Date: 20071120

Docket: IMM-5700-06

Citation: 2007 FC 1216

Ottawa, Ontario, November 20, 2007

PRESENT: The Honourable Madam Justice Dawson

BETWEEN:

OSSAMA KAMAL KAMEL GHALY

Applicant

and

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

Respondents

REASONS FOR JUDGMENT AND JUDGMENT

[1] Mr. Ossama Kamal Kamel Ghaly is a Coptic Christian and a citizen of Egypt who left Egypt in January of 2000. After living for just over three years in the United States, he came to Canada on March 24, 2003. At that time, he made a claim for refugee protection. After the Refugee Protection Division of the Immigration Refugee Board (RPD) declared his refugee claim to be abandoned, Mr. Ghaly applied for a pre-removal risk assessment (PRRA). This application for judicial review is

brought in respect of the decision of the PRRA officer that Mr. Ghaly falls within neither the definition of a Convention refugee nor the definition of a person in need of protection.

[2] In reaching her decision, the PRRA officer found that: (i) while there is evidence that Coptic Christians are discriminated against in Egypt, such conduct does not amount to persecution; and (ii) Mr. Ghaly had not rebutted the presumption that state protection was available to him in Egypt.

[3] This application for judicial review of that decision is allowed because the officer erred in law by failing to consider that Mr. Ghaly had suffered persecution in the past and erred in law when she applied the test to determine the existence of state protection. Both errors of law are reviewable on the standard of correctness.

[4] At the outset, it is important to recognize that Mr. Ghaly's situation before the officer was affected in two respects by the fact that the merits of his refugee claim had not been considered by the RPD.

[5] First, Mr. Ghaly was not restricted by subsection 113(*a*) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (Act), in the evidence he could present to the officer.

[6] Second, no prior decision had been made with respect to the credibility of Mr. Ghaly's evidence. The information put before the officer, all of it being "new" evidence within the meaning of subsection 113(*a*) of the Act, was central to the decision as to protection and, if accepted, would justify allowing the application for protection. The officer did not require Mr. Ghaly to attend a

hearing, which the officer would likely have had to do if, in her view, the information he provided raised a serious issue with respect to his credibility. See: Section 167 of the *Immigration and Refugee Protection Regulations*, SOR/2002-227 (Regulations), and subsection 113(*b*) of the Act. (Section 113 of the Act and section 167 of the Regulations are set out in the appendix to these reasons). Indeed, it appears that the officer accepted the truth of the information provided by Mr. Ghaly, as I believe she was obliged to do, because she did not require Mr. Ghaly to attend a hearing.

[7] The information provided by Mr. Ghaly was that in 1998 he had been threatened and attacked with knives between 10 and 15 times by members of the Gamaat Islamia because he was counselling a fellow Christian, who was tempted to convert to Islam, and because he would not convert to Islam. In 1999, Mr. Ghaly's family was attacked in their home by five men, who Mr. Ghaly described as fundamentalists that were looking for him and threatening to kill him. Mr. Ghaly's parents and sisters were beaten, and their home and its contents were damaged. His father went to the police after this attack, but the police refused to take his report. The family then went to live with relatives. After Mr. Ghaly's attackers learned where he was then living, he obtained a visa for the United States and left Egypt in January of 2000. Since Mr. Ghaly left Egypt, fundamentalists have continued to look for him, issued threats on his life, and said that they would be waiting for his return.

[8] Having decided not to hold a hearing, but rather to accept the information that Mr. Ghaly provided, the following consequences flow at law.

[9] First, as very fairly and properly conceded by counsel for the Minister, the officer erred in law by failing to consider that Mr. Ghaly had been persecuted in the past by members of the Gamaat Islamia on the basis of his religion. As my colleague Justice Tremblay-Lamer wrote in *N.K. v. Canada (Solicitor General)*, [1995] F.C.J. No. 889 at paragraph 23:

> The factual situations which the courts have found to constitute persecution generally involve acts of violence which are often accompanied by death threats. A series of such hostile acts over a long period of time, often affecting the claimant's physical safety, clearly cannot be described simply as discriminatory. [translation]

[10] This error rendered irrelevant the officer's analysis that the treatment generally afforded to Coptic Christians in Egypt amounts to discrimination and not persecution.

[11] Second, the leading authority with respect to the existence of state protection is *Canada (Attorney General) v. Ward*, [1993] 2 S.C.R. 689. At paragraph 50, the Court explained, in the following terms, how a claimant might establish a lack of state protection:

> The issue that arises, then, is how, in a practical sense, a claimant makes proof of a state's inability to protect its nationals as well as the reasonable nature of the claimant's refusal actually to seek out this protection. On the facts of this case, proof on this point was unnecessary, as representatives of the state authorities conceded their inability to protect Ward. Where such an admission is not available, however, clear and convincing confirmation of a state's inability to protect must be provided. For example, a claimant might advance testimony of similarly situated individuals let down by the state protection arrangement or the claimant's testimony of past personal incidents in which state protection did not materialize. Absent some evidence, the claim should fail, as nations should be presumed capable of protecting their citizens. Security of nationals is, after all, the essence of sovereignty. Absent a situation of complete breakdown of

> state apparatus, such as that recognized in Lebanon in Zalzali, it should be assumed that the state is capable of protecting a claimant. [emphasis added]

[12] With respect to the issue of state protection, the officer dismissed the relevance of Mr. Ghaly's evidence about past incidents because Mr. Ghaly did not mention whether the knife attacks were reported to the police. The officer concluded that Mr. Ghaly had not met the duty upon him to seek state protection. In the circumstances before me, in the absence of evidence or submissions made to the officer either that Mr. Ghaly sought protection or that he was not required to seek such protection because protection would not likely have been forthcoming, I am not prepared to find that the officer's conclusion constituted an error.

[13] The officer went on to consider the evidence before her with respect to individuals similarly situated to Mr. Ghaly, as she was obliged to do in view of the length of time that had elapsed since Mr. Ghaly left Egypt. There, however, the officer erred in law by failing to recognize that, on the basis of Mr. Ghaly's evidence, he was similarly situated to Coptic Christians who were targeted by religious extremists and who had been persecuted in the past. By only considering the situation of Coptic Christians in general, the officer erred in law by misapplying the test for state protection articulated in *Ward*, cited above. This error was material in view of the documentary evidence available to the officer that "Egypt treats its Coptic Christian minority as second-class citizens, and is rather less than vigilant about protecting them from attack by Islamic extremists". See: Response to Information Request, EGY42414.FE "The treatment of Christians and state protection available to them (1999-February 2004)".

[14] For these reasons, the application for judicial review is allowed. Counsel posed no question for certification, and I agree that no question arises on this record.

[15] In closing, I note that the Court was much assisted on this application for judicial review by the excellent submissions of Mr. Knapp, on behalf of the Minister, and Ms. Desloges, on behalf of Mr. Ghaly.

JUDGMENT

THIS COURT ORDERS AND ADJUDGES that:

1. The application for judicial review is allowed and the decision of the pre-removal risk assessment officer dated September 28, 2006 is hereby set aside.

2. The matter is remitted for redetermination by a different officer in accordance with these reasons.

"Eleanor R. Dawson"

Judge

APPENDIX

Section 113 of the Act and section 167 of the Regulations read as follows:

113. Consideration of an application for protection shall be as follows:	113. Il est disposé de la demande comme il suit :
	a) le demandeur d'asile

(*a*) an applicant whose claim to refugee protection has been rejected may present only new evidence that arose after the rejection or was not reasonably available, or that the applicant could not reasonably have been expected in the circumstances to have presented, at the time of the rejection;

débouté ne peut présenter que des éléments de preuve survenus depuis le rejet ou qui n'étaient alors pas normalement accessibles ou, s'ils l'étaient, qu'il n'était pas raisonnable, dans les circonstances, de s'attendre à ce qu'il les ait présentés au moment du rejet;

(*b*) a hearing may be held if the Minister, on the basis of prescribed factors, is of the opinion that a hearing is required;

b) une audience peut être tenue si le ministre l'estime requis compte tenu des facteurs réglementaires;

(*c*) in the case of an applicant not described in subsection 112(3), consideration shall be on the basis of sections 96 to 98;

c) s'agissant du demandeur non visé au paragraphe 112(3), sur la base des articles 96 à 98;

(*d*) in the case of an applicant described in subsection 112(3), consideration shall be on the basis of the factors set out in section 97 and

d) s'agissant du demandeur visé au paragraphe 112(3), sur la base des éléments mentionnés à l'article 97 et, d'autre part :

(i) in the case of an applicant for protection who is inadmissible on grounds of serious criminality, whether they are a danger to the public in Canada, or

(i) soit du fait que le demandeur interdit de territoire pour grande criminalité constitue un danger pour le public au Canada,

(ii) in the case of any other applicant, whether the application should

(ii) soit, dans le cas de tout autre demandeur, du fait que la demande devrait être rejetée en raison de la nature et de

be refused because of the nature and severity of acts committed by the applicant or because of the danger that the applicant constitutes to the security of Canada.

[…]

167. For the purpose of determining whether a hearing is required under paragraph 113(*b*) of the Act, the factors are the following:

(*a*) whether there is evidence that raises a serious issue of the applicant's credibility and is related to the factors set out in sections 96 and 97 of the Act;

(*b*) whether the evidence is central to the decision with respect to the application for protection; and

(*c*) whether the evidence, if accepted, would justify allowing the application for protection.

la gravité de ses actes passés ou du danger qu'il constitue pour la sécurité du Canada.

[…]

167. Pour l'application de l'alinéa 113*b*) de la Loi, les facteurs ci-après servent à décider si la tenue d'une audience est requise :

a) l'existence d'éléments de preuve relatifs aux éléments mentionnés aux articles 96 et 97 de la Loi qui soulèvent une question importante en ce qui concerne la crédibilité du demandeur;

b) l'importance de ces éléments de preuve pour la prise de la décision relative à la demande de protection;

c) la question de savoir si ces éléments de preuve, à supposer qu'ils soient admis, justifieraient que soit accordée la protection.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-5700-06
STYLE OF CAUSE:	OSSAMA KAMAL KAMEL GHALY, Applicant and THE MINISTER OF CITIZENSHIP AND IMMIGRATION and THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS, Respondents
PLACE OF HEARING:	TORONTO, ONTARIO
DATE OF HEARING:	OCTOBER 30, 2007
REASONS FOR JUDGMENT AND JUDGMENT:	DAWSON, J.
DATED:	NOVEMBER 20, 2007

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