

Federal Court



Cour fédérale

Date: 20100622

Docket: IMM-5700-09

Citation: 2010 FC 675

Ottawa, Ontario, June 22, 2010

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

KAIS CHAABANE

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

I. Overview

[1] The Court finds the Applicant's allegation is inconsistent with his course of activities in Canada. He entered Canada for the purposes of study in 2001 and, for eight years, never attempted to claim refugee protection. The Certified Tribunal Record shows the Applicant renewed his status as a foreign student four times and received two work permits during his stay in Canada.

II. Judicial Procedure

[2] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA) of an October 31, 2009 decision of the Minister's Delegate to issue an exclusion order against the Applicant. The Delegate issued this order on the basis that the Applicant was inadmissible in Canada pursuant to section 41 for not complying with the IRPA.

III. Background

[3] The Applicant, Mr. Kais Chaabane, is a citizen of Tunisia who came to Canada on January 12, 2001 on a student visa. Mr. Chaabane's temporary status expired on February 28, 2009.

[4] Eight months later, during the time he was without status, on October 31, 2009, after receiving information regarding Mr. Chaabane's location and activities, Canadian Border Services Agency (CBSA) officers arrested him while he worked at a restaurant called the "Petit Gueuleton Québécois."

[5] After interviewing Mr. Chaabane, the CBSA officer issued an inadmissibility report against him pursuant to subsection 44(1) of the IRPA. The CBSA officer was of the view that Mr. Chaabane was in violation of subsection 29(2) of the IRPA because he failed to leave Canada at the end of the authorized period. The CBSA officer reported that this action rendered Mr. Chaabane inadmissible pursuant to section 41 of the IRPA.

IV. Decision under Review

[6] The Delegate accepted the CBSA officer's report and issued an exclusion order against Mr. Chaabane.

[7] Mr. Chaabane alleges that he advised the interviewing officer that his life would be in danger if he were returned to Tunisia.

V. Pertinent Legislative Provisions

[8] Mr. Chaabane may be barred from requesting refugee protection due to section 99 of the IRPA:

Claim

99. (1) A claim for refugee protection may be made in or outside Canada.

Claim outside Canada

(2) A claim for refugee protection made by a person outside Canada must be made by making an application for a visa as a Convention refugee or a person in similar circumstances, and is governed by Part 1.

Claim inside Canada

(3) A claim for refugee protection made by a person inside Canada must be made to

Demande

99. (1) La demande d'asile peut être faite à l'étranger ou au Canada.

Demande faite à l'étranger

(2) Celle de la personne se trouvant hors du Canada se fait par une demande de visa comme réfugié ou de personne en situation semblable et est régie par la partie 1.

Demande faite au Canada

(3) Celle de la personne se trouvant au Canada se fait à l'agent et est régie par la

an officer, may not be made by a person who is subject to a removal order, and is governed by this Part.

présente partie; toutefois la personne visée par une mesure de renvoi n'est pas admise à la faire.

Permanent resident

Résident permanent

(4) An application to become a permanent resident made by a protected person is governed by Part 1.

(4) La demande de résidence permanente faite au Canada par une personne protégée est régie par la partie 1.

[9] Subsection 29(2) of the IRPA states:

Obligation — temporary resident

Obligation du résident temporaire

(2) A temporary resident must comply with any conditions imposed under the regulations and with any requirements under this Act, must leave Canada by the end of the period authorized for their stay and may re-enter Canada only if their authorization provides for re-entry.

(2) Le résident temporaire est assujéti aux conditions imposées par les règlements et doit se conformer à la présente loi et avoir quitté le pays à la fin de la période de séjour autorisée. Il ne peut y rentrer que si l'autorisation le prévoit.

[10] Section 41 of the IRPA states:

Non-compliance with Act

Manquement à la loi

41. A person is inadmissible for failing to comply with this Act

41. S'agissant de l'étranger, emportent interdiction de territoire pour manquement à la présente loi tout fait — acte ou omission — commis directement ou indirectement en contravention avec la présente

(a) in the case of a foreign national, through an act or omission which contravenes, directly or

indirectly, a provision of this Act; and
 (b) in the case of a permanent resident, through failing to comply with subsection 27(2) or section 28.

loi et, s'agissant du résident permanent, le manquement à l'obligation de résidence et aux conditions imposées.

[11] Section 44 of the IRPA states:

Preparation of report

44. (1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.

Rapport d'interdiction de territoire

44. (1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.

Referral or removal order

(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

Suivi

(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête, sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

Conditions

Conditions

(3) An officer or the Immigration Division may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer or the Division considers necessary on a permanent resident or a foreign national who is the subject of a report, an admissibility hearing or, being in Canada, a removal order.

(3) L'agent ou la Section de l'immigration peut imposer les conditions qu'il estime nécessaires, notamment la remise d'une garantie d'exécution, au résident permanent ou à l'étranger qui fait l'objet d'un rapport ou d'une enquête ou, étant au Canada, d'une mesure de renvoi.

VI. Positions of the Parties

Applicant's Position

[12] Mr. Chaabane submits the Delegate erred by issuing an exclusion order after he stated his life would be in danger if he were returned to Tunisia. Mr. Chaabane argues his fear should be assessed by the Immigration and Refugee Board because he informed the officer of his fear of return at the beginning of his interview, before he signed the exclusion order. Mr. Chaabane contends he only signed the exclusion order because he was misled by immigration officials about its significance.

Respondents' Position

[13] According to the Respondents, Mr. Chaabane never expressed any fear of returning to Tunisia for eight years; and, only during his arrest, detention and interview, does he claim, he did so. Mr. Chaabane completely contradicts the CBSA officers as to the unfolding of events at his arrest, detention and interview.

VII. Analysis

[14] In the case of *Raman v. Canada (Minister of Citizenship and Immigration)*, [1999] 4 F.C. 140, 89 A.C.W.S. (3d) 330, the Federal Court of Appeal held:

Any person, who is not a citizen of Canada however, does have a right to make a claim for Convention refugee status. If a person properly makes such a claim at the appropriate time, the *Charter* offers significant procedural protections... (Emphasis added).

[15] The question this Court must answer is whether such a claim was properly made at the appropriate time.

[16] This case involves a conflict of affidavits. Mr. Chaabane alleges that he informed CBSA officers of his wish to claim refugee status and that his life would be at risk if he were returned to Tunisia before he signed the exclusion order. The Respondents submit two affidavits, one from Officer Luc Saulnier and one from the Delegate stating that Mr. Chaabane made no such claims.

[17] Further to cross examination, Mr. Chaabane seeks to discredit CBSA officers' recollection of events as to their affidavits. Nevertheless, Mr. Chaabane's behaviour and acts for eight years, prior to his arrest, detention and interview, do not point to any fear he may have had to return to his country of origin. This, in and of itself, speaks for itself.

[18] Justice Edmond Blanchard was faced with a nearly identical situation in the case of *Elemuwa v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1026, 141 A.C.W.S. (3d)

99. In response to the factual question of whether a refugee claim was made before the issuance of an exclusion order, Justice Blanchard held the following:

[16] With respect to the Applicant's contention that the Delegate issued the order despite the fact that a claim for protection had been made, the burden is on the Applicant to establish on the balance of probabilities that the events occurred as alleged in the Applicant's memorandum. In essence, the Applicant alleges that, by failing to receive a claim for protection, an immigration officer acted contrary to the IRPA and to Canada's international obligations. The Applicant questions the officer's integrity and in order to prove such allegations, the facts upon which they are based must be stated. The Applicant's evidence fails to support his allegations and, consequently, the Applicant has failed to discharge his burden of proof.

[19] The Court finds Mr. Chaabane's allegation is inconsistent with his course of activities in Canada. He entered Canada for the purposes of study in 2001 and, for eight years, never attempted to claim refugee protection. The Certified Tribunal Record shows Mr. Chaabane renewed his status as a foreign student four times and received two work permits during his stay in Canada.

VIII. Conclusion

[20] The Court concludes, upon review of the evidence, that Mr. Chaabane has not met the burden of establishing, on the balance of probabilities, that he claimed refugee status before the issuance of the exclusion order.

[21] For all of the above reasons, the application for judicial review is dismissed.

JUDGMENT

THIS COURT ORDERS that

1. The application for judicial review be dismissed;
2. No serious question of general importance be certified.

“Michel M.J. Shore”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-5700-09

STYLE OF CAUSE: KAIS CHAABANE
v. THE MINISTER OF CITIZENSHIP AND
IMMIGRATION AND THE MINISTER
OF PUBLIC SAFETY AND EMERGENCY
PREPAREDNESS

PLACE OF HEARING: Montreal (Quebec)

DATE OF HEARING: June 10, 2010

**REASONS FOR JUDGMENT
AND JUDGMENT:** SHORE J.

DATED: June 22, 2010

APPEARANCES:

Me Viken G. Artinian

FOR THE APPLICANT

Me Evan Liosis

FOR THE RESPONDENTS

SOLICITORS OF RECORD:

ALLEN & ASSOCIATES
Montreal (Quebec)

FOR THE APPLICANT

MYLES J. KIRVAN
Deputy Attorney General of Canada

FOR THE RESPONDENTS