Federal Court  Cour fédérale

Date: 20160509

Docket: IMM-4315-15

Citation: 2016 FC 507

Ottawa, Ontario, May 9, 2016

PRESENT: The Honourable Mr. Justice Annis

BETWEEN:

MAZEN FARHA

Applicant

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act] challenging a decision of a Refugee Protection Division member [RPD or the Member] rejecting the Applicant's claim and concluding that he is not a Convention refugee and is not a person in need of protection pursuant to sections 96 and 97(1) of the Act.

[2] For the reasons that follow, the application is dismissed.

I. Background

[3] The Applicant was in born in Palestine and has a passport issued by the Palestine Authority.

[4] In 1993, the Applicant was sponsored with his family to the United States and became a permanent resident of that country.

[5] In June 1999, the Applicant was convicted of theft; in June 2003, convicted of possession of a firearm; in December 2005, convicted of driving under the influence; and in December 2009, convicted again of possession of a firearm.

[6] In 2011, as a result of his criminality, the Applicant was deported from the United States to Jordan, where he remained for 3 months.

[7] At this point, the Applicant left Jordan and sought entry to Canada via the Montreal airport, where he did not seek refugee protection. He was denied entry and immediately removed to Jordan. Upon his return to Jordan, the authorities sent the Applicant to the West Bank, where he remained for 10 days prior to seeking re-entry into Canada.

[8] On June 26, 2012, the Applicant entered Canada via the Toronto airport with a Palestinian passport. He was immediately detained.

[9] On July 26, 2012, the Applicant's personal information form [PIF] was filed with the RPD.

[10] In August 2012, the Applicant retained Mr. Prescod, an immigration consultant licensed with the Immigration Consultants of Canada Regulatory Council [ICCRC], to represent him in his immigration matters.

[11] On September 11, 2015, the Applicant, represented by Mr. Prescod, attended his hearing at which point the Member issued a verbal decision refusing the Applicant's refugee protection claim.

[12] On November 13, 2015, the Applicant's current counsel sent Mr. Prescod a request for response to concerns that the Applicant's dealings with Mr. Prescod's office raised serious concerns as to the quality of the representation provided to the Applicant for his refugee protection claim.

[13] On November 19, 2015, the Applicant's counsel, on behalf of the Applicant, filed a formal complaint against Mr. Prescod with the ICCRC.

II. Impugned Decision

[14] The Member found that the Applicant was not a credible witness primarily due to the implausibility and the paucity of details of the described events, and that the Applicant lacked documentary evidence establishing the alleged country condition or corroborating the alleged events.

III. Issue

[15] The Applicant raises the sole issue as to whether he was denied procedural fairness in his refugee claim as a result of his immigration consultant's alleged professional negligence.

IV. Standard of Review

[16] The applicable standard of review in a case of alleged denial of justice due to professional negligence is one of correctness: *Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Memari v Canada (Minister of Citizenship and Immigration)*, 2010 FC 1196 at paras 30, 32 [*Memari*].

V. Analysis

A. *Was the Applicant denied procedural fairness in his refugee claim as a result of his immigration consultant's alleged professional negligence?*

[17] It is trite law that the Applicant has the onus of demonstrating that his counsel's incompetence resulted in a breach of procedural fairness. In doing so, the Applicant must establish that all three prongs of the following tripartite test are met:

> 1. The representative's alleged acts or omissions constituted incompetence;
>
> 2. There was a miscarriage of justice in the sense that, but for the alleged conduct, there is a reasonable probability that the result of the original hearing would have been different; and
>
> 3. The representative be given notice and a reasonable opportunity to respond.
>
> See: *Yang v Canada (Minister of Citizenship and Immigration)*, 2015 FC 1189 at para 16; *Guadron v Canada (Minister of Citizenship and Immigration)*, 2014 FC 1092 at para 11; *Pathinathar v Canada (Minister of Citizenship and Immigration)*, 2013 FC 1225 at para 25; and *Nagy v Canada (Minister of Citizenship and Immigration)*, 2013 FC 640 at para 25.

[18] The third criterion will not be address as the Respondent concedes its fulfilment and the evidence on file demonstrate that the necessary notice was provided.

(1) Performance component

[19] With regard to the first criterion, the performance component, the complaint must be "clear and precise" (*Brown v Canada (Minister of Citizenship and Immigration)*, 2012 FC 1305 at para 64).

[20] In this regard, the Applicant submits that Mr. Prescod's actions and omissions amount to negligent and incompetent conduct. In support of this claim, the Applicant submits that Mr. Prescod did not adequately prepare him for his hearing; instead the Applicant met with Mr. Prescod's associate twice for approximately 25 minutes each time, and it is unclear whether this individual had any legal training.

[21] Furthermore, the Applicant submits that he raised concerns as to the quality of his PIF narrative with Mr. Prescod at which point the Applicant alleges he was reassured that if his PIF needed revision, the Immigration and Refugee Board would inform Mr. Prescod of this. Additionally, the Applicant maintains that Mr. Prescod advised him that he did not need to provide additional documents as Mr. Prescod's office would submit the necessary documentation.

[22] The Applicant's complaint regarding Mr. Prescod's representation of the Applicant is difficult to determine, given his claim that he conducted research, including that by a student, and could find no documentation supporting the Applicant's claim, which is not what he advised the hearing officer, but which appears to be an accurate statement of the absence of such

documentation in the country condition materials. I am not required to decide that issue as I conclude that the application must be rejected based on the second criterion of the test.

(2) Prejudice component

[23] With regard to the second criterion, the prejudice component, Justice Crampton stated in *Memari* at paragraph 36, that the prejudice "must be manifested in procedural unfairness, the reliability of the trial result having been compromised, or another readily apparent form."

[24] The Applicant submits that there is a reasonable probability that had it not been for Mr. Prescod's alleged incompetence, the result of the original hearing would have been different considering that the lack of documents formed the basis of the Member's negative determination.

[25] I disagree with the Applicant that had the additional documentation been before the decision-maker that the outcome would have probably been different. The additional evidence submitted in the record before this Court does not establish an objective risk and thus would not undermine the confidence in the outcome of the Member's decision.

[26] The Applicant submitted a number of documents to this Court in support of his claim that Hamas and Fatah attempted to forcefully recruit him. The Applicant submits that the document titled *Recruiting and building rockets, Hamas determined to retain Gaza grip* dated October 15, 2014, supports his claims that "Hamas is turning towards increasing dubious means to secure support including forced recruitment." However, the document speaks to Hamas' financial difficulty and makes no reference whatsoever to forced recruitment.

[27] The Applicant also relies on a Turkish News agency article to support his claim that "Hamas has launched a fresh recruitment drive in the Gaza strip." The recruitment campaign referenced in the article describes enlistment as a voluntary process. It reports that "[f]lyers have been hung on the walls of local mosques, calling on young men to join the 'popular army' in preparation for any possible conflict with Israel," and that Hamas is "opening the door to Gaza's youth; those who want to join us know how to find us [emphasis added]."

[28] Lastly, the *Response to Information Request* document dated July 31, 2013 does not confirm that Hamas engages in forced recruitment, as claimed by the Applicant. The article merely indicates that some individuals will make that claim and that there is limited information available on whether forced recruitment does occur within said organisations. On the contrary, the *Response to Information Request* reports that Israeli Forces, and not Hamas or Fatah, engage in certain types of forced recruitment of collaborators and that individuals deemed to have collaborated with Israel may face harsh repercussions by Hamas or Fatah. However, the Applicant, as a returnee to Palestine after having lived in the United States for two decades, does not fit the "collaborator" profile as described in the documentation.

[29] The Applicant further submits that it is clear that the lack of details in his PIF narrative was also a determinative factor in his claim's refusal. The Applicant maintains that had he been given the opportunity to re-write his narrative, which was not amended as per Mr. Prescod's advice, he would have included details such as fears based on his attempted recruitment by Hamas and Fatah, and as a returnee to Palestine.

[30] There is no evidence in the documentation the Applicant provided to the Court that would remedy the decision-maker's finding that there was no documentary evidence to corroborate any of the events alleged by the Applicant. Moreover, the adverse credibility findings made by the decision-maker are supported by the Applicant's highly implausible historical narrative. There is no reasonable probability, in the case at bar, that but for the alleged incompetence, the original hearing would have yielded a different result.

VI. Conclusion

[31] Accordingly, this application must be dismissed and no question will be certified for appeal.

JUDGMENT

THIS COURT'S JUDGMENT is that this application is dismissed and no question is certified for appeal.

"Peter Annis"

Judge

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-4315-15
STYLE OF CAUSE:	MAZEN FARHA v THE MINISTER OF CITIZENSHIP AND IMMIGRATION
PLACE OF HEARING:	TORONTO, ONTARIO
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