Date: 20060720

Docket: IMM-48-06

Citation: 2006 FC 906

BETWEEN:

ARLETTE SALIBY AND JOSEPH JREIJ

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

HARRINGTON J.

[1] July 31, 2002 is a date that will remain forever graven in the memory of Joseph Jreij. An incident on the road left him with a criminal record in Lebanon and led the Canadian government to refuse permanent residence to him and his wife. With this application, they are seeking judicial review of this decision.

[2] While he was driving to his office in Beirut, Mr. Jreij was caught in a traffic jam caused by a workers' demonstration against certain decisions of the Lebanese government.

[3] The security forces were in the process of dispersing the crowd and reopening the roads. Apparently taking Mr. Jreij for one of the demonstrators, they banged on his car with their guns and insulted him. Then, Mr. Jreij says:

> [TRANSLATION] To protect my dignity, I had to respond to their acts with similar acts. They then detained me on the pretext that I was resisting the security forces, although I am simply an unarmed civilian, having only them and my faith in God to protect me.

[4] In the result of this altercation, Mr. Jreij was charged and received a criminal conviction. The sentence was handed down initially *in absentia*, on June 14, 2003, then a second time in his presence on August 11, 2003. He was sentenced to pay a fine. The Court has two documents before it in connection with this conviction: one is entitled [TRANSLATION] "Summary of judgment delivered by the military tribunal", and the other, [TRANSLATION] "Criminal Record".

[5] In the summary we read:

Type of crime	Resisting security forces – Passive resistance and insulting them
Date and place of crime	Dekwaneh – 31/7/2002
Sections of law	380-383-254

[6] As to the criminal record, it does not refer to the relevant statutory provisions but describes the nature of the crime as follows:

Date of judgment	Court issuing the judgment	Type of crime	Type and duration of sentence
11/8/2003	Military Tribunal Criminal	Resistance to security forces, passive	100.000 fine

		resistance and insulting these forces	

DECISION UNDER REVIEW

[7] In a letter dated November 16, 2005, the second secretary of the Canadian Embassy in Damascus wrote to Arlette Saliby, Mr. Jreij's wife, to inform her that she was inadmissible to Canada under section 42(*a*) of the *Immigration and Refugee Protection Act* (IRPA), S.C. 2001, c. 27 because her husband belonged to a class of inadmissible individuals. The letter explained that Mr. Jreij fell within the class defined in section 36(2)(*b*) of the IRPA, which reads as follows:

36. (1) A permanent resident or a foreign national is inadmissible on grounds of serious criminality for . . . (2) A foreign national is inadmissible on grounds of criminality for . . . (*b*) having been convicted outside Canada of an offence that, if committed in Canada, would constitute an indictable offence under an Act of Parliament, or of two offences not arising out of a single occurrence that, if committed in Canada, would constitute offences under an Act of Parliament;	**36.** (1) Emportent interdiction de territoire pour grande criminalité les faits suivants : […] (2) Emportent, sauf pour le résident permanent, interdiction de territoire pour criminalité les faits suivants : […] *b*) être déclaré coupable, à l'extérieur du Canada, d'une infraction qui, commise au Canada, constituerait une infraction à une loi fédérale punissable par mise en accusation ou de deux infractions qui ne découlent pas des mêmes faits et qui, commises au Canada, constitueraient des infractions à des lois fédérales;

[8] It followed from this conclusion that no visa could be issued to Ms. Saliby and Mr. Jreij, pursuant to section 11 of the IRPA.

[9] The second secretary described Mr. Jreij's crime as follows:

> [TRANSLATION] On August 11, 2003, Joseph Jreij was convicted in Lebanon of an offence, namely *resisting the security forces*. If committed in Canada, this

> offence would be punishable under section *129* of the *Criminal Code of Canada* and would be an indictable offence.

[10] The relevant passages of section 129 of the *Criminal Code*, R.S.C. 1985, c. C-46, read:

129. Every one who (*a*) resists or wilfully obstructs a public officer or peace officer in the execution of his duty or any person lawfully acting in aid of such an officer,	**129.** Quiconque, selon le cas : *a*) volontairement entrave un fonctionnaire public ou un agent de la paix dans l'exécution de ses fonctions ou toute personne prêtant légalement main-forte à un tel fonctionnaire ou agent, ou lui résiste en pareil cas;
. . . (*d*) an indictable offence and is liable to imprisonment for a term not exceeding two years, or (*e*) an offence punishable on summary conviction.	[…] *d*) soit d'un acte criminel et passible d'un emprisonnement maximal de deux ans; *e*) soit d'une infraction punissable sur déclaration de culpabilité par procédure sommaire.

STANDARD OF REVIEW

[11] It is clear that the decision of the second secretary, that raises a question of fact, is only reviewable if it was patently unreasonable. However, the interpretation of the *Criminal Code* is a question of law. The examination of the facts of this case in relation to such a question is subject to the standard of review of reasonableness *simpliciter*.

ANALYSIS

[12] All the documents mentioned so far were supplied to the Court by the Canadian Embassy in Damascus, as provided for by the *Federal Courts Immigration and Refugee Protection Rules*, SOR/93-22:

17. Upon receipt of an order under Rule 15, a tribunal shall, without	**17.** Dès réception de l'ordonnance visée à la règle 15, le tribunal

delay, prepare a record containing the following, on consecutively numbered pages and in the following order:	administratif constitue un dossier composé des pièces suivantes, disposées dans l'ordre suivant sur des pages numérotées consécutivement :
. . .	[…]
(*b*) all papers relevant to the matter that are in the possession or control of the tribunal,	*b*) tous les documents pertinents qui sont en la possession ou sous la garde du tribunal administratif,

[13] In all cases relating to the application of the IRPA, the judicial review process follows two stages. At the first stage, the applicant must obtain leave from the Court to submit his application. Once leave is granted, the parties have an opportunity to submit additional affidavits. In this case, the Minister provided to the Court an affidavit to which was attached the three sections of the Lebanese Penal Code that are referred to in the summary of the judgment of the military tribunal that convicted Mr. Jreij. It is important to note, however, that there is no indication anywhere as to whether the second secretary of the Embassy had access to these provisions when he refused to issue the visas. If he did not have these documents before him, he certainly should have had them (*Association des crabiers acadiens v. Canada (Attorney General)*, 2006 FC 222, [2006] F.C.J. No. 294 (QL)).

[14] Section 254 of the Lebanese Penal Code provides for the reduction in sentences where there are mitigating circumstances and is therefore irrelevant in this case.

[15] Section 380 provides as follows:

> [TRANSLATION] Any act of active or passive resistance interfering with the lawful activity of one of the persons of the capacity expressed in the preceding article shall be punished by up to one month of imprisonment and a fine of up to 50 pounds.
> [Emphasis added]

[16] Under the relevant portion of section 383, the offence is constituted by:

> [TRANSLATION] Insulting, by words, actions or threats addressed to an official in the exercise or on the occasion of the exercise of his duties, or brought to his knowledge through the intention of the perpetrator.

[17] There are a number of ways to ensure that there is an equivalence between crimes under Canadian law and crimes provided for in the law of another state. In *Hill v. Canada (Minister of Employment and Immigration)* (1987), 73 N.R. 315, 1 Imm. L.R. (2d) 1 (F.C.A.), Mr. Justice Urie described three methods used to establish equivalence that appear to me to be applicable in this case:

> . . . first, by a comparison of the precise wording in each statute both through documents and, if available, through the evidence of an expert or experts in the foreign law and determining therefrom the essential ingredients of the respective offences; two, by examining the evidence adduced before the adjudicator, both oral and documentary, to ascertain whether or not that evidence was sufficient to establish that the essential ingredients of the offence in Canada had been proven in the foreign proceedings, whether precisely described in the initiating documents or in the statutory provisions in the same words or not; and three, by a combination of one and two.

[18] It is unclear whether the second secretary compared the specific language of the *Criminal Code* with that of the Lebanese Penal Code. I was urged to assume that he had done so since the Minister provided the Lebanese legislation. I will make that assumption in this case because it does not uphold the Minister's submissions.

[19] What is certain is that the second secretary gave no indication that he had benefited from the opinion of an expert in Lebanese law. If, in fact, the secretary had had the Lebanese legislation before him and had compared it to section 129 of the *Criminal Code*, he should have

realized that in Lebanon resistance to the security forces can be active or passive, while in Canada the law clearly requires that the resistance not be simply passive (*R. v. Whatcott*, [2005] S.J. No. 450, at paragraph 23 (Sask. Q.B.); *R. v. Ahooja*, [2004] J.Q. No. 4925 (M.C.); *R.v. Bouchard*, [1999] R.J.Q. 2165 (M.C.); *R. v. Sortini* (1978), 42 C.C.C. (2d) 214 (Ont. Prov. Ct.).

[20] However, if the second secretary merely looked at the evidence, this means he had only the two documents concerning Mr. Jreij's conviction before him, as well as the two statements written by Mr. Jreij. Mr. Jreij's first statement simply referred to the demonstration without providing enough particulars and was therefore clearly inadequate. He provided a further statement that the second secretary seems to have thought was adequate. Indeed, if the secretary thought this statement left him with doubts as to what had happened between Mr. Jreij and the security forces, he had a duty to mention them so that some details could be provided to him (*Khwaja v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 522, [2006] F.C.J. No. 703 (QL))**.**

[21] As I mentioned, under section 129 of the *Criminal Code*, it is not sufficient that resistance to the authorities be merely passive. In this case, nothing suggests that Mr. Jreij did anything other than hurl some insults at the security forces. Nothing indicates that he acted violently. Any finding along those lines would be purely speculative and would therefore be patently unreasonable (*Isse v. Canada (Minister of Citizenship and Immigration)*, [1998] F.C.J. No. 1020 (QL), at paragraph 14).

[22] The Minister also suggested that Mr. Jreij's activities could be viewed as obstruction of justice. Indeed, section 129 provides for two distinct crimes, resistance and obstruction. The case law treats them differently (*R. v. Pittoors*, [2000] A.J. No. 1400, at paragraph 16 (Alta. Prov. Ct.); *Sortini*, *supra*). That said, the fact is that Mr. Jreij was not sentenced for obstruction and the visas were not refused on the basis of such a charge.

[23] Since the second secretary erred in comparing the crime described in section 129 to the one for which Mr. Jreij was convicted and since, in light of the facts, it would be patently unreasonable to find that Mr. Jreij engaged in anything other than passive resistance to the security forces, I hold that the application for judicial review should be allowed. The visa application shall be reheard by a person who was not involved in assessing the file of Ms. Saliby and Mr. Jreij. The Minister will have until July 26, 2006 to propose any questions of general importance that might warrant an appeal and the applicants will have until July 31 to reply to him.

"Sean Harrington"
Judge

Ottawa, Ontario
July 20, 2006

Certified true translation

François Brunet, LLB, BCL

FEDERAL COURT

SOLICITORS OF RECORD

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