Date: 20091002

Docket: IMM-3518-08

Citation: 2009 FC 1002

Halifax, Nova Scotia, October 2, 2009

PRESENT: The Honourable Mr. Justice O'Keefe

BETWEEN:

ISABELLA CHARALAMPIS
A.K.A. BUKURIE GASHI
RUBENA CHARALAMPIS
A.K.A. RINA GASHI
By their litigation guardian,
ALI GASHI

Applicants

and

THE MINISTER OF CITIZENSHIP
AND IMMIGRATION

Respondent

REASONS FOR JUDGMENT AND JUDGMENT

O'KEEFE J.

[1] This is an application for judicial review pursuant to subsection 72(1) of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the Act), of a decision of a visa officer (the officer) dated July 18, 2008 refusing the applicants the ability to file a second refugee claim following the

decision of June 12, 2008 to vacate the applicants' and their father's refugee status on the basis that they had misrepresented their claim pursuant to subsection 109(1) of the Act.

[2] The applicant requests that the Court allow the application and set aside the decision of the tribunal that the applicants are ineligible to make refugee claims in Canada, and refer the matter for redetermination by a different officer.

Background

[3] Isabella Charaloampis *(A.K.A. Bukurie Gashi)* and her sister Rubena Charalampis *(A.K.A. Rina Gashi)* (the applicants) are 17 and 15 years old respectively. They and their father, Leonardo Staralombous (A.K.A. Ali Gashi) came to Canada and were accepted as refugees on April 18, 2000. They had claimed persecution because of being ethnic Albanians living in Kosovo. In an interview with Citizenship and Immigration officer Paul Bassi, on October 7, 2004, "Ali Gashi" admitted that he fabricated the story he put forward in his refugee claim. He was not born in Pristina, Kosovo but in Albania and he and his daughters are Greek citizens. His daughters were born in Germany, where their mother remains. Further disclosure at the vacation hearing indicated that the father is wanted in Greece because of a conviction for perjury. He has custody of his daughters by way of a Canadian Court order in 2004. In the vacation hearing, the Minister argued that there was a *prima facie* case for vacating the applicants' and their father's refugee status on the basis that they had misrepresented and withheld material facts; that they were "totally different persons than indicated in the original claim for refugee status…". As a consequence, the Refugee Protection Division (the

Board) decided that the claim "is deemed to be rejected and the decision that led to the conferral of refugee protection is nullified".

[4] The respondent submits that the applicants and their father pursued judicial review of the vacation decision but the applicants' leave application was dismissed in December 2008 on the basis that it was abandoned.

[5] The applicants went to the Hamilton Citizenship and Immigration Canada (CIC) office on July 11, 2008 to make a second refugee claim. The applicants submit that their attorney advised CIC that the applicants were applying notwithstanding the provisions of paragraph 101(1)(b) of the Act based on the applicants' rights under the Canadian *Charter of Rights and Freedoms* (the *Charter*). Despite their attorney being ready to explain how they were eligible, the CIC office refused to hear their case. A meeting was confirmed with CIC for July 16, 2008, however, the applicants had to cancel. On July 18, 2008, CIC sent the letter copied below concluding the matter beyond an application for leave to the Federal Court.

[6] The applicants and their father are subject to a removal order.

Reasons for Decision

[7] The decision of the officer is brief. The salient parts in response to the applicants' attorney read as follows:

> As you already know, the above named had their refugee claims vacated by the Refugee Protection Division. They cannot apply for refugee status under A99(3).
>
> 99(3) states: "A claim for refugee protection made by a person inside Canada must be made to an officer, may not be made by a person who is subject to a removal order, and is governed by this Part."
>
> Your clients are subject to a removal order. I regret we cannot entertain another eligibility review.
>
> If you wish to appeal the decision on "Vacation of their Status" you will have to deal with the Federal Court.

Issues

[8] The applicants submitted the following issue for consideration:

Did the officer err in law in finding that the applicants were ineligible under subsection 99(3) of the Act to have their refugee claims referred to the Board, and in failing to consider their arguments as to why they were so eligible?

[9] I would rephrase the issues as follows:

1. What is the appropriate standard of review?

2. Did the officer make a reviewable error in finding that the applicants were ineligible under subsection 99(3) of the Act to have their refugee claims referred to the Board?

3. Did the officer make a reviewable error in failing to consider their arguments as to why they were so eligible?

Applicants' Submissions

[10] The applicants submit that notwithstanding subsection 99(3) and paragraph 101(1)(b) of the Act, they are eligible to make a refugee claim.

[11] With regards to the third issue, the applicants submit that by way of the officer refusing to hear the arguments for the applicants' right to a refugee claim, the officer should be deemed to have made their claims on July 11, 2008. This is because subsection 99(3) requires a claimant to make their claim in Canada to an officer. As a "pre-condition to a finding that a claimant is ineligible under s. 99(3)" by way of a removal order, a claim must have been made. The applicants' counsel gave a copy of their submissions to the officer on July 11, 2008 and therefore, it follows that CIC was aware of the assertion that the applicants had the right to make their claims under the *Charter*, notwithstanding the provisions of the Act.

[12] In the alternative, the applicants argue that the officer made a decision in response to a non-existent claim and as such, the decision of the officer should be set aside and the applicants given the opportunity to make arguments on eligibility and have them properly considered.

[13] In the event that a finding is made that the claims were validly made pursuant to subsection 99(3), the applicants submit that the decision, in its brevity, did not properly consider the issues.

[14] Applicants' counsel states that a consideration of eligibility applies equally to subsection 99(3) and paragraph 101(1)(b) of the Act. Both of these subsections bar the applicants from second claims and are both subject to a constitutional exemption because they violate the rights of the applicants under section 15 of the *Charter*. Applicants' counsel writes, "{t]he basis for the discrimination argument was the assertion – supported by Board Member Wolman during the course of the vacation proceedings – that the applicants could not be held responsible for the misrepresentations of their father, and the consequent rejection of their refugee claims by vacation". The removal order is also a consequence of the father's misrepresentations and should be subject to a constitutional exemption. These arguments were not dealt with by the officer which is an error of law.

[15] The applicants submit that even if they were to accept that the officer considered the constitutional arguments, he did not adequately do so. Jurisprudence dictates that the standard regarding the adequacy of reasons was not met here (see *Abdeli v. Minister of Public Safety and Emergency Preparedness*, [2006] F.C.J. No. 1322, *Via Rail Canada Inc. v. Canada (National Transportation Agency)*, [2001] 2 F.C. 25 (C.A.)). The lack of adequate reasons by the officer is a reviewable error.

Respondent's Submissions

[16] The respondent disagrees that the ineligibility decision was a discretionary or statutory decision. It was simply the operation of law. This is evident in the applicants' very legal argument

which aims for a constitutional exemption from the operation of law. The officer had no authority to grant such relief in the face of a clear statutory mandate to the contrary. The officer's decision was "purely" administrative.

[17] The respondent submits that if a constitutional remedy is contingent on the application of section 52 of the *Constitution Act*, 1982 which permits a court to issue declaratory relief by way of reading in or reading down the part of the law which is found to be unconstitutional. The officer had no authority to provide such a remedy. Given this fact, the respondent submits, there is no basis for this application for judicial review.

[18] The respondent submits that the applicants do not challenge the constitutionality of the law as such but argue that they should have been granted a constitutional exemption. An officer is not a court nor an adjudicative tribunal, which may have some authority to consider constitutional issues.

[19] The Federal Court of Appeal has held conclusively that a senior immigration officer has no jurisdiction to answer legal or constitutional questions. This finding was also supported by *Raman v. Canada (Minister of Citizenship and Immigration)*, [1999] 4 F.C. 140 (C.A.) and *Gwala v. Canada (Minister of Citizenship and Immigration)*, [1999] 3 F.C. 404 (C.A.).

[20] The Federal Court of Appeal in *Raman* explained the distinction between immigration adjudicators, who have wide-ranging powers under the Act, and senior immigration officers, who do not particularly in the area of answering legal or constitutional questions.

[21] The applicants' reliance upon the Supreme Court of Canada case of *R. v. Ferguson*, [2008] 1 S.C.R. 96 is also problematic. In that case, the Supreme Court cautioned against undermining the role of the legislature and their intent with the potential that the constitutional exemption "would be to so change the legislation as to create something different in nature from what Parliament intended". The granting of a constitutional exemption by the officer, the respondent argues, would have "far reaching consequences". An exemption for minors whose refugee claims were rejected or vacated by way of their guardians fraudulent activities is a significant shift in the law and one that would require an actual amendment to the Act or "the effect would be to permit a law to remain on the books despite a constitutional infirmity" (see *Ferguson* above).

[22] The respondent submits that the *Ferguson* case was decided against the backdrop of courts exercising a "piece-meal" constitutional exemption approach. It nevertheless highlights the problems with conferring the power to confer on administrative decision makers such as the officer.

[23] Ultimately, the respondent states that this remedy may be more appropriately found in section 24 of the *Charter*; requiring the claimant to go to a court of competent jurisdiction (see Constitutional Law of Canada, Peter Hogg, Vol. 2, 5th edition, 2007, page 205).

[24] Or, the respondent submits, the Act does have processes in place to counterbalance the effect of subsection 99(3) and paragraph 101(1)(b), namely: pre-removal risk assessments (PRRA) pursuant to sections 112 and 113 of the Act and humanitarian and compassionate (H&C) consideration under section 25 of the Act. A PRRA takes into account the risks examined in a

refugee claim under sections 96 and 97 of the Act. The applicants' fear of persecution if returned to Greece could be advanced at that time. The applicants can also make their arguments in an H&C application.

[25] In conclusion, the respondent points out that the Federal Court of Appeal has not necessarily found unconstitutionality when a parent or guardian compromises a child's ability to immigrate or stay in Canada. In *De Guzman v. Canada (Minister of Citizenship and Immigration)*, 2005 FCA 436 with leave to appeal denied by the Supreme Court of Canada, for example, the parent's violation of the law did not in itself result in a constitutional infirmity. As well, when a parent fails to disclose a child when applying for permanent residence, they may lose the ability to sponsor the child altogether resulting in a separation of child and parent.

[26] In regards to the standard of review, the respondent states that law and jurisdiction questions should be correct.

Applicants' Reply

[27] The applicants reply that the issue remains after the respondent arguments, that the officer did not either consider their arguments or give adequate reasons for rejecting them.

[28] In response to the argument that an officer does not have jurisdiction to grant a constitutional exemption, the applicants submit that it is the Federal Court that has the jurisdiction

within judicial review proceedings to decide constitutional questions and not the tribunal of first instance (see *Gwala* above).

[29] In regards to the *Ferguson* decision by the Supreme Court of Canada, the applicants recognize the utility of constitutional exemptions and submit that their argument is one that is put forward against the backdrop of exceptional facts. There was no refusal on the merits of the claim but a vacating of their status because of the father's misrepresentation of their identities and nationality. An exception to the section in this case is in keeping with the principles laid out in the *Charter* regarding discrimination based on age.

[30] As to the respondent's attempts to discern a policy regarding children and the Act, they submit that the *De Guzman* above decision is distinguishable on the facts and the nature of the application and reject that it offers anything useful in assessing the case at hand.

[31] Finally, the applicants disagree that the PRRA or H&C processes offer a counterbalance to the consequences of subsection 99(3) for them. A PRRA and H&C do not offer a full oral hearing and are often heard immediately prior to removal.

Preliminary Point

[32] Subsection 57(1) of the *Federal Courts Act*, 2002, c.8, s.14 states:

57.(1) If the constitutional validity, applicability or operability of an Act of Parliament or of the legislature of a province, or of regulations made under such an Act, is in question before the Federal Court of Appeal or the Federal Court or a federal board, commission or other tribunal, other than a service tribunal within the meaning of the *National Defence Act*, the Act or regulation shall not be judged to be invalid, inapplicable or inoperable unless notice has been served on the Attorney General of Canada and the attorney general of each province in accordance with subsection (2).	57.(1) Les lois fédérales ou provinciales ou leurs textes d'application, dont la validité, l'applicabilité ou l'effet, sur le plan constitutionnel, est en cause devant la Cour d'appel fédérale ou la Cour fédérale ou un office fédéral, sauf s'il s'agit d'un tribunal militaire au sens de la *Loi sur la défense nationale*, ne peuvent être déclarés invalides, inapplicables ou sans effet, à moins que le procureur général du Canada et ceux des provinces n'aient été avisés conformément au paragraphe (2).

[33] I am of the view that this section applies to the present case. No notice was given to the Attorney General of Canada or the Attorneys General of the provinces. As a result, I would not be able to decide the matter as the giving of notice is mandatory. In case I am in error in this conclusion, I will rule on the issues raised in the application.

Analysis and Decision

[34] **Issue 1**

What is the appropriate standard of review?

Statutory interpretation, such as is required here, are questions of law. *Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190, teaches that questions of general law are almost always decided on the standard of correctness. Since in this case, the decision of the officer was solely based on statutory interpretation, correctness applies. Previous jurisprudence has provided guidance in this respect (See *Singh v. Canada (Minister of Citizenship and Immigration)*, 2006 FC 684 at paragraph 8 and *Hamid v. Canada (Minister of Citizenship and Immigration)*, 2005 FC 1632 at paragraph 4).

[35] **Issue 2**

Did the officer make a reviewable error in finding that the applicants were ineligible under subsection 99(3) of IRPA to have their refugee claims referred to the Board?

Of course, the short answer to this is no. Subsection 99(3) prohibits anyone from making a refugee claim that is subject to a removal order. The removal order was put into effect after the applicants' refugee status was vacated along with their father. From that perspective, the officer was correct. However, the applicants have made an argument beyond the bare findings available within this section. They argue that this section as well as paragraph 101(1)(b) violates their rights under the *Charter* because of their age under section 15. There are a number of issues and questions that this argument raises. First, did the applicants raise their argument for a constitutional exemption appropriately? From a technical perspective, were the Attorney Generals' of the provinces and federal government notified? Also, do immigration officers have jurisdiction to decide whether the applicants should be granted a constitutional exemption?

[36] Second, there is an issue as to whether anything beyond a statutory interpretation based on correctness is reviewable. The crux of the problem with the applicants' submissions are that this Court is being asked to review a decision that an immigration officer is not able to make in the first place (see *Raman* above). The applicants ask us to assume that the officer considered the arguments and either rejected them or did not provide adequate reasons for rejecting them. This does not cover all the bases, however. If an officer is precluded from even making a decision on a constitutional exemption in the first place, it is highly problematic when this Court is asked to in turn review a decision beyond the jurisdiction of the officer based on the viability of a constitutional exemption. It is flawed from the beginning because jurisdiction is but one of the issues that are considered in questions of law.

[37] In the Federal Court of Appeal decision of *Bekker v. Canada*, [2004] F.C.J. No. 819, Mr. Justice Letourneau for the majority states:

> ...barring exceptional circumstances such as bias or jurisdictional questions, which may not appear on the record, the reviewing Court is bound by and limited to the record that was before the judge or the Board. Fairness to parties and the court of tribunal under review dictates such a limitation. Thus, the very nature of the judicial review proceeding, in itself, precludes a granting of the applicant's request.

[38] Further, the cases that the applicants have put forward supporting the idea that the Federal Court can answer constitutional questions in a judicial review is distinct from what the applicants are asking to be done in this review. Jurisdiction is conferred by way of the Federal Court interpreting legislation that is subject to the *Charter* or determining legal or constitutional questions.

Jurisdiction is not conferred by granting *ad hoc* exceptions based on certain facts to certain statutes to bring them into conformity with the *Charter*. The applicants are essentially not asking for a review, but for relief that may infringe on Parliament's role as in *Ferguson* above, and the rule of law and the values that underpin it: certainty, accessibility, intelligibility, clarity and predictability. The *Bekker* court had similar misgivings when an applicant sought judicial review of a decision of a judge of the Tax Court who was bound by a statutory requirement in the *Income Tax Act*. The applicant had argued that the statutory provision discriminated based on disability in violation of section 15 of the *Charter*. The Court held that "[i]t is a serious matter to invoke the *Charter* to challenge the validity of legislation enacted by Parliament. Such challenges normally require an evidential foundation. Constitutional issues cannot and should not be decided in a factual vacuum".

[39] Another argument by the respondent is compelling, namely that there are instances within the Act where children face consequences by way of their legal guardian or parents representations in the immigration process. The respondent outlined the instances where children are excluded from Canada when they are not included on an original permanent residence application and findings of negative credibility of parents in refugee claims which affect the children as well. I agree that these consequences point to an intent of Parliament to make children part and parcel of parents' claims and divorcing children from this would have as in the respondent's words "far-reaching consequences" and may "create something different in nature from what Parliament intended". Therefore, even if I were to assess the constitutionality of subsection 99(3) and paragraph 101(1)(b) in this respect, I am not convinced that there is a viable argument.

[40] I agree that the father's misrepresentations have been harmful to the children in pursuing a claim and childrens' interests must always be considered. However, I am constricted by the parameters of judicial review and as such, cannot allow judicial review on this ground.

[41] **Issue 3**

Did the officer make a reviewable error in failing to consider their arguments as to why they were so eligible?

This issue relates to the findings in Issue two. In my view, the fact that the officer either did not assess the applicants' arguments or did not provide reasons for rejecting them are in keeping with the officer's power granted under the Act. The officer did not have authority to decide these issues as in *Raman* above. The applicants have argued that in any case, they should not be precluded from a fair hearing on the merits of an exemption based on *Charter* discrimination because it is beyond the reach of an immigration officer. Again, as above, in my view, the officer's decision was correct and it is problematic for me to insert more breadth to the officer's findings in order to find an error in law. I would not allow judicial review on this ground.

[42] I would therefore find that this application for judicial review be dismissed.

[43] Neither party wished to submit a proposed serious question of general importance for my consideration for certification.

JUDGMENT

[44] **IT IS ORDERED that** the application for judicial review is dismissed.

"John A. O'Keefe"
Judge

ANNEX

Relevant Statutory Provisions

The relevant statutory provisions are set out in this section.

The *Immigration and Refugee Protection Act*, S.C. 2001, c. 27:

99.(1) A claim for refugee protection may be made in or outside Canada.	99.(1) La demande d'asile peut être faite à l'étranger ou au Canada.
(2) A claim for refugee protection made by a person outside Canada must be made by making an application for a visa as a Convention refugee or a person in similar circumstances, and is governed by Part 1.	(2) Celle de la personne se trouvant hors du Canada se fait par une demande de visa comme réfugié ou de personne en situation semblable et est régie par la partie 1.
(3) A claim for refugee protection made by a person inside Canada must be made to an officer, may not be made by a person who is subject to a removal order, and is governed by this Part.	(3) Celle de la personne se trouvant au Canada se fait à l'agent et est régie par la présente partie; toutefois la personne visée par une mesure de renvoi n'est pas admise à la faire.
. . .	. . .
44.(1) An officer who is of the opinion that a permanent resident or a foreign national who is in Canada is inadmissible may prepare a report setting out the relevant facts, which report shall be transmitted to the Minister.	44.(1) S'il estime que le résident permanent ou l'étranger qui se trouve au Canada est interdit de territoire, l'agent peut établir un rapport circonstancié, qu'il transmet au ministre.
(2) If the Minister is of the opinion that the report is well-founded, the Minister may refer the report to the Immigration	(2) S'il estime le rapport bien fondé, le ministre peut déférer l'affaire à la Section de l'immigration pour enquête,

Division for an admissibility hearing, except in the case of a permanent resident who is inadmissible solely on the grounds that they have failed to comply with the residency obligation under section 28 and except, in the circumstances prescribed by the regulations, in the case of a foreign national. In those cases, the Minister may make a removal order.

sauf s'il s'agit d'un résident permanent interdit de territoire pour le seul motif qu'il n'a pas respecté l'obligation de résidence ou, dans les circonstances visées par les règlements, d'un étranger; il peut alors prendre une mesure de renvoi.

(3) An officer or the Immigration Division may impose any conditions, including the payment of a deposit or the posting of a guarantee for compliance with the conditions, that the officer or the Division considers necessary on a permanent resident or a foreign national who is the subject of a report, an admissibility hearing or, being in Canada, a removal order.

(3) L'agent ou la Section de l'immigration peut imposer les conditions qu'il estime nécessaires, notamment la remise d'une garantie d'exécution, au résident permanent ou à l'étranger qui fait l'objet d'un rapport ou d'une enquête ou, étant au Canada, d'une mesure de renvoi.

101.(1) A claim is ineligible to be referred to the Refugee Protection Division if

101.(1) La demande est irrecevable dans les cas suivants:

(a) refugee protection has been conferred on the claimant under this Act;

a) l'asile a été conféré au demandeur au titre de la présente loi;

(b) a claim for refugee protection by the claimant has been rejected by the Board;

b) rejet antérieur de la demande d'asile par la Commission;

(c) a prior claim by the claimant was determined to be ineligible to be referred to the Refugee Protection Division, or to have

c) décision prononçant l'irrecevabilité, le désistement ou le retrait d'une demande antérieure;

been withdrawn or abandoned;

(d) the claimant has been recognized as a Convention refugee by a country other than Canada and can be sent or returned to that country;

d) reconnaissance de la qualité de réfugié par un pays vers lequel il peut être renvoyé;

(e) the claimant came directly or indirectly to Canada from a country designated by the regulations, other than a country of their nationality or their former habitual residence; or

e) arrivée, directement ou indirectement, d'un pays désigné par règlement autre que celui dont il a la nationalité ou dans lequel il avait sa résidence habituelle;

(f) the claimant has been determined to be inadmissible on grounds of security, violating human or international rights, serious criminality or organized criminality, except for persons who are inadmissible solely on the grounds of paragraph 35(1)(c).

f) prononcé d'interdiction de territoire pour raison de sécurité ou pour atteinte aux droits humains ou internationaux — exception faite des personnes interdites de territoire au seul titre de l'alinéa 35(1)c) — , grande criminalité ou criminalité organisée.

FEDERAL COURT

SOLICITORS OF RECORD

DOCKET:	IMM-3518-08
STYLE OF CAUSE:	ISABELLA CHARALAMPIS A.K.A. UKURIE GASHI RUBENA CHARALAMPIS A.K.A. RINA GASHI By their litigation guardian, ALI GASHI - and – THE MINISTER OF CITIZENSHIP AND IMMIGRATION
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