Date: 20090128

Docket: IMM-5724-08

Citation: 2009 FC 94

Ottawa, Ontario, January 28, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

GATHER OMAR

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION CANADA

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Introduction

[1] The Applicant is a long-time criminal who was found to be a "danger to the public" under section 115 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA). He seeks a stay of removal until his judicial review application is determined. The Applicant has not shown that he meets all three branches of the *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 11 A.C.W.S. (3d) 440 (F.C.A.), test for a stay of removal. In particular, the evidence shows that he is a danger to both the public, when he is at large, and to prison officials and other inmates, when he is incarcerated. There is a strong public interest in the removal of the Applicant in accordance with the IRPA.

[2] One of the stated objectives of the IRPA is “to protect the health and safety of Canadians and to maintain the security of Canadian society” [“de protéger la santé des Canadiens et de garantir leur sécurité”]. The Supreme Court of Canada commented on the IRPA's objectives in *Medovarski v. Canada (Minister of Citizenship and Immigration)*, [2005] 2 S.C.R. 539, 2005 SCC 51, where Justice Beverley McLachlin stated:

> [10] The objectives as expressed in the *IRPA* indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. This marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security… the objectives of the *IRPA* and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act. (Emphasis added).

[3] This Court has long held that the balance of convenience favours the Minister in cases where the Applicant has a criminal record (*Townsend v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 247, 132 A.C.W.S. (3d) 339 at para. 6; *Moncrieffe v. Canada (Minister of Citizenship and Immigration)* (1995), 62 A.C.W.S. (3d) 964, [1995] F.C.J. No. 1576 (QL) at para. 13; *Mallia v. Canada (Minister of Citizenship and Immigration)* (2000), 96 A.C.W.S. (3d) 111, [2000] F.C.J. No. 369 (QL) at para. 6).

[4] In *Mahadeo v. Canada (Secretary of State)* (1994) 51 A.C.W.S. (3d) 901, [1994] F.C.J. No. 1624 (QL), Justice Marshall Rothstein stated that, when an Applicant is guilty of welfare fraud or has been convicted of a criminal offence in Canada, the balance of convenience weighs heavily in favour of the Respondent (*Richards v. Canada (Minister of Citizenship and Immigration)*, 2007 FC

783, 159 A.C.W.S. (3d) 248 at para. 35; *Gomes v. Canada (Minister of Citizenship and Immigration)* (1995), 91 F.T.R. 264, 53 A.C.W.S. (3d) 358 at para. 7).

[5] In *Townsend*, above, at paragraph 6, Justice Rothstein considered the appellant's “costly incarceration” in assessing the balance of convenience. This Applicant's costly incarceration, including the cost of having him in segregation or in a higher-security prison, should be factored into the balance of convenience in this case. The fact that the Applicant requires two guards for every detention review hearing also demonstrates the great cost of keeping safe the people with whom he comes into contact.

II. Facts

[6] The Applicant, Mr. Gather Omar, is a 24-year old man with no dependents. He is a citizen of Somalia.

[7] The Applicant arrived in Canada in March 2000 and claimed refugee status. In December 2000 he was determined to be a Convention refugee.

[8] According to the Applicant’s brother, the family has relatives in Djubouti and Ethiopia.

Applicant’s Criminal Record

[9] The Applicant has a lengthy criminal record. In September 2002, he was convicted of assault causing bodily harm and failure to comply with conditions of undertaking.

[10] In January 2003, the Applicant was convicted of theft under $5,000, failure to comply with recognizance and possession of property obtained by crime under $5,000.

[11] In June 2003, the applicant was convicted of obstructing a peace officer and failure to attend Court.

[12] In October 2003, the Applicant was convicted of possession of a weapon and failure to comply with a disposition under the *Youth Criminal Justice Act*, 2002, c. 1.

[13] In January 2004, the Applicant was convicted of attempting to break enter and commit, break, enter and commit and failure to comply with a probation order.

[14] In February 2004, the Applicant was convicted of aggravated assault and possession of a weapon.

[15] In April 2004, the Applicant was convicted of obstructing a peace officer and failing to comply with a probation order.

[16] In June 2004, the Applicant was convicted of failing to comply with a probation order, and possession of a Schedule II substance in the *Controlled Drugs and Substances Act*, 1996, c. 19.

[17] In July 2004, the Applicant was convicted of failing to comply with a probation order, and failing to comply with a recognizance under the *Criminal Code*, R.S. 1985, c. C-46.

[18] In October 2004, the Applicant was convicted of possession of a firearm or ammunition contrary to a prohibition order, failure to comply with a probation order and failure to comply with a probation order.

[19] In March 2006, the Applicant was convicted of failing to comply with a probation order.

[20] In May 2007, the Applicant was convicted of committing an indecent act.

[21] In July 2007, the applicant was convicted of operating a motor vehicle while impaired, trespassing at night, and failing to comply with an undertaking.

[22] In December 2007, the Applicant was convicted of possession of a Schedule I substance under the *Controlled Drugs and Substances Act*.

[23] In January 28, 2008, the Applicant was convicted of failure to comply with conditions of judicial release.

[24] In relation to the February 2004 conviction for aggravated assault and possession of a weapon, the Ottawa Police Service report indicates that, on October 29, 2003, the victim was bicycling under the bridge at 2 Rideau Street and attempted to stop his bike, which skidded on a wet

surface. The victim nearly struck the Applicant. The Applicant took out a knife and stabbed the victim in the lower left torso. The victim fell to the ground and the Applicant kicked him in the head before fleeing.

[25] A detective from the Ottawa Police Service reports that the Applicant is a confirmed member of the Ledbury Banff Cripps Street Gang, recognized by the Police as one of the most active and violent gangs in Ottawa.

Criminal Behaviour While Incarcerated

[26] The Applicant has a long history of misconduct while incarcerated. A few examples of this misconduct are detailed below.

[27] On August 25, 2007, the Applicant was found guilty of misconduct in which a guard found a 2-inch long shank from a broken cup in his cell. The Misconduct Report states "piece of cup has obviously been sharpened and inmate had previously denied ownership."

[28] On October 9, 2007, the Applicant was found guilty of misconduct after he assaulted an inmate on the head. On March 12, 2008, he was found guilty of misconduct for assaulting another inmate.

[29] On October 21, 2007, the Applicant was also found guilty of misconduct after he assaulted his cell-mate.

[30] The Applicant has a history of assaulting, disrespecting, and abusing correctional officers. On September 5, 2007, he was found guilty of misconduct for using abusive/profane language directed at a correctional officer. On November 14, 2007, the Applicant was found guilty of misconduct for using abusive/profane language and gestures (sucking noises with teeth) toward a correctional officer. On the same day, he was found guilty of misconduct for attempting to assault a correctional officer. On March 19, 2008, the Applicant was found guilty of misconduct for calling a correctional officer a “fucking bitch”.

[31] On December 31, 2007, the Applicant was found guilty of misconduct for causing a disturbance likely to endanger the security of the institution by banging and screaming. On May 4, 2008, the Applicant was found guilty of misconduct for having broken the sprinkler head in a segregation cell.

[32] The Applicant had a detention review hearing on December 11, 2008. A transcript of the hearing indicates that the Applicant had threatened the Deputy Superintendent of the prison where he was incarcerated and was on “very high security alert” and that two guards were present at the hearing. (At that hearing, the Applicant stated that, if removed to Somalia, he “would not mind” going to Hargeisa, but did not want to go to Mogadishu).

[33] The Applicant is currently incarcerated in the Ottawa-Carleton Detention Centre. Due to the Applicant’s behaviour, the Deputy Superintendent of the Detention Centre requested that the Applicant be transferred to a higher security prison, to the Central East Correctional Centre in Lindsay, Ontario. The Applicant has been in segregation for more than a year as a result of security

concerns; however, the Canada Border Services Agency (CBSA) requested that the Applicant remain in Ottawa as he was due to be removed from Canada.

[34] On November 19, 2008, the Minister of Citizenship and Immigration (the "Minister's Delegate") rendered an opinion pursuant to paragraph 115(2)(*a*) of the IRPA, that the Applicant constituted a danger to the public in Canada (“Danger Opinion”).

[35] The Minister has not imposed a general stay on removals to Somalia under section 230 of the IRPA.

[36] Arrangements for the Applicant's removal to Somalia (Mogadishu) have been made. The Applicant is scheduled to be accompanied by three CBSA officials on flights from Montreal to Amsterdam and Amsterdam to Dubai, United Arab Emirates. Once in Dubai, the Applicant is scheduled to board an African Express flight to Mogadishu. Two Somali security escorts have been hired at a pre-paid cost of $3,000 U.S. to accompany the Applicant on the Dubai-Mogadishu flight.

[37] On December 31, 2008, the Applicant brought an application for leave and judicial review in relation to the Danger Opinion.

[38] On January 27, 2009, the Applicant brought the within motion for a stay of removal.

III. Analysis

[39] To obtain a stay pending determination of a case on its merits, an applicant must establish all of the following three requirements:

a) that there is a serious question to be tried;

b) that he/she would suffer irreparable harm if the Court refused relief; and

c) that the balance of convenience favours the applicant because he/she will suffer the greater harm from the refusal of the stay.

(*Toth*, above).

[40] The Applicant has failed to demonstrate that he has satisfied each branch of the test.

A. Serious Issue

[41] The underlying application for judicial review does not present an arguable case. First, the application was filed out of time, and required the consent of the Court to proceed. Second, the Minister's Delegate's finding that the Applicant would not be subject to persecution and the risks identified in sections 96 and 97 of the IRPA if returned to Somalia is not unreasonable. The Minister's Delegate held that the Applicant would not be subject to any individualized risk and that he would not be at greater risk of harm than other Somalis. The Applicant has not demonstrated that this conclusion is unreasonable.

B. Irreparable Harm

[42] A conclusion that the Applicant will suffer irreparable harm if removed cannot be based on speculation or mere possibility. The evidence supporting such a finding must be clear and non-

speculative (*Chen v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 464, 205 F.T.R. 285 at para. 31).

[43] The relief sought on a stay motion is effectively a suspension of certain provisions of the IRPA, which is a very significant step to take without the opportunity to hear arguments on a full record. As the dramatic step of suspending the operation of legislation cannot be taken lightly, irreparable harm to the Applicant must be demonstrated in order to meet this branch of the test (*Chen*, above at paras. 41-42).

[44] The Applicant argues that he will suffer irreparable harm in being sent to Mogadishu, Somalia, because of the living conditions in that country. The Minister's Delegate explained that the Applicant did not face an individualized risk should he be returned to Somalia, and that he would not suffer persecution or the risks identified in section 97 of the IRPA as an Akisha clan member in the event that he is returned to Somalia.

[45] In any event, this motion does not constitute a judicial review application of the Danger Opinion, but is rather a request for extraordinary relief in the form of a stay of removal. What the Minister's Delegate wrote is not in issue on this branch of the test.

[46] What the Applicant would have had to show is that he will suffer irreparable harm should he be removed to Somalia.

[47] The Applicant has provided an affidavit from his brother, Mr. Omar Omar, who has lived in Brampton since 1993. Mr. Omar states that he made a telephone call to one, Mr. Moussa Hussein Ali, who stated that it would be a “death sentence” for any Akisha from Ethiopia to cross the border into Somalia. Likewise, Mr. Ali stated that the Applicant would be killed at the airport on arrival in Mogadishu. Similarly, any Akisha who received the Applicant at the Mogadishu airport would likewise be killed (Affidavit of Omar Omar sworn January 22, 2009 at paras. 7-9).

[48] This evidence - that any Akisha in Somalia would be killed - is at odds with the Applicant's preference as stated in his December 18, 2008 detention review hearing - that he would not mind going to Hargeisa, which is in Somalia.

[49] It is also at odds with the fact that the Akishe tribe exists and persists in Somalia, and is a subclan of the Dir, one of the six major tribes (or clans) of that country (“Somalia – Issue of Family Unity, Identity and Culture”, United Nations Consolidated Inter-Agency Appeal for Somalia, January-December 2000, Affidavit of Daniel Carré sworn January 28, 2009, para. 31).

[50] On this motion, the Applicant has not provided any credible, independent evidence to support the notion that on arrival in Mogadishu he would be killed as a member of the Akisha clan.

[51] The Applicant has not provided any credible, independent, evidence to show that he would be irreparably harmed should he be returned to Somalia and does not meet the second branch of the *Toth* test.

C. Balance of Convenience

[52] One of the stated objectives of the IRPA is "to protect the health and safety of Canadians and to maintain the security of Canadian society" ["de protéger la santé des Canadiens et de garantir leur sécurité". The Supreme Court of Canada commented on the IRPA's objectives in *Medovarski*, above, where Justice McLachlin stated:

> [10] The objectives as expressed in the *IRPA* indicate an intent to prioritize security. This objective is given effect by preventing the entry of applicants with criminal records, by removing applicants with such records from Canada, and by emphasizing the obligation of permanent residents to behave lawfully while in Canada. This marks a change from the focus in the predecessor statute, which emphasized the successful integration of applicants more than security… the objectives of the *IRPA* and its provisions concerning permanent residents, communicate a strong desire to treat criminals and security threats less leniently than under the former Act. (Emphasis added).

[53] This Court has long held that the balance of convenience favours the Minister in cases where the Applicant has a criminal record (*Townsend*, above; *Moncrieffe*, above; *Mallia*, above).

[54] In *Mahadeo*, above, Justice Rothstein stated that, when an Applicant is guilty of welfare fraud or has been convicted of a criminal offence in Canada, the balance of convenience weighs heavily in favour of the Respondent (*Richards*, above; *Gomes*, above).

[55] Where the Applicant is a habitual or unrehabilitated criminal, the balance of convenience favours the Minister. In *Richards*, above, the Court stated:

> [35] The balance of convenience further tips in favour of the Minister when the Applicant's criminal record is taken into account. The Applicant, in this case, has accumulated 33 convictions while in Canada, including multiple convictions for

> assault and assault with a weapon. According to the IAD, which recently heard his appeal, he is an unrehabilitated long time criminal with little establishment demonstrated in Canada…

(Reference is also made to *Louis v. Canada (Minister of Citizenship and Immigration)* (1999), 94 A.C.W.S. (3d) 541, [1999] F.C.J. No. 1101 (QL) at para. 5).

[56] The Applicant has received 30 convictions in the space of 6 years. The evidence filed in this case shows that he engages - chronically - in criminal activity, and is a member of a dangerous street gang. He certainly falls within the definition of unrehabilitated longtime criminal as described above by the Court.

[57] In *Fabian v. Canada*, the Federal Court of Appeal held that the trial judge had failed to consider whether the public was in any danger from the applicant during the relevant time period: between the possible grant of a stay application and the hearing of his Charter challenge. The Court held that because the applicant was in custody he presented very little risk of recidivism, stating: "the applicant is detained and as long as he so remains and that there is no evidence that he is conducting his criminal activities from his cell, we endorse the following statement made in the Said case...". The Federal Court of Appeal granted the stay and reversed the trial decision (*Fabian v. Canada* (2000), 94 A.C.W.S. (3d) 958, [2000] F.C.J. No. 75 (QL) at para. 2).

[58] The Federal Court of Appeal's decision in *Fabian* is distinguishable. In the present case, there is evidence that the Applicant’s pattern of behaviour is that he persistently commits offences, whether incarcerated or not. The Applicant’s criminal history shows that he is a threat not just to

people which whom he associates, but to anyone who has any contact with him. This includes, in the prison context, prison managers, correctional officers, and other inmates. His behaviour at the Ottawa-Carleton Regional Detention Centre is so disruptive that management has kept him in segregation for long periods and has asked to have him transferred to a higher security institution.

[59] In *Townsend*, above, at paragraph 6, Justice Rothstein considered the appellant's "costly incarceration" in assessing the balance of convenience. This Applicant's costly incarceration, including the cost of having him in segregation or in a higher-security prison, should be factored into the balance of convenience in this case. The fact that the Applicant requires two guards for every detention review hearing also demonstrates the great cost of keeping safe the people with whom he comes into contact.

[60] There is a public interest in enforcing removal orders in an efficient, expeditious and fair manner. Only in exceptional cases will a person's interest outweigh the public interest (*Aquila v. Canada (Minister of Citizenship and Immigration)* (2000), 94 A.C.W.S. (3d) 960, [2000] F.C. J. No. 36 (QL)).

[61] The jurisprudence suggests that an applicant's persistent criminality will weigh the balance of convenience in the Minister's favour. Given that the level of criminality exhibited by this applicant exceeds that reported in the applicable cases, the balance of convenience lies in not staying the Applicant's removal. The Applicant has not met the third branch of the *Toth* test.

IV. Conclusion

[62] The Applicant has failed to establish each of the three parts of the tri-partite stay test; therefore, the Applicant's motion for a stay of removal is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicant's motion for a stay of removal be dismissed.

"Michel M.J. Shore"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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DATED:	January 28, 2009

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