Federal Court  Cour fédérale

Date: 20221017

Docket: IMM-9968-22

Citation: 2022 FC 1406

Charlottetown, Prince Edward Island, October 17, 2022

PRESENT: Mr. Justice Sébastien Grammond

BETWEEN:

FABIO MUKENDI MELAY
OLGA VENDO MATONDO
IAN GABRIEL MELAY

Applicants

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

[1] The applicants are seeking a stay of their removal to Angola, scheduled for tomorrow. I am dismissing their motion. They have not shown "quite a strong case" that the dismissal of their request for deferral was unreasonable. The evidence they filed does not overcome the negative credibility conclusions of the Refugee Protection Division. They have not proved that they suffer from a health or psychological condition that impedes their removal. While brief, the officer's

consideration of the best interests of their children was reasonable and responsive to the applicants' submissions.

I. Background

[2] The applicants are citizens of Angola. The first two applicants, Mr. Melay and Ms. Matondo, are married. The third applicant, Ian, is their son. Ian just turned seven years old.

[3] The applicants came to Canada in July 2018 and claimed refugee status. Their claim was based on Mr. Melay's union activism in Angola. Mr. Melay alleged that he participated in a demonstration in December 2017, but was able to escape arrest. He was less fortunate two months later: he was arrested at another demonstration and was detained for approximately four months. He was mistreated during his detention. He managed to escape, reunited with his wife and child, and the family fled to Canada.

[4] Shortly after their arrival in Canada, Ms. Matondo gave birth to the couple's second child, Océane, who is now four years old. Océane is a Canadian citizen.

[5] The applicants' claim for refugee protection was dismissed by the Refugee Protection Division [RPD] of the Immigration and Refugee Board on October 7, 2020. The RPD found that the applicants were not credible with respect to crucial parts of their story. In particular, certain aspects of Mr. Melay's testimony were inconsistent with newspaper articles regarding the December 2017 and February 2018 demonstrations. The RPD concluded that Mr. Melay sought to bring himself within documented events that happened in Angola. Moreover, the RPD found

that several aspects of Mr. Melay's escape from prison were implausible. The RPD also noted that Mr. Melay, whose credibility was affected, failed to provide corroborative evidence, in particular from former work colleagues.

[6] The applicants sought judicial review of the decision of the RPD. On August 26, 2022, my colleague Justice Vanessa Rochester dismissed their application: *Melay c Canada (Citoyenneté et Immigration)*, 2022 CF 1230. She noted that in substance, the applicants were asking the Court to reweigh the evidence, which is not its role. She concluded that the RPD's reasons for finding the applicants not credible were rational and did not exhibit any major flaw. She also rejected the contention that the process before the RPD was unfair.

[7] Less than a month later, on September 22, 2022, the applicants received a direction to report for removal on October 17, 2022, a date later changed to October 18, 2022 because of the availability of flights.

[8] On the same day, the applicants' former counsel wrote to the Canada Border Services Agency [CBSA] to ask for more time. His communication was treated as a request for deferral of the applicants' removal, which was refused on October 6, 2022. The applicants' current counsel filed a more fulsome request for deferral on October 10, 2022, which was refused on October 12, 2022.

[9] In the latter decision, the CBSA officer rejected the new evidence supporting the application for deferral. She noted that the evidence pertained to the same risk that the RPD

found not credible, that no new risk was alleged and that the letters submitted contained insufficient details to overcome the RPD's credibility concerns. With respect to the applicants' health condition, the officer noted contradictions in the medical evidence submitted and the fact that the applicants sought medical assessments only after they were given a direction to report for removal. She gave little weight to psychological assessments, because they were based on a story that the RPD found not credible. She also concluded that Mr. Melay could continue to take medication in Angola. With respect to the best interests of the children, the officer mainly reviewed the evidence regarding Ian's speech delay, and noted the lack of evidence that he could not receive appropriate services in Angola. The officer also noted the lack of evidence and submissions regarding other aspects of the best interests of the children, especially any risk that they would face upon being removed to Angola. Lastly, the officer stated that the intent to file an application for permanent residence based on humanitarian and compassionate [H&C] considerations is not a ground to defer removal.

[10] The applicants are now seeking judicial review of the officer's October 12 decision. They also bring a motion for a stay of their removal.

II. Analysis

[11] Motions for stay of removal are decided on the basis of the well-known three-part test for interlocutory injunctions: *RJR – Macdonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR*], and *R v Canadian Broadcasting Corp*, 2018 SCC 5, [2018] 1 SCR 196. The Court must determine whether: (1) the applicant has shown that the underlying application raises a serious

issue; (2) the applicant will suffer irreparable harm if the stay is not granted; and (3) whether the balance of convenience favours the applicant.

A. *Serious Issue*

[12] When the underlying application targets a decision refusing deferral, the motion for stay of removal seeks the same remedy as the underlying application and is often the final determination of the matter. In these circumstances, the first prong of the *RJR* test is applied more rigorously and the applicant must show "quite a strong case" and not simply a "serious issue:" *RJR*, at 338–339; *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paragraphs 66–67, [2010] 2 FCR 311 [*Baron*]; *Ledshumanan v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 1463 at paragraphs 19–22. Moreover, as the underlying proceeding is an application for judicial review, the strength of the case must be assessed having regard to the fact that the applicants must show that the decision challenged is unreasonable. I refer to *Gill v Canada (Public Safety and Emergency Preparedness)*, 2020 FC 1075 [*Gill*], for a review of the grounds that typically warrant deferral.

(1) New Evidence of Risk

[13] In support of their motion for a stay of removal, the applicants have brought new evidence that the Angolan police is looking for them. This evidence consists of letters written by family members, a neighbour and two former co-workers. The applicants argue that their removal should be stayed until they can request a pre-removal risk assessment [PRRA], in which this evidence can be considered. I disagree with the applicants.

[14] As a general rule, a request for deferral is not the appropriate forum to seek to overturn an assessment of risk made in the course of a decision concerning refugee status or a PRRA: *Medina Cerrato v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1231 at paragraph 23. It has been said that the purpose of an appeal to the Refugee Appeal Division [RAD] is "not to provide the opportunity to complete a deficient record" and that a PRRA is not an appeal of a negative refugee determination: *Raza v Canada (Citizenship and Immigration)*, 2007 FCA 385 at paragraph 12 [*Raza*]; *Canada (Citizenship and Immigration) v Singh*, 2016 FCA 96, [2016] 4 FCR 230 at paragraphs 50 and 54 [*Singh*]. Accordingly, there are restrictions on the evidence that can be filed on an appeal to the RAD or on a PRRA. *A fortiori*, the consideration of new evidence on a motion for stay of removal or an application for deferral must be approached with caution, in order to avoid "an obvious risk of wasteful and potentially abusive relitigation": *Raza*, at paragraph 12.

[15] Nevertheless, CBSA officers must defer removal where an applicant would be exposed to a risk to life or physical integrity upon returning to their country: *Baron*, at paragraph 51; *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at paragraphs 41–44, [2012] 2 FCR 133; *Savunthararasa v Canada (Public Safety and Emergency Preparedness)* 2016 FCA 51, at paragraph 7, [2017] 1 FCR 318; *Atawnah v Canada (Citizenship and Immigration)*, 2016 FCA 144 at paragraph 22, [2017] 1 FCR 153 [*Atawnah*]. Indeed, deferring removal in such circumstances is essential to the safeguard of the rights guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms*: *Atawnah*, at paragraph 23; *Revell v Canada (Citizenship and Immigration)*, 2019 FCA 262 at paragraphs 50–52, [2020] 2 FCR 355.

[16] Beyond a new risk arising after the latest assessment, the circumstances in which this exception applies include new evidence of a pre-existing risk: *Abdulrahman v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 842 at paragraphs 15–16; *Nayeb Pashaei v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 212 at paragraphs 15–16; *Mohammadpour v Canada (Citizenship and Immigration)*, 2021 CanLII 11764 (FC); *Obaseki v Canada (Public Safety and Emergency Preparedness)*, 2021 FC 936 at paragraph 7 [*Obaseki*]. They also include situations where an applicant's risk has never been assessed: *Surmanidze v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 1615 at paragraphs 45–49; *Thuo v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 48 at paragraph 15.

[17] However, not every piece of new evidence warrants deferral; see, for example, *Abu Aldabat v Canada (Citizenship and Immigration)*, 2021 FC 277 at paragraphs 36–41. If that were the case, the finality of immigration decisions would be jeopardized. I do not purport to lay out a test to determine when removal may be deferred on the basis of new evidence. An analogy may be drawn with the tests for the admission of new evidence at the RAD or in the PRRA process, as laid out by the Federal Court of Appeal in *Raza* and *Singh*. Guidance may also be found in this Court's jurisprudence regarding new evidence of risk in H&C applications. Where "new evidence [is] merely corroborative of a story already found not to be credible," applicants face a heavy burden "to overcome the RPD and RAD's credibility determinations": *Miyir v Canada (Citizenship and Immigration)*, 2018 FC 73 at paragraph 25.

[18] In this case, it is true that the CBSA officer stated that the new evidence filed by the applicants did not pertain to a new risk. Contrary to what happened in *Obaseki*, however, she did

not stop there. She reviewed the letters and found that they were insufficient to overcome the RPD's negative credibility findings. Having reviewed the letters myself, I conclude that the applicants have not put forward a strong case that the officer's assessment is unreasonable. The family members who wrote the letters reside in Canada and can only relay information provided by the applicants regarding events in Angola. The neighbour recounts events where a member of Mr. Melay's family was abducted and officers in civilian clothes came to ask questions about Mr. Melay. One of the coworkers describes the December 2017 and February 2018 demonstrations and states that he lost contact with Mr. Melay after the latter event. The other coworker states that the police have made inquiries about Mr. Melay with his employer. By and large, these letters simply seek to buttress the narrative that the applicants put forward before the RPD.

[19] I would also add that the applicants did not seek to show that it would have been impossible for them to obtain the four letters in time to file them before the RPD.

[20] Hence, the applicants have not shown quite a strong case that the officer's decision is unreasonable on this front.

(2) Risk to Health and Medical Treatment

[21] The applicants also assert that their removal would expose them to a health risk or prevent them from receiving medical treatment in Canada. As mentioned above, the CBSA officer did not give effect to their submissions, because there was no evidence that treatment would be unavailable in Angola and because the evidence of the applicants' medical condition

was not credible. In my view, the applicants have not shown a strong case that the officer's decision is unreasonable.

[22] A short-term medical issue may be grounds for deferring removal: *Revell*, at paragraph 50; *Gill*, at paragraph 19. Yet, the medical issue must bear a certain degree of seriousness and immediacy: *Bastien v Canada (Citizenship and Immigration)*, 2021 FC 926 at paragraphs 23–24; *Bisram v Canada (Public Safety and Emergency Preparedness)*, 2022 FC 390 at paragraph 14 [*Bisram*]. Applicants have the burden of proving such a medical condition with acceptable evidence.

[23] In this case, it appears that the officer rejected the applicants' submissions regarding their medical condition mainly because she found the evidence not to be credible. In reaching this conclusion, she considered that:

- When interviewed by a CBSA officer on September 22, 2022, the applicants did not disclose any of the medical conditions they are now putting forward;

- A few days later, Mr. Melay and Ms. Matondo both stated to a psychotherapist that they "have no medical condition to report";

- There is no written evidence of a diagnosis of breast cancer;

- The psychological assessment was based on self-reporting of a story that was found not to be credible;

- All medical and mental health assessments were performed after the applicants were informed of their impending removal.

[24] I find nothing unreasonable in this assessment, which is based on the evidence and the circumstances of the case. See, by way of analogy, *Bisram*, at paragraph 23.

[25] The officer also found that Mr. Melay could continue to treat his recently diagnosed perianal fistula with the ointment prescribed by a doctor. There is no indication that the condition is so severe that Mr. Melay would be prevented from flying, no evidence that ointment would be unavailable in Angola and nothing to suggest that the CBSA officer erred in this regard.

(3) Best Interests of the Children

[26] The applicants also argue that the officer's decision is unreasonable because it fails to take into account the best interests of their children. I disagree.

[27] The Federal Court of Appeal has formulated the applicable rule as follows: "enforcement officers may look at the short-term best interests of the children whose parent(s) are being removed from Canada, but cannot engage in a full-blown H&C analysis of such children's long-term best interests": *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at paragraph 61, [2018] 2 FCR 229 [*Lewis*]; see also *Revell*, at paragraph 50. For example,

removal may be deferred for a few months to allow a child to complete a school year: *Iheonye v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 375; *Lewis*, at paragraph 83.

[28] The applicants' submissions regarding the best interests of their children focused on two considerations: the risk to their safety in Angola and the lack of services in that country to address Ian's speech delay.

[29] With respect to the risk to safety, the officer noted that this could refer either to the risk asserted by the parents before the RPD or to another risk. At the hearing before me, counsel for the applicants clarified that the risk alleged is that the children would be abandoned if their parents were arrested upon returning to Angola. The officer reasonably found that such a risk is tied to the risk to the parents, which was assessed and rejected by the RPD.

[30] The officer then reviewed the evidence regarding Ian's speech delay. She found that there was no evidence that appropriate services would be unavailable in Angola. This is a reasonable conclusion. Moreover, the officer noted that her role was to address short-term issues. I take this to mean that she considered that the issues regarding Ian's speech delay were long-term issues that could not justify deferring removal. Again, that would be a perfectly reasonable conclusion.

[31] I am mindful that Océane is a Canadian citizen. However, the mere fact that she would accompany her parents in Angola is not, in itself, sufficient grounds to defer the latter's removal: *Lewis*, at paragraph 57. The applicants have not made further submissions with respect to

Océane. Given this lack of evidence and submissions, the officer could not be expected to conclude that the applicants' removal would be against Océane's best interests.

B. *Irreparable Harm*

[32] As I have found that the applicants' motion does not meet the elevated test of "quite a strong case," it is not necessary to address irreparable harm. It is sufficient to underline that the alleged harm is essentially the same as that which formed the basis of the request for deferral and the claim for refugee status. As I explained above, the applicants' allegations of harm have been found not credible and the new evidence filed with this motion does not alter this assessment.

C. *Balance of Convenience*

[33] As the applicants have not shown a strong likelihood of prevailing on the merits nor that irreparable harm would result from their removal, it follows that the balance of convenience favours the Minister.

III. Disposition

[34] The applicants have not satisfied the three-prong test for motions for stay of removal. Accordingly, their motion is dismissed.

ORDER in IMM-9968-22

THIS COURT ORDERS that the applicants' motion for a stay of their removal from Canada is dismissed.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

François Kasenda Kabemba	FOR THE APPLICANTS
Heather Kennedy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Cabinet François K Law Office Ottawa, Ontario	FOR THE APPLICANTS
Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT