Federal Court  Cour fédérale

Date: 20230503

Docket: IMM-5062-23

Citation: 2023 FC 632

Ottawa, Ontario, May 3, 2023

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

YETUNDE MUTIAT OYADEYI
ONAOPEMIPO OLANREWAJU SOETAN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

UPON MOTION being heard at the general sittings on Tuesday, May 2, 2023, filed on behalf of the Applicants, asking that their removal to Nigeria, now scheduled to take place on May 4, 2023, be stayed until such time as the underlying application for leave and judicial review is disposed of by this Court. The underlying application is in relation to a negative decision on the Applicants' request for a pre-removal risk assessment [PRRA].

AND UPON considering the material filed and the able oral submissions of counsel for the parties.

[1] The Applicants, the mother and her son, are citizens of Nigeria. They came to Canada on March 25, 2018. They were arriving from the United States where they resided since leaving Nigeria in 2015. They made a claim for refugee status on March 28, 2018.

[2] The Basis of Claim alleged domestic abuse on the part of the Principal Applicant's husband. The Applicants were said to be at risk of harm. The Basis of Claim form was amended on April 4, 2019, to include an allegation according to which the husband continued to threaten his wife.

[3] The matter was decided by the Refugee Protection Division [RPD] on the basis that the Applicants have an Internal Flight Alternative [IFA] in various locations in Nigeria. That decision came on August 19, 2019. The appeal launched before the Refugee Appeal Division [RAD] was decided on November 3, 2020. The RAD found that the Principal Applicant lacked credibility, after having advised the Principal Applicant that such was an issue (together with the failure to claim refugee status in the United States and the availability of an IFA), thus allowing her to make submissions.

[4] New evidence was submitted before the RAD in the form of a two-page letter (dated October 25, 2019) from a registered psychotherapist; it dealt exclusively with Ms. Oyadeyi's physical and emotional trauma suffered at the hands of her husband and family. No other reason

was stated for the Principal Applicant's fear of returning to Nigeria. The two-page document was ruled to be inadmissible as not satisfying the requirements for new evidence before the RAD (ss 110(4) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[5] The judicial review application of the RAD decision was dismissed by our Court: *Oyadeyi v Canada (Citizenship and Immigration)*, 2021 FC 1159.

[6] A PRRA decision was made by a Senior Immigration Officer on February 28, 2023, but was served in person only on April 11, 2023. That same day, a direction to report for removal from Canada was delivered. The removal order had been made on March 28, 2018; the removal is scheduled for May 4, 2023.

[7] The submissions to the PRRA officer are based exclusively on the new assertion that the Principal Applicant "is a sexual minority who has recently been in a relationship with another woman" (memorandum of fact and law, para 1). Ms. Oyadeyi contended in her submissions on the PRRA application that, after her arrival in Canada (March 2018) "she began to consider relationship with women, whom she felt very comfortable around" (submissions on PRRA application, para 2). She met someone in July 2019 and the relationship evolved; in January 2021, a close relationship is said to have begun. The submission goes on to state that the two partners "have now built a life together alongside their children. They have plans to get married and move together later this year. They have opened a joint bank account to facilitate these plans".

[8] The Senior Immigration Officer found that the Applicants would not face more than a mere possibility of persecution upon return to Nigeria. In essence, the PRRA decision notes that the Principal Applicant now indicates that she fears persecution "if returned to Nigeria due to her sexual orientation/identity as a lesbian, her same-sex relationship and her status as a single mother" (PRRA decision, p. 6 of 9).

[9] The issue, according to the PRRA Officer, is that he/she was not persuaded that the Principal Applicant did not reasonably "have the opportunity to advance the information of her sexual orientation/identity if not to the RPD in August 2019, to the RAD back in November 2020" (PRRA decision, p. 7 of 9). To put it differently, it was possible for the Principal Applicant to raise as part of the refugee proceedings what was now raised for the first time. The new issue was therefore not a factor in the PRRA assessment.

[10] The same is said about the son's speech impediment which requires professional assistance. This was not a new issue. If it were to be raised, it should have been before the RPD or the RAD. At any rate, s 97(1)(b)(iv) of the IRPA excludes from consideration the risk which is caused by the inability of the country of nationality to provide adequate health or medical care.

[11] The decision maker concluded that the evidence provided did not support a new risk that was not available to be presented to the RAD. Moreover, the decision maker found that the evidence showed conditions in Nigeria that were "generalized in nature. The fact that documentary evidence shows that a the [*sic*] human rights or security situation in a country is problematic does not necessarily mean there is a risk to a given individual. … However, the

applicants have not linked the contents of these submissions to their personal, forward-looking risks in Nigeria. General country condition documents alone do not signal a risk to the applicants in Nigeria within the meaning of Section 96 or Section 97 of the IRPA" (p. 8 of 9).

[12] The Applicants have challenged the PRRA decision through an application for leave and judicial review filed on April 18, 2023. The grounds raised are minimal and generic: the decision made is not reasonable and procedural fairness was violated. As is well known, a direction to report cannot be the basis for a stay. In *Bergman v Canada (Public Safety and Emergency Preparedness)*, 2010 FC 1129, our Court stated:

> [18] This Court has confirmed that a Direction to Report is nothing more than informational communication, the sole purpose of which is to explain when and where the removal order against an applicant is to be executed. The issuance of a Direction to Report, in and of itself, does not constitute a "decision" or order falling within the ambit of subsection 18.1(2) of the *Federal Courts Act*, 1985, c. F-7, and cannot be the subject of a judicial review application. This Court has held that where the underlying application for judicial review challenges a Direction to Report, the stay can be dismissed on this preliminary basis. Since the Direction to Report is not a reviewable decision, there is no valid underlying application to support the stay motion (*Daniel v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 392, 156 A.C.W.S. (3d) 1144 at para. 12; *Tran v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 394, 138 A.C.W.S. (3d) 343 at para. 2; *Jarada v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 14, 150 A.C.W.S. (3d) 887).
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> [Emphasis in original]

Similarly, it is not because a PRRA application has not been fully litigated that a stay will be granted (*Canada (Public Safety and Emergency Preparedness v Shpati)*, 2011 FCA 286; [2012] 2 FCR 133). The removal order was not challenged and the Applicants did not seek a deferral of their removal from the removals officer. The notice of motion simply seeks a stay until such time as their challenge to the PRRA decision has been the subject of disposition by this Court.

[13] The framework for the consideration of an order in the nature of a stay, or an interlocutory injunction, is well known. An applicant must establish that:

1. there is a serious issue to be resolved in the underlying judicial review application;
2. there must be irreparable harm that will ensue if the stay is not granted; and
3. the balance of convenience must favour the applicant.

(*RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR-MacDonald*]; *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302)

[14] The Applicants argue that it suffices that the serious issue does not constitute a frivolous or vexatious claim. Arguing that the test is "not frivolous or vexatious", the Applicants go on to posit that the serious issue being that they face a personal risk if removed, it follows that "irreparable harm is made out and the second test of the test is satisfied" (memorandum of fact and law, para 48). The Applicants would suffer the greater harm if the stay is not granted in view of the irreparable harm they will suffer. Hence the three-prong test is satisfied.

[15] With great respect, this syllogism does not reflect how the framework operates and the state of the law.

[16] For starters, I am not convinced that the serious issue prong of the test in circumstances where an applicant wishes to be granted a stay which constitutes the remedy sought on judicial review (not being removed in view of the risk) can be satisfied on the basis of the serious issue being neither frivolous nor vexatious. The proposition derives from *RJR-MacDonald* and was articulated in *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148;

[2001] 3 FCR 682 [*Wang*]. As our Court put it, "[t]he result is that if the stay is granted, the relief sought will have been obtained on a finding that the question raised is not frivolous" (para 10). At paragraph 11, we read that "[i]t is that the test of serious issue becomes the likelihood of success on the underlying application since granting the relief sought in the interlocutory application will give the applicant the relief sought in the application for judicial review". The Federal Court of Appeal endorsed the *Wang* approach in *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 [*Baron*]. In that case, an applicant must establish the likelihood of success in the underlying application, taking further into account that the standard of review is reasonableness.

[17] A second issue is whether the Court has jurisdiction to entertain a stay motion where the removal order is not challenged. In *Akhayane v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 680 and in *Barh v Canada (Citizenship and Immigration)*, 2018 FC 885, I tried to explain that there is case law which found that this Court does not have jurisdiction to grant a stay where the removal order is not challenged (*Shchelkanov v Canada (Minister of Employment and Immigration)*, [1994] 76 FTR 151 and its progeny). The difficulty would be alleviated once it is the refusal by a removals officer to defer the removal that is made the subject of the judicial review application. The vast majority of stay applications seem to involve the refusal to defer by the removals officer. But such is not the case here.

[18] I note that there is another line of cases where the interpretation given to s 18.2 of the *Federal Courts Act*, RSC 1985, c F-7, which grants the Court the jurisdiction to make any interim order that it considers appropriate pending the disposition of a judicial review

application, is seen as broad enough to apply in cases such as this one (*Muncan v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 7401; 141 FTR 241).

[19] It seems to me that there is no need to resolve the possible controversy of whether the Court has jurisdiction, as the end result is the same if the serious issue must be shown to require likelihood of success. Given that in both cases, where a removals officer refuses a deferral and where the challenge to the PRRA decision is for the purpose of avoiding a removal, the stay results in the removal being delayed. There would therefore not be a strategic advantage (by being held to a lower standard on the serious issue prong) in bypassing the removals officer, in favour of seeking a stay pending the disposition of a judicial review application concerning a PRRA decision. It follows that, like in *Wang* and *Baron*, the serious issue prong will be satisfied on the basis of showing likelihood of success, and not merely that the claim is not frivolous or vexatious.

[20] Although I have my doubts that the issues raised by the Applicants have a likelihood of success, there is no need to consider further if the issues raised by the Applicants are such that they are likely to succeed. Rather, the motion fails on the lack of demonstration that there is irreparable harm. That is because, contrary to the proposition offered by the Applicants, the irreparable harm prong has been found to be a stand alone which must be satisfied for injunctive relief to be granted. One does not piggyback on the serious issue prong, whether it be “not frivolous or vexatious” or “likelihood of success”.

[21] To start off, it is not accurate to suggest that irreparable harm follows from a serious issue having been shown. The Federal Court of Appeal refused such an approach when it was argued that if irreparable harm has not been shown, it may still be possible for the Court to grant the requested stay.

[22] The Court answered with an emphatic "no". In *Janssen Inc v Abbvie Corporation*, 2014 FCA 112, the Court found that "[a]ll three questions must be answered in the affirmative. Put another way, Janssen must establish all these requirements" (para 14). The Court of Appeal stresses:

> [19] Each branch of the test adds something important. For that reason, none of the branches can be seen as an optional extra. If it were otherwise, the purpose underlying the test would be subverted.

The decision in *Selliah v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, is to the same effect (para 13).

[23] Indeed, the Court of Appeal has throughout the years required that "[i]rreparable harm must constitute more than a series of possibilities. The onus is on the appellant to demonstrate in the evidence that the extraordinary remedy of a stay of removal is warranted" (*Atwal v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427, para 14 [*Atwal*]). The "irreparable harm" prong of the test was not met in that case as "the appellant's materials contain only assertions and speculation" (para 15).

