Federal Court  Cour fédérale

**Date: 20130522**

**Docket: IMM-3189-13**

**Citation: 2013 FC 530**

**BETWEEN:**

**LALI DORESI**

**Applicant**

**and**

**THE MINISTER OF CITIZENSHIP AND IMMIGRATION**

**Respondent**

## REASONS FOR INTERLOCUTORY INJUNCTION

[1] In 2006, the Refugee Protection Division, of the Immigration and Refugee Board of Canada, gave Mr. Doresi our protection as a result of a blood feud in Albania. It was determined on the balance of probabilities that were Mr. Doresi to be removed to Albania, there existed substantial grounds to believe that he would be personally subjected to a danger of torture or a risk to his life or a risk of cruel and unusual treatment of punishment, the whole in accordance with section 97 of the *Immigration and Refugee Protection Act* [IRPA].

[2] The Minister has now applied to the Refugee Protection Division (RPD) to have his refugee protection vacated in accordance with section 109 of IRPA. The basis is that Mr. Doresi made a

material misrepresentation. He had represented that he had no criminal record while the Minister has now been provided with evidence that he had been convicted for drug trafficking, *i.e.* attempting to smuggle heroin out of Albania into Greece. Section 109(1) of IRPA reads:

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| **109.** (1) The Refugee Protection Division may, on application by the Minister, vacate a decision to allow a claim for refugee protection, if it finds that the decision was obtained as a result of directly or indirectly misrepresenting or withholding material facts relating to a relevant matter. | **109.** (1) La Section de la protection des réfugiés peut, sur demande du ministre, annuler la décision ayant accueilli la demande d'asile résultant, directement ou indirectement, de présentations erronées sur un fait important quant à un objet pertinent, ou de réticence sur ce fait. |

[3] He was convicted *in absentia* but was said to have been represented by a lawyer who entered a guilty plea.

[4] Mr. Doresi denies everything. He is said on 12 May 2005 to have personally appeared before a notary in Tirana to give a lawyer a power of attorney. At that time he was already in Canada and had already claimed refugee protection.

[5] He has asked the RPD to postpone the hearing on the Minister's application to vacate the favourable refugee decision to give him a reasonable opportunity to clear his name in Albania. The RPD has refused. Mr. Doresi then moved for an interlocutory injunction before this Court, which was granted yesterday. These are the reasons.

**MR. DORESI'S STORY**

[6] According to Mr. Doresi, he was completely unaware that he had been convicted *in absentia* for drug trafficking in Albania until he was served with the Minister's Application to Vacate Refugee Protection. He made inquiries and now understands that this is what happened.

[7] In September 2003, he lent his car to a friend who told him he had been in an accident and that the car was a total loss. He compensated Mr. Doresi.

[8] However, it seems that the friend had been attempting to transport drugs from Albania into Greece. When stopped at the border, he ran away and was not caught. However, based on vehicle registration and Mr. Doresi's passport which was in the car, he was charged with trafficking. Thus, according to Mr. Doresi, this is a case of mistaken identity coupled with police fraud.

[9] The police came to his parents' house looking for him but did not say what they wanted. Although his parents told the police where he lived, he was never contacted. He assumed they were investigating the car accident.

[10] The next year, he went to a police station to obtain a new passport. The police did not inform him that he was wanted for any crime.

[11] According to the documents in the Application to Vacate, he was sentenced on 5 June 2005 to imprisonment for six years.

[12] However, and this appears to be corroborated by evidence in Canada, he left Albania on 24 April 2005 and arrived in Canada the same day. He made a claim for refugee status.

[13] Following receipt of the Application to Vacate, he retained counsel in Canada and in Albania. His Albanian lawyer was able to locate a power of attorney which indicates that Mr. Doresi had personally appeared before a notary in May 2005 to authorize a lawyer to plead guilty on his behalf. This would appear to be impossible as Mr. Doresi was already in Canada.

[14] Through counsel, he requested an adjournment of the Application to Vacate to give him an opportunity to attempt to have the criminal conviction in Albania set aside.

[15] That request was denied as follows:

> However, we are denying the application in terms of a postponement for the documents to be obtained from Albania. The Board has a responsibility to proceed as expeditiously as possible in the cases before it. Guideline 6(7.7) indicates that if a party requests a change of date or time for purposes of obtaining documentation, the Refugee Protection Division proceeds and determines at [the] end of hearing if necessary to grant a delay to obtain the documents.

[16] Since then, Mr. Doresi has also obtained an opinion from a forensic expert which indicates that the signature on the power of attorney issued in Albania is a forgery.

[17] Counsel for Mr. Doresi and for the Minister both agree that it is highly unusual for the Court to interfere with the scheduling of hearings before federal tribunals. Absent extraordinary circumstances, parties must exhaust their rights and remedies under the administrative process before seeking help from the courts. As the Court of Appeal stated in *Szczecka v Canada (Minister*

*of Employment and Immigration)* (1993), 116 DLR (4th) 333, 170 NR 58, [1993] FCJ No 934 (QL) at paragraph 4:

> This is why unless there are special circumstances there should not be any appeal or immediate judicial review of an interlocutory judgement. Similarly, there will not be any basis for judicial review, specially immediate review, when at the end of the proceedings some other appropriate remedy exists. These rules have been applied in several Court decisions specifically in order to avoid breaking up cases and the resulting delays and expenses, which interfere with the sound administration of justice and ultimately bring it into disrepute. In the case of judicial review under s. 28 of the Federal Court Act, which is the case now before the Court, the interpretation of that section by the Court is even more strict. [See e.g. Mahabir v. Canada, [1992] 1 F.C. 133 (F.C.A.)]

[18] Likewise, as Mr. Justice Pinard held in *Rogan v Canada (Minister of Citizenship and Immigration)*, 2010 FC 532, [2010] FCJ No 660 (QL), at paragraph 6:

> The rationale for such restrictive access to judicial review is to avoid the unnecessary delays and expenses associated with breaking up a case on each and every opportunity for appeal, which would interfere with the sound administration of justice and ultimately bring it into disrepute (*Zündel*, and *Szczecka*, *supra*). The Federal Court of Appeal held in *Anti-dumping Act (In re) and in re Danmor Shoe Co. Ltd.*, [1974] 1 F.C. 22, at page 34:
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> > . . . a right, vested in a party who is reluctant to have the tribunal finish its job, to have the Court review separately each position taken, or ruling made, by a tribunal in the course of a long hearing would, in effect, be a right vested in such a party to frustrate the work of the tribunal. […]

**DISCUSSION**

[19] The *audi alteram partem* aspect of natural justice requires that Mr. Doresi be given a fair opportunity to present his defence. It has been said that even God did not remove Adam and Eve from the Garden of Eden without a proper hearing (*The King v. The Chancellor, &c., of*

*Cambridge*, (1723) 1 Stra. 557; *Cooper v. The Wandsworth Board of Works* (1863), 143 ER 414 at p. 420; and *Matondo v Canada (Minister of Citizenship and Immigration)* (2005), 44 Imm LR (3d) 225, 2005 FC 416, [2005] FCJ No 509 (QL)).

[20] Mr. Doresi's case is that he has not been sitting on his hands since learning of his conviction, and that if he succeeds in having it set aside the Minister's case falls.

[21] On the other hand, counsel for the Minister submits that it is highly speculative to suggest that the RPD will not observe the rules of natural justice. Of course, it may be that the RPD will dismiss the Minister's application (however, the Minister is not withdrawing it).

[22] I have determined that this is one of these rare cases where the RPD should be enjoined, for a reasonable period of time, from proceeding.

[23] Apart from a few preliminary matters, the hearing before the RPD has not even commenced. Furthermore, the RPD has misconstrued its own Guideline 6, section 7.7, which provides:

> If a party requests a change of date or time of the proceedings for the purpose of obtaining documentation, the RPD generally proceeds and will determine at the end of the hearing whether or not it is necessary to grant a delay to obtain and provide the documents. [My emphasis.]

[24] The RPD was of the view it had a responsibility to proceed as expeditiously as possible and only at the end of the hearing would it decide whether it would grant a delay. The RPD fettered its discretion. Mr. Doresi has the right, as a matter of fundamental justice, to be given a reasonable opportunity to obtain documents which would clear his name.

[25] The test for a stay or an interlocutory injunction is well known. There must be a serious issue, irreparable harm if the motion is not granted and the balance of convenience must favour the moving party (*Toth v Canada (Minister of Employment and Immigration)* (1988), 86 NR 302 (FCA), [1988] FCJ No 587 (QL) and *RJR – MacDonald Inc. v Canada (Attorney General)*, [1994] 1 SCR 311, [1994] SCJ No 17 (QL)).

[26] In this case, the serious issue and irreparable harm are intertwined. The RPD has already found that if Mr. Doresi is returned to Albania it is more likely than not that he will be tortured or murdered or face cruel and unusual treatment or punishment. That is certainly irreparable harm. He should not have to fight a rearguard action of applications for leave for judicial review and judicial review should his refugee protection be vacated without him having been given a fair opportunity to make his defence. It can never be inconvenient to follow natural justice.

[27] For these reasons, I have granted an interlocutory injunction enjoining the RPD, until further order, from proceeding with the hearing on the application to vacate refugee protection scheduled to recommence on Monday, 27 May 2013. I have also directed Mr. Doresi's counsel to report to the Court by 16 July 2013 as to the status of the efforts in Albania to have the conviction set aside. I remain seized of the matter.

"Sean Harrington"
Judge

Toronto, Ontario
May 22, 2013

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-3189-13 |
| **STYLE OF CAUSE:** | LALI DORESI v MCI |
| **PLACE OF HEARING:** | TORONTO, ONTARIO |
| **DATE OF HEARING:** | MAY 21, 2013 |
| **REASONS FOR INTERLOCUTORY INJUNCTION:** | HARRINGTON J. |
| **DATED:** | MAY 22, 2013 |

**APPEARANCES:**

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| Yehuda Levinson | FOR THE APPLICANT |
| Charles J. Jubenville | FOR THE RESPONDENT |

**SOLICITORS OF RECORD:**

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| Levinson & Associates<br>Barristers & Solicitors<br>Toronto, Ontario | FOR THE APPLICANT |
| William F. Pentney<br>Deputy Attorney General of Canada<br>Toronto, Ontario | FOR THE RESPONDENT |