Federal Court Cour fédérale

Date: 20190427

Dockets: IMM-2646-19
IMM-2647-19
IMM-2648-19

Citation: 2019 FC 558

Toronto, Ontario, April 27, 2019

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

MEHMET YUSUF TARTIK

Applicant

and

THE MINISTER OF CITIZENSHIPAND IMMIGRATION

Respondent

ORDER AND REASONS

[1] The Applicant has brought a motion for the Court to stay the deportation order pending a decision on the underlying judicial review, namely a refused deferral decision. I do not find that the Applicant has raised a serious issue under the elevated threshold prescribed by the jurisprudence, as will be explained below.

Background

[2] The Court was served with a last minute request of a stay of removal [Stay] for a scheduled flight at 11 p.m. tonight, April 27, 2019 to Turkey. The Applicant requested in file IMM-2646-19 that the Stay be granted until such time as two pending applications have been decided, namely a second pre-removal risk assessment [PRRA], for which the Applicant filed a mandamus in IMM-2647-19, and an inland humanitarian and compassionate [H&C] application, for which the Applicant filed a mandamus in IMM-2648-19.

[3] The Stay request was based on these three files. The Stay motion materials, together with pre- and post-hearing Stay materials from the Applicant and parties responding to the Applicant's Law Society complaint [Complaint] (see discussion below), comprise of approximately 500 pages.

[4] The Applicant attempted to file the Stay motion materials with the Court's Registry during the afternoon of April 25, 2019, but they were incomplete and not acceptable for filing. However, service of the materials was effected on the Respondent that day. The Stay was properly filed with the Court's Registry late in the morning of April 26, 2019.

[5] I received the Stay motion materials electronically at 1 p.m. on April 25, 2019. After seeing the amount of materials to be reviewed in the time necessary to render a decision, I immediately asked the Registry to contact the Department of Justice [DOJ] to see whether it was taking a position on the stay. The response was that the DOJ was indeed opposing both (i) the

hearing of the stay based on its last minute filing, as well as (ii) the merits upon which it was based.

[6] As a result, and knowing that the Respondent was under pressure to prepare its responding record, I convened a 1:30 p.m. case management teleconference to hear submissions on whether the stay would be heard.

[7] Counsel for the Respondent maintained during the teleconference that the stay should not be entertained by the Court. While she had not had time to provide the Court with her client's submissions, she advised that DOJ strongly opposed hearing the Stay on its merits due its last-minute nature. She emphasized that while the Applicant made a deferral request in a timely manner on March 11, 2019, his counsel requested that a decision be delayed.

[8] DOJ counsel advised in the teleconference that as a result of the 11th hour stay request, she herself had been scrambling to understand the nature of the complex request including its basis given the underlying three JRs, and had been reading well past midnight the previous evening and that day trying to digest the hundreds of pages filed and submissions made on the three JRs and Stay, and was still working on her submissions on the merits.

[9] Specifically, DOJ counsel pointed out that the Applicant had requested that the Officer hold off on a deferral decision until his current counsel could submit further submissions arising from a March 2019 Complaint filed with the Law Society of Ontario alleging negligence in the file against various former lawyers and an interpreter.

[10] The Officer complied with the request to delay a decision, which accounted for the deferral decision that was only issued on April 24, 2019. The motion was then filed two days later.

[11] Thus, the first order of business was to try to understand how, given the very short time provided to the Court, the Applicant might be able to focus the very broad arguments made, and thus the materials being relied upon amongst the voluminous amounts served and filed. Applicant's counsel helpfully advised that she would only be basing her Stay arguments on the deferral refusal in IMM-2646-19, and not the other two underlying JRs that were seeking relief by way of mandamus orders for the Applicant's H&C and second PRRA request.

[12] Having said that, when asked what materials might accordingly be focused upon in the Stay materials, counsel for the Applicant advised that the bulk of the materials would be relevant given the serious allegations of negligence and misconduct made against three former lawyers and one interpreter in the Complaint. These allegations, according to her submissions, undermined every immigration proceeding dating back to the original 2015 refugee claim, including all subsequent risk analyses and decisions that had taken place since, as well as the various affidavits, counsel submissions and related contents for those proceedings that had been included in the extensive record.

[13] The hearing proceeded in two parts: a two hour initial hearing during the late afternoon of April 26, which was adjourned and followed by Reply submissions when the Stay hearing resumed later that evening. All arguments were thoroughly canvassed in light of the voluminous

materials filed. As stated to counsel, adequate time was taken to ensure that counsel had fair and ample opportunity to canvass all submissions before the Court. Both advised at the end of the hearing that they were satisfied that all arguments had indeed been made.

The Law

[14] The test underlying interlocutory stays came about through judge-made law (see explanation of the development of the three-part test in *EG et al v Child and Family All Nations*, 2012 MBCA 65 at paras 25–27). While these stays are recognized in sections 48 and 50 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], they are unlike other types of statutory or administrative stays (see for instance, sections 50, 68, 114).

[15] Section 48 contains clear language legislating an officer's duty to carry out an enforceable removal order which has come into force, and "is not stayed" (s 48(1)). If indeed enforceable, "the foreign national against whom it was made must leave Canada immediately and the order must be enforced as soon as possible" (s 48(2)).

[16] However, case law has established that an interim (interlocutory) judicial stay will only issue upon the Applicant convincing the Court that (i) a serious issue exists to be determined by the Court, (ii) irreparable harm will ensue if a stay is not granted, and (iii) the balance of convenience lies in their favour (*Toth v Canada* (*Minister of Employment and Immigration*), (1988), 86 NR 302 (FCA), *RJR-MacDonald Inc v Canada* (*Attorney General*), [1994] 1 SCR 311 (SCC); *R v Canadian Broadcasting Corp*, 2018 SCC 5).

[17] This *Toth* test is conjunctive. The Applicant must meet every branch of the test. The issuance of a stay is an extraordinary remedy wherein the Applicant must demonstrate "special and compelling circumstances" that would warrant "exceptional judicial intervention" (*Zuniga v Canada (Citizenship and Immigration)*, 2016 FC 992 at para 5). As the Federal Court of Appeal held in *Es-Sayyid v Canada (Public Safety and Emergency Preparedness)*, 2012 FCA 59:

> 7. To grant a stay, the Court must be convinced that a serious issue exists, irreparable harm would result if the removal is not stayed, and the balance of convenience favours staying the removal. The test is conjunctive. All three branches must be satisfied.

[18] In addition to these challenges faced by the Applicant in order to be granted an interim injunction of his removal, this motion is one in which an elevated standard for the establishment of a serious issue applies. This is because the underlying support on which the motion is brought – arising from a refusal to defer an applicant's removal – if granted, effectively grants the relief sought in the underlying judicial review application (*Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148).

[19] An officer's discretion to defer removal is very limited, and subject to review on a standard of reasonableness, such that the applicant must put forward quite a strong case (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paras 66–67).

Analysis

[20] Despite agreeing to hear and decide the case on its merits given the serious allegations raised regarding the Applicant's representation to date, I entirely agree with the general principle

underlying the Respondent counsel's initial position taken during the case management teleconference, and then repeated during oral submissions at the Stay hearing, i.e., that she strenuously opposed the hearing of this matter. Indeed, 11th hour cases must be avoided when possible.

[21] It is little wonder that last-minute stay motions are strongly discouraged by the Court, and may be the basis for a refusal to consider the merits of the stay on the late filing alone. The Court has on numerous occasions recognized that avoidable last minute motions should be discouraged as they are not in the interests of justice (*Beros v Canada (Citizenship and Immigration)*, 2019 FC 325; *Khan v Canada (Public Safety and Emergency Preparedness),* 2018 FC 1275; *Ocaya v Canada (Citizenship and Immigration)*, 2019 Canlii 8561 (FC); *Miranda v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 1057).

[22] As is made evident by the steps set out in the Background section above, a short time frame prejudiced the Respondent by limiting its ability to obtain the relevant immigration background materials; its record consisted only of its written representations as it did not have time to obtain anything else. Indeed, much of these written representations ended up being irrelevant as they were devoted to issues that counsel for the Applicant later resiled from (i.e. the stay being based on the two underlying mandamus JRs).

[23] Unlike stay proceedings filed in a timely manner, and in stark contrast to the Applicant's voluminous record, the Respondent's material consisted of only written representations, and

lacked any affidavit or background evidence. Indeed, the Respondent relied solely on the materials that the Applicant put forward in his record.

[24] Late filings of stay motions not only limit the counsel's ability to put forward cogent positions on behalf of their client, they also limit the Court's ability to review the materials and prepare for the hearing. Judges deciding these matters on duty or General Sittings weeks when stays are heard invariably face competing demands, including other stays.

[25] Most importantly, timely motions avoid such issues and allow both the Respondent and the Court to ensure that there is adequate time for the process to properly, fairly and efficiently run its course. This in turn ensures that the just, most expeditious and least expensive determination of every stay proceeding on its merits is ultimately secured, in keeping with Rule 3 of the *Federal Court Rules*, SOR/98-106.

