Federal Court  Cour fédérale

Date: 20231103

Dockets: IMM-2571-21
IMM-2794-21

Citation: 2023 FC 1469

Ottawa, Ontario, November 3, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

GURPRIT SINGH BEDI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. OVERVIEW

[1] The applicant, a citizen of India, is the subject of an enforceable removal order. He has been directed to report for removal on November 6, 2023. He has applied for a stay of the removal order pending the final determination of two related applications for judicial review.

[2] For the reasons that follow, I am satisfied that a stay of the removal order should be granted.

II. BACKGROUND

[3] The applicant was born in India in 1971. When he was five years of age, the applicant and his family emigrated from India to the United States and the applicant became a permanent resident there. However, as a result of his having committed several criminal offences in the United States, the applicant's permanent residency was revoked due to criminality. The applicant was deported to India in September 2010.

[4] In March 2016, the applicant was permitted to return to the United States. Being unable to regularize his status there, the applicant was subsequently directed to arrange his own return to India. Fearing for his safety in India, the applicant instead entered Canada irregularly in October 2018.

[5] In March 2019, the Immigration Division of the Immigration and Refugee Board of Canada determined that, as a result of his US criminal record, the applicant is inadmissible to Canada due to serious criminality under paragraph 36(1)(b) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (*IRPA*). The applicant was then given the opportunity to apply for a Pre-Removal Risk Assessment (PRRA) under subsection 112(1) of the *IRPA.*

[6] The applicant submitted his PRRA application in December 2019. In June 2020, he was informed that a decision had been made but he was not told the result. In October 2020, the

applicant provided additional evidence and submissions in support of his PRRA application. On April 1, 2021, he was informed that the application had been refused. The applicant then requested that the decision be reconsidered, relying on the evidence and submissions provided in October 2020. The request for reconsideration was refused on April 13, 2021.

[7] The applicant has applied for leave and for judicial review of both the decision refusing his PRRA application (IMM-2571-21) and the decision refusing to reconsider that decision (IMM-2794-21).

[8] On March 18, 2022, the Honourable Justice Zinn issued orders for the production of Certified Tribunal Records in both matters under Rule 14(2) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22. The records were filed on April 8, 2022.

[9] On October 24, 2023, the applicant was served with a Direction to Report for removal to India on November 6, 2023.

[10] The applicant then brought this motion seeking a stay of the removal order pending the final determination of the applications for judicial review.

[11] As it happens, after the applicant filed this motion but before it was heard, on October 31, 2023, the Honourable Justice Zinn granted leave to proceed with both applications for judicial review. The matters have been set down to be heard together on January 22, 2024.

III. ANALYSIS

A. *The Test for a Stay of Removal*

[12] Section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7 provides:

Interim orders	**Mesures provisoires**
18.2 On an application for judicial review, the Federal Court may make any interim orders that it considers appropriate pending the final disposition of the application.	**18.2** La Cour fédérale peut, lorsqu'elle est saisie d'une demande de contrôle judiciaire, prendre les mesures provisoires qu'elle estime indiquées avant de rendre sa décision définitive.

[13] The test for obtaining an interlocutory stay of a removal order is well-known. In the present case, the applicant must demonstrate three things: (1) that the underlying applications for judicial review raise a "serious question to be tried;" (2) that the applicant 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 applications) 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.

[14] 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 one or both of his applications for judicial review (*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 (*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).

[15] 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.

[16] Under the second part of the test, the question is whether any adverse impact on the applicant's interests that would result from refusing a stay could not be remedied if the applicant were ultimately successful in either of his applications for judicial review (*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.*). 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).

[17] The third part of the test requires an assessment of which party would suffer greater harm from the granting or refusal of a stay pending a decision on the merits of the applications for judicial review. To meet this part of the test, the applicant must establish that the harm he 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.

B. *The Test Applied*

(1) Serious Question to be Tried

[18] As noted above, leave has now been granted in both of the underlying applications for judicial review. Leave will be granted where a "fairly arguable case" is disclosed: *Bains v Canada (Minister of Employment and Immigration)* (1990), 47 Admin LR 317; 109 NR 239 (FCA); *Kreishan v Canada (Citizenship and Immigration)*, 2019 FCA 223, [2020] 2 FCR 299, at para 18. Where, as in the present case, the reasonableness of a decision is in issue, the test for leave must be applied in accordance with *Canada (Citizenship and Immigration) v Vavilov*, 2019 SCC 65. This means that, to be granted leave, an applicant must establish a fairly arguable case that "there are sufficiently serious shortcomings in the decision such that it cannot be said to exhibit the requisite degree of justification, intelligibility and transparency" (*Vavilov*, at para 100).

[19] The test for leave obviously entails that the application cannot be frivolous or vexatious (although it also requires more than this). Consequently, the Court's finding of a fairly arguable case, which is implicit in the grants of leave in the two underlying applications, establishes that at least some of the grounds raised in those applications are neither frivolous nor vexatious (*Shalaby v Canada (Citizenship and Immigration)*, 2022 FC 1699 at para 15). I would even say that this is a matter of *res judicata.* The first part of the test is therefore met.

(2) Irreparable Harm

[20] The applicant submits that he would suffer irreparable harm in three respects if a stay is refused: (1) the applicant's removal from Canada would render the underlying applications for judicial review moot; (2) the applicant would be at risk of harm in India; and (3) the applicant's removal would be detrimental to his children's interests because (a) his children depend on him for financial support and he is unlikely to be able to earn an income in India that is comparable to what he is able to earn in Canada and (b) it would be harder for the applicant to maintain a parental relationship with his children (the applicant's 17-year-old son and seven-year-old daughter both live in the United States).

[21] As I will explain, I am satisfied that the applicant has established irreparable harm in the first of these respects. As a result, in the particular circumstances of this case, it is not necessary to consider the other two forms of irreparable harm the applicant alleges.

[22] In *Suresh v Canada (Minister of Citizenship and Immigration*, [1999] 4 FC 206, Robertson JA held that one way to establish irreparable harm "involves an assessment of the

effect of a denial of a stay application on a person's right to have the merits of his or her case determined and to enjoy the benefits associated with a positive ruling" (at 220). If the applicant were to be removed to India at this time, his applications for judicial review of the negative PRRA decision and the refusal to reconsider that 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.

[23] In previous decisions, I have found the question of whether there is a real risk of remedial injustice if a stay is refused to be helpful for determining when mootness gives rise to irreparable harm: see *Matthew v Canada (Citizenship and Immigration)*, 2022 FC 924 at paras 22-23; and *SKGO v Canada (Citizenship and Immigration)*, 2023 FC 83 at paras 22-23. In those cases, I found that irreparable harm was established because removing the applicants from Canada prior to the determination of their applications for judicial review would deprive them of meaningful and effective judicial review of arguably flawed decisions (in *Matthew*, a decision of the Refugee Protection Division rejecting the applicant's claim for refugee protection and finding the claim to be manifestly unfounded; in *SKGO*, a negative PRRA decision). Even if the Court were prepared to hear the judicial review applications despite their mootness, and even if the applicants were able to persuade the Court that the decisions should be set aside, remitting the matters to another decision maker would be neither meaningful nor effective relief if the

applicants had already been forced to leave Canada. Critically, if it occurred, this harm to the applicants' legal interests could not be remedied in any other way.

[24] I underscored in both cases that the apparent strength of the underlying applications for judicial review was a key consideration. This was what elevated the risk of remedial injustice from the speculative or merely hypothetical to a real probability. I also made it clear that the applicants had not been required to establish (nor had I found) that their applications for judicial review were likely to succeed. (Like the present case, neither *Matthew* nor *SKGO* concerned the refusal of a deferral request so the requirement in such a case to meet the elevated threshold of establishing a likelihood of success to satisfy the first part of the test did not apply.) Rather, I simply found that the applications for judicial review were sufficiently strong to give rise to a real risk of remedial injustice if the applicants were required to leave Canada before the applications were finally determined.

[25] It is important to note that, in both *Matthew* and *SKGO*, the stay motions were brought before a decision had been made at the leave stage. As a result, the stay motions were the first opportunity for the Court to assess in any way the merits of the underlying judicial review applications. In contrast, as has already been noted, the stay motion in the present case was argued after leave to proceed with the judicial reviews was granted.

[26] In my view, the Court's determination that the applications for judicial review underlying the present motion raise a fairly arguable case is sufficient to establish a real risk of remedial injustice if the applicant were required to leave Canada before those applications are finally

determined. It is not necessary for the applicant to meet any higher threshold than this to establish irreparable harm in this respect. Indeed, with leave having been granted, it would not be appropriate to delve further into the merits at this stage. This is because doing so could risk the appearance of a collateral attack on the decisions granting leave. (On the present motion, the respondent largely reiterated the submissions concerning the merits of the applications – or, more accurately, the lack thereof – that were made in opposing leave.) It could also create a real risk of appearing to pre-judge the merits of the applications.

[27] In short, the Court has determined that the test for leave has been met and that the applications for judicial review should therefore be permitted to proceed to a hearing on the merits. Allowing the applications to be rendered moot at this stage would cause irreparable harm because the applicant would be deprived of the right to seek a meaningful and effective remedy with respect to what the Court has determined to be arguably flawed decisions. In such circumstances, "If there is to be any reality to the judicial review application, the status quo must be maintained" (*Melo v Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 15140 (FC), at para 22).

[28] To be clear, as *Matthew* and *SKGO* demonstrate, it is not necessary for leave to be granted to establish a real risk of remedial injustice in the sense I have been discussing. On the other hand, where, as in the present case, leave has been granted and refusing a stay would render the underlying applications moot, this is sufficient to constitute irreparable harm.

(3) Balance of Convenience

[29] The balancing of interests at the third step of the test is fundamental to the exercise of equitable discretion that is inherent in determining whether a stay is warranted. It is here that the Court determines whether, having found a real risk of irreparable harm, this is an unacceptable risk having regard to all of the circumstances of the case.

[30] Given how I have assessed irreparable harm, two principal interests are at stake in determining the balance of convenience in this case: on the one hand, an interest in the enforceability of the removal order and, on the other hand, an interest in the reviewability of the PRRA decisions.

[31] The applicant is subject to a valid and enforceable removal order. Since the order was made pursuant to statutory and regulatory authority, it is presumed that it was made 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 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. That being said, the respondent has not offered any explanation for why steps are being taken only now to enforce the applicant's removal, despite the PRRA application having been refused in May 2020. Even if the COVID-19 pandemic may account for some of the delay since the decision was made, the delay since the decision was delivered to the applicant in April 2021 is left completely unexplained. Furthermore, why enforcement action was finally taken after such a long delay despite a clear indication from the

Court in the meantime that leave would be granted in due course (the productions orders having been issued in March 2022) is also a mystery.

[32] The applicant is subject to removal because he has been determined to be inadmissible due to serious criminality. This is an important consideration in assessing the public interest. However, the significance of this factor is lessened to at least some extent by the fact that the US criminal conviction that led to the finding of inadmissibility and the removal order has now been expunged from the applicant's record. Moreover, there is no suggestion that the applicant poses any sort of risk to the public at this time.

[33] In sum, the only "inconvenience" to the respondent if the applicant is not removed now and his applications for judicial review are ultimately dismissed is that the applicant's removal from Canada will have been delayed; it will not have been frustrated entirely. In the particular circumstance of this case, this factor does not weigh heavily on the respondent's side of the scale.

[34] 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. Refusing to grant a stay would defeat the reviewability interest entirely. In the present case, the reviewability interest is strengthened by the fact that, since the applicant was ineligible to make a claim for refugee protection, the PRRA is the first and only risk assessment he has had. This interest in ensuring that the applicant retains the right to a meaningful and effective remedy on judicial review is not his alone; it is also a public interest. This is another factor that tips the balance in

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

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

IV. CONCLUSION

[36] 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 either of his applications for judicial review. The countervailing considerations are insufficient to outweigh this fundamentally important consideration.

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

ORDER IN IMM-2571-21 AND IMM-2794-21

THIS COURT ORDERS that

1. The motion is granted.

2. The applicant shall not be removed from Canada prior to the final determination of the applications for judicial review of the negative PRRA decision dated May 7, 2020, and the refusal to reconsider that decision dated April 13, 2021.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2571-21
STYLE OF CAUSE:	GURPRIT SINGH BEDI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND DOCKET:	IMM-2794-21
STYLE OF CAUSE:	GURPRIT SINGH BEDI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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