Federal Court  Cour fédérale

Date: 20140212

Docket:IMM-6177-13

Citation: 2014 FC 142

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, February 12, 2014

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

ELHADJ MEKHACHEF

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicant appeared before this Court seeking a stay of execution of the deportation order scheduled for February 18, 2014, to his country of citizenship, Algeria.

[2] For 27 years, Mr. Mekhachef was a member of the Algerian police, which he joined in 1985. He was part of the antiterrorist squad starting in 1988.

[3] He and his family (his wife and two children) left Algeria on April 3, 2012, after, according to the applicant, they were threatened. An refugee claim was filed on April 19, 2012, pursuant to the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act).

[4] However, the Immigration Division (ID) found that the applicant was inadmissible on September 13, 2013. Essentially, the ID concluded that membership in the antiterrorist squad for 25 was sufficient, pursuant to the test developed in *Ezokola v Canada (Citizenship and Immigration)*, 2013 CSC 40. The ID found that the applicant had voluntarily made a significant and knowing contribution to the crimes committed by the Algerian police.

[5] There does not seem to be evidence of direct participation in exactions, but there were arrests made by the applicant following which the suspects were handed over to what the ID calls [TRANSLATION] "torture specialists" (para 34 of the ID decision). The ID therefore found that the applicant was inadmissible under paragraph 35(1)(*a)* of the Act which states

> **35.** (1) A permanent resident or a foreign national is inadmissible on grounds of violating human or international rights for
>
> (*a*) committing an act outside Canada that constitutes an offence referred to in sections 4 to 7 of the *Crimes Against Humanity and War Crimes Act*;

[6] As a result, the applicant's refugee claim was rendered ineligible by application of the Act. Paragraph 101(1)(*f)* of the Act applies and, pursuant to section 104 of the Act, notice was given to the applicant on September 16, 2013. Moreover, a deportation order was issued pursuant to section

229 of the *Immigration and Refugee Protection Regulations*, SOR/2002-2007 (the Regulations) by September 13, 2013.

[7] On January 7, 2014, the results of the pre-removal risk assessment (PRRA) were given. The senior immigration officer's general finding was summarized in a concluding paragraph, as follows:

> [TRANSLATION]
> Having read the general documentation on Algeria, I find it undeniable that many problems including restrictions on the freedom of assembly and association, the lack of independence of the judicial system, impunity and corruption persist in the country. However, these are generalized problems. Without information addressing the applicant's individualized risk in the country, I feel that he would not face a personalized risk at the hands of terrorists should he return to his country of birth.

This conclusion was reached despite the applicant's testimony recounting the many threats he allegedly received. It seems that the senior officer would have liked some evidence from the applicant's close family that had stayed in Algeria, but we do not know why the evidence offered was not sufficient [TRANSLATION] "to find that the applicant faces a personalized risk from terrorist groups should he return to Algeria".

[8] Moreover, the senior officer did not accept that the applicant had fears resulting from his defection from the police force for essentially the same reason, insufficient evidence that was considered a lack of corroboration in this case. The following is found at page 10 of the decision:

> [TRANSLATION]
> Moreover, because there is a lack of corroboration that the applicant is being sought and targeted today by the Algerian authorities, the evidence does not support the finding that, on a balance of probabilities, the applicant is a person of interest to the authorities in his country of birth.

[9] During the hearing of this application for stay, I learned that the PRRA was also the subject of an application for judicial review. However, contrary to the application for judicial review of the ID decision of September 13, this Court has not yet rendered a decision on the application for judicial review of the PRRA decision.

[10] The application for stay is therefore related to the removal order resulting from the inadmissibility ruling of September 13, 2013. This inadmissibility is now the subject of a judicial review following the January 14, 2014, order by this Court. Unlike the application for judicial review of Refugee Protection Division decision rejecting a refugee claim, which, under section 231 of the Regulations, results in a stay of the removal order, even after it is granted, an application for judicial review of an inadmissibility decision does not result in an automatic stay. Thus, the application in this case is pursuant to section 18.2 of the *Federal Courts Act*.

[11] The respondent does not object to this approach. The case therefore proceeded on this basis.

[12] In such cases, the test to apply is well known. The applicant must satisfy the Court that the following three elements have been demonstrated:

(i) is there a serious issue raised in the underlying judicial review;

(ii) would the applicant suffer irreparable harm if the stay is not granted;

(iii) the balance of convenience favours the applicant.

(*RJR-MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311; *Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA).

[13] The respondent conceded from the start that a serious issue is raised in this case because the application for judicial review was allowed. This is a sensible concession.

[14] Where the parties disagree is with regard to the criterion of irreparable harm. The respondent wishes to rely on the PRRA decision. He appears to allege that the risk assessment was completed and a return to Algeria is possible. He argues that the mere existence of a serious issue does not result in irreparable harm; he stated that there must be clear and non-speculative evidence that is not based on conjecture. The harm is not that which results from the hardships the deportation would inevitably create.

[15] The respondent's arguments that the PRRA application and the decision rendered January 7, 2014, could have an impact on the issue to be decided seems faulty to me. Not only did the respondent state that he accepted the case would proceed solely on the basis of the judicial review of the inadmissibility decision, but the PRRA decision itself is also being challenged. Additionally, the scope of the PRRA application is reduced when the person is inadmissible on the grounds of violating human rights (subsection 112(3) and paragraph 113(*d)* of the Act).

[16] In my opinion, the issue of irreparable harm cannot be determined by referring to an impugned decision by another group from the same administration. This could be considered "boot strapping". Rather, an independent review is required.

[17] If I understand the applicant's position, he is claiming that the hearing of his application for judicial review on April 14, 2014, could result in his no longer being inadmissible. A judge from this Court found that the issue should be debated. If the applicant is successful, he could then

present his refugee claim and show the validity of his fears about his physical integrity and that of his family.

[18] After 27 years as a police officer, the applicant and his family decided to leave Algeria. This is not trivial. The applicant states that he fears for his integrity and that of his family and this is why he left. However, his refugee claim was never heard, let alone decided, because he was found to be inadmissible. If not for this decision, the applicant's refugee claim would have proceeded with that of his family. But in this case, the danger of persecution or risk to his integrity were not subject to adjudication by the Refugee Protection Division. It is an unusual case in which an application for stay is made due to a refusal to grant an administrative stay after an applicant has made various applications, including a refugee claim, which were all refused.

[19] As indicated above, the application for judicial review of a decision by the Refugee Protection Division includes an automatic stay of the removal order. Under the Act, it appears that adjudication of an issue as important as a refugee claim must be completed before the removal order is carried out. Indeed, if there were a positive decision confirming persecution or risk to integrity, it might be too late for the person to benefit from the judgment if he has already been deported.

[20] As I have attempted to show, the PRRA decision cannot be a substitute for the decision not yet been rendered on the refugee claim, duly presented. And yet, in this case the Regulations also provide for a stay of the automatic removal. I feel that this stay seems to follow the same logic, to allow the applicant to benefit from a favourable judgment.

[21] In the present case, the applicant would suffer irreparable harm if the fears that led him to come to Canada were to become reality upon his return to Algeria.

[22] The situation would be completely different if the application for leave and judicial review had been refused. The effect of the Act would have had full impact. Because the applicant is inadmissible pursuant to paragraph 35(1)(*a)* of the Act, he is no longer entitled to make a refugee claim. But when the finding on the inadmissibility is challenged, resulting in a case before this Court, the situation changes a great deal. There is a certain symmetry between this situation and that of an application for review of a decision by the Refugee Protection Division that leads to a similar result, namely the deportation order is stayed to allow the case to be heard so that the applicant can benefit from a favourable judgment.

[23] In my opinion, it is not certain that the applicant would be persecuted or be at risk if he were to return. In fact, this is the type of decision the Refugee Protection Division renders, with its particular expertise. However, certainty is not required for a stay or, specifically, the assessment of irreparable harm.

[24] In the present circumstances, which I admit are quite particular, I have no doubt that the harm in question would be irreparable given the nature of the risk. More difficult to assess is whether this irreparable harm would be a mere possibility or rather should be considered a serious risk for the applicant's life or security or an obvious threat of ill treatment (*Ellero v Canada (Minister of Public Safety and Emergency Preparedness),* 2008 FC 1364*).* The applicant's past employment, his desertion and the threats he allegedly received based on his past employment lead

me to believe that, at this stage, we have gone beyond mere conjecture and there is a substantial likelihood of jeopardy.

[25] It is therefore not necessary to rely on *Figurado v Canada (Solicitor General)* 2005 FC 347, cited by the applicant in support of his suggestion that irreparable harm can be established based on the fact an applicant would not benefit from an application for judicial review. I prefer to address the issue based on the substantial likelihood of jeopardy, particularly because this jeopardy was not reviewed as thoroughly as required. I will add that the existence of an automatic stay of removal in cases of applications for judicial review of a decision by the Refugee Protection Division suggests that the substantial likelihood of jeopardy is not so far-fetched in these matters.

[26] Lastly, with regard to the balance of convenience, the importance of the public interest to have inadmissible persons leave Canada (*Canada (Minister of Employment and Immigration) v Chiarelli*, [1992] 1 SCR 711 should not be minimized. In this case, the application for judicial review shall be heard in only two months (April 14, 2014). Additionally, the issue of the risk the applicant would face is such that, once considered, the balance of convenience favours the applicant. It is not so urgent to deport the applicant to Algeria that he cannot wait in Canada for the result of the judicial review of his inadmissibility. It is not a matter of years, simply a few weeks.

[27] As a result, the application for stay is granted. The stay will be valid until a decision on the inadmissibility ruling of September 13, 2013, with a deportation removal order, has been rendered by this Court.

ORDER

THE COURT ORDERS that the application for a stay of the removal to be executed on February 18, 2004, be allowed. This stay will be valid until the decision on the application for judicial review of the Immigration Division decision of September 13, 2013, is rendered.

"Yvan Roy"

Judge

Certified true translation
Elizabeth Tan, translator

FEDERAL COURT

SOLICITORS OF RECORD

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