Federal Court  Cour fédérale

Date: 20210309

Docket: IMM-1377-21

Citation: 2021 FC 212

Ottawa, Ontario, March 9, 2021

PRESENT: The Honourable Mr. Justice Zinn

BETWEEN:

GHADER NAYEB PASHAEI

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

[1] The Applicant seeks a stay of his removal currently scheduled for March 9, 2021, at 7:45 p.m. (Eastern Time). He filed an application for leave and judicial review on March 1, 2021, in relation to an anticipated, negative decision from an officer [the Officer] of the Canada Border Services Agency in response to his request that the removal be deferred. In view of the urgency of the matter, he also filed a motion seeking a stay of the removal order. The Officer's negative response to the deferral request was made on March 4, 2021.

[2] The Applicant is not eligible for a Pre-Removal Risk Assessment [PRRA] until the 12-month bar expires on July 28, 2021. He sought a deferral of his removal until he becomes eligible to submit a PRRA, or asked that he be permitted to apply for a PRRA now, notwithstanding the 12-month bar.

[3] The Applicant is a citizen of Iran. He arrived in Canada in November 2018, and made a refugee claim on the basis of his sexual orientation. This claim was refused by the Refugee Protection Division [RPD], and his appeal to the Refugee Appeal Division [RAD] was also dismissed. The basis of both decisions was that he lacked credibility. The RPD stated, and the RAD agreed, that the Applicant's "identity as a gay man was not established."

[4] The Applicant produced new evidence before the RAD in the form of an affidavit, but given the nature of this evidence the RAD found it not to be admissible. The Applicant has not sought judicial review of the RAD decision.

[5] In his submissions to the Officer and his written submissions here, the Applicant alleges that he was represented first by an incompetent paralegal before the RPD, and then an incompetent counsel before the RAD. The Respondent observes that there is no evidence that the Applicant has given his former paralegal and counsel notice to respond to his allegations of incompetence as is required by the Federal Court protocol and the jurisprudence.

[6] The Applicant swears that he was detained by the police prior to his departure for Canada as he left a party attended by gay men. He and other attendees were taken into custody and questioned. The Applicant was later released.

[7] Before this Court, the Applicant produced *prima facie* "new" evidence in support of both the deferral request and the motion for a stay of removal. The key evidence is four separate court documents concerning the Applicant that were received by his family in Iran and just recently forwarded to him. He submits that due to the incompetence of previous counsel he was not made aware of the importance of these documents. They are as follows:

1. An "Official Notice" from the Criminal Court in Iran - The Applicant swears that this first document was received by his family at their home after his departure to Canada. It is dated July 8, 2019, after the RPD decision of April 23, 2019. While the Applicant does not know the exact date his family received it, he says that it must have been around the dated time. The document requires the Applicant to present himself at 10.00 a.m. on July 13, 2019, at Ershad Court House in Tehran. It states that the Applicant is to defend himself "for the accusation of committing unlawful action based on reports and evidence received at this courthouse." It stipulates that his failure to comply will result in his arrest. The Applicant swears that his mother did not then provide him with a copy but explained that he was being summoned to go to the court for his participation in an LGBTQ party in November 2018.

2. A Judicial Decision (Court Order), dated September 2, 2019 - The Applicant swears that his mother spoke to him about it when it was received in the mail but did not send him a copy of it. He says he does not recall their discussion but says that he did not focus on

the content of the Order as he felt that his appeal to the RAD would be successful. The Order states that the Applicant is accused of "Sodomy and Intercrural Sex" at the November 2018 party and having reviewed the accusation, the court orders that he be "sentenced to 74 whippings."

3. An Official Notice from the First Branch of Enforcement of Judgement of Office of Public Prosecutor District 38, dated July 28, 2020 - He was not provided with it at that time. It gives the Applicant five days to present himself "for the execution of the order" for the whippings, failing which he will be arrested.

4. An Arrest Warrant addressed to "all Tehran Police Stations" dated October 26, 2020, to arrest the Applicant - His mother spoke to him after receiving it but again, he was not provided with it at that time.

[8] The Applicant was aware of the first two documents prior to the RAD decision, but was not aware of the last two which post-date the RAD decision. After the Applicant retained his current counsel, these four documents were obtained by the Applicant and translated from Farsi.

[9] On their face, these documents are evidence of the Applicant's sexual orientation, at least in the view of the Iranian Courts, and evidence that he faces significant and harsh treatment if returned to Iran.

[10] The relevant portion of the Officer's decision on these documents follows:

> I further note that counsel has provided four notice to appear documents issued by the Iranian Courts, requesting for Mr. Nayeb Pashaei to appear. I further not [*sic*] that in the most recent

> document, it states that Mr. Nayeb Pashaei has been sentenced to 74 whippings. Mr. Nayeb Pashaei states that he received the four documents from his mother in Iran. I must note that I question the timing and authenticity of these documents. I first note that the documents provided are extremely illegible. Secondly I note that they do not contain any phone numbers that would demonstrate authenticity or permit verification. Thirdly, Mr. Nayeb Pashaei did not provide the manner in which his mother sent the documents to him in Canada. If they were sent by fax, mail or email? These methods would include a photocopy of the envelope, fax receipt or email chain. This would at a minimum demonstrate that the documents were sent from Iran. Lastly I note that in Mr. Nayeb Pashaei's affidavit, he stated that he was aware of the first notice to appear document while he was waiting for his refugee hearing (January 2019). I note however, that he only requested these documents from his mother in February 2021, two years later and one month before his removal from Canada. Subsequently I give these documents little weight in substantiating his evidence of risk / new risk allegations.

[11] The three-pronged test to be applied on motions to stay removal is set out in *Toth v Canada (Minister of Employment and Immigration)*, (1988) 86 NR 302 (FCA). The tri-parte test that the Applicant must demonstrate is: there must be a serious issue raised in the application; the Applicant must be likely to suffer irreparable harm if the stay is not granted; and the balance of convenience must rest with the Applicant. The threshold for a finding of a serious issue is higher where an applicant is seeking to review the refusal of an enforcement officer to exercise his or her discretion to defer removal as stated by this Court in *Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682, and approved by the Federal Court of Appeal in *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 [*Baron*]. The applicant must demonstrate a "likelihood of success" or "quite a strong case" in their application for leave and judicial review.

[12] The Federal Court of Appeal in *Baron* at paragraph 51 noted that deferral of removal is a significant remedy that "should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment."

Serious Issue

[13] Canada does not, and indeed cannot, remove a person from Canada unless an assessment of their risk in the country to which they are to be removed has been done. In *Atawnah v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 144, at paragraph 12, the Federal Court of Appeal stated:

> As this Court recognized in *Farhadi v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 646, 257 N.R. 158, at paragraph 3, "a risk assessment and determination conducted in accordance with the principles of fundamental justice is a condition precedent to a valid determination to remove an individual" from Canada.

[14] The Officer takes the view that the Applicant's risk has already been assessed by both the RPD and the RAD:

> I find that the risk allegation being raised is the same risk that the RPD and RAD have already considered, with the addition of evidence that could have been presented during those proceedings.

[15] I agree that the basis of risk raised has consistently been the Applicant's sexual orientation and was before the RPD and the RAD. However, I do not accept the Officer's view that the Applicant's risk because of this characteristic has been "considered" by the RPD and RAD. I agree with the Applicant that the situation here is nearly identical to that before Justice

Pentney in *Abdulrahman v Canada (Minister of Public Safety and Emergency Preparedness*, 2018 FC 842 [*Abdulrahman*]. There, the applicant asserted he was at risk in his country of nationality because he is bisexual. Both the RPD and RAD rejected his claim for protection based on credibility. That is the same situation here. In *Abdulrahman* at paragraph 16, this Court found that neither the RPD nor the RAD assessed the risk to the Applicant. Since they found him not to be credible, it was not necessary to assess risk. I find that applies equally to the matter before me.

[16] Here, the Officer was provided with evidence that had not been before the RPD or RAD and which on its face supports the Applicant's claim to be homosexual and at risk in Iran. In the passage recited above at paragraph 10, the Officer says, for the reasons he offers, that he gives these documents "little weight." With respect, it seems to me that he gives them no weight at all.

[17] Moreover the Officer's reasons for ascribing little weight to these, in my view, are very problematic. His reasons will be assessed on the reasonableness standard enunciated in *Canada (Minister of Citizenship and Immigration) v Vavilov***,** 2019 SCC 65. His conclusion as to these documents must be justified by the reasons advanced for it. I am of the view that there is a serious issue in this regard based on the higher standard.

[18] The Officer justifies his conclusion because the documents are "extremely illegible." However, the Applicant provided a detailed English language translation of these documents. The Officer is not a document examiner and has no expertise is determining whether they are genuine or not. This is likely not a relevant consideration.

[19] Second, the Officer notes that they do not contain any phone numbers "that would demonstrate authenticity or permit verification." There is no evidence before the Officer that phone numbers are to be expected on documents of the sort he was considering, nor is there any suggestion that it falls within his role to verify them. Again, this likely does not support his conclusion.

[20] Third, the Officer asks whether they were sent by fax, mail or email, and asks for their envelope, fax receipt or email chain. That information, the Officer says "would at a minimum demonstrate that the documents were sent from Iran." However, the Officer ignores the sworn evidence of the Applicant that he asked his mother in Iran to send him copies of the four documents and he "just received copies of the four court notices from Iran" [emphasis added]. The Officer's questioning of the source of these documents is an attack on the sworn evidence before him and on the credibility of the Applicant. There is no foundation for doubting the origins of these documents.

[21] Lastly, the Officer notes that the Applicant was "aware of the first notice to appear document while he was waiting for his first refugee hearing (January 2019)." In fact, the RPD hearing was held in April 2019, and the notice to appear is dated July 8, 2019, after the RPD decision. The Officer goes on to note that the Applicant "only requested these documents from his mother in February 2021, two years later and one month before his removal from Canada." I agree with the Applicant that the Officer lumps all four documents together in the analysis. There is a failure to note that the last two documents were dated after the RAD decision. Even if

there is some reason to question the first two, the last two constitute new evidence that the Officer was required to specifically address.

[22] There is a serious issue whether the Officer's decision regarding the four Iranian documents falls within the range of possible, acceptable outcomes which are defensible in respect of the facts and law.

[23] I am satisfied that the Applicant has made a very strong case in the underlying application for leave and judicial review. The first prong of the test has been met.

Irreparable Harm

[24] The Respondent submits that this Court ought not to allow this motion to become "a forum to re-litigate previously assessed harms." I find that the risks to the Applicant have never been assessed. This is not an attempt to re-litigate.

[25] The Record before me is clear and compelling that homosexual men are at "risk of death, extreme sanction or inhumane treatment." Aside from the country conditions documents, there is evidence that this Applicant faces whippings and imprisonment if returned. Those documents and his allegations must be examined and properly determined, before it is safe to remove him from Canada.

Balance of Convenience

[26] In view of the findings above, and the risk to the Applicant associated with his return to Iran without a proper determination of his risks, I find that the balance of convenience favours him.

[27] The Applicant noted that he had not named the proper Respondent, and the Court shall issue an order, with immediate effect, that The Minister of Public Safety and Emergency Preparedness be substituted as Respondent

ORDER IN IMM-1377-21

THIS COURT ORDER'S that The Minister of Public Safety and Emergency Preparedness is substituted as Respondent with immediate effect, the motion is granted, and the order that the Applicant is to be removed from Canada to Iran is stayed pending final disposition of the Applicant's application for leave and judicial review of the decision dated March 4, 2021, refusing the Applicant's request for a deferral of his removal pending a Pre-Removal Risk Assessment application and decision.

"Russel W. Zinn"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1377-21
STYLE OF CAUSE:	GHADER NAYEB PASHAEI v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE BETWEEN OTTAWA, ONTARIO AND TORONTO, ONTARIO
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ORDER AND REASONS:	ZINN J.
DATED:	MARCH 9, 2021

APPEARANCES:

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