Federal Court  Cour fédérale

Date: 20190114

Docket: IMM-248-19

Citation: 2019 FC 48

Ottawa, Ontario, January 14, 2019

PRESENT: Mr. Justice Grammond

BETWEEN:

DANIEL KIMANI THUO

Applicant

and

MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondent

ORDER AND REASONS

[1] Mr. Thuo brings a motion for a stay of his removal from Canada scheduled for tomorrow, January 15, 2019. An enforcement officer refused his application for administrative deferral. The motion was heard earlier today by teleconference. I am granting the motion, because the enforcement officer failed to appreciate that the risk that Mr. Thuo would face upon returning to Kenya, which is prima facie serious, has never been assessed by any immigration decision-maker.

I. Facts and Underlying Decision

[2] Mr. Thuo is a citizen of Kenya. He came to Canada in 2012 and claimed asylum because of persecution on the basis of his sexual orientation. The Refugee Protection Division [RPD] of the Immigration and Refugee Board dismissed his claim on February 19, 2018, because it found that Mr. Thuo had failed to establish his identity, as required by section 106 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act]. The RPD's decision deals only with identity. Given certain issues with the identity documents tendered by Mr. Thuo and certain inconsistencies in his testimony concerning the way he obtained them, the RPD found that they were not trustworthy identity documents. As this was sufficient to dispose of Mr.Thuo's claim, the RPD did not make any findings regarding Mr. Thuo's alleged fear of persecution in Kenya. This Court dismissed Mr. Thuo's application for leave and judicial review of the RPD decision on June 27, 2018.

[3] On November 19, 2018, Mr. Thuo was advised that his removal would take place on January 15, 2019. On December 22, 2018, he applied for an administrative deferral of his removal. This application was denied on January 13, 2019, but the decision was communicated to the Court only minutes before the hearing of this motion. The operative parts of that decision read as follows:

> In reviewing the evidence provided, I find insufficient compelling new and objective evidence was presented to indicate that Mr. Thuo would face risk of death, extreme sanctions or inhumane treatment beyond mere speculation upon return to Kenya.
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> […]
>
> I acknowledge counsel's submission that due to the RPD's decision on identity, Mr. Thuo has not had his risk and evidence of

> risk assessed. I note that as an enforcement officer, I am not qualified to assess the merits of a decision rendered by the RPD, I can only review that Mr. Thuo had an opportunity for a risk assessment and that he received his due process. I further note that Mr. Thuo further appealed his negative CR decision to the Federal Court of Canada who dismissed the appeal on 27 June 2018. Thus, I am satisfied that Mr. Thuo has had an opportunity for his due process with respect to her [*sic*] risk assessment.

[4] Mr. Thuo has brought an application for leave and judicial review against the refusal of his request for administrative deferral. In the context of this application, he brought the present motion for a stay of his removal.

II. Analysis

[5] The removal of a foreign national is a serious issue. It may engage the person's right to life, liberty and security of the person guaranteed by section 7 of the *Canadian Charter of Rights and Freedoms* [the Charter], if those interests would be in jeopardy upon the person's return to his or her country of origin: *Suresh v Canada (Minister of Citizenship and Immigration)*, 2002 SCC 1 at para 44, [2002] 1 SCR 3. Nevertheless, removing foreign nationals who have no right under the Act to be present in Canada is necessary to ensure the integrity of Canada's immigration system (see, among others, *Selliah v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261 at para 22).

[6] The Federal Court of Appeal has recognized that the assessment of the risk faced by a person who is about to be removed from Canada is a constitutional imperative:

> As this Court recognized in *Farhadi v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 646, 257 N.R. 158, at paragraph 3, "a risk assessment and determination

> conducted in accordance with the principles of fundamental justice is a condition precedent to a valid determination to remove an individual" from Canada.
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> (*Atawnah v Canada (Citizenship and Immigration)*, 2016 FCA 144 at para 12, [2017] 1 FCR 153 [*Atawnah*])

[7] The Act has been carefully designed so as to guarantee such a risk assessment. This is accomplished mainly through the refugee status determination process, which entails an in-person hearing before the RPD and the Refugee Appeal Division [RAD], and the pre-removal risk assessment [PRRA] process. Thus, where the RPD and RAD decide that a person is not a refugee or protected person, it can be assumed that the person can be safely removed from Canada without breaching section 7 rights. Likewise, where a person receives a negative PRRA decision, the person's removal would usually comply with the Charter. This explains that the Act, as a general rule, does not require further judicial authorization to remove a foreign national from Canada. Section 48 of the Act assigns the task of removal to enforcement officers, whose discretion has often been described as "limited" (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at para 49, [2010] 2 FCR 311 [*Baron*]) or "very limited" (*Lewis v Canada (Public Safety and Emergency Preparedness)*, 2017 FCA 130 at para 54, [2018] 2 FCR 229).

[8] There are, however, a number of situations where a person can lose the right to be present in Canada without any assessment of the risks associated with removal (see, for example, *Calin v Canada (Citizenship and Immigration)*, 2018 FC 707; *Bouaza v Canada (Sécurité publique et protection civile)*, 2018 CF 1028). There are also circumstances where a new risk arises after the RPD or PRRA decisions, or where, for whatever reason, a significant risk was not assessed by

the previous decision-makers. In those cases, enforcement officers and this Court bear an increased responsibility to ensure that a person is not removed to a country where his or her life, liberty or security would be at risk. Indeed, it is only because enforcement officers and this Court act as a "safety valve" in such cases that the statutory scheme that deprives certain categories of persons of the opportunity of asking for a PRRA was held to be constitutionally valid (*Atawnah* at para 23; see also *Bouaza* at paras 10–12).

[9] The statutory basis allowing this Court to order a stay of removal is found in section 18.2 of the *Federal Courts Act*, RSC 1985, c F-7, which provides that this Court may make interim orders pending the final disposition of an application for judicial review. In granting such relief, we apply the same test as for interlocutory injunctions. The Supreme Court of Canada recently restated the test as follows:

> At the first stage, the application judge is to undertake a preliminary investigation of the merits to decide whether the applicant demonstrates a "serious question to be tried", in the sense that the application is neither frivolous nor vexatious. The applicant must then, at the second stage, convince the court that it will suffer irreparable harm if an injunction is refused. Finally, the third stage of the test requires an assessment of the balance of convenience, in order to identify the party which would suffer greater harm from the granting or refusal of the interlocutory injunction, pending a decision on the merits.
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> (*R v Canadian Broadcasting Corp*, 2018 SCC 5 at para 12, [2018] 1 SCR 196, references omitted)

[10] This three-pronged test is well-known. It had been set out in earlier decisions of the Supreme Court (*Manitoba (Attorney General) v Metropolitan Stores Ltd.*, [1987] 1 SCR 110; *RJR — MacDonald Inc v Canada (Attorney General)*, [1994] 1 SCR 311 [*RJR*]). It was also applied in the immigration context in *Toth v Canada (Minister of Employment and Immigration)*,

1988 CanLII 1420 (FCA). Of course, the application of this test is highly contextual and fact-dependent.

A. *Serious Question to be Tried*

[11] In *RJR*, the Supreme Court stated that the "serious question to be tried" criterion is a relatively low threshold (*RJR* at 337). However, the Supreme Court also said that a more demanding test must be applied where the interim relief sought has the practical effect of deciding the underlying action (*RJR* at 338–339). This is the case where an application for judicial review is brought against a decision of an enforcement officer refusing to defer removal. In that context, a motion for stay of removal gives the applicant what he or she is asking for in the underlying application. For that reason, the Federal Court of Appeal stated that the applicant must show "quite a strong case" (*Baron v Canada (Minister of Public Safety and Emergency Preparedness)*, 2009 FCA 81 at paras 66–67 [*Baron*]), keeping in mind that the applicable standard of review on the merits is reasonableness.

[12] As mentioned above, enforcement officers have a limited discretion to defer removal. They may do so where a new situation has arisen that exposes the person being removed to a risk that was not previously assessed. This is what Justice Dawson of the Federal Court of Appeal described in *Savunthararasa v Canada (Public Safety and Emergency Preparedness)*, 2016 FCA 51 at para 7, [2017] 1 FCR 318 [*Savunthararasa*]:

> It is common ground that, based upon jurisprudence of this Court, when evidence of some new risk is put forward, an enforcement officer may defer removal when the failure to defer will expose the person seeking deferral to a risk of serious personal harm. More specifically, an enforcement officer may defer removal where an

> applicant establishes a risk of death, extreme sanction or inhumane treatment that has arisen since the last assessment of risk (*Baron v. Canada (Minister of Public Safety and Emergency Preparedness*), 2009 FCA 81, [2010] 2 F.C.R. 311, at paragraph 51; *Canada (Public Safety and Emergency Preparedness) v. Shpati*, 2011 FCA 286, [2012] 2 F.C.R. 133, at paragraphs 41-43). Enforcement officers are not to conduct a full assessment of the alleged risks, nor come to a conclusion as to whether the person is at risk. Rather, officers are to consider and assess the risk-related evidence in order to decide whether deferring removal is warranted in order to allow a full assessment of risk.

[13] In *Atawnah*, the Federal Court of Appeal went further. It held that enforcement officers must take into consideration all risks that have not been previously considered, not only risks that occurred subsequently to a previous determination. It also held that enforcement officers have an obligation, not merely a discretion, to consider such risks (at para 22):

> […] the risk the enforcement officer was required to consider was not restricted to a "new" risk in the sense that it arose after a refugee determination or other process. Rather, the risks an enforcement officer is required to consider include risks that have never been assessed by a competent decision-maker […].

[14] In this case, as noted above, the enforcement officer based his decision on the mere fact that the RPD denied Mr. Thuo's claim. The officer acknowledged that the RPD did so merely because it was not satisfied that Mr. Thuo had proved his identity and that the RPD did not address the issue of risk. The officer nevertheless finds that Mr. Thuo had an "opportunity" for a risk assessment, even though that opportunity was not realized, and that Mr. Thuo benefited from "due process."

[15] Where the RPD dismisses a claim on the basis of identity and does not comment on the risks that the claimant faces, it is well established that a PRRA officer must consider those risks

as if they were new, even though they arose before the RPD decision: *Yusuf v Canada (Citizenship and Immigration)*, 2013 FC 591 at paras 31–32; *Kahsay v Canada (Citizenship and Immigration)*, 2017 FC 116 at para 22. The same logic applies to enforcement officers. Indeed, the basic principle, as stated by the Federal Court of Appeal in *Atawnah*, is that someone must actually assess the risks faced by a person who is removed from Canada. This did not happen in this case.

[16] As a result, Mr. Thuo has shown "quite a strong case."

B. *Irreparable Harm*

[17] The second prong of the *RJR* test relates to irreparable harm. The assessment of irreparable harm in the somewhat unusual context of this case presents certain conceptual difficulties.

[18] Thus, a number of decisions of this Court hold that irreparable harm logically flows from the demonstration of a serious issue affecting a determination of risk (for example, in a RPD or PRRA decision): see, for example, *Koca v Canada (Public Safety and Emergency Preparedness)*, 2009 FC 473 at para 28. Other decisions insist that a separate demonstration of irreparable harm is needed: see, for example, *Azeem v Canada (MCI)*, 2018 FC 1100 at para 13.

[19] Moreover, in *Savunthararasa*, quoted above, the Federal Court of Appeal suggested that where an enforcement officer finds that a risk has not been assessed, the proper remedy is to defer removal and to proceed to a PRRA. Enforcement officers should not assess the risk

themselves. I take this to mean that as long as a certain evidentiary threshold is met, enforcement officers should defer removal, rather than come to a firm conclusion as to the existence of the alleged risk.

[20] It would be illogical for this Court to perform a full assessment of risk in the context of a motion for a stay of removal, when the enforcement officer who made the decision that is the subject of the underlying application for judicial review did not have to do that assessment. Yet, that is what will take place if we require full proof of irreparable harm, over and above proof of a "quite strong case" on the first prong of the *RJR* test – which, in this case, relates to the very same risk or harm.

[21] Thus, where an enforcement officer fails to defer removal despite the fact that a significant risk was not assessed, I am of the view that an applicant need only show a *prima facie* case of irreparable harm. In other words, the applicant must show that the risk that was never assessed is a credible risk supported by evidence. Another decision-maker will perform a full assessment of that risk.

[22] I hasten to add that the foregoing is meant to apply only to situations where an enforcement officer failed to recognize that certain significant risks have never been assessed. It is not intended to change this Court's general approach to motions for stays of removal.

[23] Irreparable harm is usually established through a combination of country condition documents and evidence that connects the applicant to the risks described in the documents. In

this case, counsel for the respondent quite properly conceded that the country condition documents show that gay men in Kenya are at risk of being persecuted. For example, the most recent report of the United States Department of State concerning the human rights situation in Kenya states that "the most significant human rights issues included … criminalization of same-sex sexual conduct" and provides the following explanation:

> The constitution does not explicitly protect LGBTI persons from discrimination based on sexual orientation or gender identity. The penal code criminalizes "carnal knowledge against the order of nature," which was interpreted to prohibit consensual same-sex sexual activity, and specifies a maximum penalty of 14 years' imprisonment if convicted. A separate statute specifically criminalizes sex between men and specifies a maximum penalty of 21 years' imprisonment if convicted. Police detained persons under these laws, particularly persons suspected of prostitution, but released them shortly afterward. In April 2016 the National Gay and Lesbian Human Rights Commission (NGLHRC) filed Petition 150 of 2016 challenging the constitutionality of these penal codes. As of November, two cases filed by NGOs in early 2016 to test the constitutionality of these laws remained unresolved.
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> LGBTI organizations reported police more frequently used public-order laws (for example, disturbing the peace) than same-sex legislation to arrest LGBTI individuals. NGOs reported police frequently harassed, intimidated, or physically abused LGBTI individuals in custody.
>
> Authorities permitted LGBTI advocacy organizations to register and conduct activities.
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> Violence and discrimination against LGBTI individuals was widespread. According to a 2015 HRW and Persons Marginalized and Aggrieved report, LGBTI individuals were especially vulnerable to blackmail and rape by police officers.

[24] Nevertheless, counsel for the respondent argues that the evidence does not connect Mr. Thuo personally with the risks affecting gay men in Kenya. Such an argument, however, cannot be given effect without impugning Mr. Thuo's credibility and, in effect, disbelieving his story.

Mr. Thuo has sworn an affidavit in which he says that he is homosexual and describes how his relationship with a gay man in Kenya was discovered, prompting that man's family to seek to harm him. He also provided evidence of association with the LGBT community in Canada. We do not know how Mr. Thuo would have answered questions if he had been examined by the RPD about his story. I also expressed concerns about a police summons filed in evidence, which, among other issues, appears to have been issued two months before Mr. Thuo's homosexual relationship was discovered. Again, we do not know what explanation Mr. Thuo would have given had the issue been put to him.

[25] It is well-known that PRRA officers may not make negative credibility findings without hearing the applicant. In *Atawnah*, the Federal Court of Appeal extended this prohibition to enforcement officers (at paras 31–32):

> Additionally on this point, I reject the notion that, if an enforcement officer were to make negative credibility findings on the basis of written submissions, the Federal Court could nonetheless find the decision to be reasonable. As the Judge noted at paragraph 93 of her reasons, enforcement officers should limit themselves to considering the sufficiency of the evidence before them. Citing *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177, [1985] S.C.J. No. 11, at paragraph 59, the Judge stated that the Supreme Court "has held that in light of the important interest at stake in risk-based claims, where a serious issue of credibility arises, 'fundamental justice requires that credibility be determined on the basis of an oral hearing'".
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> In view of the decision of the Supreme Court in *Singh*, an enforcement officer cannot reasonably make credibility findings in the absence of an interview.

[26] Likewise, in a situation where significant allegations of risk were not previously assessed by another decision-maker, this Court should not make negative credibility findings in the

context of a motion for a stay of removal, where witnesses cannot conveniently be heard in person. A negative credibility finding made without an in-person hearing is no less procedurally unfair if it is made by a court instead of an administrative decision-maker.

[27] Indeed, if I were to dismiss this motion because of the doubts I have with respect to Mr. Thuo's credibility, I would condone exactly what the Supreme Court held to be unconstitutional in *Singh* – deporting someone who has not had the opportunity to dispel credibility concerns in person.

[28] From the perspective of efficiency, this outcome may seem unsatisfactory. Situations such as this one could be avoided, however, if immigration decision-makers kept in mind the principle that someone cannot be removed from Canada without an assessment of risk. While a decision-maker may wish to dismiss a claim on a preliminary issue, thereby avoiding the substantive issue of risk, this may not always be efficient in the long run.

C. *Balance of Convenience*

[29] At this last stage of the *RJR* test, prejudice to the applicant must be balanced against prejudice to the respondent who is prevented from enforcing the law. It has sometimes been said that "[w]here the Court is satisfied that a serious issue and irreparable harm have been established, the balance of convenience will flow with the Applicant" (*Mauricette v Canada (Public Safety and Emergency Preparedness)*, 2008 FC 420 at para 48). Nevertheless, balance of convenience is not a purely formal criterion. The conduct of the applicant, for example where the applicant has a significant criminal record or has a history of evading immigration authorities,

may strengthen the interest of the state in enforcing the removal. However, none of these factors are present in this case.

[30] I conclude that the balance of convenience favours Mr. Thuo.

[31] In conclusion, the three *RJR* criteria are met and I will issue an order staying Mr. Thuo's removal from Canada.

ORDER in IMM-248-19

THIS COURT ORDERS that:

1. The applicant's removal from Canada is stayed until the final disposition of the present application for leave and judicial review.

"Sébastien Grammond"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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