Federal Court  Cour fédérale

Date: 20230120

Docket: IMM-13524-22

Citation: 2023 FC 100

Ottawa, Ontario, January 20, 2023

PRESENT: Mr. Justice Norris

BETWEEN:

JOSE ANTONIO SERNA MEDINA
ERIKA GARCIA ESPINO

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

I. OVERVIEW

[1] The applicants are citizens of Mexico. They have been directed to report for removal from Canada on January 23, 2023. They have applied for an order staying the order for their removal pending the final determination of their application for leave and judicial review of a decision dated October 26, 2022, refusing their 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] For the reasons that follow, I am satisfied that the applicants have met the three-part test for a stay.

II. BACKGROUND

[3] The applicants (a married couple) sought refugee protection in Canada on the basis of their fear of harm at the hands of a criminal cartel in Mexico. The Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada ("IRB") found the applicants to be credible but rejected their claim on the basis that they had a viable Internal Flight Alternative ("IFA") in Cancun, Manzanilla or Mexico City. The applicants appeared before the RPD without the assistance of counsel. Assisted by a social worker, they appealed the RPD's decision to the Refugee Appeal Division ("RAD") of the IRB. The RAD dismissed the appeal and upheld the RPD's determination on the basis that the applicants have a viable IFA in Mexico City.

[4] After receiving the negative RAD decision, the applicants retained a lawyer ("former counsel"). The lawyer applied for leave and judicial review of the RAD's decision. Leave was refused in February 2022.

[5] The applicants were offered the opportunity to submit an application for a PRRA. Their first application was submitted in January 2022. While it was refused in February 2022, for reasons that are not germane to the present motion, the applicants were offered the opportunity to

re-submit their application. They did so in August 26, 2022. Throughout this process, the applicants continued to be assisted by their former counsel.

[6] The PRRA application was refused again on October 26, 2022. The applicants have applied for leave and judicial review of this decision. They have also sought an order staying their removal from Canada until that application has been finally determined.

III. ANALYSIS

A. *Preliminary Issue: The Late Filing of the Application for Leave*

[7] The applicants served and filed their notice of application for leave and judicial review of the negative PRRA decision out of time. They have included a request for an extension of time in their application for leave. While their request for an extension of time will not be determined until a decision is made on the leave application (see *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, rule 6(2)), having regard to all the circumstances, I am satisfied that it is appropriate to consider this motion for interlocutory relief on its merits.

B. *The Test for a Stay of Removal*

[8] The test for obtaining an interlocutory stay of a removal order is well-known. The applicants must demonstrate three things: (1) that the underlying application for judicial review raises a "serious question to be tried;" (2) that they 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.

[9] 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 applicants be successful on their 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).

[10] 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 applicants only need to show that the underlying 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.

[11] 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).

[12] 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).

[13] 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 applicants must establish that the harm they 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.

[14] 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.

[15] 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?

C. *The Test Applied*

(1) Serious Question to be Tried

[16] The applicants' principal ground on which they seek judicial review of the negative PRRA decision is that they received ineffective assistance from their former counsel. They contend that they received ineffective assistance because their former counsel failed to advance their case fully and properly before the PRRA officer by omitting or overlooking material information that is relevant to their risk profile. They allege that, among other things, this failure appears to stem from a misunderstanding on the part of their former counsel about the nature of their risk profile and the sort of evidence that can be relied on in a PRRA application under paragraph 113(a) of the *IRPA*.

[17] The framework within which an allegation of ineffective assistance of counsel is adjudicated in the context of an application for judicial review under the *IRPA* is well-established. First, as a prerequisite to having the issue considered by the reviewing Court, the applicants must establish that their former counsel has had a reasonable opportunity to respond to the allegations. Then, on the merits of the allegation, the applicants must establish that the conduct of their former counsel was negligent or incompetent (the performance component) and that this resulted in a miscarriage of justice (the prejudice component). See, among other cases, *Hamdan v Canada (Immigration, Refugees and Citizenship)*, 2017 FC 643 at paras 36-38; *Gombos v Canada (Citizenship and Immigration)*, 2017 FC 850 at para 17; *Satkunanathan v Canada (Citizenship and Immigration)*, 2020 FC 470 at paras 33-39; and *Nik v Canada (Citizenship and Immigration)*, 2022 FC 522 at paras 22-24.

[18] For the purpose of the present motion, the applicants have alerted their former counsel to their concerns in a preliminary way and have solicited responses from him. Those responses have been included in the motion record, as has their complaint against their former counsel to the Law Society of Ontario.

[19] With respect to the performance component, the applicants will have to discharge a two-fold burden. They will have to establish the facts on which they rely in impugning the conduct of their former counsel and they will have to establish that that conduct fell below the standard of reasonable professional assistance or judgment. See *R v GDB*, [2000] 1 SCR 520 at para 27.

[20] The applicants will be required to meet a high threshold to establish the performance component of an allegation of ineffective assistance. This is because there is a strong presumption that their former counsel's conduct fell within the wide range of professional assistance (*GDB* at para 27). The reviewing court will be careful to avoid second-guessing the tactical decisions of counsel; the wisdom of hindsight will have no place in the assessment (*ibid.*). Moreover, an expression of general dissatisfaction with counsel's conduct is insufficient; the allegation of negligence or incompetence must be specific and clearly supported by the evidence (*Shirwa v Canada (Minister of Employment and Immigration)*, [1994] 2 FC 51 (CA) at para 12).

[21] With respect to the prejudice component, the applicants will have to establish that the misconduct of their former counsel resulted in a miscarriage of justice. Miscarriages of justice may take many forms in the context of ineffective assistance of counsel (*GDB* at para 28). This

includes where former counsel's conduct has compromised the reliability of the result of the earlier proceeding and where former counsel's conduct has affected the fairness of the earlier proceeding (*ibid.*).

[22] In the present case, the applicants allege that the conduct of their former counsel calls into question the reliability of the negative PRRA decision. To succeed on this basis, they will have to demonstrate a reasonable probability that, but for the incompetence of their former counsel, the result would have been different (*Bisht v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 1178 at para 24). A "reasonable probability" falls somewhere between a mere possibility and a likelihood: see *Satkunanathan* at para 96, adopting the test set out in *R v Dunbar*, 2003 BCCA 667 at para 26, which in turn adopted the test set out in *R v Joanisse* (1995), 102 CCC (3d) 35 (Ont. C.A.) at 64; see also *Bi v Canada (Citizenship and Immigration)*, 2012 FC 293 at para 33 and *Corpuz Ledda v Canada (Public Safety and Emergency Preparedness)*, 2012 FC 811 at para 15.

[23] The respondent contends that the ineffective assistance of counsel ground does not meet the not frivolous or vexatious test because it is obvious that the applicants will not be able to satisfy either the performance or the prejudice components of the test. The Supreme Court of Canada has emphasized that, at this stage, the Court should conduct only a limited and preliminary assessment of the merits of the underlying application for leave and judicial review: see *Metropolitan Stores* at 127-28 and 130; and *RJR-MacDonald* at 337. On the basis of that assessment, I am satisfied that the allegation of ineffective assistance is neither frivolous nor vexatious. The applicants have therefore met the first part of the test.

(2) Irreparable Harm

[24] I am satisfied that removal of the applicants prior to the final determination of their 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 apparent strength of the underlying application for judicial review.

[25] If the applicants were to be removed to Mexico at this time, their 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.

[26] In the present case, I am satisfied that the ineffective assistance ground is clearly arguable. Even at this preliminary stage, the applicants make a strong argument with respect to both the performance and prejudice components of the test. This is a sufficient basis on which to find that the applicants would suffer irreparable harm if they were removed to Mexico before their application for leave and judicial review has been finally determined. This is because, if the applicants were to be removed at this time, they would lose the right to advance a clearly arguable ground challenging the negative PRRA decision. They 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 applicants were able to persuade the Court that the decision was made in breach of the requirements of procedural fairness (because of the ineffective assistance of former counsel), setting aside the PRRA decision and remitting the matter to another officer for redetermination would be neither meaningful nor effective relief if the applicants are already in Mexico. This is a circumstance that could not be remedied in any other way.

[27] 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 applicants were not required to establish – nor have I found – that their application for judicial review is likely to succeed. Rather, I have simply found that their application is sufficiently strong to give rise to a real risk of remedial injustice if they are 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.

[28] In seeking a stay of their removal, the applicants also contend that they face another form of irreparable harm – namely, harm at the hands of their agents of persecution. 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 form of irreparable harm they advance.

(3) Balance of Convenience

[29] I am also satisfied that the balance of convenience favours the applicants.

[30] In assessing the balance of convenience, in addition to the applicants' 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 applicants are subject to valid and enforceable removal orders. These orders were made pursuant to statutory and regulatory authority. They are therefore presumed to have been 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 also presumed that an action that suspends the effect of a removal 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 removal order would be suspended: see *Canadian Council for Refugees* at para 27.

[31] 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).

[32] In the present case, the only "inconvenience" to the respondent if the applicants are not removed now and their application for judicial review is subsequently dismissed is that their removal from Canada will have been delayed; it will not have been frustrated entirely.

[33] On the other hand, the "inconvenience" to the applicants of losing the right to a meaningful remedy is significant and, as I have determined above, irreparable. The interest in ensuring that the applicants retain the right to a meaningful and effective remedy is not theirs alone. It is shared by the public and by the administration of justice. This is a factor that also tips the balance in favour of a stay. In the particular circumstances of this case, it outweighs the public interest in the immediate enforcement of the removal orders.

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

IV. CONCLUSION

[35] 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 applicants to bear that risk. A stay of removal is the only way to ensure that the subject matter of the underlying litigation is

preserved so that effective relief will be available should the applicants be successful on their application for judicial review (cf. *Google Inc* at para 24). The countervailing considerations are insufficient to outweigh this fundamentally important consideration.

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

[37] Finally, the style of cause names the respondent as the Minister of Immigration, Refugees and Citizenship. Although that is how the respondent is now commonly known, its name under statute remains the Minister of Citizenship and Immigration: *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22, s 5(2) and *IRPA*, s 4(1). Accordingly, as part of this order, the style of cause is amended to name the respondent as the Minister of Citizenship and Immigration.

ORDER IN IMM-13524-22

THIS COURT ORDERS that

1. The motion for a stay of removal is granted.
2. The applicants shall not be removed from Canada until their application for leave and judicial review of the PRRA decision dated October 26, 2022, is finally determined.
3. The style of cause is amended to reflect the Minister of Citizenship and Immigration as the correct respondent.

"John Norris"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-13524-22
STYLE OF CAUSE:	JOSE ANTONIO SERNA MEDINA ET AL v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	HELD BY VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 20, 2023
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APPEARANCES:

Penny Yektaeian	FOR THE APPLICANTS
Sally Thomas	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Penny Yektaeian Barrister and Solicitor Toronto, Ontario	FOR THE APPLICANTS
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT