Federal Court  Cour fédérale

Date: 20120125

Docket: IMM-134-12

Citation: 2012 FC 100

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, on January 25, 2012

PRESENT: The Honourable Mr. Justice Scott

BETWEEN:

LÉON MUGESERA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION
and
THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR ORDER AND ORDER

[1] The applicant's motion, filed on January 23, 2012, under sections 44 and 50 of the *Federal Courts Act*, RSC, 1985, c F-7, and under rules 368 and 373 of the *Federal Courts Rules*, SOR/98-106, is for

(a) an interlocutory injunction directing the respondents not to enforce the removal order issued against the applicant pending the review and final decision on the application to reopen the delegate's decision, submitted by the applicant to the delegate on January 19, 2012, considering said application and the supporting exhibits reproduced in the applicant's docket number IMM-9680-11, dated January 21, 2012, and the new evidence (filed in this docket);

(b) an order for a stay of the removal order issued against the applicant pending a final decision on the application for leave and judicial review in docket number IMM-9680-11, considering the issues raised in docket IMM-9680-11, dated January 21, 2012, and the new evidence (filed in this docket); and

(c) an order for a stay of the removal order issued against the applicant pending a final decision on the application for leave and judicial review in docket number IMM-134-12, considering the Court's docket and the new evidence (filed in this docket).

[2] Counsel for the applicant argues that

(a) the legislative provision on which the decision of the Minister's delegate is based is invalid, unconstitutional and of no force or effect pursuant to section 7 of the *Canadian Charter of Rights and Freedoms*, Part 1 of the *Constitution Act,1982*, being Schedule B to the *Canada Act 1982* (UK), 1982, c 11 [Charter], and the international obligations ratified by Canada and the impugned decision;

(b) the decision of the Minister's delegate, made under paragraph 115(2)(*b*) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA], violates the obligation of non-refoulement imposed by article 33(2) of the *Convention relating to the Status of Refugees* [Convention] and other principles of fundamental justice and, in so doing, violates section 7 of the Charter, the obligations to which Canada has committed itself and the legitimate expectation that such obligations will be respected;

(c) the IRPA and the decision of the Minister's delegate also contravene the obligations imposed by the *Convention Against Torture* and the *International Covenant on Civil and Political Rights* [Covenant] by virtue of the obligation of non-refoulement;

(d) the IRPA must be interpreted in accordance with the Convention and creates a legal obligation and duty to act fairly;

(e) with respect to the principles of fundamental justice and procedural safeguards, the IRPA and the decision of the Minister's delegate do not meet the requirements of a fair and impartial hearing before an independent tribunal for the determination of his rights, the right to be presumed innocent, the right to a fair trial and the due process of the IRPA guaranteed by section 7 of the Charter, section 2(*e*) of the *Canadian Bill of Rights*, SC 1960, c. 44, and article 14 of the Covenant;

(f) with respect to the process undertaken in the case at bar, the decision of the Minister's delegate was the result of misconduct on the part of the respondents that led to

unreasonable findings, considering that the respondents wanted to deliver the applicant to an organization they characterized and that has been characterized by the IRB as “an organization with limited, brutal purposes” in pursuit of objectives contrary to the objectives and values of the United Nations;

(g) in so doing, the respondents concealed and breached their duty of impartiality and of disclosure of relevant information that demonstrated the nature of the Rwandan government, led by the Rwandan Patriotic Front [RPF], characterized as “an organization with limited, brutal purposes” by the IRB, following the legal position taken by the Canadian government; the risk for the applicant as an opponent of the organization; the absence of the rule of law in Rwanda, the persecution of judges and the absence of judicial independence;

(h) the decision of the Minister’s delegate is also based on an error in law with respect to the assessment of risk, a serious breach of fairness by a lack of reasons regarding the risk of persecution under section 96 of the IRPA and tainted by ignorance of evidence establishing a risk of persecution; and

(i) errors of law in determining the risk of mistreatment and torture, burden, the role and reliability of diplomatic assurance were committed by the delegate, who also erred by ignoring relevant evidence regarding the position occupied by the applicant, and humanitarian and compassionate grounds.

[3] In short, the applicant's arguments involve the constitutional validity of paragraph 115(2)(*b*) of the IRPA, the violation of the obligation of non-refoulement under article 33(2) of the Convention and the principles of fundamental justice guaranteed by section 7 of the Charter. The applicant also submits that the Minister's delegate breached his duty of procedural fairness in addressing evidence put forward by the applicant and by failing to bring to his attention a decision of the IRB, characterizing the RPF government as "an organization with limited, brutal purposes."

[4] Counsel for the respondents submit that the motion should be dismissed, as

(a) it does not meet the three criteria in *Toth v Canada (Minister of Employment and Immigration)*, (1988), 86 NR 302 (FCA) [*Toth*];

(b) *Dadar v Canada (Minister of Citizenship and Immigration)*, 2006 FC 382 and *Sogi v Canada (Minister of Citizenship and Immigration)*, 2006 FC 799, provide, *inter alia*, that a motion for a stay of deportation is not a forum in which to challenge a decision that has already been the subject of an unsuccessful judicial review application; and

(c) that the documents and affidavits filed in support of the motion to stay and for an injunction do not support the finding that there is a serious issue in that the Minister's delegate breached the rules of procedural fairness or committed errors of law in his assessment of the evidence presented.

[5] Any motion to stay is assessed in accordance with the three criteria in *Toth*, which the applicant did not meet in this case, for the reasons that follow.

[6] As to the first criteria regarding a serious issue, the applicant did not provide any new evidence which would allow the Court conclude that a serious issue on the constitutional validity of paragraph 115(2)(*b*) or on the violation of section 7 of the Charter was not addressed by Justice Shore in his decision of January 11, 2012. On this point, Justice Shore wrote, at paragraphs 79 and 80 of his decision, that

> [79] The factual basis cannot be reassessed. The judgment of the Supreme Court of Canada cannot be overturned directly or indirectly by reconsidering the validity of section 115 of the IRPA as the applicant would like. At this final stage, it is also important to note that the judicial review of the decision of the Minister's delegate sought by the applicant also cannot address the legitimacy of the removal order again without contradicting the disposition of the Supreme Court of Canada in *Mugesera*, which reads:
>
> > 179 Based on Mr. Duquette's findings of fact, each element of the offence in s. 7(3.76) of the *Criminal Code* has been made out. We are therefore of the opinion that reasonable grounds exist to believe that Mr. Mugesera committed a crime against humanity and is therefore inadmissible to Canada by virtue of ss. 27(1)(*g*) and 19(1)(*j*) of the *Immigration Act*.
>
> [80] According to this reasoning of the Supreme Court of Canada, if Léon Mugesera were to remain in Canada following the assurances received from Rwanda, this Court would be completely contradicting the decision of the Supreme Court. (See also paragraphs 44 to 48 of Justice Shore's decision dated January 11, 2012, on the application of section 7 of the Charter.)
> [Emphasis added.]

[7] Finally, as to the applicant's argument based on article 33(2) of the Convention, Justice Shore dealt with it at paragraph 35 of his decision and the applicant has not provided any new evidence that was not already considered in that same decision.

[8] The applicant further submits that the Minister's delegate breached his duty of procedural fairness in that he, *inter alia*, failed to inform the applicant of *Rwiyamirira v Canada (Minister of Citizenship and Immigration)*, [2004] RPDD No 286 [*Rwiyamirira*], demonstrating the nature of the Rwandan government, led by the RPF, characterized as "an organization with limited, brutal purposes" by the IRB, following the legal position taken by the Canadian government and the potential risk for the applicant as an opponent of the government in power. According to him, such a failure meets the criterion that his motion raises a serious issue.

[9] The Court notes that the decision in question is a decision by the IRB dated July 7, 2004, involving events that occurred in the early 1990s. The Court is not satisfied, after analyzing the record, the decision in question and the decision of the Minister's delegate, that the Minister's delegate breached the duty of fairness because his analysis had to be concerned with the situation in Rwanda at the time of execution of the removal order, which is what he did in this case (see *Hasan v Canada (Minister of Citizenship and Immigration)*, 2008 FC 1069, [2008] FCJ No1342 at para 23). Nor does the Court accept the applicant's argument that the Minister's delegate ignored evidence. Accordingly, the Court dismisses the applicant's claim that the failure to raise *Rwiyamirira* constitutes a breach of the rules of procedural fairness and concludes that there is no serious issue to be tried.

[10] As to the second criterion in the test, the applicant has not demonstrated to us that he would suffer irreparable harm if he were to be returned to Rwanda. He did not provide any new evidence that would allow us to conclude that Justice Shore's analysis of the decision of the Minister's delegate regarding the risks of torture and fear for his life deserves to be reviewed (see paragraphs 58 to 70 of Justice Shore's decision dated January 11, 2012).

[11] As to the third criterion in the test, balance of convenience, the Court would like to point out that under the subsection 48(2) of the IRPA, a removal order must be enforced as soon as is reasonably practicable. Seeing as the applicant did not meet the serious issue and irreparable harm tests, the balance of convenience therefore weighs in favour of the respondents.

[12] Thus, the Court is not satisfied that the applicant meets the criteria in *Toth* as he did not submit any new evidence as to the unconstitutionality of paragraph 115(2)(*b*), the violation of the obligation of non-refoulement and the principles of fundamental justice that have not already been dealt with by Justice Shore's decision of January 11, 2012. As to the issue of procedural fairness, the Court finds that the Minister's delegate acted fairly because he had to carry out a prospective analysis of the potential risks for the applicant, while taking into account the evolution of the situation in Rwanda, which is what he did in this case.

ORDER

THE COURT dismisses, therefore, the motion for

1. an interlocutory injunction directing the respondents not to enforce the removal order issued against the applicant pending the review and final decision on the application to reopen the delegate's decision, submitted by the applicant to the delegate on January 19, 2012, considering said application and the supporting exhibits reproduced in the applicant's docket number IMM-9680-11, dated January 21, 2012, and the new evidence (filed in this docket);

2. an order for a stay of the removal order issued against the applicant pending a final decision on the application for leave and judicial review in docket number IMM-9680-11, considering the issues raised in docket IMM-9680-11, dated January 21, 2012, and the new evidence (filed in this docket); and

3. an order for a stay of the removal order issued against the applicant pending a final decision on the application for leave and judicial review in docket number IMM-134-12, considering the Court's docket and the new evidence (filed in this docket).

"André F.J. Scott"
Judge

Certified true translation

Daniela Possamai, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-134-12
STYLE OF CAUSE:	LÉON MUGESERA v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

MOTION CONSIDERED BY CONFERENCE CALL ON JANUARY 23, 2012, BETWEEN OTTAWA, ONTARIO AND MONTRÉAL, QUEBEC

REASONS FOR ORDER AND ORDER:	SCOTT J.
DATED:	January 25, 2012

WRITTEN AND ORAL SUBMISSIONS BY:

Johanne Doyon	FOR THE APPLICANT
Anne-Renée Touchette	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Doyon & Associés Montréal, Quebec	FOR THE APPLICANT
Myles J. Kirvan Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENTS