Federal Court Cour fédérale

Date: 20230221

Docket: IMM-2015-23

Citation: 2023 FC 253

Ottawa, Ontario, February 21, 2023

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

MEGLENA KIRILOVA ANDONOVA-RADIC

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. Overview

[1] The Applicant, Meglena Kirilova Andonova-Radic, brings a motion for a stay of her removal from Canada, scheduled to take place on February 28, 2023.

[2] The Applicant requests that this Court order a stay of her removal to Bulgaria until the determination of an underlying application for leave and judicial review of the refusal of her deferral request by an Inland Enforcement Officer (the "Officer") of the Canada Border Services Agency ("CBSA").

[3] For the reasons, that follow, this motion is dismissed. I find that the Applicant does not meet the tri-partite test required for a stay of removal.

II. Facts and Underlying Decisions

[4] The Applicant is a 47-year-old citizen of Bulgaria. The Applicant has a son and a daughter.

[5] The Applicant was a permanent resident of Canada as a result of a spousal sponsorship application submitted by her ex-husband. Her permanent resident status was revoked as a result of the finding of the Immigration Division that she is inadmissible to Canada due to misrepresentation, for failing to disclose that her then-husband had been incarcerated.

[6] On January 17, 2023, CBSA informed the Applicant of her scheduled removal on February 28, 2023. On January 24, 2023, the Applicant submitted a request to defer her removal to CBSA.

[7] The Applicant's daughter is expecting her second child, due in April 2023. The Applicant claims that she needs to be in Canada to support her daughter during this time,

particularly given her daughter's husband's absences and her history of mental health issues. The Applicant submits that it is in the best interests of the child ("BIOC") for her to remain in Canada to support her daughter during the child's birth and thereafter.

[8] The Applicant submits that she suffers from anxiety and depression, and is in the process of investigating possible cardiac issues related to cardiovascular disease.

[9] The Applicant has a common law partner and is the subject of a pending spousal sponsorship application. The Applicant claims that her partner has serious medical issues and her removal would cause him significant stress.

[10] In a decision dated February 7, 2023, the Officer denied the Applicant's deferral request. The Officer found that the Applicant provided insufficient evidence to indicate that she would be unable to follow up on her mental health and cardiac testing upon return to Bulgaria, or to demonstrate that the Applicant's partner is dependent on the Applicant to a degree that warrants deferring her removal. The Officer also found insufficient evidence to substantiate the claim that the Applicant's daughter and her family would be unable to find other means of support during and after childbirth, or that they would unable to adequately care for their children if the Applicant was removed.

[11] The Officer also did not find the pending spousal sponsorship application to be sufficient grounds to warrant granting the Applicant's deferral request. The Officer noted that the Applicant has been removal-ready since December 15, 2022, and can therefore not benefit from

an administrative deferral of removal, given that her spousal sponsorship application was received on January 16, 2023.

III. Analysis

[12] 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.

[13] 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*

[14] 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. 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) ("*Baron*").

[15] A decision refusing to defer removal requires the Applicant to meet an elevated standard with respect to the first *Toth* requirement of a serious issue for trial, pursuant to *Baron.*

[16] The Applicant submits that the underlying application raises serious issues about the reasonableness of the CBSA's refusal of the deferral request, specifically regarding the Officer's assessment of her partner's medical issues, her daughter's medical records, and the best interests of the child ("BIOC") affected by removal.

[17] The Respondent submits that there is no serious issue because the Officer reasonably assessed and refused the Applicant's deferral request.

[18] Having reviewed the parties' motion material and the underlying decision, I agree that there is a serious issue to be tried. The underlying application for judicial review raises issues concerning the Officer's proper assessment of the Applicant's evidence included in her deferral request. This is sufficiently serious to meet the first prong of the test.

B. *Irreparable Harm*

[19] 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 (C.A.)*, [1991] FCJ No 984, [1992] 1 FC 142 (FCA)).

[20] The Applicant submits that she would suffer irreparable harm if removed to Bulgaria, due to her own medical issues, her common law partner's medical issues, and the short-term BIOC affected by her removal, specifically her daughter's unborn child. The Applicant submits that the considerations surrounding her daughter and her daughter's unborn child are particularly serious given her daughter's history of mental health issues.

[21] I am not persuaded that the Applicant will face irreparable harm upon return to Bulgaria. The Applicant provided insufficient evidence to meet the threshold for irreparable harm concerning her own medical issues, her partner's medical issues, that her partner's health concerns would result in irreparable harm if she was removed, or that the best interests of her daughter's unborn child extend to establish irreparable harm in the Applicant's favour.

C. *Balance of Convenience*

[22] 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.

[23] The Applicant submits that the balance of convenience favours granting the stay of removal. The Applicant emphasizes that she was previously a permanent resident, has been compliant with Canadian law, and provides necessary support to her daughter.

[24] While the insufficient evidence of irreparable harm is determinative of this motion, the balance of convenience nonetheless weighs in favour of the Respondent. Subsection 48(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27, states that removal orders must be enforced expeditiously. The inconvenience that the Applicant may face as a result of removal does not outweigh the Respondent's interest in enforcing the removal order expeditiously.

[25] Ultimately, the Applicant does not meet the tri-partite test required for a stay of removal. This motion is therefore dismissed.

ORDER in IMM-2015-23

THIS COURT ORDERS that the Applicant's motion for a stay of removal is dismissed.

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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