[26] Of course, there are constraints of the adversarial system that can and do work both ways when the process in question is a stay of removal. As the government is in control of the removal, subject to various administrative constraints including from the receiving country, applicants lack an ability to control removal dates (as opposed to a voluntary departure from Canada).

[27] Thus, late timing is definitely a two-way street, with inadequate notice being given to applicants in many circumstances for them to arrange their affairs including bringing a timely stay motion.

[28] Having recognized issues that may arise for both sides in stay litigation, in my view, this was far from a case of inadequate removal notice being given to the Applicant. Rather, he was advised of his removal weeks before his removal date (today, April 27, 2019), having filed the first "part" of his deferral request on March 11, 2019 in which he asked the Officer not to make a decision. His counsel only followed up with submissions on April 16, 2019 (Respondent's counsel notes in her submissions that "the Applicant did not complete his request until April 18th, 2019".

[29] In any event, the various documentation left with the deferral Officer was voluminous – attaching and referring to other significant documentation and information, including the Complaint. Furthermore, the Applicant had hired his current counsel much earlier – according to one of his Affidavits in the record, after his PRRA was refused in March 2018. He was thus already removal-ready over a year ago.

[30] While the Applicant himself was the author of the delay, asking that a decision not be made by the deferral Officer, I decided to hear the stay despite the Respondent's strong objections, due to the serious allegations against an interpreter, and three of Applicant's counsel that were raised in the Complaint made to the Law Society of Ontario, and lengthy accompanying materials provided with that Complaint (there was a fourth immigration lawyer the Applicant hired, who filed his unsuccessful PRRA, who he did not include in his Complaint).

[31] I have reviewed each of the serious questions that the Applicant raises, and agree with the Respondent that none of them reach the heightened threshold required by *Baron* and *Wang*.

[32] In short, I agree with the Respondent that the Officer's analysis, contained in the 5-page Refusal letter dated April 24, 2019, is not unreasonable in its conclusions. While it is not perfect, perfection is not the standard required for deferral decisions. Rather, they must contain serious issues on the elevated standard set out in *Baron* and *Wang*. I do not find that the Applicant has put forward a strong case.

[33] I have reviewed each issue that the Applicant (as articulated during the hearing) submits raises a serious question in the Decision, namely that the Officer:

(i) erred in law and/or fact by failing to adequately appreciate the effect of the new evidence of risk, given the previous determinations of the impact of the new evidence of risk;

(ii) treated previous assessments of risk as determinative despite the negative inferences drawn in those assessments despite counsel's negligence;

(iii) gave inadequate reasons for why s/he determined the Applicant's lengthy submissions and details of the Complaint to be insufficient evidence of various determinations of fact and law rendered – for instance:

a. Insufficient evidence to explain why the interpretation was not adequate;

b. That the evidence of risk was not submitted to the RPD, RAD and PRRA in an timely manner;

c. That the PRRA submission disregarded issues when there were no substantive legal submissions in that PRRA.

[34] Upon review of the record and consideration of the arguments made by both parties, I agree with the Respondent that none of these issues reach the heightened threshold required by *Baron* and *Wang* forming a strong case in establishing a serious question.

[35] The Officer's analysis, contained in his 5-page single-spaced refusal letter dated April 24, 2019, is not unreasonable in any of its conclusions, including with respect to the substance of the Complaint, which the Applicant argued formed the crux of his arguments.

[36] I agree with the Applicant that the decision was not perfect, and not perfectly adequate. But perfection is not the standard required for the adequacy of administrative decisions (*Canadian Pacific Railway Company v Univar Canada Ltd*, 2019 FCA 24 at para 30); perfection most certainly is not the standard required for deferral decisions, which are by nature made under very limited discretion (*Baron* at paras 66–67), and under very limited time constraints.

[37] Ultimately, the weakness in the Applicant's analysis is that he says that the alleged negligence of his three former lawyers at the RPD, RAD, and judicial review of the latter, as well as the alleged improper conduct of the interpreter, all led to fundamental unreasonableness in the adjudication of those matters before those various tribunals. Had the new evidence been properly considered and not held against the Applicant for not being presented on time, they may well have resulted in fundamentally different outcomes, given that the evidence in question was

neither (i) properly considered, nor (ii) held against the Applicant as a key negative credibility factor.

