Federal Court Cour fédérale

**Date: 20230221**

**Docket: IMM-488-23**

**Citation: 2023 FC 254**

**Ottawa, Ontario, February 21, 2023**

**PRESENT: The Honourable Mr. Justice Ahmed**

**BETWEEN:**

**LINTON SMITH**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# ORDER AND REASONS

## I. Overview

[1] The Applicant, Linton Smith, brings a motion for a stay of his removal from Canada, scheduled to take place on February 24, 2023.

[2] The Applicant requests that this Court order a stay of his removal to Jamaica until the determination of an underlying application for leave and judicial review of a negative decision on his Pre-Removal Risk Assessment ("PRRA").

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

## II. Facts and Underlying Decisions

[4] The Applicant is a 55-year-old citizen of Jamaica.

[5] Since 1996, the Applicant has visited Canada under the Temporary Foreign Worker Program ("TFWP") as an agricultural worker on several Ontario farms. In 2011, he was recruited through the TFWP to work on a farm in Kingsville, Ontario. His work permit was valid for two years at a time and has returned to Jamaica intermittently to renew his work permit. During his time in Jamaica, the Applicant worked as a general labourer in construction.

[6] In 2017, the Applicant received a promotion and was under the impression that his employers would assist him with the renewal of his work authorization in Canada. Around this time, he applied for permanent residence on humanitarian and compassionate ("H&C") grounds.

[7] In May 2019, the Applicant suffered a stroke while working in the farm bunkhouse. He received medical care at the local hospital and was transferred to another regional hospital for

further treatment. The stroke resulted in lasting disabilities, including the impairment of motor functions in his hands and impairment of his speech.

[8] Following his stroke and the resulting disabilities, the Applicant claims that his employer terminated his employment and required the Applicant to leave the farm bunkhouse—where he had been living during his term of work—within one week of his return from the hospital. The Applicant claims that his employer reported him to the Canada Border Services Agency ("CBSA") for absconding from his employment, which instigated the removal process and triggered a warrant for his arrest. The Applicant's employer also cancelled the Applicant's medical insurance and since the Applicant did not have access to extensive healthcare as a person without status, he was unable to follow the full rehabilitation treatment plan following his stroke.

[9] In December 2021, the Applicant went to the local police branch in Leamington, Ontario to report a crime against him. The police officer discovered that there was a warrant for his arrest issued and handed the Applicant over to the CBSA for custody. CBSA released the Applicant on conditions, with which the Applicant has complied since then.

[10] In May 2022, the Applicant was invited to apply for a PRRA. In July 2022, the Applicant submitted his PRRA application. In his PRRA, the Applicant submitted that people with disabilities in Jamaica are viewed negatively, subject to mistreatment, subject to disproportionate violence, lack adequate state resources to seek support, and that legislation enacted to address this mistreatment remains largely unimplemented throughout the country.

[11] In a decision dated January 4, 2023, the Applicant received a negative PRRA decision by a Senior Immigration Officer (the "Officer") of Immigration, Refugees and Citizenship Canada. The Officer found that the Applicant provided insufficient evidence to demonstrate a unique personalized risk facing him upon removal to Jamaica, finding that the conditions he alleged were general country conditions that applied to all Jamaican residents. The Officer also found insufficient evidence to show that the Applicant would not be able to avail himself of state protection should he encounter any barriers upon his return. The Applicant submitted his application for leave and judicial review of the negative PRRA decision on January 14, 2023.

[12] On January 16, 2023, the Applicant was given a Direction to Report for Removal scheduled on February 24, 2023.

[13] The Applicant attended a local medical clinic on January 26, 2023, complaining of chest pains. He was referred to further tests by a specialist and has appointments in March 2023.

## III. Analysis

[14] 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.

[15] 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*

[16] 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). 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).

[17] On this first prong of the tri-partite test, the Applicant submits that the underlying application for judicial review raises serious issues about the reasonableness of the Officer's negative PRRA decision, particularly the Officer's assessment of the risk facing the Applicant as a person with a disability, and application of the test for state protection.

[18] The Respondent submits that there is no serious issue because the Officer reasonably assessed the evidence proffered by the Applicant in his PRRA application.

[19] 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

surrounding the Officer's proper assessment of the Applicant's evidence and unique circumstances, which are sufficiently serious to meet the first prong of the test.

B. *Irreparable Harm*

[20] 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)).

[21] The Applicant submits that he would suffer irreparable harm if removed to Jamaica. He emphasizes that he has spent much of the past 25 years as a temporary foreign worker in Canada and his ability to work was cut short by a debilitating stroke, resulting in the termination of his employment, removal from his residence, and termination of his medical insurance. This has precluded him from continuing with the rehabilitation program to fully recover from the lasting effects of his stroke, which included impaired motor skills and impaired speech. The Applicant is also currently seeking medical advice regarding ongoing health concerns involving chest pains and is scheduled to see a specialist. The Applicant claims that a return to Jamaica poses a further risk to his health and wellbeing as a person with disabilities in a country where the disabled population is subject to mistreatment and violence, as supported by the evidence.

[22] The Respondent submits that the Applicant has provided insufficient evidence to establish that he would face irreparable harm upon removal to Jamaica. The Respondent contends that the allegations of harm are speculative and vague, rather than demonstrating a definite and unavoidable risk.

[23] I find that irreparable harm is made out in the Applicant's case. I disagree with the Respondent's submission that the Applicant's allegations related to the harm he will face as a person with disabilities in Jamaica is speculative and insufficiently concrete. The Applicant is a person with disabilities, and he has provided significant evidence directly indicating how the disabled population is viewed and treated in Jamaica, and the ineffectiveness of mechanisms of redress for disabled peoples. It is not speculative to submit that as a person with disabilities, the evidence demonstrating the mistreatment of and violence against people with disabilities in Jamaica would apply to him. There is a direct correlation between these allegations and the Applicant's lived experience.

[24] I further note the Respondent's contention that the Applicant's allegations of irreparable harm and accompanying evidence is required to demonstrate a definite and unavoidable risk. In this Court's recent decision in *Revell v Canada (Public Safety and Emergency Preparedness)*, 2021 CanLII 115181 (FC), my colleague Justice Fuhrer found the following at paragraph 8, regarding the irreparable harm faced by the applicant who sought a stay of removal and submitted that he was exhibiting symptoms of an incurable disease that ran in his family:

> The Court recognizes that <u>there is a degree of speculation</u> to the status of Mr. Revell's health, pending further testing and diagnosis. That said, in light of Mr. Revell's family history with ALS and his

> evidence regarding his current symptoms, the Court finds his circumstances are sufficiently compelling, especially when coupled with his current mental state involving suicidal ideation, to find the scale tipped in his favour on the first two parts of the test, namely, a serious issue and irreparable harm. Taken together, in my view this context would lead one to conclude that Mr. Revell likely would face grave peril on deportation to the UK, the Court noting that the *Toth* test does not require a showing of certain harm: 2020 FC 716, at paras 15 and 22. The Court further notes that the Officer did not dispute Mr. Revell's mental state, having arranged, on the basis of the suicide risk, for officers to accompany Mr. Revell to Heathrow Airport to monitor him and provide assistance if required.
>
> [Emphasis added]

[25] In a decision in a previous stay motion in the same matter, my colleague Justice Shore emphasized that in assessing the prong of irreparable harm, "the harm in question awaits the future, and is therefore uncertain: the Applicant is only required to prove a likelihood of harm, not certainty of harm" [emphasis added] (*Revell v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 716 at para 15, citing *Ali v Canada (Citizenship and Immigration)*, 2007 FC 751 at para 33).

[26] In light of this jurisprudence, I do not find that the Applicant's evidence relating to the harm he will face upon return to Jamaica is insufficient simply because it is does not reveal a certain risk. The evidence directly speaks to how the Applicant's profile as a person with disabilities makes him vulnerable to exacerbated hardship in Jamaica as a person with disabilities, where he is at a disproportionate risk of mistreatment. It is therefore sufficiently concrete and personalized. This evidence, coupled with the evidence of his ongoing medical inquiries for current health concerns, is sufficient to establish irreparable harm.

[27] I also note the Respondent's submission that the Applicant has only been a temporary visitor to Canada and has always returned to Jamaica during the off-season. The Respondent submits that this signals his ability to reintegrate into Jamaican society upon his return and points to the Applicant's failure to establish that he would face irreparable harm upon his return. However, I agree with the Applicant that he has never had to live in Jamaica as a person with disabilities, considering he suffered his stroke in 2019 and has been in Canada since 2017. The evidence exhibits the ways in which life and society in Jamaica is uniquely difficult for people with disabilities, including excerpts from a book regarding the experiences of people with disabilities in Jamaica, which states that negative attitudes and associated stereotypes about people with disabilities have resulted in isolation, segregation and discrimination for this population, and that social supports for them are often inaccessible and prohibitively expensive. For these reasons, I find that the Applicant's evidence is sufficient to meet the threshold for irreparable harm.

C. *Balance of Convenience*

[28] 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.

[29] The Applicant submits that the balance of convenience weighs in his favour, given the evidence of irreparable harm and to preserve the *status quo*. While I find that the issue of irreparable harm is determinative of this motion, I agree that the balance of convenience lies in favour of granting this stay motion.

[30] The Respondent submits that the balance of convenience lies in favour of enforcing removal expeditiously. The Respondent emphasizes that the Applicant has had three negative administrative decisions and his temporary resident status expired in 2018, despite the Applicant being in Canada continuously since 2017. The Respondent notes that the Applicant has failed to demonstrate that there is a public interest not to remove him as scheduled and that, rather, the public interest weighs in favour of executing the removal order as soon as possible.

[31] I disagree. The Applicant has consistently visited Canada to work over 25 years, leaving little behind by way of a maintained support system in Jamaica. He has done this in exchange for a consistent, committed, and indispensable contribution to the Canadian society and economy as a seasonal agricultural worker. His status as a temporary foreign worker, both living and working on his employer's farm, relying on his employer for health benefits and for assistance in navigating the immigration system, resulted in the exacerbation of multiple barriers he now faces following his stroke: his sudden termination, the loss of his residence, the loss of extensive healthcare, the loss of support in regularizing his immigration status as he was told by his employer, the unexpected loss of his temporary status, and lasting disabilities that preclude him from continued work as a labourer. The balance of convenience should be weighed in light of

the Applicant's uniquely vulnerable position and the breadth of his contribution to Canadian society. For these reasons, I find that the public interest weighs in favour of the Applicant.

[32] Ultimately, the Applicant meets the tri-partite test required for a stay of removal. This motion is therefore granted.

**ORDER in IMM-488-23**

**THIS COURT ORDERS that**:

1. The Applicant's motion for a stay of removal is granted.

2. The Applicant's removal to Jamaica scheduled for February 24, 2023 is stayed pending the final disposition of the Applicant's leave and judicial review in relation to the January 4, 2023 decision to refuse his PRRA application.

"Shirzad A."
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-488-23 |
| **STYLE OF CAUSE:** | LINTON SMITH v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | FEBRUARY 21, 2023 |
| **ORDER AND REASONS:** | AHMED J. |
| **DATED:** | FEBRUARY 21, 2023 |

**APPEARANCES:**

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| Kevin Spykerman | FOR THE RESPONDENT |

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