Federal Court  Cour fédérale

Date: 20160216

Docket: IMM-525-16

Citation: 2016 FC 201

Montréal, Quebec, February 16, 2016

PRESENT: The Honourable Mr. Justice Bell

BETWEEN:

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Applicant

and

EKENS AZUBUIKE

Respondent

ORDER AND REASONS

I. Background

[1] Ekens Azubuike is a citizen of Nigeria. He entered Canada in 2007 on a false German passport, after which he claimed refugee status. Mr. Azubuike was, while in Nigeria and is, in Canada, a member and active supporter of the Movement for the Actualization of the Sovereign State of Biafra (MASSOB) which advocates the division of Nigeria in order to create a separate nation for the Biafran people. As part of the evidence in his claim for refugee status, Mr.

Azubuike relied upon a December 19, 2005, judgment from the High Court of IMO State in the Orlu Judicial Division, Nigeria, which sentenced him, *in absentia*, to life imprisonment. The judgment was purportedly signed by Justice Nwaiwu Ekeoma. On December 16, 2010, following a request for verification by the Government of Canada, the International Criminal Police Organization (INTERPOL) informed the Minister that the judgment was forged and that there is no judge by the name of Justice Nwaiwu Ekeoma at the High Court of IMO State. As a result, Mr. Azubuike was summoned to appear before the Refugee Protection Division [RPD] where a hearing was held regarding the revocation of his refugee status. In a decision made on June 3, 2014, the RPD ordered that his status as a protected person be vacated. Mr. Azubuike unsuccessfully sought judicial review of the revocation of his refugee status.

[2] On October 6, 2015, Canada Border Services Agency (CBSA) officials returned Mr. Azubuike to Nigeria. He left Canada using a Nigerian passport. When asked to return his Canadian passport, Mr. Azubuike informed an Immigration Officer that he had lost it. CBSA officials informed Mr. Azubuike that his Canadian passport was no longer valid and, having been deported, he was not entitled to re-enter Canada without authorization. On November 29, 2015, Mr. Azubuike re-entered Canada, via Morocco, using the very passport he claimed to have lost. To his credit, upon arrival, he informed an Immigration Officer that the passport was no longer valid. After conducting a routine investigation, the Immigration Division detained Mr. Azubuike pursuant to s 55 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. It is noteworthy that prior to his detention, Mr. Azubuike had sought the assistance of the Human Rights Committee of the United Nations. It apparently made an interim measures request asking Canada to stay Mr. Azubuike's removal subject to intervention by the Minister. I note in passing

that documentary proof of that request is not before me; however, both parties admit to its existence and impact.

[3] Mr. Azubuike has been detained since November 29, 2015. Following each of his 48-hour detention review (s 57(1) of the Act), 7-day detention review and first 30-day detention review (s 57(2) of the Act), the board members concluded Mr. Azubuike was a flight risk and ordered his continued detention. At the second 30-day detention review held on February 3, 2016, board member Tordoff agreed with her predecessors that Mr. Azubuike poses a flight risk but ordered his release upon conditions, which included, among others, that his guarantor, the aunt of his fiancé, deposit $3,000, that he reside with his guarantor, and that he report once a week to a CBSA office and appear as required by them.

II. Steps taken in the current motion for a stay

[4] At approximately 6:00 p.m. on February 3, 2016, the Minister sought a direction from the Court, through the offices of the Registrar, that Mr. Azubuike be detained while the Minister prepared an urgent motion whose purpose would be to request a stay of the release order. I refused to provide directions as requested. I informed the Registrar to advise counsel for the Minister that in matters where liberty is at stake I would not issue 'directions' on substantive issues and would only consider myself clothed with jurisdiction to intervene once the necessary documents were filed in court. At approximately 8:00 p.m., after the filing of the within motion, I heard and granted a motion for an interim stay of the release of Mr. Azubuike. The stay was to remain in place until 10:00 a.m. on Friday, February 5, 2016, or until further order of the Court. At 10:00 a.m. on February 5, counsel for the Minister and counsel for Mr. Azubuike appeared

before me via teleconference. Following objections by Mr. Azubuike's counsel that the procedure was unfair, he not having adequate time to file materials, I adjourned the matter to 2:00 p.m. on Monday, February 8, 2016. I heard the parties again on that date. On February 9, 2016, I received an 'unofficial' copy of the decision of board member Tordoff made on February 3, 2016. On February 12, 2016, I received the official transcript of the detention review hearing.

III. Test to be applied

[5] On this motion for a stay pending the hearing of the application for leave and for judicial review, I must apply the conjunctive tripartite test set out in *RJR-MacDonald Inc v Canada*, [1994] 1 SCR 311 and *Toth v Canada (Minister of Employment and Immigrations)* (1988), 6 Imm LR (2d) 123. In order to obtain the remedy sought, the Minister must establish a serious issue to be determined, that he will suffer irreparable harm if the stay is not granted and that the balance of convenience favours the granting of the stay. In the event the Minister establishes all three criteria, I may exercise my discretion and grant the stay. If the Minister fails to meet any one of the components of the test, the motion must be dismissed.

IV. Analysis

[6] The board member considered Mr. Azubuike's past and concluded, as did other board members, that he posed a flight risk. The Minister does not contend he is a danger to the public. There is therefore no serious issue to be decided regarding the interpretation of s 58(1) of the Act since the Minister and the board member are of one mind on those issues.

[7] The Minister contends the board member had no new information that would justify a departure from the previous detention review decisions. With respect, I disagree. On the latest detention review, Mr. Azubuike's guarantor offered $3,000 bail as opposed to a previous offer from a different guarantor of $2,000. While the difference might seem insignificant, it is new information. Second, the new offer of $3,000 bail is, according to the board member, all of the guarantor's savings. Mr. Azubuike would therefore know that if he should flee, the consequences would be severe for his guarantor. This constitutes another difference from the circumstances which existed at prior detention reviews. Third, in the special circumstances of this case, I consider the evidence of 'inaction' by the Minister to be 'new evidence' which the board member considered. Let me explain. As already indicated, Mr. Azubuike, prior to his detention, had sought the assistance of the Human Rights Committee of the United Nations. The Minister therefore has had since November 29, 2015, to make a decision whether he would remove Mr. Azubuike. The board member wrote "[…] some brief is being prepared for the Minister of Public Security [sic] in order to have them allow your removal to take place […]". A similar "brief", if not the same "brief", was being prepared to deliver through channels at the previous review. The board member concluded it was "impossible" to determine the "estimated time of detention". The fact an additional 30 days had passed, with no action by the Minister in response to the UN's intervention, constituted information which was not present at the previous reviews.

[8] The Minister also contends the member failed to consider the capacity of the guarantor to exercise control over Mr. Azubuike. He relies, in part, upon *Canada (Minister of Public Safety and Emergency Preparedness) v Torres Vargas*, 2009 FC 1005 [*Vargas*]. In my view, *Vargas* bears no resemblance to the case at bar given Mr. Vargas' serious criminality and the danger he

posed to the public. In fact, the focus of the inquiry in *Vargas* was the guarantor's capacity to manage Mr. Vargas' "dangerousness" (*Vargas*, above at para 55). Here, unlike the case in *Vargas*, the Minister does not contend Mr. Azubuike is a danger to the public. Furthermore, evidence of control, all of which were referred to by the member, include the identity of the guarantor, her relationship to Mr. Azubuike and his fiancé, the bail amount and Mr. Azubuike's knowledge that the bail constitutes all of the guarantor's savings.

[9] As a result of that set out in paragraphs 7 and 8, I disagree with the Minister's contention there was "nothing new" before the board member that was not present at previous detention reviews and am satisfied she addressed the issue of control of Mr. Azubuike by the guarantor. The member was clothed with jurisdiction and acted within her discretion under s 248 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227.

[10] Given the standard of judicial review, namely, reasonableness, I am not satisfied the Minister has demonstrated a serious issue to be determined. As a result, the tripartite test is not met and the motion for a stay of the order releasing Mr. Azubuike from detention is dismissed.

[11] I would be remiss, however, if I did not observe, in obiter, that I have serious concerns about the remaining two components of the tripartite test. Based upon Mr. Azubuike's past conduct, flagrant violations of the immigration laws of Canada, use of forged documents, willingness to mislead authorities, and the potential (now actual) mootness of the issue raised, I am of the view the Minister has established the second two components of the test. However, that is insufficient.

[12] Mr. Azubuike seeks costs. An award of costs constitutes an equitable remedy subject to the Court's discretion. The parties' conduct may be considered by the Court in deciding whether to grant such a remedy (*Hongkong Bank of Canada v Wheeler Holdings Ltd*, [1993] 1 SCR 167 at p 191). Mr. Azubuike does not come before this Court with clean hands. He entered Canada knowing he was inadmissible while using a document he knew to be invalid. It appears he mislead authorities regarding the whereabouts of that document. In the circumstances, no costs are awarded.

ORDER

THIS COURT ORDERS that the motion for a stay of the decision of the Immigration Division ordering Mr. Azubuike's release from detention is dismissed, without costs. The interim order, originally issued by me on February 3, 2016, is vacated.

"B. Richard Bell"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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