

Federal Court



Cour fédérale

Date: 20150416

Docket: IMM-2763-14

Citation: 2015 FC 481

Toronto, Ontario, April 16, 2015

PRESENT: The Honourable Mr. Justice Hughes

BETWEEN:

MOHAMMED AQQAD

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] This is a judicial review of a decision of an Officer of Citizenship and Immigration Canada dated March 20, 2014 wherein it was determined that the Applicant would not be granted an exemption on humanitarian and compassionate (“H & C”) grounds which would have allowed his application for permanent residence to be processed from within Canada.

[2] The Applicant is an adult male Palestinian. He and his family resided in Palestine; however he operated a business in the Israeli side of the border and became friendly with Israeli customers. This caused him to be denounced as a traitor and a spy in Palestine. He was detained and tortured for several days by Palestinian authorities. When he was released in 2010, he fled to Canada and claimed refugee protection. That claim was rejected; leave to seek judicial review was denied. He was unsuccessful in his Pre-Removal Risk Assessment (“PRRA”) and was returned to Palestine in 2014.

[3] The Applicant’s wife remained in Palestine with their children. She works there but the family substantially relied on the modest income received from the Applicant’s work in Canada. The Applicant alleges that he cannot obtain meaningful work in Palestine.

[4] The Officer made an assessment of the Applicant’s H & C application and determined there were insufficient humanitarian and compassionate grounds to approve the exemption request. On an assessment of the factual circumstances, a judicial review is made on the basis of reasonableness; with respect to an issue of law, a review is conducted on the basis of correctness.

[5] The circumstances of this case are not remarkable except for two factors:

- evidence not available on the earlier matters respecting his refugee application and PRRA was presented. It was a document published by the Al Aqsa Martyrs Troops in Palestine denouncing the Applicant as a traitor and spy and calling upon “all faithful Muslims” to kill him;

- The decision of the Federal Court of Appeal in *Kanhasamy v Canada (Minister of Citizenship and Immigration)*, 2014 FCA 113 had not been released as of the time the decision under review here, had been made. That decision deals with how the recently introduced provisions of subsection 25(1.3) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (“IRPA”) are to be considered. I was informed by Counsel that the Supreme Court of Canada is presently hearing an appeal of this decision. I asked Counsel if they wanted me to adjourn this matter until that Court gave its decision. They said no.

[6] Subsection 25(1.3) of IRPA says:

25(1.3) In examining the request of a foreign national in Canada, the Minister may not consider the factors that are taken into account in the determination of whether a person is a Convention refugee under section 96 or a person in need of protection under subsection 97(1) but must consider elements related to the hardships that affect the foreign national.

25(1.3) Le ministre, dans l'étude de la demande faite au titre du paragraphe (1) d'un étranger se trouvant au Canada, ne tient compte d'aucun des facteurs servant à établir la qualité de réfugié — au sens de la Convention — aux termes de l'article 96 ou de personne à protéger au titre du paragraphe 97(1); il tient compte, toutefois, des difficultés auxquelles l'étranger fait face.

[7] In *Kanhasamy*, supra, Stratas J.A., for the Court of Appeal, gave considerable thought to the manner in which subsection 25(1.3) is to be considered. I repeat a few paragraphs of what he wrote:

66 What then is the role of subsection 25(1.3)? In my view, it is not meant to change the overall standard of subsection 25(1) which, as we have seen, is to redress situations where the

applicant will personally and directly suffer unusual and undeserved, or disproportionate hardship.

67 *Rather, on its express words, subsection 25(1.3) warns that the humanitarian and compassionate relief process is not to duplicate the processes under sections 96 and 97 of the Act. Subsection 25(1.3) goes no further than that.*

68 *Applicants for humanitarian and compassionate relief under subsection 25(1) have not met the thresholds for relief under sections 96 and 97 of the Act. They have not met the risk factors under those sections, namely the risk of persecution, torture, or cruel and unusual treatment or punishment upon removal in accordance with international conventions.*

69 *Subsection 25(1.3) provides, in effect, that a humanitarian and compassionate relief application must not duplicate the processes under sections 96 and 97 of the Act, i.e., assess the risk factors for the purposes of sections 96 and 97 of the Act.*

70 *But this is not to say that the facts that were adduced in proceedings under sections 96 and 97 of the Act are irrelevant to a humanitarian and compassionate relief application. Far from it.*

71 *While the facts may not have given the applicant relief under sections 96 or 97, they may nevertheless form part of a constellation of facts that give rise to humanitarian and compassionate grounds warranting relief under subsection 25(1).*

...

73 *In my view, that is a useful way of describing what must happen under section 25 now that subsection 25(1.3) has been enacted - the evidence adduced in previous proceedings under sections 96 and 97 along with whatever other evidence that applicant might wish to adduce is admissible in subsection 25(1) proceedings. Officers, however, must assess that evidence through the lens of the subsection 25(1) test - is the applicant personally and directly suffering unusual and undeserved, or disproportionate hardship?*

74 *The role of the officer, then, is to consider the facts presented through a lens of hardship, not to undertake another section 96 or 97 risk assessment or substitute his decision for the Refugee Protection Division's findings under sections 96 and 97. His task is not to perform the same assessment of risk as is conducted under sections 96 and 97. The officer is to look at facts relating to hardship, not factors relating to risk.*

75 *Matters such as well-founded fear of persecution, risk to life, and risk of cruel and unusual treatment or punishment - factors under sections 96 and 97 - may not be considered under subsection 25(1) by virtue of subsection 25(1.3) but the facts underlying those factors may nevertheless be relevant insofar as they relate to whether the applicant is directly and personally experiencing unusual and undeserved, or disproportionate hardship.*

[8] In the present case, the Officer rejected considerations of the Al Aqsa call to murder the Applicant, saying that it went to risk, not hardship. I repeat, with emphasis, what the Officer wrote on this subject:

Counsel states that the Information about the Al Aqsa Martyrs Group's posting was not present before the officer conducted the applicant's PRRA. She states in her November 12, 2013 H & C submissions, "This is therefore new evidence of the hardship that Mr. Aqqad would face if forcibly removed from Canada and required to return to Palestine". However, I am of the opinion that a risk to the Applicant's life in Palestine falls within the purview of subsection 97(1) rather than hardship. The Al Aqsa Martyr's Group posting dated March 30, 2013 and counsel on behalf of the applicant submitted the documentation in its English translation with other H & C materials in 2013. The applicant had the option of submitting a subsequent PRRA at any time in order to have the posting considered by a Senior Immigration Officer in PRRA context. [...] I do not have the legislated authority to assess a claim of risk to life as outlined in subsection 97(1) of the IRPA. As per section 25(1.3) of the IRPA, I am unable to consider that factor in my H & C assessment.

[9] The Officer did not have Justice Stratas' decision at the time. Had that decision been available, I am confident that the Officer would not have handled the new evidence as to the Al Aqsa denunciation as it was done. That denunciation cannot be ignored; it must be viewed together with all other relevant matters so as to come to a reasonable determination as to hardship.

[10] No party requested a certified question.

JUDGMENT

THEFEFORE THE COURT ORDERS AND ADJUDGES that:

1. The application is allowed;
2. The matter is returned for redetermination by a different Officer;
3. No question is certified;
4. No Order as to costs.

“Roger T. Hughes”

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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