

Federal Court



Cour fédérale

Date: 20231119

Docket: IMM-14631-23

Vancouver, British Columbia, November 19, 2023

PRESENT: Madam Justice Sadrehashemi

BETWEEN:

**MEHMET AKTAS AND
NAJIBA ALIYEVA AKTASH**

Applicants

And

**THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS**

Respondent

ORDER

[1] The Applicants, Mr. Aktas and Ms. Aktash, are married. Mr. Aktas is scheduled to be removed from Canada later today to Turkey. Ms. Aktash is scheduled to be removed next week on November 22, 2023 to Azerbaijan. The Canada Border Services Agency [CBSA] arranged a medical escort for Ms. Aktash's removal because of mental health concerns.

[2] The Applicants made a joint request to an enforcement officer at CBSA to defer their removal. Their request was refused on November 17, 2023. The Applicants filed an application for leave and judicial review challenging the Officer's denial of their deferral request, and also

asked the Court, in this motion, to stay their removal pending the disposition of their application for leave and judicial review of the Officer's decision.

[3] I heard this motion for a stay of the Applicants' removal today, November 19, 2023, by teleconference.

[4] The Applicants came to Canada in 2017. They filed refugee claims. Their claims were refused. They also were refused protection on a Pre-Removal Risk Assessment in January 2023. The Applicants filed an application for permanent residence on humanitarian and compassionate grounds ("H & C") in November 2022 and it remains pending. The Applicants have attempted to ask for urgent processing of their H & C but have not heard back from IRCC on their request. The current average processing time for a final decision on an H & C application is approximately 19 months.

[5] The main issues raised on the Applicants' request for the deferral were the following: the uncertain length of separation because they are being removed to different countries and do not share citizenship; the impact of this separation on the ability of the couple to conceive a child as they had planned; mental health concerns, particularly of Ms. Aktash, who has a history of suicide ideation; and the imminent determination of their H & C application given the length of time it has been pending.

[6] A stay of removal can only be granted where all three parts of the well-known test in *Toth v Canada (Minister of Employment and Immigration)*, [1988] FCJ No 587 (FCA) are met:

- (i) a serious issue exists to be tried;
- (ii) Applicants would suffer irreparable harm if removal was not stayed; and

(iii) the balance of convenience favours staying removal.

[7] Where the underlying application for judicial review is a deferral request, an elevated threshold is applied to the question of whether there is a serious issue because the relief being sought on the stay motion is the same as what has been sought in the underlying decision being challenged. This standard has been described as “likelihood of success” or “quite a strong case” (*Wang v Canada (Minister of Citizenship and Immigration)*, [2001] 3 FC 682 at para 11; *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 67 [Baron]);

[8] An enforcement officer’s discretion to defer removal under subsection 48(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 is limited and focused on short-term issues (*Baron* at paras 49, 51). The decision refusing a deferral request is reviewed by this Court on a reasonableness standard.

[9] The Applicants have raised a number of concerns with the Officer’s decision. I am satisfied that the Applicants have established on the elevated standard that there is a serious issue with respect to the Officer’s evaluation of the impact of the length of separation of the Applicants given their different countries of removal and citizenship. Because this is an interlocutory matter and the short time to consider these issues, I will not engage in an exhaustive analysis of this point.

[10] The second branch of the test, irreparable harm, has been defined as harm which “either cannot be quantified in monetary terms or which cannot be cured, usually because one party cannot collect damages from the other” (*RJR-MacDonald* at 341; see also *Canada (Attorney General) v Oshkosh Defense Canada Inc.*, 2018 FCA 102 at para 24; *Janssen Inc. v Abbvie*

Corporation, 2014 FCA 112 at para 24). Irreparable harm is about the nature of the harm and not its scope or reach; as explained by Justice Gascon at paragraph 49 in *Letnes v Canada (Attorney General)*, 2020 FC 636: “The irreparability of the harm is not measured by the pound.”

[11] I am satisfied based on the combination of a number of factors that the irreparable harm branch of the test has been established in this case, including: the mental health evidence presented, particularly for Ms. Aktash; the uncertain length of separation of this couple because of their different citizenships; and that the couple is currently trying to conceive and seeking fertility treatment.

[12] The Respondent raised at the hearing a concern about “clean hands” and ask that I do not exercise my equitable jurisdiction because Mr. Aktas did not attend removal on October 11, 2023. I note that Mr. Aktas subsequently attended a removal interview on November 8, 2023. There is no other information relating to non-compliance or attempts to evade the Canadian authorities. I have a very little information about non-attendance on October 11, 2023, other than a notation in a list of events in the Officer’s decision; it is not described with any detail in the Officer’s decision. With the limited information I have, and given the irreparable harm and the serious issue identified above, I am not prepared to disentitle Mr. Aktas from the relief he is seeking on this basis (*Erhire v. Canada (Public Safety and Emergency Preparedness)*, 2021 FC 941).

[13] While the Respondent has a duty to enforce the removal order as soon as possible, given the serious issue identified in the underlying refusal and the irreparable harm explained above, the balance of convenience favours staying the Applicants’ removal until the underlying application for leave and judicial review is determined.

THIS COURT ORDERS that:

1. The motion for a stay of the removal of the Applicants is granted;
2. Mr. Aktas' removal scheduled for November 18, 2023 to Turkey is stayed pending the final disposition of the Applicants' leave and judicial review in relation to the November 17, 2023 decision to refuse to defer their removal; and
3. Ms. Aktash's removal scheduled for November 22, 2023 to Azerbaijan is stayed pending the final disposition of the Applicants' leave and judicial review in relation to the November 17, 2023 decision to refuse to defer their removal.

"Lobat Sadrehashemi"

Judge