Federal Court  Cour fédérale

Date: 20170327

Docket: IMM-1352-17

Citation: 2017 FC 314

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, March 27, 2017

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

BABA TAMAKA DIAKITÉ

Applicant

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

[1] Mr. Diakité is applying to the Federal Court to obtain a stay of his removal to his country of nationality, Mali. His removal is scheduled for Monday, March 27, 2017.

[2] The applicant has known since March 6 that he must leave Canada no later than March 27. However, it seems that he did not retain counsel until March 17, which would explain

the extremely tight timelines to handle this case. Counsel for the applicant performed his duty with all due dispatch. Counsel cannot be criticized for the very short timelines.

[3] I chose to hear the stay application on March 24, 2017, at 5:00 p.m. The decision to refuse a stay had been received on March 23, 2017, and that administrative dismissal is subject to an application for leave and for judicial review that is also dated March 23, 2017.

[4] To be granted a judicial stay, the applicant must satisfy the three conditions of the tripartite test set out in *RJR-Macdonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 and *Toth v Canada (Minister of Employment and Immigration)* [1988], 86 NR 302 (FCA). Those three conditions are as follows:

1. Is there a serious question to be tried during a hearing for the underlying application for judicial review?
2. Would the applicant suffer irreparable harm if he must leave before a judicial review is heard?
3. Does the balance of convenience favour the applicant?

[5] Mr. Diakité has been in Canada since January 2010. He reportedly came to Canada as a temporary resident to attend school. He is still a student, since he has been participating in a program at the École de Technologie (ÉTS) since January 2015. He will not complete the program until July 20, 2018. It seems that the applicant has obtained eight credits per semester for the three semesters he has completed. The applicant indicates in his affidavit that he has 66 remaining credits before he can receive his diploma.

[6] The applicant was convicted of a sexual assault offence under paragraph 271(b) of the *Criminal Code*, RSC (1985), c. C-46. He was convicted on February 9, 2016, and sentenced to 18 months of probation, in addition to a fine and mandatory community service. The sentence is suspended.

[7] Given his conviction, he is subject to a deportation order. He was subject to a pre-removal risk assessment, which resulted in a negative decision that was communicated on February 22. Based on that, his removal was scheduled for March 27, 2017.

[8] The applicant argues that the serious issue to be tried in the judicial review simply must be neither frivolous nor vexatious. Unfortunately for the applicant, that is not the state of the law. It has been held since *Wang v Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] 3 FCR 682 that anyone seeking a stay where the outcome would be the same as if the application for judicial review were allowed is held to a much higher standard than "neither frivolous nor vexatious." As Justice Pelletier, as he then was, noted at paragraph 11 of the decision "[i]t is that the test of serious issue becomes the likelihood of success on the underlying application since granting the relief sought in the interlocutory application will give the applicant the relief sought in the application for judicial review." Thus, the applicant must satisfy the Court that the application for judicial review is likely to succeed ("likelihood of success").

[9] The serious issue is that the removal officer erred by not deferring the removal because the applicant is on probation as a result of his criminal conviction. Furthermore, the applicant accuses the removal officer of not having seriously and attentively reviewed the evidence

submitted, given the short timeline, and argues that he should be able to remain in Canada until he completes his studies.

[10] Unfortunately for the applicant, these are not serious issues. It is well established that the removal officer's jurisdiction is very limited. The applicant is correct in pointing out that there is discretion, but it most certainly is not sufficient to find that the applicant's argument is correct. In *Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81, [2010] 2 FCR 311 [*Baron*], the Federal Court of Appeal stated the following:

> - In order to respect the policy of the Act which imposes a positive obligation on the Minister, while allowing for some discretion with respect to the timing of a removal, deferral should be reserved for those applications where failure to defer will expose the applicant to the risk of death, extreme sanction or inhumane treatment. With respect to H&C applications, absent special considerations, such applications will not justify deferral unless based upon a threat to personal safety.
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> [Emphasis in the original.]

[11] The removal officer is faced with the obligation set out in the *Immigration and Refugee Protection Act*, SC 2001, c. 27 [the Act] to ensure that the removal order is enforced as soon as possible, as the foreign national against whom it was made must leave Canada immediately (subsection 48(2) of the Act). This generally results in short-term deferrals, which, in addition to those noted in *Baron*, involve difficulties encountered with travel arrangements, the children's school schedule, imminent births or deaths. As the Federal Court of Appeal stated in *Canada (Public Safety and Emergency Preparedness) v Shpati*, 2011 FCA 286, [2012] 2 FCR 133, "[t]heir functions are limited, and deferrals are intended to be temporary." (paragraph 45). Furthermore, they do not make decisions on PRRA or H&C applications. The review of the

applicant's circumstances is not what he claims. No difficulties such as those recognized in the case law have been demonstrated to be likely.

[12] The applicant relied on paragraph 50(b) of the Act to argue that the stay was warranted. That paragraph provides that a removal order is stayed until the sentence is completed. In this case, there is no sentence of imprisonment to be served because the criminal court gave the applicant a suspended sentence. As set out in section 731 of the *Criminal Code*, a court may suspend the passing of sentence: there is therefore no term of imprisonment to serve. No such sentence was even given. There is no likelihood of success on this issue.

[13] As can be seen, the issues submitted by the applicant do not fulfill the parameters in any way. In my view, it might be possible to defer a removal to account for one-time factors, such as illness. However, no such difficulty is raised in the case at hand. In fact, the applicant is far from completing his academic program. Even in this regard, the stay application would have no likelihood of success. I therefore find that the serious issue criterion is not met.

[14] Just one of the three criteria not being met is sufficient for the stay application to fail. However, I would add that, in our case, no irreparable harm has been raised. The fact that Mr. Diakité's employer testified by letter that he is an excellent employee, which is to his credit, cannot constitute irreparable harm. At most, it is potential economic harm, and not for the applicant, but for the employer, who will have to replace Mr. Diakité.

[15] Lastly, the balance of convenience ultimately favours the government, because Parliament obliged the Minister to ensure that those who are inadmissible in Canada are removed as soon as the order can be enforced. There is a public interest in the law being enforced, and that is the duty the removal officer must fulfill. However, I would have given some weight to the inconvenience to the applicant because the PRRA decision rendered in October 2016 was not communicated to him until late February, at which time the government's initiative put the applicant's life in disarray. It is as if they had waited only then to expedite the removal. The applicant does not appear to pose a particular risk.

[16] I have some sympathy for the applicant, who must return to his country of origin, which he left long ago. However, the offence for which he was convicted is one that renders him inadmissible in Canada. The consequence of inadmissibility is removal to his country of origin, which always comes with some unpleasantness.

[17] Consequently, the stay application must be dismissed.

ORDER

THE COURT ORDERS that the stay application be dismissed.

"Yvan Roy"
Judge

Certified true translation
This 19th day of August, 2019

Lionbridge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1352-17
STYLE OF CAUSE:	BABA TAMAKA DIAKITÉ v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
PLACE OF HEARING:	OTTAWA, ONTARIO
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APPEARANCES:

Salif Sangaré	FOR THE APPLICANT
Guillaume Bigaouette	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Salif Sangaré Counsel Montréal, Quebec	FOR THE APPLICANT
William F. Pentney Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENT