Date: 20090106

Docket: IMM-5369-08

Citation: 2008 FC 1399

Ottawa, Ontario, January 6, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ÉRIC FRANCIS TCHOUMBOU

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR JUDGMENT AND AMENDED JUDGMENT
(Amendment to style of cause only)

I. Overview

[1] [56] This Court has often held that allegations of risk determined to be unfounded by both the Board and the PRRA cannot serve as a basis for establishing irreparable harm in the context of an application to stay (*Singh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 145, 137 A.C.W.S. (3d) 156). This principle relative to credibility is adaptable in the context of the failure to reverse the presumption of state protection.

(*Malagon v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1068, [2008] F.C.J. No. 1586 (QL)).

[2] The decisions of this Court also indicate that in assessing the balance of convenience, the public interest must be taken into consideration (*Membreno-Garcia v. Canada (Minister of Employment and Immigration)*, [1992] 3 F.C 306, [1992] F.C.J. No. 535 (QL); *Blum v. Canada (Minister of Citizenship and Immigration)*, (1994) 90 F.T.R. 54, 52 A.C.W.S. (3d) 1099).

[3] In this case, the applicant was excluded under Articles 1F(*a*), 1F(*b*) and 1F(*c*) of the Convention.

[4] Accordingly, the balance of convenience favours the public interest in the immigration process set out in the IRPA taking its course.

II. Judicial proceedings

[5] The applicant, Alain Tchoumbou, a citizen of Cameroon, filed an application to stay his removal to Cameroon, scheduled for January 5, 2009.

[6] This application was made together with an application for leave against the decision of a removals officer made on December 3, 2008, denying Mr. Tchoumbou an administrative stay of his removal. Mr. Tchoumbou had applied for a stay of the removal because he intended to file an application for permanent residence under subsection 25(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA).

III. Facts

[7] The applicant is a citizen of Cameroon and is 23 years old.

[8] He arrived in Canada on September 10, 2005, and claimed refugee protection on September 26, 2005.

[9] On November 9, 2007, the Refugee Protection Division (RPD) of the Immigration and Refugee Board (IRB) rejected Mr. Tchoumbou's claim for refugee protection, having found that he was excluded under Articles 1F(*a*), 1F(*b*) and 1F(*c*) of the *United Nations Convention Relating to the Status of Refugees* (Convention).

[10] On June 11, 2008, Madame Justice Danièle Tremblay-Lamer of the Federal Court dismissed Mr. Tchoumbou's application for judicial review (*Tchoumbou v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 585, [2008] F.C.J. No. 920 (QL)).

[11] On August 26, 2008, Mr. Tchoumbou received the documents he needed for filing an application for a pre-removal risk assessment (PRRA) under subsection 112(3) of the IRPA.

[12] On November 19, 2008, the officer denied Mr. Tchoumbou's PRRA application because he had failed to establish that he was subject to a risk of torture or persecution or cruel or unusual treatment or punishment, or to a risk to his life, if he were to be removed to the country of his nationality.

[13] On November 24, 2008, Mr. Tchoumbou was given a document by the Canada Border Services Agency (CBSA) setting an interview date for December 3, 2008.

[14] On December 3, 2008, at the interview, the officer confirmed to Mr. Tchoumbou that he was being removed, but nonetheless gave him until January 5, 2009.

[15] Mr. Tchoumbou alleges that on August 2, 2008, he married Stéphanie Blanchet, and submitted a sponsored application for permanent residence on humanitarian grounds (H&C) on October 20, 2008. However, the respondent submits that no evidence to corroborate the filing of the H&C application has been provided by Mr. Tchoumbou in support of this stay application.

IV. Analysis

[16] In order to assess the merits of the stay application, this Court must determine whether the applicant has met the tests laid down in the decision of the Federal Court of Appeal in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302, 11 A.C.W.S. 3d 440 (F.C.A.).

[17] In that case, the Federal Court of Appeal stated three tests which it took from the case law relating to injunctions, and more specifically the decision of the Supreme Court of Canada in *Manitoba (Attorney General) v. Metropolitan Stores (MTS) Ltd.*, [1987] 1 S.C.R. 110. The three tests are

- whether there is a serious issue;
- whether there will be irreparable harm; and
- the balance of convenience.

[18] Mr. Tchoumbou has not established that there is a serious issue to be tried with regard to his application for leave against the decision made by the deciding officer, that irreparable harm will result from his removal to Guinea and that he will suffer inconvenience greater than the inconvenience to the public interest in the immigration process set out in the IRPA taking its course.

A. <u>Serious issue</u>

(i) Legal framework and limited discretion of the removals officer

[19] The enforcement of removal orders is governed by section 48 of the IRPA:

48. (1) A removal order is enforceable if it has come into force and is not stayed.	**48.** (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
(2) If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable.	(2) L'étranger visé par la mesure de renvoi exécutoire doit quitter immédiatement le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.

[20] Mr. Justice Robert Barnes observed, at paragraph 19 of the judgment in *Griffiths v. Canada (Solicitor General)*, 2006 FC 127, 46 A.C.W.S. (3d) 123, that a deferral is "a temporary measure necessary to obviate a serious, practical impediment to immediate removal".

[21] The case law indicates that enforcement officers enjoy a degree of flexibility in the exercise of what is nonetheless a limited discretion; they may have regard to various factors that could interfere with or delay the performance of their duty to remove the persons concerned, for example, factors relating to the personal safety or health of an individual subject to a removal order (*Sharma v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1144, 161 A.C.W.S. (3d) 957 at paragraph 22; *Chir v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2006 FC 242, [2006] F.C.J. No. 317 (QL) at paragraph 20; *Boniowski v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1161, 133 A.C.W.S. (3d) 326 at paras. 11-12; *Prasad v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 614, 123 A.C.W.S. (3d) 533; *Pavalaki v. Canada (Minister of Citizenship and Immigration)* (1998), 78 A.C.W.S. (3d) 566, [1998] F.C.J. No. 338 (QL)).

[22] In *Canada (Minister of Citizenship and Immigration)* v. *Varga*, 2006 FCA 394, [2007] 4 F.C.R. 3 at paragraph 16, the Federal Court of Appeal noted the "narrow scope of removals officers' duties" and observed that "their obligation, if any, to consider the interests of affected children is at the low end of the spectrum".

[23] In this case, Mr. Tchoumbou asked the removals officer for a stay of his removal because he intended to file an H&C application under subsection 25(1) of the IRPA.

(ii) The removals officer exercised his limited discretion reasonably

[24] Mr. Tchoumbou argued in his application that the removals officer did not have regard to the fact that he is married.

[25] In his notes, the removals officer wrote that Mr. Tchoumbou had asked him to defer the removal because he intended to file an H&C application. The officer checked, and no H&C application had been received.

[26] There is no indication in the respondent's record that Mr. Tchoumbou ever submitted an H&C application to Vegreville or Montréal (Exhibit "A" to the affidavit of Ketsia Dorceus).

[27] Mr. Tchoumbou did not include any documents in his application record to prove that he did in fact file an application for landing sponsored by his spouse, or that he is in fact married.

[28] In addition, even if Mr. Tchoumbou had in fact filed an H&C application, he could not have been granted an administrative stay of removal because he is excluded under Articles 1F(*a*), 1F(*b*) and 1F(*c*) of the Convention.

[29] The public policy under subsection 25(1) of the IRPA to facilitate processing in the spouse and common-law partner in Canada class does not automatically allow all spouses of a Canadian citizen or permanent resident to remain in Canada during processing of their application for permanent residence. That policy establishes exceptions, which Mr. Tchoumbou falls into, in particular because of his exclusions.

[30] In addition, it is settled law that an H&C application by a spouse is not an obstacle to removal of the applicant (*Patterson v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 406, 166 A.C.W.S. (3d) 300 at paragraph 21; *Zenunaj v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1715, 144 A.C.W.S. (3d) 926; *Shchelkanov v. Canada (Minister of Employment and Immigration)* (1994), 76 F.T.R. 151, 47 A.C.W.S. (3d) 783; *Okoawoh v. Canada (Minister of Citizenship and Immigration)* (1996), 60 A.C.W.S. (3d) 816, [1996] F.C.J. No. 24 (QL)).

[31] A pending application for landing does not raise a serious issue. Mr. Tchoumbou may file an application, in the normal course of the process, from outside Canada, as a member of the family class.

[32] In Canada, applications sponsored by a spouse, like H&C applications, are processed independently of the removal process. They do not operate to interrupt removals until decisions are made regarding the applications. If Parliament had intended that this be the case, the Act would provide for a stay of removal when the applications are filed (*Patterson* and *Shchelkanov*, *supra*).

[33] With respect to Mr. Tchoumbou's arguments under the *Canadian Charter of Rights and Freedoms*, Part I, Schedule B to the *Canada Act, 1982*, 1982, c. 11 (U.K.) (Charter) and international law, it is settled law that removing a person after a complete pre-removal risk assessment is done is not contrary to sections 7 and 12 of the Charter (*Suresh v. Canada (Minister of*

Citizenship and Immigration), 2002 SCC 1, [2002] 1 S.C.R. 3; *Chieu v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 3, [2002] 1 S.C.R. 84; *Al Sagban v. Canada (Minister of Citizenship and Immigration)*, 2002 SCC 4, [2002] 1 S.C.R. 133). With respect to Article 3 of the *Convention Against Torture*, Mr. Justice Martineau said the following, in *Sidhu v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 39, 128 A.C.W.S. (3d) 559:

> [26] Paragraph 97(1)(a) of the Act refers specifically to the notion of torture contained in Article 1 of the Convention and therefore integrates the principles contained in Article 3 of the Convention. Consequently, the answer to this question is contained in the law itself and does not require certification..

[34] Accordingly, this case did not provide a basis for applying any administrative deferral of the removal that would have required that the officer not proceed with the removal.

B. Irreparable harm

[35] In this case, Mr. Tchoumbou alleges that if he is removed to Cameroon he will suffer irreparable harm because (i) he will be separated from his spouse, and (ii) he will be subject to a risk of inhumane treatment because of his political opinion.

(i) Separation from his spouse

[36] The fact that Mr. Tchoumbou will be separated from his spouse is not sufficient reason to find that he will suffer irreparable harm if he is removed.

[37] Mr. Tchoumbou has offered nothing to show what harm his spouse or he would suffer if he were to be returned to Cameroon. In fact, no evidence was produced to corroborate

Mr. Tchoumbou's marriage, be it a marriage certificate or an affidavit from Ms. Blanchet, his spouse, in support of this application.

[38] The recent comments made in *Malagon*, *supra*, apply here:

> [2] In regard to upsetting the family and the separation that must be endured by Ms. Malagon's spouse, this is not irreparable harm, but rather a phenomena inherent to removal (*Malyy v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 388, 156 A.C.W.S. (3d) 1150 at paragraphs 17-18; *Sofela v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 245, 146 A.C.W.S. (3d) 306 at paragraphs 4 and 5; *Radji v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 100, 308 F.T.R. 175 at paragraph 39). To find otherwise would render impracticable the removal of individuals who do not have the right to reside in Canada. Further, as pointed out in *Golubyev v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 394, 156 A.C.W.S. (3d) 1147 at paragraph 12: irreparable harm is a strict test in which serious likelihood of jeopardy to the applicant's life or safety must be demonstrated.

(See also: *Malagon*, *supra* at paragraph 57; *Javier* v. *Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 445, 160 A.C.W.S. (3d) 526 at paragraph 17; *Sahota* v. *Canada (Minister of Citizenship and Immigration)*, 2002 FCT 331, 112 A.C.W.S. (3d) 1119 at paragraphs 5-6; *Melo* v. *Canada (Minister of Citizenship and Immigration)* (2000), 188 F.T.R. 39, 96 A.C.W.S. 278 at paragraphs 20-21; *Saibu* v. *Canada (Minister of Citizenship and Immigration)*, 2002 FCT 103, 111 A.C.W.S. (3d) 980 at paragraph 10; *Kerrutt v. Canada (Minister of Employment and Immigration)* (1992), 53 F.T.R. 93, 32 A.C.W.S. (3d) 621; *Calderon* v. *Canada (Minister of Citizenship and Immigration)* (1995), 92 F.T.R. 107, 54 A.C.W.S. (3d) 316).

(ii) Risk of inhumane treatment

[39] Mr. Tchoumbou claims that he will be subject to a risk of inhumane treatment in the event that he is returned to his country, because he is considered to be an opponent of the party in power in Cameroon.

[40] We should note that the RPD concluded that Mr. Tchoumbou is a person described in Articles 1F(*a*), 1F(*b*) and 1F(*c*) of the Convention, for these reasons:

- The documentary evidence establishes that the Cameroon People's Democratic Movement (CPDM) is the party in power and that the police repress opponents of the government, using torture and other cruel methods;

- The applicant was in the CPDM militia and "was part of a paramilitary organization serving the party or the repressive apparatus of the state that keeps that party in power". More specifically, the applicant's mission was to infiltrate opposition parties in order to identify the leaders of demonstrations. From this, the RPD concluded that the applicant committed crimes against humanity, and is therefore also guilty of acting contrary to the purposes and principles of the United Nations;

- The claimant also worked as a pimp for the CPDM, in that he was required to find, and did find, girls whom he alleged that he believed were minors, for the cousin of President Paul Biya, this being a serious non-political crime. In fact, under paragraphs 212(1)(*a*), (*b*), (*d*), (*h*), (*i*) and (*j*) of the *Criminal Code* of Canada, these acts are punishable by a maximum sentence of 10 to 14 years' imprisonment; and

- The applicant was not credible. The RPD did not believe the claims on which the applicant's refugee protection claim was based, that he had been arrested, detained and tortured by government authorities because of his refusal to comply with the CPDM's orders to torture opponents of the regime, and that after he escaped from prison he was pursued.

[41] It is important to note that this Court has affirmed the reasonableness of the RPD's decision, by dismissing the application for judicial review of that decision. We would note the following passages from the decision in *Tchoumbou*, *supra*:

[37] In my opinion, it was reasonable for the panel to infer that the applicant had a shared common purpose because he joined the CPDM's militia between August 2003 and May 2004, infiltrated the opponents of the regime and was unable to establish that he left the CPDM because he was against the repression. He stated the following in his PIF:

> I was a member of the youth section of the political party called the "Cameroon People's Democratic Movement" (YCPDM) of President Paul BIYA who is the current head of state of my country. The leader of the YCPDM put me in with a group of members that had to do certain tasks for the government.
>
> First, the President's cousin started using me to call or find girls for him; then, I would be sent to infiltrate the political opposition parties that were demonstrating against the government in order to identify the organizers and those who incited the others to take to the street. I also identified those who were sounding alarms and who encouraged the demonstrators to do anything they could to disturb the peace and to defeat the current government's actions.

[38] It is difficult to subsequently contend that he never infiltrated opposition parties and that his only task was to find girls for the President's cousin. He described in detail his role in identifying members of the opposition, and therefore I believe that the panel was justified in determining that the applicant was not credible when he attempted to say the opposite at the hearing.

[39] As for failing to disassociate himself from the group at the earliest opportunity, the applicant alleged that he was arrested and tortured because he refused to follow the orders to beat opposition members in May 2004. The panel determined that he was not credible on this point considering his statements at the port of entry and in his PIF as well as the confused explanations he provided when he testified at the hearing.

[40] Since the applicant had to have been aware of the abuses committed, including the torturing of opponents whom he identified once they were arrested and detained and since he did not establish in a credible manner that he disassociated himself from the group at the earliest opportunity, it was reasonable for the panel to conclude that there were serious reasons to believe that he was complicit in crimes against humanity and in actions that were contrary to the purposes and principles of the United Nations.

[42] The PRRA officer concluded that Mr. Tchoumbou was not at risk of being tortured or persecuted or of being subject to cruel and unusual treatment or punishment or to a risk to his life if he were returned to Cameroon, because he failed to establish the central facts of his application.

[43] The PRRA officer stated that, having regard to the evidence as a whole, it appeared that Mr. Tchoumbou is in fact a member of the youth wing of the party, the CPDM, which is responsible for political repression and numerous human rights violations.

[44] In addition, the PRRA officer concluded that Mr. Tchoumbou had not established that he had disobeyed his party and was therefore considered to be a political opponent and was wanted by the authorities.

[45] The following comments by this Court are relevant:

> [55] The risks of return were already assessed in two administrative proceedings, by the panel and by the officer, and both made the same findings. Further, this Court confirmed the reasonableness of the Board's decision refusing the ALJR against the Board's decision. Since the order of this Court, the situation has not changed, as the PRRA confirmed.
>
> [56] This Court has often held that allegations of risk determined to be unfounded by both the Board and the PRRA cannot serve as a basis for establishing irreparable harm in the context of an application to stay (*Singh v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 145, 137 A.C.W.S. (3d) 156). This principle relative to credibility is adaptable in the context of the failure to reverse the presumption of state protection.

(*Malagon*, *supra*; see also *Javier*, *supra* at paragraphs 15-16).

[46] In addition, this proceeding is not the appropriate forum for seeking an assessment of the reasonableness of the decision regarding his PRRA application.

[47] Mr. Tchoumbou has not met his burden of proving that he will suffer irreparable harm if he is returned to Cameroon.

C. Balance of convenience

[48] Subsection 48(2) of the IRPA imposes an obligation to enforce a removal order as soon as is reasonably practicable.

[49] In this case, because there is no serious issue or irreparable harm, the balance of convenience favours the Minister, who has an interest in the removal order made against the applicant being enforced on the date set out in the order, January 5, 2008 (*Mobley v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 65 (QL)).

[50] The decisions of this Court also indicate that in assessing the balance of convenience, the public interest must be taken into consideration (*Membreno-Garcia* and *Blum*, *supra*).

[51] In this case, Mr. Tchoumbou was excluded under Articles 1F(*a*), 1F(*b*) and 1F(*c*) of the Convention.

[52] Accordingly, the balance of convenience favours the public interest in the immigration process set out in the IRPA taking its course.

V. Conclusion

[53] Mr. Tchoumbou’s application for a stay is dismissed.

JUDGMENT

THE COURT ORDERS that the application for a stay of removal be dismissed.

"Michel M.J. Shore"
Judge

Certified true translation
Susan Deichert, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

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