Federal Court  Cour fédérale

Date: 20110525

Docket: IMM-3266-11

Citation: 2011 FC 607

Ottawa, Ontario, May 25, 2011

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

MBAYE IBRAHIMA

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER AND ORDER

II. Preamble

[1] Clearly, the applicant did not submit any evidence that could have served as justification for the removal officer to exercise his discretion. He merely alleges that the officer [TRANSLATION] "should have deferred the removal because of the particular circumstances of this case" (Motion Record (MR) at page 21, paragraph 35).

[2] To interpret and follow the *Immigration and Refugee Protection Act*, SC 2001, c 27 (IRPA), in a logical manner, nothing short of complete psychological or physical inability to act

for reasons arising not out of the country of origin of the person concerned but out of a situation in Canada (examples: abduction or detention, but not hospitalization or convalescence because hospital and medical authorities have information on the individual's status, unless the individual is in a coma or has amnesia proven by medical assessment) justifies a claimant's having remained illegally in Canada for more than three years without having tried to regularize his or her situation in any way (see paragraph 20(1)(*a*) and, in this case, more particularly, no exemption is specified in the general provision set out under paragraph 20(1)(*b*) of the IRPA).

[3] Indeed, when a person reports for a "pre-removal interview", and has not filed an application in the spouse or common-law partner in Canada class, that person cannot be granted an administrative stay of removal (*Duran v Canada (Minister of Public Safety and Emergency Preparedness)*, 2007 FC 738 at paragraph 29).

[4] This application aims to obtain the same relief as may be obtained by an application for judicial review. As stated in *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FC 682, where the judge applied the decision in *RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 (paragraph 44), this Court must closely examine the merits of the underlying application in conducting the first test, that is, of a serious issue to be tried.

II. Introduction

[5] The applicant, a citizen of Senegal, came to Canada as a student in January 2006. His student permit expired in July 2007, but he stayed in Canada illegally.

[6] After having been arrested and informed of his removal, he married a Canadian citizen and filed a sponsorship application. The applicant's removal is scheduled for May 26, 2011, at 10 a.m.

[7] The officer responsible for the removal had no valid reason to defer it. The Court agrees completely with the respondent's factual and legal statements. The applicant had the onus of presenting evidence to justify deferring the removal, but he failed to do so.

III. Preliminary observation

The decision contested by way of the application for leave and for judicial review is not clearly presented

[8] The applicant states in his application for leave and for judicial review (ALJR) that the decision in respect of which judicial review is sought is the [TRANSLATION] "decision made on May 10, 2011, by Enforcement Officer Michel Renaud", from whom the "applicant received the decision written on May 10, 2011".

[9] This decision is in fact a call-in letter dated May 10, 2011, delivered to the applicant in person, ordering him to report to the airport on May 26, 2011, at 10 a.m., for the enforcement of the removal order by the Canada Border Services Agency (CBSA).

[10] The exclusion order, which prompted the call-in letter, was in fact made on March 3, 2011.

[11] The applicant filed an ALJR against this order on April 8, 2011, the respondent replied on May 6, 2011, and this Court has not yet ruled on that application.

[12] Since the applicant's Motion Record only concerned the decision made on May 10, 2011, this Court's understanding is that the applicant is contesting the officer's refusal to defer the removal.

IV. Facts

[13] The applicant, Ibrahima Mbaye, a citizen of Senegal, was allowed into Canada on January 12, 2006, on a student visa.

[14] He was issued a student permit, valid until January 1, 2007.

[15] He twice applied to the Case Processing Centre in Vegreville for an extension of his student visa, which was extended to July 31, 2007.

[16] The applicant did not leave Canada on or before July 31, 2007, staying in Canada beyond the authorized period.

[17] On March 3, 2011, CBSA officers arrested the applicant at his home, and an exclusion order was made against him because he was without status.

[18] The applicant was detained for his removal.

[19] On March 9, 2011, the applicant filed an ALJR against the exclusion order (IMM-1535-11) and an ALJR against the declaration of no intent to apply for a Pre-removal Risk Assessment (PRRA) (IMM-1534-11) (related files).

[20] On March 14, 2011, the applicant was released on certain conditions, including a $4,000 deposit.

[21] The applicant allegedly married a Canadian citizen and, on April 11, 2011, filed an application for permanent residence in the spouse or common-law partner in Canada class (sponsorship application).

[22] On April 18, 2011, during his meeting with the officer to set the date for his removal, the applicant stated that he would leave Canada and requested that his removal be scheduled to take place in four weeks.

[23] The officer agreed to this request and set the removal for the week of May 16, 2011.

[24] During this meeting, the applicant did not tell the officer that he was allegedly married, that he had filed a sponsorship application or that he feared returning to Senegal.

[25] On May 10, 2011, the applicant was officially informed that his removal was scheduled for May 26, 2011.

[26] During this meeting, the applicant informed the officer that he had filed a sponsorship application.

[27] The officer informed the applicant that his filing of that application would not stay his removal on May 26.

