Federal Court  Cour fédérale

Date: 20220314

Dockets: IMM-1636-22
IMM-1829-22

Citation: 2022 FC 344

Ottawa, Ontario, March 14, 2022

PRESENT: The Honourable Mr. Justice Ahmed

Dockets: IMM-1636-22

BETWEEN:

ZHENGQI LEE
(By her Litigation Guardian Geraldine Sadoway)
CANADIAN ASSOCIATION OF REFUGEE LAWYERS

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

Docket: IMM-1829-22

AND BETWEEN:

ZHENGQI LEE
(By her Litigation Guardian Geraldine Sadoway)

Applicant

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THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, Ms. Zhengqi Lee (Ms. "Lee"), brings a motion for a stay of her removal from Canada, scheduled to take place on March 14, 2022.

[2] The Applicants request that this Court order a stay of Ms. Lee's removal to Singapore until the determination of two underlying applications for leave and judicial review. The first concerns the decision of an officer of Immigration, Refugees and Citizenship Canada ("IRCC") to refuse Ms. Lee's application for a Pre-Removal Risk Assessment ("PRRA"). The second concerns a reconsideration of Ms. Lee's PRRA.

[3] For the reasons that follow, this motion is granted. I find that the Applicants have met the tri-partite test required for a stay of removal.

II. **Facts and Underlying Decisions**

[4] Ms. Lee is a 22-year-old citizen of Singapore. She arrived in Canada on November 13, 2021. Since arriving in Canada, Ms. Lee has been held in immigration detention at the Toronto Immigration Holding Centre.

[5] Ms. Lee suffers from complex mental health issues and has been diagnosed with schizophrenia and depression. Throughout her detention, Ms. Lee has been mute and her condition has worsened significantly.

[6] In December 2021, the Canada Border Service Agency ("CBSA") initiated Ms. Lee's PRRA and contracted a third-party, Mr. Ginsherman, to act as Ms. Lee's "designated representative" in the PRRA. On January 6, 2022, Mr. Ginsherman filed PRRA forms with IRCC and signed on Ms. Lee's behalf. On January 18, 2022, Mr. Ginsherman submitted a Use of Representative form to IRCC.

[7] On January 21, 2022, counsel for Ms. Lee sent emails to IRCC and CBSA expressing concern about the improper service of the PRRA, since Ms. Lee's capacity issues and mutism prevented her from any participation in the PRRA process.

[8] On February 8, 2022, the PRRA was refused by IRCC on the merits.

[9] By way of letter to IRCC and CBSA dated February 10, 2022, Mr. Ginsherman withdrew from the PRRA process, stating his concerns that he does not have authority or jurisdiction to act as Ms. Lee's designated representative in relation to the PRRA.

[10] On February 21, 2022, the PRRA reconsideration decision was issued. Ms. Lee's application was again refused on the merits.

III. **Analysis**

[11] The tripartite test for the granting of a stay is well established: *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA) ("*Toth*"); *Manitoba (A.G.) v Metropolitan Stores Ltd*., 1987 CanLII 79 (SCC), [1987] 1 SCR 110 ("*Metropolitan Stores Ltd*"*); RJR-MacDonald Inc. v Canada (Attorney General),* 1994 CanLII 117 (SCC), [1994] 1 SCR 311 ("*RJR-MacDonald*"); *R v Canadian Broadcasting Corp*, 2018 SCC 5 (CanLII), [2018] 1 SCR 196.

[12] The *Toth* test is conjunctive, in that granting a stay of removal requires the applicant to establish: (i) a serious issue raised by the underlying application for judicial review; (ii) irreparable harm that would result from removal; and (iii) the balance of convenience favouring granting the stay.

A. *Serious Issue*

[13] In *RJR-MacDonald*, the Supreme Court of Canada established that the first stage of the test should be determined on an "extremely limited review of the case on the merits" (*RJR-MacDonald* at 314). This Court must also bear in mind that the discretion to defer the removal of a person subject to an enforceable removal order is limited, and that the standard of review of an enforcement officer's decision is that of reasonableness (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 (CanLII), [2010] 2 FCR 311 at para 67).

[14] On this first prong of the tri-partite test, the Applicants submit that the manner of the PRRA service, Ms. Lee's lack of participation in the PRRA proceedings, and the decisions of the PRRA and PRRA reconsideration on the merits despite Ms. Lee's lack of capacity to understand the proceedings are a violation of Ms. Lee's right to procedural fairness and her rights under section 7 of the *Charter of Rights and Freedoms,* Part 1 of the *Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), c 11* (the "*Charter*").

[15] The Applicants note that, other than the authority of the Immigration and Refugee Board ("IRB") to appoint designated representatives for the purpose of IRB proceedings, there is currently no published legal authority, policy, procedure or guideline authorizing a third-party to act on behalf of Ms. Lee in relation to the service and filing of her PRRA. Absent this authority, the Applicants submit that fairness requires that the PRRA be initiated only when Ms. Lee can meaningfully participate in her immigration proceedings.

[16] The Respondent contends that Ms. Lee did have the ability to speak for herself when she first arrived in Canada and was interviewed at the port of entry on November 13, 2021. At the port of entry, Ms. Lee communicated that she was not at risk in Singapore and was not seeking refugee protection in Canada. During the hearing, the Respondent's counsel argued that Ms. Lee's mental health issues cannot be said to have affected her ability to answer these interview questions, as there are no indications that she did not understand them, nor is there any basis that she has changed her mind.

[17] I note that while Ms. Lee answered "No" to the questions: "Are you afraid in Singapore?" and "Are you here to make a refugee claim?" when interviewed at the port of entry, a CBSA officer's notes in the Notice of Arrest from November 14, 2021 state:

> The subject is being detained as she [sic] unable to be examined because she cannot understand the gravity of this situation. The subject throughout the examination made statements that lead this officer to believe that she was not understanding the situation… The subject's parents disclosed that the subject had suffered from mental health issues in the past. The subject arrived with no money and no bags at the POE. The subject was also wearing clothing that were not appropriate for the weather climate in Canada […]
>
> [Emphasis added]

[18] The above quote demonstrates that as early as her arrival in Canada at the port of entry, Ms. Lee's limited capacity and compromised mental health were evident. Furthermore, as noted by counsel for Ms. Lee during the hearing, answers provided by an applicant at the port of entry cannot be determinative of their right to fair proceedings.

[19] Procedural fairness requires that those affected by a decision be given an opportunity to fully participate and be heard (*Baker v Canada (Minister of Citizenship and Immigration),* 1999 CanLII 699 (SCC) [1999] 2 SCR 817 at para 22). In my view, Ms. Lee was not provided with a chance to meaningfully participate and speak for herself in the PRRA proceedings, and therefore has not been given an opportunity to have her risk of return to Singapore properly assessed. As noted by my colleague Justice Zinn in *Nayeb Pashaei v Canada (Public Safety and Emergency Preparedness),* 2021 FC 212, "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." (at para 13). The requirement to have risk assessed prior to removal is also reflected in Canada's international legal obligations under the *Convention Relating to the Status of Refugees*: *Surmanidze v Canada (Public Safety and Emergency Preparedness)* 2019 FC 1615; *Chol v Canada* (*Public Safety and Emergency Preparedness)* 2021 FC 1398.

[20] Ms. Lee has not spoken for over three months and has therefore not been able to articulate whether she faces a risk in Singapore. At the time the PRRA was initiated, all parties agreed that Ms. Lee did not have the capacity to understand and participate in her immigration proceedings. Ms. Lee's current lack of capacity does not change the fact that she is entitled to a fair process and a risk assessment conducted in accordance with the principles of fundamental justice prior to her removal (*Atawnah v Canada (Public Safety and Emergency Preparedness),* 2016 FCA 144 at para 12). Yet, by contracting out a third-party to act on her behalf, without any clear legislated authority to do so, IRCC stripped Ms. Lee of an opportunity to meaningfully participate in her proceedings. If anything, the requirements of procedural fairness are actually

heightened in this case; to allow Ms. Lee to fully participate, her mental health conditions must be accommodated.

[21] I therefore find that the Applicants' argument that there has been a breach of procedural fairness and a breach of Ms. Lee's *Charter* rights under section 7 raises a serious issue.

B. *Irreparable Harm*

[22] At the second stage of the test, applicants are required to demonstrate that irreparable harm will result if relief is not granted. Irreparable harm does not refer to the magnitude of the harm; rather, it is a harm that cannot be cured or quantified in monetary terms (*RJR-MacDonald* at 341). This Court must be satisfied on a balance of probabilities that the harm is not speculative, but does not have to be satisfied that the harm will occur (*Xu v Canada (Minister of Employment and Immigration)*, [1994] FCJ No 746, 79 FTR 107 (FCTD); *Horii v Canada*, [1991] FCJ No 984, [1992] 1 FC 142 (FCA)).

[23] In *Figurado v Canada (Solicitor General)*, 2005 FC 347, at paragraphs 42 and 43, this Court writes:

> [42] Indeed, Lane J.'s reasoning in *Suresh*, was subsequently endorsed by Southey J. in *Suresh v. R.* (1999), 1990 CanLII 6958 (ON SC), 42 O.R. (3d) 797 (Div. Ct.), at page 799; affg (1998), 1998 CanLII 14659 (ON SC), 38 O.R. (3d) 267 (Gen. Div.), and by Robertson J.A. in *Suresh*, at paragraphs 13, 14 and 16 (F.C.A.):
>
> > Clearly, the issue of irreparable harm can be answered in one of two ways. The first involves an assessment of the

> risk of personal harm if a person is deported or deported to a particular country. The second involves an assessment of the effect of a denial of a stay application on a person's right to have the merits of his or her case determined and to enjoy the benefits associated with a positive ruling.
>
> The alternative argument advanced by counsel for Mr. Suresh is that his pending appeal will be rendered "moot" or "nugatory" if he is deported prior to the hearing of his appeal. Assuming that Mr. Suresh is deported and detained in Sri Lanka prior to that proceeding, and assuming that he is successful on appeal, Mr. Suresh's successful constitutional challenge would be a hollow victory, since the Sri Lankan authorities would be unlikely to release him and, therefore, he would be unable to avail himself of the fruits of his victory, most likely, the right to remain in Canada until such time as his case is disposed of in accordance with the Charter. Were he to remain in Canada and be successful on his appeal, I take it for granted that the Minister would be unable to act on the deportation order. [My emphasis.]
>
> [43] […] Therefore, I find that there is considerable force in the applicant's counsel's submission that any ensuing judicial review application directed against a negative PRRA decision becomes somewhat moot once an individual is removed from Canada. Moreover, if the Court cannot effectively order the respondent to immediately return to Canada as a result of a material error made by the PRRA officer, what purpose is served in ordering that a redetermination of the risk nevertheless takes place as if the applicant was still in Canada, while in fact he has been removed a long time ago?
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> [Emphasis in original]

[24] If Ms. Lee is removed from Canada prior to the adjudication of the underlying application, she will be removed without ever having had a meaningful opportunity to articulate any risk she might face in Singapore. Her agency will have been fully negated. Yet again, as pointed out by the Applicants, Canada’s international legal obligations are relevant to this issue, notably under the *Convention on the Rights of Persons with Disabilities.*

[25] Furthermore, Ms. Lee's current mental health condition and continued detention is troubling. While Ms. Lee's mental capacity was already an issue when she first arrived in Canada, she was still able to speak when interviewed at the port of entry. However, the record before me demonstrates that Ms. Lee's mental health has steadily declined since being detained. During a meeting with a psychiatrist on December 4, 2021, Ms. Lee did not speak, but communicated through nodding and holding up fingers and endorsed a past history of assault and hospitalization. By the time she was assessed one month later, on January 12, 2022, her situation had further declined, and the psychiatrist described Ms. Lee as thin, unkempt, cachectic, and mute, and as having expressed suicidal ideation.

[26] Despite Ms. Lee's counsel's repeated request that the Respondent assist with finding an alternative to detention for her, including her release to a mental health crisis centre to give her the chance to access mental health supports, at every detention review, the Respondent has sought the continued detention of Ms. Lee because her removal is imminent, presented no alternatives to detention, and proceeded with removal arrangements.

[27] The Respondent submits that a denial of Ms. Lee's stay of removal would allow her to be released from detention, to be reunited with her family in Singapore, and to access mental health supports in Singapore, as she has in the past.

[28] This argument is flawed. First, I find it both paternalistic and problematic to rely on the presumption that Ms. Lee in fact wishes to be reunited with her family, with whom she has avoided all contact during her detention and has made no indication that she wishes to be

returned into their care. Indeed, this argument is consistent with the approach that has been taken by the CBSA and IRCC in processing Ms. Lee's case to date: presuming that others know what is in her best interest, rather than supporting her in making her own decisions. Despite being aware that their daughter is currently detained in Canada, and aware of her mental health issues, Ms. Lee's parents apparently have made no attempts to visit her while she has been languishing in detention.

[29] Second, Ms. Lee does not need to be removed from Canada in order to be released from detention or to access mental health supports. A removal as a means to end a person's suffering while in detention is not the only option. Ms. Lee is not a threat to the public; she is a person desperately in need of mental health supports – supports which are available here in Canada. The Respondent's arguments show a lack of consideration for the sensible option put forward by Ms. Lee's counsel: that Ms. Lee be released from detention, where her mental health state is clearly worsening, and be permitted to access the mental health care she requires while remaining in Canada, pending fair proceedings.

[30] In my view, to remove a person without providing them the right to a meaningful determination of the risks they face in their country of origin, through a process in which they can fully and meaningfully participate, constitutes irreparable harm. The permanent loss of Ms. Lee's right to a procedurally fair risk-assessment is a deprivation of her rights and thus constitutes irreparable harm.

[31] I therefore find that the Applicants meet the test of irreparable harm.

C. *Balance of Convenience*

[32] The third stage of the test requires an assessment of the balance of convenience—a determination to identify which party will suffer the greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits (*RJR-MacDonald* at 342; *Metropolitan Stores Ltd* at 129). It has sometimes been said, "Where 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 (CanLII) at para 48). However, the Court must also consider the public interest to uphold the proper administration of the immigration system.

[33] Should a stay be granted and the underlying applications be dismissed, the Respondent would face the inconvenience of a delay in enforcing a removal. However, should a stay not be granted, Ms. Lee faces a serious breach to her rights to procedural fairness and a meaningful risk assessment prior to removal.

[34] In my view, it is also in the public interest to ensure that vulnerable persons with mental health conditions such as those faced by Ms. Lee are afforded the full and fair protection of Canada's laws and procedural fairness obligations.

[35] The severity of the damaging impacts of immigration detention on those with mental health issues cannot be understated or ignored. A 2021 report released by Amnesty International and Human Rights Watch titled: ""I Didn't Feel Like a Human in There" Immigration Detention

in Canada and its Impact on Mental Health" outlines how research has shown that even brief periods of immigration detention can cause significant deterioration of the mental health of immigration detainees.

[36] It is undisputed that Ms. Lee's continued detention has worsened her current mental state. Despite available space in a local mental health crisis centre, she has continued to be detained after each detention review, and has been left to languish. What more, she has had her agency circumvented and her rights contracted out to a third-party without a clear legislated authority. Ms. Lee deserves to be given an opportunity to get well, to speak for herself, and to be meaningfully involved in decision-making that affects her life.

[37] Upon reviewing the submissions and the record before me, I am persuaded that the balance of convenience favours the Applicants.

[38] The style of cause lists the Respondent in IMM-1636-22 as the Minister of Public Safety and Emergency Preparedness. I note that the proper Respondent in this matter is The Minister of Citizenship and Immigration (*IRPA*, s 4(1); *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, s 5(2)). The style of cause is hereby amended accordingly.

ORDER in IMM-1636-22 and IMM-1829-22

THIS COURT ORDERS that:

1. The style of cause is amended to reflect “The Minister of Citizenship and Immigration” in IMM-1636-22 as the proper Respondent.

2. Ms. Lee’s removal from Canada is stayed until the disposition of the applications for judicial review.

"Shirzad A."
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKETS:	IMM-1636-22 IMM-1829-22
STYLE OF CAUSE:	ZHENGQI LEE (By her Litigation Guardian Geraldine Sadoway) AND CANADIAN ASSOCIATION OF REFUGEE LAWYERS v THE MINISTER OF CITIZENSHIP AND IMMIGRATION ZHENGQI LEE (By her Litigation Guardian Geraldine Sadoway) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	BY VIDEOCONFERENCE
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ORDER AND REASONS:	AHMED J.
DATED:	MARCH 14, 2022

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