

Federal Court



Cour fédérale

Date: 20190312

Docket: IMM-1814-18

Citation: 2019 FC 298

Ottawa, Ontario, March 12, 2019

PRESENT: The Honourable Madam Justice McDonald

BETWEEN:

**RAMI ALKURD,
JOOD RAMY YOUSEF AHMED ALKURD
EMAN ANWAR MOHAMED SHURRAB**

Applicants

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

JUDGMENT AND REASONS

[1] The Applicants seek review of the March 12, 2018 decision of the Refugee Protection Division (RPD) denying their refugee claims. In particular, the Applicants take issue with the RPD's determination that the Principal Applicant (PA), Rami Alkurd, would not be at risk of persecution if he returns to Gaza. They argue that the RPD failed to properly consider his claim under section 97 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [IRPA].

[2] For the reasons that follow, this judicial review is dismissed as the decision of the RPD is reasonable.

I. Preliminary Issue

[3] There were four claimants before the RPD on this matter – Rami Alkurd, his wife Eman Shurrab, their daughter Jood Alkurd, and Rami’s brother Ibrahim Alkurd. Ibrahim Alkurd is not part of this Application. Additionally, although the judicial review is filed on behalf of all the Applicants, the submissions were focused only on the PA’s claim that he cannot return to Gaza.

II. Background

[4] The Applicants fled the United Arab Emirates (UAE) in November 2016 and arrived in Canada at the Rainbow Bridge point of entry in Niagara Falls via the United States.

[5] The PA was born in Gaza but moved to the UAE as a young child and remained there for his entire life, apart from a three-year period when he returned to Gaza for post-secondary studies.

[6] The female Applicants are Egyptian citizens. The wife acquired Egyptian nationality because her father worked there in the 1980s and the daughter acquired hers by birth. They allege that they are persecuted because of their uncertain situation in the UAE, and that the PA would not be able to relocate with them to Egypt.

[7] In August 2016, the PA lost his employment and sponsor in the UAE and claims he no longer has a right to continue residing in the UAE.

[8] Although he holds a passport from the Palestinian Authority, the PA contends he would face persecution in Gaza due to the Israeli blockade and military operations against Gaza. He attended Al-Azhar University while studying in Gaza, which is allegedly affiliated with the Fatah political party. As such, he claims that he would be perceived as a political opponent of Hamas. He also claims he is at risk because he would be perceived as a liberal Muslim.

III. RPD Decision

[9] With respect to the principal claimant, Rami, the RPD found that the UAE is a country of former habitual residence. The RPD also had to consider if Gaza is a country of former habitual residence for Rami, who holds a passport from the Palestinian Authority and testified that he could legally reside in Gaza.

[10] The RPD relied on the Federal Court of Appeal decision in *Maarouf v Canada (Minister of Employment and Immigration)*, [1994] 1 FC 723 to determine the issue of former habitual residence. The RPD also found the facts of this case to be comparable to the facts in *Al-Khateeb v Canada (Citizenship and Immigration)*, 2017 FC 31. Using this jurisprudence, the RPD found that Gaza is a country of former habitual residence for Rami.

[11] On the claim of persecution in Gaza, the RPD found that any risks that Rami would face are the same risks that the general population of Gaza faces. While Rami did testify that he

attended an allegedly Fatah-affiliated university in Gaza, the RPD concluded that it was highly speculative that this would cause him to be perceived as being politically opposed to Hamas. The RPD noted that the national documentation package for Gaza states that, while Hamas does target Fatah members and loyalists, there was no evidence that Rami would be perceived as such. The RPD determined that Rami did not demonstrate a personalized risk of persecution.

[12] The RPD found that Rami's fears were not well-founded and, therefore, the RPD did not need to consider the allegations pertaining to potential persecution in the UAE. The RPD concluded that Rami can legally return to Gaza without fear of persecution and without need for protection.

[13] The RPD also considered the claims of Eman and her daughter, Jood, who are citizens of Egypt and based their refugee claims on the fact that the family could not be united in Egypt. The RPD stated that this was not a proper ground for a claim of refugee protection. They alleged that they were fearful of residing in the Sinai Peninsula of Egypt, but these fears were only raised during testimony which led to the RPD's credibility concerns.

[14] The RPD determined that Eman had no subjective fear about residing in Egypt and that she could do so legally. These findings also applied to her daughter. The RPD determined that they could safely reside in Egypt as citizens without fear of persecution. The RPD concluded that there was no credible or trustworthy evidence to make a favourable decision for Eman and Jood, and their claims were dismissed as having no credible basis.

[15] The RPD reasoned that, even if the female claimants did face persecution in the Sinai Peninsula, they were not restricted to residing in that area and could reside elsewhere in Egypt without fear of persecution.

[16] The RPD concluded that, as the claimants failed to meet the lower threshold established under section 96 of the *IRPA*, their claims under section 97 must also fail. Rami was also not a person in need of protection against Gaza.

IV. Issues

[17] The Applicants raise the following issues:

- a) Was the RPD's analysis of risk reasonable?
- b) Did the RPD err by not undertaking a section 97 analysis?
- c) Did the RPD err by concluding that Gaza is a country?

V. Standard of Review

[18] The applicable standard of review for the findings of the RPD is reasonableness (*Choudry v Canada (Citizenship and Immigration)*, 2011 FC 1406 at paras 17-19).

[19] A reasonable decision is one that has the hallmarks of “justification, transparency, and intelligibility” and falls into a range of possible, acceptable outcomes (*Dunsmuir v New Brunswick*, 2008 SCC 9 at para 47).

VI. Statutory Provisions

[20] The following are the relevant provisions of the *IRPA*:

<i>Immigration and Refugee Protection Act</i> (SC 2001, c 27) Sections 96 and 97	<i>Loi sur l’immigration et la protection des réfugiés</i> (LC 2001, ch 27) Articles 96 et 97
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Convention refugee

96. A Convention refugee is a person who, by reason of a well-founded fear of persecution for reasons of race, religion, nationality, membership in a particular social group or political opinion,

(a) is outside each of their countries of nationality and is unable or, by reason of that fear, unwilling to avail themselves of the protection of each of those countries; or

(b) not having a country of nationality, is outside the country of their former habitual residence and is unable or, by reason of that fear, unwilling to return to that country

Person in need of protection

Définition de « réfugié »

96. A qualité de réfugié au sens de la Convention — le réfugié — la personne qui, craignant avec raison d’être persécutée du fait de sa race, de sa religion, de sa nationalité, de son appartenance à un groupe social ou de ses opinions politiques :

a) soit se trouve hors de tout pays dont elle a la nationalité et ne peut ou, du fait de cette crainte, ne veut se réclamer de la protection de chacun de ces pays;

b) soit, si elle n’a pas de nationalité et se trouve hors du pays dans lequel elle avait sa résidence habituelle, ne peut ni, du fait de cette crainte, ne veut y retourner.

Personne à protéger

97. (1) A person in need of protection is a person in Canada whose removal to their country or countries of nationality or, if they do not have a country of nationality, their country of former habitual residence, would subject them personally

(a) to a danger, believed on substantial grounds to exist, of torture within the meaning of Article 1 of the Convention Against Torture; or

b) to a risk to their life or to a risk of cruel and unusual treatment or punishment if

(i) the person is unable or, because of that risk, unwilling to avail themselves of the protection of that country,

(ii) the risk would be faced by the person in every part of that country and is not faced generally by other individuals in or from that country,

(iii) the risk is not inherent or incidental to lawful sanctions, unless imposed in disregard of accepted international standards, and

(iv) the risk is not caused by the inability of that

97. (1) A qualité de personne à protéger la personne qui se trouve au Canada et serait personnellement, par son renvoi vers tout pays dont elle a la nationalité ou, si elle n'a pas de nationalité, dans lequel elle avait sa résidence habituelle, exposée

a) soit au risque, s'il y a des motifs sérieux de le croire, d'être soumise à la torture au sens de l'article premier de la Convention contre la torture;

b) soit à une menace à sa vie ou au risque de traitements ou peines cruels et inusités dans le cas suivant :

(i) elle ne peut ou, de ce fait, ne veut se réclamer de la protection de ce pays,

(ii) elle y est exposée en tout lieu de ce pays alors que d'autres personnes originaires de ce pays ou qui s'y trouvent ne le sont généralement pas,

(iii) la menace ou le risque ne résulte pas de sanctions légitimes — sauf celles infligées au mépris des normes internationales — et inhérents à celles-ci ou occasionnés par elles,

(iv) la menace ou le risque ne résulte pas de

country to provide adequate health or medical care.

l'incapacité du pays de fournir des soins médicaux ou de santé adéquats.

(2) A person in Canada who is a member of a class of persons prescribed by the regulations as being in need of protection is also a person in need of protection.

(2) A également qualité de personne à protéger la personne qui se trouve au Canada et fait partie d'une catégorie de personnes auxquelles est reconnu par règlement le besoin de protection.

VII. Analysis

A. Was the RPD's analysis of risk reasonable?

[21] The PA argues that the RPD failed to consider that the Israeli Defense Forces, the State of Israel, and the Egyptian-Israeli blockade are agents of persecution. He argues that he faces a personal risk of persecution in Gaza. He relies upon the fact that his parents' house in Gaza was destroyed in air raids in 2014. He points to the possibility that, had his family been in the home at the time of the air raids, they would have suffered catastrophic injuries and perhaps death. He argues that this is evidence of personalized persecution.

[22] The PA relies on the case of *Salibian v Canada (Minister of Employment and Immigration)*, [1990] 3 FC 250 (FCA) [*Salibian*] to argue that he does not need to show persecution is personal or that persecution has happened in the past. He argues that he merely needs to show that his fear arises from acts committed or likely to be committed against members of a group to which he belongs (*Salibian* at para 19).

[23] Be that as it may, an applicant must still establish some evidence that he or she is personally at risk, although that evidence does not necessarily have to establish that the persecution is purely personal (see *Hasan v Canada (Minister of Citizenship & Immigration)*, 2004 FC 1537 at para 18). The problem for the PA in this case is that the only evidence of risk was a generalized risk of persecution. The argument he was at risk because of the damage to his parents' house is hypothetical and does not support a claim of persecution. Without an associated personal risk, this evidence is insufficient.

[24] The findings of the RPD that there was a lack of evidence in support of a persecution claim are reasonable.

B. *Did the RPD err by not undertaking a section 97 analysis?*

[25] The Applicants argue that the RPD erred by failing to undertake a section 97 analysis, asserting that, even if a section 96 claim had not been established, the RPD still needed to consider the section 97 claim.

[26] They point to paragraph 31 of the decision where the RPD concluded:

The panel finds, however, that Rami's and Ibrahim's claims against Gaza amount to the same risk that the general population of Gaza faces. Rami and Ibrahim have not shown how they are personally at risk. It would indeed be difficult to do so given the limited amount of time that Rami and Ibrahim have actually resided in Gaza. Rami testified that during his studies in Gaza from 1999 – 2003, he did not face any abuse that would amount to persecution or would require protection.

[27] However, the RPD is not obligated to undertake a section 97 analysis as noted in *Kaur v Canada (Citizenship and Immigration)*, 2012 FC 1379 at paragraph 50:

The Board is not obliged to conduct a separate analysis under section 97 in each case. Whether it has an obligation to do so will depend on the particular circumstances of each case (*Kandiah v Canada (Minister of Citizenship and Immigration)*, 2005 FC 181 (CanLII) at para 16, 137 ACWS (3d) 604). Where no claims have been made or evidence adduced that would warrant such a separate analysis, one will not be required (*Brovina v Canada (Minister of Citizenship and Immigration)*, 2004 FC 635 (CanLII) at paras 17-18, 254 FTR 244; *Velez*, above at paras 48-51).

[28] Here the RPD specifically stated that, as the Applicants did not meet the lower threshold to establish a claim under section 96, "...so too must this claim fail under section 97."

[29] In this case there was a lack of evidence to support a section 97 claim, therefore in the circumstances, the Applicants have not established that the RPD had an obligation to conduct such an analysis.

C. *Did the RPD err by concluding that Gaza is a country?*

[30] The RPD found that Gaza is a former habitual residence for the PA. He holds a passport from the Palestinian Authority, and his testimony was that he could legally reside in Gaza. However on this Application he argues that Gaza should not be considered a country and therefore should not be considered his habitual residence.

[31] He argues that Gaza and the Occupied Palestinian Territories are not a sovereign nation-state as they are made up of non-contiguous territories in Israel that are precluded from self-

governance, military protection, and international relations. Instead, he argues that the country of reference should be the sovereign state of Israel where Palestinians face daily persecution.

[32] The determination of whether a country is considered a country of former habitual residence is a question of fact (*Qassim v Canada (Immigration, Refugees, and Citizenship)*, 2018 FC 226 at para 38), which is owed a high degree of deference.

[33] In any event, the PA, by asserting that Gaza should not be considered a country, is essentially arguing that he is a stateless person. However, not every stateless person is a refugee as stated by Justice Strickland in *Cehade v Canada (Citizenship and Immigration)*, 2017 FC 282 at paragraph 20:

This Court has previously held that it is clear from the definition of a Convention refugee that stateless persons, being those not having a country of nationality, may be Convention refugees. However, not every stateless person is a Convention refugee. In order for a stateless person who is outside the country of his or her former habitual residence and who is unable to return to that country to be a Convention refugee, he or she must find him or herself in that situation by reason of a well-founded fear of persecution for one or more of the reasons cited in the Convention definition (*Thabet* at para 16; *Arafa* at paras 7-8; *Salah* at paras 7-8). Further, the denial of a right to return may be persecutory and, therefore, forms a part of the RPD's assessment of a well-founded fear of persecution (*Thabet* at para 32; *Daghmash* at para 9). The burden is on the applicant to show on the balance of probabilities that they are unable or unwilling to return to any country of former habitual residence (*Thabet* at para 28).

[34] In the present circumstances, even if the PA is considered stateless, he still has the burden to prove a risk of persecution. Therefore, his submissions with respect to the status of Gaza as a

country or territory are irrelevant as the RPD determined that his evidence that he would face persecution in Gaza was lacking.

[35] Further, I agree with the Respondent that the Applicants cannot now raise this argument as the transcript of the RPD hearing shows that the Applicants' counsel explicitly acknowledged that Gaza was to be considered a country of former habitual residence.

[36] The determination of the RPD on the issue of Gaza as a country of former habitual residence is reasonable.

VIII. Question for Certification

[37] The Applicants propose the following as a certified question: whether the territory of Gaza is a country and sovereign nation.

[38] The test for certification was recently confirmed by the Federal Court of Appeal in *Lunyamila v Canada (Public Safety and Emergency Preparedness)*, 2018 FCA 22. The Federal Court of Appeal has jurisdiction to hear an appeal from the judgment of the Federal Court on an application for judicial review with respect to any matter under the *IRPA* only if, in rendering judgment, the Federal Court certifies that a serious question of general importance is involved and states the question. Accordingly, "The question must be a serious question that is dispositive of the appeal, transcends the interests of the parties and raises an issue of broad significance or general importance".

[39] In the circumstances, it would not be appropriate to certify this question as the issue was not raised before the RPD and was an issue that was conceded. In any event, this case is fact-specific and the answer to this question would not be dispositive of an appeal.

[40] I therefore decline to certify a question.

JUDGMENT in IMM-1814-18

THIS COURT'S JUDGMENT is that this judicial review is dismissed and no question is certified.

"Ann Marie McDonald"

Judge

FEDERAL COURT
SOLICITORS OF RECORD

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