Date: 20060510

Docket: IMM-1644-06

Citation: 2006 FC 587

Montréal, Quebec, May 10, 2006

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

MOHAMED ZIAR JAOUADI

applicant

et

THE MINISTER OF SECURITY PUBLIC AND EMERGERNCY PREPAREDNESS

et

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

défendeurs

REASONS FOR ORDER AND ORDER

[1] May 15 is "D" day for Mr. Jaouadi. That is the day he has been ordered to leave Canada and return to his homeland, Tunisia. He arrived here on a tourist visa in 2000, promptly sought status as a refugee, and has been working his way through the *Immigration and Refugee Protection Act* (IRPA), and its predecessor, ever since. The Immigration and Refugee Board (IRB) determined that he was not entitled to be considered a refugee in virtue of Sections F(b) and (c) of Article 1 of the *United Nations Convention Relating to the Status of Refugees*. It found that he had committed a serious non-political crime in Tunisia and was guilty of acts contrary to the purposes and principles of the United Nations. Mr. Justice Pinard dismissed his application for judicial review (2005 FC 1256). He then sought a Pre-Removal Risk Assessment (PRRA). Because his claim to refugee protection had been rejected on the basis of Section F of Article 1 of the Convention, Section 112(3) of the IRPA limited the assessment to whether he was a person in need of protection as set out in Section 97 of the Act i.e., that there would be a substantial risk that he would be personally subjected to a danger of torture or to a risk to his life or to a risk of cruel and unusual punishment if he were returned to Tunisia. The PRRA officer determined that he would not be at risk. Mr. Jaouadi seeks leave and, if granted, judicial review of that decision.

[2] In the meantime, his departure is enforceable and is not stayed by the application for leave and for judicial review. He needs a specific Court order, which is the subject matter of this application.

[3] During his stay in Canada, Mr. Jaouadi has been caught out in lies, but paradoxically, when he claimed he lied, he was not believed! When he first appeared at the IRB, he claimed amongst other things that he was an activist against the Tunisian Government and a sympathiser of the Ennhada Group, which was considered to be a terrorist organization by the Board. The Board halted the hearing and invited Citizenship and Immigration Canada to intervene. Thereafter, Mr. Jaouadi claims that he had been advised to falsify his story, that he was not a member of Ennhada, and that the real reason he feared a return to Tunisia was because of his political activities in Canada.

[4] His new counsel moved that the Board members recuse themselves. They refused. Their decision was upheld by Mr. Justice Martineau at 2003 FC 1347.

[5] All that being said, in opposing the stay, the Minister appears to be asking me to try the man, not the case. Liars may also be in need of international protection.

[6] The thrust of Mr. Jaouadi's argument that the PRRA officer got it wrong is twofold. Even though he is not a member of Ennhada, the Board disbelieved him. Mr. Justice Pinard found that the Board's decision was not patently unreasonable and therefore the Tunisian authorities might come to the same conclusion. Secondly, his anti-Tunisian activities while in Canada over the past six years are well documented, and can easily be found by the Tunisian authorities on the Internet. There are clear indications that the Tunisian authorities search the World Wide Web.

[7] There was considerable debate before me as to what burden of proof rested on Mr. Jaouadi to demonstrate that the Tunisian authorities were or might become aware of his political activities. The PRAA officer also concluded that there were many people with the name Jaouadi in Tunisia which would make it difficult for the Tunisian authorities to identify him. This is somewhat questionable as he will have to be issued a travel document by those very authorities.

THE TEST FOR A STAY

[8] It has been well established in cases such as *Toth v. Canada(Minister of Employment and Immigration)*(1988), 86 N.R. 302 that in order to obtain a stay of proceedings, the applicant must show all of three things. First, there must be a serious question in the underlying case. Second, there must be risk of irreparable harm. Thirdly, the balance of convenience must rest with him. These issues were reviewed in considerable detail by the Supreme Court in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311.

Serious question

[9] As to the first issue, whether there is a case to be made that the PRRA decision can be set aside, there is a serious question to be tried as long as the claim is not frivolous or vexatious. Since the IRB found him to be a terrorist, it is not frivolous or vexatious for Mr. Jaouadi, whatever his shortcomings may be, to propose that the Tunisian authorities might find likewise. If they do, it is certainly arguable that he will be mistreated on his return so that he should have been afforded international protection in Canada.

[10] Messrs. Justices Sopinka and Cory writing for the Court in *RJR-MacDonald* said at page 348:

At the first stage, an applicant for interlocutory relief (...) must demonstrate 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.

[11] Meeting the non-frivolous, non-vexatious test is less onerous than meeting the test for leave in an application for judicial review which requires a fairly arguable case (*Bains v. Canada (Minister of Citizenship and Immigration)* (1990), 109 N.R. 239), and much lower than the onus in a judicial review on the merits which is based on the balance of probabilities.

[12] I find that there is a serious issue to be tried.

Irreparable harm

[13] Unlike *RJR-MacDonald, supra*, this is not a money case. The irreparable harm is inextricably tied in with the serious question. No amount of money will make good torture, cruel and unusual treatment or punishment, or death, the very dangers and risks from which a person needs protection pursuant to Section 97 of IRPA.

Balance of convenience

[14] Again, unlike *RJR-MacDonald, supra*, the loss which Mr. Jaouadi would suffer is not merely financial. Although there is a public interest in administering IRPA, that interest does not mean that a person who has satisfied the first two parts of the test should be removed before his application for leave is even heard. In *RJR-MacDonald, supra*, public health was paramount. Here personal safety is paramount.

ORDER

THIS COURT ORDERS thatthe motion on behalf of the applicant, Mr. Jaouadi, for a stay of the execution of the removal order scheduled to take place on 15 May 2006 is granted until the final disposition of the application for leave and for judicial review herein.

"Sean Harrington"

Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET: IMM-1644-06

STYLE OF CAUSE: MOHAMED ZIAR JAOUADI et

LE MINISTRE DE LA SÉCURITÉ PUBLIQUE

ET DE LA PROTECTION CIVILE ET AL.

PLACE OF HEARING: Montréal, Quebec

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REASONS FOR ORDER AND ORDER: HARRINGTON J.

DATED: May 10, 2006

APPEARANCES:

Peter Shams	FOR THE APPLICANT
Michèle Joubert	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

Saint-Pierre Grenier Montréal, Quebec	FOR THE APPLICANT
John H. Sims, Q.C. Deputy Attorney General of Canada Montréal, Quebec	FOR THE RESPONDENTS