[38] Essentially, the Applicant makes a domino argument, that had the proper decision been made on the new evidence at the first hearing (the RPD), that tribunal may have made an entirely different decision, and then it is quite possible that the next two proceedings – the RAD and PRRA – would have had an entirely different case before them – if indeed any case before them was necessary at all. The Applicant, in a nutshell, argues that the Officer failed to appreciate these facts or consider the evidence presented in the deferral request, because this conclusion would have been obvious had the Officer done so.

[39] I do not agree with these arguments, or any of those made by the Applicant in the "serious question" raised above. After reading what the Applicant describes as the lynchpin RPD decision, which leads to the domino effect, I find no such alleged error.

[40] First, the new evidence was considered by the RPD, albeit after having been initially not accepted for filing. The RPD clearly addresses the evidence and does not hold the post-hearing filing against the Applicant.

[41] Second and more importantly, there were multiple other grounds upon which negative credibility findings were made – primarily those concerning subjective fear. None of those findings would have changed with the new evidence being considered because they involved the

Applicant's conduct both in Turkey and in Canada, which the RPD (and then the RAD) found to be inconsistent with subjective fear.

[42] The one caveat is that I cannot comment on the PRRA decision as it was not included in the record – but of course a paper PRRA application (made without legal representations according to Applicant's counsel), would not have the same fact-finding, credibility-determination as either of the RPD or RAD proceedings. And ultimately the crux of the Applicant's arguments hinges on the credibility determinations, and his arguments regarding the documentary evidence underlying those determinations.

[43] On that documentary evidence, which also forms the heart of the criticism of the Complaint, as well as the arguments regarding the Officer's decision, they were doubted based on their contents in light of all the other evidence presented, including the Applicant's own comportment.

[44] The Applicant insists that even subsequent counsel, in her RAD submissions (the Applicant's second lawyer), admits that the RPD held the late filing against the Applicant's credibility.

[45] First, I note that just because the argument is included in Applicant's counsel's submissions does not make it so.

[46] Second, I find it difficult to understand why the Applicant is relying on his RAD Counsel's substantive positions taken in her RAD submissions, when he has made serious allegations against that very counsel in his Law Society Complaint on the basis of incompetence, negligence, and unprofessionalism.

[47] Third, I am not convinced that was indeed the RPD's conclusion – particularly since it ultimately accepted for filing and considered the substance of each piece of new evidence. Rather, the tenor of the RPD appeared to be that the Applicant had plenty of time to get his documents from Turkey and failed to do so – even if they were filed late.

[48] Even if I were to accept that the RPD included this issue as part of the central credibility determination against the Applicant – which I do not – I again find that it formed at best a peripheral part of the RAD's determination on appeal. It was one among many observations in a very detailed appellate decision by the RAD. That decision was never judicially reviewed.

[49] Finally, I note that had the Applicant wished to challenge the interpretation as he now does, the proper time to do that was at the RPD, after the RPD hearing with post-hearing materials that were provided, or before the RAD. It is not three years later in a Stay motion in what appears to be the first such allegation before the Court.

[50] Finally, with respect to the Complaint, which the Applicant focused on during the hearing, I will make two points.

[51] First, I am neither a primary decision-maker in the Deferral request, nor the Complaint, but rather a reviewer of the Officer's decision and the evidence provided in that Complaint, and the responding Affidavit put before the Court from one of the impugned lawyers and the impugned interpreter. However, in my limited review role, I note that the Applicant appears to have put forward inconsistent positions in his very detailed Affidavit to the Law Society, which the Officer was asked to review, including with respect to the interpreter. The Officer's response to this Complaint was reasonable given what he had before him.

[52] Second, the Respondent put forward cogent arguments in her Affidavit (and in her oral argument), as to the Complaint. Her written arguments can be read at paragraphs 28-55 of her Written Representations.

CONCLUSION

[53] In conclusion, I do not find that the Applicant has met the heightened *Baron* threshold as required; he has not put forward a sufficiently strong case to meet the first, serious question prong of the *Toth* test.

ORDER

1. This Stay motion is denied. The deportation to Turkey may proceed as scheduled tonight.

"Alan S. Diner"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-2646-19, IMM-2647-19, IMM-2648-19
STYLE OF CAUSE:	MEHMET YUSUF TARTIK v THE MINISTER OF CITIZENSHIP AND IMMIGRATION

MOTION HELD VIA TELECONFERENCE ON APRIL 26, 2019 FROM OTTAWA, ONTARIO AND TORONTO, ONTARIO

ORDER AND REASONS:	DINER J.
DATED:	APRIL 27, 2019

ORAL AND WRITTEN REPRESENTATIONS BY:

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