Federal Court  Cour fédérale

Date: 20161004

Docket: IMM-729-16

Citation: 2016 FC 1101

Toronto, Ontario, October 4, 2016

PRESENT: The Honourable Mr. Justice Mosley

BETWEEN:

NADER HUSSEIN K KADDOURA
HEBA A ZAIDAYH
LARINE KADDOURA

Applicants

and

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Respondent

JUDGMENT AND REASONS

I. INTRODUCTION

[1] This is an application for judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c 27 ("IRPA"). The Applicants challenge a decision of the Refugee Protection Division of the Immigration and Refugee Board ("RPD" or the "Board"),

dated January 26, 2016, wherein they were found not to be Convention refugees or persons in need of protection pursuant to sections 96 and 97 of the IRPA.

[2] The Applicants are stateless Palestinians born and raised in Saudi Arabia. The male Applicant, Mr. Kaddoura and his daughter, Larine Kaddoura, hold a Lebanese Travel Document. The female Applicant, Heba A Zaidayh, holds an Egyptian Travel Document. The family has never resided in Lebanon or Egypt. The adult Applicants were educated in Jordan but have no status there. Mr. Kaddoura's residency permit for Saudi Arabia expired in October 2015.

[3] In February 2013 Mr. Kaddoura travelled to the United States ("US") on a visitor visa and stayed for a few weeks with relatives in Michigan. While there he made no inquiries about asylum in Canada or the US. Mr. Kaddoura returned to Saudi Arabia and married Ms Zaidayh in July 2013. Their daughter was born in February 2015. He testified that he had spoken with his family in Canada and the US and obtained US visas in August 2015 with the intention of coming to Canada to make a claim. He stated that he was told that making a claim in the US would be costly, take a long time and would have only a limited chance of success. No attempt was made to obtain a visa to come directly to Canada but Mr. Kaddoura testified that he had discussions and exchanged messages with an immigration consultant in Canada.

[4] On November 3, 2015 the family travelled together to the US on six month visitor visas. They remained in Detroit, Michigan for three weeks visiting his Aunt and her family. On November 24, 2015 the Applicants made their refugee claim at the Port of Entry in Windsor, Ontario alleging discrimination amounting to persecution in Saudi Arabia. The reasons cited in

the Basis of Claim documents and Mr. Kaddoura's evidence for not claiming in the US were the difficulties mentioned above and their desire to be reunited with his paternal uncle in Edmonton, Alberta.

II. DECISION UNDER REVIEW

[5] The Board determined that the Applicants are neither Convention refugees under section 96, nor persons in need of protection under section 97 of the IRPA. It found that the Applicants' last country of habitual residence is Saudi Arabia, based on the male Applicant's testimony and the filed copies of their travel documents. The Board also found that they had no other country of habitual residence available to them.

[6] The Board found that the Applicants had made no serious effort to apply for asylum in the US. While the Board recognized that such a finding and delay in claiming are not determinative, it concluded that in this case they were significant factors undermining the subjective basis of the Applicants' claims. The Board was not persuaded by the Applicants' explanation of the reasons for why they did not claim asylum in the US. In particular, the Board noted the lack of any evidence presented by the Applicants to support their assertions about the difficulties they would face in claiming in the US.

[7] The IRPA's objective of family reunification was not relevant to the claim, in the Board's view, as it did not accept the male Applicant's explanation that their claim was motivated by the presence of family in Canada (the paternal uncle in Alberta). As of the time of the Board hearing, the Applicants had not travelled to meet the paternal uncle and his family; nor had that family

come east to meet the Applicants. Mr. Kaddoura testified that his plan was "to be independent and rely on myself and finish or pursue our, my education, my wife and I and then after we've settled I might go". They also had family in the US with whom they had remained close. The Detroit based Aunt, for example, had travelled to Toronto to look after the baby during the hearing.

[8] In the result, the Board concluded that the Applicants did not demonstrate a well-founded fear of persecution on a Convention ground. Finding that was the determinative issue, the Board did not consider it necessary to address other elements of the Applicants' claim.

III. ISSUES

[9] Having considered the parties' submissions, I would describe the issues as follows:

A. Did the Board err in finding that the Applicants lacked subjective fear by not claiming asylum in the US?

B. Was the Board's negative credibility finding made in a capricious manner without regard to the material before it?

C. Did the Board err in finding that the Applicants' only country of former habitual residence is Saudi Arabia?

IV. ANALYSIS

[10] There is no disagreement between the parties that the applicable standard of review for each of these issues is reasonableness. The RPD is a specialized tribunal which is owed

deference. The Court should not intervene unless the Board's decision does not fall within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *Dunsmuir v New Brunswick,* 2008 SCC 9, [2008] 1 SCR 190 at para 47.

[11] The determination of the country of former habitual residence of a stateless person is a question of fact attracting the standard of reasonableness: *Marchoud v Canada (Minister of Citizenship and Immigration),* 2004 FC 1471 at para 10. It is well-established that boards and tribunals are ideally placed to assess the credibility of refugee claimants: *Iqbal v Canada (Minister of Citizenship and Immigration),* 2014 FC 415 at para 15; *Aguebor v Canada (Minister of Employment and Immigration),* 160 NR 315, [1993] FCJ No 732 (FCA) at para 4.

[12] A finding that the subjective component of the bipartite test for establishing fear of persecution is lacking is sufficient to deny the claims: *Canada (Attorney General) v Ward*, [1993] 2 SCR 689 at para 46; *Adjei v Canada (Minister of Employment and Immigration)*, [1989] 2 FC 680 (FCA). A delay in making a refugee claim is a relevant consideration in assessing an applicant's subjective fear: *Ortiz Garzon v Canada (Minister of Citizenship and Immigration),* 2011 FC 299 at para 30.

[13] In *Mejia v Canada (Minister of Citizenship and Immigration),* 2011 FC 851, at paragraphs 14 and 15, I stated that:

> [14] Delay points to a lack of subjective fear of persecution or negates a well-founded fear of persecution. This is based on the rationale that someone who is truly fearful would claim refugee status at their first available opportunity: *Espinosa v Canada (Minister of Citizenship and Immigration),* 2003 FC 1324 at para 16;
>
> [15] Recently, in *Jeune v Canada (Minister of Citizenship and Immigration),* 2009 FC 835 at para 15, this Court found that the

> applicant's failure to claim asylum at his first opportunity further undermined his credibility.

[14] In *Garavito Olaya, v Canada (Minister of Citizenship and Immigration),* 2012 FC 913, a decision relied upon by the Board, Justice O'Keefe found that absent a satisfactory explanation for the delay, such delay can be fatal to an applicant's claim. He stated at paragraph 54:

> In this case, it is notable that the applicants remained in the U.S. less than a week. However, as they held six-month U.S. visitor visas, there was no legal impediment to them staying longer and filing asylum claims there. Furthermore, the mere fact that the applicants have one relative living in Canada is not a sufficient basis to overcome the fact that they did not claim refugee status in the U.S. "as quickly as possible".

[15] Justice O'Keefe also found, at paragraph 30, that it was reasonable for the Board to conclude that the failure to apply for asylum in the US because it would be granted more easily and faster in Canada were not valid reasons for negating the adverse inference that he lacked subjective fear.

[16] In this matter, the adverse credibility finding, although not determinative, was also reasonably open to the Board. The Board had provided the Applicants an opportunity to explain the reasons for the delay in making a refugee claim and it clearly set out its concerns with respect to the underlying issue of subjective fear and credibility. It was open to the Board to make an adverse credibility finding based on the evidence before it.

[17] The Board considered both of the male Applicant's explanations for not claiming asylum in the US: the difficulties alleged to be inherent in the US process and his desire to reunite with

his Uncle in Edmonton. Given the lack of evidence it was reasonable for the Board to discount the first explanation. It was open to the Board to conclude that the Applicants had made no serious efforts to either inform themselves of the process in the US or to claim asylum at their first opportunity. It was also reasonable for the Board to conclude that family reunification was not a motive for the Applicants' claim in Canada.

[18] The Board did not err in finding that the Applicants' only country of former habitual residence is Saudi Arabia. The Applicants argue that the Board should have considered the fact that they have travel documents for both Lebanon and Egypt and considered whether those were countries of habitual residence available to them.

[19] In *Kadoura v Canada (Minister of Citizenship and Immigration),* 2003 FC 1057, a case also involving a stateless Palestinian applicant, Justice Martineau held that travel documents and other documents in the applicant's possession that had been issued by the Lebanese authorities were not conclusive evidence of habitual residence.

[20] At the oral hearing, the male Applicant testified that, with the exception of living in Jordan while being students, neither he nor his wife has ever resided in any country outside of Saudi Arabia. The entry and departure stamps from Lebanon in his travel document are evidence only of transit through that country. Their counsel's representations at the hearing were based solely on Saudi Arabia being the only available country of habitual residence. I am satisfied that the Board's finding that the Applicants could raise a reasonable fear of persecution with respect to Saudi Arabia alone was reasonable.

[21] Given its negative credibility finding on the subjective basis of the claim under section 96, the Board did not err in not conducting a separate section 97 analysis.

[22] In the result, the application for judicial review is dismissed. No questions were proposed for certification.

JUDGMENT

THIS COURT'S JUDGMENT is that the application is dismissed. No questions are certified.

"Richard G. Mosley"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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