Date: 20080717

Docket: IMM-2552-08

Citation: 2008 FC 881

BETWEEN:

JAMES COREY GLASS

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

REASONS FOR ORDER

FRENETTE D.J.

[1] This is a motion to stay the execution of an order rendered against the applicant for removal to the United States (U.S.), scheduled to be executed on July 10th, 2008. I granted the stay on July 9th, 2008 and here are my reasons.

I. Background

[2] The applicant is a citizen of the U.S. who came to Canada on August 6, 2006, claiming refugee status. His claim was dismissed on June 21, 2007; he was denied leave for judicial review of that decision. His Pre-Removal Risk Assessment (PRRA) was decided negatively on March 25, 2008. His humanitarian and compassionate (H&C) application was refused on the same day.

[3] He now seeks judicial review of both decisions. The applicant's claim results from his refusal to serve in the U.S. army in Iraq. He joined the Army National Guard (National Guard) in 2002 to serve his community in humanitarian missions in case of national disasters and local needs. He was told that the National Guard would never be involved in foreign wars.

[4] In 1993, numerous National Guard units were advised they were activated to go to war in Iraq and Afghanistan. After his transfer to the California National Guard, he was promoted to the rank of Sergeant. After activation, the National Guard unit of which Mr. Glass was a member was sent to join the U.S. army and deployed in Iraq, where he was ordered to serve in the military intelligence service.

[5] He served during six months in Iraq during which he observed "gross human rights violations and gross misconduct by U.S. soldiers against Iraqi civilians including children". During this service, he observed many Iraqi civilians who were killed "for no good reason".

[6] He also became aware of misconduct by U.S. soldiers, including extorting protection money from Iraqi shopkeepers. He stated that military records were falsified to "white wash" the real situation of violation of human rights against Iraqi civilians and misconduct by some army soldiers.

[7] He tried to inform his superiors of the violations of human rights and discuss the situation with them but was told to mind his own business. His immediate supervisor attributed his worries to

stress and recommended leave. He was reminded that if he deserted, he would face the death penalty.

[8] Scandalized by what he saw, he decided to try to avoid participating in what he considered an “illegal war”. He tried, with no avail, to be transferred to a non-combatant role in Iraq. When he was granted a two week leave in the U.S., he decided not to report back to the army and in August 2006, fled to Canada. Here he publicly denounced the conditions in Iraq and publicized his opposition to that war.

II. The PRRA officer’s decision

[9] Officer Dello, who decided both applications (PRRA & H&C), determined that most of the evidence submitted in the PRRA was not “new evidence” and did not take it into consideration. The evidence submitted as new consisted of four affidavits and the opinion of the U.S. Attorney Eric Seitz, dated March 2008, who has represented numerous military personnel or conscientious objectors to the wars in Vietnam and Iraq.

[10] The Officer concluded that U.S. soldiers who objected to and publicly condemned these wars, would face severe punishment including incarceration and be denied due process before military tribunals.

[11] This type of treatment was confirmed in public documentation and exhibits provided by the applicant from ex-members of the U.S. Forces, amongst whom were Mr. Funk and Mr. Kjar.

[12] In 2008, the applicant learned that in 2006, his membership in the California National Guard had been terminated and he had been transferred to the U.S. Ready Reserve, a program from which former soldiers can be recalled to the military. The result of this action is that he could be assigned to active duty, made subject to Court Martial proceedings for desertion leading to a term of imprisonment or re-activated for re-deployment in Iraq. Because of the on-going war in Iraq, the U.S. Military Forces have had to re-activate members of the National Guard. The evidence emanating from U.S. Army sources shows that prosecution for desertions were increasing, with prison terms imposed, particularly against those members who had publicly denounced the war in Iraq.

[13] Among the documents provided by the applicant, is a New York Times article of April 9, 2007 entitled "Army is cracking down on deserters", which states that:

> Army prosecutions of desertion and other unauthorized absences have risen sharply in the last four years, resulting in thousands more negative discharges and prison time for both junior soldiers and combat-tested veterans of the wars in Iraq and Afghanistan, Army records show.
>
> […] Using courts-martial for these violations, which before 2002 were treated mostly as unpunished nuisances, is a sign that active-duty forces are being stretched to their limits, military lawyers and mental health experts said.

[14] The same article quotes Maj. Anne D. Edgecomb, an army spokeswomen, as saying "[t]he Army's leadership will take whatever measures they believe are appropriate if they see a continued upward trend in desertion, in order to maintain the health of the force."

[15] The problems set out in that article are supported by a 2008 CNN report, entitled "Concern mounts over rising troop suicides".

[16] The situation prompted the Canadian Parliament to pass a resolution on June 3, 2008, calling on the Canadian Government to permit U.S. conscientious objectors to remain in Canada and to cease deportations of such objectors.

[17] In this case, Officer Dello rejected the evidence put forward by the applicant as "not new" and did not consider its implication on the issues to be decided. In the March 25, 2008 PRRA decision, it was concluded that the applicant would not risk persecution if he were returned to the U.S. The Officer decided there was no objective new evidence since the RPD decision to support the applicant's claim and that he faced "no more than a mere possibility of persecution". The allegation of a risk of undue hardship was dismissed on the basis that the presumption of state protection had not been rebutted.

[18] Finally, the Officer referred to the RPD decision, which stated that 94% of AWOL soldiers between 1994 and 2001 were not persecuted by the military or were given "less than honourable discharges" (the same fact relied upon which the Federal Court of Appeal in *Hinzman v. Canada*

(Minister of Citizenship and Immigration), 2007 FCA 171, 282 D.L.R. (4th) 413 (*Hinzman*), saying 2000-2001 statistics showed those deserters were only sentenced to "less honourable discharges").

[19] This evidence was contradicted by recent documentation and the "new evidence" adduced in this case by the applicant, showing that in 2007-2008 the "army is cracking down on deserters", prosecuting them and convicting them to lengthy imprisonment. This statement was corroborated in 2008 by the affidavit of an experienced U.S. Attorney, Mr. Eric Seitz, who represented numerous objectors to the war and deserters in their U.S. prosecutions.

[20] I also find support on this point in Justice Robert L. Barnes' decision in *Key v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 838, [2008] F.C.J. No. 1003 (QL). I reproduce partly what Justice Barnes wrote:

> **13** For the sake of argument, I am prepared to accept the Board's conclusion that the conduct of the United States Army in Iraq as described by Mr. Key would not meet the definition of a war crime or a crime against humanity. Nevertheless, the Board's observations that some of that conduct reflected "a disturbing level of brutality" and that many of these reported indignities would represent violations of the Geneva Convention prohibition against humiliating and degrading treatment cannot be seriously challenged.
>
> **14** The Board concluded that refugee protection could only be extended to Mr. Key if he had been or would be expected to be complicit in the commission of war crimes, crimes against peace or crimes against humanity. Put another way, the Board indicated that refugee status can only be conferred where a soldier's past combat experiences or the expectations for further combat service would constitute excludable conduct under the *Convention Relating To The Status Of Refugees*, 189 U.N.T.S. 150, Can. T.S. 1969 No. 6 (entered into force April 22, 1954.) In my view, the Board erred in its interpretation of Article 171 of the UNHCR Handbook by concluding that refugee protection for military deserters and evaders

> is only available where the conduct objected to amounts to a war crime, a crime against peace or a crime against humanity.
>
> **15** The relevance of the UNHCR Handbook was considered by the Supreme Court of Canada in *Chan v. Canada (M.E.I.)*, [1995] 3 S.C.R. 593, 128 D.L.R. (4th) 213 at para. 46 where it was accepted as a "highly relevant authority": also see *Hinzman* above at para. 116. Accordingly, I consider that reference and the legal authorities which have considered and applied it, to be determinative of the first issue raised on this application. (footnotes removed)

[21] Also, Justice Barnes points out, the Board's narrow interpretation of Article 171 of the UNHCR Handbook in that case resulted in a failure to follow the Federal Court of Appeal's decision in *Zolfagharkhani v. Canada (Minister of Employment and Immigration)*, [1993] 3 F.C. 540, 155 N.R. 311 (F.C.A.). In *Zolfagharkhani*, the Court of Appeal granted the applicant medic refugee status finding that his conscientious opposition to the use of chemical weapons against Iran's internal war against the Kurds, was reasonable:

> **171.** Not every conviction, genuine though it may be, will constitute a sufficient reason for claiming refugee status after desertion or draft-evasion. It is not enough for a person to be in disagreement with his government regarding the political justification for a particular military action. Where, however, the type of military action, with which an individual does not wish to be associated, is condemned by the international community as contrary to basic rules of human conduct, punishment for desertion or draft-evasion could, in the light of all other requirements of the definition, in itself be regarded as persecution.

[22] I believe the behaviour of the U.S. Army in Iraq, as described in *Key* above, is condemned by the international community as contrary to basic rules of human conduct. Punishment for desertion or draft evasion could, in light of all other requirements of the deportation, in itself be regarded as persecution.

[23] I agree with Justice Barnes when he wrote in *Key* at para. 29:

> It is clear from the above passages that officially condoned military misconduct falling well short of a war crime may support a claim to refugee protection. […]

III. State protection

[24] The applicant alleges that, at this time, he would not enjoy state protection in the U.S. because of the crackdown on deserters, the growing opposition to the war in the U.S. and the difficulty of recruiting Army Personnel for the war in Iraq and Afghanistan.

[25] He contends that the Officer illegally excluded new evidence which the RPD had not considered and which would have modified that decision. The respondent counters that the issue of state protection has been dealt with by the Federal Court of Appeal, in a similar case, i.e. *Hinzman*. That case has raised the bar which a deserter has to meet before claiming there is insufficient state protection in the U.S.

IV. Analysis

[26] On the issue of new evidence, I realize that the Officer found that the evidence put forward by the applicant had already been assessed by the RPD and therefore refused to consider it, relying on *Raza v. Canada (Minister of Citizenship and Immigration)*, 2007 FCA 385, 370 N.R. 344. However, as evidenced by the opinion of the U.S. Attorney, Eric Seitz, the current or recent

situation in the U.S., *i.e*. 2007-2008, is different from that which existed in 2001-2002 because of the difficulties described earlier.

[27] In *Hinzman*, Justice J. Edgar Sexton wrote that the first step in such case is to examine whether there is an objective fear of persecution or undue hardship and only after a decision that state protection does not exist at that stage could one go to the second stage, where the illegality of the war could be raised.

[28] I note that in the *Hinzman* case, Justice Sexton's reasons appear to turn in large measure upon the fact that, according to statistics of 2000-2001, the usual sentence for deserters was a less than honourable discharge, totalling approximately 94 % of cases,.

[29] However, with the new evidence in this case, it is established that the situation has drastically changed in 2007-2008, and a crackdown on deserters is established whereby prosecution and conviction by military tribunals results in prison sentences of up to five years.

[30] This is the same situation that Justice Barnes considered in the *Key* decision. I therefore believe that, in light of this new situation, the issue of effective state protection for U.S. Army deserters must be re-examined.

[31] Justice Sexton in the *Hinzman* case goes on to point out that the U.S. is a democratic state with a system of checks and balances within its three branches of government. He held, therefore, that the appellants bore a heavy burden in attempting to rebut the presumption of state protection.

[32] The U.S. has procedures to punish deserters and the evidence before the Board, dating from 2001-2002, was that the vast majority of army deserters in the U.S. had not been persecuted or court-martialled. Rather, approximately 94% of deserters had been dealt with administratively and merely received a less than honourable discharge from the military.

[33] However, the situation has since changed. The evidence before the Board, here particularly the new evidence, reveals that, while the majority of deserters had previously been treated in a lenient manner, since 2007-2008 those who have spoken publicly against the war have suffered a different and harsher treatment which distinguishes the facts of the instant case from those of *Hinzman*.

[34] On this basis, it can reasonably be argued that state protection does not exist in the U.S. to shelter these persons from such treatment and would not prevent the applicant from suffering degrading treatment during a prison term which could be as much as five years.

[35] This would bring the applicant to the second stage of Justice Sexton's test where the legality of the war could be assessed among other factors.

[36] There has been no official declaration of war by the U.S. against Iraq and it is a notorious fact that the U.S. Congress has not officially authorized such war. The applicant reported human rights abuses committed by American Forces against Iraq's civilian population which revolted him and prevented him from returning there.

[37] As Justice Barnes pointed out in *Key* in para. 19:

> It is apparent to me that the Board in *Hinzman* did not have before it the kind of evidence that was presented by Mr. Key and, therefore, neither the Board nor Justice Mactavish were required in that case to determine the precise limits of protection afforded by Article 171 of the UNHCR Handbook. I do not consider Justice Mactavish's remarks to be determinative of the issue presented by this case -- that is, whether refugee protection is available for persons like Mr. Key who would be expected to participate in widespread and arguably officially sanctioned breaches of humanitarian law which do not constitute war crimes or crimes against humanity.

[38] I acknowledge that the recent jurisprudence is divided on the issues raised in this case, *i.e.* deserters from U.S. Army whose objections to the war are based upon their conscience or the way the war is conducted.

[39] Justice Michel Beaudry, in *Colby v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 805, [2008] F.C.J. No. 1015 (QL) (*Colby*), relied upon the Court of Appeal decision in *Hinzman*, because the factual situation was similar. In *Colby*, the applicant joined the U.S. Army as a medic but was later informed that the invasion and occupation of Iraq was based upon the claim of weapons of destruction which were never found.

[40] Justice Beaudry dismissed the application principally because, as reiterated in *Hinzman*, the applicant had not passed the first stage of assessing the existence of objective fear, by exhausting the potential for state protection in the U.S.

[41] In a recent case, *Robin Long v. Canada (MCI & MPSEP)*, IMM-3042-08 (July 14, 2008), Justice Mactavish refused a stay because there had been no clear and convincing evidence that Mr. Long would suffer irreparable harm if deported.

[42] I conclude that the Officer, in the present case, did not give the applicant the opportunity to present a meaningful case on the issue of state protection and to establish the undue hardship he feared if returned to the U.S.

V. The test for granting a stay of removal order

[43] The test for granting a stay is whether:

a) A serious issue exists to be tried;

b) Irreparable harm will be caused if the stay is not granted; and

c) The balance of convenience favours the applicant.

See *Toth v. Canada (Minister of Employment and Immigration)* (1988), 86 N.R. 302, 6 Imm. L.R. (2d) 123 (F.C.A.). All of these conditions must be met in order to grant a stay.

a. Serious issue

[44] The first branch of the test is whether on a preliminary and tentative assessment of the merits of the case, a *prima facie* case can be made out.

[45] The applicant alleges that the Officer erred in law in failing to accept and assess the new evidence presented. The Officer excluded the evidence because it was found that it was not new and that some of it was presented at the RPD hearing or was then available to the applicant.

[46] The respondent counters this submission that some of this evidence was known before the hearing and that Mr. Kjar's affidavit of November 2007 could have been obtained earlier. The respondent also says that the affidavit of U.S. Attorney Mr. Seitz, although sworn in March 2008, attests to information that predates the board's decision.

[47] It is true that some of this evidence was available before the board's hearing but some was not, such as Mr. Sutz and Mr. Kjar's affidavits, the opinion of U.S. Attorney Mr. Seitz and the documentation regarding persecution of AWOL members of the U.S. Army in 2007-2008.

[48] What constitutes "new evidence" for the purpose of the PRRA application is governed by section 113(a) of the *IRPA*. It is a question of law reviewable on a standard of correctness, see *Raza*. In this case, as discussed above, the PRRA Officer Dello failed to consider new evidence in support of the applicant's PRRA application when assessing the risk of persecution under section 96 of the

IRPA and when assessing the applicant's risk of cruel and unusual treatment under section 97 of the *IRPA*.

[49] The PRRA Officer erred in failing to provide adequate reasons for excluding the new evidence. The respondent submits this was sufficiently explained. A simple analysis of the law leads to the conclusion that such reasons were essential to explain excluding such evidence but were not given.

[50] The PRRA Officer misconstrued the risks identified by the applicant and failed to analyse the new risks not raised before the RPD.

[51] The respondent alleges that the Officer did not fail to assess the new risk. The respondent relies upon the U.S. Army publicity claiming the applicant is not considered a deserter. An analysis of the new evidence and the reasons of the Officer, it is evident that the risk was considered to be low as found by the RPD when in fact the new evidence contradicted findings made by the RPD as to the recent situation in the U.S. and its treatment of deserters.

VI. State protection

[52] The applicant submits that the Officer's reference to state protection indicates the application of a more stringent test. The respondent argues that the Court of Appeal's decision in

Hinzman shows that soldier facing punishment in the U.S. for deserting must, as a rule, pursue state protection at home before seeking protection in Canada.

[53] However, as Justice Barnes points out at paragraph 32 of the *Key* decision, the circumstances of each case varies:

> […] The circumstances of this case are very different from those which were considered in Hinzman and Hinzman (C.A.), above, most notably because, unlike Mr. Hinzman, Mr. Key was not required to address the state protection issue.

He also added:

> **34.** Unlike many cases where state protection is invoked as the basis for denying refugee status, here the 'die may have been cast' by Mr. Key's decision to enter Canada before exhausting his protection options at home. […] If there is clear and convincing evidence presented that Mr. Key faced a serious risk of prosecution and incarceration notwithstanding the possible availability of less onerous, non-persecutory treatment, he is entitled to make that case and to have that risk fully assessed.

[54] I endorse these remarks and believe they apply to the facts of the present case.

i. Agent of the State

[55] A problem arises to rebut the presumption of state protection when the agents of the State themselves are the cause of the persecution.

[56] Justice Tremblay-Lamer wrote the following statement on this point in Chaves v. Canada (MCI), 2005 FC 193, 45 Imm. L.R. (3d) 58 at para. 15:

> […] where agents of the state are themselves the source of the persecution in question, and where the applicant's credibility is not undermined, the applicant can successfully rebut the presumption of state protection without exhausting every conceivable recourse in the country.

[57] The statement was quoted with approval by Justice Kelen in Farias v. Canada (MCI), 2008 FC 578, [2008] F.C.J. No. 735 (QL) at para. 30.

[58] This issue should have been addressed in this case.

b. Irreparable harm

[59] The applicant submits that if returned to the U.S., he will be court-martialled for desertion and will be incarcerated in a military prison where, like Stephen Funk, Camilo Mejia and Kevin Benderman, he will suffer persecution, cruel and inhuman treatment. Desertion being considered a felony in some states, it carries the loss of crucial rights, including the right to vote and to hold public office.

[60] The respondent argues that the applicant has not discharged the onus of demonstrating irreparable harm through clear and convincing evidence.

[61] Irreparable harm must constitute more than a mere possibility and cannot be based upon assertions and speculations (*Atwal v. Canada (Minister of Citizenship and Immigration)*, 2004 FCA 427, 330 N.R. 300).

[62] I believe the evidence here shows that, if returned to the U.S., the applicant will suffer the irreparable harm he has described.

[63] Furthermore, these applications for judicial review could become moot if he is removed before they are heard (*Perez v. Canada (Minister of Citizenship and Immigration)*, 2008 FC 663, [2008] F.C.J. No. 836 (QL).

c. The balance of convenience

[64] The applicant pleads that the balance of convenience leans in his favour. He also relies upon the fact that a recent resolution passed by the Parliament in Canada is favourable to U.S. Army deserters who are conscientious objectors to the war in Iraq.

[65] He argues that he is well established in Canada, is employed and is not a burden upon Canadian society. The respondent submits that section 48 if the *IRPA*:

Enforceable removal order	**Mesure de renvoi**
48. (1) A removal order is enforceable if it has come into force and is not stayed.	48. (1) La mesure de renvoi est exécutoire depuis sa prise d'effet dès lors qu'elle ne fait pas l'objet d'un sursis.
(2) If a removal order is enforceable, the foreign	(2) L'étranger visé par la

national against whom it was made must leave Canada immediately and it must be enforced as soon as is reasonably practicable.	mesure de renvoi exécutoire doit immédiatement quitter le territoire du Canada, la mesure devant être appliquée dès que les circonstances le permettent.

stipulates that enforceable removal orders must be executed as soon as reasonably practical. She also argues that public interest requires that the application of the *IRPA* and removal orders should be obeyed (*Dugonitsch v. Canada (Minister of Employment and Immigration)* (1992), 53 F.T.R. 314, 6 Admin. L.R. (2d) 47).

[66] In the circumstances of this case, on the basis of the strong possibility of irreparable harm on removal, the balance of convenience favors the applicant.

[67] The application has therefore satisfied all the conditions of a stay.

THEREFORE, THIS COURT grants the application for a stay of execution of the removal order until:

i. the disposition of the latest leave application; and

ii. if leave is granted, until such time as the sections 18 and 18.1 application is disposed of by this Court.

"Orville Frenette"

Deputy Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-2552-08
STYLE OF CAUSE:	James Corey Glass **v.** MCI
PLACE OF HEARING:	Toronto, Ontario
DATE OF HEARING:	July 9, 2008
REASONS FOR ORDER:	FRENETTE D.J.
DATED:	July 17, 2008

APPEARANCES:

Ms. Geraldine Sadoway Ms. Alyssa Manning	FOR THE APPLICANT
Ms. Sharon Stewart Guthrie Ms. Margherita Braccio	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Geraldine Sadoway Barrister & Solicitor Parkdale Community Legal Services 1266 Queen Street West Toronto, ON M6K 1L3	FOR THE APPLICANT
John H. Sims, Deputy Attorney General of Canada	FOR THE RESPONDENT