Date: 20080313

Docket: IMM-1142-08

Citation: 2008 FC 343

BETWEEN:

RENATA ARINA MAKIAS
OR MAKIAS
SHANY MAKIAS

Applicants

and

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

Respondents

REASONS FOR ORDER

(Order delivered on March 12, 2008)

HARRINGTON J.

[1] Here are but a few of the reasons why young Or and his sister Shany do not want to be removed from Canada and into the custody of their father in Israel:

> "My dad would always used to threatened to kill me and my sister and that's why I'm scared of going back to my dad in Israel. He would run after me with a hammer in his hands trying to hit me with it. My dad would also always tell me and my sister that if we would ever bring any of are friends home he would throw them out of the window and by the way we leaved in the 4th floor. My dad almost killed my mom once by throwing a very heavy cup of glass and he would always throw stuff at her like cell phones or house phone or plates, My dad would always beat me and my sister very bad and he would do it for small thing like not giving him the TV remote."

[2] Their mother, the principal applicant, Renata Makias, has applied for permanent resident status in Canada, and asked that they be permitted to remain here while that application is being processed. The Minister of Citizenship and Immigration has discretion under s. 25 of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), to so allow. However, the Officer appointed to make the decision refused to do so on March 5th. An application for leave and for judicial review of that decision has been filed, but cannot be heard for a few months. In the meantime, Mrs. Makias and her two children were ordered to be removed back to Israel today. They applied for a stay of that order pending resolution of their application for leave and for judicial review. These are the reasons why I granted their stay motion yesterday.

[3] Mrs. Makias, her husband Yossef, and their two children, Or and Shany, came to Canada from Israel in 2003, and claimed refugee status. The decision was negative, as was the subsequent decision on their pre-removal risk assessment.

[4] Mrs. Makias failed to appear for her removal in 2005. A warrant for arrest was issued against her, she was recently arrested and is currently in detention near Montreal. She refuses to divulge the whereabouts of her children.

[5] The marriage unravelled in June 2004. The police arrested Mr. Makias and charged him with uttering threats to cause death or bodily harm to his wife. He was released on conditions which included a restraining order that forbade him from having any contact with his wife or his children. He did not respect those conditions and was convicted of “breach of reconnaissance”. In July 2005,

he was either removed or returned to Israel.

[6] By then, Mrs. Makias had moved to Montreal and on March 8th, 2006 was granted a divorce by the Quebec Superior Court as well as custody of the two children. Mr. Makias has moved to vacate that order, which motion was dismissed by the Quebec Superior Court in October of last year. That last order is in appeal and will be heard next month.

[7] Notwithstanding the divorce decree and custody order, on November 16, 2006 Mr. Makias obtained what I can only call a disturbing order from the Regional Rabbinical Court of Tel Aviv. The court noted that Mrs. Makias and the children were in Canada without status and that an arrest warrant had been issued against her. The court granted custody of the children to their father and ordered Mrs. Makias to transfer the two children to him "immediately and with no further delay". It declared that the decision could be enforced by any competent court either in Israel or in Canada. The judgment also deals with a Get (religious divorce), which is not directly relevant to this decision.

[8] What is of concern is that although Mrs. Makias was in Canada, and not in Israel, so that in one sense the decision could be said to have been rendered *in absentia*, the court noted that she had responded.

[9] Either the court was not made aware of the restraining order which Mr. Makias breached, as well as the divorce and custody order, or it considered the orders of courts in British Columbia and

Quebec irrelevant. In any event, the moment Or and Shany step off the tarmac in Israel, their father will take custody. He is well aware of these proceedings as his Canadian lawyer was in the audience.

CONDITIONS FOR A STAY

[10] It is well established that in order to obtain the equitable remedy of a stay the applicants must show a reasonably arguable case (meaning not frivolous or vexatious); irreparable harm and that the balance of convenience favours them (*Toth v. Canada (Minister of Employment and Immigration)*, [1988] F.C.J. No. 587, (1988), 86 N.R. 302 ; RJR-*MacDonald Inc. v. Canada (Attorney General)*, [1994] 1 S.C.R. 311).

[11] There is a serious argument to be made that leave and judicial review should be granted. I need only mention that while the officer noted that the Israeli Rabbinical Court had granted the husband custody, she was of the view Mrs. Makias could apply to a civil court for a re-evaluation. It is unclear how she reached that conclusion, but in any event it is strongly arguable that she did not take into account the best interests of the children, as specifically required by s. 25 of IRPA.

[12] As to irreparable harm, a strong case has been made out that Mrs. Makias and her children, or at least her two children, face imminent peril on their return, as there is already an order in place giving the husband custody. While no one denies state protection is available in Israel, the *status quo* there is not the *status quo* here.

[13] Finally, with respect to the balance of convenience, it may well be that Mrs. Makias does not come to the Court with the cleanest of hands. However it must be kept in mind that the main thrust of her actions has been to keep her children from their father. The Minister complains that she is a scofflaw because she will not reveal the whereabouts of her children. If she does they shall be put into the custody of a man who has threatened to kill them. She has even gone to jail. What mother would not do the same? The balance of convenience lies with her.

[14] As noted in *RJR-MacDonald*, above, a motions judge must make a decision on the basis of common sense and an extremely limited review of the case on the merits. As so often happens, this application was brought on an urgent basis. It is far better to preserve the Canadian *status quo* until the matter is fully heard.

[15] Once I announced at the hearing what my decision would be, given that Mrs. Makias remains in custody and has not disclosed the whereabouts of her children, in my discretion, and with the consent of the parties, I shortened the normal filing delays so that this matter may be heard as soon as possible.

"Sean J. Harrington"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

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APPEARANCES:

Me Mitchell Goldberg	FOR THE APPLICANTS
Me Daniel Latulippe	FOR THE RESPONDENTS

SOLICITORS OF RECORD:

MITCHELL GOLDBERG Montreal, QC	FOR THE APPLICANTS
John H. Sims, Q.C. Deputy Attorney General of Canada	FOR THE RESPONDENTS