[28] The applicant did not ask the officer to stay his removal for another reason.

[29] Therefore, according to the applicant, the officer refused an administrative deferral of his removal by applying the *Public Policy Under 25(1) of IRPA to Facilitate Processing in accordance with the Regulations of the Spouse or Common-law Partner in Canada Class* (Public Policy). This decision is now the subject of the ALJR to which this motion is attached.

V. Analysis

[30] To assess the merits of the motion for a stay, this Court must determine whether the applicant has met the tests laid down in the Federal Court of Appeal's decision in *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302, 11 ACWS 3d 440 (FCA):

A. there is a serious issue to be tried;

B. the applicant will suffer irreparable harm; and

C. the weighing of the balance of convenience.

[31] These three tests must be met in order for this Court to allow the stay application. If any one of the tests is not met, this Court cannot grant the stay.

[32] In this case, the applicant is applying for a temporary stay of enforcement of the removal order made against him, and the Court's order will be equivalent to this stay of enforcement.

A. Serious issue

[33] The applicant has not established that there is a serious issue to be tried by this Court.

[34] The applicant must show that he has a reasonable chance of succeeding in his main proceeding, that is, his ALJR of the removal officer's decision.

The applicant has not been granted an administrative deferral.

[35] The applicant remained in Canada, without legal status, from July 31, 2007, to March 3, 2011, the date on which he was arrested by the CBSA and an exclusion order was made against him.

[36] The applicant admits having stayed in Canada beyond the authorized stay.

[37] It was only after having been informed of his removal that the applicant filed an application for permanent residence in the spouse or common-law partner in Canada class. In fact, the application was filed on April 11, 2011, one month after the exclusion order was made.

[38] The conclusion that may be reached, from reading page 10 of the Public Policy, is that it does not apply in this case because the applicant was “removal ready” when he filed his application in the spouse or common-law partner in Canada class.

[39] As of the time that the exclusion order was made against the applicant, his removal was imminent, as provided 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 immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent. [Emphasis added.]

[40] Without these limiting criteria, a person could make application upon application and thus avoid ever being removed. That is not the purpose of the policy relied on by the applicant.

The applicant has not shown that his previous consultants were incompetent

[41] The applicant alleges that he was improperly advised by various immigration consultants and that he did not know he could file a common-law partner sponsorship application, incorrectly believing that he had to get married.

[42] It should be noted that the applicant has not provided the contact information of his previous consultants, is not adding his alleged consultants as third parties to these proceedings and has not adduced any evidence showing that a complaint was filed against those consultants.

[43] The applicant cannot allege having been improperly advised without adducing sufficient evidence (*R v GDB*, 2000 SCC 22, [2000] 1 SCR 520 at paragraphs 26-29; *Flores v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1147 at paragraph 38).

[44] The sponsorship application will continue to be processed after his removal, and the applicant will be able to return to Canada if the decision is in his favour (*Berki v. Canada (Solicitor General)*, 2005 FC 1084 at paragraph 5).

The removal officer has limited discretion

[45] The Court has established that removal officers have limited discretion, which is limited to deferring the removal because of special or compelling circumstances (*Adviento v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1430, 242 FTR 295 at paragraph 27; *Simoes v Canada (Minister of Citizenship and Immigration)* (2000), 187 FTR 219, 98 ACWS (3d) 422 (FC) at paragraph 12; *Williams v Canada (Minister of Citizenship and Immigration)*, 2002 FCT

853, 116 ACWS (3d) 89 at paragraph 21; *Prasad v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 614, 123 ACWS (3d) 533 at paragraph 32; *Griffith v Canada (Solicitor General)*, 2006 FC 127, 146 ACWS (3d) 123 at paragraph 26).

[46] However, there is nothing special about the applicant's circumstances.

[47] In fact, the applicant has not even formally applied to have his removal deferred.

[48] The courts have consistently held that a pending sponsorship application is not, in itself, an obstacle to removal (*Banwait v Canada (Minister of Citizenship and Immigration)* (1998), 79 ACWS (3d) 599, [1998] FCJ No 522 (QL/Lexis) (TD) at paragraphs 17 to 19; *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FC 682 at paragraph 5).

[49] Considering all the above, the applicant has failed to raise a serious issue in support of his motion. The application for a stay of removal could be dismissed on that ground alone.

B. Irreparable harm

[50] The notion of irreparable harm was defined by the Court in *Kerrutt v Canada (Minister of Employment and Immigration)* (1992), 53 FTR 93, 32 ACWS (3d) 621 (TD) as being the removal of a person to a country where there is a danger to the person's safety or life.

[51] Furthermore, in *Calderon v Canada (Minister of Citizenship and Immigration)* (1995), 92 F.T.R. 107, 54 ACWS (3d) 316, Justice Sandra Simpson stated the following about the definition of irreparable harm established in *Kerrutt*, above:

> [22] In *Kerrutt v. M.E.I.* (1992), 53 F.T.R. 93 (F.C.T.D.) Mr. Justice MacKay concluded that, for the purposes of a stay application, irreparable harm implies the serious likelihood of jeopardy to an applicant's life or safety. This is a very strict test and I accept its premise that irreparable harm must be very grave and more than the unfortunate hardship associated with the breakup or relocation of a family.

[52] In his affidavit, the applicant merely alleges that [TRANSLATION] "it is too chaotic in Senegal, and the authorities are unable to support the population" (MR, Applicant's Affidavit at page 14, paragraph 39) and that if he were to be removed, he would face [TRANSLATION] "a real risk as a result of his marriage with a women of another religion", without specifying either this risk or his or his wife's religion (MR, written submissions of the applicant at page 21, at paragraph 37).

[53] The applicant has not filed any evidence in support of these vague allegations.

[54] It is not sufficient for a claimant to make allegations of harm in an affidavit. When that harm is a fear of being mistreated if removed to one's country, it is also necessary to adduce evidence establishing the objective basis of that fear: *Gogna v Canada (Minister of Employment and Immigration)* (1993), 68 FTR 140, 42 ACWS (3d) 480).

[55] None of the documents adduced by the applicant in this file or the related files indicates the applicant's or his wife's religion. The applicant has also not adduced any evidence on possible religious intolerance in Senegal.

Applicant's spouse

[56] The applicant's spouse stated in her affidavit that she could not go and live in Senegal with the applicant because of her religion and because the applicant's family allegedly rejected them.

[57] However, the applicant's parents, who allegedly disowned him after having been informed of his marriage, live in the United States, not Senegal.

[58] The applicant's spouse also claims to have taken on many commitments with the applicant in relation to their married life and that it would be impossible for her to fulfill those commitments alone.

[59] The problems raised by the applicant's spouse are usual consequences of removal. Furthermore, no details or evidence are provided about these commitments.

[60] It is well settled that separation from family does not, in itself, constitute irreparable harm, since it is a usual consequence of removal (*Tesoro v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 148, [2005] 4 FCR 210 at paragraphs 34 to 45).

[61] Separation from a spouse is not the type of harm to which the tripartite test for obtaining a stay refers (*Melo v. Canada (Minister of Citizenship and Immigration)*, [2000] 188 FTR, 96 ACWS (3d) 278) at paragraph 21 (T.D.).

[62] Ultimately, the applicant and his spouse were aware of the applicant's illegal and, thus, precarious status when they allegedly made their commitments. They made their decisions with full knowledge of the situation. In the words of Justice Paul Rouleau, they did so at their peril (*Banwait*, above, at paragraph 16).

[63] Accordingly, in the absence of a serious issue to be tried by this Court, the applicant has failed to establish irreparable harm.

C. Balance of convenience

[64] In addition to showing that the underlying ALJR raises a serious issue to be tried and that the person would suffer irreparable harm if his or her removal is not stayed, the person applying for a stay must establish that, considering all of the circumstances, the balance of convenience weighs in favour of granting the stay (*Manitoba (Attorney General) v. Metropolitan Stores Ltd.*, [1987] 1 SCR 110; *RJR-Macdonald Inc*., above; *Toth*, above).

[65] In order to determine the balance of convenience, the Court must decide which of the two parties will suffer the greater harm depending on whether the stay is granted or refused (*Metropolitan Stores Ltd.*, above).

[66] In the absence of serious issues and irreparable harm, the balance of convenience favours the Minister, who has an interest in having a removal order enforced on the scheduled date (*Mobley v. Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No. 65 (QL/Lexis) at paragraph 2).

[67] In fact, subsection 48(2) of the IRPA provides that a removal order must be enforced as soon as it is reasonably practicable.

[68] The Court has acknowledged expressly that the Minister has the duty to enforce valid removal orders and that it is in the public interest to enforce such orders quickly. The Court has identified public interest considerations underlying the assessment that must be conducted of the balance of convenience:

> [18] There is a public interest in having a system which operates in an efficient, expeditious and fair manner and which, to the greatest extent possible, does not lend itself to abusive practices. This is the public interest which in my view must be weighed against the potential harm to the applicant if a stay is not granted.

Membreno-Garcia v. Canada (Minister of Employment and Immigration), [1992] 3 FC 306, 55 FTR 104 (T.D.).

[69] The balance of convenience favours the Minister.

VI. Conclusion

[70] For all of the reasons above, the application for a stay of enforcement of the removal order is dismissed.

ORDER

THE COURT ORDERS the dismissal of the application to stay the removal order's enforcement.

"Michel M.J. Shore"
Judge

Certified true translation
Sarah Burns

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3266-11
STYLE OF CAUSE:	MBAYE IBRAHIMA v MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

MOTION HEARD BY TELECONFERENCE ON MAY 24, 2011, BETWEEN OTTAWA, ONTARIO, AND MONTRÉAL, QUEBEC

REASONS FOR ORDER AND ORDER:	SHORE J.
DATED:	May 25, 2011

APPEARANCES:

Anthony Karkar	FOR THE APPLICANT
Margarita Tzavelakos	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Anthony Karkar, Advocate Montréal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT