Federal Court  Cour fédérale

Date: 20230106

Docket: IMM-13593-22

Ottawa, Ontario, January 6, 2023

PRESENT: Madam Justice McDonald

BETWEEN:

CHERRY CHRISTALINE MCDOWALD
DESTANY CHRISTALINE CHANDLER
DERRY ETHAN J MCDOWALD
DARREN EVAN J MCDOWALD

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER

UPON MOTION on behalf of the Applicants for an Order staying their removal to Barbados scheduled for Tuesday, January 10, 2023, pending determination of their application for leave and judicial review of the January 6, 2023 decision of Canada Border Services Agency [CBSA] refusing to defer their removal [Decision];

AND UPON reading the material filed with the Court and upon hearing counsel for the parties by teleconference on Friday, January 6, 2023;

AND UPON considering the tri-partite test for a stay articulated by the Federal Court of Appeal in *Toth v Canada (MEI)* (1988) 86 NR 302 (FCA) [*Toth*], namely: (1) there is a serious issue to be tried; (2) the applicant would suffer irreparable harm if the stay is not granted; and (3) that the balance of convenience favours granting the stay;

AND UPON noting the *Toth* test is conjunctive, meaning an applicant must satisfy all three elements of the test in order to be entitled to relief (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112 at para 14);

AND UPON noting a higher threshold to establish a serious issue applies where an applicant is seeking review of a refusal to defer removal (W*ang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148 at para 11; *Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paras 66-67 [*Baron*]);

AND UPON noting that, in determining the "serious issue" prong of the tri-partite test for a stay of removal, the Court "should take a hard look at the issues raised in the underlying application" (*Baron* at para 67);

AND UPON noting that the test for irreparable harm is strict, and it "implies a serious likelihood of jeopardy to the applicant's life, security or safety. It requires clear, convincing and non-speculative evidence going beyond the inherent consequences of deportation" (*Ngomnkap v Canada (Citizenship and Immigration)*, 2021 FC 899 at para 18);

AND UPON reserving a decision;

AND UPON being satisfied that the Applicants have established a serious issue and irreparable harm, this Motion is granted for the following reasons:

[1] The Applicants are a family, comprised of a 50-year-old mother, her 18-year-old daughter, and her 14-year-old twin sons. The Applicants are citizens of Barbados. The mother and daughter arrived in Canada in 2018 and the mother made a refugee claim. This refugee claim was withdrawn, as it was based on an untrue narrative. The twins arrived in Canada in 2019. The Applicants filed an application for permanent residence based on humanitarian and compassionate [H&C] grounds in May 2022.

[2] On November 22, 2022, CBSA served the Applicants with a Direction to Report for removal from Canada on January 10, 2023.

[3] On December 14, 2022, the Applicants filed a request for a deferral of their removal on a number of grounds including the pending H&C application; a Pre-Removal Risk Assessment for the daughter based on risk because of her sexual orientation; and the mental and physical health conditions of the mother and daughter. They also sought a deferral until the 14-year-old twins, both of whom have learning disabilities, complete their current school year.

[4] Although the Applicants raise a number of issues with the CBSA Officer's Decision, I am granting this Motion based upon the CBSA Officer's treatment of the best interests of the children [BIOC] considerations as addressed below. It is therefore not necessary for me to consider the other issues raised.

Serious Issue

[5] In determining whether a serious issue exists in a refusal to defer, the Court must consider that the CBSA Officer's discretion to defer the Applicants removal is limited, and that the standard of review of the Decision is reasonableness, meaning the Applicants must put forward quite a strong case (*Baron* at para 67).

[6] Despite the limited discretion, the CBSA Officer was required to consider the short-term BIOC (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61). The Federal Court of Appeal in *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 [*Lewis*] held that short-term BIOC factors need to be considered (paras 82-83), including the need for a child to finish a school year during the period of the requested deferral.

[7] The CBSA Officer misstated the facts and does not appear to have considered the possibility of a deferral to the end of the year when he states "the end of the school year is far away and the children are in lower grades". It was an error for the Officer to say the children are in lower grades – they are 14 years old and in Grade 8.

[8] The Officer also does not address the evidence that there would be a significant disruption to the twins' education if they were required to leave Canada part way through the academic year, considering their learning disabilities and current education accommodations they receive. A letter from the treating physician for one of the twins' confirms he requires "substantial modifications and educational support at school." Further evidence included a

psychological assessment done by the school board for the same twin and an individual education plan for the other, which showed modifications or accommodations were required for every class. These factors are not addressed by the CBSA Officer.

[9] Further, one of the twins is currently undergoing a medical assessment relating to a further diagnosis and has a consultation scheduled before the end of the school year. Allowing him to attend this medical consultation is a compelling exigent circumstance.

[10] I am satisfied the Applicants have raised a serious issue on the BIOC.

Irreparable Harm

[11] The Applicants rely on *Neto v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1301 [*Neto*] for the proposition that interruption of a child's school year may constitute irreparable harm, depending on the circumstances. In *Neto*, Justice Pentney held at paragraph 29 "the special supports enabling the youngest child to succeed in school, [were] a relevant consideration" and that irreparable harm was established.

[12] Further, in *Cvetkovic v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1303, Justice Pentney held at paragraph 30:

> …the impact on a child's life of the likely loss of a school year cannot be discounted. The harm cannot be undone and it is reasonable to infer that an interruption of specialized support for ongoing learning needs would have downstream effects on the educational and social success of the children.

[13] In the deferral application materials, the Applicants provided documents which confirmed the twins had been diagnosed with learning disabilities. The removal of the children during the school year has been recognized as irreparable harm and I find that the potential harm here is heightened considering the documented learning challenges faced by these children.

[14] I am satisfied the twins would face irreparable harm due to the disruption of their education if they were removed from Canada before the end of the school year.

[15] I am satisfied the Applicants have met the irreparable harm part of the test.

Balance of Convenience

[16] As the Applicants have met the first two branches of the *Toth* test, the balance of convenience favours the Applicants.

THIS COURT ORDERS that this Motion is granted, and the Applicants removal from Canada will be stayed until June 30, 2023 to allow the children to finish the current school year.

"Ann Marie McDonald"
Judge