Federal Court  Cour fédérale

Date: 20240112

Docket: IMM-478-24

Citation: 2024 FC 56

Ottawa, Ontario, January 12, 2024

PRESENT: The Honourable Mr. Justice Ahmed

BETWEEN:

FELIPE DE JESUS ZAVALA MARTINEZ
JUANA VIANEY GARCIA MARTINEZ
JOCELINE GUADALUPE ZAVALA GONZALEZ (MINOR)
FELIPE DE JESUS ZAVALA GARCIA (MINOR)
ALEXIS GAEL ZAVALA GARCIA (MINOR)
LIA YUSELI ZAVALA GARCIA (MINOR)

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
AND THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

Respondents

ORDER AND REASONS

I. Overview

[1] The Applicants bring a motion for a stay of their removal from Canada, scheduled to take place on January 14, 2024.

[2] The Applicants request that this Court stay their removal until the determination of an underlying application for leave and judicial review of a negative deferral of removal request rendered by an officer (the "Officer") of Canada Border Services Agency ("CBSA").

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

II. **Facts and Underlying Decisions**

[4] The Applicants, Felipe de Jesus Zavala Martinez and Juana Vianey Garcia Martinez, as well as their children (the "Minor Applicants"), are citizens of Mexico.

[5] On December 4, 2021, the Applicants arrived in Canada and made a claim for refugee protection. On September 13, 2022, the claim before the Refugee Protection Division ("RPD") was refused. In a decision dated March 6, 2023, the Refugee Appeal Division ("RAD") denied their appeal and upheld the RPD's refusal.

[6] On January 3, 2024, the Applicants met with the CBSA and received their direction to report for removal, scheduled for January 14, 2024. The Applicants requested they be given until June 2024 to leave Canada so that the Minor Applicants could complete the school year.

[7] In a decision dated January 8, 2024, the Officer refused the Applicants' deferral request. The Officer found that there was insufficient evidence provided to show that education would be refused to the Minor Applicants, the Minor Applicants being familiar with the language and

being able to continue their education in Mexico with the support of their parents. The Officer further found that the Applicants had been made clear in removal orders on January 7, 2022, that they would have to depart Canada in the event of a negative RPD process, thus providing the Applicants with ample opportunity to prepare for removal.

[8] The Officer also acknowledged evidence of the Applicants having previously requested their removal be postponed in November of 2023 due to the Minor Applicants' schooling. The officer in that instance obliged so that the family could travel to Mexico in 2024. Acknowledging this evidence and for the reasons above, the Officer found there was insufficient evidence demonstrating that the Applicants would suffer underserved and disproportionate hardship if returned to Mexico.

III. **Analysis**

[9] 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.

[10] 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*

[11] 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*").

[12] 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.*

[13] On this first prong of the tri-partite test, the Applicants submit that the underlying application for leave and judicial review raises the serious issue of the Officer failing to consider the evidence adduced by the Applicants and failing to consider evidence of the Minor Applicants facing undeserved and disproportionate hardship.

[14] The Respondents submit that there is no serious issue in the Applicants' underlying application for leave and judicial review. The Respondents maintain that the Officer reasonably considered the Minor Applicants' short-term interests with reference to the evidence submitted

by the Applicants and with reference to the fact the Applicants had adequate time to prepare for removal, including due to the Applicants having a previously postponed removal so the Applicants could travel to Mexico in January 2024.

[15] Having reviewed the materials, I agree with the Applicants. There is a myriad of jurisprudence establishing that failing to consider the short-term best interests of the children may raise a serious issue, including finishing a school year (see e.g. *Galusic v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 223 at para 27; *Iheonye v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 375 ("*Iheonye*") at para 19; *Toney v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1018 at para 50). The Applicants have established the first prong of the *Toth* test.

B. *Irreparable Harm*

[16] 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 (CA)*, [1991] FCJ No 984, [1992] 1 FC 142 (FCA)).

[17] The Applicants submit that the Minor Applicants will be irreparably harmed if they are not permitted to complete the school year in Canada.

[18] The Respondents submit that the Applicants have not established that the Minor Applicants face irreparable harm upon removal, as disruption of a child's school year alone does not amount to irreparable harm, nor does the fact children may have to pursue their education in a different language as a result of removal.

[19] I agree with the Respondents. I do not find that the Applicants have led sufficiently particularized and non-speculative evidence that the Minor Applicants would face irreparable harm upon return to Mexico (Glooscap Heritage Society v Canada (National Revenue), 2012 FCA 255 at para 31). In my view, the Applicants have failed to tie the objective evidence that they furnish to the personal circumstances of the Minor Applicants. For example, even accepting that "school mobility was independently associated with increased risk of psychotic symptoms in late adolescence," the Applicants do not demonstrate how their children in particular will be subject to this risk. Evidence establishing that school mobility has been "implicated as a risk factor for a variety of negative developmental outcomes" similarly fails to be connected to how the Minor Applicants themselves would be subject to these risks. I further agree with the Respondents that this evidence, in fact, establishes that removal of the Minor Applicants during the school year is here as a consequence of removal, rather than irreparable harm (*Rizvi v Canada (Citizenship and Immigration)*, 2009 FC 463 at para 40, citing *Selliah v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, 132 ACWS (3d) 547 [CanLII case being *Ghanaseharan v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261 (CanLII)] at paras 12-14). I thus find the Applicants' evidence has not established irreparable harm.

[20] Furthermore, accepting this evidence and the other documentary evidence tendered by the Applicants would also mean accepting that no child could be removed from Canada if it meant changing schools during the school year. As my colleague Justice Grammond held, albeit in the context of determining whether there was a serious issue under the first prong of the *Toth* test, "*Iheonye* and similar cases do not stand for the proposition that children can never be removed during the school year. Rather, it is mainly when a school year is about to end that removal may be deferred on this ground" (*Quezada Salas v Canada (Citizenship and Immigration)*, 2022 FC 1801 at para 37). The second prong of the *Toth* test is not established.

C. *Balance of Convenience*

[21] 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.

[22] The Applicants submit that the balance of convenience lies in their favour, having no history of criminality, not being flight risks, and requesting a stay for a short period of time. The Applicants further submit there is a public interest in ensuring the legality of the Officer's decision is reviewed.

[23] The Respondents submit that the inconvenience the Applicants may experience as a result of removal from Canada does not outweigh the public interest the Respondents seek to maintain in executing removals expeditiously under 48(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*").

[24] Having failed to establish that the Minor Applicants face irreparable harm is dispositive of this matter. Nonetheless, the Minister's interest in enforcing removal orders expeditiously under section 48(2) of the *IRPA* outweighs the Applicants' interests, especially in light of stays of removal being interim relief and the fact the Applicants have already had a removal deferred with the expectation they would leave Canada in January 2024.

[25] Ultimately, the Applicants have not met the tri-partite test required for a stay of removal. This motion is therefore dismissed.

ORDER in IMM-478-24

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

"Shirzad A."

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-478-24
STYLE OF CAUSE:	FELIPE DE JESUS ZAVALA MARTINEZ, JUANA VIANEY GARCIA MARTINEZ, JOCELINE GUADALUPE ZAVALA GONZALEZ (MINOR), FELIPE DE JESUS ZAVALA GARCIA (MINOR), ALEXIS GAEL ZAVALA GARCIA (MINOR), AND LIA YUSELI ZAVALA GARCIA (MINOR) v THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	BY VIDEOCONFERENCE
DATE OF HEARING:	JANUARY 12, 2024
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