

Federal Court



Cour fédérale

Date: 20170407

Docket: IMM-2180-16

Citation: 2017 FC 342

BETWEEN:

ABDULAZIZ ODAH JABR GHANEM

Applicant

and

**THE MINISTER OF CITIZENSHIP AND
IMMIGRATION**

Respondent

REASONS FOR JUDGMENT

HENEGHAN J.

[1] By Judgment issued on April 4, 2017, the within application for judicial review was dismissed, with Reasons to follow. These are the Reasons.

[2] Mr. Abdulaziz Odah Jabr Ghamen (the “Applicant”) seeks judicial review of the decision of the Immigration and Refugee Board, Refugee Protection Division (the “Board”), dismissing his application to be found a Convention refugee or person in need of protection, pursuant to

section 96 and subsection 97(1), respectively of the *Immigration and Refugee Protection Act*, S.C. 2001, c. 27 (the “Act”).

[3] The Applicant formerly resided in Kuwait. He is of Bidoon ethnicity and suffers from spastic cerebral palsy. He advanced his claim against Kuwait, on the basis that he faces discrimination due to ethnicity.

[4] The Applicant’s claim for protection was denied by the RPD on the grounds that his evidence was not credible and that he failed to establish that discrimination in the receipt of medical services, access to education and employment opportunities amounts to persecution.

[5] The Applicant filed his notice of application for leave and judicial review on May 25, 2016. Leave was granted by Order dated September 7, 2016.

[6] In his initial Memorandum of Fact and Law, the Applicant argued that the Board erred in its credibility findings. He also claimed that its other findings were not supported by the evidence. As well, he argued that translation issues at the hearing breached the procedural fairness owed to him.

[7] Following the granting of leave, the Applicant filed a Further Memorandum of Fact and Law, in which he raised the issue of incompetence of Counsel relative to his hearing before the RPD.

[8] By Notice of Motion filed on November 17, 2016, Mr. Isaac Owusu-Sechere, the lawyer who represented the Applicant upon his claim for protection and at the hearing before the Board, sought leave to intervene in the hearing of this application for judicial review.

[9] The motion for intervention was heard on November 22, 2016. Counsel for the Applicant and Counsel for the Minister of Citizenship and Immigration (the “Respondent”) responded to that Motion. An oral Order was made granting leave to Mr. Owusu-Sechere to intervene and to file brief submission; the hearing of the application for judicial review was adjourned until November 30, 2016.

[10] In his Further Memorandum of Fact and Law, the Applicant argues that his former lawyer was incompetent, specifically for failing to adequately prepare him for his hearing before the Board and for referring to the wrong Kuwaiti legislation about disability benefits. He submits that the incompetence of his former lawyer deprived him of the right to meaningfully participate in his hearing.

[11] Issues of procedural fairness are reviewable on the standard of correctness; see the decision in *Canada (Citizenship and Immigration) v. Khosa*, [2009] 1 S.C.R. 339 (S.C.C.).

[12] Incompetence of counsel that leads to deprivation of a fair hearing can result in a breach of procedural fairness; *Shirwa v. Canada (Minister of Employment and Immigration)*, [1994] 2 F.C. 51 (F.C.T.D.) at paragraph 14.

[13] Credibility findings are reviewable on the standard of reasonableness; see the decision in *Borbon Marte v. Canada (Minister of Public Safety and Emergency Preparedness)* (2010), 374 F.T.R. 160 (F.C.) at paragraph 18.

[14] The Applicant initially argued that errors in translation impaired his right to procedural fairness.

[15] The Applicant did not raise this problem during the hearing before the Board. Although the transcript of the hearing, at page 307 of the Certified Tribunal Record, shows that the Applicant said: “I don’t know if that’s what you mean”, in response to a question from the Board, I am not persuaded that the Applicant clearly raised translation issues at the first opportunity, that is during the hearing before the Board.

[16] The test to be met when a party alleges incompetence of counsel amounting to a breach of procedural fairness is discussed by the Supreme Court of Canada in *R. v. G.D.B.*, [2000] 1 S.C.R. 520 (S.C.C.), which held as follows at paragraph 26:

...For an appeal to succeed, it must be established, first, that counsel’s acts or omissions constituted incompetence and second, that a miscarriage of justice resulted.

[17] The Applicant argues that his former Counsel’s failure to properly prepare him for the hearing of his claim, in particular in the preparation of his Basis of Claim (“BOC”) form and by referring to the wrong Kuwaiti legislation (“Law 49/1999”) relating to the rights of persons with disabilities.

[18] I note from the transcript that at the beginning of the hearing before the Board, former Counsel advised the Board about changes to the Applicant's narrative to the BOC. This exchange demonstrates that some communication took place between the Applicant and his former Counsel and rebuts the claim that former Counsel failed to review and correct the BOC narrative.

[19] The minor changes made on behalf of the Applicant may not have yielded a positive outcome but changes were indeed made, by former Counsel, to assist the Applicant.

[20] I see no reviewable error arising from the erroneous reference of former Counsel to Law 49/1996.

[21] I am not persuaded that the Applicant's former Counsel's actions fall to the level of professional incompetence. Even if they did, I am not satisfied that the actions of former Counsel led to an injustice.

[22] The Board made negative credibility findings. As noted above, these findings are reviewable on the standard of reasonableness.

[23] I have reviewed the Applicant's BOC, as well as the transcript of his evidence before the Board. The negative credibility findings meet the standard of reasonableness, when considered against the evidence given by the Applicant.

[24] No question for certification was proposed by the parties.

[25] For these reasons, the application for judicial review was dismissed.

"E. Heneghan"

Judge

Ottawa, Ontario
April 7, 2017

FEDERAL COURT
SOLICITORS OF RECORD

DOCKET: IMM-2180-16

STYLE OF CAUSE: ABDULAZIZ ODAH JABR GHANEM v THE
MINISTER OF CITIZENSHIP AND IMMIGRATION

PLACE OF HEARING: OTTAWA, ONTARIO
TORONTO, ONTARIO

DATE OF HEARING: NOVEMBER 22, 2016
NOVEMBER 30, 2016

REASONS FOR ORDER: HENEGHAN J.

DATED: APRIL 7, 2017

APPEARANCES:

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Andrew Cameron FOR THE RESPONDENT

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