[24] The requirement that the evidence be more than assertions and speculation has been further articulated by the Court of Appeal in a number of decisions. A summary of the state of

the Court of Appeal's jurisprudence on irreparable harm can be found in *Canada (Attorney General) v Oshkosh Defence Canada Inc*, 2018 FCA 102 [*Oshkosh*]:

> [25] Finally, to prove 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: *Stoney First Nation v. Shotclose*, 2011 FCA 232, 422 N.R. 191 at paras. 47-49; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84, 402 N.R. 341 at paras. 14-22; *Gateway City Church v. Canada (National Revenue)*, 2013 FCA 126, 445 N.R. 360 at paras. 14-16; *Glooscap Heritage Society v. Canada(National Revenue)*, 2012 FCA 255, 440 N.R. 232 at para. 31; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 at para. 12; *Janssen Inc. v. Abbvie Corporation*, 2014 FCA 176 at paras. 44-46. Those who offer assertions rather than evidentiary demonstrations and "[a]ssumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence" often fall short on this branch of the stay test: *Glooscap* at para. 31; *Stoney First Nation* at para. 48. Those who offer "evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result unless a stay is granted" often succeed: *Glooscap* at para. 31; see also *Dywidag Systems International, Canada, Ltd. v. Garford Pty Ltd.*, 2010 FCA 232, 406 N.R. 304 at para. 14 and *Laperrière* at para. 17.
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> [My emphasis]

Thus, the evidence must be detailed and concrete, and the irreparable harm must be real and not speculative or abstract.

[25] The true flavour of the attributes and quality of evidence required to establish irreparable harm can be gleaned from this passage from *Gateway City Church v Canada (National Revenue)*, 2013 FCA 126:

> [14] Such a general assertion is insufficient to establish irreparable harm: *Holy Alpha and Omega Church of Toronto v. Canada (Attorney General)*, 2009 FCA 265 at paragraph 22. That sort of general assertion can be made in every case. Accepting it as sufficient evidence of irreparable harm would unduly undercut the power Parliament has given to the Minister to protect the public

> interest in appropriate circumstances by publishing her notice and revoking a registration even before the determination of the objection and later appeal.
>
> [15] General assertions cannot establish irreparable harm. They essentially prove nothing:
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> > It is all too easy for those seeking a stay in a case like this to enumerate problems, call them serious, and then, when describing the harm that might result, to use broad, expressive terms that essentially just assert – not demonstrate to the Court's satisfaction – that the harm is irreparable.
>
> (*Stoney First Nation v. Shotclose*, 2011 FCA 232 at paragraph 48.) Accordingly, "[a]ssumptions, speculations, hypotheticals and arguable assertions, unsupported by evidence, carry no weight": *Glooscap Heritage Society v. Minister of National Revenue*, 2012 FCA 255 at paragraph 31.
>
> [16] Instead, "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": *Glooscap, supra* at paragraph 31. See also *Dywidag Systems International, Canada, Ltd. v. Garford Pty Ltd.*, 2010 FCA 232 at paragraph 14; *Canada (Attorney General) v. Canada (Information Commissioner)*, 2001 FCA 25, 268 N.R. 328 at paragraph 12; *Laperrière v. D. & A. MacLeod Company Ltd.*, 2010 FCA 84 at paragraph 17.

I agree with my colleague Justice Denis Gascon that "[i]n the context of stays of removal, it [irreparable harm] implies a serious likelihood of jeopardy to an applicant's (or his or her family's) life, security or safety" (*Lima v Canada (Public Safety and Emergency Preparedness)*, IMM-3741-19, June 27, 2019, para 6). Indeed, his characterization of the irreparable harm test as being "very strict" (para 5) seems to me to be accurate.

[26] The evidence of the alleged irreparable harm that would ensue if the Applicants must be removed to Nigeria does not meet the strict requirements of the law. There is no evidence that goes beyond general assertions that violence directed at homosexuality has been on the rise in

Nigeria. To put it in the words of *Oshkosh*, "to prove 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" (para 25). That understanding of the second prong was entirely endorsed recently in *Western Oilfield Equipment Rentals Ltd* v M-I L.L.C., 2020 FCA 3 [*Western Oilfield*]. The evidence must be at a convincing level of particularity, as illustrated in *Western Oilfield*. The evidence in this case was acknowledged by the Respondent as presenting general mistreatment of homosexuals in Nigeria. It is rather that the evidence offered by the Applicants never rises beyond generalities to reach a measure of granularity on a convincing level of particularity. There was never a proper link made between country conditions to the particular circumstances of the Applicants in a country of 220 million inhabitants. The harm is accordingly left at the level of speculation. The requisite particularity is not present.

[27] I have reviewed carefully the evidence offered by the Applicants. It is of a general nature. Thus we learn that violence against the LGBTQ+ Community has risen 214% since the adoption of the *Same Sex Marriage (Prohibition) Act* a few years ago. It remains very much unclear what that implies in reality in Nigeria. Some incidents are referred to where an angry mob is reported to have been responsible for violence. Every act of violence is tragic. But that evidence concerning the country conditions or acts of violence does not rise to the requisite level that there be a serious likelihood of jeopardy. That is the burden on an applicant and it was not discharged. More and better evidence with a measure of granularity is needed.

[28] Some twenty years ago, the Court of Appeal spoke, in the immigration context, of irreparable harm not being constituted by a series of possibilities (*Atwal*, *supra*). Since then, it has been found that the demonstration must be detailed and concrete, and that the harm suffered will be real and definite. I would not situate the bar at a level approximating certainty. That would not serve the needed purpose of a stay. But more than country conditions and examples of violence over the years are required if the notion of irreparable harm must be given a reasonable meaning. I add that if that were to be sufficient, the requirement that it be demonstrated by evidence that the extraordinary remedy of a stay of removal is warranted would largely disappear.

[29] As the test requires that the three prongs be satisfied, the lack of proper demonstration of irreparable harm disposes of the motion for a stay of execution of the removal order.

[30] One final observation may be made. The Applicants raised for the first time in their PRRA application an issue that was not dealt with during the refugee seeking process. As was stated close to twenty years ago, a "PRRA application cannot be allowed to become a second refugee hearing" (*Kaybaki v Canada (Minister of Citizenship and Immigration)*, 2004 FC 32 at para 11). In *Luanje v Canada (Citizenship and Immigration)*, 2013 FC 792, Justice Sean Harrington stressed that the "pre-removal risk analysis is not a second refugee determination process" (para 10). The Court added at para 11 that "[i]n his submissions, Mr. Luanje claims that he has been openly gay for some time. Accepting, as he says, that he was openly gay at least a year before his refugee board hearing, he has offered no reason whatsoever why he could not have advanced a claim based on sexual orientation at that time". Much more recently, our Court

in *Ghorbanniay Hassankiadeh v Canada (Citizenship and Immigration)*, 2023 FC 33, found that a "PRRA is not an occasion to put forward an entirely new basis for a refugee claim that the applicant could have raised, but chose not to raise, when the matter was heard by the RPD" (para 19).

[31] The requested stay brings to the fore an issue that was arguably in existence as the Principal Applicant claimed that her interest in persons of her gender went back to 2018. She was then seeking refugee status on the basis that she suffered from abuse from her husband. The psychotherapist's report of October 2019 never even alluded to some issue other than the trauma the Principal Applicant suffered at the hands of her husband. That report, which was ruled to be inadmissible by the RAD, came four months after the Principal Applicant met her partner, well before the RAD ruled on the appeal (November 3, 2020). The Principal Applicant has not explained why the claim was not advanced much earlier. A brand new issue should, in my view, be raised as part of a PRRA application. If that were not possible, the very purpose of the PRRA would be defeated. However, to allow a PRRA application to become a second refugee hearing where the matter could have been raised defeats the purpose of the PRRA as well. Surely the principle of finality calls for an applicant to put forward her arguments before the RPD and the RAD that refugee status must be granted in view of the circumstances.

[32] The requested stay of the execution of the removal order must therefore be denied.

ORDER in IMM-5062-23

THIS COURT ORDERS:

The motion for a stay of the removal order is dismissed.

"Yvan Roy"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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