

Federal Court



Cour fédérale

Date: 20160318

Docket: IMM-1145-16

Citation: 2016 FC 337

Ottawa, Ontario, March 18, 2016

PRESENT: The Honourable Mr. Justice Diner

BETWEEN:

**CYNTHIA ANOKWURU-NKEMKA
BENITA ANOKWURU NKEMKA**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

ORDER AND REASONS

[1] **UPON** motion of the Applicants for an Order staying the execution of the removal order presently set for March 19, 2016;

[2] **AND UPON** considering the evidence and the submissions contained in the motion records submitted by the Applicant and by the Respondent, as well as the oral submissions of counsel for both parties at a stay hearing held via teleconference at 9:30 p.m. on March 18, 2016;

[3] **AND UPON** directing myself both to the procedural aspects of this stay motion, as well as to the substantive component of having to meet the conjunctive tri-partite test in *Toth v Canada (Minister of Employment and Immigration)*, (1998) 86 NR 302 (FCA), namely (i) the existence of a serious issue to be determined by the Court, (ii) irreparable harm which will ensue should the stay not be granted, and (iii) that balance of convenience in issuing such Order lies in the Applicant's favour, I am unable to find that the Applicant satisfies either requirement, for the following reasons.

[4] First, there is a deficiency in the underlying Application for Judicial Review, filed March 16, 2016, which challenges the "direction for removal" and "Notice for Removal" (both are referenced in the said Application). This Court has held that these are not reviewable decisions (see *Bergman v. Canada (MPSEP)*, 2010 FC 1129 at paras 16-18, which provides a full summation of the law on this procedural point).

[5] I note that there was a request on this file that was made of the Inland Enforcement Officer to defer the removal, a decision which was rendered hours before this stay hearing, and forwarded to the Court in a break taken during this hearing. The Applications could have brought a judicial review based on this deferral request, and subsequent refusal (or even a deemed refusal) given the late timing of the decision of the Inland Enforcement Officer. They did not do so.

[6] However, even if I consider that the underlying judicial review challenged a formal decision, such as that refusal of the deferral request, I do not find that the tripartite test has been met, and thus am not in a position to grant the stay.

[7] First, I note that a higher threshold applies with respect to serious issue, where an applicant is seeking to review a refusal of an enforcement officer to exercise his or her discretion to defer removal as stated by this Court in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paras. 51 and 66), [*Baron*].

[8] While there have been decisions of this Court -- two 'unpublished' decisions (i.e. without neutral citations) were cited by the Applicants, and one by the Respondent -- that may be interpreted for going both ways on the issue of serious issue raised in this matter, i.e. as to whether the one year PRRA bar runs from the rejection of the refugee claim by the RPD or the RAD). Either way, it appears that the Courts have not yet pronounced on this issue in any authoritative way, although this may well happen at some point in the near future.

[9] However, what has not been established here is the second prong of irreparable harm. The underlying harm claimed has, in my view, been thoroughly addressed by two tribunals -- the RPD and RAD (for which judicial review was sought, but leave was also dismissed by this Court). There is no new evidence of any new irreparable harm that has been presented in this motion. For instance, the medical evidence produced was produced before the RPD and RAD. A more recent email from the Applicant's mother raises the same risks which had been raised

before those two tribunals, which both found that the Applicant did not face a risk of persecution claimed in Nigeria.

[10] Finally, I offer one other comment. Turning back to *Baron*, on another issue raised in that case, *Baron* holds that neither the enforcement officers nor the courts should encourage or reward persons who do not have “clean hands”. The Court has on numerous occasions dismissed stay motions on the basis of equity. The Applicants were found to have unclean hands by the RPD, and then again by the RAD. Indeed, the RPD noted that the Applicants tried to mislead a medical professional that provided evidence. No evidence from the Applicants presented in this stay motion addressed this unfortunate history, or tried to explain it.

[11] The RPD decision notes that the Applicants have already misled a medical professional, and that furthermore, the Applicants missed an enforcement interview in this matter and were ultimately arrested for doing so. This is in addition to the issues addressed in both the RPD and RAD decisions.

ORDER

THIS COURT ORDERS that this motion is dismissed.

"Alan S. Diner"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-1145-16

STYLE OF CAUSE: CYNTHIA ANOKWURU-NKEMKA, BENITA
ANOKWURU NKEMKA v THE MINISTER OF
CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: OTTAWA, ONTARIO

DATE OF HEARING: MARCH 18, 2016

ORDER AND REASONS: DINER J.

DATED: MARCH 18, 2016

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