Federal Court  Cour fédérale

Date: 20230321

Docket: IMM-2335-22

Citation: 2022 FC 379

Ottawa, Ontario, March 21, 2022

PRESENT: The Honourable Mr. Justice Pentney

BETWEEN:

MATTHEW WILLIAM FUCITO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

ORDER AND REASONS

[1] The Applicant seeks a stay of his removal to the United States of America, which was scheduled for March 16, 2022, pending a determination of his application for leave and judicial review of the denial of his request to defer his removal.

[2] Following the hearing of the parties' submissions on March 15, 2022, I indicated that I was dismissing the stay motion, with reasons to follow. These are those reasons.

I. Background

[3] The Applicant is inadmissible to Canada because of his American criminal record, which includes convictions for drug possession and trafficking, which he says were associated with his drug addiction, as well as operation of a motor vehicle without a license and driving with a suspended license. Despite his inadmissibility, which he had not attempted to remedy, the Applicant has repeatedly entered Canada. The record shows that on four occasions, he tried to enter Canada and each time he was allowed to leave without triggering the formal deportation process.

[4] Following this, in December 2014, he once again sought to enter Canada, and was issued a deportation order and removed in January 2015. He returned to Canada through unknown means at some point following his deportation, and was arrested in August 2015 and deported in September 2015. He re-entered Canada, and has remained here until he was arrested on criminal charges for spousal assault in July 2021.

[5] The Applicant's arrest resulted in the issuance of another deportation order, and a negative Pre-Removal Risk Assessment decision was provided to him in January 2022. There followed a series of removal interviews, culminating in a removal interview on March 2, 2022 during which he was provided with a Direction to Report on March 16, 2022 for his removal to the USA.

[6] On March 9, 2022, the Applicant applied to defer his removal, so that he would have time to address the criminal charge of spousal assault as well as to deal with custody and access issues

relating to his children. He also indicated that he would be filing a request for permanent residence on humanitarian and compassionate (H&C) grounds.

[7] The Applicant has had two relationships that are relevant for his stay request. First, he was married in 1987, and he has two children born in 2012 and 2013 from this relationship. He was also a father figure to his wife's two children from a prior relationship. For most of the 7 years of his marriage, the Applicant stayed home and was a primary child care provider for his children while his wife pursued her education and then after she found employment. This relationship has ended, and his wife filed criminal charges alleging that he assaulted her. There are also family court proceedings relating to custody and access rights in respect of the Applicant's two biological children. The Applicant currently has supervised access to his children, but he is seeking greater custody and access rights.

[8] As noted previously, the Applicant is also facing a criminal charge of domestic assault, and he has been informed that those charges will be stayed for one year if he is removed from Canada.

[9] More recently, the Applicant has commenced a relationship with another woman, and they have been living together with her two children from a previous relationship, aged 12 and 7.

[10] The Applicant sought to defer his removal from Canada so that he could maintain his relationship with his biological children as well as with his current partner and her two children. He also claimed that he should be allowed to stay because of his pending H&C application.

[11] The Officer refused the deferral request, finding that a pending H&C application does not operate as a stay of removal, and noting although the Applicant has been living in Canada since 2015, the H&C claim was only recently filed and a decision on that matter is not imminent.

[12] Regarding the best interests of the children (BIOC) and the pending family law matter, the Officer noted the Applicant's evidence of his devotion to his children, stepchildren and his current partner's children. The Officer acknowledged that the Applicant provided care for his children since 2015, and since his criminal charge in August 2021 he has had supervised access. The Officer noted that the Applicant was represented by counsel in the family law matter, but no evidence had been provided that these matters would not proceed in his absence, and that since the pandemic, virtual proceedings have been possible. The Officer found that the timing and duration of the family law matter had not been established, noting that "these matters can sometimes be lengthy which is indicative that this request is not likely to be short term in nature."

[13] The Officer stated that the evidence indicates that the children's mother was employed and able to support the family financially, and so they were not dependent upon the Applicant for the basic necessities of life. The mother and children are also Canadian citizens, with access to the social safety net available in this country. The Officer found the Applicant had only recently begun to live with the current partner and her children, and the partner was also financially self-sufficient and able to care for her children on her own.

[14] Based on these considerations, and noting the limited discretion to defer a removal and that it is a temporary measure intended to alleviate exceptional circumstances, the Officer

refused to defer the Applicant's removal. The Applicant has filed applications for leave and judicial review in regard to the decision, and he has also sought a stay of removal pending the determination of that application.

II. Issues

[15] The only issue is whether a stay of removal should be granted in these circumstances.

III. Analysis

[16] In considering whether to grant a stay of removal, this Court applies the same test as for interlocutory injunctions. The Supreme Court of Canada recently restated the test as follows:

> At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.
>
> (*R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12, references omitted)

[17] This three-pronged test is well known. It had been set out in earlier decisions of the Supreme Court: *Manitoba (Attorney General) v Metropolitan Stores Ltd.*, [1987] 1 SCR 110; *RJR — MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311. It was also applied in the immigration context in *Toth v Canada (Minister of Employment and Immigration)*, (1988) 86 N.R. 302, 1988 CanLII 1420 (FCA). The application of this test is highly contextual and fact-

dependent. It bears repeating that the Supreme Court of Canada has recently emphasized that "[u]ltimately, the question is whether granting the injunction would be just and equitable in all the circumstances of the case." (*Google* at para 1).

A. *Serious Issue*

[18] In many cases, the serious issue branch of the test is not a high threshold. However, in cases where the stay is requested following a refusal to defer removal, it has been found that a higher threshold applies, which requires the Applicant to demonstrate a "likelihood of success" or "quite a strong case" in regard to the underlying application for leave and judicial review (*Wang v Canada (Minister of Citizenship and Immigration),* 2001 FCT 148, [2001] 3 FC 682; and *Baron v Canada (Minister of Public Safety and Emergency Preparedness),* 2009 FCA 81, [2010] 2 FCR 311 at para 67*; Lewis v Canada (Public Safety and Emergency Preparedness),* 2017 FCA 130 at para 43).

[19] The Applicant accepts that the higher threshold applies, but argues that the Officer nevertheless had a discretion to defer removal even where the pending H&C request is not imminent, citing *Ortiz v Canada (Public Safety and Emergency Preparedness),* 2017 FC 931 [*Ortiz*]. The Applicant submits that the Officer unreasonably failed to consider the impact of family separation in the particular circumstances of this case, noting that he had a very close relationship with his children having acting as their primary child care provider for many years, and that his ability to gather the evidence he needed to fully defend his rights as a parent would be impaired if he was not in Canada. Because of this, the Applicant contends that the Officer's

BIOC analysis and failure to consider the statutory purpose of family reunification is unreasonable.

[20] I am not persuaded. The Officer has a limited discretion to defer removal, and the facts of this are distinguishable from the exceptional circumstances found in the *Ortiz* case where the removal of the father was demonstrated to have a negative impact on his autistic son in a situation where the mother's medical situation raised doubts about whether she could care for the children. Here, the Officer's decision took account of the legal framework, in particular the limited discretion to defer removal, and the limited nature of the BIOC assessment that was required. The Officer also considered the relevant facts as established in the evidence, including the mother's capacity to care for the children, the absence of evidence that the Applicant could not continue to pursue his family law proceedings, and the fact that he had waited many years before seeking to regularize his status in Canada.

[21] Based on the foregoing, I am not persuaded that the Applicant has demonstrated a likelihood of success on the underlying application, and therefore the Applicant has failed to meet the high threshold for the serious issue element of the test.

[22] Although this could be sufficient to deal with this motion, in view of the arguments that were advanced I will briefly address the other two factors.

B. *Irreparable Harm*

[23] Irreparable harm refers to harm which cannot be compensated in money; it is the nature rather than the magnitude of the harm which is to be examined: *R.J.R. MacDonald*, at p. 135. In

the context of a stay of removal, the harm usually relates to the risk to the individual(s) of harm upon removal from Canada. It may also include specific harms that are demonstrated in regard to any persons directly affected by the removal, and who will be remaining in Canada: *Tesoro v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 148.

[24] There is considerable overlap between the evidence and arguments on the first issue and those relating to irreparable harm, and I will not repeat my earlier analysis. The onus is on the claimant to adduce evidence showing that irreparable harm will follow if the stay is refused. This must be established based on clear and non-speculative evidence at a convincing level of particularity demonstrating a real probability that unavoidable irreparable harm is likely to occur (*Erhire v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 941 at para 65 and the cases cited therein).

[25] In this case, the Applicant submits that he will suffer irreparable harm if he is not present to gather the evidence and fully participate in the family law matters, and also that he will lose further contact with his children, as well as being separated from his current partner and her children. In addition, the Applicant points to the lower success rates for H&C applications from overseas as compared with those from claimants in Canada.

[26] I am not persuaded that the Applicant's evidence meets the irreparable harm threshold. His ability to gather evidence and participate in this family law matter has been discussed above, and there is no need to repeat it. He has maintained a relationship with his children during the supervised visits which began in October 2021, and there is no evidence relating to those visits or the impact on the children of having limited contact with the Applicant during this period. The

Applicant can provide further evidence to the Family Court in regard to his custody and access matters, and that Court will address those questions (*Lynch v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1312).

[27] On the statistics about H&C approval rates, I can do no better than to adopt the reasons set out by my colleague Justice Denis Gascon in *Ledshumanan v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 1463 at paragraphs 79-83). The raw statistics do not establish irreparable harm, and the Applicant's H&C application can proceed after he is removed from Canada. Indeed, it may result in him being able to return to Canada with lawful status (*Patterson v Canada (Citizenship and Immigration)*, 2008 FC 406 at para 31).

C. *Balance of Convenience*

[28] In view of the findings above, I find that the balance of convenience weighs in favour of the Respondent.

[29] Canada has an interest in the prompt removal of persons whose refugee claims have not been upheld (as articulated in s 48(2), cited above), and this is not merely a matter of administrative convenience, it goes to the wider public interest in ensuring confidence in the integrity of the immigration program as a whole: *Vieira v Canada (Public Safety and Emergency Preparedness)*, 2007 FC 626; *Selliah v Canada (Citizenship and Immigration)*, 2004 FCA 261 at para 22.

[30] In this case, the Applicant knew that he was inadmissible to Canada when he entered in 2015, and since then he has not sought to regularize his status until very recently. The fact that he

will suffer because he will be separated from his children and his current partner and her children is an unfortunate but natural consequence of removal (*Melo v Canada (Citizenship and Immigration)* (2000), 188 F.T.R. 39 (FCTD)).

[31] The balance of convenience favours the Respondent.

IV. Conclusion

[32] Stepping back and considering the case as a whole, I am not persuaded that the Applicant has demonstrated that it is "just and convenient" that a temporary stay of removal be issued in his favour.

[33] Although I have some sympathy for the situation he now finds himself in, the Applicant had many years to seek to regularize his immigration status but he has only recently begun to take those steps. He can pursue his rights and interests in the family law proceeding, and he can seek to maintain his current relationship with his partner and her children, while the H&C application is processed. The unfortunate consequences of separation that he faces are a natural consequence of removal, which in turn is a statutory requirement for persons lacking status in Canada.

[34] The Applicant's motion for a stay of removal is therefore dismissed.

ORDER AND REASONS in IMM-2335-22

THIS COURT ORDERS that the application for a stay of removal pending the determination of the Applicant's application for judicial review is dismissed.

"William F. Pentney"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2335-22
STYLE OF CAUSE:	MATTHEW WILLIAM FUCITO v THE MINISTER OF CITIZENSHP AND IMMIGRATION
PLACE OF HEARING:	BY TELECONFERENCE FROM TORONTO AND OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 15, 2022
JUDGMENT AND REASONS:	PENTNEY J.
DATED:	MARCH 21, 2022

APPEARANCES:

Linda Kassim	FOR THE APPLICANT
Matthew Siddall	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Lewis & Associates Barristers and Solicitors Toronto, Ontario	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT