Date: 20070726

Docket: IMM-2363-07

Citation: 2007 FC 772

Ottawa, Ontario, July 26, 2007

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

Ahmed DJEBLI

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

INTRODUCTION

[1] The Applicant is scheduled to be removed from Canada on July 31, 2007. He seeks a stay of his removal until the underlying application for judicial review of the decision dated, April 26, 2007, by the Pre-Removal Risk Assessment (PRRA) Officer, has been determined by this Court.

[2] Most recently, this Court has confirmed that when a PRRA decision is considered as a whole, the applicable standard of review should be *reasonableness simpliciter*; however, findings of fact made by a PRRA officer are only reviewable by this Court if they are patently unreasonable.

(*Chong v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 584, [2007] F.C.J. No. 791 (QL), as stated by Justice Pierre Blais.

[3] This Court has also stated that PRRA Officers have a specialized expertise in risk assessment, and that their findings are usually fact driven. The weighing of evidence is also a factual determination. Accordingly, findings of fact and the weighing of evidence should attract considerable deference from a reviewing Court. (*Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 872, [2004] F.C.J. No. 1134 (QL) at para. 16; *Kim v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 437, [2005] F.C.J. No. 540 (QL) at para. 19; *Ray v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 731, [2006] F.C.J. No. 927 (QL) at paras. 28-29.)

[4] The Applicant has failed to demonstrate that any of the PRRA Officer's findings of fact are patently unreasonable, or that, as a whole, the decision is unreasonable.

[5] The Applicant has not established the existence of a serious issue in relation to the underlying judicial review application. Since all three elements of the tri-partite test set out in *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302 (F.C.A.), must be proven by the Applicant, this motion should be dismissed for that sole reason.

[6] The Applicant has similarly failed to establish that he will suffer irreparable harm if he is returned to Algeria. Nor has he shown that the balance of convenience is in his favour. (*Toth*, above;

MacDonald Inc. v. Canada (Attorney General), [1994] 1 S.C.R. 311 (S.C.C.); *Wang* v. *Canada (Minister of Citizenship and Immigration),* (2001) 3 F.C. 682; *Mikhailov v. Canada (Minister of Citizenship and Immigration),* [2000] F.C.J. No. 642 (QL).)

[7] For these reasons as well, his motion for a stay of his removal should be dismissed.

PRELIMINARY REMARK

[8] As a preliminary matter, it should be noted that there is no statutory stay in this case since the circumstances described in sections 231 and 232 of the *Immigration and Refugee Protection Regulations,* SOR/2002-227 (Regulations), more specifically, section 232(*c*) thereof, no longer apply to the Applicant; therefore, the only remedy that was available to him is a judicial stay under section 18.2 of the *Federal Courts Act,* R.S.C., 1985, c. F-7.

FACTS

[9] On September 8, 1999, the Applicant was admitted to Canada as a member of the crew of a vessel owned by an Algerian state company. On September 10, 1999, the Applicant deserted this vessel. Five days later, on September 15, 1999, the Applicant claimed refugee status.

[10] On March 24, 2000, the Immigration and Refugee Board (IRB) rejected the Applicant's claim. The IRB did not believe the Applicant's story to the effect that he was persecuted by two individuals who wanted him to assist them to leave Algeria clandestinely on the ship of which he

was a crew member. (IRB Decision dated, March 24, 2000, Exhibit “E” to Sylvie Boutin’s affidavit at pps. 23–27 of the Respondent’s Motion Record.)

[11] On May 8, 2000, the Applicant filed an application for permanent residence in Canada as a member of the post-determination refugee claimants in Canada class (PDRCC); however, the study of this application was deferred due to the temporary suspension of removals to Algeria ordered by the then Minister of Citizenship and Immigration (Minister). (1st page of PDRCC application & internal document indicating study of PDRCC claim to be deferred, Exhibit “F” to affidavit of Sylvie Boutin at pps. 29-30 of the Respondent’s Record.)

[12] On August 2, 2000, this Court rejected the Applicant’s application for leave and judicial review of the negative decision of the IRB. (Order of Justice Pierre Denault dated, August 2, 2000, Exhibit “G” to Sylvie Boutin’s affidavit, Respondent’s Record at p. 32.)

[13] On April 5, 2002, the Minister lifted the temporary suspension of removals to Algeria. (Affidavit of Sylvie Boutin at para. 14, Respondent’s Record at p. 10.)

[14] On January 29, 2003, the Applicant applied for permanent residence in Canada based on humanitarian and compassionate considerations (H&C). On February 26, 2003, the Applicant was advised that his application had been transferred to the “Ministère des Relations avec les Citoyens et de l’Immigration du Québec” (MRCI) pursuant to the joint programme established for Algerians by

the governments of Quebec and of Canada. (Affidavit of Sylvie Boutin at para. 15, Respondent's Record at p. 34.)

[15] On October 28, 2003, the MRCI concluded that the Applicant's integration into Canada was insufficient to warrant granting his application for permanent residence. (MRCI Decision dated, October 28, 2003, Exhibit "I" to Sylvie Boutin's affidavit, Respondent's Record at pps. 36-40.)

[16] On March 17, 2006, after receiving an updated in-Canada application for permanent residence from the Applicant on March 7, 2003, his case was evaluated for a second time by a Canadian immigration officer. The latter determined that the Applicant's integration into Canada was minimal. Furthermore, the immigration officer also considered the Applicant's allegation that he risked imprisonment for deserting his ship, if he were to return to Algeria. The immigration officer considered recent documentary evidence, and concluded that the treatment of prisoners and the conditions of detention in Algeria had significantly improved; therefore, the immigration officer concluded that sufficient humanitarian and compassionate considerations did not exist to warrant exempting the Applicant from the requirement that he apply for permanent residence from outside of Canada. (Applicant's update of his H&C application, Decision and Notes to file of Immigration Officer, Exhibit "J" to Sylvie Boutin's affidavit at pps. 42-55, Respondent's Record.)

[17] On October 25, 2006, the Applicant was called in for an interview by Canadian immigration authorities and advised of his right to apply for a Pre-Removal Risk Assessment (PRRA). On April

26, 2007, the Applicant's PRRA application was dismissed. It is that decision which is the subject of the underlying judicial review application.

ISSUE

[18] Has the Applicant demonstrated that he satisfies the tri-partite test?

ANALYSIS

SERIOUS ISSUE

(a) The PRRA Officer did not misinterpret the United Nations High Commissioner for Refugees (UNHCR) position paper related to possible risks for returning Algerians

[19] The Applicant argues that the PRRA officer erred in concluding that the UNHCR position paper dated, December 2004, indicates a risk for returning Algerians, suspected of links to Islamist movements.

[20] The Applicant argues that the UNHCR position paper indicates that there is a risk for all returning failed asylum seekers. Furthermore, according to his interpretation of this document, the risk arises by reason of one's prolonged absence from Algeria.

[21] The Applicant's argument is tantamount to saying that no country may return failed asylum seekers to Algeria, when the individuals have been absent from their country for a prolonged period. This argument is untenable.

[22] Moreover, a careful reading of the entire position paper (found at pp. 21-22 of the Applicant's Motion Record) demonstrates that the PRRA officer's interpretation of this document is reasonable.

[23] A recognition exists, for example, in the second paragraph of the said document that it is stated that there is a concern for returned asylum seekers, because of the Algerian government's perception that they may have been involved in "international terrorism". In the same paragraph, there is also a reference to **"public reports"** that European intelligence agencies have uncovered networks related to groups proscribed by the United States (U.S.) government after September 11, 2001. The paragraph goes on to state that it is alleged that these networks operate in Algeria.

[24] The third paragraph states that the UNHCR will not comment on the substance of these **"public reports"**; however, it notes that they contribute to the suspicion with which returned asylum seekers may be viewed, "notably those persons who have had prior links to Islamist movements".

[25] In the fourth paragraph, the UNHCR refers to the **potential** risk, associated with prolonged absence. It is only reasonable to conclude that the meaning of this statement may only be truly understood if one considers the context, that is, the content of the document, as a whole.

[26] The plain and ordinary meaning of the UNHCR position paper is as stated by the PRRA officer. Returned asylum seekers with prior links to Islamist movements may be at risk.

[27] Since the Applicant does not fit this profile, the PRRA officer reasonably concluded that he was not at risk simply because he is returning to Algeria after a prolonged absence.

[28] Further support exists for the PRRA officer's interpretation of the UNHCR position paper which is provided in the document, as cited at footnote 15, of her decision. This document is a Response to Information Request (RIR) prepared by the IRB, which was posted on the UNHCR website. (Affidavit of Mélanie Leduc, Exhibit "A".)

[29] After citing the UNHCR position paper, the RIR stated that "No further information on the treatment of failed refugee claimants returned to Algeria […] could be found among the sources consulted by the Research Directorate." This RIR, however, also states, amongst other matters, the following:

- An article in *The Guardian* indicated that, in 2002, 55 of the 1,330 "failed asylum seekers" in the UK were returned to Algeria, while in April 2005, "nearly all [were] returned";
- In 13 December 2005 correspondence with the Research Directorate, an official with the Canada Border Services Agency (CBSA) indicated that:

  > At no point during the removal process are foreign authorities informed that an individual has made a refugee claim in Canada…

- According to Mohammed Sekkoum, chairman of the Algerian Refugee Council in Britain, "more than 12,000 Algerians [have] returned to Algeria since the announcement [by President Abselaziz Bouteflika] of the National Civil Concord in 1999";

- Human rights organizations, however, stated that returnees suspected of terrorism faced "abusive treatment, including torture".

[30] The RIR cited by the PRRA officer confirms that her interpretation of the UNHCR position paper was reasonable. It also confirms that many Algerians have returned to their country since the late 90's. Moreover, it indicates that Algerian authorities may not know that the Applicant has made an unsuccessful refugee claim in Canada. It does not indicate that prolonged absence, in and of itself, places a returning Algerian at risk.

[31] Based on all of the foregoing, the Applicant has not demonstrated that the PRRA officer erred in her interpretation of the UNHCR position paper.

b) <u>The PRRA Officer did not err in law in relation to the Applicant's allegation that he may be imprisoned for desertion in Algeria</u>

[32] The Applicant makes no mention of a critical finding of fact of the PRRA officer, that is: it is reasonable to assume that if he is sought by Algerian authorities, as he alleges, other summonses, convocations or warrants would have been sent to him.

[33] The PRRA officer notes that the convocation submitted by the Applicant (page 19 of the Applicant's Record) is dated, May 14, 2002. Yet, five years, subsequently, at the time of the PRRA evaluation, no other document is submitted.

[34] Moreover, as the PRRA officer notes, she was never provided with an original of the convocation.

[35] The Applicant deserted his ship in September of 1999. It is difficult to understand why Algerian authorities would wait three years to issue a convocation for desertion of his ship.

[36] Moreover, the wording of the convocation is sparse, to say the least. It makes no mention of the article of the Algerian penal code under which the Applicant is allegedly charged, nor does it provide any description of the circumstances of the offence.

[37] In light of the foregoing, it was reasonable for the PRRA officer to conclude that the convocation does not demonstrate that the Algerian authorities are after the Applicant.

[38] Even if the Applicant possibly faces prosecution under Article 527 of the Algerian National Code, a simple reading of the wording of that provision of the law, indicates that a conviction is highly unlikely. Article 527 indicates that a crew member who deserts his vessel is liable to conviction if he occupies “un poste de garde ou de sécurité”, and if his desertion causes damages. The Applicant told the removals officer that he was an assistant mechanic. (Sylvie Boutin’s Notes to File, Exhibit “L” to her affidavit at pp. 71-72 of the Respondent’s Record.)

[39] In light of the foregoing, the statements in paragraphs 10 and 11 of the Applicant's Written Representations that "Mr. Djebli fears extended detention" and that he "faces a mandatory prison sentence" appear to be without any foundation.

[40] Although the PRRA officer discussed the monetary fine at page 5 of her decision, at page 1, under the heading, "Risques allégués par le demandeur", she specifically referred to the Applicant's allegation that he faces prosecution under an Algerian law that punishes desertion by imprisonment. Moreover, starting at page 5, after discussing the possibility of a fine, the PRRA officer discussed legal rights afforded by the Algerian justice system, and prison conditions. Her concluding paragraph under the heading "Conditions de détention" indicates that, even if the Applicant were to be imprisoned, she is satisfied that his rights would be respected.

c) <u>The PRRA officer did not err in law in concluding that the Algerian law in question was not excessive or contrary to international norms</u>

[41] The Applicant argues that the Algerian penalties for desertion are grossly disproportionate when one considers the nature of the offence. He argues that the PRRA officer should have considered whether such imprisonment constitutes cruel and unusual punishment.

[42] Yet, the Applicant does not provide any jurisprudence that specifically supports his argument that imprisonment for deserting a ship would constitute cruel and unusual punishment.

[43] In *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540 (C.A.), [1993] F.C.J. No. 584 (QL), the Federal Court of Appeal established the following general propositions in relation to the issue as to whether a law of general application is persecutory:

> [19] After this review of the law, I now venture to set forth some general propositions relating to the status of an ordinary law of general application in determining the question of persecution:
>
> [20] (1) The statutory definition of Convention refugee makes the intent (or any principal effect) of an ordinary law of general application, rather than the motivation of the claimant, relevant to the existence of persecution.
>
> [21] (2) But the neutrality of an ordinary law of general application, vis-à-vis the five grounds for refugee status, must be judged objectively by Canadian tribunals and courts when required.
>
> [22] (3) In such consideration, an ordinary law of general application, even in non-democratic societies, should, I believe, be given a presumption of validity and neutrality, and the onus should be on a claimant, as is generally the case in refugee cases, to show that the laws are either inherently or for some other reason persecutory.
>
> [23] (4) It will not be enough for the claimant to show that a particular regime is generally oppressive but rather that the law in question is persecutory in relation to a Convention ground.

[44] According to the principles established in *Zolfagharkhani*, above, an ordinary law of general application, such as article 527 of the Algerian National Code, is presumed to be valid and neutral. The onus is on the claimant to show that it is inherently, or for some other reason, persecutory.

[45] In that regard, very recently in *Hinzman v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 171, [2007] F.C.J. No. 584 (QL) at paragraphs 46-49, although not dealing specifically with the issue of whether a law of general application is persecutory, the Federal Court of Appeal concluded that evidence as to the actual treatment of military deserters in the U.S.,

including whether they are usually imprisoned for desertion was highly relevant to the Applicant's claim.

[46] As to whether imprisonment for desertion is, in and of itself, cruel and unusual, the Applicant has not undertaken the analysis prescribed in *R. v. Smith*, [1987] 1 S.C.R. 1045. Nor has he provided any foundation for his argument that a sentence of imprisonment for desertion of a ship is so unfit, having regard to the offence, and the offender, as to be grossly disproportionate.

d) Conclusion re the question of a serious issue

[47] In light of all of the foregoing, the Applicant has not demonstrated that there is a serious issue in relation to the underlying PRRA decision.

[48] Since all of the elements of the tri-partite test must be established, this motion should be dismissed on this basis alone.

IRREPARABLE HARM

[49] The jurisprudence of this Court establishes that "irreparable harm" implies the "serious likelihood of jeopardy to an applicant's life or safety". (*Calderon v. Canada (Minister of Citizenship and Immigration)*, [1995] F.C.J. No. 393; *Legault v. Canada (Minister of Citizenship and Immigration)*, 2002 FCA 125, [2002] F.C.J. No. 457 (QL); *Kerrutt v. Canada (Minister of Employment and Immigration)* (1992), 53 F.T.R. 93 (F.C.T.D.); *Simpson v. Canada (Minister of Employment and Immigration)*, [1993] F.C.J. No. 380 (QL).)

[50] For the reasons set out above, the Applicant has not demonstrated that he is at risk as a failed refugee claimant, returning to Algeria.

[51] The letter from “Amnistie internationale” is new evidence that was not placed before the PRRA officer. It is therefore inadmissible in the underlying judicial review application.

[52] If this Court is to consider this letter, in relation to the issue of irreparable harm, the following should be noted:

- No matter how well-intentioned, Amnistie internationale should not be permitted to usurp the functions of the PRRA officer or of this Court;
- This letter speaks of risk associated with prolonged absence; however, other documentary evidence associated the risk is one which is coupled with suspicion by Algerian authorities that an individual has had links to Islamist movements;
- The letter itself cites information which speaks of individual at risk of being detained by the “Département du Renseignement et de la Sécurité” (DRS);
- Moreover, the letter indicates that the DRS is involved in anti-terrorist activities; therefore, presumably potential targets are suspected terrorists, or persons the DRS suspects have links to Islamist movements.

[53] In this case, as the PRRA officer noted that the Applicant does not fit this profile.

[54] As to the possibility of imprisonment, it is extremely remote, and most probably non-existent.

[55] Even assuming that imprisonment of the Applicant is possible, the PRRA officer reasonably concluded that the Applicant would not be at risk in Algeria even if he were in prison.

BALANCE OF CONVENIENCE

[56] Removal orders must be enforced as soon as is reasonably practicable. Furthermore, it is trite law that the public interest must be considered when this Court evaluates whether the balance of convenience favours the Applicant or the Minister. In this case, in light of all of the foregoing, it is in the public interest that the Applicant be removed as soon as possible. (Section 48, *Immigration and Refugee Protection Act*, S.C. 2001, c.27; *RJR-MacDonald Inc. v. Canada*, [1994] 1 S.C.R. 311; *Blum v. Canada (Minister of Citizenship and Immigration)* (1994), 90 F.T.R. 54, [1994] F.C.J. No. 1990 (QL) (Justice Paul Rouleau).)

[57] Therefore, the balance of convenience favours the Minister. For this reason as well, this motion for a stay should be dismissed.

CONCLUSION

[58] For all of the above reasons, the Applicant’s Motion for a stay of execution of the removal order is dismissed.

JUDGMENT

THIS COURT ORDERS that the Applicant's Motion for a stay of execution of the removal order be dismissed.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2363-07
STYLE OF CAUSE:	AHMED DJEBLI v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS
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APPEARANCES:

Mr. Jared Will	FOR THE APPLICANT
Ms. Gretchen Timmins	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

JARED WILL Montreal (Quebec)	FOR THE APPLICANT
JOHN H. SIMS, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENTS