Date: 20070921

Docket: IMM-3344-07
IMM-3363-07

Citation: 2007 FC 948

Ottawa, Ontario, September 21st 2007

PRESENT: The Honourable Mr. Orville Frenette

BETWEEN:

DAVID MAKORI NYACHIEO, ELECTA TERESA NYACHIEO,
BRENDA NYABOKE NYACHIEO (MINOR),
LINDA MONGINA NYACHIEO, and
FRED GEORGE NYACHIEO (MINOR)

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

BETWEEN:

DAVID NYACHIEO, ELECTA NYACHIEO,
BRENDA NYACHIEO, LINDA NYACHIEO, and
FRED NYACHIEO, by his litigation guardian,
DAVID NYACHIEO

Applicants

and

THE MINISTER OF PUBLIC SAFETY
AND EMERGENCY PREPAREDNESS

Respondent

REASONS FOR ORDER

[1] These motions seek an order granting the applicants a stay against an order of removal scheduled for September 17th 2007, pending an application for judicial review of the administrative decision of removal dated September 6th 2007, refusing their request for the deferral of the removal order.

STATEMENT OF FACTS

[2] The principal applicant, David Makori Nyachieo, is a citizen of Kenya. He came to the United States in 1999. His family composed of his wife, Electra Teresa Nyachieo (the female applicant) and their children, Brenda Nyaboke Nyachieo, Linda Mongina Nyachieo and Fred George Nyachieo, all citizens of Kenya. Brenda stayed in the United States after 1999. The female applicant came to the United States with her daughter Brenda in 2000. The principal applicant stayed in Kenya with his children Linda and Fred. During all the time they stayed in the United States between 1999 and 2004, none applied for refugee status there.

[3] In November 2004, the family entered Canada, except Electra who came to Canada in February 2005. They immediately all made refugee claims in Canada alleging persecution of the family in Kenya from a member of Parliament of Kenya. They claimed they were threatened because the principal applicant, an educator, had made efforts to incite awareness about human rights, HIV/AIDS, and Female Genital Mutilation, in the community.

[4] In 1998, the applicant's uncle was killed because of the involvement in the community. The killers also beat and tortured his brother. The family's fear for their safety and life induced their decision to move to America. In the United States, they did not obtain visas until 2004.

[5] The applicants have filed a new application to judicially review the last decision of August 7th 2007. This motion has not yet obtained leave to proceed.

[6] The record reveals that the principal applicant is working as a counsellor in the developmental disability field. The female applicant is a Registered Practical Nurse since July 26, 2007. The children in this application are all students in various schools or university in Canada. Linda has one semester to complete to finish grade 12. The family members are actively involved in an African Fellowship Church.

DECISIONS

[7] The claims of the applicants for refugee protection were rejected by a decision of August 12th 2005 of the Refugee Protection Division (the "RPD"). The decision rendered by L. Fournier, was based on the lack of fear or risk of the applicants and the absence of grounds to believe them, if removed to Kenya, that they would be in danger. In particular, the agent considered the failure to claim asylum in the United States. The applicant had explained it was because the United States system was not as generous as the Canadian one.

[8] The applicants sought a judicial review from that ruling on July 11th 2006 by Justice Beaudry, who dismissed the motion, agreeing with most of the reasons of the RPD decision. Justice Beaudry also considered the failure of the applicants to claim protection in the United States. A factor taken into account in *Gonzalez v. Canada (Minister of Citizenship and Immigration)*, [2005] F.C.J. no. 1965; *Mesikano et al v. Canada (Minister of Citizenship and Immigration)*, IMM-4433-06, September 17th 2007 and Qureshi *et al v. Canada (Minister of Citizenship and Immigration)*, IMM-4462-06, September 14th 2007.

[9] The applicants filed motions for a Pre-Removed Risk Assessment (PRRA), which were rejected on January 18, 2007.

[10] The applicants sought to have their refugee claim re-opened in November 2006. This application was denied in a decision of August 7th 2007.

APPLICANTS' SUBMISSIONS IN SUPPORT OF A STAY OF THE REMOVAL ORDER

(i) *The removal decision*

[11] A summary of the decision of September 5th 2007, by the agent Nancy Holdsworth of Canada Border Services Agency (CBSA), (notes covering 11 pages), shows that she considered:

1- The question of the applicants, three young adults, to complete their school year;

2- The risk of returning to Kenya;

3- If removed, the inability to pursue the negative H&C application;

4- The medical condition of Linda Mongina Nyachieo;

[12] The agent addressed all of these questions and decided there existed no exceptional circumstances which would justify a deferral.

[13] In particular, she quoted Dr. Waddell from the medical branch to the effect that there was no evidence that Linda Mongina Nyachieo could not travel and saw no problems in the United States and Kenya, to obtain appropriate medical treatment for her.

(ii) *The issues*

[14] The issues raised in this proceeding are in brief identified to those discussed in front of the removal officer, i.e.

1. The risk and fear of returning to Kenya;
2. The most recent H&C application of August 7th 2007, unauthorized to date;
3. The completion of the education of three of the applicants;
4. The medical condition and medical treatment of the applicant Linda.

[15] The applicants pleaded that the refusal to defer the removal order was unreasonable and that the stay should be granted pending the disposition of the H&C application for judicial review. In summary, the respondent argued that the decision was reasonable and was subject to a high degree of deference.

THE STANDARD OF REVIEW APPLICABLE IN THIS CASE

[16] Section 48(1) of the *Immigration and Refugee Protection Act* (the IRPA) states:

48(1) **Enforceable removal order**--A removal order is enforceable is it has come into force and is not stayed.	48(1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'object d'un sursis.
(2) **Effect--**If a removal order is enforceable, the foreign national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable.	(2) L'étranger visé par la mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.

If this is a valid enforceable order, immediate removal should be the rule not the exception: see *Chowdhury v. Canada (Solicitor General)* 2006 FC 663 at para 4.

[17] According to some cases, because the removal officer's discretion is very limited, the standard of review is a patently unreasonable one: see *Wang v. Canada (Minister of Citizenship and Immigration),* 2001 FCT 148; *Bharat v. Canada (Solicitor General),* 2004 FC 1720; *Labiyi v. Canada (Solicitor General),* 2004 FC 1493; *Hailu v. Canada (Solicitor General),* 2005 FC 229; *Griffiths v. Canada (Solicitor General),* 2006 FC 127.

[18] Another group of cases decided that the standard of review in such a case, reasonableness simpliciter, (a less stringent test) see: *Raudales v. Canada (Minister of Citizenship and Immigration),* 2003 FCT 385; Liyanage v. Canada (Minister of Citizenship and Immigration), 2005 FC 1045; *Poyanipur v. Canada (Minister of Citizenship and Immigration),* [1995] F.C.J. 1785 at

para 9; *Cortes v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 78. I believe that the present situation is one of mixed facts and law and should be resolved on the intermediate standard of reasonableness simpliciter. The reasonableness test requires the court to consider the reasons mentioned before but also humanitarian and compassionate grounds.

[19] As Justice O'Reilly wrote in *Ramada v. Canada (Solicitor General)*, 2005 FC 1112, at para 3 "[…] valid reasons may be related to the person's ability to travel (*e.g.* illness or a lack of proper travel documents), the need to accommodate other commitments (*e.g.* school or family obligations), or compelling personal circumstances (*e.g.* humanitarian and compassionate considerations) […]". However, the fact that a person has an outstanding application for humanitarian and compassionate relief is not a sufficient ground to defer removal.

ANALYSIS

[20] The applicants argue that there are four serious issues, referred to above. The respondent replies that these are normal issues which appear in many or most removal or deportation orders. A review of the record in this case reveals that the applicants have instituted all available legal recourses under the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, since 2004 after they landed in Canada. All of these recourses have failed. They had an H&C application which was decided unfavorably by a judicial review in 2006 and also a PRRA in 2007. The question of risk of returning to Kenya has already been disposed of. The only remaining more recent issues are the completion of the studies of some of the applicants and the medical issue concerning the applicant

Linda's injuries. I find that this last one is a non-issue since Dr. Waddell's opinion is clear that travel is not a problem and medical treatment is available in the U.S.A. or Kenya.

[21] The H&C application of August 7th 2007 has not yet been authorized. In any case, it can be pursued even if the applicants are outside Canada.

[22] As for the disruption of the studies of the applicants, it is an issue but it is the same one that occurs in many situations of removal or deportation. The Expulsion Officer, Nancy Holdsworth, reviewed all of the facts submitted and most of the arguments presented to this Court by the applicants. She considered the factors involved and decided that there were no exceptional circumstances that warranted a deferral of removal. According to the law exposed previously, I cannot conclude that upon these facts or issues, her decision is unreasonable. The question here is not if I agree with her decision, but if the facts rationally support her decision.

IRREPARABLE HARM

[23] Irreparable harm must not be speculative or based upon simple possibilities. A court must be satisfied that irreparable harm will occur: *Atakora v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 826 (F.C.T.D.); *Osaghae v. Canada (Minister of citizenship and Immigration)*, IMM-872-03, February 12, 2003 (F.C.T.D.). The irreparable harm claimed by one of the applicants concerning the schooling is often the usual one of the consequences of a removal or a deportation order. The applicants must have expected the removal order since all attempts they made to remain since 2004 have failed. They have raised the issue of "irreparable harm", one which

existed beyond the motion of removal or deportation itself: *Melo v. Canada (Minister of Citizenship and Immigration)*, [2000] F.C.J. No. 403 (F.C.T.D.) at para. 20-21. The requirement of irreparable harm beyond removal consequences as not been made here.

THE BALANCE OF CONVENIENCE

[24] In light of the fact that this is a tripartite test and, once the first and second conditions have not been satisfied, the exercise should stop here. Furthermore, public interest must prevail over private interest when the evidence indicates the applicants were not likely to suffer irreparable harm or that serious issues have not been raised.

[25] In summary, the Expulsion Officer's refusal to defer removal is reasonable and the conditions of the tripartite test have not been met.

[26] There is no question for certification.

CONCLUSION

[27] Therefore, for all of the above reasons, the application for an order granting the applicants a stay against an order of removal, is dismissed.

"Orville Frenette"

Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

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