Federal Court Cour fédérale

Date: 20180707

Docket: IMM-3073-18

Citation: 2018 FC 703

[ENGLISH TRANSLATION REVISED BY AUTHOR]

Ottawa, Ontario, July 7, 2018

PRESENT: The Honourable Mr. Justice Grammond

BETWEEN:

MAMADOU KONATÉ

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

[1] The applicant, Mamadou Konaté, filed a motion to stay his removal from Canada scheduled for July 9, 2018. The motion was heard yesterday via conference call. Here are my reasons for granting the motion.

I. Underlying Facts and Decision Challenged

[2] Mr. Konaté is a citizen of Côte d'Ivoire. He entered Canada on February 1, 2016, and claimed refugee protection. He states that in 2002 and 2003, he belonged to the Patriotic Movement of Côte d'Ivoire, an armed group that fought against then-president Laurent Gbagbo. In 2003, he deserted this movement. However, he was reportedly captured and imprisoned in 2004 and 2005 for desertion. Although the record before me is rather sparse in this respect, he appears to have been beaten, subjected to ill-treatment and even tortured while in detention. Following a regime change in 2010-2011, it appears that members of the Patriotic Movement of Côte d'Ivoire are now part of the government and the armed forces. Mr. Konaté is therefore afraid of reprisals if he returns to Côte d'Ivoire.

[3] However, since the Patriotic Movement of Côte d'Ivoire was a group that advocated the forcible overthrow of a foreign government, the processing of Mr. Konaté's claim for asylum was suspended. For the same reason, on May 29, 2017, the Immigration Division of the Immigration and Refugee Board found him inadmissible to Canada pursuant to paragraphs 34(1)(b) and 34(1)(f) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. On February 5, 2018, my colleague Justice Luc Martineau dismissed the application for judicial review of this decision, ruling that it was reasonable *(Konaté v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 129).

[4] Mr. Konaté then applied for a pre-removal risk assessment [PRRA], based on the fear of persecution described above. This application was denied in a decision handed to him on June

14, 2018. Mr. Konaté applied to this Court for judicial review of this decision under a separate file number (No IMM- 3019 -18).

[5] Mr. Konaté asked the enforcement officer (acting under section 48 of the Act) to postpone his removal, this time citing post-traumatic symptoms and suicidal thoughts that would result from his deportation to Côte d'Ivoire. This request was denied.

[6] Mr. Konaté filed an application for leave and judicial review of the enforcement officer's decision, as well as this motion to stay the removal order.

II. Analysis

[7] The Act does not require a judicial authorization to remove a foreign national from Canada. In that sense, the stay of execution of a removal order is an exceptional remedy because it interferes with the normal administrative process.

[8] The legislative authority for the stay of removal is set out in section 18.2 of the *Federal Courts Act*, RSC, 1985, c F-7, which provides that this Court may make any interim orders pending the final disposition of an application for judicial review. In granting such relief, we apply the same test as for interlocutory injunctions. The Supreme Court of Canada recently restated the test as follows:

> At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it

> will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.
>
> (*R v Canadian Broadcasting Corp*, 2018 SCC 5, at paragraph 12, references omitted)

[9] This three-part test is well known. It was previously stated in earlier Supreme Court decisions (*Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110, *RJR-MacDonald Inc v Canada (Attorney General)* [1994] 1 SCR 311 [RJR]). It was also applied in the context of immigration in *Toth v Canada (Minister of Employment and Immigration)*, 1988 CanLII 1420 (FCA). Needless to say, the application of this test is eminently contextual and dependent on the facts.

A. *Serious Issue to be Tried*

[10] In *RJR*, the Supreme Court declared that the threshold of the test for demonstrating a "serious question to be tried" is relatively low (*RJR*, at page 337). However, the Supreme Court also stated that a more stringent test must be applied when the interim relief which is sought has the practical effect of deciding the underlying action (*RJR*, at pages 338 to 339). This is the case when an application for judicial review is filed against an enforcement officer's decision not to postpone the removal. In this context, a motion for a stay of removal gives the applicant what he is asking for in the original application. For this reason, the Federal Court of Appeal stated that the applicant must put forward "quite a strong case" (*Baron v Canada (Public Safety and Emergency Preparedness)*, 2009 FCA 81, at paragraphs 66 to 67 [*Baron*]), bearing in mind that the standard of review applicable to the merits of a case is that of reasonableness.

[11] Given that the application for administrative stay was based on the risk that Mr. Konaté may try to end his life and that I am analyzing this issue in terms of irreparable harm, I will simply say that my findings on that issue show that there is a serious question to be tried. As I have already pointed out in other cases, there is often a significant overlap between the first and second prongs of the *RJR* test (*Kanumbi v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 336, at paragraph 23; *Farkas v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 658, at paragraph 17). This is the case here.

B. *Irreparable Harm*

[12] Mr. Konaté argues that removal to Côte d'Ivoire exposes him to irreparable harm, because this removal fills him with such dread of being tortured or mistreated that he would rather commit suicide.

[13] Such an allegation raises particularly delicate issues. On the one hand, it is obvious that removal from Canada inevitably brings with it a number of hardships and difficulties, particularly from a psychological standpoint (*Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61, at paragraph 23, [2015] 3 SCR 909). We do not want to allow people who are required to leave Canada to avoid removal simply by exaggerating these hardships and simulating suicidal ideation.

[14] On the other hand, mental health disorders that can lead to suicide are very real. There is no doubt that the prospect of imminent removal may worsen an individual's psychological state and trigger a suicide attempt. In these cases, suicidal ideation is not "voluntary" and cannot be

equated with a mere scheme to skirt the obligation to leave Canada. Like the addiction referred to in *Canada (Attorney General) v PHS Community Services Society*, 2011 SCC 44, at paragraphs 97–101, [2011] 3 SCR 134, suicidal ideation is not a matter of "choice."

