Federal Court  Cour fédérale

Date: 20100518

Docket: IMM-2305-10

Citation: 2010 FC 549

Montréal, Quebec, May 18, 2010

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

SONIA ARFAOUI

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

and

THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS

Respondents

REASONS FOR ORDER AND ORDER

[1] Ms. Arfaoui is a Tunisian national who left her country 12 years ago. After a lengthy stay in the United States, where she was married and divorced, she arrived in Canada two years ago in somewhat unusual circumstances. She was not eligible to seek refugee protection, but was entitled to and did ask for a pre-removal risk assessment (PRRA). That assessment was negative and so, pursuant to Section 48 of the *Immigration and Refugee Protection Act*, she has been ordered to report for removal to Tunisia later this month.

[2] She has filed an application for leave and for judicial review of the negative PRRA. That application does not give rise to an administrative stay of her scheduled removal. Consequently, she has moved in this Court for a stay pending the outcome of the underlying proceedings before this Court. These are the reasons why I have granted her motion.

[3] According to her very detailed affidavit which was before the PRRA Officer, Ms. Arfoui, who is now 40 years of age, had left her dysfunctional father and his wife and was taken under the wing of a religious family. She decided to wear the hijab like the women in the family did, although she has never professed to be particularly religious or political.

[4] When she was 17, she was warned by the police to remove her hijab. When she refused, she was brought to the police station and forced to take it off, her long skirt was cut, she was forced to sign a false confession and called upon to spy on her benefactors. She ran away. Some four years later, in a series of events first thought to be unrelated, she was falsely accused of various crimes and jailed. She then learned that the officer who had removed her hijab had been behind this. He beat her, burnt her, and raped her over a period of years. She claims to have spiralled downwards into a life of drugs, sex and rock’n’roll; for all intents and purposes a slave to the rogue policeman and his cronies.

[5] She managed to make it to the U.S. where she married, disastrously it turned out.

[6] As a result of her divorce in 2007, an American change of status was denied. Later her sister arranged for her to come into contact with a Tunisian man who was then living in Canada. They were married by proxy at the Tunisian Embassy in Washington in May 2009. Thereafter they planned a wedding celebration the following month in Montréal.

[7] On arrival at the Canadian border she sought refugee protection. The *Canada-U.S. Safe Third Country Agreement* provides for a family class exemption, but the Border Authorities did not recognize her proxy marriage and she was denied entry. Later, after staying at a refugee shelter in the United States for three months, she was granted a temporary resident permit to enter Canada.

[8] However, the wedding never took place. She became the victim of domestic violence, and criminal charges were laid against her “husband”.

[9] Thus, the only assessment of whether she would have been determined to be a convention refugee, or whether she is a person in need of protection, fell to be made in the PRRA.

[10] A claimant who seeks refugee protection is entitled to an oral hearing. An oral hearing is not automatic in the PRRA process, even for those who had not gone through the refugee process in the first place. Regulation 167 of the *Immigration and Refugee Protection Regulations* provides:

167. For the purpose of determining whether a hearing is required under paragraph 113(*b*) of the Act, the factors are the following:	167. Pour l’application de l’alinéa 113*b*) de la Loi, les facteurs ci-après servent à décider si la tenue d’une audience est requise :

(*a*) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;	*a*) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;
(*b*) whether the evidence is central to the decision with respect to the application for protection; and	*b*) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;
(*c*) whether the evidence, if accepted, would justify allowing the application for protection.	*c*) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

[11] Ms. Arfaoui, through counsel, emphasized that she never had access to the Refugee Protection Division of the Immigration and Refugee Board, and never had a hearing of any kind in order to evaluate the credibility of her allegations pertaining to her risk of return or hardship in Tunisia. She concluded: "[T]he applicant requests a hearing in the event that there are any concerns regarding the applicant's credibility."

THE PRRA DECISION

[12] The PRRA Officer noted that Ms. Arfaoui was ineligible to claim refugee status as Section 101(1)(e) of IRPA provides that: "A claim is ineligible to be referred to the Refugee Protection Division if… *e*) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence". The United States is such a country.

[13] He went on to review the wearing of the hijab in the documentary evidence. Considering that Ms. Arfaoui had never claimed political involvement, he was not satisfied that there was risk.

[14] With respect to rape by members of the police, he merely pointed out that the government enforced the penal code vigorously and that, in some cases, the penalty for rape is death.

THE TRI-PARTITE TEST

[15] The issue in a matter such as this is whether to maintain the *status quo*, i.e. let the PRRA officer's decision lead to her removal to Tunisia later this month, or maintain the *status quo ante*. This distinction is most important in light of the decision of the Federal Court of Appeal in *Solis Perez v. Canada (Minister of Citizenship and Immigration)*, 2009 FCA 171, 82 Imm. L.R. (3d) 167, which held that the enforcement of a removal order renders moot the underlying application for leave and for judicial review of the negative PRRA.

[16] A stay of removal is not to be granted unless the applicant establishes a serious issue, irreparable harm and that the balance of convenience lies in her favour (*Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302, 6 Imm. L.R. (2d) 123 (F.C.A.), *RJR - MacDonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311).

SERIOUS ISSUE

[17] As this is not a motion with respect to the refusal of an enforcement officer to grant an administrative stay, this part of the test as per *RJR-MacDonald*, is satisfied as long as the claim is neither frivolous nor vexatious.

[18] Two serious issues are readily apparent. The first is whether Ms. Arfaoui should have been granted an oral hearing. The Minister submits that credibility was not in issue. He submits that rather there was insufficient evidence adduced in support of her cause.

[19] That may or may not be so if the basis of her allegation was simply that she intended to wear the hijab on return to Tunisia. However, in this case the heart of the claim is the fact that she was mistreated by the police. No analysis worth mentioning of those allegations was carried out as to explain why it would be unlikely that the treatment that she had previously received at their hands would not be repeated.

[20] In my view, the PRRA officer could not have made the decision he did unless he did not believe the claimant. That lack of belief is inherent in his analysis (*Liban v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 1252, 76 Imm. L.R. (3d) 227). It seems extraordinary that Ms. Arfaoui's story was not subjected to an oral examination. As stated in *Singh v. Canada (Minister of Employment and Immigration)*, [1985] 1 S.C.R. 177 at 213-4:

> I should note, however, that even if hearings based on written submissions are consistent with the principles of fundamental justice for some purposes, they will not be satisfactory for all purposes. In particular, I am of the view that where a serious issue of credibility is

> involved, fundamental justice requires that credibility be determined on the basis of an oral hearing. Appellate courts are well aware of the inherent weakness of written transcripts where questions of credibility are at stake and thus are extremely loath to review the findings of tribunals which have had the benefit of hearing the testimony of witnesses in person: see *Stein v. The Ship "Kathy K"*, [1976] 2 S.C.R. 802, at pp. 806-08 (*per* Ritchie J.) I find it difficult to conceive of a situation in which compliance with fundamental justice could be achieved by a tribunal making significant findings of credibility solely on the basis of written submissions.

[21] Another serious issue is that if she is removed now, her right, given to her by Parliament, to seek leave and judicial review of the PRRA decision is lost, unless two judges decide in their discretion to hear a moot case. It must be recalled that in *Perez*, above, leave was granted after the removal order was enforced, but the judicial review itself was declared moot.

IRREPARABLE HARM

[22] If Ms. Arfaoui is to be believed, and she is presumed in her affidavit to be telling the truth (*Maldonado v. Canada (Minister of Employment and Immigration)*, [1980] 2 F.C. 302 (C.A.)), she has certainly made out a case of irreparable harm.

[23] The Minister submits that the fact that judicial proceedings may become nugatory does not necessarily constitute irreparable harm. A leading case in this context is *El Ouardi v. Canada (Solicitor General)*, 2005 FCA 42, 332 N.R. 76, 48 Imm. L.R. (3d) 157 which was motion for a stay of removal pending appeal of a decision of the Federal Court to refuse to entertain a stay of removal motion so as to await the outcome of underlying judicial reviews on the grounds that the motion was brought at the “last minute”. This is not a late application.

[24] In dismissing the stay in the Court of Appeal, Mr. Justice Rothstein stated:

> The appellant argues that her appeal will be rendered nugatory if the stay is not granted, resulting in irreparable harm. The difficulty with the argument that an appeal being rendered nugatory amounts to irreparable harm is that if it is adopted as a principle, it would apply to virtually all removal cases in which a stay is sought and would essentially deprive the Court of the discretion to decide questions of irreparable harm on the facts of each case. In some cases, the fact that an appeal is rendered nugatory will amount to irreparable harm. In others, it will not. The material indicates that the appellant's husband may apply to sponsor her return to Canada. While removal will cause hardship, it is not clear that rendering the appeal nugatory will result in irreparable harm.
>
> [My emphasis.]

[25] That decision, of course, was rendered before the Court of Appeal's decision in *Perez*, above. Nowhere is it stated in *El Ouardi* that the underlying application for leave and for judicial review of a negative PRRA decision becomes moot. In this case, the irreparable harm test has been met.

BALANCE OF CONVENIENCE

[26] There was no argument of substance with respect to the balance of convenience. Certainly the risk of irreparable harm outweighs the interest of the Minister in enforcing removal orders as soon as is "reasonably practicable" to use the words of Section 48 of IRPA.

[27] The style of cause is forthwith amended to add the Minister of Public Safety and Emergency Preparedness as party respondent to this matter.

ORDER

FOR REASONS GIVEN;

THIS COURT ORDERS that:

1. The motion is granted.
2. The removal of the applicant to Tunisia is stayed pending the outcome of the application for leave and for judicial review.

"Sean Harrington"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2305-10
STYLE OF CAUSE:	*Sonia Arfaoui v. MCI*
PLACE OF HEARING:	Montréal, Quebec
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