



Date: 20200522

Docket: IMM-1947-20

[ENGLISH TRANSLATION]

Montreal, Quebec, May 22, 2020

**PRESENT: The Honourable Mr. Justice Michel M.J. Shore
In collaboration with Benjamin Dionne, law clerk**

BETWEEN:

BERNARD RIEUX

Applicant

And

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

(Teaching Instrument – As conceived could have been pleaded by Albert Camus, the writer, philosopher of *The Plague (La Peste)* - An informed reader will soon understand that this case is loosely based on *The Plague (La Peste)* by Albert Camus, reference to the 1955 Gallimard edition.)

I. Introduction

[1] The unusual events involved in this application for judicial review occurred in 201..., in Oran. Everyone agreed that considering their somewhat extraordinary character, they were out of place there¹.

¹ As per the 1955 Gallimard edition.

[2] The applicant, Dr. Bernard Rieux, is a medical doctor in Oran, a city in Algeria. As a doctor, the applicant was one of the first people exposed to what would later be admitted to be a bubonic plague epidemic. A great humanist, the applicant threw himself body and soul into combating the epidemic. At first glance, nothing really distinguished the applicant from his compatriots, except his professional skills which enabled him to perform useful work during the epidemic; however, the applicant's actions set him apart: faced with the absurdity of the scourge, Dr. Rieux decided to fight it.

[3] The applicant's story began on the morning of April 16, 201... when he left his office and stumbled upon a dead rat in the middle of the staircase². The next day, his janitor discovered three big dead rats strewn along the halls of the building³. Although surprised, the applicant did not pay much attention to it at first; however, as the days went by, the situation worsened exponentially. Everywhere in Oran, people were finding bodies of rats that had come out to die together in the open. As of April 25, the municipal authorities were collecting and burning more than 6,000 rats per day⁴. Then, on April 28, the phenomenon suddenly ended, and hardly any rats were found⁵.

[4] The same day, the applicant noticed that the janitor of his building was in pain. His health soon deteriorated, the fever set in and, two days later, he was dead⁶. Soon, other patients of the applicant also presented with the same symptoms and died. The applicant called his colleagues

² *The Plague*, page 18

³ *The Plague*, page 19

⁴ *The Plague*, page 27

⁵ *The Plague*, page 27

⁶ *The Plague*, page 33

and found out that there were about 20 similar cases⁷. Within a few days, the number of terminal cases multiplied⁸. The applicant and one of his colleagues, Dr. Castel, came to the tragic conclusion: it was the plague.

[5] Faced with the danger of the epidemic, the applicant succeeded, by dint of persistence, in having a health committee convened at the Mayor-Prefect's office⁹. Much to the applicant's dismay, the authorities were unwilling to accept such a fatal diagnosis. At best, the applicant obtained certain concessions: the Mayor-Prefect half-heartedly recognized that a "malignant fever" had set in, but dared not call a spade a spade¹⁰.

[6] It soon became apparent that the measures undertaken were quite insufficient. Just a few days later, the doctors were overwhelmed by the disease. In three days, the two hospital pavilions were filled to capacity. Appearing before the Refugee Appeal Division (RAD), counsel for the applicant, Mr. Camus, described this period as follows:

Mr. Camus: Rieux had never found his work so overwhelming. Until then, the patients had made his job easier for him. They gladly put themselves in his hands. For the first time, the doctor felt that they were reluctant. They had hit rock bottom and were coping with their illness with a kind of wary astonishment¹¹.

[7] Then death came to call. Within four days the fever had made four startling strides: 16, 24, 28, and 32 deaths¹². Still toiling on the front line, the applicant telephoned the Mayor-Prefect

⁷ *The Plague*, page 42

⁸ *The Plague*, page 47

⁹ *The Plague*, page 60

¹⁰ *The Plague*, page 65

¹¹ *The Plague*, page 73

¹² *The Plague*, page 75

to have the authorities take further action. The Mayor-Prefect refused to take the initiative without an order from the government. The Mayor-Prefect asked for a formal report¹³, but hardly any further concrete measures were taken. The hospitals were quickly overwhelmed; however, people's daily lives did not change: the streetcars were always packed at rush hour, empty and dirty during the day; in the evening, the usual crowd filled the streets, and there were long line-ups in front of the movie theatres¹⁴.

[8] Concrete measures were only taken when the official count alarmed the Mayor-Prefect, but it was several days too late. The city gates were closed, and the people of Oran were isolated from the rest of the world¹⁵. Even communications were restricted.

[9] As the weeks and months went by, the plague waxed and waned. At any rate, the dead-count increased and the government did little to stop it. Clearly, there was a lack of resources. Appearing before the Refugee Protection Division (RPD), counsel for the applicant, Mr. Camus described a conversation between the applicant and Rambert, a foreign journalist stuck in Oran; it follows:

- Is the epidemic getting out of hand? Rambert asked.

Rieux said it wasn't and that even the statistical curve was not rising as steeply. They just didn't have enough resources to fight the plague.

- We're short of equipment, he said. All armies throughout the world generally use manpower to offset equipment shortages. But we're short of manpower too.

¹³ Laisser passer A38 : see La maison des fous des douze travaux d'Astérix (French only) <https://www.youtube.com/watch?v=c45FtDhdDoY>

¹⁴ *The Plague*, page 76

¹⁵ *The Plague*, page 81

- Doctors and health workers have come from outside the city.

- Yes, said Rieux. Ten doctors and about 100 men. That may sound like a lot, but it's barely enough to deal with the number of patients we have now. It won't be enough if the epidemic spreads.¹⁶

[10] Even if the patients were isolated, life went on in Oran: the streetcars continued to run. Restaurants and movie theatres remained open. The Mayor-Prefect did not dare take more drastic measures—drafting men and women to serve—for fear of exacerbating public discontent¹⁷. In short, the stage was set to maintain a high rate of contagion.

[11] Life was difficult for the applicant Dr. Rieux in the following months. On the front line, he described the situation as “a never ending defeat”¹⁸. That was no reason to stop fighting. He could not leave his fellow citizens suffering at the hands of the plague¹⁹. Not having received any support from the authorities, the applicant Dr. Rieux built a response team from scratch. He lost close friends who were constantly exposed to the disease while helping him fight the plague.

[12] Counsel for the applicant described the situation:

Week after week, the prisoners of the plague fought the good fight. Some, like Rambert, even managed to imagine, as we can see, that they were still behaving like free men, that they still had a choice. But actually, it would have been more accurate to say at that time, in mid-August, that the plague had spread everywhere. There were no longer any individual destinies, only a collective history consisting of the plague and emotions shared by all.²⁰

¹⁶ *The Plague*, page 166

¹⁷ *The Plague*, page 141

¹⁸ *The Plague*, page 145

¹⁹ *The Plague*, page 145

²⁰ *The Plague*, page 185

[13] And yet, while “the disease had apparently forced a solidarity of the besieged on the inhabitants, it also shattered traditional ties and sent individuals back to their solitude.”²¹ Citizens began to revolt, loot the abandoned homes of the sick or charge the city gates to escape to the outside world. Coffins became scarcer. There was a shortage of space in the cemetery. The dead had to be interred in burial pits²².

[14] The applicant Dr. Rieux experienced one horror after another. One example is all that is needed to demonstrate the extent of these horrors. Towards the end of October, people believed that a vaccine against the plague had been developed²³. The applicant Dr. Rieux had to resign himself to testing it on a young boy who was going to die from the disease. The vaccine did not work. The young boy died in pain before the helpless eyes of the applicant Dr. Rieux.

[15] The epidemic only ended after death had taken its toll. Suddenly, overnight, the deaths diminished and life resumed. But for the applicant Dr. Rieux, life would never be the same again. Unable to remain in Oran, he left for Canada where he sought refugee protection.

II. Analysis

[16] Pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (IRPA), the applicant is challenging a decision of the Refugee Appeal Division (RAD) in which the RAD confirmed the decision of the Refugee Protection Division (RPD) denying the applicant’s refugee claim.

²¹ *The Plague*, pages 188-189;

²² *The Plague*, page 194

²³ *The Plague*, page 230

[17] The applicant is asking this Court to set aside the decision of the RAD that denied his claim for refugee protection on the ground that the compelling reasons exception could not apply to Dr. Rieux’s case because he had not actually ever been recognized as a refugee. The RAD further held that Dr. Rieux’s mistreatment did not constitute “atrocious and appalling” persecution.

[18] Therefore, the RAD’s decision is reviewable on the standard of reasonableness. According to *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65, in reviewing a decision on the standard of reasonableness, a reviewing court must first consider the reasons provided with deference and seek to understand the reasoning process followed by the decision maker to arrive at its conclusion. A reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker.

[19] In general, a person is not eligible for refugee status if the reasons for which the person sought refugee protection have ceased to exist (paragraph 108(1)(e) of the IRPA); however, this general rule does not apply to persons who can establish that there are “compelling reasons” arising out of previous persecution or treatment for refusing to avail themselves of the protection of the country which they left (subsection 108(4) of the IRPA):

<i>Immigration and Refugee Protection Act,</i> <i>SC 2001, c 27</i>	<i>Loi sur l’immigration et la protection</i> <i>des réfugiés, LC 2001, ch 27</i>
--	--

Rejection

Rejet

108. (1) A claim for refugee protection shall be rejected, and a person is not a Convention refugee or a person

108. (1) Est rejetée la demande d’asile et le demandeur n’a pas qualité de réfugié ou de personne à protéger dans tel des cas suivants:

in need of protection, in any of the following circumstances:

...

[...]

(e) the reasons for which the person sought refugee protection have ceased to exist.

e) les raisons qui lui ont fait demander l'asile n'existent plus.

...

[...]

Exception

Exception

(4) Paragraph (1)(e) does not apply to a person who establishes that there are compelling reasons arising out of previous persecution, torture, treatment or punishment for refusing to avail themselves of the protection of the country which they left, or outside of which they remained, due to such previous persecution, torture, treatment or punishment.

(4) L'alinéa (1)e) ne s'applique pas si le demandeur prouve qu'il y a des raisons impérieuses, tenant à des persécutions, à la torture ou à des traitements ou peines antérieurs, de refuser de se réclamer de la protection du pays qu'il a quitté ou hors duquel il est demeuré.

[20] The doctrine of this Court holds that for subsection 108(4) of the IRPA and the compelling reasons ground to apply, the applicant had to first persuade the RAD that he had a well-founded fear of persecution in his country of origin. As Mr. Justice O'Reilly said in *Ismail v. Canada (Citizenship and Immigration)*, 2016 FC 650, "claimants must show that they once qualified for refugee protection; they do not have to establish that they actually achieved it." (See also *Perger v. Canada (Minister of Citizenship and Immigration)*, 2001 FCT 551, at paragraph 15; *Nadjat v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 302, at paragraph 50; *Salazar v. Canada (Minister of Citizenship and Immigration)*, 2011 FC 277, at paragraphs 31 to 35).

[21] It is not enough to establish that one may have been a refugee, because the protection granted to the refugee claimant is generally understood to be prospective.

[22] In *Canada (Minister of Employment and Immigration) v. Obstoj*, [1992] 2 F.C. 739

(C.A.) [*Obstoj*], Mr. Justice Hugessen of the Federal Court of Appeal held that subsection 2(3) of the *Immigration Act*—now subsection 108(4) of the IRPA—must be interpreted as:

. . . requiring Canadian authorities to give recognition of refugee status on humanitarian grounds to this special and limited category of persons, i.e., those who have suffered such appalling persecution that their experience alone is a compelling reason not to return them, even though they may no longer have any reason to fear further persecution.

(*Obstoj*, at page 748)

[23] What Parliament means by “compelling reasons” (or the more elegant translation:

“raisons impérieuses”) is not defined in the IRPA. Although the phrase is found in

paragraph 1 C5 of the *United Nations Convention Relating to the Status of Refugees*,

July 28, 1951, [1969] R.T. Can. No. 6 (the Convention), the Convention itself does not further

define it:

C. This Convention shall cease to apply to any person falling under the terms of section A if:

. . .

(5) He can no longer, because the circumstances in connection with which he has been recognized as a refugee have ceased to exist, continue to refuse to avail himself of the protection of the country of his nationality; Provided that this paragraph shall not apply to a refugee falling under section A(1) of this article who is able to invoke **compelling reasons** arising out of previous persecution for refusing to avail himself of the protection of the country of nationality.

(Emphasis added.)

[24] James C. Hathaway writes as follows regarding paragraph 1 C5 of the convention:

The intention of the drafters in inserting the “compelling reasons” exception was two-fold: first, to recognize the legitimacy of the psychological hardship that would be faced by victims of persecution were they to be returned to the country responsible for their maltreatment; and second, to protect the victims of past atrocities from harm at the hands of private citizens, whose attitudes may not have reformed in tandem with the political structure.

(Hathaway, James C., *The Law of Refugee Status*, Toronto: Butterworths, 1991, pages 203 and 204)

[25] In *Shahid v. Canada (Minister of Citizenship and Immigration)*, (1995) 28 Imm. L.R. (2nd) 130 (F.C.T.D.) [*Shahid*], this Court set out the relevant considerations for determining whether compelling reasons exist:

The board, once it embarked upon the assessment of the applicant’s claim under subsection 2(3) of the (former *Immigration Act*), had the duty to consider the level of atrocity of the acts inflicted upon the applicant, the repercussions upon his physical and mental state, and determine whether this experience alone constituted a compelling reason not to return him to his country.

Shahid, at page 138).

[26] Concretely, compelling reasons are warranted by the trauma experienced by refugee claimants, who, even if a given situation no longer exists, never really get over the trauma. The Office of the United Nations High Commissioner’s handbook on determining refugee status states the following:

136. The second paragraph of this clause contains an exception to the cessation provision contained in the first paragraph. It deals

with the special situation where a person may have been subjected to very serious persecution in the past and will not therefore cease to be a refugee, even if fundamental changes have occurred in his country of origin. The reference to Article 1 A (1) indicates that the exception applies to “statutory refugees”. At the time when the 1951 Convention was elaborated, these formed the majority of refugees. The exception, however, reflects a more general humanitarian principle, which could also be applied to refugees other than statutory refugees. **It is frequently recognized that a person who – or whose family – has suffered under atrocious forms of persecution should not be expected to repatriate. Even though there may have been a change of regime in his country, this may not always produce a complete change in the attitude of the population, nor, in view of his past experiences, in the mind of the refugee.**

(Emphasis added)

[27] Canadian law recognizes the idea underlying trauma that has been experienced. In this regard, my colleague Mr. Justice Martineau wrote comments in *Suleiman v. Canada (Minister of Citizenship and Immigration)*, 2004 FC 1125, that are worth citing in their entirety:

[19] The degree, to which a refugee claimant lives his anguish upon thought of being forced to return from where he came, is subject to the state of his psychological health (strength). **The formulative question to ask in regard to “compelling reasons” is, should the claimant be made to face the background set of life which he or she left, even if the principal characters may no longer be present or no longer be playing the same roles? The answer lies not so much in established determinative conclusive fact but rather more to the extent of travail of the inner self or soul to which the claimant would be subjugated.** The decision, as all decisions of a compelling nature, necessitates the view that **it is the state of mind of the refugee claimant that creates the precedent - not necessarily the country, the conditions, nor the attitude of the population, even though those factors may come into balance.** Moreover, this judgment does not involve the imposition of Western concepts on a subtle phenomenon which roots in the individuality of human nature, an individuality which is unique and has grown in an all-together different social and cultural environment. Therefore, consideration should also be given to the claimant’s age, cultural background and previous social experiences. Being resilient to adverse conditions

will depend of a number of factors which differ from one individual to another.

(Emphasis added)

[28] As previously explained, for refugee status to be granted for compelling reasons, the refugee claimant must have been in a situation that would have enabled him to obtain refugee protection had it not been for the change in circumstances. Today, the plague epidemic in Oran is over, but could the applicant Dr. Rieux have applied for refugee protection at the time? Within the meaning of section 96 of the IRPA, the applicant submitted that the positions he had taken as a physician were political opinions and that he was persecuted because of them. Within the meaning of section 97 of the IRPA, the applicant submitted that he was a person in need of protection because of a risk to his life or a risk of cruel and unusual treatment or punishment as a result of the plague epidemic.

[29] The Supreme Court defined a political opinion within the meaning of section 96 of the IRPA as “any opinion on any matter in which the machinery of state, government, and policy may be engaged” (*Canada (Attorney General) v. Ward*, [1993] 2 SCR 689, at page 693). This definition is very broad. For example, in *Klinko v. Canada (Minister of Citizenship and Immigration)*, 2000 CanLII 17111 (FCA), [2000] 3 FC 327, the Federal Court of Appeals extended it to cover those who expose corruption within government. Clearly, this Court cannot doubt—as the RAD implicitly confirmed—that the positions taken by the applicant Dr. Rieux are political opinions.

[30] That being said, did the RAD reasonably find that the government's actions in this case did not constitute persecution within the meaning of the IRPA? I do not believe the RAD erred on this question: from the facts of record, it does not appear that the government has taken any action against the applicant.

[31] The plague is a disease that threatens human life. This is hardly a controversial statement; however, subparagraph 97(1)(b)(iv) of the IRPA provides that a person can only qualify as a person in need of protection if "the risk is not caused by the inability of that country to provide adequate health or medical care." In other words, it is necessary here to determine whether the risk facing the applicant Dr. Rieux resulted from his country's inability to provide the health care to fight the plague epidemic.

[32] In *Covarrubias v. Canada (Minister of Citizenship and Immigration)*, 2006 FCA 365 [*Covarrubias*], the Federal Court of Appeal had to determine what Parliament meant by "the inability" to provide health care. The Federal Court of Appeal determined that the scope of subparagraph 97(1)(b)(iv) of the IRPA must be sufficiently broad so as not to require the Court "to inquire into the decisions of foreign governments to allocate their public funds" (*Covarrubias*, at paragraph 38). A foreign government is unable to provide health care when it does not have a universal health care system, for example.

[33] On the other hand, the Federal Court of Appeal clarified that subparagraph 97(1)(b)(iv) of the IRPA must not be interpreted so broadly that the Act is rendered inoperative: "The wording of the provision clearly leaves open the possibility for protection where an applicant can show

that he faces a personalized risk to life **on account of his country's unjustified unwillingness to provide him with adequate medical care**, where the financial ability is present” (Emphasis added) (*Covarrubias*, at paragraph 39). In short, it is a distinction between the inability to provide health care (including due to budgetary choices), and the fact that the government in question is “unwilling” to provide it, *Covarrubias*, at paragraph 35).

[34] On this issue, the RAD was mistaken: clearly, local authorities refused to act diligently to put an end to the epidemic. The Mayor-Prefect could have acted, but other imperatives prevailed, and in the end, the city of Oran as a whole paid the price. Section 97 of the IRPA applies to the applicant's situation.

[35] The applicant was forced to endure the government's failure to act. A man of courage, the applicant dedicated himself heart and soul to correcting the situation; however, the simple tools at his disposal were not enough. The horror of the disease left the applicant grappling with the tragedy of lost lives and human suffering. These events indelibly marked the applicant's heart, mind and soul. The applicant will never leave Oran, at least in spirit. Although the plague is over, the applicant would experience excruciating suffering if he were forced to return. The RAD unreasonably held that compelling reasons should not apply in the applicant's case.

III. Conclusion

[36] The application for judicial review is granted and the matter is returned to the RAD for consideration anew by a differently constituted panel.