[15] This is not the first time this Court has dealt with the risk that a person who must be removed from Canada may commit suicide. In *Nagarasa v Canada (Citizenship and Immigration)*, 2018 FC 313, at paragraph 28, my colleague Justice Shirzad Ahmed echoed what I have just pointed out:

> Self-harm and suicide is not "controllable" by a person who contemplates taking his or her own life. By definition, the fact that the Applicant was willing to take his own life means that the pain with which he is suffering is so unbearable to him that, in his view, the only answer is to end his own life. Like other serious medical conditions, depression and other mental health issues often require intervention by specialists who can diagnose the problem and provide treatment in the form of counseling, medication, etc. As the Officer was well aware, the Applicant's situation was so severe that he eventually came to the most extreme consequence of his condition: he attempted to take his life. Only the most perverse characterization would call attempted suicide in these circumstances a choice, or, in the Officer's words, "controllable by the applicant's own actions."

[16] In *Tiliouine v Canada (Public Safety and Emergency Preparedness)*, 2015 FC 1146 [*Tiliouine*], my colleague Justice René LeBlanc found that refusal to postpone the removal of a person who presented a serious risk of suicide raised a serious question, and this Court "has found on numerous occasions that significant psychological damage and suicidal behavior constitute irreparable harm" (at paragraph 13). He granted the motion for a stay.

[17] Reference may also be made to the following decisions: *Melchor v. Canada (Solicitor General)*, 2004 FC 372, at paragraph 12; *Bodika-Kaninda v Canada (Citizenship and Immigration)*, 2011 FC 1484, at paragraph 13; *Danyi v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 730, at paragraph 3; *El Sayed v Canada (Public Safety and Emergency Preparedness)*, 2017 FC 802, at paragraph 23.

[18] From this perspective, let us now consider the evidence presented by Mr. Konaté.

[19] Mr. Konaté first relied on a report written by Dr. Olga Wrezel of the CLSC Côte-des-Neiges' Clinique des demandeurs d'asile et des réfugiés [Asylum seeker and refugee clinic], who has been treating him for two years. She indicated that Mr. Konaté is suffering from post-traumatic syndrome, anxiety, depression and insomnia. He is also suffering from some psychotic symptoms, including visual and auditory hallucinations. He was prescribed two types of medication. The following paragraph provides a good summary of Dr. Wrezel's opinion:

> Considering that Mr. Konate may now be deported, it is my clinical opinion that there is a high risk that he may act on his suicidal ideation and end his life rather than face the danger of being tortured and killed by the army. Even if he were able to effectively hide himself from the army, he would not be able to have access to continued psychotherapy or medications necessary to help him with his PTSD symptoms and insomnia, once again leading to increased suicidal ideation.

[20] Moreover, when an enforcement officer met with him on June 14, 2018, Mr. Konaté began to sweat and cry, became increasingly nervous and said he would not go back to Côte d'Ivoire. After the officer repeatedly tried to calm him down and contact his lawyer, Mr. Konaté

said he would commit suicide if he were sent back to Côte d'Ivoire. The officer therefore detained him because of the risk he posed to himself, and then brought him to the hospital.

[21] On June 22, 2018, during the review of Mr. Konaté's detention, the Immigration Division member declared him a vulnerable person, [TRANSLATION] "given your fragile state of mind and that you are currently in great distress." She considered the evidence regarding Mr. Konaté's condition and decided to keep him in detention, in particular because of the danger he posed to himself.

[22] Based on these facts, I am satisfied that Mr. Konaté's psychological state does not result from simulation or a scheme. Dr. Wrezel, the enforcement officer and the Immigration Division member all considered Mr. Konaté to be at significant risk of suicide. I am therefore of the opinion that the evidence demonstrates that Mr. Konaté's removal would be likely to cause him irreparable harm.

[23] Counsel for the respondent argued that Mr. Konaté's suicide risk cannot be taken into consideration because it arises from a concern that the PRRA officer deemed to be without merit. However, this risk does exist, regardless of whether the fear underlying it is objectively justified or not. Counsel also argued that Mr. Konaté's application for an administrative stay focused more on his desire to continue treatment in Canada than on the risk of suicide as such. In this regard, I would note what LeBlanc J. said in *Tiliouine*, at paragraph 11:

> In such context, the Court has ruled that where, as here, there is evidence of irreparable psychological harm resulting from the removal itself, it is not enough for the removal officer to simply

> examine the availability of health care and treatment in the home country…

C. *Balance of Convenience*

[24] At this last stage of the *RJR* test, prejudice to the applicant must be balanced against prejudice to the respondent who is prevented from enforcing the law. In this case, only very compelling considerations could outweigh a risk of suicide. However, the record does not provide any reasons to disregard the usual rule that evidence of a serious question and irreparable harm tilt the balance in favour of the applicant (see for example, *Mauricette v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 420, at paragraph 48; *Manto v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 335, at paragraph 26; *Tiliouine*, at paragraph 15).

[25] Because the three prong s'*RJR* tests have been met, the motion to stay the removal order is granted.

JUDGMENT in IMM-3073-18

THIS COURT'S JUDGMENT is that the motion to stay the removal order is granted.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3073-18
STYLE OF CAUSE:	MAMADOU KONATÉ v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

MOTION HEARD BY CONFERENCE CALL ON JULY 6, 2018, AT OTTAWA, ONTARIO

ORDER AND REASONS:	GRAMMOND J.
DATED:	JULY 7, 2018

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