

Federal Court



Cour fédérale

Date: 20090715

Docket: IMM-2602-09

Citation: 2009 FC 722

Vancouver, British Columbia, July 15, 2009

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

**BORHAN GHAREMANI and
FATEME SOLTANI OVANDI**

Applicants

and

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

Respondents

REASONS FOR ORDER AND ORDER

[1] The Applicants, husband and wife, are scheduled to be removed to Iran, their homeland, later this month. They ask this Court to stay that removal.

[2] Their claim that they were refugees or otherwise in need of Canada's protection was dismissed in 2006. More recently, their pre-removal risk assessment (PRRA) was also unsuccessful.

They have applied to this Court for leave and for judicial review of that decision. Given the delays provided for in the Rules, it will be a month before leave is granted or denied.

[3] There is a fundamental date in this case which simply cannot be ignored, June 12, 2009. On that day, a general election was held in Iran. It is a notorious fact, which the Minister does not dispute, that many Iranians deny that the incumbent president, Mahmoud Ahmadinejad, actually won that election. There have been street protests throughout the country; harsh violence has been used to suppress them. Many protesters have been killed, beaten or arrested. Because of severe restrictions on the freedom of the press, it is difficult to know exactly what is going on. The Canadian government has rebuked Iran and rescinded its Canada Day invitation. Iranian nationals working at the British embassy in Tehran have been arrested. Some have been released; the fate of others is unknown. Britain has been accused of subversive activities.

[4] Yet, the Canadian government has not placed a moratorium on returning failed refugees to Iran until such time as the current situation can be clarified. Hence, a motion to this Court for a stay of removal pending resolution of the underlying application for leave and for judicial review.

[5] A stay is a discretionary remedy. It is incumbent upon the Applicants to convince the Court that there is a serious issue in the underlying application, that irreparable harm would be suffered, and that the balance of convenience favours them (*Toth v. Canada (Min. of Employment & Immigration)* (1988), 86 N.R. 302 (Fed. C.A.), 6 Imm. L.R. (2d) 123; *RJR-MacDonald Inc. v. Canada (A.G.)*, [1994] 1 S.C.R. 311. The test is conjunctive.

[6] As per *RJR-MacDonald*, the serious issue question in the context of this particular case is whether the motion for a stay is frivolous or vexatious. This test is less stringent than the test as to whether or not there is an arguable case that leave should be granted, and far less stringent than a determination on the merits which is based on the balance of probabilities.

[7] In the eyes of the Canadian authorities Mr. Ghahremani is a liar. The basis of the couple's refugee claim *sur place* was that he worked as an electrician at a secret nuclear facility, came here on a visitor's visa when his father died here, and then, through a series of mishaps, that information became public and would lead to his persecution should he be returned to Iran.

[8] The panel of the Refugee Protection Division (RPD) of the Immigration and Refugee Board concluded that the whole story was fabricated from information which was publicly available. It is a fact, however, that he was twice interviewed by CSIS. No consideration was given by the RPD as to whether this fact would put Mr. Ghahremani in jeopardy on return to Iran and so it was considered as a fresh issue in the PRRA, as was his more recently developed opposition to the current regime.

[9] Although the PRRA officer recognized that returning Iranians may be questioned, even harshly so, he saw no need for Mr. Ghahremani to mention his involvement with CSIS or to mention his current opposition to the government in power. In other words, if asked, Mr. Ghahremani is being encouraged by the PRRA officer to lie. He doubted the Applicant would be treated harshly.

Serious Issue

[10] It is certainly not frivolous or vexatious to submit that the PRRA officer's findings of fact were highly speculative. In *Boyer v. The King* (1948), 94 C.C.C. 195, the accused was convicted of violating our *Official Secrets Act* notwithstanding that the information revealed was said to be in the public domain. The issue is not whether Canadian officials consider Mr. Ghahremani a liar, but rather how he will be considered in Iran.

Irreparable Harm

[11] Even without the current unrest in Iran, if, as is arguable, the underlying decision was made on an erroneous finding of fact, there is no doubt that the Applicants face the serious possibility of irreparable harm, persecution, unusual punishment, torture and perhaps death.

[12] Furthermore, if the Applicants are removed now, their application for judicial review becomes moot in the light of the recent decision of the Federal Court of Appeal in *Perez v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 171, 2009 F.C.J. No. 691. It is too speculative to imagine that, nevertheless, the Court in its discretion would decide to hear the application for judicial review on its merits.

Balance of Convenience

[13] The balance of convenience strongly favours the Applicants. Not only is there great uncertainty as to the current situation in Iran, but the application for leave will in all likelihood be decided in a month's time. In addition, counsel advised that efforts in one way or another will be

made to get the current situation before a decision-maker, be it by a new PRRA or an expedited application on humanitarian and compassionate grounds.

ORDER

UPON MOTION to stay the removal of the Applicants to Iran, currently scheduled for July 31, 2009, pending determination of the application for leave and for judicial review of the negative decision of the pre-removal risk assessment officer, dated February 26, 2009;

THIS COURT ORDERS that the motion is granted. The removal of the Applicants is so stayed.

“Sean Harrington”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2602-09

STYLE OF CAUSE: BORHAN GHahremani et al. v. MCI et al.

PLACE OF HEARING: Vancouver, BC

DATE OF HEARING: July 13, 2009

**REASONS FOR ORDER
AND ORDER:** HARRINGTON J.

DATED: July 15, 2009

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