Federal Court  Cour fédérale

Date: 20130619

Docket: IMM-3168-13

Citation: 2013 FC 688

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, June 19, 2013

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ABOUDRAMAN FOFANA

Applicant

and

MINISTER OF CITIZENSHIP AND IMMIGRATION AND MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR ORDER AND ORDER

[1] Aboudraman Fofana, a citizen of Côte d'Ivoire and the applicant in this case, is appealing to this Court to obtain a stay of removal scheduled for June 20, 2013.

[2] The applicant is inadmissible to Canada. His immigration history in Canada began with his arrival in Montréal on August 28, 2008. He has an Ivorian passport whose photo was trafficked. He quickly became the subject of an investigation for his possible participation in war crimes.

[3] This request ultimately led to a decision by the Refugee Protection Division (RPD), which concluded that the applicant should be excluded from the Refugee Convention as Article 1F of the Convention applies. Plainly, those covered by that Article cannot obtain international protection in countries if they claim refugee protection. It is sufficient to establish that there are serious reasons for considering that the acts were committed by the individual (including complicity); this standard is of course lower than the criminal law standard, which requires proof beyond a reasonable doubt, but it is higher than the mere existence of suspicions. Evidence must be established.

[4] In this case, the RPD stated that it was satisfied that, for two years, the applicant was present at a roadblock with a rebel group (Forces Nouvelles), where he took part in extorting money from travellers. Indeed, the applicant admitted his participation during those two years. The RPD was also satisfied that these extortion practices took place as part of an armed conflict not of an international character. This is what is required to conclude that there are serious reasons for considering that the applicant committed a war crime. He could not therefore benefit from Canada's protection as a refugee.

[5] The application for judicial review of that decision before this Court was dismissed on July 6, 2011. The applicant then applied for permanent residence under section 25 of the

Immigration and Refugee Protection Act, SC 2001, c 27 (the Act). I reproduce subsection (1) of that section:

25. (1) Subject to subsection (1.2), the Minister must, on request of a foreign national in Canada who applies for permanent resident status and who is inadmissible or does not meet the requirements of this Act, and may, on request of a foreign national outside Canada who applies for a permanent resident visa, examine the circumstances concerning the foreign national and may grant the foreign national permanent resident status or an exemption from any applicable criteria or obligations of this Act if the Minister is of the opinion that it is justified by humanitarian and compassionate considerations relating to the foreign national, taking into account the best interests of a child directly affected.	25. (1) Sous réserve du paragraphe (1.2), le ministre doit, sur demande d'un étranger se trouvant au Canada qui demande le statut de résident permanent et qui soit est interdit de territoire, soit ne se conforme pas à la présente loi, et peut, sur demande d'un étranger se trouvant hors du Canada qui demande un visa de résident permanent, étudier le cas de cet étranger; il peut lui octroyer le statut de résident permanent ou lever tout ou partie des critères et obligations applicables, s'il estime que des considérations d'ordre humanitaire relatives à l'étranger le justifient, compte tenu de l'intérêt supérieur de l'enfant directement touché.

[6] An immigration officer disposed of that last application on April 9, 2013. For some unknown reason, the applicant originally presented only a letter of less than two pages as being the decision of April 9 on the application under section 25 of the Act. He filed an application for leave and judicial review on May 1, 2013, on the basis of that letter.

[7] It should be added that on May 8, 2013, the application for a pre-removal risk assessment was denied in a decision with detailed reasons. There was no application for leave and judicial review of that decision. A stay application to a removal officer was also refused on June 6, 2013. No application for leave and judicial review was filed regarding that decision.

[8] Instead, it was the decision of April 9 refusing the application under section 25 that is the subject of judicial review and the legal remedy underlying the stay application. This procedural mess is not complete without additional proceedings undertaken by the applicant because his memorandum for the judicial review commenced on May 1 was filed beyond the time limit, which had expired on May 31. But that is not all.

[9] His motion record, in this case, is amorphous. His notice of motion describes a judicial review case that is [TRANSLATION] "extremely strong, and the submissions made in support of it clearly state why ministerial relief should have been applied". The same notice complains of the immigration officer's refusal to exercise her jurisdiction and to make a decision. It states that [TRANSLATION] "the officer could not be unaware that the application was based on section 25 of the IRPA and required that the analysis be based on humanitarian and compassionate considerations". The notice is dated June 11, 2013.

[10] The applicant's "submissions" are cast in the same mould. They essentially allege that the immigration officer refused to exercise her jurisdiction in violation of section 25. I reproduce paragraphs 20 and 21 of the "submissions":

[TRANSLATION]

> 20. Section 25 also states that the Minister or the officers exercising her jurisdiction must assess applications submitted to her under this section. Thus, the officer could not decline jurisdiction and had to diligently examine the arguments submitted to her by the applicant. The refusal to examine an application on humanitarian and compassionate grounds must be treated as a refusal to exercise jurisdiction, that is, a decision made *Infra Petita*, which is a reason allowing the Federal Court to intervene under its reviewing power.
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> 21. We submit that the officer's automatic refusal of the application based on humanitarian and compassionate grounds filed by Mr. Fofana, without giving any weight to the arguments he put forward and claiming to be bound by the inadmissibility order must be considered a refusal to exercise jurisdiction. This is a fatal error in law, which makes the decision erroneous and reviewable by the Federal Court.

[11] These "submissions" sought to support the applicant's claim that a serious question is before the Court on judicial review of the decision under section 25 of the Act. Thus, the applicant concluded this part of his written memorandum at paragraph 51:

> [TRANSLATION]
> 51. In view of the foregoing, it is clear that the officer has made bad use or rather has made no use of her jurisdiction. She made a decision that is completely erroneous with regard to the nature of the applicant's submissions and ignored the exceptional circumstances, which meant that his application should have been able to be granted ministerial exemption. In this context, the humanitarian and compassionate considerations related to the applicant's case strongly favour his being granted permanent residence. At least, the application should have been examined seriously and diligently, which was not done.

[12] These "submissions" are also dated June 11. It is now clear that the applicant was arguing on the basis of a letter dated April 9, 2013, which did not deal with his application under section 25. The applicant's record did not contain the decision dated April 9, 2013, which is eight pages long and deals directly with the application. He did not learn of its existence until June 12. Thus, while the applicant is arguing that a serious question justifying a refusal exists, he presents an argument as

if the impugned decision had not examined the issue of the best interests of the child. That was not the case. The immigration officer dealt with that issue fully.

[13] I like to think that this was an error in good faith. However, the Court notes the surprise expressed by counsel for the respondent, who wanted the application dismissed. Despite clear deficiencies, the Court preferred to hear the parties and to dispose of the motion on the merits because of the importance of a removal order.

[14] The removal order and the decision to refuse a stay, dated June 6, are not being challenged. The application for a pre-removal risk assessment also was not challenged, and it would seem that an undisputed removal order is also on file. The removal order is therefore not technically disputed. In any case, given the finding I have made, a quick review of the legal criteria that must be met will suffice.

[15] A person who applies for a stay must meet a three-pronged test in this regard:

(1) Is there a serious issue to be tried?

(2) Will the applicant suffer irreparable harm?

(3) Does the balance of convenience lie in the applicant's favour?

To succeed, the applicant must satisfy the Court that the answer to each of these questions is yes. (*RJR – MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311 and *Toth v Canada (Minister of Employment and Immigration)*, (1988), 86 NR 302 (FCA)).

[16] It is quite clear that the applicant's original argument that the immigration officer did not exercise her jurisdiction and did not deal with the issue of the best interests of the child is flawed. The decision dated April 9, rather than the letter against which the argument was presented, deals with it amply.

[17] Counsel for the applicant therefore changed gears to attempt to contest the RPD's decision refusing to grant refugee status for participation in war crimes (serious reasons to consider). I advised counsel several times that he could not indirectly challenge that decision especially since our Court had refused leave for judicial review. A collateral attack is not permitted. Despite this, counsel persisted. The argument is rejected.

[18] Counsel ended by challenging the argument that the best interests of the child should have prevailed and that the immigration officer erred in not deciding in the applicant's favour. In other words, it was not that the immigration officer had not considered the issue. Instead, her decision was unreasonable. The applicant is the father of a 16-month-old child, and his spouse is expecting twins in a few months. In addition, he is also the father of another child, who lives with his mother in Côte d'Ivoire.

[19] It must be conceded that the application under section 25 of the Act, which includes the consideration of the best interests of the child, is an exceptional and highly discretionary measure. The applicant must contend with the decision of the Federal Court of Appeal in *Legault v Canada (Minister of Citizenship and Immigration)*, [2002] 4 FC 358. For our purposes, it is sufficient to reproduce paragraph 12:

> 12 In short, the immigration officer must be "alert, alive and sensitive" (*Baker, supra*, at paragraph 75) to the interests of the children, but once she has well identified and defined this factor, it is up to her to determine what weight, in her view, it must be given in the circumstances. The presence of children, contrary to the conclusion of Justice Nadon, does not call for a certain result. It is not because the interests of the children favour the fact that a parent residing illegally in Canada should remain in Canada (which, as justly stated by Justice Nadon, will generally be the case), that the Minister must exercise his discretion in favour of said parent. Parliament has not decided, as of yet, that the presence of children in Canada constitutes in itself an impediment to any "*refoulement*" of a parent illegally residing in Canada (see *Langner v. Canada (Minister of Employment and Immigration)*, (1995), 29 C.R.R. (2d) 184 (F.C.A.), leave to appeal refused, [1995] 3 S.C.R. vii).

[20] As indicated, a review of the immigration officer's decision very quickly shows that particular attention was given to the issue. The immigration officer was "alert, alive and sensitive" to the interests of the child. Reading her reasons can only convince me that, in the context of an application for a stay of a removal order, the immigration officer exercised discretion reasonably. This finding does not imply that this is the only conclusion that could have been reached. "Tribunals have a margin of appreciation within the range of acceptable and rational solutions". (*Dunsmuir v New Brunswick*, [2008] 1 SCR 190, at paragraph 47).

[21] Undoubtedly, it is desirable for children to enjoy the presence of both their parents. But the Federal Court of Appeal is clear: it falls to the Minister's representative to attribute the weight that is appropriate. In doing so, the Minister or his or her representative must also consider the integrity of the immigration system. Thus, paragraph 19 of *Legault*, above, reads as follows:

> 19 In short, the *Immigration Act* and the Canadian immigration policy are founded on the idea that whoever comes to Canada with the intention of settling must be of good faith and comply to the letter with the requirements both in form and substance of the Act. Whoever enters Canada illegally contributes to falsifying the

> immigration plan and policy and gives himself priority over those who do respect the requirements of the Act. The Minister, who is responsible for the application of the policy and the Act, is definitely authorized to refuse the exception requested by a person who has established the existence of humanitarian and compassionate grounds, if he believes, for example, that the circumstances surrounding his entry and stay in Canada discredit him or create a precedent susceptible of encouraging illegal entry in Canada. In this sense, the Minister is at liberty to take into consideration the fact that the humanitarian and compassionate grounds that a person claims are the result of his own actions.

[22] In this case, the immigration officer did just that. There may be a little bit of hyperbole in the immigration officer's conclusion, but that does not take anything away from the fact that discretion must take into account other considerations:

> [TRANSLATION]
> I took the family background into account, and I was especially sensitive to the best interests of the child. However, these factors are not more important than all the others, and, in my balancing, I gave more weight to the acts committed on behalf of the Forces Nouvelles rebels, who were guilty of generalized abuses towards civilians: extortion, rape, arbitrary detention and sometimes execution.

[23] The best interests of the child are always a serious issue. That is not the issue meant by the test. Rather, the issue is whether the immigration officer's treatment of the issue can be considered the serious issue meant by the three-pronged test. In my opinion, the applicant did not demonstrate that his claim was serious in this regard. I note that the applicant, through his counsel, made point blank statements at the hearing about his family situation if he has to leave Canada that contradict other statements made in different contexts. It is useless to emphasize the credibility and the weight that can be attributed to these statements. They had to be ignored by the Court.

[24] Finally, the applicant tried to briefly make arguments of law relying on the *Charter of Rights and Freedoms*, international law and even the *Civil Code of Québec*. The applicant made little mention of these arguments at the hearing. He was right to do so. As presented, these arguments are without value and cannot constitute a serious issue.

[25] It flows from this that the applicant failed the first component of the test. That is fatal. It is sufficient to fail one of the three components of the test for the stay to be refused. But he would also have failed the second and third components. In fact, he did not establish that the irreparable harm he alleges is not the harm that normally results from a removal (*Tesoro v Canada (Minister of Citizenship and Immigration)*, 2005 FCA 148, *Selliah v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261; *Singh Atwal v Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427, *Melo v Canada (Minister of Citizenship and Immigration)*, [2000] FCJ No. 403, 188 FTR 39). It is settled law in this Court that the mere presence of children is insufficient, in itself, to establish irreparable harm. This is even less so when the reasons for removal are of the type at issue in this case. I also note that the judicial review of the decision regarding the application under section 25 will continue to follow its course. If the applicant succeeds in his endeavour to reverse the immigration officer's decision, he will be able to file a new permanent residence application on humanitarian and compassionate grounds before another decision-maker. At the stage of staying the removal order, he did not discharge his burden of proof.

[26] I would also have found that, in this case, the necessity in the Minister's view to remove a person who is inadmissible because he has committed war crimes, a decision that is now more than two years old, deserves to be attributed some weight in the balance of convenience (*Legault*, above).

The applicant's illegal entry into the country in 2008 put him in a precarious situation with regard to immigration; he has been without status since March 2011 and is inadmissible. To quote the Federal Court of Appeal, "the Minister is at liberty to take into consideration the fact that the humanitarian and compassionate grounds that a person claims are the result of his own actions". The balance of convenience is not favourable to the applicant.

[27] Accordingly, despite the sympathy that the Court feels for the applicant's family, the state of the law applied to the facts put in evidence and the arguments presented lead me to find that the application for a stay of the enforcement action must be dismissed.

ORDER

THE COURT ORDERS that the application for a stay of the enforcement action is dismissed.

"Yvan Roy"
Judge

Certified true translation
Margarita Gorbounova, Translator

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3168-13
STYLE OF CAUSE:	ABOUDRAMA FOFANA and MINISTER OF CITIZENSHIP AND IMMIGRATION ET AL.
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REASONS FOR ORDER AND ORDER:	ROY J.
DATED:	June 19, 2013

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