Federal Court  Cour fédérale

Date: 20200303

Docket: IMM-2927-19

Citation: 2020 FC 331

[UNREVISED CERTIFIED ENGLISH TRANSLATION]

Ottawa, Ontario, March 3, 2020

PRESENT: The Honourable Mr. Justice McHaffie

BETWEEN:

BERTHE GISÈLE NGO SEN

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. Overview

[1] The applicant for judicial review seeks an extraordinary and discretionary remedy. This remedy will only be granted where the applicant has complied with the rules, processes and orders of the court, and comes forward with "clean hands". In this case, the applicant's conduct demonstrates a disregard of these requirements.

[2] Berthe Gisèle Ngo Sen failed to appear for removal following the rejection of her application for protection in Canada. A warrant for her arrest was issued accordingly. While in hiding to avoid this warrant, she submitted a new application on humanitarian and compassionate (H&C) considerations, which was also rejected. She is now applying for judicial review of the rejected H&C application and has filed an affidavit in support of her application. Nevertheless, she refused to appear to allow the Minister to complete the cross-examination on her affidavit, claiming fear of being arrested during the cross-examination.

[3] At the Minister's request and under the authority of rule 97 of the *Federal Courts Rules*, SOR/98-106, I strike out Ms. Ngo Sen's affidavit. It is appropriate, under the circumstances, to exercise this discretion: Ms. Ngo Sen's affidavit contains disputed facts about her allegation of a breach of procedural fairness, and she refused to appear for cross-examination. Ms. Ngo Sen's fear of arrest does not justify her refusal to appear in this circumstances.

[4] Since Ms. Ngo Sen's affidavit has been struck out, there is no evidence to support her claim. Despite this fact, I have the discretion to consider the alleged errors that are evident in the record. Ms. Ngo Sen's circumstances do not justify the exercise of that discretion. I find that her conduct—including her refusal to appear for her removal, her decision to remain hidden from the authorities, and her refusal to appear for cross-examination—is such that she comes before this Court without "clean hands". Her misconduct speaks against the exercise of this discretion, and is an independent reason for dismissing the application for judicial review. I am aware that exercising this power could lead to consequences for Ms. Ngo Sen, but this is not sufficient to

outweigh the seriousness of her misconduct, the need to deter others from similar conduct and the weakness of her case.

[5] The application for judicial review is therefore dismissed.

II. Ms. Ngo Sen's application

[6] Ms. Ngo Sen arrived in Canada in June 2015. She made a claim for refugee protection based on her fear of persecution in Cameroon. This claim was rejected by the Refugee Protection Division (RPD) and the Refugee Appeal Division (RAD) on the basis of her credibility, and this Court denied her application for leave to apply for judicial review of the RAD's decision. As a result, she was issued a removal order. However, despite purchasing an airline ticket and undertaking to leave Canada, Ms. Ngo Sen did not appear for her departure from Canada. As a result, the Border Services Agency issued an arrest warrant for Ms. Ngo Sen. She has been in hiding since these events, and her address remains unknown to this day.

[7] In July 2017, Ms. Ngo Sen applied for permanent residence on humanitarian and compassionate considerations. Many of the documents filed with this application, which are found in the certified tribunal record, were redacted to hide the addresses and even the names of the witnesses who could lead to Ms. Ngo Sen's contact information.

[8] After she filed her application, Ms. Ngo Sen's counsel closed his practice. She found a new representative in March 2019, who sent an email to Immigration, Refugees and Citizenship Canada (IRCC) explaining that Ms. Ngo Sen planned to send an addition to her record by May 1,

2019, and requesting that a decision not be made before that date. In April 2019, Ms. Ngo Sen changed representatives again, this time claiming the services of Annick Legault. Annick Legault contacted the IRCC again, stating that [TRANSLATION] "it will not be possible" to file the new evidence before May 1, and [TRANSLATION] "notifying" the IRCC that [TRANSLATION] "we will file an addition to the H&C application no later than June 1, 2019". On April 30, 2019, an immigration officer refused Ms. Ngo Sen's application.

[9] Still in hiding, Ms. Ngo Sen filed an application for leave and for judicial review of the immigration officer's decision. The application was accompanied by an affidavit from Ms. Ngo Sen, stating that there was a breach of procedural fairness since the officer did not allow her to submit her addition before rendering a decision. Ms. Ngo Sen stated, among other things, that Ms. Legault said that she had never been denied a request for a delay, even though the time offered was sometimes shorter than that requested. The application for leave and for judicial review also alleged that the officer erred in the burden of proof imposed in the context of the H&C application.

[10] Justice Roussel granted Ms. Ngo Sen's application for leave. Justice Roussel's order is typical of this type of order pursuant to rule 15(1) of the *Federal Courts Citizenship, Immigration and Refugee Protection Rules*, SOR/93-22 [Immigration Rules]. This order provides for cross-examinations on affidavits, indicating that any affidavits must be completed on or before December 20, 2019.

[11] Following Justice Roussel's order, the Minister asked Ms. Ngo Sen to appear for cross-examination on her affidavit. On December 6, 2019, Ms. Ngo Sen's counsel, who replaced Ms. Legault, sent a letter informing the Minister that Ms. Ngo Sen would not appear for cross-examination. The reasons for her refusal were as follows:

> [TRANSLATION]
>
> We have discussed this case with our client. Since she has no status in Canada, she is afraid that she will be arrested by Canadian authorities if she appears for examination on her affidavit. Therefore, she has decided not to comply with your request.

III. The applicable rules

[12] Applications for judicial review are governed by the Immigration Rules, which incorporate some of the *Federal Courts Rules*. Rule 3 of the *Federal Courts Rules* states that the rules are intended to provide a solution to the dispute so as to secure the just, most expeditious and least expensive determination. Failure to comply with the rules may jeopardize the fairness and timeliness of the proceedings for the parties involved.

[13] In particular, rule 83 of the *Federal Courts Rules* provides that a party "may cross-examine the deponent of an affidavit served by an adverse party to the motion or application". Rule 97 sets out the order that the Court may make when a party to the dispute fails to appear for examination:

Failure to attend or misconduct	**Défaut de comparaître ou inconduite**
97 Where a person fails to attend an oral examination or refuses to take an oath, answer	**97** Si une personne ne se présente pas à un interrogatoire oral ou si elle refuse de prêter

a proper question, produce a document or other material required to be produced or comply with an order made under rule 96, the Court may	serment, de répondre à une question légitime, de produire un document ou un élément matériel demandé ou de se conformer à une ordonnance rendue en application de la règle 96, la Cour peut :
. . .	[…]
(c) strike all or part of the person's evidence, including an affidavit made by the person;	**c)** ordonner la radiation de tout ou partie de la preuve de cette personne, y compris ses affidavits ;
(d) dismiss the proceeding or give judgment by default, as the case may be;	**d)** ordonner que l'instance soit rejetée ou rendre jugement par défaut, selon le cas ;
. . .	[…]

[14] The Minister relies on this rule to ask that the entire contents of Ms. Ngo Sen's affidavit be struck out and that the judicial review be dismissed.

[15] Justice Rothstein, while a member of this Court, noted that "as a general rule, affidavits will be struck if the deponent does not appear for cross-examination": *Bayer Ag v Apotex Inc*, 1998 CanLII 8327 (FC) at para 11. I note that this Court's certified French translation of this passage does not provide the same exact meaning and reads "*en règle générale les affidavits ne sont radiés que si leur auteur omet de se présenter pour le contre-interrogatoire*". I would present Justice Rothstein's proposition as reading "*en règle générale les affidavits seront radiés si leur auteur omet de se présenter pour le contre-interrogatoire*" [emphasis added].

[16] This general rule also applies in the context of immigration law. In *Kuzmich v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 8857 (FC), the applicant took the position that he would only appear for cross-examination if "the Minister and the Consulate undertake not to disclose the applicant's illegal presence in the United States": *Kuzmich* at paras 11, 12. According to Justice McGillis, the imposition of such a condition was "outrageous" and constituted a refusal to appear for cross-examination on his affidavit: *Kuzmich* at para 12. Consequently, she exercised her discretion under rule 97(c) and (d) to strike out the applicant's affidavit and dismiss the Notice of Motion.

[17] Ms. Ngo Sen does not seek to impose conditions in order to participate in her cross-examination. Rather, she explicitly refused to appear for her cross-examination in order to avoid the authorities. I am of the view that the conclusion in *Kuzmich* applies equally, if not more, to this case.

[18] As conceded by the Minister's representative at the hearing, the examination of affidavits is rarely claimed in applications for judicial review in immigration law. This is no doubt related to the principle that new evidence is generally inadmissible in judicial review proceedings: *Association of Universities and Colleges of Canada v Canadian Copyright Licensing Agency (Access Copyright)*, 2012 FCA 22 at paras 19, 20; *Kabran v Canada (Immigration, Refugees and Citizenship)*, 2018 FC 115 at para 19. However, one of the exceptions to this rule is that the Court may admit evidence that addresses procedural fairness arguments: *Access Copyright*, at para 20(b). When facts of this nature are in dispute, as is apparently the case here, rule 83 states

that the opposing party may cross-examine the affiant to examine the value of the evidence presented.

[19] Ms. Ngo Sen refused to appear despite a legitimate request by the Minister to appear for cross-examination. While the fear of arrest and the desire to avoid removal may seem [TRANSLATION] "reasonable" from Ms. Ngo Sen's perspective, this can in no way justify a refusal to appear in response to a valid request to cross-examine. For these reasons, I exercise my discretion under rule 97(c). Ms. Ngo Sen's affidavit is therefore struck out.

[20] I note that a situation where a request for cross-examination has the sole underlying purpose of trapping a claimant who is in hiding to avoid removal may raise different considerations in the exercise of discretion under rule 97. In this regard, I would like to recall that the *Federal Courts Rules* are put in place to govern, facilitate and resolve disputes before the Courts. They are not in themselves a tool for the authorities to use in their quest to deport foreigners in hiding. Seeking an order from this Court is one thing; attempting to use the rules for the sole and undisclosed purpose of forcing an applicant to appear in order to arrest him or her is another. This is not the case here, so the question remains open as to whether the Court could decline to exercise its discretion under rule 97 where an examination is claimed in bad faith or where the facts suggest that the examination is clearly unnecessary.

[21] Ms. Ngo Sen's affidavit was the only evidence filed in support of her application for judicial review. The Minister therefore asks that the judicial review be dismissed under rule 97(d).

[22] Despite the absence of evidence, this Court may still consider an application for judicial review if the alleged errors "appear on the face of the record": *Turcinovica v Canada (Minister of Citizenship and Immigration)*, 2002 FCT 164 at paras 12–14. This principle does not apply to Ms. Ngo Sen's allegations of breach of procedural fairness, which depend on her affidavit, but could apply to her allegations that the officer did not apply the correct burden of proof.

[23] In the circumstances, I am not prepared to exercise my discretion to consider the application in the absence of evidence and, at the same time, I am exercising my discretion to dismiss the application under rule 97(d). I do so because of Ms. Ngo Sen's misconduct, which influences the exercise of my discretion, and which in my view provides an independent basis for dismissing the application.

IV. Ms. Ngo Sen's misconduct

[24] The doctrine of "clean hands" applies to all applications for judicial review, including those in immigration matters. That is, the applicant on judicial review is seeking a discretionary and extraordinary remedy from the Court, and must therefore have clean hands.

[25] Failing to appear for removal and going into hiding to avoid removal after a claim for refugee protection and an application for judicial review have been rejected is not conduct beyond reproach. In fact, it is conduct that is "very serious and [that] undermined the valid removal process and shows disregard for a decision of this Court": *Debnath v Canada (Citizenship and Immigration)*, 2018 FC 332 at para 25. Subsection 48(2) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA] requires that a foreign national who is the subject

of an enforceable removal order leave the territory of Canada immediately. If this would cause irreparable harm, an applicant may apply for a stay of removal in appropriate circumstances, which Ms. Ngo Sen did not do in this case. An applicant who does not meet the requirements of the legislation on which he or she is basing their H&C application and judicial review application does not have clean hands.

[26] However, the absence of clean hands does not mean that an application for judicial review should be automatically dismissed. The Federal Court of Appeal confirmed in *Thanabalasingham* that the power to dismiss an application or refuse to grant a remedy is a discretionary power. In exercising this discretion, the balance between the integrity of the judicial process and the public interest in the legality of the administration's actions and the protection of fundamental human rights must be considered: *Canada (Minister of Citizenship and Immigration) v Thanabalasingham*, 2006 FCA 14 at paras 9, 10; see also *Gazlat v Canada (Citizenship and Immigration)*, 2008 FC 532 at paras 13–18; *Debnath* at paras 20–22. To this end, the Court of Appeal identified certain non-exhaustive factors relevant to the exercise of discretion, as follows:

- the seriousness of the applicants' 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 applicants if the administrative action impugned is allowed to stand.

[27] The weighing of these factors supports the exercise of discretion to deny the application on the basis of Ms. Ngo Sen's misconduct. First, as noted, failure to report for removal despite a valid deportation order and hiding to avoid removal is serious misconduct with significant consequences for the removal process and the integrity of the immigration system: *Debnath* at paras 23–25; see also *Wu v Canada (Citizenship and Immigration)*, 2018 FC 779 at paras 13, 14.

[28] Second, no one can dispute that there is an interest in deterring this type of conduct in order to ensure the proper functioning of the Canadian immigration system: *Wu* at para 15.

[29] The strength of the case also works against Ms. Ngo Sen. Other than the potential breach of procedural fairness, which depends on her struck affidavit, Ms. Ngo Sen's only argument was that the officer applied the wrong burden of proof by using the phrase [TRANSLATION] "the applicant has the burden of proof to show that the hardship alleged in support of her application is such as to justify an exemption". She argues that the officer should not have limited his consideration to issues of "hardship", following the approach of the Supreme Court of Canada in *Kanthasamy v Canada (Citizenship and Immigration)*, 2015 SCC 61.

[30] The phrase used by the officer can be found at the beginning of the decision under the heading [TRANSLATION] "Application Summary: Briefly describe the factors stated by the applicant". In this context, the reference to "hardship" should be considered in light of the

submissions filed on behalf of Ms. Ngo Sen. Her submissions described the factors relevant to the H&C application as being only the hardship that would be caused by her return to Cameroon. It is clear from reading the decision as a whole that the officer followed the instructions of the Supreme Court of Canada in *Kanthasamy* and considered all of the factors presented by Ms. Ngo Sen. In this context, the mere reference to "hardship" is not an error that could overturn the reasonableness of the officer's decision.

[31] Finally, I note that the return to Cameroon is an important consequence for Ms. Ngo Sen. However, taking into account the fact that the RPD and the RAD have already rejected her claim for refugee protection, this factor alone is not sufficient in this case to outweigh the other factors, including Ms. Ngo Sen's conduct and the lack of strength of her case, see *Debnath* at paras 27, 28; *Wu* at paras 14, 16–18.

V. Conclusion

[32] In light of Ms. Ngo Sen's refusal to appear for cross-examination on her affidavit without satisfactory justification, I strike her affidavit under rule 97(c). Furthermore, I exercise my discretion to dismiss this application for judicial review without deciding it on its merits, on the grounds of Ms. Ngo Sen's misconduct as a result of her failure to appear under rule 97(d) and independently by applying the clean hands doctrine.

[33] No party has proposed or is proposing any issue for certification. Finally, for consistency and in accordance with subsection 4(1) of the IRPA and rule 5(2) of the Immigration Rules, the

style of cause is amended to name the Minister of Citizenship and Immigration as the respondent.

JUDGMENT in IMM-2927-19

THIS COURT'S JUDGMENT is as follows:

1. The application for judicial review is dismissed.

2. The style of cause is amended to name the Minister of Citizenship and Immigration as the respondent.

"Nicholas McHaffie"
Judge

Certified true translation
This 21st day of April 2020
Michael Palles, Reviser

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2927-19
STYLE OF CAUSE:	BERTHE GISÈLE NGO SEN v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	MONTRÉAL, QUEBEC
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