Federal Court Cour fédérale

Date: 20180325

Docket: IMM-1345-18

Citation: 2018 FC 336

Ottawa, Ontario, March 25, 2018

PRESENT: The Honourable Mr. Justice Grammond

BETWEEN:

BUZANGU MUTOMBO KANUMBI

Applicant

and

MINISTER OF IMMIGRATION, CITIZENSHIP AND REFUGEES

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

[1] The applicant, Mr. Buzangu Mutombo Kanumbi, brings a motion for a stay of his removal from Canada scheduled for tomorrow, March 26, 2018. The motion was heard earlier today by teleconference. These are my reasons for dismissing the motion.

I. Facts and Underlying Decision

[2] Mr. Kanumbi is a citizen of the Democratic Republic of Congo [DRC]. There is little information in the record before me as to his immigration history. We know that he came to Canada in 1996 and made a refugee claim, which was dismissed later that year. He applied for a pre-removal risk assessment [PRRA], which was denied in 2009. He was then removed from Canada, but came back in 2010. He also made an application for permanent residence, apparently sponsored by his spouse, which was also refused. He made another PRRA application, which was refused in 2013.

[3] Since 2013, the Canadian Border Services Agency [CBSA] interviewed Mr. Kanumbi a number of times in order to make arrangements for his removal. Finally, on February 19, 2018, he was given a direction to report to Ottawa Airport on March 26, 2018 for his removal to the DRC.

[4] Mr. Kanumbi made a request to the Enforcement Officer (acting under section 48 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]) to defer his removal, based on a number of grounds including his pending application to remain in Canada on humanitarian and compassionate [H&C] grounds, his good faith, the risk of torture or death upon removal to the DRC and the best interests of his child. That request was denied.

[5] Mr. Kanumbi brought an application for leave and judicial review of the decision of the Enforcement Officer and the present motion for stay of removal.

II. Preliminary Issue: Delay

[6] Prior to the hearing, counsel for the respondent argued that I should not consider this motion for a stay of removal because it had not been brought in a timely manner. Mr. Kanumbi was served on February 19, 2018, with a direction to report to Ottawa Airport on March 26 for removal. Mr. Kanumbi made his application for deferral to the Enforcement Officer on March 9, and a decision was made on March 15. Mr. Kanumbi served his motion for stay of removal on Friday, March 23, at 4:52 PM.

[7] In *El Ouardi v Canada (Solicitor General)*, 2005 FCA 42, Justice Marshall Rothstein, then of the Federal Court of Appeal, stated that a judge to whom a motion for stay of removal is presented may refuse to entertain it if it is brought too late. There are several important reasons why stay of removal motions must be brought at the earliest occasion. Such motions raise important and complex issues and deserve careful consideration. When they are brought on the eve of the scheduled removal, the respondent has little time to prepare a meaningful response and the Court has little time to review the materials. It is preferable to deal with such motions during regular working days, not merely for the convenience of the Court and counsel, but also because it may be more difficult for counsel to obtain instructions, to seek additional information or to find relevant documents over the weekend.

[8] In this case, counsel for Mr. Kanumbi wrote a letter explaining that his client did not have legal counsel, had applied for legal aid but had not yet received an answer. His assertion that Mr. Kanumbi did not have a lawyer is puzzling, as he represented Mr. Kanumbi for his

administrative application for deferral on March 9, barely two weeks earlier. In a case like this, counsel should inform the Court and the opposing party at the earliest occasion that a motion for stay of removal is under consideration. The Court may then issue directions accordingly. If the legal aid process poses systemic obstacles to a timely presentation of stay of removal motions, the Court hopes that these obstacles can be identified and addressed.

[9] I have decided to deal with the motion despite the fact that it was brought at the very last minute. Nevertheless, I cannot refrain from thinking that the fact that this motion was prepared and presented at the last minute had consequences on the quality of the record before me. In future cases, this should be avoided.

III. Analysis

[10] The Act does not require a judicial authorization to remove a foreign national from Canada. In that sense, a stay of removal is an exceptional remedy, as it interferes with the normal administrative process.

[11] The statutory basis for a stay of removal is found in section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7, which provides that this Court may make interim orders pending the final disposition of an application for judicial review. In granting such relief, we apply the same test as for interlocutory injunctions. The Supreme Court of Canada recently restated the test as follows:

> At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a “serious question to be tried”, in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it

> will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.
>
> (*R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12, references omitted)

[12] This three-pronged test is well-known. It had been set out in earlier decisions of the Supreme Court (*Manitoba (Attorney General) v Metropolitan Stores Ltd.*, [1987] 1 SCR 110; *RJR — MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR*]). It was also applied in the immigration context in *Toth v Canada (Minister of Employment and Immigration)*, 1988 CanLII 1420 (FCA). Of course, the application of this test is highly contextual and fact-dependent.

A. *Serious Issue to be Tried*

[13] In *RJR*, the Supreme Court stated that the "serious question to be tried" criterion is a relatively low threshold (*RJR* at 337). However, the Supreme Court also said that a more demanding test must be applied where the interim relief sought has the practical effect of deciding the underlying action (*RJR* at 338-339). This is the case where an application for judicial review is brought against a decision of an Enforcement Officer refusing to defer removal. In that context, a motion for stay of removal gives the applicant what he or she is asking for in the underlying application. For that reason, the Federal Court of Appeal stated that the applicant must show "quite a strong case" (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paras 66-67 [*Baron*]), keeping in mind that the applicable standard of review on the merits is reasonableness.

[14] The starting point of the analysis is that, under section 48 of the Act, the Enforcement Officer's discretion to defer removal is very limited (*Baron* at para 49; *Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 55). Justice Denis Gascon recently summarized the main categories of situations where the Enforcement Officer may exercise his or her discretion:

> First, in all cases (including where an H&C application is at stake), an enforcement officer may consider logistical or practical factors influencing the timing of removal (such as travel arrangements, illness or health issues, the end of a child's school year, imminent births and deaths, etc.). Arguably, the imminence of a decision on an H&C application, if adequately supported by evidence, would fit in that more technical or timing category […]. Second, H&C applications can justify a deferral when they are "based upon a threat to personal safety." Third, even where there is no threat to personal safety or no practical or timing concern, H&C applications can still justify a deferral when "special considerations" are present.
>
> […]
>
> This Court has recognized that those special considerations which may warrant deferral in the face of an H&C application can include situations where an H&C application was brought on a timely basis but has not yet been determined by the immigration authorities due to a backlog in the system […]
>
> (*Newman v Canada (Public Safety and Emergency Preparedness)*, 2016 FC 888 at paras 28-31 [*Newman*])

[15] Mr. Kanumbi asserts that the Enforcement Officer made a number of reviewable errors.

[16] First, Mr. Kanumbi argues that his removal should have been deferred until his H&C application is determined. He says that he made that application in a timely fashion and that he falls under the exception described by Justice Gascon in *Newman*. However, he made his

application in 2017, while his PRRA application was denied in 2013. Hence, he waited four years. The application was not made in a timely fashion.

[17] At the hearing, counsel for Mr. Kanumbi alleged that the delay was explained by the fact that Mr. Kanumbi had made an application for permanent residence sponsored by his wife, which was abandoned when they separated. Counsel for Mr. Kanumbi sought to send supporting documents to the Court minutes before the hearing, but was unable to do so. I note that Mr. Kanumbi was represented by the same counsel for his administrative application for deferral. The issue of whether the H&C application was made on a timely basis was canvassed at length. I fail to understand how such an explanation, if true, could have been omitted from the administrative application for deferral. In any event, this Court reviews the Enforcement Officer's decision based on the record before him or her and there was no explanation for the four-year delay in that record.

[18] Second, Mr. Kanumbi argues that the Enforcement Officer failed to assess properly the evidence of the risk that he would be imprisoned, tortured or killed upon his removal to the DRC. In this regard, Mr. Kanumbi says that he has been active in organizations which oppose the current regime in the DRC and that he will be identified as such by the Congolese authorities. He appears in videos that have been posted on the Internet showing various demonstrations that took place in Canada against the Congolese regime.

[19] There are numerous reports of serious human rights abuses in the DRC and some were filed in the record. However, Mr. Kanumbi must be able to show a link between his situation and

the categories of persons who may be subject to persecution. In this regard, the record contains a response to an information request [RIR] by Citizenship and Immigration Canada which deals with the situation of persons who return to the DRC after making a refugee claim. It reads:

> […] an official source at the Belgian embassy in Kinshasa, who monitored the repatriation of 23 Congolese from Belgium and deals with migration issues in the DRC, stated on 18 November 2014 that the DRC authorities are not interested in "low-level" political activities, but rather in a group described by the source as "combatants" […]

[20] Mr. Kanumbi has not provided evidence of his political involvement other than a number of videos posted on the Internet. Those videos do not identify Mr. Kanumbi by name and it is doubtful that he can be recognized. He has not shown that he would be considered a "combatant" by the DRC regime.

[21] I also note that Mr. Kanumbi submitted essentially the same arguments in his PRRA application in 2013. He was found not to be credible.

[22] In this context, Mr. Kanumbi has not made out a "strong case" that the Enforcement Officer made an unreasonable decision in refusing the deferral.

B. *Irreparable Harm*

[23] The second prong of the RJR test relates to irreparable harm. Where the underlying application challenges an Enforcement Officer's decision not to defer the removal, such as in this case, the analysis of this criterion duplicates in large part the analysis of the serious question to be tried. I have already concluded that the Enforcement Officer reasonably found that Mr.

Kanumbi would not face a risk of persecution upon returning to the DRC. It follows that he has not shown irreparable harm either.

C. *Balance of Convenience*

[24] At this last stage of the RJR test, prejudice to the applicant must be balanced against prejudice to the respondent who is prevented from enforcing the law. It is not strictly necessary to deal with this criterion, as the motion fails on the first two prongs of the *RJR* test. Nevertheless, Mr. Kanumbi's conduct strengthens the state's interest in ensuring the immediate enforcement of the law.

[25] I will not insist on Mr. Kanumbi's criminal history, as I do not have enough information and the offences he is charged with are not among the most serious and occurred more than 15 years ago.

[26] What is more important is the fact that Mr. Kanumbi has a pattern of trying to circumvent immigration laws. He was removed from Canada to the United States in 2009, but returned a year later. He failed to appear at removal interviews and failed to inform immigration authorities of his change of address. CBSA had to arrest him on one occasion. Such conduct has often been found to be a negative factor in assessing whether a stay of removal should issue.

[27] As none of the criteria of the *RJR* test are met, the motion for stay of removal is dismissed.

JUDGMENT

THIS COURT'S JUDGMENT is that the motion for a stay of removal is dismissed.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1345-18
STYLE OF CAUSE:	BUZANGU MUTOMBO KANUMBI v MINISTER OF IMMIGRATION, CITIZENSHIP AND REFUGEES
PLACE OF HEARING:	OTTAWA, ONTARIO
DATE OF HEARING:	MARCH 25, 2018
REASONS FOR JUDGMENT AND JUDGMENT:	GRAMMOND J.
DATED:	MARCH 25, 2018

APPEARANCES:

Alain Tayeye	FOR THE APPLICANT
Joanie Roy	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Alain Tayeye Barrister and Solicitor Ottawa, Ontario	FOR THE APPLICANT
Nathalie G. Drouin Deputy Attorney General of Canada Ottawa, Ontario	FOR THE RESPONDENT