Federal Court  Cour fédérale

**Date: 20211112**

**Docket: IMM-841-21**

**Citation: 2021 FC 1231**

**Ottawa, Ontario, November 12, 2021**

**PRESENT: The Honourable Mr. Justice Mosley**

**BETWEEN:**

**J.N.**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR ORDER AND ORDER

## I. Introduction

[1] The Applicant seeks an order staying her removal from Canada, currently scheduled for Friday, November 26, 2021, until her Application for Leave and for Judicial Review is finally disposed of.

[2] The underlying application is in relation to a negative decision on the Applicant's request for permanent residence in Canada on humanitarian and compassionate (H&C) grounds issued on January 6, 2021, by a Senior Immigration Officer. The Application for Leave and for Judicial Review was filed on February 8, 2021, and was perfected for a leave determination by the Court on July 15, 2021. The Applicant received a Direction to Report for removal on October 20, 2021, and this motion was filed on October 28, 2021.

## II. **Background**

[3] The Applicant is a 44 year old citizen of India who entered Canada as a Permanent Resident in December 2010, as the spouse of a member of the skilled worker class. On August 17, 2015, a report was issued under s 44 of the *Immigration and Refugee Protection Act*, S.C. 2001, c 27 [IRPA] for serious criminality contrary to s 36(1)(a) of IRPA. As a result, a deportation order was issued on September 28, 2018, and the Applicant lost her permanent resident status. The H&C application was submitted on June 5, 2019.

[4] The serious criminality cited in the s 44 Report was the Applicant's conviction for manslaughter for which she received a sentence on July 31, 2015, of 10 years imprisonment with credit for several months of pre-trial custody.

[5] It was an appalling crime. As set out in the Reasons for Sentence of the trial judge, in September 2011, the Applicant's three year old child sustained a massive brain injury as a result of blunt force trauma to her skull. In addition to the fatal injuries suffered, her body was riddled with dozens of internal and external injuries that included bruising, hemorrhaging and multiple

skull fractures which predated the date of her death. The description of her condition upon arrival at the hospital is horrific.

[6] The Applicant was charged with second-degree murder on the basis of allegations that she had beat her daughter over many weeks or months culminating in the final fatal attack. The jury returned a verdict of manslaughter, thus presumably accepting that the killing was not-intentional.

[7] The sentencing judge noted that there were numerous aggravating factors to the crime including the vulnerability of the victim, the evidence of repeated assaults, the offender's denial of responsibility and lack of empathy or remorse for the loss of her daughter. No one from the immediate or extended family spoke for the child. It was left for the Court to do so. There were no mitigating factors. These facts are not necessary for the determination of this motion but I think it is necessary that they be stated because it is not at all clear that the Applicant has accepted responsibility for her crime and members of her family continue to claim she is blameless.

[8] The Sentencing Court noted that the conviction would result in significant immigration consequences for the Applicant and gave that factor some modest weight in determining sentence. The Applicant properly notes that deportation should not be considered an additional punishment for her crime. Nonetheless, she has benefitted to some extent from it being taken into account in the length of incarceration imposed.

[9] Pending trial, the Applicant had two other children with her husband, both of whom were removed from their care at birth by the Children's Aid Society. They, and an older child born before the victim, live with their father and their grandmother. The Applicant has now been released on parole to live in a half-way house under strict conditions including that she has no contact with anyone under the age of 16 including her own children unless accompanied by a responsible adult approved in advance by her parole supervisor.

[10] The Applicant filed extensive updated submissions in support of her H&C application between the initial filing on June 4, 2019, and September 25, 2020. I note that in the Applicant's affidavit sworn on April 5, 2019, in support of her H&C application, she continues to diminish her responsibility for the crime notwithstanding the jury verdict and the trial judge's factual findings about the abuse inflicted on the child.

[11] In addition to written representations, the submissions included letters of support from family, friends and caseworkers and reports of rehabilitation programs completed by the Applicant while incarcerated. The grounds relied upon in support of the application included her degree of establishment and family ties in Canada, the best interests of her surviving children and hardship to be expected from conditions in India. While the Applicant is, as she noted in her affidavit, a Brahmin and therefore a member of the highest caste in Hindu society, she says she would not be accepted in her husband's family because of the strict cultural norms in their community.

[12] The Senior Immigration Officer who considered the application reviewed the background, nature of the offence and the materials submitted on behalf of the Applicant. The Officer addressed each of the grounds raised by the Applicant.

[13] On this motion, the Applicant argues that the Officer made several errors notably in application of an incorrect test in assessing the Applicant's circumstances and degree of establishment, in considering the best interests of the surviving children and the evidence of hardship the Applicant claims she would face in India.

## III. **Issues**

[14] The issues to be addressed on this motion are as follows:

A. Whether the Court should make an Anonymization Order?

B. Whether the Applicant has satisfied the test for an interlocutory injunction?

## IV. **Analysis**

### A. *Should the Court make an Anonymization Order?*

[15] By notice filed on October 28, 2021, the Applicant requested that the Court make an order that all documents that are prepared by the Court and which may be made available to the public be amended and redacted to the extent necessary to make the identity of the Applicant, her husband and their three children anonymous.

[16] The Applicant submits that the criminal trial garnered substantial media attention. Publication of the names of her and her family members in relation to her Federal Court case may be harmful to her children's mental, physical, and emotional health. Any ongoing publicity may cause additional distress to her children. The trial judge imposed a ban on publication of the names of any surviving children of the Applicant and her husband in relation to the case.

[17] The Respondent notes that there is a strong presumption in favour of open courts and that there is a high bar against such a request for a discretionary court order, including redactions of identifying information, in order to maintain the open court principle: *Sherman Estate v Donovan*, 2021 SCC 25 at paras 2-3.

[18] I agree with the Respondent that the Applicant's request is overly broad particularly in as much as the facts of the crime and the conviction are already known to the public. Were it to only concern the Applicant, I would have no hesitation in refusing the request. However, it also concerns her children and I am satisfied from the evidence submitted that the oldest child in particular suffered from the publicity about her mother's actions.

[19] In the circumstances, I am satisfied that a more limited order would suffice and I will therefore order that the name of the Applicant in the style of cause on this motion and in any subsequent proceedings be anonymized by the substitution of initials for her full name. There will be on order for redaction of the identities of the Applicant and her family members but that question could be revisited should leave be granted and the matter proceed to judicial review.

B. *Whether the Applicant has satisfied the test for an interlocutory injunction?*

[20] To be successful on a stay motion, the Applicant must satisfy the conjunctive tripartite test, set out in *Manitoba (Attorney General) v Metropolitan Stores Ltd*.,[1987] 1 S.C.R. 110 and applied by the Federal Court of Appeal to stays of deportation in *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.) [*Toth*], namely that there is a serious issue to be tried, that the Applicant would suffer irreparable harm if a stay is not granted and that as between the parties, the balance of convenience lies in the Applicant's favour. These principles were confirmed by the Supreme Court in *RJR MacDonald Inc. v Canada (Attorney General),* [1994] 1 SCR 311 and *R v Canadian Broadcasting Corp,* 2018 SCC 5, [2018] 1 SCR 196, at para 12.

(1) Serious issue

[21] The threshold for determining whether there is a serious issue to be tried is low. The Court must be satisfied that the case is neither frivolous nor vexatious. A prolonged inquiry into the merits is neither necessary nor desirable. While the inquiry into the merits should not be prolonged, at least a minimal inquiry is required : *Telecommunications Workers Union v Canadian Industrial Relations Board and Telus Communications Inc*., 2005 (F.C.A.) 83.

[22] On this motion, the Applicant argues that the Officer erred in assessing the Applicant's circumstances exclusively through the lens of hardship and by importing exceptionality into the test for relief. Further, the Applicant contends that the Officer erred in applying hardship as the test in his assessment of the best interests of the surviving children. He was not, it is argued,

"alert, alive and sensitive to their best interest" as required by the decision of the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)* 2015 SCC 61, at paras 40-41; see also *Lewis v Canada (Minister of Public Safety and Emergency Preparedness)*, 2017 FCA 130, at paras 70-74.

[23] The Respondent contends that the H&C decision is reasonable as the Officer considered each of the factors raised by the Applicant and provided reasons in the decision for refusing the application on each factor. The Respondent addresses each of the Applicant's arguments about the Officer's alleged errors in turn.

[24] I agree with the Respondent that the Officer's reasons are thorough but it is not the Court's role on a motion such as this to assess the merits of the arguments advanced by the Applicant beyond the minimal inquiry necessary to determine whether they are frivolous or vexatious. I am unable to conclude that the arguments presented by the Applicant do not constitute serious issues to be tried.

(2) Irreparable harm

[25] The Applicant submits that the second branch of the test for a stay or injunction is whether she will face irreparable harm of a kind not easily compensable by a remedy if she is removed prior to the determination of her application for leave and for judicial review. She points to the conclusion in *Toth*, above:

> … I am of the view that the applicant has met the irreparable harm test. As noted *supra*, the evidence is to the effect that if the applicant is deported now, there is a reasonable likelihood that the

> family business will fail and that his immediate family as well as others who are dependent on the family business for their livelihood will suffer. I think that at least a portion of this potential harm is irreparable and not compensable in damages.

[26] The Respondent points to more recent decisions of the Federal Court of Appeal which require more than a reasonable likelihood of harm, such as this passage in *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 31:

> 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…
>
> See also *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at para 15.

[27] In a recent decision, Justice Norris considered a stay motion in relation to an applicant who was also inadmissible for reasons of serious criminality. The applicant was, similarly, awaiting a decision from the Court at the leave stage of an application for judicial review of a negative H&C decision: *Kambasaya v Canada (Citizenship and Immigration)*, 2021 FC 664 [*Kambasaya*]. Justice Norris described the second branch of the test for a stay in these circumstances as follows:

> [22] Under the second part of the test for a stay, "the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application" (*RJR-MacDonald* at 341). This is what is meant by describing the harm that must be established as "irreparable". It concerns the nature of the harm rather than its magnitude (ibid.).

> [23] Generally speaking, irreparable harm is harm which cannot be quantified in monetary terms or which could not be cured for some other reason even if it can be quantified (e.g. the other party is judgment-proof). This notion of what is or is not reparable is easily understood in private law and commercial disputes. It is perhaps more difficult to incorporate in a case where the underlying litigation is an application for judicial review, damages are not available in any event, and other interests besides economic ones are paramount.
>
> [24] To establish irreparable harm, the applicant must show that there is "real, definite, unavoidable harm – not hypothetical and speculative harm" (*Janssen Inc. v Abbvie Corporation*, 2014 FCA 112 at para 24). He must adduce clear and non-speculative evidence that irreparable harm will follow if the stay is refused. Unsubstantiated assertions of harm will not suffice. Instead, "there must be evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result" unless the stay is granted: *Glooscap Heritage Society* at para 31; see also *Canada (Attorney General) v Canada (Information Commissioner)*, 2001 FCA 25 at para 12; *International Longshore and Warehouse Union, Canada v Canada (Attorney General)*, 2008 FCA 3 at para 25; *United States Steel Corporation v Canada (Attorney General)*, 2010 FCA 200 at para 7.

[28] In the present matter, the Applicant submits that she and her children will face irreparable harm from her removal. It appears now that the family would not follow her to India as they had initially indicated. That is not surprising in that the father is gainfully employed here and the children have been raised and educated in Canada and are accustomed to Canadian society and cultural norms. The children would be deprived of the daily contact they presently have with their mother given the time differences and difficulties in communicating with rural India.

[29] The Applicant argues further that the oldest child suffers from disorders stemming from the traumatic events of her mother's conviction and incarceration and her health would deteriorate if her mother were removed. The Applicant contends that she also suffers from

mental disorders for which she has been receiving treatment while in custody and would be unable to receive adequate treatment in the region of India to which she would have to return. Both of these claims are supported by psychologist reports and other evidence. Removal, the Applicant argues, would result in her being separated from her family for an extended period of time as she would be unable to return to Canada without a pardon, authorization to return and approval on a permanent residence application. She will remain ineligible for a pardon for another 10 years.

[30] The Applicant contends that should she be removed, the proceedings before this Court in relation to the refusal of her H&C application will be rendered illusory even though the application will continue to be considered. Further, if successful on judicial review and the H&C application were to be sent back for redetermination, the chances of success in those circumstances would be substantially reduced. Even if she were to be readmitted at a later time, the harm resulting from her separation from the family would have already occurred.

[31] The Respondent submits that the Applicant could rely on her extended family in India for support and maintain ties with her family through the use of modern technology. Any potential mootness of the outstanding litigation does not, in itself, suffice to establish irreparable harm warranting a stay: *El Ouardi v Canada (Solicitor General),* 2005 FCA 42 at para 8; Palka v Canada (Public Safety and Emergency Preparedness), 2008 FCA 165 at paras 13-15*; Shpati v Canada (MPSEP),* 2011 FCA 286, paras 34-38.

[32] At paragraph 34 of *Kambasaya,* Justice Norris points out that the jurisprudence establishing that removal while an H&C application is pending does not constitute irreparable harm, does not address the situation where the application has been refused and what is at issue is removal while a judicial review application of that decision is under consideration.

[33] Much of what the Applicant has argued under the second branch of the stay test are among the normal consequences of deportation. The individuals in question may find it difficult to readjust to a country and culture they left long ago. Families are separated and face difficulty in staying in contact with each other. In the present matter, I would not find that such consequences constitute irreparable harm, nor would the fact of an outstanding H&C application be sufficient.

[34] However, I am satisfied that in the particular circumstances of this matter where the application for leave has been perfected and merely awaits the attention of a judge to be decided, removal before a decision on leave is made and, if granted, before the judicial review of the H&C decision is determined would constitute irreparable harm to the Applicant.

(3) Balance of Convenience

[35] I agree with the Respondent that the public interest must be taken into consideration when evaluating whether the Court should exercise its extraordinary equitable jurisdiction to grant a stay of removal. And the public interest generally calls for the execution of removal orders as soon as possible particularly where they concern persons who have been found to be inadmissible for serious criminality.

[36] The facts of the underlying crime are shocking and have troubled me greatly. But there is also a public interest in ensuring that available remedies are meaningful and effective. In the present matter, the Applicant has raised issues with the underlying decision that are not frivolous or vexatious and has presented a compelling case that she would suffer irreparable harm if she were to be removed before they are considered by the Court. The fact that the application has been perfected and a decision on leave will shortly be made is also a factor to be considered.

[37] This is not a case where the Applicant has a long history of criminality. While her crime was appalling, she had no prior criminal history and is not considered now to be a risk to reoffend. She will remain on parole and under strict supervision pending the outcome of her application for leave and for judicial review. In those circumstances, I am satisfied that the balance of convenience lies in her favour and the stay should be granted.

**ORDER IN IMM-841-21**

**THIS COURT ORDERS that**:

1. The motion is granted and the removal of the Applicant is stayed until such time as the underlying Application for Leave is decided, and if granted, until the Application for Judicial Review is finally determined;

2. The style of cause in this file is amended by substituting the initials "J N" for the name of the Applicant on this motion and in each document presently or subsequently to be filed in the underlying application; and

3. The parties shall provide the Registry with amended versions of the documents already filed with the amended style of cause as soon as practicable.

" Richard G. Mosley "
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-841-21 |
| **STYLE OF CAUSE:** | J.N. v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | HEARD VIA VIDEOCONFERENCE WITH TORONTO, ONTARIO |
| **DATE OF HEARING:** | NOVEMBER 9, 2021 |
| **REASONS FOR ORDER AND ORDER:** | MOSLEY, J. |
| **DATED:** | NOVEMBER 12, 2021 |

**APPEARANCES:**

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| Barbara Jackman | FOR THE APPLICANT |
| Alex Kam | FOR THE RESPONDENT |

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