Federal Court  Cour fédérale

Date: 20200908

Docket: IMM-3931-20
IMM-4024-20

Citation: 2020 FC 887

[ENGLISH TRANSLATION]

Montréal, Quebec, September 8, 2020

PRESENT: The Honourable Mr. Justice Gascon

BETWEEN:

CHONDY PIERRE

Applicants

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER

UPON the two motions brought by the applicant, Mr. Chondy Pierre, to stay enforcement of a deportation order made against him and ordering his removal under escort to Haiti, his country of citizenship, on the morning of September 9, 2020;

CONSIDERING that, in IMM-3931-20, the application for leave and for judicial review [ALJR] underlying the motion to stay concerns a decision dated April 16, 2015, by the

Immigration Division [ID], concluding that Mr. Pierre was inadmissible to Canada on the basis of the seriousness of his criminal record, pursuant to paragraph 36(1)(a) of the *Immigration and Refugee Protection Act* [IRPA];

CONSIDERING that, in IMM-4024-20, the ALJR underlying the motion to stay concerns a decision dated August 29, 2020, by an enforcement officer [Officer] of the Canada Border Services Agency [CBSA] refusing to defer Mr. Pierre's removal;

UPON READING Mr. Pierre's two motion records and the responses filed on behalf of the respondent Minister in each file, and having considered the oral submissions of counsel for both parties at a hearing held by videoconference on September 8, 2020;

CONSIDERING that a stay of enforcement of a removal order is an extraordinary and discretionary remedy in equity that requires special and compelling circumstances (*Canada (Minister of Citizenship and Immigration) v Harkat*, 2006 FCA 215 at para 10) and requires Mr. Pierre to demonstrate the following:

1. Mr. Pierre must meet the tripartite test established by the Supreme Court of Canada in *RJR-Macdonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 for the issuance of interlocutory injunctions and stays, and applied by the Federal Court of Appeal to stays of immigration removals in *Toth v Canada (Citizenship and Immigration)* (1988), 86 NR 302 (FCA).
2. This tripartite test requires Mr. Pierre to demonstrate to the Court (1) that there is a serious issue to be tried; (2) that he will suffer irreparable harm if removed from Canada to Haiti; and (3) that the balance of convenience favours him (*R v Canadian Broadcasting Corporation*, 2018 SCC 5 at para 12).

3. As the Supreme Court stated in *Google Inc. v Equustek Solutions Inc.*, 2017 SCC 34 [*Google*], the fundamental question is "whether the granting of an injunction is just and equitable in all of the circumstances of the case", which "will necessarily be context-specific" (*Google* at para 25).
4. The test is conjunctive, and each of its three components must be satisfied (*Western Oilfield Equipment Rentals Ltd. v M-I L.L.C.*, 2020 FCA 3 at para 7; *Janssen Inc. v Abbvie Corporation*, 2014 FCA 112 [*Janssen*] at para 19). Thus, if Mr. Pierre fails on any element of the tripartite test, his application for a stay must be dismissed.
5. Where the interim relief sought has the practical effect of deciding the underlying action, the serious issue test is more demanding; this is particularly true where the decision sought in the underlying appeal is that of not deferring a removal. In such cases, the serious issue test gives way to a more stringent one where the criterion "becomes the likelihood of success on the underlying application" (*Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 [*Wang*] at para 11). Applicants must then demonstrate a reasonable prospect of success in their ALJR (*Fox v Canada (Citizenship and Immigration)*, 2009 FCA 346 at para 21).
6. Section 48 of the IRPA requires the Minister to enforce a valid removal order "as soon as possible" (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 [*Lewis*] at para 54), so the discretion of an enforcement officer to defer a removal under subsection 48(2) is limited (*Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 [*Baron*] at paras 49, 67). This discretion is reserved for cases where failure to defer removal would expose an applicant to a risk of death, extreme sanction or inhumane treatment, or where there are compelling and

temporary practical or logistical factors that affect the timing of removal (such as travel arrangements, health problems or the children's school schedule) (*Lewis* at para 55); *Atawnah v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 144 [*Atawnah*] at paras 13–15; *Canada (Minister of Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 [*Shpati*] at para 43; *Baron* at paras 49–51; *Wang* at para 48).

7. Furthermore, the standard of review applicable to a decision to refuse to defer a removal is reasonableness. To be considered reasonable, a decision must be based on "an internally coherent and rational chain of analysis" and be "justified in relation to the facts and law that constrain the decision maker" (*Canada (Minister of Citizenship and Immigration) v Vavilov*, 2019 SCC 65 at paras 85, 101); *Wang* at para 48);

CONSIDERING that Mr. Pierre does not appear before this Court with "clean hands", and that this is sufficient for the Court to reject his applications for a stay:

1. Since a stay application is an exceptional discretionary remedy, those who apply to the Court for such a remedy are required to have clean hands (*Massoni Vasquez v Canada (Citizenship and Immigration)*, 2011 FC 1144 at para 27; *Adams v Canada (Minister of Citizenship and Immigration)*, 2008 FC 256 at para 2; *Chavez v Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 830 at para 13). Where such is not the case, this may constitute grounds for the dismissal of an application for a stay (as the Minister has argued here), or at least weigh in favour of the Minister in the balance of convenience.
2. In other words, "those who seek equity must do equity" ("*quiconque cherche l'équité doit agir à l'avenant*")(*Wright v Canada (Minister of Citizenship and Immigration),*

2002 FCTD 113 at para 26; see also *Canada (Citizenship and Immigration) v Thanabalasingham*, 2006 FCA 14 at paras 9–10).

3. The Court has repeatedly held that a stay may be denied to those who do not have "clean hands" or do not appear before the Court with the best of good faith and propriety (*Baron* at para 65). In *Canada (National Revenue) v Cameco Corporation*, 2019 FCA 67 [*Cameco*], the Federal Court of Appeal recently reiterated that the "clean hands" doctrine is "an equitable doctrine, under which a party may be disentitled to relief to which it was otherwise entitled as a consequence of past conduct or bad faith. Importantly, for past conduct to justify a refusal of relief, the conduct must relate directly to the very subject matter of the claim" (*Cameco* at para 37).
4. This is precisely the case here.
5. Mr. Pierre had already challenged the ID's decision before this Court in IMM-5643-15, but withdrew that application. He had exercised his right to appeal the ID's decision to the Immigration Appeal Division [IAD] but, given Mr. Pierre's failure to respond, the IAD declared his appeal abandoned. In January 2019, the IAD then denied an application to reopen filed by Mr. Pierre, and Mr. Pierre challenged before the Court that unfavourable decision rendered against him by the IAD (IMM-499-19). The Court dismissed Mr. Pierre's ALJR in that case. In addition, in a detailed order with supporting reasons issued on February 8, 2019, the Court refused to grant the stay then requested by Mr. Pierre.
6. However, Mr. Pierre decided not to report for removal on the scheduled date, and an immigration arrest warrant had to be issued against him. It was not until July 2020 that

Mr. Pierre decided to report to immigration authorities and the warrant for his arrest was enforced.

7. Mr. Pierre therefore deliberately chose to ignore and disobey a valid deportation order in a case that raised the same facts that Mr. Pierre is now attempting to reintroduce before the Court. Mr. Pierre intentionally violated Canada's immigration laws, undermined the integrity of the immigration system, and showed a profound disregard for the Court's authority.
8. The Minister submits that this ground alone justifies the dismissal of these motions. I agree wholeheartedly. Mr. Pierre's misconduct militates against the exercise of the Court's discretion, which cannot condone such conduct.

CONSIDERING that, in addition and in any event, Mr. Pierre does not meet any of the three elements of the well-established tripartite test for granting a stay;

CONSIDERING that, for the following reasons, Mr. Pierre has not demonstrated the existence of a serious issue to be tried in either of his two motion records:

1. There are no serious issues to be tried in IMM-3941-20, as the Court has already rejected the grounds for the challenge that Mr. Pierre is now pursuing against the ID's decision.
    a. In his submissions, Mr. Pierre merely repeats allegations similar to those made unsuccessfully in his previous appeals before the IAD and this Court. Mr. Pierre was heard on his application to reopen and was given the opportunity to present arguments alleging an error in the findings of serious criminality against him or a breach of the principles of natural justice in the handling of his case. The IAD rejected those arguments, and the Court upheld that decision.

b. In sum, Mr. Pierre is attempting to challenge a particular issue that has already been decided in a previous proceeding to which he was a party. There is clearly *res judicata* here (*Danyluk v Ainsworth Technologies Inc.*, 2001 SCC 44 at para 33; *Tuccaro v Canada*, 2014 FCA 184 at para 14). Therefore, Mr. Pierre cannot now ask the Court to reconsider the merits of the findings of serious criminality made against him, or the previous decisions of the ID and the IAD, and of this Court.

c. I would also point out that the arguments raised by Mr. Pierre with respect to *Tran v Canada (Public Safety and Emergency Preparedness)*, 2017 SCC 50, could have been raised at his hearing before the IAD in July 2018. They were not, and Mr. Pierre cannot now resubmit them in an argument for a remedy that is essentially identical to the one that the Court has already denied him.

d. Moreover, Mr. Pierre's ALJR is clearly out of time, and no evidence or argument has been presented to satisfy the Court that Mr. Pierre could meet the criteria for an extension of time (*Canada (Attorney General) v Larkman*, 2012 FCA 204 at para 61; *Canada (Attorney General) v Hennelly*, [1999] FCJ No 846 (FCA) at para 3).

e. Mr. Pierre's ALJR, in light of the ID's April 2015 decision, therefore has no chance of success.

2. There is no more serious issues to be discussed in IMM-4024-20 regarding the Officer's decision to refuse to defer removal:

a. Since the remedy sought by Mr. Pierre in this second stay application is the same as in his underlying ALJR, namely to remain in Canada, the test of a serious issue

to be tried is here more demanding and turns into a test of likelihood that the underlying application will succeed (*Wang* at para 11). Mr. Pierre therefore was required to demonstrate a reasonable prospect of success in his ALJR against the decision of the Officer denying his request for a deferral of his removal.

b. I emphasize that the serious issue to be tried is not whether, in light of his submissions, Mr. Pierre should be returned to his country of citizenship or not; rather, the issue is whether the Officer's decision Mr. Pierre is seeking to have set aside raises such an issue that his removal should be suspended pending the Court's consideration of the merits of the matter.

c. I can find no serious issue that would offer Mr. Pierre a reasonable chance of success against the Officer's decision. Indeed, a review of this decision reveals that, although the reasons are brief, the Officer analyzed the evidence submitted rigorously, but that the evidence of the risks alleged by Mr. Pierre was deficient, whether it be with regard to his challenge to the ID's April 2015 decision, his pending sponsorship application, his son in Canada, or Mr. Pierre's alleged need to be present for his mother or brother because of their state of health. All relevant elements were considered by the Officer but were found to be incomplete, flawed and insufficient to support Mr. Pierre's application.

d. Therefore, Mr. Pierre has not satisfied me that, in the face of such a factual background and considering the limited discretionary power of an IRPA enforcement officer in an application for an administrative stay, the Officer made an error of fact or law in her assessment of the case. I am not persuaded that Mr. Pierre could demonstrate that the impugned decision is not justified in light of the

legal and factual constraints to which the decision maker was subject. Rather, I conclude that the Officer's decision has the requisite attributes of justification, transparency and intelligibility, and that it is well-founded and reasonable.

CONSIDERING that, for the following reasons, Mr. Pierre has also failed to demonstrate that he would suffer irreparable harm between now and the date of a future decision on any of his ALJRs, should he return to Haiti:

1. Under the legislation and case law, irreparable harm is a stringent test that requires proof of a serious threat to the life or safety of the applicants (or their loved ones). It requires clear, conclusive and non-speculative evidence to support it, going beyond what is inherent in the very notion of removal or deportation (*Palka v Canada (Public Safety and Emergency Preparedness)*, 2008 FCA 165 at para 12; *Selliah v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261 [*Selliah*] at para 13).
2. The Federal Court of Appeal has frequently emphasized the quality of the evidence required to establish irreparable harm:
    a. Irreparable harm requires clear and non-speculative evidence (*AstraZeneca Canada Inc. v Apotex Inc.*, 2011 FC 505 at para 56, aff'd 2011 FCA 211; *Aventis Pharma SA v Novopharm Ltd*, 2005 FC 815 at para 59-61, aff'd 2005 FCA 390).
    b. Simply alleging that irreparable harm is possible is not enough: "It is not sufficient to demonstrate that irreparable harm" is "likely" to be suffered" (*United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 at para 7; *Centre Ice Limited v National Hockey League* (1994), 53 CPR (3d) 34 (FCA) at 52).

c. Proof of irreparable harm requires more than a series of general and unsupported possibilities, assumptions or assertions (*Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 [*Gateway City Church*] at para 15; *Singh Atwal v Canada (Citizenship and Immigration)*, 2004 FCA 427 [*Atwal*] at para 14).

d. Rather, it must be shown that there is a real likelihood of irreparable harm if the stay is not granted (*Gateway City Church* at para 16): "To establish irreparable harm, there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted. Assumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight" (*Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31).

e. Vague assumptions and bald assertions, rather than detailed and specific evidence, cannot justify a remedy as significant as a stay (*Janssen* at para 24).

3. In terms of irreparable harm, Mr. Pierre's case boils down to very little. Mr. Pierre mentions the fact that he was unjustly deemed inadmissible for serious criminality; the detrimental effect of his removal on his family and spouse; the promise he made to his father-in-law on his deathbed; and his pending spousal sponsorship application. His affidavit is lacking in detail and boils down to general assertions.

4. After analysis, I conclude that the evidence provided by Mr. Pierre is largely insufficient to meet the stringent test and high threshold for establishing irreparable harm. It does not demonstrate that, on a balance of probabilities, Mr. Pierre would face a serious risk to his life and safety were he to return to Haiti.

5. The personal risks Mr. Pierre alleges, such as having a criminal record in Canada and being deported on that basis, have already been examined and rejected by a Pre-Removal Risk Assessment [PRRA] officer.
6. I would also point out that the obligation to leave Canada inevitably involves some disruption and hardship (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61 at para 23). As the Federal Court of Appeal stated, "one of the unfortunate consequences of a removal order is hardship and disruption of family life. However, that clearly does not constitute irreparable harm" (*Baron* at para 69). The fact that family hardship caused by removal is not, in and of itself, irreparable harm is, moreover, the subject of a broad consensus in the case law (*Tesoro v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 148 at para 42; *Atwal* at para 16; *Tran v Canada (Minister of Citizenship and Immigration)*, 2005 FC 394 at para 10). The negative impacts on Mr. Pierre's family, alas, are difficult and unfortunate consequences inherent in the concept of deportation and caused by removal orders (*Selliah* at para 13).
7. Moreover, it is well established that risks already alleged before Canadian immigration authorities, and found to be unsatisfactory, cannot rise from the ashes and constitute irreparable harm at the stage of a stay application (*Yafu v Canada (Citizenship and Immigration)*, 2016 FC 125 at para 5; *Ellero v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 1364 at para 45-47; *Nalliah v Canada (Solicitor General)*, 2004 FC 1649 at para 18). This is the case here with respect to the harm claimed in relation to the situation in Haiti, which was analyzed in the context of Mr. Pierre's PRRA application. There is also no evidence in this case of new allegations of risk that were

omitted or ignored by immigration authorities in the processing of Mr. Pierre's file, or that have arisen since his PRRA application (*Atawnah* at para 14; *Shpati* at paras 41–42).

8. Finally, I would add that Mr. Pierre's sponsorship application will proceed and that the mere fact that removal may make it more difficult for an application pending before Canadian immigration authorities does not, in and of itself, constitute irreparable harm and grounds for a stay in the absence of exceptional circumstances. Simply having a sponsorship application pending in Canada is not irreparable harm unless a decision on it is imminent. There is nothing in the evidence to suggest that this is the case here.
9. After analysis, therefore, I am unable to identify any evidence sufficient to meet the stringent requirements of irreparable harm that might be suffered by Mr. Pierre as a result of his removal.

CONSIDERING that, for the following reasons, the balance of convenience also favours the Minister in the circumstances:

1. The public interest favours protecting the integrity of Canada's immigration and refugee protection system, which requires that removal to the country of origin be effected as soon as possible and that a removal be enforced on the scheduled date (IRPA, subsection 48(2); *Lewis* at para 54; *Selliah* at paras 21–22). It is a matter of "the integrity and fairness of, and public confidence in, Canada's system of immigration control" that removal orders be enforced promptly (*Selliah* at para 22).
2. In addition, the fact that a person seeking a deferral of a removal order has had several unsuccessful appeals under Canada's immigration system may be taken into account in determining the balance of convenience. In such a case, repeated refusals tip the balance in favour of enforcement by the Minister (*Selliah* at paras 21–22). Here, Mr. Pierre has

been able to pursue various remedies to remain in Canada under the IRPA between April 2015 and the present (multiple applications before the ID and IAD, PRRA application). On each occasion, he received unfavourable administrative decisions. The balance of convenience therefore does not support a further delay in discharging the Minister's duty to return him to his country of origin.

3. Moreover, the fact that Mr. Pierre cavalierly ignored a prior court order denying his application for a stay helps to tip the balance of convenience in favour of the Minister;

CONSIDERING THAT a stay of enforcement is an extraordinary measure for which Mr. Pierre was required to establish special and compelling circumstances giving rise to exceptional judicial intervention, which is absolutely not the case here;

AND CONSIDERING that, in view of all the circumstances of the present cases, granting a stay of enforcement would not be just and equitable;

THIS COURT ORDERS that:

1. The two motions seeking a stay of enforcement of the deportation order concerning the applicant, Mr. Chondy Pierre, be dismissed without costs.

"Denis Gascon"

Judge

Certified true translation

Michael Palles, Reviser