Federal Court  Cour fédérale

**Date: 20220617**

**Docket: IMM-9439-21**

**Citation: 2022 FC 924**

**Ottawa, Ontario, June 17, 2022**

**PRESENT: Mr. Justice Norris**

**BETWEEN:**

**DAVID OLUSANYA MATTHEW**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

# ORDER AND REASONS

## I. OVERVIEW

[1] The applicant is a 60 year old citizen of Nigeria. He sought refugee protection in Canada on the basis of his risk due to a land dispute as well as his bisexuality. The Refugee Protection Division ("RPD") of the Immigration and Refugee Board of Canada ("IRB") rejected the claim. The RPD also found under section 107.1 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("*IRPA*") that the claim was manifestly unfounded.

[2] This latter finding has significant consequences for the applicant. He cannot appeal the RPD's rejection of his claim to the Refugee Appeal Division of the IRB: see *IRPA*, paragraph 110(2)(c). Since the applicant does not have a right of appeal to the RAD, the coming into force of the conditional removal order made against him when he submitted his refugee claim is not delayed by such an appeal: see *IRPA*, subsection 49(2). Furthermore, for the same reason, the applicant is not entitled to a statutory stay of removal pending an application for leave and judicial review of the decision rejecting his claim for refugee protection; this is in contrast to a party who seeks leave and judicial review of a decision of the RAD: see *Immigration and Refugee Protection Regulations*, SOR/2002-227, subsection 231(1).

[3] The applicant has applied for leave and judicial review of the RPD's decision under subsection 72(1) of the *IRPA*. The application has been perfected. The Court's Recorded Entries note that as of May 17, 2022, the application is ready for a determination on leave.

[4] On June 1, 2022, the applicant was directed to report for removal to Nigeria on June 18, 2022.

[5] The applicant now seeks an order staying his removal pending the final determination of his application for leave and judicial review.

[6] I stated at the conclusion of the hearing of this motion that I would be granting the motion for reasons to follow. These are those reasons.

## II. BACKGROUND

[7] Section 107.1 of the *IRPA* provides as follows:

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| **107.1** If the Refugee Protection Division rejects a claim for refugee protection, it must state in its reasons for the decision that the claim is manifestly unfounded if it is of the opinion that the claim is clearly fraudulent. | **107.1** La Section de la protection des réfugiés fait état dans sa décision du fait que la demande est manifestement infondée si elle estime que celle-ci est clairement frauduleuse. |

[8] *Warsame v Canada (Citizenship and Immigration)*, 2016 FC 596, sets out several principles to guide the application of section 107.1 of the *IRPA*:

- It is the claim itself that must be fraudulent. The use of fraudulent documents to escape persecution or to enter Canada is not sufficient. However, once making a claim for refugee protection, that claimant must "operate with clean hands and statements in support of the claim have to be accurate or they could be held against the claimant" (at para 27).

- For a claim to be fraudulent, "it would be required that a situation be represented of being of a certain character when it is not" (at para 30). Not every misstatement or falsehood would make a claim fraudulent. "It must be that the dishonest representations, the deceit, the falsehood, go to an important part of the refugee claim for the claim to be fraudulent, such that the determination of the claim would be influenced in a material way" (at para 30). For a claim to be clearly fraudulent, "there must be an attempt to deceive in a substantial or material manner with respect to the determination of the status" (at

para 32). Falsehoods that are "merely marginal or are antecedent to the claim would not qualify" (at para 31).

- The use of the word "clearly" denotes how firm the finding that the claim is fraudulent must be. (I would add that the same could be said about the word "manifestly".) To make a finding that a claim is clearly fraudulent, the decision maker must have "the firm conviction that refugee protection is sought through fraudulent means, such as falsehoods or dishonest conduct that go to the determination of whether or not refugee protection will be granted" (at para 31).

[9] In the decision at issue, the RPD cites and follows *Warsame*.

[10] For present purposes, the RPD's main reasons for rejecting the claim and finding that it was manifestly unfounded may be summarized as follows:

a) The allegations regarding the land dispute are not credible:

- The applicant gave numerous inconsistent addresses for the bungalow he claims to have built on the disputed land;

- The police documents are fabricated because the header in all documents is "Police Intelligent Department" instead of "Police Intelligence Department," and because they were compiled by the applicant's cousin, Emmanuel Ademola;

- The hospital report depicting the assault on the applicant's son Arnold is fabricated because it states he was 15 years old at the time, when in fact he was 16; because it

post-dates the date of his treatment (July 1, 2018) by almost two years (report dated April 8, 2020); and because it references the fabricated police report;

- The photographs of Arnold's injuries are likely staged because they relate to the fabricated hospital report and came from the same cousin.

b) The allegation of a 2016 arrest in Nigeria for same sex crimes is not credible:

- The applicant omitted this incident and his fear of persecution on this basis from his original Basis of Claim ("BOC") narrative and his explanation for the late disclosure of this information was not credible;

- The BOC narrative implies that the 2016 matter was resolved with the payment of a single bribe yet at the hearing the applicant stated that he continued to pay bribes in relation to that matter;

- The applicant testified that he had been arrested and detained only once (in relation to the alleged same sex crime) but the BOC narrative alludes to another arrest in relation to the land dispute;

- The applicant did not disclose either arrest on his Schedule A form, despite being fluent in English, well-educated, and aware of the significance of the arrests;

- The police report (the "Invitation Regarding Indecent Practices") is also likely a fabricated document as it contains the same error as the other police documents;

- Emails from Emmanuel and Hossana (the applicant's wife) are tainted by the fact that the fabricated reports originated from Emmanuel, and are therefore given no weight.

c) The claim is manifestly unfounded:

- The applicant's use of and reliance upon fraudulent documents (the three police reports, the hospital report, and the photographs) support a finding that the claim itself is fraudulent;

- The fabricated documents were not used to escape persecution but, rather, were held out by the applicant as genuine documents going to the core of his claims in respect of both the land dispute and sexuality;

- The applicant's numerous dishonest representations concerning his sexuality (in his testimony and in his supporting documents) demonstrate that his claim that he is bisexual is not genuine and was made for the sole purpose of advancing the refugee claim.

## III. ANALYSIS

### A. *The test for a stay of removal*

[11] As is well-known, to be entitled to a stay of removal, the applicant must demonstrate three things: (1) that the underlying application for judicial review raises a "serious question to be tried;" (2) that he will suffer irreparable harm if the stay is refused; and (3) that the balance of

convenience (i.e. the assessment of which party would suffer greater harm from the granting or refusal of a stay pending a decision on the merits of the judicial review application) favours granting a stay: see *Toth v Canada (Employment and Immigration)* (1988), 86 NR 302, 6 Imm LR (2d) 123 (FCA); *R v Canadian Broadcasting Corp*, 2018 SCC 5, [2018] 1 SCR 196 at para 12; *Manitoba (Attorney General) v Metropolitan Stores Ltd*, [1987] 1 SCR 110; and *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 at 334.

[12] The purpose of an interlocutory order like the one sought here is to ensure that the subject matter of the underlying litigation will be preserved so that effective relief will be available should the applicant be successful on his application for judicial review: see *Google Inc v Equustek Solutions Inc*, 2017 SCC 34 at para 24.

[13] A decision to grant or refuse such interlocutory relief is a discretionary one that must be made having regard to all the relevant circumstances: see *Canadian Broadcasting Corp* at para 27. As the Supreme Court stated in *Google Inc*, "The fundamental question is whether the granting of an injunction is just and equitable in all of the circumstances of the case. This will necessarily be context-specific" (at para 25).

[14] While each part of the test is important, and all three must be met, they are not discrete, watertight compartments. Each part focuses the Court on factors that inform its overall exercise of discretion in a particular case: *Wasylynuk v Canada (Royal Mounted Police)*, 2020 FC 962 at para 135. The test should be applied in a holistic fashion where strengths with respect to one factor may overcome weaknesses with respect to another: see *RJR-MacDonald* at 339;

*Wasylynuk* at para 135; *Spencer v Canada (Attorney General)*, 2021 FC 361 at para 51; *British Columbia (Attorney General) v Alberta (Attorney General)*, 2019 FC 1195 at para 97 (rev'd on other grounds 2021 FCA 84); and *Power Workers Union v Canada (Attorney General)*, 2022 FC 73 at para 56. See also Robert J Sharpe, "Interim Remedies and Constitutional Rights" (2019) 69 UTLJ (Supp 1) at 14.

[15] Together, the three parts of the test help the Court to assess and assign what has been termed the risk of remedial injustice (see Sharpe, above). They guide the Court in answering the following question: Is it more just and equitable for the moving party or the responding party to bear the risk that the outcome of the underlying litigation will not accord with the outcome on the interlocutory motion?

B. *The test applied*

(1) Serious Issue

[16] In the present case, under the first part of the test, the threshold for establishing a serious question to be tried is a low one. The applicant only needs to show that the application for judicial review is not frivolous or vexatious: *RJR-MacDonald* at 335 and 337; see *also Gateway City Church v Canada (National Revenue)*, 2013 FCA 126 at para 11 and *Glooscap Heritage Society v Canada (National Revenue)*, 2012 FCA 255 at para 25.

[17] The applicant challenges the RPD's finding that the refugee claim is manifestly unfounded in several respects but the common thread is that the RPD unreasonably relied on

concerns with respect to the *credibility* of the claim to support the finding that the claim was clearly fraudulent. The applicant also submits that several of the RPD's key findings concerning the authenticity of documents and the credibility of evidence are unreasonable. I am satisfied that the grounds for review that the applicant has identified are neither frivolous nor vexatious. Accordingly, the applicant has satisfied the first part of the test.

(2) Irreparable Harm

[18] Under the second part of the test, the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicant's own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application: see *RJR-MacDonald* at 341. To meet this part of the test, the applicant must show that there is "real, definite, unavoidable harm – not hypothetical and speculative harm" (*Janssen Inc v Abbvie Corporation*, 2014 FCA 112 at para 24). He must provide "evidence at a convincing level of particularity that demonstrates a real probability that unavoidable irreparable harm will result" unless the stay is granted: see *Glooscap Heritage Society* at para 31.

[19] The applicant relies on two forms of irreparable harm. One is the risk he would be exposed to if he were returned to Nigeria. This is the same risk that underlies his claim for refugee protection. The other is that his application for judicial review would be rendered moot.

[20] As I will explain, I am satisfied that the applicant meets the second part of the test because an arguable application for judicial review would effectively be rendered pointless if he

is returned to Nigeria before it can be determined on its merits. As a result, it is not necessary to consider the other form of irreparable harm the applicant relies upon.

[21] The potential mootness of the underlying application for judicial review does not necessarily constitute irreparable harm; rather, whether this is so must be determined in the individual circumstances of the particular case at hand: see *El Ouardi v Canada (Solicitor General)*, 2005 FCA 42 at para 8, and *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286 at paras 34-38.

[22] Where, as is the case here, the Court is satisfied that the applicant has raised arguable grounds for review, this is a sufficient basis to find irreparable harm. This is because, if he were to be removed at this time, the applicant would be deprived of the right to a meaningful and effective remedy in the event that he were to persuade the reviewing Court that the RPD's decision is unreasonable. Even if the argument could be made that, strictly speaking, the application for judicial review would not become moot if the applicant leaves Canada involuntarily (see *Jawad v Canada (Citizenship and Immigration)*, 2021 FC 1262), all this would mean is that the application for judicial review would not be dismissed on this basis. From the applicant's point of view, the crucial question is what would happen if his application for judicial review is allowed after he is removed. Setting aside the decision and remitting the matter to the RPD for redetermination would be neither meaningful nor effective relief if the applicant is already in Nigeria. This is sufficient to constitute irreparable harm.

[23] The present case illustrates the point made above that the three parts of the test for a stay are not watertight compartments and that the test should be applied in a holistic fashion where strengths with respect to one factor may overcome weaknesses with respect to another. Even though this anticipates part of the analysis under the third step, in finding that the applicant has satisfied the second step of the test, I have considered the fact that the underlying application for judicial review is the only opportunity he has to challenge the determination that he is neither a Convention refugee nor a person in need of protection. This additional fact helps to elevate the risk of remedial injustice from the speculative or merely hypothetical to a "real probability". However, to be clear, the applicant was not required to establish – nor have I found – that his application for judicial review is likely to succeed. Rather, I have simply found that his application is sufficiently strong to give rise to a real risk of remedial injustice if he were required to leave Canada before it is finally determined. In the particular circumstances of this case, where the RPD's decision cannot be reviewed in any other way, this is sufficient to satisfy the second part of the test.

[24] Finally, my assessment of the merits of the underlying application for judicial review is solely for the purpose of this motion. It should go without saying that it in no way binds any other judge who may be called upon to consider this matter for some other purpose.

(3) Balance of Convenience

[25] The third part of the test requires an assessment of which party would suffer greater harm from the granting or refusal of a stay of the removal order pending a decision on the merits of the application for judicial review. To meet this part of the test, the applicant must establish that the

harm he would suffer if the stay is refused is greater than the harm the respondent would suffer if the stay is granted. The harm found under the second part of the test is considered again at this stage, only now it is assessed in comparison with other interests that will be affected by the Court's decision. This weighing exercise is neither scientific nor precise: see *Canada (Citizenship and Immigration) v Canadian Council for Refugees*, 2020 FCA 181 at para 17. But this is not to say it is unprincipled. On the contrary, it is at the heart of the determination of what is just and equitable in the particular circumstances of the case at hand.

[26] In assessing the balance of convenience, in addition to the applicant's interests, the public interest must be taken into account since this is a case involving the actions of a public authority (*RJR-MacDonald* at 350). The applicant is subject to a valid and enforceable removal order. It was made pursuant to statutory and regulatory authority. It is therefore presumed that it is in the public interest. Further, under subsection 48(2) of the *IRPA*, a removal order "must be enforced as soon as possible" once it is enforceable. It is also presumed that an action that suspends the effect of the order (as would an interlocutory stay) is detrimental to the public interest: see *RJR-MacDonald* at 346 and 348-49. Whether this is sufficient to defeat a request for an interlocutory stay in a given case will, of course, depend on all the circumstances of the case. This can also depend on how long the effect of the deportation order would be suspended: see *Canadian Council for Refugees* at para 27.

[27] The fact that the applicant is subject to a valid and enforceable removal order is an important consideration in assessing the balance of convenience. However, the only "inconvenience" to the respondent if the applicant is not removed now and his application for

judicial review is ultimately dismissed is that his removal from Canada will have been delayed; it will not have been frustrated entirely. In weighing the public interest, I also note that many months have passed since the applicant's removal order became enforceable. While I recognize that the delay in enforcement may have been due at least in part to the ongoing impact of the COVID-19 pandemic, no evidence was presented to explain the delay or why this particular time for removal was chosen. It is also noteworthy that the decision to direct the applicant to report for removal was finally made when the Court is on the verge of determining whether to grant leave to proceed with the application for judicial review. All these considerations diminish (although they certainly do not negate) the public interest in the enforcement of the removal order at this time. Furthermore, there are no other factors that weigh on the respondent's side of the scale. For example, there is no suggestion that the applicant poses a danger to the public or that he is a flight risk.

[28] On the other hand, the "inconvenience" to the applicant of losing the right to seek a meaningful and effective remedy is significant and, as I have determined above, irreparable. This interest is not confined to the applicant; it is shared by the public and by the administration of justice, a consideration that also tips the balance in favour of a stay. It may turn out to be the case that the applicant is unable to persuade the reviewing judge that the RPD's decision is unreasonable. This is not for me to determine. The critical consideration is that to permit the applicant to be removed now would deprive him of *any* chance of obtaining a meaningful and effective remedy. This tips the balance of convenience in his favour. Also weighing in the applicant's favour is the fact that this application for judicial review is his only opportunity to contest the determination that he is not a Convention refugee or a person in need of protection.

In the particular circumstances of this case, these considerations outweigh the public interest in the enforcement of the removal order at this time.

## IV. CONCLUSION

[29] Balancing all of the relevant considerations, I am satisfied that it is more just and equitable for the respondent to bear the risk that the outcome of the underlying litigation will not accord with the outcome on this motion than it would be for the applicant to bear that risk. A stay of removal is the only way to ensure that the subject matter of the litigation is preserved so that effective relief will be available should the applicant be successful on his application for judicial review (cf. *Google Inc* at para 24). The countervailing considerations are insufficient to outweigh this fundamentally important consideration.

[30] Accordingly, the motion is granted. The applicant shall not be removed from Canada prior to the final determination of the underlying application for leave and judicial review.

**ORDER IN IMM-9439-21**

**THIS COURT ORDERS that**

1. The motion is granted.
2. The applicant shall not be removed from Canada prior to the final determination of his application for leave and judicial review of the decision of the Refugee Protection Division dated November 12, 2021.

"John Norris"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-9439-21 |
| **STYLE OF CAUSE:** | DAVID OLUSANYA MATTHEW v THE MINISTER OF CITIZENSHIP AND IMMIGRATION |
| **PLACE OF HEARING:** | HELD BY VIDEOCONFERENCE |
| **DATE OF HEARING:** | JUNE 15, 2022 |
| **ORDER AND REASONS:** | NORRIS J. |
| **DATED:** | JUNE 17, 2022 |

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| Amy King | FOR THE RESPONDENT |

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| Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |