Date: 20090122

Docket: IMM-5106-08

Citation: 2009 FC 41

Ottawa, Ontario, January 22, 2009

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

PHILIP SOITA WASHIKO SIMUYU

Applicant

and

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

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] To the dismay of the counsel of the Applicant, the former was unaware of the full situation of his own client, the Applicant. Therefore, a piece of the story which unfolds below appeared as surprising to counsel of the Applicant as it was to the Court. The Applicant weaved a narrative through several spools of thread, one of which was unknown even to his counsel, who attempted to relate his client's background of which, he, himself, had not been given a key missing strand. The element of surprise to the counsel was duly recognized in open Court.

II. Introduction

[2] The Court received two stay motions from the Applicant within an eight day period from Monday, January 5, 2009, to Monday, January 12, 2009. The Applicant requested that each of these stay motions be heard within three days, even though he was not scheduled for removal until January 31, 2009. Despite the tight time constraints imposed by the Applicant, the Respondent had attempted to accommodate the Applicant's timeframe and had not requested postponement. The Court is cognizant of the prejudicial effect that these unnecessarily brief time constraints have imposed upon the Respondent.

III. Judicial Procedure

[3] The Applicant moves to stay his removal scheduled for January 31, 2009. This Court dismissed a similar stay motion by the Applicant on January 8, 2009.

IV. Background

[4] The Applicant, Mr. Philip Soita Washiko Simuyu, is a Kenyan national who entered Canada as a domestic servant for the Kenyan High Commission. His official status in Canada ended in June 2005 when his employer returned to Kenya.

[5] The Applicant's subsequent applications for sponsorship, extension of his visitor status and student visa were all denied. During the course of the hearing, counsel for the Applicant, himself, discovered that the Applicant now has a second sponsorship application with a second person for

consideration subsequent to having a sponsorship application with a first person revoked. The Applicant's counsel was completely unaware of the first sponsorship application.

[6] The Applicant submitted a Pre-Removal Risk Assessment (PRRA) application, which was rejected, on September 19, 2007.

[7] The Applicant submitted an application for leave to seek judicial review of the negative PRRA decision, which was withdrawn after he was granted a stay of his removal, on January 31, 2008, due to political instability in Kenya at that time. The stay was valid pending the outcome of his second PRRA application.

[8] On February 19, 2009, the Applicant submitted his second PRRA application, which was rejected, on September 22, 2008.

[9] On February 28, 2008, the Canadian Border Services Agency (CBSA) issued guidelines indicating that all removals to Kenya should proceed as normal.

[10] On November 19, 2008, the Applicant filed this application for leave and for judicial review of the September 22, 2008, second negative PRRA decision.

[11] On January 8, 2009, Justice Anne Mactavish dismissed the Applicant's motion for a stay of his removal.

V. Issues

[12] (1) Does the Applicant's decision to file a second stay motion one week after this Court dismissed his first stay motion prejudice the Respondent?

(2) Does the Applicant meet the tri-partite test for the granting of a stay of his removal?

VI. Analysis

(1) Prejudice to the Respondent

(i) Abuse of Process

[13] This Court dismissed a similar stay motion by the Applicant one week ago. To allow the Applicant to adduce new evidence in response to weaknesses identified by this Court in his previous stay motion last week would prejudice the Respondent and constitute an abuse of process.

[14] This Court has noted that, "…it is trite law that a stay of removal is an equitable remedy and, as such, it is open to the Court to deny the remedy in circumstances where an applicant does not come to the Court with 'clean hands'." One week ago, the Applicant brought a motion before this Court seeking to stay his removal on the basis that his wife's pregnancy [related to a pending second sponsorship application (with a second person)] established serious issues to be tried, irreparable harm and a favourable balance of convenience. Justice Mactavish dismissed the Applicant's stay motion that same day. (*Lima v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 383, 156 A.C.W.S. (3d) 1149 at para. 16; Order of Justice Mactavish, dated January 8, 2009).

[15] The Applicant did not bring this stay motion at the same time that he brought his first stay motion one week ago. All of the facts and new evidence that the Applicant presents in this motion were in the possession of the Applicant during his hearing but he failed to submit the information. The Applicant is unable to access an equitable remedy in the form of a stay of removal, as clean hands are required to obtain such relief (*Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.); *Lima*, above).

(ii) New evidence not considered

[16] The new information which the Applicant seeks to adduce was not before the PRRA officer. The Applicant had an opportunity to make representations to the officer when he filed his application, yet the officer notes that no supporting documentary evidence was submitted. This Court has repeatedly refused to consider new evidence, even where it contains serious allegations, if it was not before the original decision maker in the underlying proceeding under review; therefore, Exhibits "A" to "E" of the Applicant's affidavit are not considered by this Court (*Kante v. Canada (Public Safety and Emergency Preparedness)*, 2007 FC 109, [2007] F.C.J. No. 260 (QL) at para. 9; *Park v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 623, [2008] F.C.J. No. 786 (QL) at para. 9).

(iii) Lack of clarity in Notice of Motion and Factum are prejudicial

[17] The Applicant's notice of motion and his factum both indicated that he seeks a stay of the decision of an enforcement officer of the CBSA. The Applicant has already brought this matter before this Court and received a negative decision from Justice Mactavish. The Applicant referred to the underlying decision of the PRRA officer and not the decision of the enforcement officer.

These errors further prejudice the Respondent's ability to respond since the scope of the Applicant's motion lacks clarity. Given the short timeframe for filing responding submissions, the Applicant has imposed upon the Respondent, ambiguity exists as the counsel for the Respondent was also as unaware of a first spousal application (with a first person) as was the counsel of the Applicant.

(iv) Overarching prejudice to Respondent

[18] The Court received two stay motions from the Applicant within an eight day period from Monday, January 5, 2009, to Monday, January 12, 2009. The Applicant requested that each of these stay motions be heard within three days, even though he was not scheduled for removal until January 31, 2009. Despite the tight time constraints imposed by the Applicant, the Respondent had attempted to accommodate the Applicant's timeframe and had not requested postponement. The Court is cognizant of the prejudicial effect that these unnecessarily brief time constraints have imposed upon the Respondent.

(2) Applicant has not met the tri-partite test for the grant of a stay

[19] To obtain a stay pending determination of a case on its merits, the Applicant must establish all of the following three requirements:

a. there is a serious issue to be tried;

b. the Applicant would suffer irreparable harm if the Court refused relief; and

c. the balance of convenience favours the Applicant because he will suffer the greater harm from the refusal of the stay.

(*Toth*, above).

[20] In the present case, the Applicant has failed to demonstrate that he satisfies any of the requirements of the test; therefore, the Court must dismiss the motion for a stay of removal as it did last week.

(a) Serious Issue

[21] The determination of risk on return is fact-driven inquiry which attracts significant deference. Where there is nothing perverse or patently unreasonable in the PRRA decision there is no serious issue warranting a stay of removal (*Bui v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 1369, 68 Imm. L.R. (3d) 207; *Ahmed v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 686, 131 A.C.W.S. (3d) 304 at para. 5).

[22] As the Applicant notes, this Court stated in *Aquila v. Canada (Minister of Citizenship and Immigration)* (2000), 94 A.C.W.S. (3d) 960, [2000] F.C.J. No. 36 (QL), at paragraph 8, that although a Court must not undertake a prolonged assessment of the merits of a case when determining whether there is a serious issue to be tried, "[t]he assessment does require that the pleadings in the main action be examined in light of the evidence presented to support them." There is little for this Court to assess in this regard, since neither the Applicant nor his counsel submitted any documentary evidence to the PRRA officer or this Court in the underlying judicial review application to support his claims of risk (Applicant's Record, PRRA decision at p. 11, para. 6).

[23] Without such evidence, the officer was obliged to consult objective country condition reports to assess the Applicant's claims. As this Court stated in *Hassaballa v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 489, 157 A.C.W.S. (3d) 602 at paragraph 33, "…the PRRA

officer has not only the right but <u>the duty</u> to examine the most recent sources of information in conducting the risk assessment; the PRRA officer cannot be limited to the material filed by the applicant." (Emphasis added).

[24] The Applicant argues that the PRRA officer committed a reviewable error by referring to objective evidence regarding current country conditions without notifying the Applicant, thereby depriving him of an opportunity to respond; however, both this Court and the Federal Court of Appeal have established that an immigration officer is under no obligation to disclose the fact that he consulted publicly available documents relating to general country conditions if those documents were available and accessible to the Applicant at the time he submitted his application (*Mancia v. Canada (Minister of Citizenship and Immigration)*, [1998] 3 F.C. 461, 79 A.C.W.S. (3d) 796 at paras. 26-27; *Lima v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 222, 165 A.C.W.S. (3d) 313 at para. 13).

[25] The core information upon which the officer relied was publicly available before the PRRA application was submitted, thereby providing the Applicant with an opportunity to make representations on it. The officer relied heavily on a 2007 United States Department of State (U.S. DOS) country report that summarized human rights practices in Kenya, including the existence of police misconduct, instances of violence against minority groups and state attempts to address these problems. The officer also relied on a Human Rights Watch report from January 2008 that indicated decreasing violence and greater political stability in Kenya. Both documents pre-dated submission of the PRRA application. Moreover, this Court has stated that both of these documents are well-

known sources of general information that are in the public domain, and are frequently cited by immigration counsel; therefore the Applicant was not prevented from making representations in relation to the general content of either of these documents (*Lima*, above).

[26] The officer relied upon two documents that post-dated submission of the PRRA application: a United Nations (UN) report and a report from the British Broadcasting Corporation (BBC). The Federal Court of Appeal stated in *Mancia*, above, that:

> [27] …
>
> (a) with respect to documents relied upon from public sources in relation to general country conditions which were available and accessible at Documentation Centres at the time submissions were made by an applicant, fairness does not require the post claims determination officer to disclose them in advance of determining the matter;
>
> (b) with respect to documents relied upon from public sources in relation to general country conditions which became available and accessible after the filing of an applicant's submissions, fairness requires disclosure by the post claims determination officer where they are novel and significant and where they evidence changes in the general country conditions that may affect the decision. (Emphasis added).

[27] Although the BBC and UN documents relied upon by the officer post-date submission of the PRRA application, the information they contained was not so new or novel that the Applicant was prevented from making representations to the officer on their content at the time he submitted his application. Moreover, the information they contained was neither novel nor significant to the point that it could have altered the decision of the PRRA officer. For example, the instability which resulted from the December 2007 elections was known to the Applicant at the time of the application.

[28] The officer's conclusions regarding Kenya's effective control of its territory, the presence of police and civil authority and the country's ability to protect its citizens were all reasonably open to the officer on the basis of evidence that pre-dated submission of the PRRA application. The reasonableness of these conclusions may be substantiated without any reference to the documents that post-dated submission of the PRRA application; therefore, the information relied upon by the officer that post-dated submission of the application was not so novel, significant or indicative of changes in general country conditions that its absence would have altered the officer's decision.

[29] The officer's conclusions regarding the availability of state protection and the Applicant's failure to meet the requirements of either sections 96 or 97 of the IPRA were among the range of possible, acceptable outcomes available to the officer on the evidence. The Applicant has not established that the officer's decision was unreasonable.

[30] In view of the foregoing, the underlying judicial review application of the PRRA officer's decision does not raise a serious issue. Consequently, the Applicant has failed to fulfill the first branch of the tri-partite test.

(b) Irreparable Harm

[31] For the purposes of a stay of removal, "irreparable harm" is a very strict test. Irreparable harm implies the serious likelihood of jeopardy to the Applicant's life or safety (*Melo v. Canada (Minister of Citizenship and Immigration)* (2000), 188 F.T.R. 39, 96 A.C.W.S. (3d) 278 at paras. 20-21.

[32] The evidence in support of irreparable harm must be non-speculative and credible. There must be a high degree of probability that the harm alleged will occur if the stay is not granted (*Radji v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 100, 308 F.T.R. 175 at para. 40; *Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261, 132 A.C.W.S. (3d) 457 at para. 13).

[33] The Supreme Court has held that a state is presumed capable of protecting its citizens and claimants must therefore provide "clear and convincing confirmation" of the state's inability or unwillingness to protect them. As the officer's notes indicate, the Applicant has failed to rebut the presumption of state protection, since he did not provide any documentary evidence to support his allegations of risk. The totality of the evidence examined by the officer suggests that state protection is available to the Applicant (*Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689).

[34] The Applicant's affidavit contains a summary of an incident that occurred to him before he left Kenya in 2003 in which he witnessed the murders of two students while armed police watched. The details of this incident were before the first and second PRRA officers, both of whom determined that the Applicant's removal could proceed. Moreover, the incident contained in this affidavit was before Justice Mactavish when she dismissed the Applicant's stay motion last week; therefore, the Applicant's risk has already been assessed a number of times and each time he was found not to be at risk in his country of origin. There is significant support for the claim that the Applicant would not face irreparable harm if returned to Kenya (*Golubyev v. Canada (Minister of*

Citizenship and Immigration), 2007 FC 394, 156 A.C.W.S. (3d) 1147 at para. 13; *Manohararaj v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 376, 147 A.C.W.S. (3d) 660).

(c) The balance of convenience

[35] In the present case, the balance of convenience favours the Respondent, who is under a statutory obligation under paragraph 48(2) of the IRPA to ensure that the Applicant's removal is carried out as soon as reasonably possible.

[36] Any inconvenience that the Applicant may suffer as a result of his removal from Canada is outweighed by the public interest which the Respondent seeks to maintain by ensuring that removal orders are executed (*Aquila*, above at para. 18).

[37] The Applicant submits that the balance of convenience favours him because he has not been a burden to Canadian society, has not been on welfare and has not been criminally charged. Yet the mere fact that the person seeking a stay has no criminal record and is financially established and socially integrated in Canada does not mean that the balance of convenience favours granting a stay order (*Selliah*, above at paras. 21 & 22).

VII. Conclusion

[38] The Applicant has failed to establish each of the three parts of the tri-partite stay test; therefore, the Applicant’s motion for a stay of removal is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicant's motion for a stay of removal be dismissed.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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