Rahman v. Canada (Citizenship and Immigration), 2016 FC 1355 (CanLII)

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Docket: IMM-1003-16

Citation: 2016 FC 1355

Ottawa, Ontario, December 8, 2016

PRESENT: The Honourable Madam Justice McVeigh

BETWEEN:

RANA ISMAIL ABDUL RAHMAN
BASSAM IBRAHIM GHABAIN
REEM IBRAHIM BASSAM GHABAYEN
YASMEEN GHABAYEN
IBRAHIM BASSAM GHABAYEN

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMI GRATION

Respondent

JUDGMENT AND REASONS

[1] Rana Ismail Abdul Rahman, Bassam Ibrahim Ghabain, Reem Ibrahim Bassam Ghabayen, Yasmeen Ghabayen and Ibrahim Bassam Ghabayen [collectively, the Applicants] have brought an application for judicial review of a Refugee Protection Division [RPD] decision dated February 1, 2016, which determined that the Applicants are neither Convention refugees nor persons in need of protection under sections 96 and 97 of the *Immigration and Refugee Protection Act*, SC 2001 c 27 [the Act].

[2] Subsequent to the RPD decision, the Refugee Appeal Division [RAD] dismissed the Applicants' appeal for lack of jurisdiction because they had entered Canada through the United States under an exception to the Safe Third Country Agreement. As a result, the Applicants were not eligible to appeal the negative RPD decision to the RAD under paragraph 110(2)(d) of the Act.

I. Background

[3] The Applicants are all stateless Palestinians. The principal Applicant (Rana Rahman) and her three children were all born in Kuwait and lived there their whole lives; they do not have citizenship in that country. The male Applicant (Bassam Ghabain) was born in Gaza and moved to Kuwait shortly thereafter. All of the Applicants have Egyptian travel documents for stateless Palestinians.

[4] At the age of 18, Mr. Ghabain left Kuwait to attend school in Gaza. In October 1999, he graduated with a degree in Computer Science from Al Quds Open University in Gaza. Immigration status for Palestinians in Kuwait is dependent on sponsorship from Kuwaiti employers. Mr. Ghabain returned to Kuwait, and from 1999 until May 2015, he was sponsored by his employers in Kuwaiti when employed in a number of information technology roles.

[5] In his most recent role, Mr. Ghabain was employed as a senior computer specialist with Kuwait Finance House. He held this position from September 2004 until May 2015. In May 2015, Mr. Ghabain's employment contract was terminated as the government of Kuwait began enforcing a policy compelling banks to employ a workforce that consisted of no more than 40% foreigners. He was given three months to find a new Kuwaiti employer who would sponsor him, thereby allowing him and his family to remain in Kuwait.

[6] Mr. Ghabain was unable to find a new employer and thus secure immigration status through a new sponsor. Faced with the possibility of being placed in detention for illegally being in Kuwait once their Temporary Resident Permits expired, the Applicants applied for American tourist visas, which were granted and issued in June 2015. The Applicants flew to New York and then travelled to Buffalo before eventually entering Canada on August 25, 2015, and filing a claim for refugee protection on September 6, 2015.

[7] The Applicants' claims were joined and heard together by the RPD on October 20, 2015. The claims were rejected by the RPD on December 11, 2015, and the Applicants were notified of the

decision February 1, 2016.

[8] The RPD determined the Applicants' countries of residency were Kuwait and Gaza. The RPD found that the Applicants did not have a well-founded fear of persecution in Kuwait or Gaza on any of the five Convention grounds and thus were not Convention refugees under section 96.

[9] The RPD also determined that the Applicants removal to Kuwait or Gaza would not personally risk their life or subject them to a risk of cruel and unusual punishment or torture. The Applicants were therefore found to not be persons in need of protection under section 97 of the Act.

[10] I will grant this application for the reasons that follow.

II. Issues

[11] The Applicants presented a number of arguments and issues that I do not need to address as I find that that there is a determinative issue on these unique facts. The determinative issue is whether the RPD ignored evidence and whether it failed to explain in their reasons why the Applicants are denied entry to a country of former habitual residence?

III. Standard of Review

[12] The RPD decision is reviewable on the reasonableness standard (*Dunsmuir v New Brunswick*, 2008 SCC 9 (CanLII), at paras 47-48).

IV. Analysis

[13] This Court recognizes, as did the RPD, that statelessness alone does not confer refugee status. The leading case on the treatment of stateless individuals is *Thabet v Canada (Minister of Citizenship and Immigration)*, 1998 CanLII 9063 (FCA), [1998] 4 FC 21 [*Thabet*]. Linden J. writing for the unanimous court said "There is no reason why stateless persons should be any more or less accommodated in their claims to refugee status." That being said, the Federal Court of Appeal then set out the test to be used when a person is stateless that recognized that there is uniqueness to determine if they are a refugee, but have the test so there is no advantage or disadvantage to the two groups when determining if they meet the definition of being a convention refugee.

[14] According to the test in *Thabet*, above, the RPD had to first determine the Applicants' habitual residences. In this case, it was determined that the Applicants habitually resided in both Kuwait and Gaza. The RPD then had to determine if on a balance of probabilities whether the family would suffer persecution in any country of former habitual residence. The RPD found the Applicants would not suffer persecution in either Kuwait or Gaza.

[15] Finally, the RPD had to consider whether the Applicants could return to any of their countries of former habitual residence; if not, the RPD is "compelled to ask itself why the applicant

is being denied entry to a country of former habitual residence because the reason for the denial may, in certain circumstances, constitute an act of persecution by the state" (*Thabet*, at para 32). The RPD is to ask, if not being able to return to a country of habitual residence, is in itself persecution and why they would not be able to return.

[16] The Applicants argue that the RPD did not fully address all of the reasons that they would be denied entry into their countries of habitual residence or if that denial were persecution in itself.

[17] The RPD determined that the family cannot return to Kuwait as they are not employed and thus do not have a sponsorship and as stateless individuals they would not be allowed entry.

[18] Neither the principal Applicant nor the children could follow the male Applicant to Gaza if he were removed there. The female Applicant and her children could not as they have no documentation from and have never lived in the Occupied Palestinian Territories.

[19] The RPD failed to consider that the principal Applicant and children were born and raised in Kuwait with no connection beyond the male Applicant to any other state. This is a matter that the decision maker must engage in and address in their reasons of which the decision maker did not, making the decision unreasonable.

[20] The RPD found that stateless persons in Kuwait do not face persecution. Rather, there is some discrimination against all non-Kuwaitis that may include restrictions on residency and movement.

[21] The RPD looked at the principal Applicant's rights as a woman within Kuwait including her inability to sponsor her family and found she would not be persecuted if returned to Kuwait.

[22] The RPD findings directly contradict the National Documentation Package (*Country Information and Guidance: Kuwaiti Bidoon*, United Kingdom Home Office, May 20, 2014, at 3.1.5-3.1.6; see also *Operational Guidance Note: Kuwait*, United Kingdom Home Office, January 2013 at 3.6.35-3.6.36), which specifically addresses the persecution of stateless persons in Kuwait (known as "Bidoon"):

> Undocumented Bidoon are subjected to numerous infringements of their civil and human rights. Their lack of legal status means they are not allowed to participate in the political process, they have no right to work, are constantly at risk of arrest or detention and their family relationships are effectively illegitimate.
>
> Undocumented Bidoon living in Kuwait experience discrimination so severe that it amounts to persecution. A grant of asylum will therefore normally be appropriate in such cases.

[23] The severity of the discrimination faced particularly by the principal Applicant and children goes beyond discrimination. Whereas foreign nationals who can no longer find work in Kuwait can be removed to another jurisdiction, the mother and children are disproportionately affected. They cannot claim citizenship, and cannot remain in Kuwait. They face the risk of arbitrary and indeterminate detention. This may reveal that there is prosecutorial intent or conduct in denying a right of return to the Applicants. The decision failed to address the fact that if removed to Kuwait, she and her children could face arbitrary and indefinite detention. The decision is unreasonable in failing to address the evidence and whether failure to be returned to a country is persecution in itself.

[24] With respect to the Applicants' claim of persecution in Gaza, the RPD determined that while there is evidence that the treatment faced by Palestinians in Gaza amounts to serious harm, it is not connected to a Convention ground.

[25] The RPD determined that Mr. Ghabain's alleged fear of being forcibly recruited into a political organization, thus giving rise to an enumerated Convention ground, was not supported by the objective evidence and the Applicants would not suffer persecution from any of the five grounds from *Canada (Attorney General) v Ward*, 1993 CanLII 105 (SCC), [1993] 2 SCR 689 [*Ward*].

[26] The RPD did engage in finding that while there is evidence that the treatment faced by Palestinians in Gaza amounts to serious harm, it is not connected to a Convention ground and is of a general nature. The RPD was guided by the guidelines (Guidelines on the Civilian Non-Combatants fearing Persecution in Civil war Situations) when dealing with the applicants being returned to civil war when they are compelled to leave as a result of armed national conflicts such as exist in the Gaza Strip. The fact that an individual fears returning to a civil armed conflict is not enough to be considered a refugee. The RPD considered the embargo and siege tactics which severely curtail the lives of the residents of the Gaza strip and that it amounts to serious harm but in the end held that on these facts the fear was general and felt by all citizens.

[27] What the reasons do not address is as the FCA instructed, the RPD is "compelled to ask itself why the applicant is being denied entry to a country of former habitual residence because the reason for the denial may, in certain circumstances, constitute an act of persecution by the state" (*Thabet*).

[28] As noted previously, the principal Applicant and the children would not be allowed to go to Gaza but that specifically was not addressed nor was whether that denial would be persecution in itself given the family separation and the fact they cannot go back to Kuwait without possible incarceration. In addition, nowhere in the reasons is mentioned that Canada, since November 27, 2012, has issued an Administrative Deferral of Removals [ADR] to the Gaza strip. Re-entry into a country of habitual residence may not have been denied as provided in the Convention but the error is the ADR was not examined, as a reason the Applicants could not return to the Gaza Strip. The RPD does not have to refer to all documents but the decision maker does have to refer to the pertinent ones that go to the crux of the central elements of the claim. This ADR is of course temporary and can change at any time but it has been in place since 2012 and should be addressed as Canada does not lightly issue ADR and this is one of significant duration.

[29] The evidence before the RPD was that the family cannot go back to either Kuwait or Gaza. This was of central importance to the families claim and yet the 2012 ADR is not mentioned or referred to in the reasons. This omission and lack of discussion in the reasons makes this decision reviewable as it is unreasonable.

[30] I will not comment on how the ADR will be treated by the decision maker or if any of the Applicants' arguments are meritorious, but as the FCA has directed, the RPD is compelled to ask why the Applicants is denied entry to a country when they are making a refugee determination regarding stateless persons. Unlike in *Altawil v Canada (Minister of Citizenship and Immigration)*, [1996] FCJ No 986, and *Karsoua v Canada (Minister of Citizenship and Immigration)*, 2007 FC 58 (CanLII), the specific facts of this case go beyond a law of general application.

[31] The Court is not satisfied as to the existence of justification, transparency and intelligibility within the decision-making process, and find that the decision falls outside the range of possible, acceptable outcomes which are defensible in respect of the facts and law (*Dunsmuir*, above, at paras 47-48).

[32] The application is granted and will be sent back to be heard by a different decision maker.

[33] No certified questions were presented or arose.

JUDGMENT

THIS COURT'S JUDGMENT is that:

1. The Judicial Review is granted and the matter is sent back to be reviewed by another decision maker.
2. No question is certified.

"Glennys L. McVeigh"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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