Federal Court Cour fédérale

Date: 20070530

Docket: IMM-1618-07

Citation: 2007 FC 566

[ENGLISH TRANSLATION]

Ottawa, Ontario, May 30, 2007

PRESENT: The Honourable Mr. Justice Shore

BETWEEN:

ABDELMALEK MEKARBÈCHE

Applicant

and

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

Respondent

REASONS FOR ORDER AND ORDER

OVERVIEW

[1] The concept of "clean hands" is no different in law than it is in life; even if someone says they have clean hands, the evidence obviously has hands of its own.

INTRODUCTION

[2] The evidence unequivocally shows that the applicant certainly does not have "clean hands" in filing his motion for a stay before this Court. The long and onerous immigration record submitted to the Court shows that the applicant has had a history of not complying with the law during his two stays in Canada. The applicant was arrested and convicted on a number of occasions for committing criminal acts during his two stays in Canada.

[3] The notion of irreparable harm was defined by the Court in *Kerrutt v. Canada (Minister of Employment and Immigration)*, (1992) 53 F.T.R. 93, [1992] F.C.J. No. 237 (QL), as the removal of a person to a country where his or her safety or life is in jeopardy.

[4] In this case, in terms of irreparable harm, the applicant alleges his medical condition. Essentially, he alleges there is a remote possibility in the future of serious complications that could require emergency surgery. Yet, the evidence shows that:

- his medical condition has been very stable for 10 years;
- the anticoagulant therapy treatments are available in Algeria, there are good cardiologists;
- the applicant's medical situation does not in any way prevent him from travelling by airplane at this time. The applicant is therefore able to travel.

According to the various medical opinions given by the doctors of Citizenship and Immigration Canada (CIC) and by Dr. Denis Carl Phaneuf.

JUDICIAL PROCEEDING

[5] This is a motion to stay the enforcement of a removal order issued against the applicant. This motion is joined to an application for leave and for judicial review (ALJR) of the decision by the removal officer, Mr. Francis Letellier, dated April 2, 2007, setting the date for the applicant's removal on April 27, 2007.

AMENDMENT OF THE STYLE OF CAUSE

[6] Considering the coming into force of the *Department of Public Safety and Emergency Preparedness Act* (S.C. 2005, c. 10), the Minister of Public Safety and Emergency Preparedness, should be designated as a respondent in this case, along with the Minister of Citizenship and Immigration, in accordance with the order issued on April 4, 2005 (P.C. 2005-0482).

[7] Accordingly, the style of cause is amended to indicate that the Minister of Public Safety and Emergency Preparedness is a respondent, in addition to the Minister of Citizenship and Immigration.

THE IMPUGNED DECISION IN THE APPLICATION FOR LEAVE AND FOR JUDICIAL REVIEW (ALJR) IS NO LONGER THE CORRECT DECISION

[8] This motion to stay is joined to an ALJR impugning the decision of the removal officer, Mr. Letellier, dated April 2, 2007. The removal officer decided to set the applicant's removal date on April 27, 2007.

[9] On April 19, 2007, the applicant served a first motion to stay on the respondents and that motion is also attached to the ALJR impugning the decision of the removal officer, Mr. Letellier, dated April 2, 2017, setting the removal date on April 27, 2007. However, this motion was never heard by this Court **because on April 20, 2007, applicant's counsel and respondents' counsel informed the Court that the removal officer had agreed to defer the removal date for one month, so that the officer could get an update of the medical opinion that he had obtained in January 2006 regarding the applicant's case. This letter asked the Court that the motion contesting the removal date of April 27, 2007, be removed from this Court's record because it was moot.** (See the letter dated April 20, 2007, in this Court's record and/or exhibit P-9 of Mr. Luc Saulnier's affidavit.)

[10] After Mr. Letellier received the opinion of CIC's Dr. Walter Waddel dated April 23, 2007, which confirmed the medical opinions received in 2002 and 2006, the removal officer, Mr. Letellier, set the applicant's removal date on May 31, 2007.

[11] It is that decision that is impugned by the applicant in this motion to stay.

[12] Therefore, the applicant should have filed a new notice of application for leave or at least have asked this Court to amend his notice of application so that the impugned decision is the one dated April 23, 2007, and not the one dated April 2, 2017.

FACTS

[13] The Court carefully reviewed **the affidavit of Mr. Saulnier, removal officer, which contained a detailed history of the facts and numerous proceedings appearing in the applicant's immigration record** involving his two stays in Canada.

[14] It is clear from the immigration record that **the applicant, during his two stays in Canada, filed and exhausted all of the recourse that was available to him under the *Immigration and Refugee Protection Act,* S.C. 2001, c. 27 (IRPA)** to not be removed from Canada.

[15] Also, it is clear from the record that **the applicant has a long and onerous immigration history. He was even removed to Algeria, under escort, in May 1994**. About one year later, i.e., **in July 1995, the applicant came back to Canada, after having stayed in several countries, to once again claim refugee status in Canada, which was refused to him a second time.**

[16] The evidence unequivocally shows that the applicant certainly does not have "clean hands" in filing his motion before this Court. The applicant's long and onerous immigration record, submitted to the Court, shows:

> **That he has a history of not complying with the law in the course of his last two stays in Canada**

- On March 21, 1991, the applicant **did not show up for his hearing** bearing on report 27. On June 10, 1991, an **arrest warrant was issued** against the applicant. On June 26, 1991, the applicant was arrested by Immigration Canada and was released on parole, with conditions imposed.
- On January 13, 1992, the applicant **did not show up for his departure arrangements and he did not leave before his time limit expired**. The departure notice became a deportation order;
- On January 16, 1992, a national **arrest warrant** was issued in the applicant's name;
- On May 12, 1994, the applicant **was stopped by SPCUM officers for possession of narcotics**. He was arrested by immigration authorities and he was detained for removal;
- On May 31, 1994, the applicant **was deported from Canada to Algeria <u>under escort</u>**;
- On September 15, 1995, the applicant **came back to Canada despite his deportation in May 1994**;
- A report was prepared under section 20 of the *Immigration Act* and an exclusion order was issued against him, which the applicant **refused to sign. The applicant was therefore arrested and detained;**
- On October 4, 2000, a report was prepared in accordance with subsection 27(2) of the IRPA on the grounds that the applicant had **worked without a valid work permit**;

- The applicant was called to an interview to make departure arrangements for February 16, 2006. **He did not show up for his appointment**;
- March 16, 2006, **an arrest warrant was issued** for the applicant for failing to appear for his departure arrangements;
- On December 11, 2006, the **arrest warrant was enforced**.

<u>That he was arrested and/or convicted on several occasions for having committed criminal acts during his two stays in Canada</u>

- On January 9, 1990, the applicant was **found guilty of theft, of conspiracy with a minor to commit theft**;
- On May 12, 1994, the applicant was **stopped by SPCUM officers for possession of narcotics**. He was arrested by immigration authorities and he was detained for removal;
- On June 26, 1996, the applicant was **found guilty of theft and possession of break-in instruments**;
- On January 14, 1999, the applicant was **found guilty of possession of break-in instruments and for failing to comply with an order**;
- On December 11, 2006, **the applicant was stopped by SPVM officers** while he was urinating in an alley.

[17] The applicant therefore certainly does not have "clean hands" by appearing before this Court. For that reason alone, this motion should be dismissed. On this point, the respondents refer

this Court to a recent decision in *Manohararaj v. Canada (Minister of Public Safety and Emergency Preparedness*, 2006 FC 376, [2006] F.C.J. No. 495 (QL)

> **<u>Preliminary considerations prior to the tri-partite test</u>**
>
> [13] **It is important to note that the Applicants chose to disobey a valid deportation order, and a warrant was issued for their arrest**. The Applicants were represented by counsel at the time. The Applicants did not approach this Court for relief until after their arrest.
>
> [14] **This Court has held that the equitable remedy of a stay can be denied to those who do not come to the Court with clean hands, including those who deliberately choose to disobey deportation orders. (*Araujo v. Canada (Minister of Citizenship and Immigration)*, (27 August 1997), IMM-3660-97 (F.C.T.D.) *Ilyas v. Canada (Minister of Citizenship and Immigration)* (1 December 2000), IMM-6126-00 (F.C.T.D.)).**
>
> [15] In the case at bar, **the Applicants have ignored a validly issued removal order. As such, they have purposely violated Canada's immigration laws and have undermined the integrity of the system.** The Respondent submits that this reason alone justifies the dismissal of his application. (*Homex Reality and Development Co. v. Wyoming (Village)*, [1980] 2 S.C.R. 1011 see also *Basu v. Canada*, [1992] 2 F.C. 38 (F.C.T.D.)).
>
> (Emphasis added.)

ANALYSIS

CONDITIONS FOR A STAY

[18] To obtain a judicial stay of a removal order, the applicant must prove three things:

> The tri-partite test of Cyanamid requires, for the granting of such an order, that the applicant demonstrate, firstly, that he has raised **a serious issue to be tried; secondly that he would suffer irreparable harm** if no order was granted; and **thirdly that the balance of convenience** considering the total situation of both parties, favours the order. (Emphasis added.)

(*Toth v. Canada (Minister of Employment and Immigration)*, (1988), 86 N.R. 302 (F.C.A.), [1988] F.C.J. No. 587 (QL).)

[19] **The three requirements** must be met for this Court to grant the requested stay. **If even one is not met, this Court cannot grant the requested stay.** The applicant does not satisfy the test established in *Toth* (*supra*). (See also *Wang v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 148, [2001] F.C.J. No. 295 (QL).)

ABSENCE OF A SERIOUS ISSUE

[20] The applicant has not shown that there is a serious issue that would invalidate the removal officer's decision to refuse to further defer his removal from Canada and to maintain the date set for his removal on May 31, 2007.

[21] Relying on the opinion of Dr. Phaneuf, a **cardiologist who practices only in Canada, and who admits that he does not have any knowledge of the health care available in Algeria**, the applicant is essentially asking this Court to defer his removal from Canada **indefinitely even though he does not have valid status, and despite his heavy criminal history in the time that he has been in Canada**.

[22] According to the allegations of the applicant and his doctor, he is asking this Court to stay his removal until the same quality care that he has received since he has been in Canada is available in in his country of origin, Algeria.

[23] Yet, that is not the question that the removal officer had to ask before setting the applicant's removal date, and it is also not the test applied by this Court in the context of this motion.

[24] In fact, whether or not the health care available in Algeria is identical, or as good as, the health care available in Canada is not a basis for the applicant not to be removed to his country.

[25] The question before the removal officer in exercising his very limited discretion, in accordance with subsection 48(2) of the IRPA is: is the removal order issued against the applicant valid and do the circumstances allow him to set a removal date?

[26] That was exactly what was done by the officer in this case. To do so, he considered the applicant's entire immigration record and the allegations and evidence submitted by the applicant regarding his current medical condition. He considered and based his decision on the medical opinions in the record, dating from 2002, by various CIC doctors with knowledge of the health care available in Algeria, and who reviewed the care required by the applicant in view of his medical condition:

- Opinion of Dr. Michel Lapointe, CIC doctor, dated June 20, 2002 (exhibit P-4 of Luc Saulnier's affidavit);
- Opinion of Dr. Valérie Hindel, CIC doctor, dated January 9, 2006 (exhibit P-4 of Luc Saulnier's affidavit);

- Two opinions of Dr. Walter Waddell, CIC doctor, dated April 25, 2007, and May 22, 2007 2002 (exhibits P-10 and P-11 of Luc Saulnier's affidavit).

[27] The removal officers that were in charge of the applicant's file, over the years, ensured that they obtained **medical opinions from qualified doctors before determining whether the date for the removal should be set. They even gave a number of opportunities to the applicant so that he could properly plan his departure**, because of his medical condition, which has been, according to the applicant and his doctor, **stable for 10 years now.**

[28] **Even if the applicant and his doctor, Dr. Phaneuf, do not seem to agree with the opinions of the CIC's doctors, they do not show that the opinions of the CIC doctors are without merit. They do not show, either, that the applicant is unable to travel at this time. To the contrary, Dr. Phaneuf confirms that the applicant's medical condition has been stable and under control for 10 years.**

[29] In *Holubova v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 527, [2004] F.C.J. No. 655 (QL), the applicant had provided medical opinions in order to impugn the medical opinions given by CIC's doctors. Dr. Phelan stated as follows:

> [13] On the basis of the medical advice and other information, the Officer concluded that there were insufficient grounds for the exercise of her limited discretion to defer.
>
> [14] The Applicant then forwarded another two medical opinions, one from the doctor who provided the first report and a second opinion from a new doctor. The Officer agreed to reconsider her decision and forwarded these reports to the Medical Services Branch.

> [15] This latest medical evidence advised that the Applicant's therapy should not be discontinued and that she was awaiting investigation for a possible heart condition. There is a paucity of detail about this latest possible medical condition.
>
> ...
>
> [20] The record is also devoid of any evidence that medical treatment, particularly the therapy for her physical injuries, is not available in the Czech Republic. Similarly, **the record is bereft of clear evidence that the Applicant cannot endure eight hours of flight from Canada to the Czech Republic.**
>
> [21] **In considering a stay of a removal order, regard must be had to the scope of the decision the Officer could make, as well as the nature of this proceeding. <u>The deferral request and this stay is not the forum for duelling medical opinions, rebuttal, reply, sur-rebuttal and sur-reply.</u>**
>
> (Emphasis added.)

[30] Moreover, Dr. Phaneuf states in his letter that, [TRANSLATION] "even with the most stringent medical follow-up, complications could arise for the applicant at any time because of the prosthetic valve that he has worn since 1996" (see Dr. Phaneuf's letter dated May 15, 2007).

[31] Therefore, regardless of where the applicant is, whether in Algeria, where a basic coagulation follow-up is available, or in Quebec, with the medical follow-up that he has benefitted from for years, Dr. Phaneuf states that there the applicant will always have a risk of complications. Dr. Phaneuf calculated the risk of fatal complications at 0.2 % per year, and between 1% and 2% per year for what he describes as serious non-fatal complications (see Dr. Phaneuf's letter dated May 15, 2007).

[32] With respect, but contrary to Dr. Phaneuf's opinion, neither the CIC's doctor nor the respondents can qualify this as "[TRANSLATION] a significant risk for the applicant if he were to return to Algeria". The respondents point out that Dr. Phaneuf states that the complications that he refers to in his letter could happen anywhere at any time. Further, Dr. Phaneuf refers to a percentage of **0.2%, 1/5 of 1%** of whom are patients who are at risk of fatal complications per year. **This is not a risk that we can qualify as "significant" as alleged by the applicant and his doctor**.

[33] The applicant's medical condition may seem very sympathetic but **his life would not be in danger if he were to return to his country of origin, since care is available to him over there and he is able to travel. This is based on several medical opinions made in 2002, 2006, and 2007, by qualified doctors who are aware of the kind of care that is available in Algeria.**

[34] Dr. Phaneuf's opinion and the weak statistics that he relies on cannot counter the opinions of the qualified CIC doctors who all found that there was nothing to prevent the applicant's removal, and/or to justify another deferral of his removal from Canada.

[35] The applicant is trying to ask this Court to grant him status in Canada based on his medical condition, which is not contemplated under the Act.

[36] To the contrary, subparagraph 97(*a*)(iv) specifically provides that:

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.	(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[37] In this case, the applicant could certainly not obtain the status of a person in need of protection based on his medical condition since:

- first, **he has already exhausted all of his recourse since he arrived in Canada** (two IRB claims, ALJR dismissed by the Federal Court, PRRA application and HC application), and **<u>all of these decisions were negative</u>**.
- second, **<u>his medical condition could not be considered</u>** in his two refugee claims, or in the PRRA application (the officer that made the PRRA decision indeed noted subparagraph 97(*a*)(iv) in his reasons - See exhibit P-2 of Luc Saulnier's affidavit).

(See: *Covarrubias v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365, [2006] F.C.J. No. 1682 (QL.)

[38] The only way that the applicant could **<u>possibly</u>** have obtained legal and valid status in Canada, by alleging his medical condition, would have been through an application for exemption based on humanitarian and compassionate considerations. **He filed one in which he in fact alleged his medical condition. His application for exemption based on humanitarian and compassionate considerations (CH) was denied and the applicant did not file any ALJR before the Court to dispute that decision rendered in November 2005.**

[39] The officer who reviewed the HC application filed by the applicant, also specifically examined the applicant's allegation regarding his medical condition and the health care available in Algeria. This is her finding:

[TRANSLATION]

Current medical condition

The applicant claims that he is hemophiliac and that he is followed closely for anticoagulant therapy treatments (i.e., Coumadin) following a valve replacement in 1996. Letters from various doctors in Canada attest to the applicant's health problems. However, I note that the last report sent to us is dated June 2002. The applicant has not filed any evidence to the effect that he cannot be treated in Algeria for the alleged problems. I note that during the interview on May 10, 2005, the applicant stated that his situation has been stable since 2002.

Yet, according to the information that I consulted, treatment and medication (i.e. anticoagulants) are in fact available in Algeria. An article published in April 2005 indicates that there is a hemophilia centre in Algiers as well as a coagulation laboratory … in the blood transfusion centre of the university clinic. There is whole blood, plasma, and to a certain degree frozen cryoprecipitate available at the blood transfusion centre. Also the *Association Algerianne des Hémophiles* is in Algiers. The association's website is available at the following link and informs Algerians on the procedures to follow http://membres.lycos.fr/algeriehemophile. The applicant did not file evidence to the contrary that the State would not be able to provide him with adequate care. The Faculty of Medicine at Algiers University published an in-depth study on cardiovascular diseases. I consider that this study shows the country's willingness to research to develop new strategies for the health care system.
(See exhibit P-1 of Luc Saulnier's affidavit.)

[40] The removal officer did not have the authority to defer the applicant's removal **indefinitely** based on his current medical condition, as he requested. If he had done so, he would have made an error reviewable by this Court.

[41] The removal officers have discretion that is limited to deferring the removal based on special circumstances.

[18] The validity of the removal order is not in doubt.

[19] The discretion that a removal officer may exercise is very limited, and in any case, is restricted to when a removal order will be executed. In deciding when it is "reasonably practicable" for a removal order to be executed, a removal officer

> may consider various factors such as illness, other impediments to travelling, and pending H & C applications that were brought on a timely basis but have yet to be resolved due to backlogs in the system. (*Simoes v. Canada (Minister of Citizenship and Immigration)* (2000), 187 F.T.R. 219, 7 Imm. L.R. (3d) 141; *Paterson v. Canada (Minister of Citizenship and Immigration)* (2000), 4 Imm. L.R. (3d) 65 (F.C.T.D.); *Jmakina v. Canada (Minister of Citizenship and Immigration)* (1999), 3 Imm. L.R. (3d) 198 (F.C.T.D.); *Poyanipur v. Canada (Minister of Citizenship and Immigration),* [1995] 116 F.T.R. 4 (F.C.T.D.); *Wang*, above*; Pavalaki v. Canada (Minister of Citizenship and Immigration)*, (10 March 1998), IMM-914-98 (F.C.T.D.), [1998] F.C.J. No. 338 (QL); *Olcese v. Canada (Minister of Citizenship and Immigration*) (15 April 2002), IMM-1650-02 (F.C.T.D.)

(*Manohararaj*, *supra*.)

> [42] With respect to the present case, I note that the applicant had every opportunity to present her concerns at the H & C application stage. Nevertheless, the removal officer did read the materials contained in the submissions of the applicant's counsel, including Dr. Tan's e-mail and article, and was fully cognizant of the fact that someone who suffers from renal failure would die if not treated. **That being said, the substance of those allegations were already considered by the H & C officer and it was previously determined the applicant could access treatment. Therefore, the removal officer relied, among other things, on the findings of the H & C officer, which she was allowed to do (*Harry v. Canada (Minister of Citizenship and Immigration)* (2000), 195 F.T.R. 221 (T.D.); *Keppel v. Canada (Minister of Citizenship and Immigration)*, [2003] F.C.J. No. 1532 at para. 10 (T.D.) (QL)).**
>
> [43] The applicant also contends that her third application for H & C contains "new" information which was not previously considered. The "new information" referred to by counsel does not speak in my view to the applicant's personal situation but rather explains the general conditions of treatment in the Philippines for the average Filipino. This information could have been submitted many months before. Moreover, it was reasonably opened to the officer to question who Dr. Tan was as the e-mail was cut off and there was no mention as to his qualification as an expert in this area. That being said, besides the fact that Dr. Tan's e-mail postdate the second H & C decision, there is nothing really new brought by this letter. On the contrary, it corroborates the determinations previously made in 1998 and 2002 that the applicant can receive proper treatments for her renal condition in the Philippines.
>
> ...

> [45] **I also find that the removal officer did not act contrary to law. It is important to take note that the applicant does not challenge the removal order against her, but the "decision" of Shari Fidlin, removal officer, refusing to defer her removal from Canada. The removal officer clearly had the power under the Act to refuse to defer the removal. Section 48 of the Act provides the following: "Subject to sections 49 and 50, a removal order shall be executed as soon as reasonably practicable". Sections 49 and 50 deal with statutory stays of execution in certain defined circumstances; for instance, where an applicant has filed an appeal which has yet to be heard and disposed of, or where there are other proceedings. None of those conditions are present here and therefore the latter sections do not apply.**
>
> [46] **Here, the applicant <u>was not asking the removal officer to reschedule the departure for a few days or weeks</u> in order to permit her to make proper arrangements in Canada and in the Philippines in terms of bringing or securing access to the needed supplies and medications.** In this regard, the evidence reveals that the applicant was able in 1997 to travel to the Philippines and stayed there for a whole month without experiencing any medical difficulties. Here, the applicant wanted the removal order to be stayed pending the determination of her third H & C application.
>
> (Emphasis added.)

(*Adviento v. Canada (Minister of Citizenship and Immigration)*, 2003 FC 1430, [2003] F.C.J. No. 1837 (QL); See also *Prasad v. Canada (Minister of Citizenship and Immigration)*, 2003 FCT 614, [2003] F.C.J. No. 805 (QL); *Benitez v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 1307, [2001] F.C.J. No. 1802 (QL).)

[42] In this case, the evidence in the record clearly shows that the removal officer **<u>already exercised his discretion to defer the removal</u>** that was initially scheduled for April 27, 2007. On April 20, 2007, officer Letellier agreed to defer the removal for the sole purpose of updating the opinions given in 2002 and 2006. The letter dated April 20, 2007, addressed to this Court, **was signed by applicant's counsel, and it is very clear on that point**.

[43] Therefore, the applicant's allegations (contained in his affidavit and memorandum filed in support of his ALJR - see pp. 9 and 28 of the AR) to the effect that the officer should have agreed to defer his removal in light of the serious health risks given that he is unable to travel in such a condition and that it is impossible to obtain the necessary medical care in his country of origin, are **erroneous**.

[44] On April 23, 2007, Dr. Waddell, after he reviewed the applicant's medical record and after consultation and verification, confirmed the medical opinions given by CIC's doctors in 2002 and 2006 (See exhibit P-10 of Luc Saulnier's affidavit).

[45] Therefore, the removal officer correctly used his limited discretion. However, after considering all of the applicant's record, the reasons in support of his deferral request, and the various medical opinions obtained, it was entirely reasonable that the removal officer refused to defer the applicant's removal once again.

[46] For all of these reasons, there is no serious issue to be tried.

ABSENCE OF IRREPARABLE HARM

[47] The notion of irreparable harm was defined by the Court in *Kerrutt*, (*supra*), **as the removal of a person to a country where his or her safety or life is in jeopardy**.

[48] In this case, as irreparable harm, the applicant alleges his medical condition. **Essentially, he alleges that there is a remote possibility in the future of serious complications that could require emergency surgery. Yet, the evidence shows that**

- his medical condition has been very stable for 10 years;
- the anticoagulant therapy treatments are available in Algeria, there are good cardiologists;
- the applicant's medical situation does not in any way prevent him from travelling by airplane at this time. The applicant is therefore able to travel.

According to the various medical opinions of CIC's doctors and by Dr. Phaneuf.

[49] As previously stated, the evidence in the record shows that the applicant managed to remain in Canada **unlawfully by defying the Act and by committing a number of criminal acts, which brought the application of the "clean hands" principle into play**.

[50] Therefore, the applicant can certainly not insist on remaining in Canada **for even longer when he has exhausted all of his recourse**, based solely on **a remote possibility in the future** that one day he may need surgery that would not be available as quickly as it would be in Canada.

[51] The Court considers a very relevant decision on the application of the clean hands principle and medical harm:

> [TRANSLATION]
>
> WHEREAS the applicant avoided the deportation orders on several occasions, and has had a history of not complying with the law during the course of his life in Canada and he did not have clean hands when he appeared before the Court.

> WHEREAS the applicant alleges that he must remain in Canada to deal with his health problems;
>
> WHEREAS the preponderance of the evidence in the record indicates that the applicant's situation does not prevent him from travelling and that Morocco has the infrastructures necessary to treat the applicant, and that the medications prescribed to the applicant are available in Morocco."

(*Chouaiby v. Canada, (Minister of Citizenship and Immigration),* IMM-4434-06, August 17, 2006.)

[52] Another recent decision addresses a medical condition as irreparable harm:

> [8] There is no specific evidence on the level of medical treatment required for the daughter, and there is no conclusive evidence that treatment for the daughter's condition will not be available in Iran. There is evidence of health care for the daughter in Iran. The Applicant's assertion[s] are speculative on this issue. Similarly, there is no evidence that the Applicant would face extreme punishment if he returned to Iran. A risk officer did consider the relevant documentary evidence and determined that the Applicant would not be at risk in Iran for making a refugee claim in Canada or for any other basis that he claimed. Evidence of irreparable harm must not be speculative.

(*Shafigh v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 324, [2001] F.C.J. No. 560 (QL).)

BALANCE OF CONVIENIECE

[53] Given that the applicant did not establish a serious issue or one of irreparable harm, the balance of convenience favours the respondents' enforcement of the removal order (*Morris v. Canada (Minister of Citizenship and Immigration)*, IMM-301-97, 24 January 1997.)

[54] Subsection 48(2) of the IRPA states that a removal must be enforced as soon as possible. This situation prevails in this case and the applicant must leave Canada.

[55] As previously stated, the fact that the applicant has **committed a number of criminal acts since he has been in Canada, that on several occasions he has avoided the application of the *Immigration Act* and the IRPA and that he was the subject of several arrest warrants**, are such **that he does not have clean hands before this Court**. On this point, this is what the Court has already stated:

> AND UPON determining that the Applicant, who is here seeking equitable relief, does not come before the Court with "clean hands", in that she has admitted to operating under at least two identities in Canada, was arrested on a number of occasions, has breached the terms and conditions of her release orders, and has displayed disregard of the law of Canada by using alias. She was also admitted to Canada on September 26, 1999 for the sole purpose of testifying in a court proceeding relating to the assault charges against her common law spouse in Canada, yet she did not appear in Court, thereby undermining her credibility.

(*Sook Morris v. Canada (Minister of Citizenship and Immigration)*, IMM-2186-06, May 18, 2006; see also *Patel v. Canada (Minister of Citizenship and Immigration and (Minister of Public Safety and Emergency Preparedness),* IMM-3442-06, June 28, 2006; *Manohararaj*, *supra*; *Vernege v. Canada (Minister of Public Safety and Emergency Preparedness)*, IMM-4346-05, July 16, 2005.)

[56] The Court refers to the application of the "clean hands" principle in another recent decision where an applicant hid to escape the Canadian immigration authorities: *Khan v. Canada (Minister of Citizenship and Immigration and (Minister of Public Safety and Emergency Preparedness),* IMM-562-07, February 9, 2007.)

[57] Finally, this Court notes a decision of the Federal Court that elaborated on the balance of convenience issue with respect to stays and public interest that must be considered:

> (iii) Balance of convenience
>
> [21] Counsel says that since the appellants have no criminal record, are not security concerns, and are financially established and socially integrated in Canada, the balance of convenience favours maintaining the status quo until their appeal is decided.
>
> [22] I do not agree. **<u>They have had three negative administrative decisions, which have all been upheld by the Federal Court. It is nearly four years since they first arrived here</u>. In my view, the balance of convenience does not favour delaying further the discharge of either their duty, as persons subject to an enforceable removal order, to leave Canada immediately, or the Minister's duty to remove them as soon as reasonably practicable: IRPA, subsection 48(2). This is not simply a question of administrative convenience, but implicates the integrity and fairness of, and public confidence in, Canada's system of immigration control.**
>
> (Emphasis added.)

(*Selliah v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 261 (F.C.A.), [2004] F.C.J. No. 1200 (QL); see also *Atwal v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427, [2004] F.C.J. No. 2118 (QL); *Dasilao v. Canada (Solicitor General)*, 2004 FC 1168, [2004] F.C.J. No. 1410 (QL).)

[58] In this case, the balance of convenience is in favour of the respondents.

CONCLUSION

[59] For all of the foregoing reasons, the Court finds that this motion to stay is dismissed.

ORDER

THE COUR ORDERS that the motion to stay be dismissed.

"Michel M.J. Shore"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-1618-07
STYLE OF CAUSE:	**ABDELMALEK MEKARBÈCHE v. THE MINISTER OF CITIZENSHIP AND IMMIGRATION AND THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**
PLACE OF HEARING BY TELECONFERENCE:	Ottawa, Ontario
DATE OF HEARING PAR TELECONFERENCE:	May 28, 2007
REASONS FOR ORDER AND ORDER:	SHORE J.
DATED:	May 30, 2007

APPEARANCES:

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Isabelle Brochu	FOR THE RESPONDENTS

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