Federal Court  Cour fédérale

Date: 20170315

Docket: IMM-5164-16

Citation: 2017 FC 281

Montréal, Quebec, March 15, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

JEFFREY BRIGHT

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

ORDER AND REASONS

[1] Mr. Jeffrey Bright seeks the intervention of this Court in order to prevent his departure from Canada scheduled for March 17, 2017. He is to leave for Ghana.

[2] It is less than clear on what basis the interim order is sought. The affidavit of the enforcement officer confirms that when she met with the applicant on March 2, "(t)he applicant

did not ask me to defer his removal to wait for the outcome of his application for judicial review against the refusal of his refugee claim."

[3] As was noted less than a year ago by my colleague, Justice Alan Diner, in *Anokwuru-Nkemka v Canada (Citizenship and Immigration)*, 2016 FC 337, "there is a deficiency in the underlying Application for Judicial Review, filed March 16, 2016, which challenges the "direction for removal" and "Notice for Removal" (both are referenced in the said Application). This Court has held that these are not reviewable decisions (see *Bergman v. Canada (MPSEP)*, 2010 FC 1129 at paras 16-18, which provides a full summation of the law on this procedural point)." (para 4).

[4] Here, it appears that the stay is sought while a judicial review application has been filed against a decision of the Refugee Protection Division pursuant to sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] which dismissed the application made by Mr. Bright. At best, we have on file a notice requesting that the applicant present himself on March 3 with the ticket he will have purchased for a departure date of March 17, 2017. I cannot do better than to reproduce para 18 of *Bergman*:

> 18 This Court has confirmed that a Direction to Report is nothing more than informational communication, the sole purpose of which is to explain when and where the removal order against an applicant is to be executed. The issuance of a Direction to Report, in and of itself, does not constitute a "decision" or order falling within the ambit of subsection 18.1(2) of the Federal Courts Act, 1985, c. F-7, and cannot be the subject of a judicial review application. This Court has held that where the underlying application for judicial review challenges a Direction to Report, the stay can be dismissed on this preliminary basis. Since the Direction to Report is not a reviewable decision, there is no valid underlying application to support the stay motion (*Daniel v. Canada (Minister*

> *of Citizenship and Immigration)*, 2007 FC 392, 156 A.C.W.S. (3d) 1144 at para. 12; *Tran v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 394, 138 A.C.W.S. (3d) 343 at para. 2; *Jarada v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 14, 150 A.C.W.S. (3d) 887).

It is in my estimation important to establish the legal framework under which we are operating. Here, counsel for the applicant, candidly, acknowledged that she wished to apply for a stay directly to this Court as an administrative stay appears to be considered as less than likely. As we shall see, I am less than convinced that the legal standard to be met before this Court is less stringent than that before administrative instances.

[5] Nevertheless, I have chosen to examine the contents of the motion.

[6] As is well known, in order to be successful, an applicant must satisfy the tripartite test of *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 and *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302: The applicant must satisfy the motions judge that:

1. There is a serious issue to be determined in the underlying proceedings;
2. Irreparable harm will ensue if the motion is not granted;
3. The balance of convenience favours the applicant.

[7] Having reviewed the record carefully and heard the submissions of counsel, I have no doubt that the “serious issue” branch of the test has not been satisfied, whether it suffices that the

issue is not frivolous or vexatious, or that there be a likelihood of success (*Wang v Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FC 682).

[8] In the case at hand, counsel for the applicant chose not to submit to the Court the decision of the Refugee Protection Division which is the subject of an application for leave and judicial review. The examination of that decision is essential as it is the starting point of the assessment of the serious issue to be determined. The serious issue to be determined is not whether or not the applicant ought to be returned to his country of origin given submissions made by counsel, but rather whether the underlying decision subject to a judicial review raises an issue such that the removal ought to be suspended while the matter is examined before our Court. Not only did counsel decide not to reproduce the submissions in support of the leave application with respect to the Refugee Protection Division decision, but he did not reproduce the negative decision. This is odd. Instead of reproducing the decision, the applicant chose to reproduce 109 pages of the evidence presented to the Refugee Protection Division. It was as if there was a way to operate with a clean slate in a stay application. Such is evidently not the case.

[9] Counsel for the respondent vociferously complained about this practice and suggested that the application ought to be dismissed on that basis. Indeed, there is caselaw supporting that contention. This is, in my view, a practice that is unacceptable. An applicant who wishes to have access to the Court has to provide the material necessary to dispose of the issue submitted to the Court. I fail to see how an assessment of the seriousness of the issue to be determined can be accomplished if the decision is not made available and discussed. Here, this applicant seeks injunctive relief without providing the most essential element in the submissions to be made.

However, dismissing the motion on that basis alone would negate what may be the last opportunity for an applicant to obtain relief before leaving for his country of origin. In the circumstances of this case, it is preferable to dispose of the issue on its merits. In fact, the Crown (respondent) supplied a copy of the decision and an extensive analysis of it, for which I am grateful. I wish to add that counsel who appeared before the Court, but did not produce the motion record, acquitted herself valiantly in spite of a rather difficult case.

[10] The applicant had to seek to address the large volume of contradictions and apparently false statements catalogued in the Refugee Protection Division decision. That is the decision challenged by the applicant and about which he must claim a deficiency such that it ought to be quashed. Thus, the serious issue involves here explaining how a decision based on facts is unreasonable. The Refugee Protection Division decision cannot be discounted. It had to be addressed, and addressed squarely. That was not done in the memorandum of fact and law nor at the hearing before this Court. In fact, the decision was dealt with as if it did not really matter.

[11] That is surprising because of the very strong findings made by the Refugee Protection Division, reaching the conclusion that there is no credible basis for that claim (s. 107(2)) which prevents an appeal to the Refugee Appeal Division (s. 110(2)(c) of IRPA). Furthermore, the RPD analyzed carefully the various contradictions and omissions, concluding that not only it is not known who is the real Mr. Bright (para 90 of the RPD decision) but also that “he did not establish he was gay, that he ever had a gay partner, that he is a pastor, or that he resided in Ghana in 2015 when the alleged events that made him flee his country occurred” (para 20 of the RPD decision).

[12] Instead of addressing the findings made by the RPD, the applicant was satisfied by declaring omissions and contradictions as “small”, and used to set aside the main evidence. What is the main evidence alluded to remains largely unknown. With respect, the omissions and contradictions are anything but small. They deserve to be rebutted, at least enough to establish a likelihood of success on judicial review, specifically to show that there is a serious issue to be tried. There was not even an attempt made, only generalities. Not only was the decision left out of the material that should have been included in the motion’s record, but it was largely ignored in the submissions.

[13] The decision of the Refugee Protection Division is unassailable on this record. The difficulty encountered by this applicant is that not even the identity of the applicant has been ascertained. Page after page, over 126 paragraphs, the Refugee Protection Division examines the evidence brought forward by the applicant and comes to the conclusion that the identity of the applicant has not been established. The conflicting statements and contradictory information were not with respect to peripheral issues, but rather went to the heart of the matter. The submissions on this motion never adduced adequately the large number of contradictions and the various versions of events offered by the applicant.

[14] Counsel for the respondent made a commendable job of exposing various contradictions in her Memorandum of fact and law. It was a persuasive case that was put forward. That was never answered by the applicant whose burden was not discharged. In my estimation, there was ample evidence that this applicant made various statements which cannot be reconciled and which left his identity impossible to assess. In effect, the applicant did not satisfy the most basic

element of a claim for protection: who are you? It is therefore not surprising that the Refugee Protection Division made a finding pursuant to section 107(2) or IRPA, which reads:

107 (2) If the Refugee Protection Division is of the opinion, in rejecting a claim, that there was no credible or trustworthy evidence on which it could have made a favourable decision, it shall state in its reasons for the decision that there is no credible basis for the claim**.**	**107(2)** Si elle estime, en cas de rejet, qu'il n'a été présenté aucun élément de preuve crédible ou digne de foi sur lequel elle aurait pu fonder une décision favorable, la section doit faire état dans sa décision de l'absence de minimum de fondement de la demande.

[15] I would therefore dismiss the motion for a stay as there is no serious issue to consider. It is worth repeating that the applicant must satisfy the Court that there is a serious issue to determine in the underlying proceedings. Nothing of the sort is present in this case. It is not necessary to even consider the other two branches of the test.

JUDGMENT

THIS COURT'S JUDGMENT is that the motion for a stay concerning the departure of the applicant scheduled for March 17, 2017 is dismissed.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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