Federal Court  Cour fédérale

Date: 20230119

Docket: IMM-13666-22

Citation: 2023 FC 83

Ottawa, Ontario, January 19, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

SKGO

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. OVERVIEW

[1] The applicant, a citizen of Colombia, has been directed to report for removal from Canada on January 20, 2023. She has applied for an order staying the order for her removal pending the final determination of her application for leave and judicial review of a decision dated November 14, 2022, refusing her application for a Pre-Removal Risk Assessment

("PRRA") under subsection 112(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, ("*IRPA*").

[2] I stated at the conclusion of the hearing that I would be granting this motion because I was satisfied that the applicant had met the three-part test for a stay. I also stated that my reasons would follow. These are those reasons.

II. BACKGROUND

[3] The applicant first entered Canada in January 2016 as a student. Subsequently, she obtained a work permit. She maintained status in Canada at least until 2019.

[4] In April 2020, the applicant made a claim for refugee protection in Canada on the basis of her fear of the *Aguilas Negras*, or Black Eagles, a paramilitary group in Colombia. However, while her refugee claim was pending, the applicant was convicted of certain criminal offences in Canada. As a result of this, she was determined to be ineligible to seek refugee protection under paragraph 101(2)(a) of the *IRPA*. A deportation order was made on July 30, 2021.

[5] The applicant's initial PRRA application was refused on February 23, 2022. For reasons that are not germane to the present motion, the Senior Immigration Officer who had refused the application granted the applicant's request to have her PRRA reconsidered. On reconsideration, the PRRA was refused again on November 14, 2022. The applicant has applied for leave and judicial review of this decision.

[6] According to the applicant, when she was a university student in Colombia, she became interested in the social justice work of a Colombian professor of sociology, Alfredo Rafael Francisco Correa de Andreis, who had been murdered in September 2004. She decided to write her final paper on Professor Correa's work and his murder. As part of her research, the applicant interviewed individuals in Soledad, a community where Professor Correa had conducted research, and also spoke to various government funded agencies and university departments about Professor Correa.

[7] The applicant claims that her research attracted the attention of the Black Eagles. In April and May 2015, she and her parents began receiving threatening telephone calls at their home, warning the applicant to stop what she was doing. The applicant claims that in early November 2015, she was kidnapped and raped by three men who identified themselves as Black Eagles. The men had said they would teach her a lesson she would not forget for asking questions about Professor Correa's work. The applicant left Colombia for Canada a few months later.

[8] The Senior Immigration Officer accepted the applicant's evidence about her volunteer activities in Colombia as a high school student. The Officer also accepted that, as a university student, the applicant had done research into Professor Correa's work and murder. Further, the Officer accepted that the applicant had been the victim of a violent sexual assault in Colombia in November 2015. However, the Officer found that the applicant's account of the attack did not support a well-founded fear of the Black Eagles. On the basis of their own research into Professor Correa's murder, the Officer determined that his death had been at the hands of another

paramilitary group and not the Black Eagles. The Officer gave "little weight" to evidence from the applicant's parents about the threatening telephone calls because her parents had a vested interest in the outcome of the application and because they did not report the calls to the authorities. The Officer also determined that the applicant's work in Colombia did not "rise to the level of a human rights defender or activist." Consequently, extensive documentation concerning the risks to human rights defenders and activists in Colombia had little relevance to the applicant's particular case.

[9] The Officer concluded that the applicant's profile, activities, and research did not put her at risk of "continued, ongoing threats or violence at the hands of any paramilitary organization" and, further, that the applicant had not rebutted the presumption of state protection. The Officer therefore refused the PRRA application.

III. ANALYSIS

A. *The Test for a Stay of Removal*

[10] The test for obtaining an interlocutory stay of a removal order is well-known. The applicant must demonstrate three things: (1) that the underlying application for judicial review raises a "serious question to be tried;" (2) that she will suffer irreparable harm if the stay is refused; and (3) that the balance of convenience (i.e. the assessment of which party would suffer greater harm from the granting or refusal of a stay pending a decision on the merits of the judicial review application) favours granting a stay: see *Toth v Canada (Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123 (FCA); *R v Canadian Broadcasting Corp,*

2018 SCC 5, [2018] 1 SCR 196 at para 12; *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110; and *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 334.

[11] The purpose of an interlocutory order like the one sought here is to ensure that the subject matter of the underlying litigation will be preserved so that effective relief will be available should the applicant be successful on her application for judicial review: see *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 24. A decision to grant or refuse such interlocutory relief is a discretionary one that must be made having regard to all the relevant circumstances: see *Canadian Broadcasting Corp* at para 27. As the Supreme Court stated in *Google Inc*, "The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific" (at para 25).

[12] In the present case, under the first part of the test, the threshold for establishing a serious question to be tried is a low one. The applicant only needs to show that the application for judicial review is not frivolous or vexatious: *RJR-MacDonald* at 335 and 337; see also *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at para 11 and *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 25.

[13] Under the second part of the test, "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.*). Generally speaking, irreparable harm is harm that cannot be quantified in monetary terms or that could not be cured for some other reason even if it can be quantified (e.g. the other party is judgment-proof).

[14] To establish irreparable harm, the moving party “must demonstrate in a detailed and concrete way that it will suffer real, definite, unavoidable harm – not hypothetical and speculative harm – that cannot be repaired later” (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112 at para 24). Unsubstantiated assertions of harm will not suffice. The moving party must establish a “real probability” of irreparable harm (*Glooscap Heritage Society* at para 31).

[15] The third part of the test requires an assessment of which party would suffer greater harm from the granting or refusal of a stay of the removal order pending a decision on the merits of the application for judicial review. To meet this part of the test, the applicant must establish that the harm she would suffer if the stay is refused is greater than the harm the respondent would suffer if the stay is granted. The harm found under the second part of the test is considered again at this stage, only now it is assessed in comparison with other interests that will be affected by the Court’s decision. This weighing exercise is neither scientific nor precise: see *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2020 FCA 181 at para 17. It is, however, at the heart of the determination of what is just and equitable in the particular circumstances of the case at hand.

[16] Taking a step back, while each part of the test is important, and all three must be met, they are not discrete, watertight compartments. Each part focuses the Court on factors that inform its overall exercise of discretion in a particular case: *Wasylynuk v Canada (Royal Mounted Police)*, 2020 FC 962 at para 135. The test should be applied in a holistic fashion where strengths with respect to one factor may overcome weaknesses with respect to another: see *RJR-MacDonald* at 339; *Wasylynuk* at para 135; *Spencer v Canada (Attorney General)*, 2021 FC 361 at para 51; *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 FC 1195 at para 97 (rev'd on other grounds 2021 FCA 84); and *Power Workers Union v Canada (Attorney General)*, 2022 FC 73 at para 56. See also Robert J Sharpe, "Interim Remedies and Constitutional Rights" (2019) 69 UTLJ (Supp 1) at 14.

[17] Together, the three parts of the test help the Court to assess and assign what has been termed the risk of remedial injustice (see Sharpe, above). They guide the Court in answering the following question: Is it more just and equitable for the moving party or the responding party to bear the risk that the outcome of the underlying litigation will not accord with the outcome on the interlocutory motion?

B. *The Test Applied*

(1) Serious Question to be Tried

[18] The applicant submits that the Officer fell into reviewable error in at least four material respects. Specifically: (a) the Officer erred by making a veiled credibility finding without a hearing; (b) the Officer breached procedural fairness by relying on extrinsic evidence without

providing the applicant with an opportunity to respond; (c) the Officer unreasonably dismissed the evidence of the applicant's family members; and (d) the Officer imposed an unreasonable threshold for considering whether someone could be considered a human rights defender.

[19] The respondent submits that all of the grounds for review identified by the applicant are frivolous or vexatious. I do not agree. As the hearing of this motion demonstrated, there is room for serious debate concerning all of the grounds identified by the applicant. The outcome of the application for judicial review is far from a foregone conclusion. The grounds for review are clearly neither frivolous nor vexatious. The applicant therefore meets the first part of the test.

(2) Irreparable Harm

[20] I am satisfied that removal of the applicant prior to the final determination of her application for leave and judicial review of the negative PRRA decision would render that application nugatory. This is sufficient to satisfy the second part of the test because of the strength of the underlying application for judicial review.

[21] If the applicant were to be removed to Colombia at this time, her application for leave and judicial review of the negative PRRA decision would become moot (*Solis Perez v Canada (Citizenship and Immigration)*, 2009 FCA 171 at para 5). The potential mootness of an underlying application for judicial review does not necessarily constitute irreparable harm; whether this is so must be determined in the individual circumstances of the particular case at hand: see *El Ouardi v Canada (Solicitor General)*, 2005 FCA 42 at para 8; and *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at paras 34-38.

[22] In the present case, I am satisfied that, at the very least, the first and third grounds for review set out in paragraph 18, above, are clearly arguable. Even at this preliminary stage, the applicant makes a strong argument that, in at least these two respects, the decision was made in breach of the requirements of procedural fairness and/or is unreasonable. This is a sufficient basis on which to find that the applicant would suffer irreparable harm if she were removed to Colombia before her application for leave and judicial review of the negative PRRA decision has been finally determined. This is because, if the applicant were to be removed at this time, she would lose the right to advance clearly arguable grounds challenging the negative PRRA decision. She would also, as a result, be deprived of the right to seek a meaningful and effective remedy in this Court with respect to an arguably flawed decision. Even if the Court were prepared to hear the judicial review application despite its mootness, and even if the applicant were able to persuade the Court that the decision is unreasonable or was made in breach of the requirements of procedural fairness, setting aside the PRRA decision and remitting the matter to another officer for redetermination would be neither meaningful nor effective relief if the applicant is already in Colombia. This is a circumstance that could not be remedied in any other way.

[23] Before leaving this part of the test, it is important to underscore that, in approaching the issue of irreparable harm as I have, the apparent strength of the underlying application for judicial review is a key consideration. In the present case, this is what has elevated the risk of remedial injustice from the speculative or merely hypothetical to a real probability. However, to be clear, the applicant was not required to establish – nor have I found – that her application for judicial review is likely to succeed. Rather, I have simply found that her application is

sufficiently strong to give rise to a real risk of remedial injustice if she is required to leave Canada before it is finally determined. This is sufficient to satisfy the second part of the test. In contrast, grounds for review that satisfied the first part of the test because they were not frivolous or vexatious but which nevertheless did not appear strong may not support such a finding. Of course, in such a case, a party seeking a stay could still seek to satisfy the second part of the test by establishing other forms of irreparable harm.

[24] In seeking a stay of her removal, the applicant also contends that she faces other forms of irreparable harm. Since I have found that the loss of the right to seek a meaningful and effective remedy in the underlying proceeding is sufficient to meet the second part of the test, it is not necessary to assess the other forms of irreparable harm she advances.

(3) Balance of Convenience

[25] I am also satisfied that the balance of convenience favours the applicant.

[26] In assessing the balance of convenience, in addition to the applicant's interests, the public interest must be taken into account since this is a case involving the actions of a public authority (*RJR-MacDonald* at 350). The applicant is subject to a valid and enforceable removal order. It was made pursuant to statutory and regulatory authority. It is therefore presumed that it is in the public interest. Further, under subsection 48(2) of the *IRPA*, a removal order "must be enforced as soon as possible" once it is enforceable. It is also presumed that an action that suspends the effect of the order (as would an interlocutory stay) would be detrimental to the public interest: see *RJR-MacDonald* at 346 and 348-49. Whether this is sufficient to defeat a request for an

interlocutory stay in a given case will, of course, depend on all the circumstances of the case. This can also depend on how long the effect of the deportation order would be suspended: see *Canadian Council for Refugees* at para 27.

[27] Further, the impact on the public interest of suspending the effect of an act by a public authority is a matter of degree that varies depending on the subject matter of the litigation. As the Supreme Court noted in *RJR-MacDonald*, the impact on the public interest of exempting an individual litigant from the application of lawfully enacted legislation is less than suspending the effect of that legislation entirely. The impact of suspending temporarily the implementation of a removal order is arguably of an even lesser degree than this (although again the precise calibration of that impact will depend on the particular circumstances of the case).

[28] The applicant is subject to removal because she has been determined to be inadmissible due to serious criminality. This is an important consideration in assessing the public interest. However, the only "inconvenience" to the respondent if the applicant is not removed now and her application for judicial review is dismissed is that her removal from Canada will have been delayed; it will not have been frustrated entirely. Moreover, there is no suggestion that the applicant poses any sort of risk to the public at this time.

[29] On the other hand, the "inconvenience" to the applicant of losing the right to a meaningful remedy is significant and, as I have determined above, irreparable. The interest in ensuring that the applicant retains the right to a meaningful and effective remedy is not the applicant's alone. It is shared by the public and by the administration of justice, a factor that also

tips the balance in favour of a stay. In the particular circumstances of this case, this outweighs the public interest in the immediate enforcement of the removal order.

[30] For these reasons, I am therefore satisfied that the balance of convenience favours the applicant.

IV. CONCLUSION

[31] Balancing all of the relevant considerations, I am satisfied that it is more just and equitable for the respondent to bear the risk that the outcome of the underlying litigation will not accord with the outcome on this motion than it would be for the applicant to bear that risk. A stay of removal is the only way to ensure that the subject matter of the litigation is preserved so that effective relief will be available should the applicant be successful on her application for judicial review (cf. *Google Inc* at para 24). The countervailing considerations are insufficient to outweigh this fundamentally important consideration.

[32] Accordingly, the motion is granted. The applicant shall not be removed from Canada prior to the final determination of the underlying application for leave and judicial review.

ORDER IN IMM-13666-22

THIS COURT ORDERS that

1. The motion is granted.
2. The applicant shall not be removed from Canada prior to the final determination of her application for leave and judicial review of the negative PRRA decision dated November 14, 2022.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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