Date: 20090306

Docket: IMM-4011-08

Citation: 2009 FC 243

BETWEEN:

UWADIAE OSAGHAE

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

HARRINGTON J.

[1] When it comes to Mr. Osaghae, it is most difficult to separate fact from fiction. On arrival here in 2006, he sought protection and said he fled his native Nigeria for two reasons, somewhat intertwined. His mother was killed in 2002 in a land dispute and he had reason to fear the same fate at the hands of the murderers. The other reason is that he is bisexual. Homosexuality is illegal in Nigeria. The men involved in the land dispute came to his office and outed him, leading to social ostracization. He also mentioned that during a good part of 2003 through 2005 he was in an American prison.

[2] Contrary to that assertion, in his Personal Information Form filed in support of his refugee claim he said he was Nigeria from 2000 through to 2006 and even gave the name of his employer. In both instances, however, he said he was in Nigeria in 2002 when his mother was allegedly murdered. His application for refugee status was declared abandoned, and this Court refused to grant him leave to have that decision reviewed.

[3] He was later declared inadmissible due to serious criminality. He had been convicted outside Canada of an offence that if committed here would have constituted an offence punishable by a maximum term of imprisonment of at least ten years. He was still entitled to a PRRA, but limited to an assessment of risk under section 97 of the *Immigration and Refugee Protection Act*, not section 96.

[4] The PRRA officer determined that he would not be at risk of torture, risk to life or risk of cruel treatment or punishment due to his sexual orientation if returned to Nigeria. Although sodomy is a criminal offence, the officer carried out a detailed analysis which was not unreasonable and should not be disturbed.

[5] With respect to the land dispute, the officer pointed out that internal relocation to avoid ill-treatment from non-state agents is almost always an option in Nigeria. She also found that there was no evidence to indicate that any person would be interested in targeting him if he returned to Nigeria and that being ostracized by his family was irrelevant. This finding is also reasonable and so the application for judicial review will be dismissed.

[6] Although the above reasons are enough to dispose of the application, the Minister submitted there were two reasons why I should not have considered the judicial review on its merits. They were the equitable doctrine of "clean hands" and mootness. In *Thanabalasingham v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 14, 51 Imm. L.R. (3d) 1, the Court of Appeal disagreed with the Minister's proposition that if it is determined an applicant has come to Court with unclean hands then the Court must refuse to hear or grant the relief sought on its merits. In speaking for the Court, Mr. Justice Evans pointed out that the Court may dismiss an application without proceeding to the merits or even though having found reviewable error decline to grant relief [my emphasis.]. He said:

> [10] In exercising its discretion, the Court should attempt to strike a balance between, on the one hand, maintaining the integrity of and preventing the abuse of judicial and administrative processes, and, on the other, the public interest in ensuring the lawful conduct of government and the protection of fundamental human rights. The factors to be taken into account in this exercise include: the seriousness of the applicant's misconduct and the extent to which it undermines the proceeding in question, the need to deter others from similar conduct, the nature of the alleged administrative unlawfulness and the apparent strength of the case, the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.
>
> [11] These factors are not intended to be exhaustive, nor are all necessarily relevant in every case. While this discretion must be exercised on a judicial basis, an appellate court should not lightly interfere with a judge's exercise of the broad discretion afforded by public law proceedings and remedies. …

[7] The events giving rise to the "clean hands" and mootness submissions occurred after the negative PRRA decision. Upon apprehending Mr. Osaghae in preparation for his removal it was discovered that he was actually living with a woman with whom he had fathered two children. Mr.

Osaghae sought, and was granted, leave to pursue this judicial review. That decision did not have the effect of deferring his removal and so he sought a stay of the Removal Order pending final disposition of this judicial review.

[8] His stay application came before Mr. Justice Hughes. In addition to his sexual inclination, the Minister submitted that Mr. Osaghae lied as to his whereabouts from 2003 to 2005. Evidence from the United States was produced which appears to establish that he was in prison there, as indeed he had stated when he first arrived in Canada. It was further submitted, however, that his first declaration was not before the PRRA officer. Mr. Osaghae's counsel was granted an adjournment to seek instructions on this point, but no clarifying affidavit was forthcoming.

[9] Mr. Justice Hughes refused to grant a stay. He said:

> …
>
> **AND UPON** determining that the Applicant mislead the Respondent and was not forthcoming as to his incarceration in the United States and the period from 2003 to 2005 and that he was living with a woman in an heterosexual relationship, not a gay lifestyle;
>
> **AND UPON** concluding that the Applicant has not come to this Court with clean hands …
>
> … The motion for a stay is dismissed.

[10] Later, counsel for the Minister recanted the submission that the Port of Entry Notes were not before the PRRA Officer, then produced an affidavit wherein that Officer swore that although the information was in the file she paid no attention to it. This puts quit to the presumption that an

Officer has read everything in a file (*Florea v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 598 (QL)).

[11] All this caused Mr. Osaghae's counsel to invoke another maxim of equity: "those who seek equity must do equity". Mr. Justice Hughes' refusal to grant a stay of removal was based on standards quite different from those applicable in judicial reviews. In *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1995] 3 S.C.R. 199, 187 N.R. 1, the Supreme Court made it clear that Motions Judges are often called to render interlocutory orders in the heat of the moment, and without benefit of a full record. Suffice it to say I do not think the circumstances of this case warrant a refusal to consider the merits of the application on the grounds that Mr. Osaghae does not come to the Court with clean hands.

[12] The mootness argument is based on a number of decisions of this Court. The purpose of a PRRA is to assess the risks to the applicant before his removal to his homeland, not after it. The fact is that Mr. Osaghae was removed against his will to Nigeria in December 2008. The cases are reviewed by Mr. Justice Martineau in *Perez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 663, 328 F.T.R. 290. Although a PRRA application normally gives rise to a statutory stay of removal until it is decided, section 232 of the *Immigration and Refugee Protection Regulations* sets out a number of exceptions. Due to his serious criminality, one of the listed exceptions, Mr. Osaghae was never entitled to a statutory stay. Others have lost their statutory stay for a transgression no more serious than a lawyer's office failing to file their application on time (*Chukwudebe v. Canada (Minister of Citizenship and Immigration)* 2009 FC 211).

[13] Section 160 and following of the said Regulations provide that the applicant is nevertheless entitled to a PRRA. Mr. Osaghae's counsel submits that *Perez*, above, and the cases that preceded it, are either wrongly decided or distinguishable on the facts. For instance *Perez* does not deal with sections 160 and following of the Regulations. What is the point of an express declaration that one is entitled to a PRRA, notwithstanding there is no statutory stay and one has the right to seek leave to have a negative decision reviewed pursuant to IRPA and the *Federal Courts Act*? Can those rights be rendered moot by a decision of an Enforcement Officer under section 48 of IRPA to remove the person involved?

[14] In *Perez*, above, Mr. Justice Martineau certified the following questions in order to support an appeal to the Federal Court of Appeal:

> a) Is an application for judicial review of a Pre-Removal Risk Assessment moot where the individual who is the subject of the decision has been removed from or has left Canada after an application for a stay of removal has been rejected?
>
> b) What factors or criteria, if different or additional to those elucidated in *Borowski v. Canada (Attorney General)*, [1989] 1 S.C.R. 342 at p.358-363, should the Court consider in the exercise of its discretion to hear an application for judicial review that is moot?
>
> c) If a judicial review of a Pre-Removal Risk Assessment is successful after the applicant has been removed from or has left Canada, does the Court have the authority to order the Minister to return the applicant to Canada pending re-determination and, as the case may be, at the cost of the government?

The appeal is scheduled to be heard in Montréal on 26 May 2009.

[15] Whatever the decision in appeal might be, if the issue is moot I still have discretion to hear it, and I have done so. Because three discrete issues were argued, the merits, clean hands, and

mootness, I informed the parties that I would issue my reasons before the order so as to give the party who turned out to be unsuccessful an opportunity to pose a serious question of general importance. Mr. Osaghae shall have until Tuesday, 17 March 2009 to file such question(s) with the Toronto Registry and the Minister shall have until Monday, 23 March 2009 to respond.

"Sean Harrington"
Judge

Ottawa, Ontario
March 6, 2009

FEDERAL COURT

SOLICITORS OF RECORD

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