Date: 20080404

Docket: IMM-1257-08

Citation: 2008 FC 433

Ottawa, Ontario, April 4, 2008

PRESENT: The Honourable Mr. Justice Lemieux

BETWEEN:

MOUCTAR SOUARESY

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

I. Introduction and facts

[1] This is a motion by Mouctar Souaresy, a citizen of Guinea, for a stay of his deportation to Guinea set for April 25, 2008, until this Court considers and determines his application for leave and judicial review filed on March 14, 2008. That application concerns the lack of a decision on his urgent application for permanent residence in Canada on humanitarian and compassionate considerations under section 25 of the *Immigration and Refugee Protection Act* (the Act) that was submitted to the Case Processing Centre of the Department of Citizenship and Immigration

(the Centre) on February 12, 2008, by his new counsel at the Étude légale Stewart Istvanffy (applicant's motion record, page 8). The application for permanent residence on humanitarian and compassionate considerations is supported/sponsored by his spouse Ms. Fatim Touré.

[2] The applicant's new counsel subsequently learned that his client's removal had been set for April 25, 2008. By letter dated February 21, 2008, to the Centre, his counsel asked the Centre to review on an urgent basis the application for permanent residence on humanitarian and compassionate considerations and the sponsorship application prior to the applicant's deportation, on the ground that he would face incarceration, torture and/or death at the hands of the authorities in Guinea if he were to return. (Emphasis added.)

[3] By letters dated February 27, 2008, counsel for the applicant asked two Ministers to intervene in this matter: the Minister of Citizenship and Immigration and the Minister of Public Safety. Considering the identified risks of cruel treatment, they implored both Ministers to stay the deportation until the applicant's file could be reviewed.

[4] The applicant's correspondence to the Canadian authorities was supported by significant documentation including

- an arrest warrant dated April 27, 2004, for the applicant issued by the Conakry court of appeal. The warrant stated that the applicant had been charged with rebellion in 2004 (applicant's motion record, page 30);

- letter dated February 15, 2008, from Amnesty International, Canadian Francophone Section, opposing the applicant's removal; according to this organization, the applicant could be detained and tortured or mistreated, could disappear or be executed extrajudicially in Guinea (applicant's record, page 45);

- excerpt from the *Nouvelle Tribune* newspaper, published in Conakry, dated January 25, 2005, which refers to the applicant's arrest, detention and escape (applicant's record, page 65);

- letter dated January 15, 2008, from Mr. Ibrahim Diallo, second vice-president of Canada's Association des ressortissants de Guinéennes et Guinéens, stating his support for the applicant's permanent residence based on humanitarian and compassionate considerations and certifying that the applicant [TRANSLATION] "is being sought in Guinea for desertion and for disobeying an order of a superior in the army" (applicant's record, page 24);

- letter dated January 25, 2008, from Mr. Foday Kamara, president of the Sierra Leone Nationals Union-Guinea in Conakry, confirming that the applicant brought humanitarian aid to the refugees in Sierra Leone during the 1999-2000 crisis (applicant's record, page 25);

- other similar letters from the Sierra Leone Refugee Committee in Guinea and from Mr. Ibrahim Yansaneh, a senior official at the United Nations (applicant's record, pages 27 and 28).

[5] It is important, in my view, to summarize the decisions made by the Canadian immigration authorities concerning the applicant, who had joined the Guinean army on November 1, 1998, fled Guinea in March 2004 after being detained for three years, arrived in Canada on March 30, 2004, and claimed refugee protection on May 11, 2004:

(1) decision dated July 21, 2006, by the Refugee Protection Division: The panel determined that the applicant is excluded from the Canadian refugee protection system because there is reason to believe that he has committed acts referred to in sections 1F(a) and (c) of the Convention. The panel did not decide on the inclusion of the applicant, that is, whether he had demonstrated a reasonable fear of persecution in Guinea. In his Personal Information Form, the applicant maintained that he had joined the army in Guinea in 1998, been suspected by the army of collaborating with the rebels to overthrow the government, been detained from August 2001 to his escape on March 10, 2004, and was wanted in his country because he was Malinké, his mother was Sierra Leonian and he was accused of collaborating with the Sierra Leonian rebels;

(2) application for leave and judicial review dismissed on July 21, 2006, by a judge of this Court;

(3) On August 7, 2005, the applicant married Fatim Touré, a Canadian citizen of Guinean origin who had been granted refugee status in Canada. Prior to his hearing before the Refugee Protection Division on April 5, 2006, and May 23, 2006, the applicant filed an application for permanent residence on February 8, 2008, sponsored by his wife in the Spouse or Common-Law Partner in Canada class (the program). This application was refused on January 7, 2008, on the ground that the applicant did not meet the eligibility requirements of the program since he was inadmissible to Canada under section 35 of the Act (applicant's record, page 55);

(4) The applicant's application in October 2007 for a pre-removal risk assessment (PRRA) was rejected on January 10, 2008, but only communicated to him on February 20, 2008. During the hearing before this Court in Montréal on March 31, 2008, Mr. Istvanffy, newly mandated, acknowledged that the applicant's PRRA application had not been supported by the fresh evidence listed in paragraph 4 of these reasons;

(5) On January 29, 2008, before he knew about the negative result of his PRRA application, the applicant filed a sponsored application for permanent residence in Canada based on humanitarian and compassionate considerations. That application is still under review.

II. Analysis and findings

[6] The three tests that the applicant must satisfy to obtain a stay of his deportation are well known. According to *RJR – MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311, the applicant must

(1) demonstrate that there is a serious question to be tried. "Whether the test has been satisfied should be determined by a motions judge on the basis of common sense and an extremely limited review of the case on the merits" (*RJR – MacDonald*, above, at page 348); that is to say, "Once satisfied that the application is neither vexatious nor frivolous, the . . . judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable." (*RJR – MacDonald*, above, at page 337, last paragraph)

(2) convince the Court that he or she will suffer irreparable harm if the stay is denied. "'Irreparable' refers to the nature of the harm suffered rather than its magnitude. It is harm which . . . cannot be quantified in monetary terms . . ." (*RJR – MacDonald*, above, at page 341).

(3) show that the balance of convenience favours the applicant. This test consists of "a determination of which of the two parties will suffer the greater harm from the granting or refusal of an interlocutory injunction, pending a decision on the merits." (*RJ – MacDonald*, above, at page 342).

[7] In this case, I believe that the applicant has discharged his burden of establishing that these three tests have been satisfied.

(a) Serious question

[8] In *Suresh v. Canada (Minister of Citizenship and Immigration)*, [2002] 1 S.C.R. 3 , the Supreme Court of Canada addressed the issue of whether the Canadian Immigration Act permitted deportation to torture and found as follows at paragraphs 77 and 78:

> **77** The Minister is obliged to exercise the discretion conferred upon her by the *Immigration Act* in accordance with the Constitution. This requires the Minister to balance the relevant factors in the case before her. As stated in *Rehman, supra,* at para. 56, *per* Lord Hoffmann:
>
> > The question of whether the risk to national security is sufficient to justify the appellant's deportation cannot be answered by taking each allegation seriatim and deciding whether it has been established to some standard of proof. It is a question of evaluation and judgment, in which it is necessary to take into account not only the degree of probability of prejudice to national security but also the importance of the security interest at stake and the serious consequences of deportation for the deportee.
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> Similarly, Lord Slynn of Hadley stated, at para. 16:
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> > Whether there is . . . a real possibility [of an adverse effect on the U.K. even if it is not direct or immediate] is a matter which has to be weighed up by the Secretary of State and balanced against the possible injustice to th[e] individual if a deportation order is made.
>
> In Canada, the balance struck by the Minister must conform to the principles of fundamental justice under s. 7 of the *Charter*. It follows that insofar as the *Immigration Act* leaves open the possibility of deportation to torture, the Minister should generally decline to deport refugees where on the evidence there is a substantial risk of torture. [Emphasis added.]
>
> **78** We do not exclude the possibility that in exceptional circumstances, deportation to face torture might be justified, either as a consequence of the balancing process mandated by s. 7 of the *Charter* or under s. 1 . . . [Emphasis added.]

[9] In general, this determination by the Supreme Court was adopted by Parliament in sections 97 and 112 to 115 of the *Immigration and Refugee Protection Act*, which was proclaimed in force on June 22, 2002.

[10] The applicant is subject to a deportation order, the validity of which is not in dispute. He is alleging a substantial risk of detention, torture or death if he is deported to Guinea. In addition, the applicant very recently filed an application for permanent residence on humanitarian and compassionate considerations, relying on the power of the Minister of Citizenship and Immigration (the Minister) under section 25 of the Act, which confers on the Minister a very broad discretion to grant an applicant "permanent resident status or an exemption from any applicable criteria or obligation of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to them . . . or by public policy considerations."

[11] In my view, the serious question raised by the application for leave and judicial review in this case is as follows: "Considering the applicant's particular circumstances, was the Minister required to determine the applicant's recent application for permanent residence on humanitarian and compassionate considerations before deporting him to Guinea, when the evidence in the record appears to establish a serious possibility of the risk of torture, a risk to his life or a risk of cruel and unusual treatment, notwithstanding the fact that the applicant's application was filed very recently and contains fresh evidence that the applicant had not submitted during the PRRA process?"

(b) The other tests

[12] It goes without saying that a serious risk of torture or execution constitutes irreparable harm and that the balance of convenience favours the applicant.

ORDER

THE COURT ORDERS that the applicant's deportation to Guinea be stayed until the decision of this Court on the application for leave to seek judicial review and, if allowed, until the decision of this Court on the judicial review.

"François Lemieux"

Judge

Certified true translation
Mary Jo Egan, LLB

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1257-08
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