Date: 20070129

Docket: IMM-22-07

Citation: 2007 FC 94

Montréal, Quebec, the 29th day of January 2007

Present: The Honourable Mr. Justice Shore

BETWEEN:

Johan-Kévin MAGANGA

Applicant

and

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

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] [22] In *Kerrutt v. M.E.I.* (1992), 53 F.T.R. 93 (F.C.T.D.) Mr. Justice MacKay concluded that, for the purposes of a stay application, irreparable harm implies the serious likelihood of jeopardy to an applicant's life or safety. This is a very strict test and I accept its premise that irreparable harm must be very grave and more than the unfortunate hardship associated with the breakup or relocation of a family.

Madam Justice Sandra Simpson wrote the above paragraph with regard to the definition of irreparable harm established in *Kerrutt* (*Calderon v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 393 (QL); Also: *Lewis v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1271, [2003] F.C.J. No. 1620 (QL), paragraph 9).

LEGAL PROCEEDINGS

[2] On January 3, 2007, Johan-Kévin Maganga filed an application for leave and for judicial review of a deportation order made on December 21, 2006, by the Minister's delegate.

[3] Incidentally to this application for leave, on January 18, 2007, Mr. Maganga filed a motion to stay the enforcement of his removal, which was scheduled for January 30, 2007.

PRELIMINARY COMMENT: AMENDMENT TO THE STYLE OF CAUSE

[4] Given the reorganization of government departments, the Minister of Public Safety and Emergency Preparedness should be added as defendant, pursuant to the *Public Service Rearrangement and Transfer of Duties Act*, R.S.C. 1985, c. P-34, and the *Department Of Public Safety and Emergency Preparedness Act*, S.C. 2005, c. 10, as well as orders in council P.C. 2003-2059, P.C. 2003-2061, P.C. 2003-2063, P.C. 2004-1155 and P.C. 2005-0482.

SUMMARY OF FACTS

[5] The respondent refers the Court to the following exhibits submitted in support of the affidavit of Francine Lauzé and to the facts disclosed by these exhibits, as well as to the affidavit of Officer Louis Lessard, an enforcement officer under the Act.

[6] Mr. Maganga, a citizen of Gabon, arrived in Canada on August 12, 2005, as a temporary resident (study permit) for a period ending November 10, 2007 (Exhibit D of the affidavit of Francine Lauzé).

[7] On December 4, 2006, Mr. Maganga pleaded guilty to a charge under paragraph 253(*b*) of the *Criminal Code*, R.S.C. 1985, c. C-46. He was sentenced under subparagraph 255(1)(*a*)(i) of the *Criminal Code* to the minimum sentence, that is, a $600 fine plus costs to be paid within three months and a surcharge of $90, also to be paid within three months (Exhibit A of the affidavit of Francine Lauzé).

[8] On December 7, 2006, a notice to appear was sent to Mr. Maganga requesting that he report to the Canada Border Services Agency (CBSA) office in Trois-Rivières on December 21, 2006, at 1:30 p.m. for an interview (Exhibit B of the affidavit of Francine Lauzé).

[9] After receiving the notice to appear, Mr. Maganga telephoned the CBSA officer to ask why he was being summoned to an interview. The officer explained to Mr. Maganga that the interview concerned his status in Canada (Affidavit of Louis Lessard).

[10] Mr. Maganga reported for his interview on December 21, 2006. Before beginning the interview, the officer advised Mr. Maganga that he was aware of his conviction under paragraph 253(*b*) and subsection 255(1) of the *Criminal Code* and was going to consider the consequences this conviction may have on the applicant's status in Canada, that is, whether the conviction dated December 4, 2006, could lead to the preparation of a report concerning the removal of Mr. Maganga, pursuant to section 44 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act) (Affidavit of Louis Lessard).

[11] On December 21, 2006, Mr. Maganga's interview began at 1:30 p.m. The officer questioned Mr. Maganga about his conviction, his situation in Canada, and his family in Gabon. As mentioned in the affidavit of Louis Lessard, Mr. Maganga stated that he was a scholarship student from Gabon, his father worked in Gabon for an oil company as an accounting manager, his mother worked as a manager in a bank in Gabon, he lived in a house with approximately 15 rooms in Gabon, and he received between $300 to $400 per month from his parents. Mr. Maganga also specified that he had no children and, since September 2006, had been living with a woman, a French citizen with student status in Canada. Mr. Maganga stated that he had a brother in Québec (Affidavit of Louis Lessard; Exhibit D of the affidavit of Francine Lauzé).

[12] On December 21, 2006, following the interview with Mr. Maganga, the officer prepared a report under section 44 of the Act to the effect that the applicant was not a Canadian citizen or a permanent resident of Canada and was inadmissible under paragraph 36(2)(*a*) of the Act because he

had been convicted under subsection 253(*b*) of the *Criminal Code* and was liable under subsection 255(2) of the *Criminal Code* to imprisonment for a term not exceeding five years (Exhibit D of the affidavit of Francine Lauzé).

[13] On December 21, 2006, the officer submitted the section 44 report to the Minister's delegate with a recommendation that a deportation order be made against Mr. Maganga (Exhibit D of the affidavit of Francine Lauzé).

[14] On December 21, 2006, the Minister's delegate made a deportation order against Mr. Maganga (Exhibit E of the affidavit of Francine Lauzé).

[15] On December 21, 2006, a notice for a Pre-Removal Risk Assessment (PRRA) was given to Mr. Maganga to advise him of the possibility of applying for a PRRA by January 5, 2007, at the latest. Mr. Maganga was advised that he was not required to give his answer immediately and could think about it (Exhibit H of the affidavit of Francine Lauzé; Affidavit of Louis Lessard).

[16] On December 21, 2006, Mr. Maganga did not allege any risks of return to Gabon and waived the right to apply for a PRRA by signing a declaration of non-intent before the officer and the Minister's delegate (Exhibit D of the affidavit of Francine Lauzé; Affidavit of Louis Lessard).

[17] On December 21, 2006, Mr. Maganga was advised once again to report to the CBSA on December 29, 2006, to schedule a departure date (Affidavit of Louis Lessard).

[18] On December 29, 2006, Mr. Maganga reported to the CBSA with his lawyer and was advised to come back on January 10, 2007. The date of January 10, 2007, was subsequently changed to January 11, 2007, with the consent of Mr. Maganga and his lawyer.

[19] On January 11, 2007, Mr. Maganga received a hand-delivered notice stating that his removal would be enforced on January 30, 2007 (Exhibit J of the affidavit of Francine Lauzé).

ISSUE

[20] Did Mr. Maganga show that he met the three factors required to obtain a judicial stay of the enforcement of a removal order?

ANALYSIS

[21] To obtain a judicial stay of a removal order, Mr. Maganga **must establish the following three elements:**

(1) first, that he raised a serious question to be decided;

(2) second, that he would suffer irreparable harm if the order was not granted; **and**

(3) third, that the balance of convenience, taking into consideration the general situation of the two parties, is in favour of the issue of the order.

(*Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.))

IRREPARABLE HARM

[22] The notion of irreparable harm was defined by the Court in *Kerrutt v. Canada (Minister of Employment and Immigration)* (1992), 53 F.T.R. 93, [1992] F.C.D. No. 237 (QL) as being the **removal of a person to a country where there is a serious likelihood of jeopardy to an applicant's life and safety**. In the same decision, the Court also concluded that this must not simply be personal inconvenience or the breakup of a family.

[23] This decision was followed among others by Simpson J. in *Calderon, supra*. In fact, she mentioned the following with regard to the definition of irreparable harm established in *Kerrutt, supra*:

> [22] In *Kerrutt v. M.E.I.* (1992), 53 F.T.R. 93 (F.C.T.D.) Mr. Justice MacKay concluded that, for the purposes of a stay application, irreparable harm implies the serious likelihood of jeopardy to an applicant's life or safety. This is a very strict test and I accept its premise that irreparable harm must be very grave and more than the unfortunate hardship associated with the breakup or relocation of a family.

[24] In the case at bar, the respondent submits that Mr. Maganga did not establish that he would sustain irreparable harm if he were removed to Gabon.

[25] Mr. Maganga alleges that the enforcement of the removal order would cause the following irreparable harm:

- He would miss his winter semester at the Université du Québec à Trois-Rivières;
- He would be unable to pay his fine and surcharge within a period of three months.

[26] The respondent submits that, first, Mr. Maganga did not allege any risks in connection with his removal to Gabon and that, second, he waived the right to apply for a PRRA following the notice given to the applicant by the CBSA on December 21, 2006, pursuant to section 160 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations). In addition, the time limit Mr. Maganga had to apply for a PRRA expired on January 5, 2007, pursuant to the notice and section 162 of the Regulations.

[27] With regard to the loss of his winter semester at the university, the respondent notes that the notion of irreparable harm refers to harm to a person's life:

> [5] In addition to the lack of a serious question before the Court from the application for leave and for judicial review, I am also not satisfied in this case that the applicant has established irreparable harm, another essential requirement for a stay. I do appreciate that members of his family anticipate suffering quite serious dislocation and emotional stress, in particular his wife and her family. I also appreciate that removal may cause dislocation and some psychological difficulties for Mr. Ram himself, but everyone who is required, against his or her will, to leave Canada when he or she has no right to remain in this country faces similar difficulties. I am not persuaded that those are special circumstances that constitute irreparable harm.

(*Ram v. Canada (Minister of Citizenship and Immigration)*, [1996] F.C.J. No. 883 (QL))

[28] The respondent submits that the loss of Mr. Maganga's winter semester is directly related to his summons and does not fit the definition of irreparable harm.

[29] Furthermore, the respondent submits that Mr. Maganga was advised that he had lost his study permit, which had been seized on December 21, 2006. In fact, Mr. Maganga was the subject

of an enforceable removal order, as the study permit had become invalid under section 222 of the Regulations (Exhibits E and G of the affidavit of Francine Lauzé).

[30] The respondent argues that Mr. Maganga could have changed or cancelled his registration for the winter semester, from January 8 to January 15, as appears from Exhibit C of the affidavit of Francine Lauzé.

[31] In addition, contrary to Mr. Maganga's argument regarding the payment of his fine and surcharge, there is nothing preventing the applicant from taking steps to pay them before his removal. In fact, the sentence specifies that the amounts must be paid within a time limit of three months and not upon the expiry of a period of three months.

[32] Moreover, the respondent submits that the imposition of a fine does not prevent enforcement of a deportation order, as Mr. Maganga is not imprisoned, the subject of a summons, or facing criminal charges (sections 50 of the Act and 234 of the Regulation).

[33] Accordingly, the respondent submits that Mr. Maganga did not discharge the burden of establishing that he would sustain irreparable harm by reason of his removal to his country.

ABSENCE OF A SERIOUS QUESTION

[34] All of the issues raised by Mr. Maganga in his submissions have been settled by the judgment of the Federal Court of Appeal in *Cha v. Canada (Minister of Public Safety and Emergency Preparedness),* 2006 FCA 126, [2006] F.C.J. No. 491 (QL), dated March 29, 2006, by Mr. Justice Robert Décary, concurred in by Mr. Justice Marc Noël and Mr. Justice Denis Pelletier.

[35] Contrary to the facts in *Cha, supra,* and following his notice to appear on December 7, 2006, Mr. Maganga was advised by the officer that the purpose of his interview was to review his status in Canada.

[36] In the case at bar, it was up to Mr. Maganga to avoid putting himself in a situation that would compromise his status. The respondent submits that by being convicted of an offence under paragraph 235(*b*) of the *Criminal Code*, Mr. Maganga became inadmissible under paragraph 36(2)(*a*) of the Act, lost his status as a temporary resident because of a removal order (section 44 and paragraph 47(*b*) of the Act), and lost his study permit pursuant to paragraph 65(*c*) and section 222 of the Regulations.

[37] *Cha, supra,* at paragraphs 35 to 39, supports the view that the Minister's delegate properly exercised his discretion in making a deportation order against Mr. Maganga, this discretion being very restricted and limited to the facts of the case. In fact, it was proven that Mr. Maganga was described in paragraph 36(2)(*a*) of the Act, to which the section 44 report refers.

[38] Because the section 44 report proved to be well founded, the Minister's delegate could issue a removal order in the form of a deportation order, as specified in section 44 of the Act and paragraph 228(1)(*a*) of the Regulations.

[39] The officer was not required to advise Mr. Maganga of his right to counsel, as he was not detained (see paragraphs 53 to 61 of the judgment of the Federal Court of Appeal in *Cha*, *supra*).

[40] There was no breach of the principles of natural justice in this case.

[41] The deportation order results from the application of the Act, and it is therefore not in the interests of justice to set aside the deportation order for the reasons invoked by Mr. Maganga, because the result would inevitably be the same, namely, the issuance of a deportation order (paragraph 67 of the judgment of the Federal Court of Appeal in *Cha*, *supra*).

[42] In light of the preceding, Mr. Maganga did not discharge the burden of establishing the existence of a serious question.

BALANCE OF CONVENIENCE

[43] In the absence of serious questions and irreparable harm, the balance of convenience favours the public interest, which is that the immigration process under the Act be upheld (*Mobley v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 65 (QL)).

[44] Under subsection 48(2) of the Act, a removal order must be enforced as soon as circumstances allow.

[45] Madam Justice Barbara Reed, in *Membreno-Garcia v. Canada (Minister of Employment and Immigration)*, [1992] 3 F.C. 306, [1992] F.C.J. No. 535 (QL), wrote the following on the issue of the balance of convenience as it concerns stays, and of the public interest, which must be taken into consideration:

> [18] What is in issue, however, when considering balance of convenience, is the extent to which the granting of stays might become a practice which thwarts the efficient operation of the immigration legislation. It is well known that the present procedures were put in place because a practice had grown up in which many many cases, totally devoid of merit, were initiated in the court, indeed were clogging the court, for the sole purpose of buying the appellants further time in Canada. There is a public interest in having a system which operates in an efficient, expeditious and fair manner and which, to the greatest extent possible, does not lend itself to abusive practices. This is the public interest which in my view must be weighed against the potential harm to the applicant if a stay is not granted.

[46] In the case at bar, the balance of convenience is in the Minister's favour.

CONCLUSION

[47] Mr. Maganga did not show that he met the criteria for obtaining a stay. Accordingly, this application for a stay cannot be allowed.

ORDER

THE COURT ORDERS that this application for a stay be dismissed.

"Michel M.J. Shore"
Judge

Certified true translation
Michael Palles

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-22-07
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