

Federal Court



Cour fédérale

Date: 20120925

Docket: IMM-2609-12

Citation: 2012 FC 1118

[UNREVISED ENGLISH CERTIFIED TRANSLATION]

Ottawa, Ontario, September 25, 2012

PRESENT: The Honourable Mr. Justice Harrington

BETWEEN:

REDOUANE BARAKA

Applicant

and

**THE MINISTER OF CITIZENSHIP
AND IMMIGRATION**

Respondent

REASONS FOR ORDER AND ORDER

[1] The applicant, Mr. Baraka, is an Algerian citizen and the leader of an organization called Étoile d'Algérie, a folk cultural and musical troupe. He alleges that he received death threats by telephone on three occasions in January and February 2009 by reason of his artistic activities. He arrived in Canada on June 9, 2009, and claimed refugee protection on June 22, 2009.

DECISION UNDER REVIEW

[2] Mr. Baraka is seeking judicial review of the decision by the Refugee Protection Division (RPD) that rejected his refugee claim on the ground that he was not a Convention refugee or a person in need of protection. The RPD did not call into question the applicant's credibility. The determinative issue was state protection.

[3] The RPD was of the opinion that artists do not constitute a social group under section 96 of the *Immigration and Refugee Protection Act* (IRPA). That seems to indicate that Mr. Baraka's claim was only considered under subsection 97(1) of the IRPA, which reads as follows:

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

(b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée :

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that country to provide adequate health or medical care.

tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

[4] The focus of the RPD's analysis was on the availability of state protection. The RPD pointed out that the evidence submitted by the applicant was not sufficient to establish the inadequacy of the state protection and found that the applicant failed to rebut the presumption of state protection in Algeria.

ISSUES

[5] The applicant submits the following:

- a. The RPD's decision was not supported by sufficient reasons;
- b. The RPD erred in its application of the analysis of fear of persecution based on membership in the social group of artists or political opinion under section 96 of the IRPA and did not support its decision with sufficient reasons on this point;

- c. The RPD failed to analyze fear of cruel and unusual treatment or punishment under subsection 97(1) of the IRPA;
- d. The RPD improperly assessed the possibility of the applicant availing himself of protection in Algeria by, namely, failing to consider the particular circumstances of artists in that country and failing to analyze the legislation and the police forces in Algeria.

ANALYSIS

[6] Even without taking into account the Supreme Court's recent decision in *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, [2011] SCJ No 62 (QL), that the validity of written reasons and the decisions rendered on the basis of those reasons is not at issue simply because some elements were not included therein, I am convinced that the reasoning by which the RPD came to its decision is clear and completely intelligible.

[7] It is fair to say that the burden of proof required by section 96 of the IRPA, which supports the United Nations Convention, differs from that required by section 97 of that Act. In order to invoke section 96, it is sufficient that an applicant establishes a serious possibility of persecution. In order to invoke section 97, the applicant must demonstrate the existence of a personalized risk, which he or she must establish on a balance of probabilities (*Li v Canada (MCI)*, 2005 FCA 1, [2005] 3 FCR 239, [2005] FCJ No 1 (QL)).

[8] It is important, however, to read the RPD's decision as a whole. Notwithstanding its finding that artists do not constitute a social group under section 96, the RPD did, however, consider the situation of artists broadly, beyond Mr. Baraka's personal situation, and found that "the claimant did not discharge his burden of establishing a serious possibility of persecution on a Convention ground".

[9] Regarding the protection provided by Algeria, even if it is true that consideration should be given to the ability of the state to protect its citizens (which, however, need not be infallible) as well as its willingness to ensure that protection, the RPD's assessment of this was not unreasonable.

[10] It is important to point out that it always rests on refugee claimants to establish, on a balance of probabilities, that they cannot avail themselves of protection in their country of nationality, regardless of whether their claim was based on section 96 or section 97 of the IRPA. As stated by the Federal Court of Appeal in paragraph 30 of *Carillo v Canada (MCI)*, 2008 FCA 94, [2008] 4 FCR 636, [2008] FCJ No 399 (QL): "a claimant seeking to rebut the presumption of state protection must adduce relevant, reliable and convincing evidence which satisfies the trier of fact on a balance of probabilities that the state protection is inadequate."

[11] In this case, Mr. Baraka is basing his claim on outdated information. The situation in Algeria, both in general and for artists in particular, has significantly improved. In short, the RPD's decision has the qualities that make a decision reasonable and falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, [2008] SCJ No 9 (QL), at paragraph 47).

ORDER

FOR THE REASONS GIVEN ABOVE;

THIS COURT ORDERS that:

1. The application for judicial review be dismissed.
2. There is no serious question of general importance for certification.

“Sean Harrington”

Judge

Certified true translation
Janine Anderson, Translator

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2609-12

STYLE OF CAUSE: BARAKA v MCI

PLACE OF HEARING: MONTRÉAL, QUEBEC

DATE OF HEARING: SEPTEMBER 19, 2012

**REASONS FOR ORDER
AND ORDER:** HARRINGTON J.

DATED: SEPTEMBER 25, 2012

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