Federal Court  Cour fédérale

Date: 20160526

Docket: IMM-2057-16

Citation: 2016 FC 585

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Montréal, Quebec, May 26, 2016

PRESENT: The Honourable Mr. Justice Roy

BETWEEN:

TRABELSI, BELHASSEN

Applicant

and

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

Respondents

ORDER AND REASONS

[1] This application for a stay arrived at this Court in a rather strange manner. The applicant, Belhassen Trabelsi, is the subject of a removal order to be enforced on May 31 to return him to his country of citizenship, Tunisia. It follows an application for a pre-removal risk assessment (PRRA) which resulted in a negative decision on April 14, 2016.

[2] This negative decision was the subject of an application for leave to seek judicial review on May 17. This application for judicial review has not yet been addressed. The application for a stay was made under section 18.2 of the *Federal Courts Act*, R.S.C. 1985, c. F-7. The applicant must therefore satisfy the Court with regard to the three-part test set out in *RJR-MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 SCR 311; *Toth v. Canada (Minister of Employment and Immigration)*, 86 NR 302 (FCA).:

1. Is there a serious issue to be tried in the underlying judicial review?
2. Would the applicant suffer irreparable harm if removed from Canada?
3. Does the balance of convenience favour the applicant?

Each component of the test must receive a positive response for the stay to be granted.

I. Preliminary questions

[3] By the very admission of counsel for the applicant, the applicant cannot be found. With commendable candor, this counsel submitted an affidavit in which he declared that [TRANSLATION] "the client can no longer be contacted." The client also failed to complete the affidavit in support of the application for a stay. After the hearing for the application for a stay, the Court was warned by counsel for the respondent that the applicant did not appear for the meeting set by the Canada Border Services Agency for the afternoon of May 24, 2016. Counsel other than that acting in this application for a stay but representing the applicant's interest in other proceedings indicated that the applicant could not be found.

[4] An application for a stay requires the person to appear before the Court with clean hands, in good faith, and with an attitude beyond reproach.

[5] I can only conclude that the applicant failed to act in good faith when he did not sign the affidavit in support of the grounds upon which a stay should be granted in his case. In fact, it is not even clear whether he will submit to the removal order against him if it is not suspended, since he currently cannot be found and his only communication seems to be with a Tunisian lawyer. Brown and Evans, in their *Judicial Review of Administrative Action in Canada* (Carswell, loose-leaf), succinctly describe the nature of the Court's power:

> Of course, being both discretionary and an equitable remedy, it may be denied where the applicant does not come to court with "clean hands".
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> [6:2130]

[6] Someone who wishes to benefit from an equitable remedy like a stay must at least establish the facts supporting the application. The applicant must attest to the irreparable harm, especially if health reasons are invoked. Instead, we have an argument from counsel for the applicant, which is eloquent but is not founded on facts established by the applicant. This lack of evidence is clearly very problematic.

[7] Also troubling is the applicant's absence. His whereabouts are unknown, though he verbally communicated with a Tunisian lawyer to give a mandate to counsel now representing the applicant's interests in his application for a stay. The scant evidence for irreparable harm and the argument based on that evidence are, so to speak, non-existent, as the applicant did not cooperate. The applicant's attitude is far from beyond reproach. Mr. Justice Nadon, of the

Federal Court of Appeal, wrote in *Baron v. Canada (Minister of Public Safety and Emergency Preparedness)*, [2010] 2 FCR 311, 2009 FCA 81, at paragraph 65, that "neither enforcement officers nor the courts, for that matter, should encourage or reward persons who do not have 'clean hands.'"

[8] In my mind, this suffices to dismiss the application for a stay. But there is more; after reviewing the case and hearing from counsel for the parties, I must conclude that no part of the three-part test has been met.

II. Merit of the stay

[9] Since the applicant was excluded under section 98 of the *Immigration and Refugee Protection Act*, S.C. 2001, chapter 27, the risks associated with his removal from Canada were assessed for the first time as part of the PRRA application. The decision, which was very sophisticated and well-developed, was rendered without the applicant presenting any arguments to the administrative decision-maker. Upon reading the PRRA decision, one cannot help but be struck by its fairness despite the lack of evidence or even arguments. Suffice it to say that after a fairly long hearing, the Refugee Protection Division found that there were serious grounds to believe that the applicant had committed crimes of common law in Tunisia corresponding to fraud, fraud on the government and money laundering. Mr. Trabelsi therefore cannot seek status as a refugee or person in need of protection. The application for leave to seek judicial review was denied (section 72 of the Act). Even though the applicant failed to present evidence or articulate an argument, the PRRA decision still involved a pre-removal risk assessment because the risk had not been assessed by the Refugee Protection Division.

[10] The application for a stay depends on the application for leave to seek judicial review from the PRRA decision. First, the applicant must satisfy this Court that there is a serious issue to be tried before the Federal Court if leave for judicial review is granted.

[11] The burden of proof falls on the applicant not only when making an application for a stay, but also before the PRRA decision-maker. Mr. Justice Mainville, when he was on this Court, wrote the following in *Mandida v. Canada (Citizenship and Immigration)*, 2010 FC 491 at paragraph 30:

> [30] In a pre-removal risk assessment, it is the applicant who bears the burden of proof. The standard of proof is the balance of probabilities. Thus, the Applicant in this case had the burden of proving, on a balance of probabilities, that she would be at risk of persecution, torture, to life or of cruel or unusual treatment or punishment if she returned to Ethiopia: *Bayavuge v. Canada (Minister of Citizenship and Immigration)*, 2007 FC 65 (CanLII), 308 F.T.R. 126, [2007] F.C.J. No. 111 (QL) at para. 3; *Ferguson v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1067 (CanLII), [2008] F.C.J. No. 1308 (QL) at paras. 20-21; *Guergour v. Canada (Minister of Citizenship and Immigration)*, 2009 FC 1147 (CanLII), [2009] F.C.J. No. 1417 (QL) at para. 6.

For reasons that remain unexplained, the evidence before the PRRA decision-maker was painfully inadequate.

[12] The PRRA decision-maker noted that the [TRANSLATION] "submissions" promised when the applicant applied for a pre-removal risk assessment were never received. The decision-maker looked into whether they had, in fact, been sent. They had not. All that had been received were documents from February 8, February 26, and March 4, 2016.

[13] Of these three items, only the one from March 4 is useful for our purposes; those from February 8 and 26 are of no interest. As for the document from March 4, it included documents related to the applicant's medical situation. The PRRA decision states:

> [TRANSLATION]
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> "In this email, the applicants' representative wrote: 'You will note that two of our client's brothers did not receive medical care while in preventive detention in Tunisia. We submit that this would be the case for Belhassen Trabelsi [the applicant] as well.' These are the only allegations made by the applicant or the applicant's representative in the context of this PRRA."
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> [page 4]

[14] No further evidence from the applicant was received. Despite the burden of proof that lay on him, the applicant was content to oppose the PRRA decision-maker, who chose to examine the applicant's situation based on the file as it was compiled, rather than rejecting the application due to lack of evidence or argument. In other words, having failed to present positive evidence, the applicant sought to find fault with the PRRA decision-maker's reasoning to provide an argument for the applicant, which he had not done himself. The PRRA decision-maker, in fact, probably articulated the best possible argument that could be made with the sparse evidence in this case.

[15] The applicant alleged that he would be deprived of the healthcare that he needs if he were returned to Tunisia (memorandum of fact and law, paragraph 18). This is exactly the angle that the PRRA decision-maker examined. Below are three paragraphs taken from *Covarrubias v. Canada (Minister of Citizenship and Immigration)*, [2007] 3 FCR 169, 2006 FCA 365, which address the paragraph of the Act that merits review in our case:

> [31] Having considered the parties' arguments and the limited authorities, I am of the view that the provision in issue is meant to be broadly interpreted, so that only in rare cases would the onus on the applicant be met. The applicant must establish, on the balance of probabilities, not only that there is a personalized risk to his or her life, but that this was not caused by the inability of his or her country to provide adequate health care. Proof of a negative is required, that is, that the country is not unable to furnish medical care that is adequate for this applicant. This is no easy task and the language and the history of the provision show that it was not meant to be.
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> [39] This is not to say that the exclusion in subparagraph 97(1)(*b*)(iv) should be interpreted so broadly as to exclude any claim in respect of health care. The wording of the provision clearly leaves open the possibility for protection where an applicant can show that he faces a personalized risk to life on account of his country's unjustified unwillingness to provide him with adequate medical care, where the financial ability is present. For example, where a country makes a deliberate attempt to persecute or discriminate against a person by deliberately allocating insufficient resources for the treatment and care of that person's illness or disability, as has happened in some countries with patients suffering from HIV/AIDS, that person may qualify under the section, for this would be refusal to provide the care and not inability to do so. However, the applicant would bear the onus of proving this fact.
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> [43] Subsection 100(4) of the IRPA provides that the burden of proving that a person is eligible to make a claim for refugee protection rests on the claimant. Accordingly, for the male appellant to meet the requirements of section 97 (so as to be eligible to make a claim for refugee protection), he was required to prove that should he be removed to Mexico, his removal would subject him personally to a danger of torture or a risk to his life or a risk of cruel and unusual treatment or punishment. In establishing a risk to his life, the appellant was required to prove that, among other things, his claim was not barred by the application of the exclusion in subparagraph 97(1)(*b*)(iv). In other words, the appellant was required to prove, on the balance of probabilities, that his risk to life was factually not caused by the inability of Mexico to provide the medical care he requires.

These are also the paragraphs cited in the PRRA decision.

[16] Based on a very generous analysis of the conditions described in this judgment, the PRRA decision-maker found that medical care would be necessary for a depressive state, a cardiac situation, and a nodule discovered on the prostate, despite the fact that the medical evidence was scarce and lacking in description or details. In addition, Tunisia is able to provide the required treatment. However, the conclusion reached in the PRRA decision was that the situation in Tunisia is such that the applicant would not be deprived of the medical assistance he requires: [TRANSLATION] "I find that the applicant has not shown that, if he returns to Tunisia and is detained, he will not be able to receive the medical care normally available in Tunisia" (decision, p. 13). It was up to the applicant to prove that he would be subject to a risk to his life. What was attempted through judicial review was to reverse the burden of proof, such that it would be up to the PRRA decision-maker to prove that there would not be a risk to the applicant's life. This attempt is destined to fail.

[17] If leave to seek judicial review is granted, the applicant must show the existence of a serious issue. However, he has in no way established the risk of unusual treatment, as argued by his counsel during the hearing for the application for a stay, where the risk of such unusual treatment is not caused by the inability of that country to provide adequate health or medical care (subparagraph 97(a)(*b*)(iv) of the Act). The applicant did not provide any evidence of this whatsoever. On the contrary, the applicant attempted to show that the changes that had occurred in Tunisia that were mentioned by the PRRA decision-maker were perhaps not as well established as some might have liked. As a result, there was a risk of not receiving treatment. This is pure speculation, far beyond the balance of probabilities standard (*Li v. Canada (Citizenship and Immigration*), [2004] 3 FCR 501; [2005] 3 FCR 239; *Covarrubias* cited above). There is no serious issue to be debated through judicial review of the PRRA decision, given the

lack of evidence from the applicant, on whom the onus fell to demonstrate the evidence on a balance of probabilities.

[18] The applicant claimed that the case also included allegations other than those related to his medical condition. He reproached the PRRA decision-maker for not having reviewed allegations, which, according to the evidence, were never made. This argument is of no merit.

[19] Those allegations were presented as an exhibit to the applicant's affidavit, which he did not sign and which was not certified. There is therefore no affidavit and no proposed [TRANSLATION] "submissions." Furthermore, the [TRANSLATION] "submissions" are also unsigned. That is enough to dispense with the issue. I also considered the merits of these allegations. They are all without merit in the context of a PRRA.

[20] I find it rather unusual to try to hold against the PRRA decision-maker the fact that he did not consider [TRANSLATION] "implied submissions" regarding the applicant's vulnerability, which, apparently, could have been found in the file. Here again, the applicant is behaving as though the burden of proof lay somewhere other than with him. He needed to satisfactorily show that he is a person in need of protection within the meaning of section 97 of the Act. The applicant should be complaining about the absence of [TRANSLATION] "submissions" and evidence. Therefore, the blame lies only with him.

[21] The applicant has not made any presentations in connection with irreparable harm. The comments presented were related to the fact that the applicant was convicted in absentia in

Tunisia and that he will be detained on his return. Nothing more. Irreparable harm constitutes a distinct test. The absence of evidence and arguments alone would have doomed it.

[22] The same goes for the balance of convenience. There is undeniable and substantial public interest in having people without status leave the country as soon as possible after a removal order becomes enforceable (section 48 of the Act). In this case, the applicant has filed an application for a stay without confirming the alleged facts and, in addition, he has disappeared to the point where his counsel says he cannot be found. Given the state of the case, the balance of convenience must favour the Minister. Even the fact that the applicant is leaving his family in Canada cannot work in his favour because he has disappeared.

[23] Consequently, the application for stay of the removal order must be dismissed.

ORDER

THE COURT ORDERS that the application for stay of the removal order to be enforced on May 31, 2016 be dismissed.

"Yvan Roy"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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