Federal Court  Cour fédérale

**Date: 20191105**

**Docket: IMM-2591-18**

**Citation: 2019 FC 1377**

**Montréal Quebec, November 5, 2019**

**PRESENT: The Honourable Madam Justice St-Louis**

**BETWEEN:**

**BASSAM KHOLOOD EL-SAKKA**

**Applicant**

**and**

**THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS**

**Respondent**

# JUDGMENT AND REASONS

## I. INTRODUCTION

[1] Mr. Bassam Kholood El-Sakka seeks the judicial review of the May 8, 2018 decision by the Immigration Appeal Division [IAD], which rejected his appeal, and maintained the removal order made against him on September 17, 2014.

[2] For reasons set out below, I will dismiss this Application.

## II. CONTEXT

[3] Mr. El-Sakka is a stateless Palestinian. In 2000, he arrived in Canada and was granted Canadian permanent resident status, as the dependent of his father, the principal applicant. In 2005, Mr. El-Sakka's family members were granted Canadian citizenship and they left Canada for the United Arab Emirates shortly thereafter.

[4] Mr. El-Sakka had not applied for Canadian citizenship with his family, but applied in February 2006, on his own, after reaching majority, assisted by counsel. In the Citizenship Residence Questionnaire he completed in 2008, he indicated that he had been studying abroad, at the NY Institute of Technology in Abu Dhabi, since October 2006. His application suffered delays, partly because details were sought in relation to his criminal history at the time he was a minor.

[5] On September 17, 2014, Mr. El-Sakka sought admission to Canada in order to attend a citizenship interview. The Canada Border Services Agency [CBSA] officer interviewed him at the port of entry and, having determined that he had not met the statutory residency requirements set by section 28 of the *Immigration and Refugee Protection Act*, SC 2001, c 27 [the Act], issued a removal order against him. In the document Mr. El-Sakka then signed to outline humanitarian and compassionate considerations, he confirmed having left Canada in 2009.

[6] Before the IAD, Mr. El-Sakka did not challenge the legal validity of the removal order issued against him, recognizing that he had been present in Canada for only approximately 60 days during the 5-year reference period. As provided by paragraph 67(1)(c) of the Act, Mr. El-Sakka argued that the appeal should be allowed as sufficient humanitarian and compassionate considerations warrant special relief, in light of all the circumstances of the case, taking into account the best interests of a child affected by the decision.

[7] Mr. El-Sakka, represented by an immigration consultant, filed hundreds of pages of documents to demonstrate there existed sufficient humanitarian and compassionate considerations to warrant special relief, and he testified at the hearing before the IAD. The documents he submitted essentially outlined his situation in Canada prior to 2006 and following his return in 2014. It included, *inter alia*, an assessment of Mr. El-Sakka's cognitive skill and capacity, completed in 2003, when Mr. El-Sakka was 16 years old, by the Oxford Learning Center whereby one of the assessed capacities, the *auditory attention-span and distractibility*, was graded as *below average*. Mr. El-Sakka's parents were present at the hearing, but remained outside the hearing room, and did not appear as witnesses.

[8] Despite the information that appeared in the aforementioned voluminous documentation filed with the IAD confirming he had left Canada in 2006, at the hearing, Mr. El-Sakka confirmed he left Canada in 2009. In addition, and despite the information also found in the documentation, Mr. El-Sakka did not immediately volunteer the information regarding his

criminal history. On a general note, his answers before the IAD were long and often convoluted. It is not disputed that his consultant wrongly asserted, before the IAD, that Mr. El-Sakka had finished his studies in Canada before leaving for the UAE.

[9] The IAD confirmed that the removal order was valid in law, and found there were not sufficient humanitarian and compassionate grounds to find in Mr. El-Sakka's favour.

[10] Before this Court, Mr. El-Sakka argues having lost his appeal before the IAD because of his former's consultant's incompetence. The former consultant had the opportunity to respond to the allegations and he contradicted Mr. El-Sakka's submissions. The parties do no contest that the applicable Court protocol has been respected.

## III. IAD DECISION

[11] On May 8, 2018, the IAD confirmed that the removal order was valid in law, and that there were not sufficient humanitarian and compassionate grounds to find in favour of Mr. El-Sakka. In its decision, the IAD outlined a non-exhaustive list of the appropriate considerations that prior decision makers of the IAD have established, and then proceeded to examine Mr. El-Sakka's (1) initial establishment and reasons for leaving; (2) ties to Canada in terms of family; and (3) hardship.

[12] Regarding his initial establishment to Canada and his reasons for leaving, the IAD essentially concluded that: (a) Mr. El-Sakka's initial establishment in Canada was a positive factor; (b) that the contradiction regarding the year he left Canada as well as the fact he initially omitted to disclose his criminal history when testifying affected his general credibility; (c) that he left based on his own personal and family choices; and (d) that his reasons to remain in the UAE and absent from Canada were negative factors.

[13] Regarding his ties to Canada, the IAD noted that; (a) his family ties to Canada, with only one brother studying here, were limited, and that there was no evidence that the rest of his family were coming back to reside in Canada; (b) his corporate establishment was limited to business investments and unremunerated employment; and (c) his ex-wife and daughter lived in the USA and had not spoken to him since 2015.

[14] Regarding the hardship, the IAD concluded that: (a) there was insufficient evidence to conclude Mr. El-Sakka's family, his estranged ex-wife and daughter in the US, would suffer emotional hardship if the appeal was denied; (b) Mr. El-Sakka himself will suffer hardship if he is removed as a stateless citizen of Palestine; and (c) there was insufficient evidence to conclude that the best interest of the child would be compromised if the appeal was denied.

[15] In its conclusion, the IAD noted that, as the breach of the residency obligation was very important - Mr. El-Sakka having been in Canada for only 60 days during the 5-year reference period - the humanitarian and compassionate grounds had to be very important as well.

Essentially, the IAD concluded that Mr. El-Sakka did not have compelling reasons to return to Abu Dhabi and to remain there for five years; that he had moderate establishment in Canada even after 18 years as a Canadian permanent resident; and that the many negative factors outweighed the hardship he would face.

## IV. PARTIES' POSITIONS

### A. *Mr. El-Sakka's position*

[16] Mr. El-Sakka argues that the numerous errors and omissions of the immigration consultant who represented him before the IAD constitute incompetence, which resulted in a miscarriage of justice, and that the outcome of his appeal would, but for the numerous errors, have been different. In essence, Mr. El-Sakka argues that he had a story to tell about his life, that this story was not told, and that it would have led to a different result if the relevant evidence would have been underlined and if Mr. El-Sakka had been properly prepared for his testimony.

[17] Mr. El-Sakka essentially submits that his former representative (1) did not provide an opinion on factors and evidence required to win the appeal; (2) did not attempt to marshal the necessary evidence or establish its quality; (3) did not prepare a narrative or recommend that a narrative be written; (4) made no reference during the hearing to the 2003 aptitude report to explain Mr. El-Sakka's difficulty with dates and events and to explain why he had left to study in the UAE rather than in Canada; (5) made no reference to the documents in the citizenship applications; (6) did not attempt to obtain confirmation from business associates about business

activities in Canada; (7) submitted no evidence regarding Mr. El-Sakka's assertion that he could not return to Abu Dhabi in the UAE; (8) failed to properly prepare Mr. El-Sakka for the hearing; and (9) should have asked Mr. El-Sakka's family members to testify.

B. *The Minister's position*

[18] The Minister responds that Mr. El-Sakka has not demonstrated that his former consultant was incompetent, nor that the decision rendered by the IAD would not have been different if a different representative had represented him. The Minister adds that, in any case even if we were to consider the Applicant's allegation alone, without the response from former consultant, the record does not show that the intervention of the Court is warranted.

[19] The Minister argues that the submissions of Mr. El-Sakka's former consultant paint a significantly different picture from that of Mr. El-Sakka, and that Mr. El-Sakka's allegations do not meet the threshold of incompetence because they need to be supported by clear evidence (*Gambos v Canada (Minister of Citizenship and Immigration),* 2017 FC 850).

The Minister responds by reviewing each allegation to outline that nothing newly put forward would have altered the IAD's decision.

## V. DISCUSSION

[20] The case before me pertains to procedural fairness in that I must determine whether there is evidence of miscarriage of justice as a result of the professional incompetence of Mr. El-Sakka's former consultant. There is no specific standard of review for procedural fairness in that if the procedure is not fair, the decision will generally have to be sent back to the original decision maker for reassessment or readjudication (*Lessard-Gauvin v Canada (Attorney General)*, 2019 FCA 233 at para 25).

[21] As Mr. El-Sakka raised his former consultant's incompetence, the parties agree that the appropriate test is the one been set out by Justice Diner in *Guadron v Canada (Citizenship and Immigration)*, 2014 FC 1092). Hence, the burden of proof is on the applicant, who must establish that:

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.

[22] This being said, I do not need to examine the incompetence allegations if I am satisfied that Mr. El-Sakka has not demonstrated a prejudice that amounts to a miscarriage of justice (*Jeffrey v Canada (Minister of Citizenship and Immigration)*, 2006 FC 605), and that there exists a real probability that the result would be different but for the incompetent act.

[23] Mr. El-Sakka insisted on certain elements at the hearing before the Court, namely the fact that the IAD had not been directed to take into account the afore mentioned 2003 assessment by the Oxford Learning Center, particularly the *auditory attention-span and distractibility* skill that was graded *below average*. Mr. El-Sakka submits that this result explains his difficulty to testify, his omission to discuss his criminal history from the onset as well as the fact that he confirmed having left Canada in 2009 at the hearing although some documents in the file mentioned he left Canada in 2006. Mr. El-Sakka also submits that the evidentiary record before the IAD demonstrated that he left Canada in 2006, not by choice, but because he was unable to pursue his studies in Canada, being distressed and suffering difficulties, and that this is also substantiated by the 2003 assessment.

[24] As I noted during the hearing, this assessment was completed in 2003, some 15 years before the matter was heard at the IAD, and some three years before Mr. El-Sakka left Canada, when Mr. El-Sakka was 16 years old. Also, the Cognitive skills he refers to pertain to his capacity to retain instructions he hears once, in the context of a classroom.

[25] The applicant has not outlined how this laconic report can reasonably explain Mr. El-Sakka's omissions or contradictions at the hearing, nor can it demonstrate that he left Canada in 2006 because he was in some sort of academic or other distress: there is no evidence to substantiate the allegations before this Court that he experienced distress and difficulties in Algonquin College or Carleton University. Mr. El-Sakka has,

therefore, not demonstrated that he suffered a prejudice because this 2003 assessment was not argued before the IAD.

[26] Mr. El-Sakka has not identified the parts of the story that remained untold, and that would have had an impact on the IAD decision. He has not shown that there was a reasonable probability that but for the alleged incompetence, the result of the IAD hearing would have been different.

[27] Mr. El-Sakka's submissions do not displace the IAD conclusions, *i.e*. that he left Canada by choice, that his absence from Canada was a result of his family choices and preferences at the time, that his ties in Canada were limited, that his family's and his establishment were limited, and that negative factors outweigh the hardship the IAD (Shivan *v Canada (Minister of Citizenship and Immigration*), 2005 FC 1509 at para 35). Mr. El-Sakka has not shown a prejudice, and there is thus no need to examine the allegations of incompetence.

**JUDGMENT in IMM-2591-18**

**THIS COURT'S JUDGMENT is that**:

1) The Application is dismissed;

2) No question is certified.

"Martine St-Louis"
Judge

**FEDERAL COURT**

**SOLICITORS OF RECORD**

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| **DOCKET:** | IMM-2591-18 |
| **STYLE OF CAUSE:** | BASSAM KHOLOOD EL-SAKKA v THE MINISTER OF PUBLIC SAFETY AND EMERGENCY PREPAREDNESS |
| **PLACE OF HEARING:** | MONTRÉAL, QUEBEC |
| **DATE OF HEARING:** | OCTOBER 28, 2019 |
| **JUDGMENT AND REASONS:** | ST-LOUIS J. |
| **DATED:** | NOVEMBER 5, 2019 |

**APPEARANCES:**

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| Suzanne Trudel | FOR THE RESPONDENT |

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