Date: 20090330

Docket: IMM-1474-09

Citation: 2009 FC 326

Ottawa, Ontario, March 30, 2009

PRESENT: The Honourable Mr. Justice Martineau

BETWEEN:

**THE TORONTO COALITION TO STOP THE WAR,
THE OTTAWA PEACE ASSEMBLY, THE SOLIDARITY
FOR PALESTINIAN HUMAN RIGHTS,
GEORGE GALLOWAY, JAMES CLARKE,
YAVAR HAMEED, HAMID OSMAN,
KRISNA SARAVANAMUTTU,
CHARLOTTE IRELAND,
SID LACOMBE, JUDITH DEUTSCH
JOEL HARDEN,
and DENIS LEMELIN,
LORRAINE GUAY**

Applicants

and

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

Respondents

REASONS FOR ORDER AND ORDER

[1] This urgent motion for the issuance of an interim order was heard yesterday.

[2] George Galloway, one of the applicants in the herein proceeding, is a British citizen and member of the Parliament of the United Kingdom. He is due to speak tonight in Toronto at a public forum entitled "Resisting War from Gaza to Kandahar", hosted by the Toronto Coalition to Stop the War, one of the other applicants in the herein proceeding. Other engagements to speak in Mississauga, Montreal and Ottawa are scheduled for March 31, April 1 and April 2, 2009 respectively.

[3] Mr. Galloway has been in Canada before and has spoken to Canadian audiences as well. He has no criminal record and has apparently never had a problem entering any country. He is currently on a speaking tour in the United States and intends to present himself at the Lacolle, Québec port-of-entry sometime this afternoon. However, he has no desire to be detained in Canada on the grounds that he is inadmissible to Canada.

[4] The applicants bring this motion seeking an order of this Court to permit Mr. Galloway to enter Canada. To succeed in this motion, the applicants must persuade me that: (a) there is a serious issue to be tried; (b) the applicants would suffer irreparable harm if their motion does not succeed; and (c) the balance of convenience favours the applicants. All three parts of this test must be met. Before turning to the elements of the test for granting the motion, I will set out some of the relevant background and facts.

[5] As a British citizen, Mr. Galloway does not require a temporary resident visa to visit Canada: paragraph 190(1)(b)(i) of the *Immigration and Refugee Protection Regulations*, SOR/2002-

227, as amended (the Regulations). Neither does he need to obtain a work permit as a guest speaker: paragraph 186(j) of the Regulations. That said, every person seeking to enter Canada must appear for an examination to determine whether that person has a right to enter Canada or is or may become authorized to enter and remain in Canada: subsection 18(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27, as amended (the Act). Practically speaking, this examination would be conducted by an officer of Canada Border Services Agency (the CBSA) at the time Mr. Galloway presents himself at a port-of-entry: subsection 15(1) of the Act and paragraph 28(b) of the Regulations.

[6] A permanent resident or foreign national is inadmissible on security grounds where there are reasonable grounds to believe that the facts referred to in subsection 34(1) of the Act have occurred, are occurring or may occur: section 33 of the Act. Engaging in terrorism or being a member of a terrorist organization are grounds of inadmissibility: paragraphs 34(1)(c) and (f) of the Act. However, the matters referred to in subsection 34(1) of the Act do not constitute inadmissibility in respect of a permanent resident or a foreign national who satisfies the Minister (in this case, the Minister of Public Safety and Emergency Preparedness) that their presence in Canada would not be detrimental to the national interest: subsection 4(2), 6(3) and 34(2) of the Act.

[7] An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister. If the Minister is of the opinion that the report is well-founded, subject to certain exceptions, the Minister may refer the report to the Immigration Division of the

Immigration and Refugee Board for an admissibility hearing. In those cases, the Minister may make a removal order. See subsections 44(1) and 44(2) of the Act. In the meantime, a temporary resident permit may be delivered to the foreign national who is inadmissible if an officer is of the opinion that it is justified in the circumstances. However, the officer shall act in accordance with any instruction that the Minister may give: see subsections 24(1) and (3) of the Act. That said, both the officer and the Immigration Division are empowered to arrest and detain, or as the case may be to order or maintain the detention of the permanent resident or foreign national, where there are reasonable grounds to believe that the latter he is inadmissible and is a danger to the public, or is inadmissible on grounds of security. See sections 55 to 58 of the Act.

[8] Mr. Galloway's personal views and open sympathies for the Palestinians and their cause have become a matter of public record. Earlier this month, media reported that he was part of a convoy organized by Viva Palestina which delivered financial and material assistance to Gaza and that he would personally donate £ 25,000 ($35,000) and a fleet of vehicles. This apparently prompted the Hamas government in Gaza to deliver a Palestinian passport to Mr. Galloway.

[9] The applicants, who include individuals and other interested organizations, now fear that the applicant Galloway will not be allowed to enter the country, but may even be detained if he seeks to enter at a port-of-entry. Mr. Orr, an official of the High Commission of Canada, Immigration Section, by letter dated March 20, 2009, has advised the applicant Galloway, apparently as a matter of "courtesy", that according to the "preliminary assessment" of the CBSA, he is inadmissible to Canada on security grounds:

> Hamas is a listed terrorist organization in Canada. There are reasonable grounds to believe you have provided financial support for Hamas. Specifically, we have information that indicates you organized a convoy worth over one million British pounds in aid and vehicles, and personally donated vehicles and financing to Hamas Prime Minister Ismail Haniya. Your material support for this organization makes you inadmissible to Canada …

[10] Mr. Galloway is invited by the letter above to make submissions and is further advised that "[if] we do not receive any submissions on or before March 30, 2009, and you present yourself at a Port of Entry, the CBSA officer will make a final determination of inadmissibility based on this preliminary assessment and any submissions you may make at the time". Moreover, Mr. Galloway is informed that, in the event an application for a temporary resident permit is submitted in order to overcome this inadmissibility, it is unlikely that the application would be successful. Written representations have been submitted by applicant Galloway's counsels with respect to the allegations or inferences mentioned by Mr. Orr in his letter dated March 20, 2009. No reply with respect to same has been made by the respondents or their representatives.

[11] Challenging by way of an application for leave and judicial review the legality of the actions made or announced in the letter dated March 20, 2009 (the impugned decision), the applicants now seek an interim order enjoining the respondents and their officials from denying Mr. Galloway entry to Canada, between March 30 and April 3, 2009, on the basis that he is a person described in subsection 34(1) of the Act.

[12] Sections 18.2 and 44 of the *Federal Courts Act*, R.S.C. 1985, c. F-7, as amended, as well as rules 372 and 373 of the *Federal Courts Rules*, SOR/98-106, as amended, clearly empower a judge of the Court, upon motion, to grant interim relief in the form of an interlocutory injunction especially when the right the applicant seeks to enforce or protect can only be exercised immediately or not at all. An interlocutory injunction is typically sought so as to preserve matters as they are until a final determination of the issues. All elements of the known tri-partite test mentioned at paragraph 4 of the present reasons must be met.

[13] First, on the basis of the evidence and representations submitted by the parties, I am satisfied that there are serious issues to be tried. Most issues, if not all, raised by the applicants in their motion material meet the low threshold established by the case law.

[14] The applicants' argument that the reasonableness of the impugned decision can be examined on its merits by the Court is certainly not frivolous or vexatious. While Mr. Orr's letter of March 20, 2009 is characterized as merely "informational" by the respondents' learned counsel, its content seems to suggest otherwise, as it announces to Mr. Galloway that some sort of "preliminary assessment" has already taken place. Although the exception, interlocutory decisions of federal boards may be reviewed by the Court, and at this early stage, I am not ready to affirm that the present application for leave and judicial review is doomed to fail on the ground that an interlocutory decision is not reviewable.

[15] At the hearing, respondents' counsel also submitted that the applicants (other than Mr. Galloway) lack standing to bring an application for leave and judicial review based on their alleged Charter rights. While the standing of those applicants may be questionable, I do not need to decide this debatable issue today.

[16] It remains that Mr. Galloway is directly affected by the actions purportedly taken by the respondents and announced to him as a matter of "courtesy". Mr. Galloway claims that the allegations or inferences made in the impugned decision, which have been publicized in the media, are unreasonable and/or defamatory. He alleges that he has never engaged in terrorism and that he is not a member of a terrorist organization. Therefore, Mr. Galloway may still have some interest to set aside the impugned decision even if he chooses not to present himself this afternoon at the port-of-entry in Lacolle, Québec.

[17] Assuming that the applicants are able at a later date to convince the Court to grant leave and to examine the legality of the impugned decision, which remains interlocutory, the Court may be asked on the merits to determine whether Mr. Galloway's participation in the convoy organized by Viva Palestina and/or personal financial support at this occasion, can legally serve as a basis to make an inadmissibility finding under paragraphs 34(1)(c) or (f) of the Act on the grounds that Hamas is a listed terrorist organization in Canada. In this respect, the applicants wish to argue that Mr. Galloway's participation to this convoy simply represents a symbolic gesture and political statement made by pacifists through the provision of humanitarian aid to the Palestinian people of Gaza. This is certainly a debatable issue which is not frivolous or vexatious.

[18] Some remarks made in Mr. Orr's letter of March 20, 2009 letter, particularly the following: "In order to overcome this inadmissibility, you could submit an application for a Temporary Resident Permit. I have been asked to convey to you that it is unlikely that the application would be successful", may also give credence to the applicants' argument that the whole matter is being pre-judged, particularly in light of certain other public comments made by the Minister of Citizenship and Immigration's spokesman, which comments have been reported subsequently in the media. Moreover, some hearsay evidence upon which the applicants intend to rely, may be invoked to support their claim of external lobbying and political influence leading to the making of the impugned decision, which is alleged to be one made in bad faith and politically motivated. Again, it is not necessary that I express an opinion on the admissibility or reliability of such hearsay evidence. Suffice it to say that the arguments raised by the applicants are not frivolous or vexatious.

[19] This now brings me to the well-known irreparable harm and balance of convenience considerations.

[20] "Irreparable" refers to the nature of the harm suffered rather than its magnitude. In this regard, I must ask myself whether a refusal to grant relief could so adversely affect the applicants that the harm could not be remedied by the eventual decision of the Court on the merits. Irreparable harm must constitute more than a series of possibilities and cannot be simply based on assertions and speculation.

[21] Essentially, Mr. Galloway claims that irreparable harm is established because individuals who want to hear him speak in Canada will be deprived of this opportunity. However, Mr. Galloway has been adamant in his statements reported by the media that he will be heard in Canada by some other technical means if he remains out of the country, in this case in the United States:

- "I'll come to the Canadian border and I will be heard in Canada one way or another. Whether it's by megaphone across the bridge or through the new technology that now exits. This here-today-gone-tomorrow minister will not stop me being heard by those who want to hear me in Canada." (The Toronto Star, March 21st, 2009)

- "I will one way or another be heard in Canada – either in person or by some other technical means." (The Ottawa Sun, March 21st, 2009)

- "More than half a century ago Paul Robeson, one of the greatest men who ever lived, was forbidden to enter Canada not by Ottawa but by Washington, which had taken away his passport. But he was still able to transfix a vast crowd of Vancouver's mill hands and miners with a 17-minute telephone concert, culminating in a rendition of the Ballad of Joe Hill. Technology has moved on since then. And so from coast to coast, minister Kenney notwithstanding, I will be heard – one way or another."
(The Guardian, March 21st, 2009)

- I'll be heard in Canada, either electronically or in person. We've not given up hope; there's an appeals process and we've appealed." (The Ottawa Citizen, March 24th, 2009)

- "One way or another, the thousands of people who have bought tickets to hear me, in four different places, will hear me. The technology exists through which I can still get my message across. I suppose in a perverse way, Minister

> Kenney's decision has further increased the audience, one way or another." (CTV.ca, March 25th, 2009)

[22] Despite the fact that the evidence of irreparable harm appears speculative, Mr. Galloway seeks an interlocutory injunction to be permitted entry to Canada without any examination by an officer of his admissibility. At one time, the Court was reluctant to grant mandatory interlocutory injunctions but, over time, the Court has been somewhat more willing to do so. Still, some greater level of caution arises when, particularly at an interlocutory stage, the Court is asked to order somebody to take a positive action that will change the *status quo*. It is only in clear cases that mandatory injunction relief against the enforcement of a law will likely be granted by the Court before a full hearing of the application for judicial review. In such instances, public interest and the relative strength of the parties' arguments, are relevant factors to consider in the assessment of balance of convenience.

[23] While the applicants in this case (other than Mr. Galloway), who are residents in Canada, invoke their constitutionally guaranteed freedoms of expression and association, this has to be balanced with the objectives of the Act which are to protect the health and safety of Canadians, and to maintain the security of Canadian society. A fundamental principle of immigration law is that non-citizens do not have an unqualified right to enter in Canada. The admission of a foreign national to this country is a privilege determined by statute, regulation or otherwise, and not a matter of right. In this respect, Parliament has expressly given the CBSA officers legal authority to exclusively determine whether a foreign national who seeks to enter this country is admissible (sections 15 and

18 of the Act). Yet, there has been no final determination made by an officer with respect to the admission in Canada of Mr. Galloway.

[24] The issues raised by the applicants are both factually driven and highly complex from the point of view of the applicable principles of law. If I were to grant the mandatory interim relief sought today by the applicants, this would, by necessity, imply that the applicants are likely to succeed on the merits. I acknowledge that serious arguments are advanced against the impugned decision. However, a proper factual record and the benefit of full legal argument, (notably on the complex issue of whether or not the grounds of inadmissibility stated in the impugned decision are founded), are lacking at the present time. Therefore, I am not ready today to exempt Mr. Galloway from the application of the provisions in the Act and Regulations respecting entry and examination, or to order the respondents' officials to allow the applicant Galloway to come to Canada between March 30 and April 2, 2009, without any final decision made on his admissibility.

[25] In conclusion, I am not satisfied that all three elements of the test for the issuance of an interim order or interlocutory injunction, namely serious issue, irreparable harm and balance of convenience in favour of the applicant, have conjunctively been met by the applicants. Accordingly, the present motion must be dismissed.

ORDER

THIS COURT ORDERS that the motion for interim order or interlocutory injunction presented by the applicants be dismissed.

"Luc Martineau"
Judge

FEDERAL COURT

NAME OF COUNSEL AND SOLICITORS OF RECORD

DOCKET:	IMM-1479-09
STYLE OF CAUSE:	**THE TORONTO COALITION TO STOP THE WAR, THE OTTAWA PEACE ASSEMBLY, THE SOLIDARITY FOR PALESTINIAN HUMAN RIGHTS, GEORGE GALLOWAY, JAMES CLARKE, YAVAR HAMEED, HAMID OSMAN, KRISNA SARAVANAMUTTU, CHARLOTTE IRELAND, SID LACOMBE, JUDITH DEUTSCH JOEL HARDEN, and DENIS LEMELIN, LORRAINE GUAY and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS AND THE MINISTER OF CITIZENSHIP AND IMMIGRATION**
PLACE OF HEARING (BY VIDEOCONFERENCE):	Toronto and Ottawa, Ontario
DATE OF HEARING:	March 29, 2009
REASONS FOR JUDGMENT AND JUDGMENT:	Martineau J.
DATED:	March 30, 2009

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