Federal Court  Cour fédérale

Date: 20140209

Docket: IMM-757-14

Ottawa, Ontario, February 9, 2014

PRESENT: The Honourable Madam Justice Gleason

BETWEEN:

ADEL HABIB KHALAF

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER

UPON motion of the applicant for an order granting a stay of his removal to Kuwait currently scheduled for February 10, 2014;

AND UPON reading the materials filed and hearing submissions of counsel for the parties via teleconference on February 9, 2014;

AND UPON having regard to the criteria governing the grant of a stay as set forth in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311; *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA); and *Baron v Canada (Minister of*

Public Safety and Emergency Preparedness), 2009 FCA 81 [*Baron*], which require that an applicant establish that the pending application for judicial review raises a serious issue, that the applicant would suffer irreparable harm if the stay is not granted and that the balance of convenience favours granting the stay;

AND UPON determining that the applicant has established the three criteria in this case for the following reasons:

This application for a stay arises in the context of an application to judicially review the February 7, 2014 decision of a CBSA Enforcement Officer, in which the Officer refused to defer the applicant's removal to Kuwait pending the determination of the applicant's outstanding application for Humanitarian and Compassionate [H&C] consideration. Although the H&C application was made in a timely fashion, it is unlikely to be decided for several months.

In light of the context in which this stay application arises, a higher threshold applies to the assessment of whether the pending judicial review application raises a serious issue and requires that the applicant demonstrate that the application raises "quite a strong case" (*Baron,* at paras 66 and 67; *Wang v Canada (Minister of Citizenship and Immigration*), 2001 FCT 148, [2001] FCJ No 295 at para 11).

I find that the applicant has met this higher threshold and has established that there is a strong argument that the Officer committed a reviewable error in determining that the applicant would likely be able to benefit from the medical care he needs if returned to Kuwait. In this

regard, the evidence both before me and before the Officer included certificates from two physicians who treated the applicant. They establish that the applicant suffers from severe ulcerative colitis and now requires regular therapy with Remicade. His physician in Ottawa indicates that if he misses a dose, the applicant will require hospitalization, a colectomy and ileostomy (i.e. resection of his intestine and construction of an opening for waste to exit from his abdominal wall). The applicant's next dose of Remicade is scheduled to be administered intravenously on February 19, 2014, and he is scheduled for a colonoscopy at the Ottawa Hospital on February 11, 2014. His former treating physician in Kuwait indicates that he was unable to administer Remicade to the applicant when he was treating him before the applicant left Kuwait because the applicant is a Bidun – or stateless person- and Remicade is dispensed in Kuwait by the National Health Service only to Kuwaiti nationals.

The objective documentary evidence before the Officer and also before me indicates that Kuwait discriminates in the provision of medical services between nationals and stateless individuals (of whom there are many in Kuwait). The documentation notes that medical insurance may be purchased by stateless individuals, but does not state to what extent it covers the cost of drugs, like Remicade. The report from Human Rights Watch, "Prisoners of the Past - Kuwaiti Bidun and the Burdens of Statelessness" documents several instances where the medical insurance available to the Bidun was insufficient to fund required treatments or drugs. In addition, the applicant is currently unable to work due to his disability and is in receipt of benefits under the Ontario Disability Support Program. He thus would be unable to work to acquire funds to purchase health insurance if returned to Kuwait.

In the face of this evidence, the Officer concluded that the applicant would be able to obtain Remicade in Kuwait. In my view, there is a strong argument that this conclusion is unreasonable, as it contradicts the documentary evidence before the Officer. Thus, I find that the applicant has established the presence of a serious issue.

Contrary to what the respondent asserts, I disagree that the very same issues that were considered by the Officer were considered by the Refugee Protection Division of the Immigration and Refugee Board [the RPD]. The RPD did not have before it the evidence from the applicant's Ottawa physician regarding his current medical status.

I also find that the applicant has established that he will suffer irreparable harm if returned to Kuwait. The evidence shows that he requires Remicade, failing which he will need surgery to resect his bowel. This surgery would leave him with an ileostomy. The only evidence before me regarding the availability of Remicade for the applicant in Kuwait is from the applicant's Kuwaiti physician, who stated that the drug is not available to the applicant. There is likewise no evidence that the applicant would be able to obtain the surgery he would need in Kuwait if he does not continue with his Remicade regimen, and without such surgery his life would be at risk.

I note that the respondent did not refer this file to one of its medical specialists for advice prior to ruling on the applicant's deferral request and did not inquire as to the availability in Kuwait of the required Remicade treatment for the applicant. This case is therefore similar to *Valdez v Canada (Minister of Citizenship and Immigration)*, 2013 FC 697, where in the face of a

lack of detailed inquires – and a risk of death from lack of medical treatment – my colleague, Justice Roy, stayed the removal of the applicant to his country of origin. In somewhat similar fashion, in *Arrechavala de Roman v Canada (MPSEP)*, [2013] FCJ No. 526 and *Ramada v Canada (Solicitor General)*, 2005 FC 1112, my colleagues, Justices Shore and O'Reilly, set aside negative deferral decisions where required medical treatment, essential to control life-threatening conditions, was not available in the applicants' countries of origin.

In the circumstances, the balance of convenience follows the determinations on serious issue and irreparable harm as the interests of the applicant in his physical integrity and life outweigh those of the respondent in ensuring that those who have no right to remain in Canada are returned expeditiously to their countries of origin.

Finally, I do not find that the applicant delayed in bringing this motion for a stay as he was incarcerated immediately after he was advised of his removal date and was released only on February 5th. He retained counsel the next day. The deferral application was made in less than 24 hours, and the stay application was made even before the Officer rendered his negative deferral decision. Accordingly, this is not a case where the Court should decline to hear the motion due to delay in bringing it.

The requested stay will therefore be granted.

THIS COURT ORDERS that:

1. The applicant's motion for a stay of his removal to Kuwait is granted;

2. The removal of the applicant to Kuwait is stayed until the final determination of his pending Application for Leave and, if leave is granted, is further stayed until the final determination of his Application for Judicial Review in respect of the decision of the Enforcement Officer, dated February 7, 2014; and

3. There is no order as to costs.

"Mary J.L. Gleason"
Judge