Federal Court  Cour fédérale

Date: 20190913

Docket: IMM-5507-19

Citation: 2019 FC 1172

Ottawa, Ontario, September 13, 2019

PRESENT: Mr. Justice Norris

BETWEEN:

FUNDU NSUNGANI

Applicant

and

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

Respondents

ORDER AND REASONS

[1] On Thursday, September 12, 2019, the applicant served and filed a motion seeking a stay of his removal to the Democratic Republic of the Congo (scheduled to occur on Saturday, September 14, 2019) pending the determination of his application for leave and judicial review of the September 10, 2019, decision of an Inland Enforcement Officer refusing to defer this removal.

[2] The respondent Minister of Public Safety and Emergency Preparedness opposes the Court hearing the motion on its merits because the applicant does not have clean hands and because the Minister is prejudiced by the timing of the motion.

[3] In reply, the applicant has suggested that an interim interlocutory stay would cure any prejudice faced by the Minister. He resists the submission that he is disentitled to seek equitable relief under the "clean hands" doctrine.

[4] For the reasons that follow, I agree with the applicant that he should not be barred from seeking relief on the basis of the "clean hands" doctrine. Further, while I agree with the Minister that it would not be in the interests of justice to hear the motion prior to the scheduled time of removal, I do not agree that the Court should therefore refuse to hear the motion. Rather, in my view the appropriate and just solution in the circumstances of this case is to grant an interim interlocutory stay to permit a proper hearing on the merits. The Court will conduct this hearing and render a decision as soon as reasonably possible.

[5] The Minister argues forcefully that the applicant is not entitled to seek equitable relief from the Court because he does not have clean hands. The Minister points to the applicant's November 2007 conviction for robbery, his failure to report for removal in December 2017, and his repeated failure to abide by his conditions of release after he was apprehended (first in May 2018, and again in November 2018) and subsequently released from immigration detention (first in September 2018, and again in January 2019). The failures to comply consist of not

residing where he was required to following the September 2018 release and missing one reporting date following the January 2019 release.

[6] The leading authority on the clean hands doctrine in the immigration and refugee context is still the decision of the Federal Court of Appeal in of *Canada (Citizenship and Immigration) v Thanabalasingham*, 2006 FCA 14 [*Thanabalasingham*]. Writing for the Court, Evans JA held that, "if satisfied that an applicant has lied, or is otherwise guilty of misconduct, a reviewing court may dismiss the application without proceeding to determine the merits or, even though having found reviewable error, decline to grant relief" [emphasis in original] (at para 9). As Evans JA went on to explain, in exercising this discretion, a reviewing 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" (at para 10).

[7] Evans JA suggested several factors to consider in the exercise of this discretion (at para 10):

- 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; and
- the importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand.

[8] As Evans JA noted, this is not an exhaustive list, nor are all the considerations necessarily going to be relevant in every case.

[9] In *Canada (National Revenue) v Cameco Corporation*, 2019 FCA 67, the Federal Court of Appeal recently reiterated that "clean hands" is "an equitable doctrine, under which a party may be disentitled to relief to which it was otherwise entitled as a consequence of past conduct or bad faith. Importantly," the Court continued, "for past conduct to justify a refusal of relief, the conduct must relate directly to the very subject matter of the claim" [references omitted, emphasis added] (at para 37).

[10] Among the authorities cited by the Federal Court of Appeal in support of this statement is R. J. Sharpe, *Injunctions and Specific Performance* (looseleaf) Toronto: Thomson Reuters, 2018 (looseleaf updated November 2018) at §1.1030 [Sharpe]. There one finds the following salutary observation:

> The maxim that one "who comes to equity must come with clean hands" is colourful but potentially misleading in so far as it suggests a general power to scrutinize all aspects of the plaintiff's behaviour and refuse relief if it offends. The "clean hands" maxim is best understood as a very general catch-all phrase encompassing many discretionary factors better considered in more precise terms. By itself, it has really no analytical value, although, as will be seen, it has sometime been employed as if it did [footnotes omitted].

[11] *Thanabalasingham* helpfully provides analytical clarity to the concept of "clean hands" which Sharpe finds missing elsewhere. Applying the approach set out there, I do not agree with the Minister that the applicant's past misconduct should disentitle him from seeking equitable relief from the Court.

[12] The applicant's robbery conviction is not only very dated, it is the very reason the applicant has been determined to be inadmissible to Canada and is facing removal in the first place. It has nothing to do with the appropriateness of the stay the applicant now seeks (cf. Sharpe at §1.1070). More generally, I cannot agree that anyone who is criminally inadmissible is disentitled to equitable relief for this reason alone. To the extent that my colleague Justice Shore held otherwise in *Bentamtam v Canada (Public Safety and Emergency Preparedness)*, 2019 FC 984, I must respectfully disagree. Such a categorical rule is inconsistent with the discretion described by the Federal Court of Appeal in *Thanabalasingham.*

[13] As for the applicant's failure to meet his obligations under the Canadian immigration process, while this is a serious matter, it should not disentitle him from seeking equitable relief in the form of a stay. It does not subvert the Court's ability to determine his request for a stay on its merits. Hearing the stay motion on its merits could not reasonably be seen as condoning the applicant's earlier misconduct or rewarding him for it. The applicant has not engaged in any misconduct in the context of the present litigation that must be deterred. Other mechanisms exist for deterring misconduct in connection with the removal process, including arrest and detention. The applicant has been effectively under the control of immigration authorities since November 2018. Finally, and perhaps most importantly, the applicant contends that he faces severe consequences if removed. Currently, Canada has a temporary suspension of removals in place for the Democratic Republic of the Congo because general conditions there pose a risk to the entire civilian population. The applicant is not entitled to the benefit of this, however, because of his criminal inadmissibility. The applicant also alleges serious personal risks to his health and safety given a recent medical diagnosis. Without in any way pronouncing on the merits of the

applicant's position at this time, I am satisfied on a *prima facie* basis that the "importance of the individual rights affected and the likely impact upon the applicant if the administrative action impugned is allowed to stand" are sufficient to overcome the applicant's past misconduct under the "clean hands" doctrine.

[14] Many of these considerations will also figure in an assessment of where the balance of convenience lies under the three-part test for a stay as set out in *RJR-MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311, *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA), and their progeny. It should go without saying that I have not made any determination with respect to this question at this stage. The only issue before me is whether the "clean hands" doctrine should preclude the applicant from having his case for a stay heard by the Court. For the reasons I have articulated here, I am not satisfied that it should. Whether the applicant ultimately prevails in meeting the three-part test is for another day.

[15] I turn now to the Minister's objection to the Court hearing the motion on the basis of a lack of timeliness.

[16] The Court certainly discourages last-minute motions for stays of removal. They do not give the Minister an adequate opportunity to respond, the Court may not receive a complete record of relevant material from either party, and the Court may not have sufficient time to review the materials in advance of the hearing, or to properly consider and decide the motion. For these reasons, bringing stays of removal at the last minute is generally not in the interests of

justice: see *Beros v Canada (Citizenship and Immigration)*, 2019 FC 325 at paras 12-13; *Khan v Canada (Public Safety and Emergency Preparedness)*, 2018 FC 1275 at paras 12-13; and *Nsumbo v Canada (Citizenship and Immigration)*, 2019 CanLII 49238 (FC). The Court therefore has the discretion to decline to hear a stay motion that is not brought in accordance with the requisite timelines. A key consideration is whether the moving party could reasonably have brought the motion sooner.

[17] In the present case, however, the applicant is not responsible for the last-minute character of his stay motion. His removal is scheduled to take place on September 14, 2019. He was only notified of this date by the Canada Border Services Agency [CBSA] on September 6, 2019. There is no evidence or information before me to explain why this particular removal date was chosen, when it was chosen, or why the applicant was only informed of it one week and a day in advance.

[18] As soon as the applicant learned of the removal date on Friday September 6th, he and his counsel moved promptly and diligently. On Monday September 9th, a request for deferral was submitted to CBSA. The request was refused on Tuesday September 10th. An application for leave and judicial review of this decision was served and filed on Wednesday September 11th. The motion for a stay was served and filed on Thursday September 12th.

[19] The short timeline the Minister and the Court are now confronted with is due entirely to unexplained decisions made by CBSA concerning the timing of the applicant's removal and

when he was advised of this. In such circumstances, it would not be in the interests of justice to deny the applicant the opportunity to have his motion for a stay determined on its merits.

[20] At the same time, it would also not be in the interests of justice to force the matter on prior to the removal as it is currently scheduled. The solution is to grant an interim interlocutory stay in order to permit the motion to be heard on a schedule that is fair to the Minister and to the Court. Obviously this will disrupt the removal arrangements that are in place before there has been a determination of the merits of the stay motion. This is a regrettable but unavoidable consequence of decisions made by CBSA concerning the timing of the applicant's removal and when he was notified of this.

[21] For these reasons, the Court will order a stay of the applicant's removal on an interim interlocutory basis.

ORDER IN IMM-5507-19

THIS COURT ORDERS that

1. The applicant's removal to the Democratic Republic of the Congo, currently scheduled to take place on September 14, 2019, is stayed pending the final disposition of the applicant's request to stay his removal pending his application for leave and judicial review of the September 10, 2019, decision of an Inland Enforcement Officer refusing his request to defer his removal;
2. The motion for a stay of removal will be heard by way of teleconference commencing at 1:00 p.m. EST on September 18, 2019, for a duration not exceeding one hour;
3. The Minister's responding materials shall be served and filed no later than 3:00 p.m. EST on September 17, 2019.

"John Norris"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5507-19
STYLE OF CAUSE:	FUNDU NSUNGANI v THE MINISTER OF CITIZENSHIP AND IMMIGRATION ET AL

INFORMAL MOTION IN WRITING CONSIDERED AT OTTAWA, ONTARIO

ORDER AND REASONS:	NORRIS J.
DATED:	SEPTEMBER 13, 2019

WRITTEN REPRESENTATIONS BY:

Jatin Shory	FOR THE APPLICANT
Maria Green	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Shory Law Calgary, Alberta	FOR THE APPLICANT
Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENTS