Federal Court  Cour fédérale

Date: 20181219

Docket: IMM-225-18

Citation: 2018 FC 1288

Ottawa, Ontario, December 19, 2018

PRESENT: The Honourable Mr. Justice Favel

BETWEEN:

THE MINISTER OF CITIZENSHIP AND IMMIGRATION

Applicant

and

BASIL ABDULBASET ABUSHEFEH, LABEBA ABDULHAKEEM ABUSHEFEH, ZAKYEH BASIL, ABUSHEFEH, AYAT BASIL ABDULBASET ABUSHEFEH, AND SALSABEEL BASIL ABDULBASET ABUSHEFEH

Respondents

JUDGMENT AND REASONS

I. Overview

[1] The Minister of Citizenship and Immigration [the Minister] seeks judicial review under subsection 72(1) of the *Immigration and Refugee Protection Act*, SC 2001, c-27 [IRPA] of a

decision of the Refugee Protection Division [the RPD] of the Immigration and Refugee Board of Canada [the Board], dated December 19, 2017. In its decision, the RPD determined that the claimants are Convention refugees pursuant to section 96 of the IRPA. The application is dismissed.

II. Background

[2] The Principal Respondent, Basil Abushefeh, is a 30-year-old citizen of Syria. The Secondary Respondents are his wife and their three minor children.

[3] The Principal Respondent lived in Homs, Syria until April 2012 when a conflict broke out between the Syrian Army and the Free Syrian Army Militia. He then fled to Damascus to live with his uncle. While living in Damascus, the Principal Respondent got married and the couple's first daughter was born in May 2013. The family returned to Homs, but the situation was far from being settled as the Principal Respondent was detained and beaten by members of the security forces. After his release in August of 2013, the Principal Respondent travelled to Jordan to meet with his extended family. The Principal Respondent and his family were placed in the same refugee camp. On February of 2014, his wife and daughter joined him at the camp.

[4] After being contacted by the United Nations High Commissioner for Refugees [the UNHCR] about relocation, on June 13, 2017, the Respondents arrived in the United States of America [USA] and were granted refugee claimant status. Fearing for their lives and safety in the USA due to their religion as Muslims, the Respondents relocated to Canada and filed for asylum. The Principal Respondent's uncle and grandfather live in Canada. The Respondents' claims were

referred to the Board on October 7, 2017. The claims were determined without a hearing on December 19, 2017.

III. Decision

[5] On January 2, 2018, after considering all the evidence, including the Basis of Claim [BOC] forms and the country conditions in Syria, the RPD found that the Respondents are Convention refugees pursuant to subsection 107(1) of the IRPA, as they have a well-founded fear of persecution in Syria as set out in s 96 of the IRPA.

A. *Identity*

[6] The RPD was satisfied, on a balance of probabilities, in the Respondents' identities after considering the documentation provided, including, refugee identity documents issued by U.S. officials, children's birth certificates and the Principal Respondent's military document.

B. *Credibility*

[7] The RPD noted that the claimants' allegations were presumed to be truthful. It was also concluded that no hearing was to be held before the Board, according to the Board's *Policy on the Expedited Processing of Refugee Claims by the Refugee Protection Division*, effective date September 18, 2015 [the Policy]:

> Considering the record, there are no material issues for the panel to question the claimants' overall truthfulness, a hearing was not conducted.

C. *Well-founded Fear of Persecution*

[8] The RPD's duty was to determine whether there was sufficient, credible or trustworthy evidence establishing that there was "more than a mere possibility" that all of the members of the principal claimant's family would be persecuted if returned to Syria.

D. *Risk Profiles*

[9] The RPD next addressed the particular risk profiles that were relevant in the case of the Respondents' claim. For instance, to determine whether the children in the refugee claim were impacted by the war in Syria, the Board cited the following passage found in the 2017 UNICEF report:

> Children have paid the heaviest price in this six-year war and their suffering hit rock bottom last year in a drastic escalation of violence. At least 652 children were killed in 2016 alone […] Beyond the bombs, bullets and explosions, countless children are dying in silence from preventable diseases that could easily be cured. But in today's Syria few doctors are left and access to medical care and facilities is increasingly difficult. […] These figures represent only verified instances and understate the scope of the problem.

[10] According to the London School of Economics, Centre for Women, Peace and Security evidence, the RPD also noted in its decision that the Assad regime has been using different methods such as torture and chemical weapons "[i]n its attempt to crush the revolution and remain in power".

[11] The RPD concluded that, considering the principal claimant's previous treatment, there was sufficient evidence to find that the principal claimant, as well as his family, would be at risk of ongoing harassment, arrests and potential serious harm.

E. *State Protection*

[12] Given the mass atrocities and the multiple violations and assaults happening in Syria, the RPD concluded that "state protection would not be reasonably forthcoming if the claimants return to Syria".

F. *Internal Flight Alternative*

[13] Based on the country conditions in Syria, the RPD found that "[t]he armed hostilities have left no area within Syria unaffected by the conflict and the resulting massive humanitarian consequences". Consequently, the RPD was not satisfied that the Respondents would no longer face a serious possibility of persecution by residing in a different area in Syria.

G. *Conclusion*

[14] The RPD determined that the Respondents are Convention refugees pursuant to section 96 of the IRPA, and therefore, accepted their claims.

IV. Issue

[15] The Applicant submits that the sole issue to be determined in the present matter is whether the RPD breached the principles of procedural fairness by failing to notify the Minister, pursuant to Rule 26(1) of the Refugee Protection Division Rules, SOR/2012-256 [RPD Rules], about the possibility that the Respondents were excluded from refugee protection under Article 1E of the *Convention Relating to the Status of Refugees*, 28 July 1951, 189 UNTS 137 [Refugee Convention].

V. Standard of review

[16] The parties do not agree on the applicable standard of review. After reviewing the parties' written submissions, the Court is of the view that the applicable standard of review regarding issues of procedural fairness is correctness ((*Canada (Minister of Citizenship and Immigration) v Khosa*, 2009 SCC 12 at para 43; *Canada (Citizenship and Immigration) v Ahmed*, 2015 FC 1288 at para 8 [*Ahmed*]). Therefore, the Court must not show deference to the decision maker on this issue.

VI. Applicant's Written Submissions

[17] The Applicant argues that the RPD erred in failing to give notice to the Minister of the Respondents' possible exclusion under section 1E of the Refugee Convention. The RPD failed to give such notice to the Minister pursuant to Rule 26(1) of the RPD Rules, and therefore, committed a breach of procedural fairness to be reviewed under the standard of correctness.

[18] According to the Applicant, the RPD had sufficient information before it to demonstrate that the Respondents had a refugee status in the USA. Consequently, the RPD ought to have known that there was a possibility that section 1E would apply in the case of the Respondents.

[19] Moreover, the Applicant submits that a hearing was required following the principles as set out in section IV of the Policy, one of them being: "members will not decide claims without a hearing under this policy unless there are no issues that should be brought to the attention of the Minister".

[20] The Applicant argues that this Court has previously concluded in *Canada (Citizenship and Immigration) v Oladapo*, 2013 FC 1195 [*Oladapo*] that failure to give notice to the Minister pursuant to Rule 26 of the RPD Rules is a breach of procedural fairness. In this decision, the Applicant submits that the RPD made a specific finding regarding the issue of exclusion under section 1E (*Oladapo* at para 26). Nevertheless, the Applicant argues that although this was not the case at bar, the RPD had to consider whether there was a possibility of exclusion after mentioning the following information in its reasons for decision:

> The claimants were contacted by the United Nations High Commissioner for Refugees (UNHCR) and advised that they were being relocated to the United States (U.S.). They arrived on June 13, 2017 in the U.S. The principal claimant submits that when he arrived in the U.S., they were granted refugee claimant status, meaning that they would not be granted any permanent refugee status.

VII. Respondents' Written Submissions

[21] The Respondents, on the other hand, argue that a notice to the Minister is only required if the RPD finds that there is a "possibility" of exclusion under Article 1E of the Refugee Convention. "Therefore, in alleging a breach of procedural fairness, the Minister is really alleging that the RPD erred in determining that there was no possibility that 1E applied."

[22] According to the Respondents, the test for exclusion under Article 1E of the Refugee Convention is a question of mixed fact and law to be reviewed under the standard of reasonableness (*Zeng v Canada (Citizenship and Immigration)*, 2009 FC 466 at paras 22-23).

[23] The Respondents argue that it was reasonable for the RPD to determine that no hearing was required under s170(f) of the IRPA. After receiving the Respondents' BOC, the Minister had ten days under Rule 23 of the RPD Rules to notify the RPD of his intention to intervene in the matter, which he did not.

[24] The Respondents further argue that in order for Section 1E of the Refugee Convention to apply, the claimants must have a permanent resident status in the USA to allow them to enter and remain in the country. In the case at bar, it was clear that the Respondents did not have similar rights and obligations which are attached to a person of that nationality (*Shamlou v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1537, 59 ACWS (3d) 494 at para 36); the Respondents did not have permanent resident status in the USA and their refugee status was only valid for a year.

[25] In response to the Applicant's submission with regards to *Oladapo*, the Respondents argue that *Oladapo* was a case in which it was clear that the RPD had addressed in its reasons the possibility of section 1E to apply. Therefore, notice to the Minister was required. This was not the case at bar.

VIII. Applicant's Reply Submissions

[26] In response to the Respondents' submission on the Minister's right to intervene, the Applicant submits that paragraph 170(f) of the IRPA does not take away the responsibility from the RPD to notify the Minister under Rule 26 of the RPD Rules. The Applicant submits that there is a clear distinction between the intervention of the Minister after receiving the BOC form and the failure of the Board to provide notice to the Minister as required by Rule 26(1) (*Ahmed* at para 19).

IX. Analysis

[27] For the following reasons, the application for judicial review is dismissed.

A. *Did the RPD fail to notify the Minister about the possibility that the Respondents would be excluded from refugee protection under Article 1E of the Refugee Convention?*

[28] The Court finds that there was no evidence or information before the Board that should have alerted the Board to the possibility of exclusion under Article 1E of the Refugee Convention. Article 1E of the Refugee Conventions states:

> This Convention shall not apply to a person who is recognized by the competent authorities of the country in which he has taken

> residence as having the rights and obligations which are attached to the possession of the nationality of that country.

[29] It is clear from the evidence that the Respondents did not have a permanent resident status in the USA, nor were they considered to have such status by the US authorities. On June 6, 2017, the claimants were given a refugee status by the United States Department of State that was only valid for one year. In the refugee document that was issued to the claimants, the Department of Homeland Security/U.S. Citizenship and Immigration Services had approved their application to apply for admission to the United States.

[30] Moreover, there was evidence before the RPD confirming that the Respondents are not excluded from Article 1E as they do not have the right to enter to the USA. An officer from the Canada Border Services Agency [the CBSA Officer] had the opportunity to interview the Principal Respondent and then noted the following information in his reasons:

> [An officer] from Regional Programs and [a second officer] from the Embassy in Washington are of the opinion that the Claimant and his family cannot be returned to the United States. Therefore, despite having been recognized as convention refugees, they are*(sic)* still eligible to make a claim, as they cannot be returned to the Country from where they are Refugees. The claimant had to first ask for authorization to leave the United States, otherwise they risk not being allowed re-entry into the United States.
>
> [Emphasis added.]

[31] Lorne Waldman, in Immigration Law and Practice, vol. 1, states that:

> [i]f the applicant has some sort of temporary status which must be renewed, and which could be cancelled, or if the applicant does not have the right to return to the country of residence, clearly the applicant should not be excluded under Art. 1E.

> [Emphasis added.]
>
> (*Shamlou v Canada (Minister of Citizenship and Immigration)*, [1995] FCJ No 1537, 59 ACWS (3d) 494 at para 35)

[32] It is also clear from the RPD's reasons for decision, as set out in the allegations, that it acknowledged the fact that the Respondents are not permanent residents of the USA.

> The principal claimant submits that when he arrived in the U.S., they were granted refugee claimant status, meaning that they would not be granted any permanent refugee status.
>
> [Emphasis added.]

[33] The Court finds that the Board was convinced by the evidence before it that there was no issue for the possibility of exclusion. This issue was not raised, nor was it a concern, in the RPD's decision. The Court finds that it is clear from the reasons that the RPD did not exclude the Respondents from Article 1E of the Refugee Convention. Where the presiding member of the RPD raises the issue of a claimant's exclusion in the refugee process, the RPD has the duty to give notice to the Minister of the possibility that the Respondents will be excluded from the Refugee Convention, pursuant to Rule 26(1) of the RPD Rules. For instance, in *Chowdhury v Canada (Minister of Citizenship and Immigration)*, 2003 FCT 744, although the exclusion for refugee protection was under Article 1F of the Refugee Convention, this Court determined that there was a breach of procedural fairness in failing to provide notice to the Minister prior to the hearing, only because the presiding member first raised the exclusion issue during the course of the claimant's hearing, and therefore, failed to give an opportunity to the Minister's counsel to prepare submissions. This was not the case at bar.

[34] For these reasons, the Court concludes that no breach of procedural fairness was committed by the RPD in omitting to give notice to the Minister pursuant to Rule 26(1) of the RPD Rules. The Board was simply not convinced that there was a mere possibility of exclusion, based on the evidence before it, to even raise the issue of exclusion in its reasons for decision. There was no duty to notify the Minister of the possibility of exclusion under Article 1E of the Refugee Convention when it was not an issue for the Board.

X. Conclusion

[35] The application for judicial review is dismissed. No question of general importance will be certified.

JUDGMENT in IMM-225-18

THIS COURT'S JUDGMENT is that the application for judicial review is dismissed.

There is no question of general importance for certification.

"Paul Favel"
Judge

FEDERAL COURT

SOLICITORS OF RECORD

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