective of the Turkish authorities who will deal with Mr. Manto upon his return to Turkey. They will consider that he has been living out of the country for two years and claimed refugee status on the basis of conscientious objection. In my view, there is a significant likelihood that he will be viewed as a deserter, a "draft dodger" or conscientious objector, either upon arrival or when he is called to report for service. In this regard, he will soon reach the age of 29, an age at which several of the exemptions to military service expire. If he is seen as someone who attempted to evade military service, he will likely be jailed and subjected to inhumane prison conditions.

[22] I am mindful that irreparable harm must be proved and must not be based on mere speculation (see, e.g., *Montenegro v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 609 at para 12). Yet, irreparable harm is about the future and the future can never be predicted with certainty. Moreover, the harm under review is a particularly serious one – inhumane prison conditions and breaches of physical integrity. In the context of a motion for stay of removal, it is unrealistic to require proof of certainty of harm, especially where the potential consequences for the individual concerned include serious human rights violations.

[23] In those circumstances, I am of the view that Mr. Manto has shown irreparable harm. Even though we do not know for sure what will happen to him in Turkey, he will be at the mercy

of Turkish officials who are known for their grave mistreatment of conscientious objectors, in a country where the general human rights situation has been deteriorating and where allegations of torture are now frequent. The risks involved have not been adequately addressed by the previous decision-makers.

[24] The fourth kind of harm alleged is the fact that Mr. Manto's application for judicial review of his PRRA decision would become moot if he is removed to Turkey. In this regard, the Federal Court of Appeal has repeatedly stated that the potential mootness of the underlying application does not, in and of itself, constitute irreparable harm (*El Ouardi v Canada (Solicitor General)*, 2005 FCA 42 at para 8; *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 50, [2010] 2 FCR 311; *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at paras 35-39, [2012] 2 FCR 133; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paras 56-57). I would not give effect to this alleged harm independently of Mr. Manto's other submissions.

[25] In the result, and taking a holistic view of the harms alleged, I conclude that Mr. Manto has shown that irreparable harm is likely to occur if a stay of removal is not granted.

C. *Balance of Convenience*

[26] At this last stage of the RJR test, prejudice to the applicant must be balanced against prejudice to the respondent who is prevented from enforcing the law. It has sometimes been said that "[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 at para 48). Nevertheless, balance of convenience is not a purely formal criterion. The conduct of the applicant, for example where the applicant has a significant criminal record or has a history of evading immigration authorities, may strengthen the interest of the state in enforcing the removal.

[27] However, none of these factors are present in this case and I conclude that the balance of convenience favours Mr. Manto.

[28] In conclusion, the three *RJR* criteria are met and I will issue an order staying Mr. Manto's removal from Canada.

JUDGMENT

THIS COURT'S JUDGMENT is that the motion for a stay of the removal of the applicant is granted.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1364-18
STYLE OF CAUSE:	ALI MANTO v MINISTER OF IMMIGRATION, CITIZENSHIP AND REFUGEES and MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 25, 2018
REASONS FOR JUDGMENT AND JUDGMENT:	GRAMMOND J.
DATED:	MARCH 25, 2018

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