Federal Court  Cour fédérale

Date: 20150501

Docket: IMM-4621-13

Citation: 2015 FC 573

Ottawa, Ontario, May 1, 2015

PRESENT: The Honourable Mr. Justice LeBlanc

BETWEEN:

AMRO ALOMARI
RULA MANSOUR

Applicants

and

MINISTER OF CITIZENSHIP, IMMIGRATION AND MULTICULTURALISM

Respondent

ORDER AND REASONS

I. Introduction

[1] The Applicants, Amro Alomari (Mr. Alomari) and Rula Mansour (Ms. Mansour) are husband and wife. Mr. Alomari is a Palestinian with Jordanian citizenship and a resident of the West Bank and Ms. Mansour is a Palestinian with Israeli citizenship. The Applicants met in

2007 and have travelled and lived abroad together, often in Canada or the United States. Mr. Alomari obtained a visitor's visa to Canada in April 2012, which was used in May 2012, and he returned to Canada in August 2012, shortly after Ms. Mansour arrived in Canada with her daughter, on a student visa, and here to meet with her son, also in Canada since 2010. The Applicants were married, in Canada, on October 22, 2012. Ms. Mansour learned, around that time, that she was pregnant. Back then, it seems the Applicants were planning on returning to Palestine, in hope that Mr. Alomari's family would accept their union.

[2] On March 19, 2013, the Applicants made a joint claim for refugee protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 (the Act), saying that they feared Mr. Alomari's family would physically harm them and their unborn child if they were to return to Palestine. They explained that after Mr. Alomari's family learned of their marriage and pregnancy, members of the family began threatening them. For the purposes of the Act, Ms. Mansour is considered to be from a Designated Country of Origin (DCO).

[3] This claim was dismissed by the Refugee Protection Division of the Immigration and Refugee Board of Canada (the RPD) on June 17, 2013, on the basis that the Applicants had failed to establish, on sufficient and reliable evidence, the allegation of a well-founded fear of persecution. In fact, the RPD found that the evidence in areas crucial to the Applicants' claim lacked credibility. Furthermore, it found it had not been demonstrated that Mr. Alomari's family had any persecutory interest in the Applicants. Rather, the RPD concluded that the evidence and chronology reflected strong motivation and attraction to Canada for non-refugee reasons, as well as extensive opportunity for the Applicants to have made refugee claims in Canada or the United

States, if the genuine need existed. The RPD concluded that the only risk existing was a generalized one, that of criminality in the city of Aaram, where the Applicants stated they could live, or in their countries of citizenship.

[4] The Applicants contend that the RPD breached the principles of procedural fairness in treating both refugee claimants as being from DCO countries, which had the effect of depriving Mr. Alomari, who is from a non-DCO country, access to the Refugee Appeal Division (RAD) and to a Pre-Removal Risk Assessment (PRRA), as well as to the procedural timelines normally applicable to the processing of a refugee claim. They also submit that their right to a fair hearing was breached when the RPD refused to accept the late-filling of documents despite the Applicants being unrepresented.

[5] The Applicants also challenge the reasonableness of the RPD's decision.

[6] For the reasons below, the application for judicial review is dismissed.

II. Issue and Standard of Review

[7] This matter raises questions related to procedural fairness, an issue which is reviewable under the standard of correctness (*Mission Institution v Khela*, 2014 SCC 24, [2014] 1 SCR 502, at para 79; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 43; *IR v Canada (Minister of Citizenship and Immigration)*, 2013 FC 973, at para 9 [*IR*], at para 21; *Tamas v Canada (Minster of Citizenship and Immigration)*, 2012 FC 1361, at para 19).

[8] The other issue raised in this judicial review application goes to the RPD's negative credibility findings. It is equally well-established that such findings attract the standard of reasonableness since it is considered at the heart of the RPD's expertise (*Rahal v Canada (Minister of Citizenship and Immigration)*, 2012 FC 319 [*Rahal*], at para 22; *Zhou v Canada (Citizenship and Immigration)*, 2013 FC 619 at para 26; *Lubana v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 116, 228 FTR 43 at paragraph 7; *Shatirishvili v Canada (Citizenship and Immigration)*, 2014 FC 407, at para 19). Reasonableness requires the existence of justification, transparency and intelligibility within the decision-making process. It is also concerned with whether the decision falls within a range of possible, acceptable outcomes defensible in respect of the facts and law (*Dunsmuir v New Brunswick*, 2008 SCC 9, [2008] 1 SCR 190, at para 47).

III. Analysis

A. *Preliminary Issue*

[9] The Respondent submits that Mr. Alomari is barred from seeking judicial review by paragraph 72(2)(a) of the Act, as he did not exhaust his internal appeal rights by appealing the RPD decision to the RAD pursuant to section 110 of the Act. As a result, he should be struck from the application for judicial review.

[10] Paragraph 72(2)(a) of the Act is a broad prohibition to resort to judicial review until "any" right of appeal has been exercised. It prevails over section 18.1 of the *Federal Courts Act* granting the right to apply for judicial review (*Somodi v Canada (Minister of Citizenship and*

Immigration), 2009 FCA 288, [2010] 4 FCR 26, at paras 23-24 [*Somodi*]). However, the Federal Court of Appeal in *Habtenkiel v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 180 [*Habtenkiel]*, clarified that *Somodi* above does not stand for the proposition that the mere existence of a statutory right of appeal necessarily bars judicial review in all cases. A certain flexibility exists for the Court to assess whether an appeal on the issues in question was truly available to the applicant (*Habtenkiel*, at para 36).

[11] In this case, what transpires from the facts and the tribunal record is that there was some confusion on both sides as to whether Mr. Alomari had access to an appeal before the RAD: the RPD's Notice of Decision is silent on that point and the record shows that there was no response to Mr. Alomari's inquiry, and that of his counsel, to clarify this point.

[12] In these peculiar circumstances, I will allow Mr. Alomari to remain as a party to this judicial review application.

B. *Procedural fairness*

[13] Mr. Alomari contends that his right to procedural fairness was breached in two ways: first, because the RPD proceeded in joining the two claims together, resulting in Mr. Alomari's claim to be treated as one from a DCO country with a fast-tracked procedure and no right to appeal to the RAD and no access to a PPRA; second, because the RPD refused to accept the documentation he attempted to file at the hearing.

(1) Joining of Claims

[14] This argument must fail. The *Refugee Protection Division Rules*, SOR/2012-256, (Rules) require that claims of family members be joined. When, as here, this means the joining of DCO and non-DCO claims, the hearing will be scheduled along the DCO timelines, which are shorter than for non-DCO claims. However, Rule 56(2) allows a refugee claimant to make an application to the RPD to separate claims. Therefore, a procedural vehicle does exist to correct defects that can arise from joining claims together. It was not used in this case.

[15] Furthermore, the fact that the joining of claims will have the practical effect of a hearing scheduled along the DCO timeline does not automatically affect the fairness of the process. As the Respondent points out, refugee claimants in Canada are entitled to a full oral hearing (*Singh v Canada (Minister of Employment and Immigration)*, (1985) 1 SCR 177) but beyond this, fundamental justice does not provide for a specific amount of time within which to prepare for a hearing. A breach of procedural fairness must be material to the claim or result in a prejudice for the refugee claimant (*Patel v Canada (Minister of Citizenship and Immigration)*, 2002 FCA 55, at para 12 [*Patel*]).

[16] Here, I find that all the necessary tools and protection existed for the Applicants. If they believed that the DCO timelines were unfair, they were allowed by the Rules to request an adjournment or a rescheduling of the hearing (Rule 54). However, it was incumbent on them to make the request (*Bema v Canada (Minister of Citizenship and Immigration)*, 2007 FC 845 at para 22). Again, they did not make such a request whereas nothing prevented them to do so.

Moreover, there is no evidence that a different timeline would have impacted on the outcome of the decision or on the fairness of the process. This is fatal to this part of the Applicants' argument.

[17] Finally, I agree with the Respondent that Mr. Alomari's argument that he is being denied access to the RAD and to a PRRA simply because he is married to someone from a DCO country, cannot stand. The reason he did not bring the RPD's decision to the RAD is not because he did not have a right of appeal, but, as I indicated earlier, because of the confusion that surrounded this issue when the RPD released its decision. As for Mr. Alomari's right to a PRRA, it does not turn on his marital status but rather on what the Act says in this regard.

(2) Filing of Documents at the Hearing

[18] On the issue of the late-filing of documents, I cannot agree with the Applicants that this breached their right to a fair hearing. It is true, as the Applicants contend, that the RPD owes unrepresented litigants a heightened duty of fairness (*Nemeth v Canada (Minister of Citizenship and Immigration)*, 233 FTR 301, [2003] FCJ No 776 (QL) at para 13*; Lee v Canada (Minister of Citizenship and Immigration)*, 2012 FC 705, 412 FTR 290 at para 12). However, the Applicants, in this case, sought to submit various articles and reports pertaining to country conditions, two documents pertaining to Mr. Alomari's father's business, and an identification card indicating Mr. Alomari's status as a registered Palestinian refugee. The tribunal record shows that the RPD reviewed the identification card and accepted two of the country condition documents into evidence, but did not accept the other documents on the basis that the Immigration and Refugee Board had its own information packages.

[19] Again, a breach of procedural fairness must be material to the claim or result in a prejudice for the Applicants (*Patel,* above). In the case at bar, the Applicants have not explained how they were prejudiced by the RPD's decision not to accept the remainder of the documents.

C. *Reasonableness of the RPD's decision*

[20] The Applicants submit numerous arguments in order to establish that the RPD's decision was unreasonable. They say that the burden of proof upon a refugee claimant is limited only to a demonstration that he or she faces more than "a mere possibility" of persecution if returned to his or her country of origin. They say that the credibility findings are vague, that the RPD did not properly assess the evidence before it and finally, that it failed to consider the *sur place* aspect of their claim.

[21] While the Applicants are correct in asserting that refugee claimants need only to establish that there is more than a mere possibility they would face persecution in their country of origin, the facts in support of this conclusion must be established on a balance of probabilities. This distinction is explained in *Hinzman v Canada (Minister of Citizenship and Immigration)* 2006 FC 420, [2007] 1 FCR 561 at paras 183-184, which was upheld by the Federal Court of Appeal:

> The decision in *Adjei* stands for the proposition that a refugee claimant need only demonstrate that there is more than a mere possibility that the individual would face persecution in his or her country of origin in the future…
>
> A distinction has to be drawn between the legal test to be applied in assessing the risk of future persecution, and the standard of proof to be applied with respect to the facts underlying the claim itself. While the legal test for persecution only requires a demonstration that there is more than a mere possibility that the individual will face persecution in the future, the standard of proof

> applicable to the facts underlying the claim is that of the balance of probabilities: *Adjei*, at page 682. See also *Li v. Canada (Minister of Citizenship and Immigration)*, [2005] 3 F.C.R. 239 (F.C.A.), at paragraphs 9-14 and 29.
>
> [emphasis added].

[22] Thus, while the RPD may have incorrectly stated the legal test for persecution, this will not be determinative unless the RPD also erred in finding that the facts underlying the claim had not been credibly established on a balance of probabilities. The issue the Court must then consider is whether the RPD's finding that the facts underlying the claims had not been credibly established was reasonable. The RPD's findings of fact, including its findings with respect to credibility, are subject to significant deference, though they are reviewable if perverse, capricious or made without regard for the evidence (*IR*, above, at para 34).

[23] In this case, the RPD identified significant problems with the Applicants' claim, namely : (i) they stated they could live with their child in Israel, despite having initially indicated the contrary; (ii) there were inconsistencies between their testimony and their Basis of Claim form regarding the time the threats started; (iii) no documentation was adduced to support the allegation that a warrant exists against them in Palestine and that Mr. Alomari's family retaliated against him by freezing his bank account in Palestine; and (iv) the Applicants had several opportunities to submit a refugee protection claim in the past, showing strong private motivation to immigrate for non-refugee reasons.

[24] Considering the above, I find that, when read as a whole, the RPD's decision and the finding that the Applicants had not credibly established their claims were reasonable in light of

the facts and the law. It was open to the RPD to reject the explanations for the lack of documentation, to find that there was inadequate specificity and several inconsistencies around some of the key allegations and to infer that the claimants had other reasons for coming to Canada. Indeed, the Applicants failed to provide supporting documentation on issues that were central to their claim.

[25] The Applicants further contend that the RPD erred in drawing inference or disbelieving their claim based on the absence or failure to file supporting evidence. However, I find that since there were several reasons to doubt the credibility of the allegations made by the Applicants, the RPD did not err in relying on the lack of supporting documentation in assessing the credibility of the Applicants' evidence (*Ahortor v Canada (MEI),* [1993] FCJ No 705 (QL) (FCTD)). Similarly, the RPD did not err in relying on the inconsistency in whether Mr. Alomari's own assets and credit cards were frozen or whether he was removed from his father's company, since this went to the key issue of the absence of supporting documents (*Attakora v Canada (Minister of Employment and Immigration)* (1989), 99 NR 168, [1989] FCJ No 444 at para 9).

[26] As for the other alleged errors in the RPD's decision, namely the failure on the part of the RPD to consider the Applicants' *sur place* refugee protection claim and the vagueness of the decision regarding the documentation that was considered and the finding of a generalized risk, I find that they are not substantiated by the Applicants as the RPD's decision is justified, transparent and intelligible and not, as the Applicants contend, unduly vague. Indeed, reasons may not include all the arguments, statutory provisions, jurisprudence, but that does not impugn

the validity of either the reasons or the result under a reasonableness analysis (*Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 SCR 708, at para 16).

[27] As the Respondent correctly points out, the RPD primarily found that the risk alleged was not established and not that the risk they were facing was generalized in nature. The discussion on the existence of a generalized risk was only related to relocation in the city of Aaram. Finally, in conducting a *sur place* analysis, the RPD is entitled to import its negative credibility findings (*Jiang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1067; *Sun v Canada (Minister of Citizenship and Immigration)*, 2015 FC 387, at para 29). And while it is true that the RPD did not explicitly state that it was or was not conducting a *sur place* analysis, nor did it refer to country documentation evidence, it did have serious credibility concerns that tainted the Applicant's credibility relating to their actions in Canada and the risk that allegedly followed (see *Sanaei v Canada (Minister of Citizenship and Immigration)*, 2014 FC 402, at para 57).

[28] The role of the Court on proceedings of this sort is not to reweigh the evidence and substitute its own view of the case to that of the RPD (*Dunsmuir*, above; *Canada (Citizenship and Immigration) v Khosa*, 2009 SCC 12, [2009] 1 SCR 339, at para 59; *Jiang v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1511 at paras 28-31; *Chekroun v Canada (Minister of Citizenship and Immigration)*, 2013 FC 737, 436 FTR 1, at para 36; *Negm v Canada (Minister of Citizenship and Immigration)*, 2015 FC 272, at para 34). As I have indicated

previously, it can only intervene if the RPD's decision falls outside the range of possible, acceptable outcomes, defensible in fact and in law (*Dunsmuir*, above at para 47).

[29] I find that it was within reason for the RPD to disbelieve the Applicants' story based on the inconsistencies revealed by their testimony and the lack of evidence adduced, particularly on the key aspect of their refugee protection claim.

[30] Finally, I wish to add that Applicants' counsel questioned, at the hearing, the fact that East Jerusalem, where Ms. Mansour is from, is actually part of Israel and therefore, Ms. Mansour is from a DCO. It was put before me that the government of Canada does not recognize Israel's unilateral indexation of East Jerusalem. It is correct to say that Canada does not recognize permanent Israeli control over territories occupied in 1967 (the Golan Heights, the West Bank, East Jerusalem and the Gaza Strip). However, I cannot find that the RPD erred in finding that Ms. Mansour is from a DCO. In fact, it is not up to the RPD to decide if East Jerusalem should be part of the designation. The decision to designate a country as a DCO pertains to the Minister, pursuant to subsection 109.1(1). The Minister deliberately decided to exclude the West Bank and Gaza from the designation of Israel as a DCO as established in the Government notice, Order amending the order designating countries of origin, which came into force on February 15, 2013, Canada Gazette, Vol. 147, No. 8, February 23, 2013, but not East Jerusalem. This is the law that was binding on the RPD at the time of the decision. The Court cannot intervene on this question as the Minister's decision cannot be reviewed by way of judicial review of the RPD's decision.

[31] This judicial review application is dismissed.

[32] Neither party proposed a question of general importance. None will be certified.

ORDER

THIS COURT ORDERS that:

1. The application for judicial review is dismissed.

2. No question is certified.

"René LeBlanc"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4621-13
STYLE OF CAUSE:	AMRO ALOMARI ET AL v MINISTER OF CITIZENSHIP, IMMIGRATION AND MULTICULTURALISM
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 23, 2014
ORDER AND REASONS:	LEBLANC J.
DATED:	MAY 1, 2015

APPEARANCES:

Edward C. Corrigan	FOR THE APPLICANTS
Sharon Stewart Guthrie	FOR THE RESPONDENT

SOLICITORS OF RECORD:

Edward C. Corrigan Barrister and Solicitor London, Ontario	FOR THE APPLICANTS
William F. Pentney Deputy Attorney General of Canada Toronto, Ontario	FOR THE RESPONDENT